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

Bassam Yusuf KHOURY; Alvin RODRIGUEZ MOYA; Pablo CARRERA ZAVALA, on behalf of themselves as individuals and on behalf of others similarly situated,

Plaintiffs-Petitioners,

v.

Nathalie ASHER, Field Office Director, ICE; Lowell CLARK, Warden, NWDC; Juan P. OSUNA, Director of EOIR; Eric H. HOLDER, Jr., Attorney General of the United States; Janet NAPOLITANO, Secretary of the Department of Homeland Security; and the UNITED STATES OF AMERICA,

Defendants-Respondents.

Civil Action No. _____

CLASS ACTION COMPLAINT AND PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

1. Plaintiffs-Petitioners Bassam Yusuf Khoury, Alvin Rodriguez Moya, and Pablo Carrera Zavala and the class they propose to represent ("Plaintiffs") are currently being held in immigration detention without even the opportunity to demonstrate their eligibility for release

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

on bond or on their own recognizance. Many members of the proposed class have lived lawfully and productively in the United States for many years; they live with family members including U.S. citizens and/or permanent residents; and they work hard to support their families. However, Defendants-Respondents ("Defendants") maintain that Plaintiffs are subject to mandatory detention during the pendency of their removal proceedings under the Immigration and Nationality Act, 8 U.S.C. § 1226(c), based on a prior criminal conviction, even though they were not detained by the immigration authorities "when [they were] released" from custody for that conviction, as the statute requires. In many cases, the prior criminal conviction occurred years ago, and Plaintiffs have returned to their families and community since that time. Indeed, based on the BIA's decision in *Matter of Rojas,* 23 I&N Dec. 117 (BIA 2001) – a decision that has been overwhelmingly rejected by this court and other district courts around the country – Defendants apply mandatory detention to individuals *any time* after their release from criminal custody—even if that release took place almost *15 years ago*, when the statute went into effect. Nonetheless, Defendants refuse to allow Plaintiffs any opportunity to demonstrate eligibility for release.

2. Defendants assert this position even though this Court has repeatedly held that the BIA's decision in *Matter of Rojas* is wrong, and that individuals like Plaintiffs are not properly included in the mandatory detention statute. Moreover, to Plaintiffs' knowledge, the government has never appealed this Court's grants of individual habeas relief. Indeed, Defendants themselves acquiesced to this Court's interpretation of § 1226(c) for many years, declining to apply mandatory detention to individuals who were not detained at the time of their release from criminal custody.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

3. Defendant's application of the mandatory detention statute to Plaintiffs is unlawful. As this Court and other courts have repeatedly held, *Matter of Rojas* is wrong: Plaintiffs are not subject to § 1226(c) under the plain language of the statute because they were not detained "when . . . released" from criminal custody for a removable offense listed in § 1226(c)(1). But even assuming § 1226(c) did not plainly require that Defendants take custody at the time of Plaintiffs' release, it would be unreasonable to construe § 1226(c) to require the detention of individuals who have been living in the community for months or years without incident, as such individuals do not pose the categorical flight risk or danger that justifies application of mandatory imprisonment. Indeed, mandatory detention in such circumstances raises serious due process concerns.

4. Plaintiffs' detention without a bond hearing where they have the opportunity to demonstrate that they should be released on bond or on their own recognizance, violates both the statute, 8 U.S.C. § 1226(c), and the United States Constitution. Through this action, Plaintiffs respectfully request that this Court resolve once and for all that individuals who are not taken into immigration custody "when [they are] released" from criminal custody for an enumerated offense are not subject to mandatory detention, and order that Plaintiffs be provided with individualized bond hearings to determine whether their continued detention is justified.

II. Parties

5. Plaintiff-Petitioner Bassam Yusuf Khoury is a native of Palestine and a lawful permanent resident of the United States who is presently detained at the Northwest Detention Center in Tacoma, Washington.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

6. Plaintiff-Petitioner Alvin Rodriguez Moya is a native and citizen of the Dominican Republic and a lawful permanent resident of the United States who is presently detained at the Northwest Detention Center in Tacoma, Washington.

7. Plaintiff-Petitioner Pablo Carrera Zavala is a native and citizen of Mexico who is presently detained at the Northwest Detention Center in Tacoma, Washington.

8. Respondent-Defendant Nathalie Asher is the Field Office Director for the Seattle District of Immigration and Customs Enforcement ("ICE"), an agency of the United States, named in her official capacity. The Field Officer Director has custody of Plaintiff-Petitioners and, on information and belief, other members of the proposed Class.

9. Respondent-Defendant Lowell Clark is the warden of the Northwest Detention Center, operated by the GEO Group, Inc., under contract with the Department of Homeland Security. Defendant Clark is sued in his official capacity because he has custody of Plaintiff-Petitioners and, on information and belief, other members of the proposed Class.

10. Respondent-Defendant John Morton is the Director of ICE. ICE is the agency within the Department of Homeland Security ("DHS") that is responsible for apprehension, detention, and removal of noncitizens from the United States. Director Morton is a legal custodian of the plaintiffs. He is sued in his official capacity.

11. Respondent-Defendant Juan P. Osuna is the Director of the Executive Office for Immigration Review ("EOIR"), an agency within the Department of Justice responsible for the immigration courts and Board of Immigration Appeals ("BIA"). He is named in his official capacity.

12. Respondent-Defendant Eric Holder is the Attorney General of the United States and the most senior official in the Department of Justice. He has the authority to interpret the

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

immigration laws and adjudicate removal cases. By regulation, the Attorney General delegates this responsibility to the immigration courts and the BIA, which are administered by EOIR. He is named in his official capacity.

13. Respondent-Defendant Janet Napolitano is the Secretary of DHS, an agency of the United States. She is named in her official capacity.

III. Jurisdiction and Venue

14. Jurisdiction is proper under 28 U.S.C. §§ 1331, 1361, 1651, and 2241.

15. Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. § 2202.

16. Venue is proper in the Western District of Washington under 28 U.S.C. §§ 1391(e) and 1402 because the Plaintiffs are detained in this District and the United States government is a Defendant.

IV. Factual Allegations

Plaintiff Khoury

17. Plaintiff Khoury is a native of Palestine and has been a lawful permanent resident of the United States since April 28, 1976.

18. Mr. Khoury was convicted of attempted manufacture or delivery of a controlled substance on May 9, 2011. He was sentenced to serve thirty days in jail for his offense.

19. Mr. Khoury was released from state custody in June 2011. Defendants did not take him into custody at that time. Instead, Mr. Khoury returned to his home and employment. He is close to his family and a positive member of the community. He has had no further brushes with the law during that time.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

20. On April 15, 2013, almost two years after his release from criminal custody, ICE arrested Mr. Khoury at his home on the basis of his 2011 conviction, placed him in mandatory detention at the Northwest Detention Center, and initiated removal proceedings against him.

21. Mr. Khoury has substantial community ties to the United States, and has no ties to Jordan, the country to which ICE seeks to deport him. In particular, Mr. Khoury has a U.S. citizen child, and a U.S. citizen grandchild. He has two U.S. citizen sisters, with whom he has a close, supporting relationship.

22. Mr. Khoury is not a flight risk nor a danger to the community. He has steady employment with Trade Recruiter CLP Resources In., a division of TrueBlue Inc., where he continued to be employed until April 15, 2013.

23. After requesting a bond hearing, Mr. Khoury was scheduled for and attended a hearing on June 27, 2013, before Immigration Judge Tammy L. Fitting in Tacoma, Washington, to determine eligibility for bond or release.

24. The Immigration Judge held that the court lacked jurisdiction to determine whether Mr. Khoury should be released under bond or his own recognizance because, as per the BIA's erroneous decision in *Matter of Rojas,* Mr. Khoury is subject to mandatory detention under 8 U.S.C. § 1226(c).

25. Mr. Khoury remains detained at the Northwest Detention Center, a period now exceeding three and half months, far exceeding the 30-day sentence he was required to serve for the conviction that serves as the basis of his mandatory detention. Because of his detention, he has been unable to pay rent for his apartment and is currently making arrangements for his family to move his things out.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

Plaintiff Rodriguez Moya

26. Plaintiff Rodriguez Moya is a native and citizen of the Dominican Republic and has been a lawful permanent resident of the United States since he immigrated as the child of a lawful permanent resident on November 19, 1995.

27. Mr. Rodriguez was convicted of one count of third degree Misconduct Involving a Controlled Substance on August 20, 2010, in Anchorage, Alaska, for which he received a sentence of three years with two years suspended.

28. Mr. Rodriguez was released from state custody on or about August 20, 2010. Defendants did not take him into custody at that time. Instead, Mr. Rodriguez returned to his home.

29. On October 8, 2010, Immigration and Customs Enforcement detained Mr. Rodriguez when he subsequently appeared at the State Office of Probation and Parole in Anchorage, Washington, transferred him to the Northwest Detention Center, and initiated removal proceedings against him.

30. After requesting a bond hearing, Mr. Rodriguez was scheduled for and attended a hearing on November 30, 2010, before Immigration Judge Theresa M. Scala in Tacoma, Washington.

31. The Immigration Judge held that, notwithstanding the BIA's decision in *Matter of Rojas*, Mr. Rodriguez was eligible for a bond hearing since he had not been taken into immigration custody when released from criminal custody for the removable offense. Upon information and belief this determination was made pursuant to the Immigration Court's practice of adhering to a local directive that acquiesced to this Court's prior holdings interpreting the mandatory detention statute in question.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

32. On December 29, 2010, Mr. Rodriguez was released on a $12,000 bond and returned to his home in Anchorage, Alaska, and has had no further incursions with the law.

33. On February 15, 2013, the Immigration Judge issued an order administratively closing the removal proceedings against him.

34. On March 25, 2013, ICE sent Mr. Rodriguez a letter to appear at the ICE office in Anchorage, Alaska, on April 3, 2013.

35. On April 3, 2013, Mr. Rodriguez appeared at the ICE office as instructed by the letter. When he appeared, ICE detained Mr. Rodriguez, transferred him to the Northwest Detention Center, and reinitiated the removal proceedings against him, based on the prior charges.

36. Mr. Rodriguez is not a flight risk nor a danger to the community. It was precisely for this reason that Defendants previously agreed to administratively close his removal proceedings. He has had no subsequent offenses.

37. After requesting a bond hearing, Mr. Rodriguez attended a hearing on April 17, 2013, before Immigration Judge Theresa M. Scala in Tacoma, Washington.

38. The Immigration Judge held that, pursuant to the BIA's erroneous decision in *Matter of Rojas,* the court lacked jurisdiction to determine whether Mr. Rodriguez should be released under bond or his own recognizance because Mr. Rodriguez was subject to mandatory detention under 8 U.S.C. § 1226(c).

39. Mr. Rodriguez remains detained at the Northwest Detention Center, a period now of almost 4 months – far more than he served for the criminal conviction that forms the alleged basis for his mandatory immigration detention.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

Plaintiff Carrera Zavala

40. Plaintiff Carrera Zavala is a native and citizen of Mexico who entered the United States as a visitor in July of 1998. He has lived in the United States since that date.

41. Mr. Carrera was convicted on February 7, 2003, of unlawful imprisonment with sexual motivation and refusal to give information to a police officer. He was sentenced to sixty days with work release.

42. Mr. Carrera was released from state custody after serving his sentence on or about April 29, 2003. Defendants did not take him into custody at that time. Instead, Mr. Carrera returned to his family, home and employment. He has been employed at Rainier Tugs since 2007, where he performs electrical work on ships.

43. On April 7, 2013, ten years after Mr. Carrera was released from criminal custody, ICE arrested him at his home on the basis of the 2002 conviction, placed him in mandatory detention at the Northwest Detention Center, and initiated removal proceedings against him.

44. Mr. Carrera has substantial community ties to the United States. In particular, Mr. Carrera has been married for thirteen years, has two U.S. citizen children, and is the sole financial support for his family.

45. Mr. Carrera is not a flight risk nor a danger to the community. He has steady employment as a mechanic at Rainier Tugs, and has no convictions since the 2002 offense.

46. After requesting a bond hearing, Mr. Carrera was scheduled for and attended a hearing on June 19, 2013, before Immigration Judge Theresa M. Scala in Tacoma, Washington.

47. The Immigration Judge held that, pursuant to the BIA's erroneous decision in *Matter of Rojas*, the court lacked jurisdiction to determine whether Mr. Carrera should be

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

released under bond or his own recognizance because Mr. Carrera was subject to mandatory detention under 8 U.S.C. § 1226(c).

48. Mr. Carrera remains detained at the Northwest Detention Center, a period already greater than he was required to serve for the conviction that forms the basis for his mandatory detention.

V. Class Action Allegations

49. Plaintiffs bring this action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b) on behalf of themselves and all other persons similarly situated. The proposed class is defined as follows:

> All individuals in the Western District of Washington who are or will be subject to mandatory detention under 8 U.S.C. § 1226(c) who were not taken into immigration custody at the time of their release from criminal custody for an offense referenced in § 1226(c)(1).

50. The requirements of Rule 23(a)(1) are met in this case because the class is so numerous that joinder of all members is impracticable. Plaintiffs have identified at least 26 individuals at the Northwest Detention Center who presently satisfy the class definition, and many more individuals will become class members in the future; moreover, the inherent transitory state of the putative class members further demonstrates that joinder is impracticable.

51. The proposed class meets the commonality requirements of Federal Rule of Civil Procedure 23(a)(2) because the mandatory detention of individuals within the proposed class is the result of the same policy: Defendants' interpretation that 8 U.S.C. § 1226(c) applies to individuals with a predicate removal offense regardless of when they were released from the related criminal custody, as long as it was post the statute's effective date in October 1998, nearly 15 years ago. This is a legal determination that is made by the Defendants and applies to all members of the proposed class.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

52. The proposed class meets the typicality requirements of Federal Rule of Civil Procedure 23(a)(3) because the claims of the representative parties are typical of the claims of the class. Plaintiffs and the class of individuals they seek to represent have all been subjected to mandatory detention despite not having been detained by immigration authorities at the time of their release from criminal custody for a removable offense enumerated in § 1226(c)(1). Plaintiffs challenge their mandatory detention as violating the statute and the Due Process Clause. The legal claims raised by the Plaintiffs are the same claims at issue in the class claims.

53. The proposed class meets the requirements of Federal Rule of Civil Procedure 23(a)(4) on adequacy of representation. Plaintiffs seek the same relief as the other members of the class, namely an individualized bond hearing, and they do not have any interests adverse to those of the class as a whole. In addition, the proposed class is represented by counsel from the Northwest Immigrant Rights Project; the American Civil Liberties Union Immigrants' Rights Project; the American Civil Liberties Union of Washington; and Gibbs Houston Pauw. These Counsel have extensive experience litigating class action lawsuits, including lawsuits on behalf of immigration detainees.

54. Finally, the proposed class satisfies Federal Rule of Civil Procedure 23(b)(2) because the immigration authorities have acted on grounds generally applicable to the class in applying an erroneous interpretation of § 1226(c) to members of the proposed class. Thus, final injunctive and declaratory relief is appropriate with respect to the class as a whole. *Cf. Rodriguez v. Hayes*, 591 F.3d 1105, 1119-20 (9th Cir. 2010) (8 U.S.C. § 1252(f) does not bar declaratory relief, nor injunctive relief where "Petitioner here does not seek to enjoin the

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

operation of the immigration detention statutes, but to enjoin conduct it asserts is not authorized by the statutes.").

VI. Claims for Relief

First Cause of Action—Violation of 8 U.S.C. § 1226.

55. The foregoing allegations are realleged and incorporated herein.

56. Section 1226(a) authorizes Defendants to release non-citizens who are placed into removal proceedings, including Plaintiffs and class members, on bond or conditional parole, "[e]xcept as provided in [1226] subsection (c)." Section 1226(c) prohibits the release during removal proceedings of noncitizens who were taken into immigration custody "when ... released" from criminal custody for a removable offense. However, § 1226(c) does not apply to individuals, such as Plaintiffs and class members, whom ICE did not take into immigration custody at the time of their release from criminal custody.

57. Defendants' policy and practice of detaining class members without an individualized bond hearing violates 8 U.S.C. § 1226, and is therefore unlawful.

Second Cause of Action—Violation of Due Process Clause

58. The foregoing allegations are realleged and incorporated herein.

59. The Due Process Clause of the Fifth Amendment to the United States Constitution requires that detention be limited to its purpose of preventing flight risk and danger to the community, and is accompanied by "strong" procedural protections to ensure that detention is serving those goals.

60. Mandatory detention is not reasonably related to its purpose when applied to individuals such as Plaintiffs and class members, who are not detained at the time of their

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

release from criminal custody and have returned to their lives in the community, since these individuals are less likely to be a danger or flight risk.

61. The Defendants' policy and practice of mandatorily detaining Plaintiffs and class members who were not taken into immigration custody when released from custody on the underlying criminal conviction, but were taken into immigration custody months or years after returning to their communities, violates the Due Process Clause of the United States Constitution, and is therefore unlawful.

VII. Request for Relief

Plaintiffs request this Court to grant the following relief:

1. Certify this case is a class action lawsuit, as proposed herein, appoint the Plaintiffs as class representatives, and appointed the undersigned counsel as class counsel;
2. Declare Defendants' policy and practice of applying mandatory detention to Plaintiffs and others similarly situated who were not taken into immigration custody "when . . . released" from criminal custody as described in this Complaint to violate the Immigration and Nationality Act, or in the alternative, the United States Constitution;
3. Order the Defendants to cease and desist from holding Plaintiffs and class members in detention without bond;
4. Order the Defendants to provide individualized bond hearings to all Plaintiffs and class members;
5. Grant Plaintiffs Khoury, Rodriguez and Carrera's writ of habeas corpus and order them individualized bond hearings.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

6. Grant an award of attorneys' fees and costs;

7. Grant such other relief as may be just and reasonable.

Dated this 1st day of August, 2013.

NORTHWEST IMMIGRANT RIGHTS PROJECT

/s/ Matt Adams
Matt Adams, WSBA No. 28287

/s/ Chris Strawn
Chris Strawn, WSBA No. 32243

615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 957-8611

/s/ Betsy Tao
Betsy Tao, WSBA No. 33348

1331 G Street NW, Suite 200
Tacoma, WA
(206) 957-8647

ACLU IMMIGRANTS' RIGHTS PROJECT

/s/ Michael Tan
Michael Tan, Cal. Bar. No. 284869
Pro hac vice pending

39 Drumm St.
San Francisco, CA 94111
(415) 343-0779

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

/s/ Judy Rabinowitz
Judy Rabinovitz, NY Bar. No. JF-1214
Pro hac vice pending

/s/ Sarah Mehta
Sarah Mehta, NY Bar. No. 4929584
Pro hac vice pending

125 Broad Street
New York, NY 10004
(212) 549-2619

ACLU OF WASHINGTON FOUNDATION
/s/ Sarah A. Dunne
Sarah A. Dunne, WSBA No. 34869

901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

GIBBS HOUSTON PAUW

/s/ Robert Pauw
Robert Pauw, WSBA No. 13613

/s/ Devin T. Theriot-Orr
Devin T. Theriot-Orr, WSBA No. 33995

1000 Second Avenue, Suite 1600
Seattle, WA 98104-1003
(206) 682-1080

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025