

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

CLAYTON RICHARD GORDON and)
PRECIOSA ANTUNES, on behalf of)
themselves and others similarly situated,)

Plaintiff-Petitioners,)

v.)

Civ. No. 13-30146

JANET NAPOLITANO,)
Secretary of Homeland Security,)
ERIC H. HOLDER, JR.,)
Attorney General of the United States,)
JOHN SANDWEG,)
Acting Director, Immigration and Customs)
Enforcement,)

SEAN GALLAGHER)
Acting Field Office Director,)
Immigration and Customs Enforcement,)
New England Field Office,)

CHRISTOPHER DONELAN,)
Sheriff of Franklin County,)

MICHAEL G. BELLOTTI,)
Sheriff of Norfolk County,)

STEVEN W. TOMPKINS,)
Sheriff of Suffolk County,)

THOMAS M. HODGSON,)
Sheriff of Bristol County, and)

JOSEPH D. MCDONALD, JR.,)
Sheriff of Plymouth County,)

Defendant-Respondents.)

CLASS ACTION COMPLAINT AND PETITION FOR WRIT OF HABEAS CORPUS

Plaintiff-Petitioners Clayton Richard Gordon and Preciosa Antunes (“Plaintiffs”) are noncitizens who are being unlawfully detained without a bond hearing under the mandatory

immigration detention provision, 8 U.S.C. § 1226(c). Relying on the decision of the Board of Immigration Appeals (“BIA”) in Matter of Rojas, 23 I&N Dec. 117, 127 (BIA 2001), the government is subjecting Plaintiffs to mandatory, no-bond detention even though they were not taken into immigration detention at the time of their release from criminal custody for the relevant predicate offenses. Their mandatory detention violates the plain meaning of the statute, which requires detention without the possibility of bond only for individuals who are detained “when [they are] released” from criminal custody for a relevant removable offense. See § 1226(c). As a result of this erroneous application of § 1226(c), Plaintiffs may spend months or years in detention while their immigration cases proceed, without even the opportunity to be considered for release on bond or on conditional parole.

To remedy this unlawful detention, Plaintiffs, on behalf of themselves and all others similarly situated, seek individual bond hearings at which an Immigration Judge can determine whether their detention is justified based on considerations of flight risk and danger to the community. Plaintiffs bring this action as a petition for writ of habeas corpus and a class action complaint for declaratory and injunctive relief or, in the alternative, a class action habeas.

Plaintiff Clayton Richard Gordon has lived in the United States as a lawful permanent resident since 1982, when he was six years old. He has been detained without a bond hearing since June 20, 2013, because immigration authorities have erroneously subjected him to mandatory detention under § 1226(c). Gordon is being detained without a bond hearing based on an offense for which he was arrested, and released from criminal custody, in 2008, and for which he spent less than a day in jail.

Plaintiff Preciosa Antunes has lived in the United States as a lawful permanent resident since 1983, when she was 14 years old. She has been detained without a bond hearing since May

10, 2013, because immigration authorities have erroneously subjected her to mandatory detention under § 1226(c). Antunes is being detained without a bond hearing based on offenses for which she was released from criminal custody in or around January, 2012, after serving a total of 90 days in jail.

Plaintiffs, and all others similarly situated, were not detained at the time of their release from criminal custody for the offenses that the government has invoked as grounds for their mandatory detention. Accordingly, they are not properly detained under § 1226(c). Plaintiffs respectfully request that this Court order that they and all others similarly situated be provided with individualized bond hearings to determine whether their continued detention is justified by considerations of flight risk and danger.

PARTIES

1. Plaintiff Clayton Richard Gordon is a native of Jamaica and was admitted to the United States as a lawful permanent resident of the United States in 1982 at the age of six. He was detained by Immigration and Customs Enforcement (“ICE”) on June 20, 2013, and was subjected to mandatory detention. He remains in ICE custody at the Franklin County Jail and House of Correction in Greenfield, Massachusetts.

2. Plaintiff Preciosa Antunes is a native of Portugal and was admitted to the United States as a lawful permanent resident in 1983, at the age of 14. She was detained by ICE on May 10, 2013, and was subjected to mandatory detention. She remains in ICE custody at the Franklin County Jail and House of Correction in Greenfield, Massachusetts.

3. Defendant-Respondent Janet Napolitano is the Secretary of Homeland Security and the most senior official in the Department of Homeland Security (“DHS”), the arm of the federal government responsible for the enforcement of immigration laws. Secretary Napolitano is

the ultimate legal custodian of the Plaintiffs and the members of the proposed Class. She is sued in her official capacity.

4. Defendant-Respondent 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 immigration laws and adjudicate removal cases. By regulation, the Attorney General delegates initial exercise of this responsibility to the immigration courts and the BIA, which are administered by the Department of Justice's Executive Office of Immigration Review. He is sued in his official capacity.

5. Defendant-Respondent John Sandweg is the Acting Director of ICE. ICE is the agency within DHS that is responsible for apprehension, detention, and removal of noncitizens from the United States. Acting Director Sandweg is a legal custodian of the Plaintiffs and other members of the proposed Class. He is sued in his official capacity.

6. Defendant-Respondent Sean Gallagher is the Acting Field Office Director for ICE Enforcement and Removal Operations in ICE's Boston Field Office. He is a legal custodian of the Plaintiffs and other members of the proposed Class, all of whom are held at various detention facilities in Massachusetts. He is sued in his official capacity.

7. Defendant-Respondent Christopher Donelan is the Sheriff of Franklin County and has immediate custody of Plaintiffs Gordon and Antunes, and, on information and belief, other members of the proposed Class. He has custody of Gordon, Antunes, and other members of the proposed Class because ICE contracts with Franklin County to house immigration detainees such as Gordon and Antunes in county correctional facilities. Sheriff Donelan is sued in his official capacity.

8. Defendant-Respondent Michael G. Bellotti is the Sheriff of Norfolk County and, on information and belief, has immediate custody of members of the proposed Class. He has custody of members of the proposed Class because ICE contracts with Norfolk County to house immigration detainees in county correctional facilities. Sheriff Bellotti is sued in his official capacity.

9. Defendant-Respondent Steven W. Tompkins is the Sheriff of Suffolk County and, on information and belief, has immediate custody of members of the proposed Class. He has custody of members of the proposed Class because ICE contracts with Suffolk County to house immigration detainees in county correctional facilities. Sheriff Tompkins is sued in his official capacity.

10. Defendant-Respondent Thomas M. Hodgson is the Sheriff of Bristol County and, on information and belief, has immediate custody of members of the proposed Class. He has custody of members of the proposed Class because ICE contracts with Bristol County to house immigration detainees in county correctional facilities. Sheriff Hodgson is sued in his official capacity.

11. Defendant-Respondent Joseph D. McDonald, Jr. is the Sheriff of Plymouth County and, on information and belief, has immediate custody of members of the proposed Class. He has custody of members of the proposed Class because ICE contracts with Plymouth County to house immigration detainees in county correctional facilities. Sheriff McDonald is sued in his official capacity.

JURISDICTION

12. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question), § 1361 (federal employee mandamus action), § 1651 (All Writs Act—mandamus), and § 2241 (habeas

corpus); and Art. I § 9, cl. 2 of the U.S. Constitution (“Suspension Clause”), as Plaintiffs and members of the proposed Class are currently in custody under color of the authority of the United States in violation of the Constitution, laws, or treaties of the United States.

VENUE

13. Venue lies in the District of Massachusetts because Plaintiffs and members of the proposed Class are currently detained in Massachusetts, and a substantial part of the events or omissions giving rise to their claims occurred in Massachusetts. 28 U.S.C. § 1391.

EXHAUSTION

14. Plaintiffs have exhausted their administrative remedies to the extent required by law, and judicial action is their only remaining remedy.

15. No statutory exhaustion requirement applies to Plaintiffs’ claim of unlawful detention. See Sengkeo v. Horgan, 670 F. Supp. 2d 116, 121 (D. Mass. 2009).

16. Nevertheless, on July 17, 2013, Gordon requested a bond hearing before the Immigration Judge. The Immigration Judge denied Gordon an individualized hearing, finding Gordon was subject to mandatory detention under 8 U.S.C. § 1226(c) pursuant to the BIA’s decision in Matter of Rojas, 23 I&N Dec. 117.

17. On June 5 and July 3, 2013, Antunes argued she was eligible for release on bond. The Immigration Judge denied Antunes an individualized hearing, finding that she was subject to mandatory detention under 8 U.S.C. § 1226(c) pursuant to BIA precedent.

18. These efforts and any further efforts to seek relief through administrative proceedings, by the Plaintiffs or by any member of the proposed Class, are futile. The BIA has found that 8 U.S.C. § 1226(c) applies to any noncitizen who was released from non-DHS custody after October 8, 1998 in connection with one of the offenses enumerated in the statute,

regardless of whether there was a gap in time between that release and detention by ICE. Rojas, 23 I&N Dec. at 127; see also Matter of Garcia Arreola, 25 I&N Dec. 267, 271 n.4 (BIA 2010) (clarifying that BIA was not departing from Matter of Rojas decision). In light of the BIA's position, Plaintiffs and other members of the proposed Class have no reasonable prospect of receiving a bond hearing before an Immigration Judge without an order of this Court. Therefore, further efforts would be futile.

FACTS

I. INDIVIDUAL ALLEGATIONS

A. Clayton Richard Gordon

19. Plaintiff Clayton Richard Gordon left Jamaica and immigrated to the United States as a lawful permanent resident in 1982, when he was six years old.

20. Gordon joined the National Guard in 1994. In 1996, Gordon began serving in active duty in the United States Army. He was stationed in Fort Hood, Texas. Gordon was honorably discharged in 1999.

21. Gordon met his current fiancée around 2008, and the couple had a son in 2010. They own a home in Bloomfield, Connecticut.

22. DHS is seeking Gordon's removal based on a 2008 drug offense.

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

24. On June 20, 2013, Gordon was stopped by ICE agents while driving to work and was taken into ICE custody. He has been subject to mandatory detention since then based on the government's interpretation of 8 U.S.C. § 1226(c).

25. Because Gordon was found to be subject to mandatory detention, the Immigration Judge did not consider facts that might have been relevant in a bond hearing, including that Gordon has lived in the United States since childhood, served in the military, lives with his United States citizen fiancée and son in the home that they own, has a successful business, and has been working on a project to open a halfway house for women released from incarceration.

B. Preciosa Antunes

26. Plaintiff Preciosa Antunes is a native of Portugal and was admitted to the United States as a lawful permanent resident in 1983, at the age of 14.

27. Antunes has three children and four young grandchildren, and owns a home in Bridgeport, Connecticut.

28. DHS is seeking Antunes' removal based on a 2006 larceny offense, for which she was fined \$75, and 2011 convictions for burglary and larceny, for which she was required to serve concurrent periods of 90 days in jail.

29. In 2006, Antunes was convicted of larceny in the sixth degree and a fine of \$75 was imposed. In January, 2011, Antunes was arrested after it was reported that she and another person had taken two garbage bags out of a house that was unoccupied and for sale. The bags appear to have contained towels. In connection with these events, Antunes pleaded guilty to second-degree burglary in October, 2011, and was sentenced to five years in jail, with the execution suspended after 90 days. She continues to be on probation. Also in 2011, Antunes pleaded guilty to larceny in the sixth degree after allegedly taking a package from the front of a

home. She was sentenced to 90 days' imprisonment, concurrent with her sentence in the burglary case. She was released from jail in connection with these offenses in or around January, 2012.

30. ICE did not take Antunes into custody at that time. Instead, she was not taken into ICE custody until May 10, 2013, when ICE agents showed up at her job. She has been subjected to mandatory detention since then based on the government's interpretation of 8 U.S.C. § 1226(c).

31. Because Antunes was found to be subject to mandatory detention, the Immigration Judge did not consider facts that might have been relevant in a bond hearing, including that Antunes has lived in the United States as a permanent resident since she was a teenager, that her crimes were nonviolent, that she owns a home, and that she spends her time working to pay her mortgage and caring for her two grandchildren so that her daughter can work.

II. CLASS ACTION ALLEGATIONS

32. Plaintiffs bring this action for themselves and as a class action on behalf of others similarly situated pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), or, in the alternative, as a class action habeas, on behalf of a class defined as:

All individuals in Massachusetts who are or will be subjected 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).

33. Numerosity: The proposed Class meets the requirements of Federal Rule of Civil Procedure 23(a)(1) because it is so numerous that joinder would be impracticable. On information and belief, on any given day approximately 200 individuals in Massachusetts are being subjected by immigration authorities to mandatory detention under 8 U.S.C. § 1226(c). On information and belief, some 50 or more of those individuals may fall into the proposed Class. In addition, the government's continued detention of individuals who fall within the Class will

bring additional members into the Class in the future. Moreover, the inherent transitory state of the putative class members further demonstrates that joinder is impracticable.

34. Commonality: The proposed Class meets the requirements of Federal Rule of Civil Procedure 23(a)(2) because application of the mandatory detention provision to members of the proposed Class is the result of the same erroneous interpretation of 8 U.S.C. § 1226(c) adopted by immigration authorities: namely that § 1226(c) applies to all individuals with a removable offense designated under the statute, regardless of whether they were detained at the time of their release from custody in connection with the offense. This erroneous interpretation applies to all members of the class and raises common questions of law in this action, including whether the government's interpretation of § 1226(c) in Matter of Rojas should be rejected and whether § 1226(c) applies only to those who are detained at the time of their release from criminal custody for an offense falling within one of the categories designated under the statute.

35. Typicality: The requirements of Federal Rule of Civil Procedure 23(a)(3) are satisfied. Plaintiffs' claims are typical of those of the proposed Class as a whole: 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 the relevant criminal custody. Plaintiffs assert their detention violates 8 U.S.C. § 1226. Their claims therefore raise the same legal question that lies at the core of the Class claims.

36. Adequacy: The requirements of Federal Rule of Civil Procedure 23(a)(4) are satisfied. Plaintiffs will adequately represent the proposed Class because they seek the same relief as the other members of the proposed Class, namely an individualized bond hearing, and they do not have any interests adverse to those of the proposed Class as a whole. In addition, the proposed Class is represented by counsel from the American Civil Liberties Union Foundation of

Massachusetts, the American Civil Liberties Union Immigrants' Rights Project, and the Political Asylum / Immigration Representation Project. These counsel have experience litigating the specific issues raised in this case, and litigating class actions.

37. Finally, the proposed Class satisfies Federal Rule of Civil Procedure 23(b)(2) because immigration authorities have acted on grounds that are generally applicable to the proposed Class, in that immigration authorities have applied a clear and consistent, though incorrect, interpretation of 8 U.S.C. § 1226(c) in imposing mandatory detention on members of the proposed Class. Classwide injunctive and declaratory relief is therefore appropriate.

CLAIM FOR RELIEF

VIOLATION OF 8 U.S.C. §1226

Claim for Plaintiffs and Proposed Class

38. The foregoing allegations are realleged and incorporated herein.

39. Section 1226(a) authorizes immigration authorities to release noncitizens who are placed into removal proceedings, including Plaintiffs and members of the proposed Class, on bond or conditional parole, “[e]xcept as provided in subsection (c).” Section 1226(c) requires detention of certain noncitizens who were taken into immigration custody “when . . . released” from criminal custody for a removable offense. It does not apply to noncitizens who, like Plaintiffs and all other members of the proposed Class, were not detained “when . . . released” from custody for a removable offense referenced in § 1226(c)(1).

40. Plaintiffs’ detention contradicts the plain language of the mandatory detention provision as well as its statutory context, raises serious constitutional questions, and is contrary to the First Circuit’s analysis of § 1226(c) in Saysana v. Gillen, 590 F.3d 7 (1st Cir. 2009).

41. Because Plaintiffs and other members of the proposed Class were not detained at the time of their release from criminal custody for their relevant offenses, their detention without a bond hearing violates § 1226 and is therefore unlawful.

REQUEST FOR ORAL ARGUMENT

In accordance with Local Rule 7.1(d), counsel respectfully requests oral argument.

PRAYER FOR RELIEF

Petitioner asks that this Court grant the following relief:

1. Certify this matter as a class action, appoint Plaintiffs as class representatives, and appoint the undersigned counsel as class counsel;
2. Declare that Defendant-Respondents' policy and practice of subjecting Plaintiffs and the members of the proposed Class to mandatory detention despite their not having been taken into immigration custody at the time of their release from criminal custody for the relevant offense is a violation of 8 U.S.C. § 1226, and that Plaintiffs and members of the proposed Class are subject to § 1226(a) and are entitled to individualized bond hearings;
3. Order that Defendant-Respondents cease and desist their policy of subjecting Plaintiffs and members of the proposed Class to mandatory detention under § 1226(c) despite their not having been taken into immigration custody at the time of their release from criminal custody for the relevant offense;
4. Order Defendant-Respondents to provide Plaintiffs and the members of the proposed Class with individualized bond hearings as required under § 1226(a);
5. Grant a writ of habeas corpus to Plaintiff Clayton Richard Gordon ordering an immediate individualized bond hearing under § 1226(a);

6. Grant a writ of habeas corpus to Plaintiff Preciosa Antunes ordering an immediate individualized bond hearing under § 1226(a);
7. Order that Defendant-Respondents provide the Court and Plaintiffs' counsel with at least two business days' notice prior to any removal of the Plaintiffs from the jurisdiction;
8. Award attorney fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504, if applicable; and
9. Order any further relief this Court deems just and proper.

Respectfully submitted this 8th day of August, 2013.

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

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

*Motion for admission pro hac vice forthcoming.

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

Certificate of Service

I, Adriana Lafaille, hereby certify that a true copy of the foregoing Class Action Complaint and Petition for Writ of Habeas Corpus, together with attached Civil Cover Sheet, Category Sheet, Motion for Preliminary Injunctive Relief, Memorandum of Law in Support of Motion for Preliminary Injunctive Relief, and accompanying exhibits, was served on August 8, 2013, by certified U.S. mail, upon the following:

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

/s/ Adriana Lafaille

Adriana Lafaille (BBO # 680210)
American Civil Liberties Union
of Massachusetts