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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISON

BERTHA MEJIA ESPINOZA,

Petitioner,

v.

TIMOTHY AITKEN, Field Office Director, San Francisco Field Office, United States Bureau of Immigration and Customs Enforcement (ICE); JANET NAPOLITANO, Secretary, United States Department of Homeland Security; ERIC HOLDER, United States Attorney General,

Respondents.

Case No. 5:13-cv-00512-EJD

PETITIONER'S TRAVERSE IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Hearing Date: Feb. 28, 2013
Hearing Time: 3:30 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

STATUTES

RULES

I. INTRODUCTION

For the past seventeen months, Respondents have held Petitioner Bertha Mejia in a county jail without making any showing that her detention is warranted by risk of flight or danger to the community. Respondents' prolonged detention of Petitioner without even the basic process of a bond hearing before an Immigration Judge defies the constitutional principle that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Because Respondents lack the authority under the Immigration and Nationality Act or the United States Constitution to continue detaining Petitioner without a bond hearing, the Petition for Writ of Habeas Corpus should be granted.

Both the Supreme Court and the Ninth Circuit have invoked due process considerations to adopt narrowing constructions of immigration detention statutes that appear to confer sweeping power to detain noncitizens in removal proceedings. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (interpreting statute not to authorize indefinite detention); *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942, 947 (9th Cir. 2008) (interpreting statute not to authorize prolonged mandatory detention). Under controlling Ninth Circuit law, 8 U.S.C. § 1226(c) does not authorize Petitioner's prolonged mandatory detention. The Ninth Circuit held in *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005), and *Casas-Castrillon*, 535 F.3d at 947, that mandatory detention under § 1226(c) is authorized only where removal proceedings are "expedit[ious]." Subsequently, in *Diouf v. Napolitano*, 634 F.3d 1081, 1091-92 (9th Cir. 2011), the Ninth Circuit held that a rigorous bond hearing is required at six months of detention in order to avoid the serious constitutional problems presented by prolonged detention without adequate review. Because Petitioner's mandatory detention has long since exceeded this period, she is entitled to an immediate bond hearing before an Immigration Judge where the

government must justify her continued detention by clear and convincing evidence.

Against the weight of the law, Respondents attempt to distinguish these precedents by highlighting two irrelevant factors. First, Petitioner's lack of lawful permanent residence has no bearing on the interpretation of § 1226(c). Because the statute applies uniformly to lawful permanent residents ("LPRs") and non-LPRs, it must be construed in view of its applications to both groups. Second, Respondents argue that only indefinite detention after entry of a final removal order raises serious constitutional concerns. But the Ninth Circuit has held that the constitutional concerns posed by prolonged detention without adequate review do not turn on the procedural posture of the noncitizen's removal case.

Respondents barely addressed Petitioner's two additional claims for relief against her mandatory detention. First, Petitioner should not have been held in mandatory detention in the first place because she was not detained by immigration authorities "when…released" from criminal custody as the statute requires, but almost a year after her release. Second, Petitioner is not properly subject to mandatory detention because she has a substantial claim for relief from removal.

II. STATEMENT OF FACTS

Over thirty years ago, Petitioner arrived in the United States after fleeing political violence, sexual abuse, and poverty in her native El Salvador. Petition ¶¶ 15-17. Petitioner has struggled with the lasting psychological effects of childhood physical and sexual abuse and has been convicted several times of minor, nonviolent offenses, primarily petty theft of grocery items. *Id.* ¶ 19. Her last shoplifting arrest, for which she spent less than a day in jail, occurred in October 2010. *Id.* ¶ 20.

Nearly a year later, on September 17, 2011, Immigration and Customs Enforcement ("ICE") placed Petitioner in immigration detention and instituted removal proceedings against

her. *Id.* Petitioner has applied for and continues to pursue two avenues of immigration relief. In Immigration Court, she sought asylum and withholding of removal. The Immigration Judge ("IJ") denied relief on these grounds in August 2012 and Petitioner appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). *Id.* ¶¶ 22, 24. Through a separate process administered by United States Citizenship and Immigration Services ("USCIS"), Petitioner applied for a U visa as a victim of rape by her employer. Although her initial submission was denied, Petitioner filed a renewed U visa application through new counsel in December 2012. *Id.* ¶¶ 23, 25. In January 2013, the BIA remanded Petitioner's asylum and withholding case to the IJ to await adjudication of the U visa application by USCIS. *Id.* ¶ 25. Petitioner's next master calendar hearing before the IJ is scheduled for March 26, 2013.[1] Return at 4.

Since her arrest by ICE in September 2011, Petitioner has remained in immigration detention while she fights to remain in the United States with her family. Petition ¶ 26. ICE asserts that due to her petty theft convictions, Petitioner is subject to mandatory detention under § 1226(c) and ineligible for a bond hearing, even as her time in detention approaches a year and a half. *Id.* ¶ 20. The IJ agreed with ICE that he lacked the authority to conduct a bond hearing and denied Petitioner's motions for bond redetermination in October 2012 and January 2013. *Id.* ¶ 26.

Petitioner has no serious or violent criminal history and has never been sentenced to more than 45 days in jail for any offense. *Id.* ¶ 19. She is not a threat to the community. Because Petitioner has a pending U visa application and is responsible for the care of her young grandson, her risk of flight is extremely low. *Id.* ¶ 27. However, Petitioner has never had the opportunity to argue before a neutral decisionmaker that her detention is unwarranted because

[1] Contrary to Respondents' suggestion, Petitioner must await a decision by USCIS on her U visa application; the IJ will not decide that question at the March 26 hearing, or at any other time. Return at 6.

she poses no danger to society and will reliably appear in her immigration proceedings.

III. ARGUMENT

A. Due Process Considerations Demand that Section 1226(c) be Construed Not to Authorize Prolonged Detention Without a Bond Hearing.

In a series of cases involving immigration detention, the Supreme Court and the Ninth Circuit have held that "due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" *Casas-Castrillon*, 535 F.3d at 950 (quoting *Zadvydas*, 533 U.S. at 690). Respondents' emphasis on factual differences between these cases and Petitioner's case is misplaced because these basic due process principles are equally applicable in Petitioner's case.

1. Section 1226(c) Does Not Authorize Prolonged Mandatory Detention.

It is well established that "[f]reedom 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*, 533 U.S. at 690 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Guided by this constitutional principle, the Supreme Court and the Ninth Circuit have consistently "read significant limitations" into immigration statutes "in order to avoid their constitutional invalidation." *Zadvydas*, 533 U.S. at 689; *Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010) ("In each case in which we have interpreted the scope of various [immigration detention] statutes, our determinations have been guided, if not controlled, by the question of whether indefinite or prolonged detention generating serious constitutional concerns is present.").

In *Zadvydas*, the Supreme Court read an implicit reasonableness limitation into 8 U.S.C. § 1231(a)(6), which governs the continued detention of noncitizens whom the government fails to remove during the 90-day period following the completion of their immigration cases. 533

U.S. at 689. The Court declined to adopt the government's literal reading of the statute, whose language places no explicit limit on the length of time that a noncitizen can be detained. Instead, it held that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute" because "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.* at 699, 690.

Although the Supreme Court in *Demore v. Kim* upheld 8 U.S.C. § 1226(c), the statute at issue here, the *Demore* decision did not address whether the statute authorizes the *prolonged* mandatory detention to which Petitioner has been subjected. 538 U.S. 510 (2003). In fact, "in upholding Section 1226(c), the Court interpreted it to authorize mandatory detention only for the 'limited period of [the alien's] removal proceedings'"—typically no more than five months. *Rodriguez*, 591 F.3d at 1116 (quoting *Demore*, 538 U.S. at 531). Two Ninth Circuit decisions have confirmed that "*Demore*'s limited holding that Congress could permissibly authorize 'brief' detention without procedural protections" cannot be extended to prolonged detentions under § 1226(c). *Casas-Castrillon*, 535 F.3d at 950; *Tijani*, 430 F.3d at 1242. First, in *Tijani*, the Ninth Circuit interpreted the authority conferred by § 1226(c) as applying only to "expeditious" removal proceedings in order to avoid deciding the constitutional issue posed by the petitioner's mandatory detention of over two years. 430 F.3d at 1242.

The Ninth Circuit again limited the reach of § 1226(c) to avoid constitutional concerns in *Casas-Castrillon*. 535 F.3d 942. Casas-Castrillon's removal order had been affirmed by the BIA and he remained in detention while he sought judicial review. The Court held that § 1226(c) ceased to authorize Casas-Castrillon's detention for two reasons: (1) § 1226(c) only authorizes mandatory detention where proceedings are "'expedited,'" *id*. at 947 (quoting *Tijani*, 430 F.3d at 1242); and (2) § 1226(c) applies only "pending [administrative] removal proceedings," which concluded once the BIA ordered his removal. *Id*. at 948 (internal quotation

marks and citation omitted). Thus, the basis for Casas-Castrillon's detention shifted to § 1226(a), under which he was entitled to a bond hearing before an Immigration Judge. *Id.* Moreover, the Court held broadly that "prolonged detention must be accompanied by appropriate procedural safeguards, including a hearing to establish whether releasing the alien would pose a danger to the community or a flight risk." *Id.* at 944. The same fundamental due process principle applies equally to Petitioner's prolonged detention.

In extending *Casas-Castrillon* to a new set of facts in *Diouf v. Napolitano*, the Ninth Circuit affirmed that a noncitizen's due process interest in freedom from prolonged detention without a bond hearing applies at any stage of the removal proceedings. 634 F.3d at 1087. The petitioner in *Diouf* was detained under § 1231(a)(6) while litigating a motion to reopen, a form of collateral challenge to a final removal order. *Id.* at 1084. The Court found no basis for denying Diouf the bond hearing accorded to Casas-Castrillon, noting that the government made too much of the procedural distinctions between the two cases. *Id.* at 1086, 1087. "*Regardless of the stage of the proceedings*, the same important interest [was] at stake—freedom from prolonged detention." *Id.* at 1087 (emphasis added). As Petitioner enjoys the same liberty interest, she is likewise entitled to review of any factual justification for her prolonged detention.

Thus, under Ninth Circuit precedent, § 1226(c) does not to authorize Petitioner's prolonged detention without a bond hearing. While *Diouf* held that detention generally becomes prolonged at six months, 634 F.3d at 1091, this Court need not determine the maximum length of mandatory detention under § 1226(c) because Petitioner's detention of seventeen months far exceeds the "brief" and "limited" period upheld by the Supreme Court in *Demore*. 538 U.S. at 513, 526; *see also Casas-Castrillon*, 535 F.3d at 950 ("References to the brevity of mandatory detention under § 1226(c) run throughout *Demore*."). With her case back before the IJ,

Petitioner faces many more months in detention as she seeks relief from removal. Section 1226(c) would be unconstitutional to the extent that it conferred such unlimited power on ICE to impose prolonged detention without the basic procedural safeguard of a bond hearing before an IJ. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (striking down detention scheme for the mentally ill that afforded the detainee a hearing but placed the burden on the detainee to prove eligibility for release).

This Court can avoid deciding the constitutional question by adopting a narrowing construction of the statute, as the Supreme Court and the Ninth Circuit have done repeatedly in immigration cases. Such an approach would also be consistent with several district court decisions within this circuit that have ordered bond hearings in cases of prolonged mandatory detention, including *Rodriguez v. Robbins*, CV07-03239 (C.D. Cal. filed May 16, 2007), where a subclass of § 1226(c) detainees held for over six months were granted preliminary injunctive relief.[2] *See also Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133, 1143 (C.D. Cal. 2011) (ordering bond hearing where noncitizen's detention under § 1226(c) was "well-beyond the outer limit of the five-month period estimated by the *Demore* Court"); *Centeno-Ortiz v. Culley*, No. 11-1970, 2012 WL 170123, at *9 (S.D. Cal. Jan. 19, 2012) (noncitizen in prolonged mandatory detention under 8 U.S.C. § 1225(b)(2)(A), governing detention of "arriving aliens," was entitled to a bond hearing); *Chen v. Aitken*, No. 12-6024, 2013 WL 123618, at *6 (N.D. Cal. Jan. 8, 2013) (same).

[2] Respondents misconstrue *Rodriguez* in the Return, claiming that the district court ordered ICE to provide bond hearings to "essentially all non-citizens in removal proceedings in the Central District." Return at 7-8 n.6. In fact, the district court certified subclasses of noncitizens detained for more than six months under various immigration detention statutes and its order specifically pertained to two of those subclasses, including the § 1226(c) subclass—of which Petitioner would be a member if she were held in the Central District. Order and Prelim. Inj. (Dkt. 255), *Rodriguez v. Robbins*, CV07-03239 (C.D. Cal. Sept. 13, 2012).

2. Petitioner's Immigration Status Does Not Impact the Construction of Section 1226(c) to Avoid Due Process Concerns.

Contrary to Respondents' assertions, the fact that Petitioner is not an LPR is irrelevant to the question of statutory construction facing the Court because the statute must be construed such that it applies uniformly to LPRs and non-LPRs alike.[3] In *Clark v. Martinez*, the Supreme Court held that an immigration detention provision "applies without differentiation to all [noncitizens] that are its subject." 543 U.S. 371, 378 (2005). The Court applied the limiting construction of § 1231(a)(6) it adopted in *Zadvydas* to all classes of noncitizens subject to detention under the statute, including those who had never been admitted as LPRs—regardless of whether their detention raised the same constitutional concerns as the detention of the admitted noncitizens in *Zadvydas*. *Id*. As the Supreme Court explained, courts must avoid interpretations that present constitutional problems in some of the statute's applications "whether or not those constitutional problems pertain to the particular litigant before the Court." *Id*. at 381.

Citing *Clark*, the Ninth Circuit in *Diouf* rejected the very argument advanced by Respondents here. 634 F.3d at 1088 ("whether Diouf was a legal permanent resident is irrelevant"). Like the statute in *Clark* and *Diouf*, § 1226(c) "applies without differentiation to all [noncitizens] that are its subject." *Clark*, 543 U.S. at 378. Because § 1226(c) must be applied in the same manner to LPRs and non-LPRs, whether Petitioner herself is an LPR is irrelevant to how the statute must be construed.

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[3] Although Petitioner is not an LPR, it bears mentioning that she has lived continuously in the United States for over three decades and has family ties to United States citizens. *See Zadvydas*, 533 U.S. at 693 ("once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). Moreover, she has a substantial claim to immigration relief—namely, asylum and a U visa—that would eventually enable her to obtain LPR status.

3. Prolonged Detention Without Review Raises Serious Constitutional Concerns Regardless of Whether a Final Removal Order Has Been Entered and Detention Is Indefinite.

Respondents incorrectly assert that the Ninth Circuit's decisions regarding the detention of noncitizens turned on the fact that the petitioners had final orders of removal and were facing indefinite detention. According to Respondents, a bond hearing may be required *after* a final removal order because the petitioner's immigration situation is static and "[t]here is no end in sight" to her detention, but not *before* a final removal order because "there are procedures that will lead to a final decision." Return at 7. In essence, they suggest that a bond hearing is only necessary in cases of indefinite detention, and not in cases where detention is prolonged but an end point is foreseeable. Respondents' argument is factually incorrect and mischaracterizes the law. The distinction between pre- and post-final removal order detention is a distinction without a difference for purposes of avoiding the constitutional concerns that attend prolonged detention without a bond hearing.

As a descriptive matter, the claim that a noncitizen's immigration situation is static after a final removal order is incorrect. A "final removal order," as the term is used in immigration law, simply means that removal proceedings are complete at the administrative level, not that the removal order is no longer subject to challenge. 8 C.F.R. § 1241.1 (an IJ's removal order is final when the BIA rules or the noncitizen waives appeal to the BIA); s*ee also Prieto-Romero v. Clark*, 534 F.3d 1053, 1060 (9th Cir. 2008) (differentiating administratively final and judicially final removal orders). As the facts of the above-discussed cases illustrate, a noncitizen's immigration case is far from over after a "final removal order" is entered. The noncitizen may file a petition for review by a federal appellate court, as the petitioners in *Tijani* and *Casas-Castrillon* did, or seek collateral review of a final removal order through a motion to reopen, as the petitioner in *Diouf* did. Either course of action can result in renewed proceedings before an

IJ. By contrast, only *Zadvydas* involved a petitioner whose removal order was truly "final" in the regular sense of the word—that is, that all forms of review had been exhausted or waived.

Thus, Respondents' position that the Ninth Circuit has only required bond hearings in cases of *indefinite* detention, where no further developments are possible in the petitioner's immigration case, is erroneous. While the *Zadvydas* decision specifically concerned indefinite detention, the Ninth Circuit has held unequivocally that *prolonged* detention without a bond hearing is impermissible irrespective of whether the detention has an eventual termination point. *See Diouf*, 634 F.3d at 1087 n.8 ("In *Casas-Castrillon*, moreover, we made clear that this liberty interest applies not only to indefinite detention, but also to prolonged detention."). The petitioners in *Tijani*, *Casas-Castrillon*, and *Diouf* were found to be entitled to bond hearings, even though judicial review of their removal orders could have ended their detentions. *See Prieto-Romero*, 534 F.3d at 1064-65 (explaining that detention pending judicial review has an end point).

The fact that Petitioner's immigration case is in an earlier stage of a lengthy process—of which a BIA decision is only an intermediate step—does not diminish her due process interest in freedom from prolonged and unreviewed detention. On the contrary, Respondents' prolonged detention of Petitioner prior to her receiving a BIA decision strengthens the need for a bond hearing in her case, which could continue for years. In *Diouf*, the government took the position that a noncitizen in later stages of her immigration case enjoys *fewer* procedural protections because her liberty interest weakens and the government's interest in detaining her grows as she progresses toward actual removal. 634 F.3d at 1086. By that logic, Petitioner's entitlement to a bond hearing would be even *stronger* than in *Casas-Castrillon* and *Diouf* because she is further from a possible final order of removal. *See Franco-Gonzales*, 828 F. Supp. 2d at 1143 n.7 (because noncitizen's case is "at a nascent stage," his liberty interest is

stronger and the government's interest weaker than in *Diouf*).

B. Petitioner Is Not Properly Subject to Mandatory Detention Under Section 1226(c) Because She Was Not Detained by ICE "When…Released" From Criminal Custody.

Because Petitioner was detained by immigration authorities a year after she was released from criminal custody, not "when…released," as § 1226(c) requires, she should never have been held in mandatory detention. Section 1226(c) provides that the Attorney General "shall take into custody any alien" who is "inadmissible" or "deportable" on designated criminal grounds "when the alien is released" from criminal custody. The plain and ordinary meaning of the "when…released" clause is that mandatory detention only applies if ICE detains the noncitizen at the time of her release from criminal custody. *See Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004) ("the clear language of the statute indicates that the mandatory detention of aliens 'when' they are released requires that they be detained at the time of release") (quoting *Alikhani v. Fasano*, 70 F. Supp. 2d 1124, 1130 (S.D. Cal 1999)).

The broader statutory context confirms Congress's intent to authorize mandatory detention only where a noncitizen is transferred directly from criminal to immigration custody. Against a general backdrop of discretionary detention, § 1226(c) defines a narrow class of noncitizens who are subject to mandatory detention: those who are finishing sentences for designated criminal offenses. *See* 8 U.S.C. § 1226(a) (the Attorney General has discretion to detain or release a noncitizen, "[e]xcept as provided in subsection (c)"). Section 1226(c) does not reflect an "amorphous" intent to detain noncitizens with criminal convictions, but rather serves the "limited" and "focused" purpose of "preventing the return to the community of those released in connection with the enumerated offenses." *Saysana v. Gillen*, 590 F.3d 7, 17 (1st Cir. 2009). Congress did not intend to mandate detention without the possibility of bond for noncitizens who have reintegrated themselves into their communities in the months or years

following their release from criminal custody. Moreover, because such noncitizens cannot reasonably be presumed to pose a risk of flight or danger to society, an interpretation of § 1226(c) that would permit their mandatory detention would raise serious constitutional concerns. *See, e.g.*, *Nimako v. Shanahan*, No. 12-4909, 2012 WL 4121102, at *7 (D.N.J. Sept. 18, 2012) ("by definition, aliens who have lived in the community for years after release…are among the least likely to pose a flight risk or danger to the community, the presumed reasons for mandatory detention"); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) (given the length of time since his conviction, "DHS can only determine whether [the petitioner] poses a risk of flight or danger to the community through an individualized bond hearing").

In asserting that Petitioner is subject to § 1226(c) despite the fact that she had been out of criminal custody for a year when arrested by ICE, Respondents rely solely on the Fourth Circuit's decision in *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012), which deferred to the BIA's interpretation of § 1226(c) in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001). *Hosh* was poorly reasoned and did not address the constitutional avoidance argument that Petitioner raises here. As one court has observed, the Fourth Circuit in *Hosh* analyzed the meaning of the word "when" in isolation from the rest of the statutory language, failing to explain how the clause "when the alien is released" can plausibly be read to mean "any time after the alien is released." *Nimako*, 2012 WL 4121102 at *8. Furthermore, this Court should not defer to the BIA's *Rojas* decision as the Fourth Circuit did in *Hosh* because an agency interpretation that "raise[s] grave constitutional doubts" is not entitled to deference. *Diouf*, 634 F.3d at 1090. Thus, *Hosh* should be rejected as non-binding and unpersuasive.[4] *See, e.g.*, *Castillo v. ICE Field Director*, No.

[4] Respondents quote *Hosh*'s statement that even if the statute required ICE to take custody at the moment of release from criminal custody, ICE's noncompliance should not "bestow a windfall upon criminal aliens." 680 F.3d at 384. For this proposition, *Hosh* cited *United States v. Montalvo-Murillo*, which held that failure to comply with a procedural requirement "does not defeat the Government's authority to seek detention of the person charged." 495 U.S. 711, 717

C12-502, 2012 WL 5511716 (W.D. Wash. Nov. 14, 2012) (refusing to follow *Hosh*); *Davis v. Hendricks*, No. 12-6478, 2012 WL 6005713, at *8 (D.N.J. Nov. 30, 2012) (noting that "few (if any) courts outside the Fourth Circuit have been persuaded to follow *Hosh*").

C. Petitioner Is Not Properly Subject to Mandatory Detention Under Section 1226(c) Because She Has a Substantial Claim for Immigration Relief.

Respondents do little to refute Petitioner's argument that § 1226(c) should be construed narrowly to exclude noncitizens like herself who have substantial claims for immigration relief. Petitioner's substantial claims for immigration relief that would lead to LPR status reduce her risk of flight, raising serious constitutional concerns about a scheme that permits her mandatory detention.

In *Demore*, the Supreme Court upheld mandatory detention, "for the brief period necessary for…removal proceedings" of an individual who had no substantial challenge to deportability. 538 U.S. at 513-14. Thus, the Court had no occasion to address the constitutionality of mandatorily detaining individuals who do have substantial claims to discretionary relief from removal. *See Gonzalez v. O'Connell*, 355 F.3d 1010, 1019-20 (7th Cir. 2004) (noting that this "important issue" was left open in *Demore*). Moreover, § 1226(c) does not clearly define the circumstances under which a noncitizen is "inadmissible" and "deportable," and thus subject to the statute. *See Tijani*, 430 F.3d at 1243 (Tashima, J., concurring) (§ 1226(c) "leaves many questions unanswered, the most important of which is who, exactly, falls under the statute's provisions"); *see also Demore*, 538 U.S. at 578 (Breyer, J., concurring in part and dissenting in part) (§ 1226(c) requires detention of a noncitizen who *is* deportable, "not one who may, or may not, fall into that category").

(1990). However, Petitioner does not argue that ICE's failure to take custody immediately strips the agency of its power to detain her. Rather, she seeks a hearing on whether her detention is justified, which can hardly be described as a "windfall." *See Castillo v. ICE Field Director*, No. C12-502, 2012 WL 5511716, at *4 (W.D. Wash. Nov. 14, 2012) ("this case is about providing due process to an individual, not taking away a benefit afforded the government").

Petitioner has substantial challenges to removal. Unlike the petitioner in *Demore*, she has applied for both asylum and a U visa, either of which would entitle her to eventual LPR status. Thus, Petitioner does not pose the categorical flight risk that Congress sought to prevent when enacting mandatory detention for a limited class of noncitizens, as she has strong incentives to appear for her proceedings. *See Demore*, 538 U.S. at 520-21; *United States v. Castiello*, 878 F.2d 554, 555 (1st Cir. 1989) (holding that, "as a matter of common sense, the likelihood of succeeding on appeal is relevant to flight risk"). In order to avoid a constitutionally suspect result, this Court should interpret § 1226(c) not to apply to Petitioner because she has a substantial claim to relief from removal. *See Tijani*, 430 F.3d at 1247 (Tashima, J., concurring) (only noncitizens who cannot raise a substantial argument against removal are subject to mandatory detention); *Demore*, 538 U.S. at 578-79 (Breyer, J., concurring in part and dissenting in part) (same).

IV. CONCLUSION

The length of Petitioner's immigration detention has now vastly exceeded any criminal sentence she has ever served for her minor, nonviolent offenses. Her Petition for Writ of Habeas Corpus should be granted because as the federal courts have consistently held, Respondents have no authority to detain individuals for prolonged periods of time without any semblance of due process. Alternatively, the Petition should be granted because the timing of Petitioner's arrest by ICE and her substantial claim for immigration relief place her outside the scope of the mandatory detention statute.

As Respondents have provided no evidence that Petitioner poses any risk of flight or threat to the community, Petitioner requests that the Court order her immediate release. *See, e.g. Victor v. Mukasey*, No. 08-1914, 2008 WL 5061810 (M.D. Pa. Nov. 25, 2008) (ordering release of petitioner who had been held over a year where petitioner showed family ties and

government presented no evidence of danger to community or risk of flight). Petitioner alternatively requests that the Court order her release unless Respondents provide her with a bond hearing within 30 days of this Court's order. *See Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011) (directing district court to grant the writ and order Singh's release unless within 45 days of the district court's order the agency provides a constitutionally sufficient bond hearing).

Dated: February 22, 2013

Respectfully submitted,

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By: /s/ Jingni Zhao
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