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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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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.

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

IMMIGRATION CASE

INTRODUCTION

1. Petitioner Bertha Mejia Espinoza has been imprisoned by the Bureau of Immigration and Customs Enforcement of the Department of Homeland Security ("ICE") for over sixteen months without a hearing before a neutral decision maker as to whether her detention

is justified. Ms. Mejia has lived in the United States for over thirty years and has extensive family and community ties in the San Francisco Bay Area. As a crime victim who cooperated with law enforcement authorities, she has a strong chance of obtaining a visa, and eventually, lawful permanent resident status. Nonetheless, on the basis of minor, nonviolent offenses—primarily petty theft of food items—ICE has classified her as a "criminal alien" who must be detained for the duration of her immigration proceedings without the possibility of release on bond.

2. As a general rule, a noncitizen detained during her removal proceedings, like any other person whom our government seeks to incarcerate, is entitled to review of her custody status by a neutral magistrate. However, ICE purports to hold Ms. Mejia under 8 U.S.C. § 1226(c). This statute provides that noncitizens who are removable for having committed designated criminal offenses *shall* be taken into immigration custody when released from criminal custody, and may be released only in exceptional circumstances. Section 1226(c) was enacted in 1996 with the narrow purpose of ensuring that a "subset of deportable criminal aliens" remained in government custody for the "brief period" of their removal proceedings. *Demore v. Kim*, 538 U.S. 510, 521, 513 (2003).

3. Petitioner Mejia's case is a striking illustration of ICE's pattern of overreach in implementing § 1226(c). First, the statute never contemplated detention for such prolonged and excessive periods of time without a bond hearing. Nor was the statute designed to sweep in individuals who, like Ms. Mejia, have successfully reintegrated into society after being released from criminal custody. Finally, the statute was not intended to impose mandatory detention on community members who are likely to win immigration relief and remain in the United States.

4. Confronted with ICE's heavy-handed interpretations of § 1226(c), the federal courts have made clear that the agency's power to detain under § 1226(c) is constrained both by

the statute itself and by the Due Process Clause of the Constitution. The Ninth Circuit has held unequivocally that prolonged immigration detention without custody review raises serious constitutional concerns. *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942, 950 (9th Cir. 2008). On several occasions, the Court has construed immigration detention statutes not to authorize prolonged detention without a bond hearing so as to avoid deciding the constitutional issue. *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (§ 1226(c) only authorizes mandatory detention during "expeditious" removal proceedings); *Casas-Castrillon*, 535 F.3d at 944 ("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"); *Diouf v. Napolitano*, 634 F.3d 1081, 1091-92 (9th Cir. 2011) (clarifying that detention becomes prolonged at six months and a bond hearing is required at that point).

5. In this case, ICE has again exceeded the scope of its limited authority to deprive a person of her physical liberty without affording her a bond hearing. Accordingly, Petitioner Mejia brings this Petition for Writ of Habeas Corpus to challenge her continued detention on statutory and constitutional grounds.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 2241 (habeas corpus), 28 U.S.C. § 1651 (All Writs Act), the Suspension Clause of Article I of the U.S. Constitution, and 28 U.S.C. § 1331 (federal question).

7. While the courts of appeal have jurisdiction to review removal orders directly through petitions for review, *see* 8 U.S.C. § 1252(a)(1), (b) the federal district courts have jurisdiction under 28 U.S.C. § 2241 to hear habeas petitions by noncitizens challenging the

lawfulness of their detention by ICE. *See, e.g.*, *Demore*, 538 U.S. at 516-17; *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006).

8. Venue is proper in the Northern District of California pursuant to 28 U.S.C. §§ 1391(b) and (e) because a substantial part of the events giving rise to these claims occurred in this District.

INTRADISTRICT ASSIGNMENT

9. The San Francisco Field Office of Immigration and Customs Enforcement is responsible for determining Petitioner Mejia's custody status. Assignment to the San Francisco or Oakland Division of this Court is proper under Local Rule 3-2(d) because a substantial part of the events giving rise to these claims occurred in San Francisco County.

PARTIES

10. Petitioner Bertha Mejia is a citizen and national of El Salvador who resides in Oakland, California. She is currently in immigration proceedings in San Francisco Immigration Court. She has been held in immigration detention for over sixteen months without a hearing to determine whether her detention is justified. ICE is detaining Ms. Mejia at the Yuba County Jail in Marysville, California through an Intergovernmental Service Agreement.

11. Respondent Timothy Aitken is the Field Office Director for the San Francisco Field Office of Immigration and Customs Enforcement, Department of Homeland Security. The San Francisco Field Office's area of responsibility consists of Kern County, California and all California counties north of Kern; Hawaii; and Guam. Mr. Aitken oversees custody determinations made by ICE within the San Francisco Field Office's area of responsibility and is a legal custodian of Petitioner.

12. Respondent Janet Napolitano is the Secretary of Homeland Security and heads the Department of Homeland Security, the arm of the U.S. government responsible for enforcement of immigration laws. Ms. Napolitano is the ultimate legal custodian of Petitioner.

13. Respondent Eric Holder is the Attorney General of the United States and the head of the Department of Justice. Mr. Holder shares responsibility for implementation and enforcement of immigration laws along with Respondent Napolitano. Mr. Holder is a legal custodian of Petitioner.

14. All Respondents are sued in their official capacities.

FACTUAL ALLEGATIONS

15. Bertha Mejia Espinoza ("Ms. Mejia") is a 53-year-old citizen and national of El Salvador who has lived in the United States for over thirty years. She has four U.S. citizen daughters and several U.S. citizen grandchildren, including a nine-year-old grandson for whom she is the primary caretaker and de facto guardian. Declaration of Berth Mejia in Support of Petition for Writ of Habeas Corpus, filed herewith ("Mejia Decl.") ¶ 2.

16. When Ms. Mejia was ten years old, her father died. Ms. Mejia's mother forced Ms. Mejia to leave school and help support the family. She worked in the market with her mother, but money was scarce, and she sometimes resorted to stealing food so that her siblings would not go hungry. *Id.* ¶ 4. When she was about twelve years old, Ms. Mejia's older cousin began to sexually abuse and beat her. Her stealing became more frequent as she experienced the stress and shame of this ongoing abuse. *Id.* ¶ 5.

17. In 1981, Ms. Mejia fled political violence in El Salvador and sought refuge in the United States, settling in California and raising a family here.

18. Ms. Mejia has provided for her family by cleaning homes and businesses. In 2005, while at work, she was raped by the owner of the house she was cleaning. Mejia Decl. ¶ 8. Ms.

Mejia reported the crime and both the Oakland Police Department and the Contra Costa Sheriff's Department investigated the crime. Ms. Mejia was severely traumatized by the rape and received medical treatment at La Clinica, a nonprofit organization in Oakland. The Oakland Police Department has certified that she assisted their investigation of the crime. Declaration of Rosy H. Cho in Support of Petition for Writ of Habeas Corpus, filed herewith ("Cho Decl.") ¶ 7; Cho Decl. Ex. A, Law Enforcement Certification.

19. Ms. Mejia has never been arrested for or convicted of a violent crime. Cho Decl. Ex. B, Brief in Support of Application for Waiver of Inadmissibility at 2-3; Cho Decl. Ex. C, List of Criminal Convictions. However, she has a number of minor criminal convictions, nearly all for shoplifting food items from stores. *Id.*; *see also* Cho Decl. Ex. D, Probation Officer's Report. Although she no longer needed to steal food to survive when she came to the United States, Ms. Mejia continued to feel urges to steal food when experiencing anxiety or depression. In November 2011, she was diagnosed with kleptomania by a clinical psychologist, and she is motivated to seek treatment if released from detention. Cho Decl. Ex. E, Psychological Assessment. Ms. Mejia has never been sentenced to more than 45 days of jail time for any of her criminal offenses. Cho Decl. Ex. C, List of Criminal Convictions.

20. Ms. Mejia's most recent arrest by police, for petty theft of grocery items, occurred on October 21, 2010. Mejia Decl. ¶ 13. She was released on the same day and has not been in criminal custody since then. On September 17, 2011, nearly a year from the last time Ms. Mejia was in criminal custody, ICE officers arrived at her home, took her into immigration custody, and instituted removal proceedings against her. *Id.* ¶ 16. The arrest was part of a larger ICE program called "Operation Cross Check." Ms. Mejia was charged with removability based on her illegal entry and for having been convicted of a crime involving moral turpitude. She was deemed to be subject to 8 U.S.C. § 1226(c), which mandates the detention of certain noncitizens with criminal

histories.

21. In Immigration Court, Ms. Mejia sought asylum and withholding of removal based on the political persecution she experienced in El Salvador. Collateral to the proceedings in Immigration Court, she applied for a U visa, a visa available to victims of crime, based on the 2005 rape by her employer.

22. On August 28, 2012, the Immigration Judge denied Ms. Mejia's application for asylum and withholding of removal. Following the hearing, Ms. Mejia's family retained new immigration counsel.

23. On November 7, 2012, United States Citizenship and Immigration Services denied Ms. Mejia's U visa application. Despite Ms. Mejia's statutory eligibility for the visa, the application submitted by her former counsel was denied because the application was deficient in several ways. Cho Decl. ¶ 5.

24. On December 10, 2012, Ms. Mejia appealed the IJ's denial of asylum and withholding to the Board of Immigration Appeals ("BIA"). *Id.* ¶ 6.

25. On December 15, 2012, Ms. Mejia submitted a renewed U visa application that corrected the inadequacies in the previous application. *Id.* ¶ 7. On January 11, 2013, the BIA remanded the case to the Immigration Court to await the adjudication of the newly-filed U visa application. *Id.* ¶ 13. Ms. Mejia is a strong candidate for the U visa, as she meets the statutory eligibility requirements and her case presents compelling positive equities. *See generally* Cho Decl. Ex. B, Brief in Support of Application for Waiver of Inadmissibility; Cho Decl. Ex. F, Letters of Support.

26. As her immigration case has proceeded, Ms. Mejia has remained in detention in Yuba County Jail, which holds immigration detainees pursuant to an Intergovernmental Service Agreement with ICE. Ms. Mejia has attempted to obtain a bond hearing before an Immigration

Judge, to no avail. She filed motions for custody redetermination with the Immigration Court on October 18, 2012 and on December 20, 2012, arguing that 8 U.S.C. § 1226(c) does not authorize such prolonged detention and that she is not subject to 8 U.S.C. § 1226(c) at all. Cho Decl. ¶¶ 14, 16. The Immigration Judge denied both motions, concluding that he lacked jurisdiction to conduct a bond hearing. *See* Cho Decl. Exs. G and H, Orders Denying Bond Redetermination.

27. If granted a bond hearing, Ms. Mejia will present a convincing case for release. She has no history of violence and would not pose a threat to the community. She intends to seek treatment for her kleptomania so that she does not repeat her mistakes. Mejia Decl. ¶ 15. The prospect of obtaining a visa is a strong incentive for Ms. Mejia to comply with all conditions of release and attend all hearings and appointments related to her immigration case. Moreover, with a dependent grandson and four daughters who all live in the Bay Area, Ms. Mejia poses no risk of flight. *Id.* ¶¶ 19-20; Cho Decl. Ex. F, Letters of Support.

LEGAL BACKGROUND

28. Under 8 U.S.C. § 1226(a), a noncitizen may be detained during her removal proceedings, but is entitled to a bond hearing before an Immigration Judge on whether her detention is justified to prevent flight or danger to the community. In contrast, 8 U.S.C. § 1226(c) mandates the detention of noncitizens who are "inadmissible" or "deportable" on specified criminal grounds when they are released from criminal custody, creating a limited exception to the general rule of discretionary detention set forth in § 1226(a). Noncitizens deemed to be subject to § 1226(c) are routinely detained for months without any custody review by a neutral arbiter.

29. Petitioner Mejia challenges her continued detention under 8 U.S.C. § 1226(c) on three independent grounds. First, neither the statute nor the Constitution authorize ICE to hold Ms. Mejia in ***prolonged*** detention without affording her a bond hearing before an Immigration

Judge at which the government must prove by clear and convincing evidence that she is either a flight risk or a danger to the community. Second, Ms. Mejia contends that she is not subject to § 1226(c) at all because she was not detained by immigration authorities "when released" from criminal custody, as the statute requires, but rather a year later. Third, Ms. Mejia is not subject to § 1226(c) because she has a substantial claim for immigration relief and is therefore not "inadmissible" or "deportable" within the meaning of the statute.

Prolonged Detention Without a Bond Hearing is Not Authorized by 8 U.S.C. § 1226(c) or the Due Process Clause.

30. Petitioner Mejia argues that the government may not detain her for sixteen months without a hearing before a neutral decision maker on whether such prolonged detention is justified in her case. She makes this argument on statutory and constitutional grounds.

31. The Ninth Circuit has repeatedly construed immigration detention statutes as implicitly providing for bond hearings to avoid the due process concerns otherwise posed by prolonged detention. In *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005), the Court held that § 1226(c) authorizes mandatory detention only during expeditious removal proceedings and required the government to provide a bond hearing to the petitioner, who had been detained for over two years. *See also Demore v. Kim*, 538 U.S. 510, 528-30 (2003) (upholding detention under § 1226(c) for the brief period of a noncitizen's removal proceedings, typically no longer than five months, and suggesting that detention for longer periods may not be permissible).

32. In *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942, 950 (9th Cir. 2008), the Ninth Circuit again construed § 1226(c) as applying only to expeditious removal proceedings because "prolonged detention without adequate procedural protections would raise serious constitutional concerns." The Court held that once Casas-Castrillon's removal order was affirmed by the Board of Immigration Appeals, the basis for his detention shifted from § 1226(c)

to § 1226(a), under which he was entitled to a bond hearing. *Id.* at 948.

33. The Ninth Circuit later clarified that immigration detention becomes prolonged at six months and a bond hearing is generally required at that point. *Diouf v. Napolitano*, 634 F.3d 1081, 1091-92 (9th Cir. 2011). *Diouf* interpreted 8 U.S.C. § 1231(a)(6), which governs the detention of noncitizens with a final order of removal, as not authorizing prolonged detention without custody review. *See also Zadvydas v. Davis*, 533 U.S. 678 (2001) (statute authorizing detention after a final order of removal does not allow indefinite detention and six months is the presumptive limit).

34. The holdings of *Tijani*, *Casas-Castrillon*, and *Diouf* establish the principle that detainees held under § 1226(c) for longer than a brief and reasonable period of time must be afforded a bond hearing before an Immigration Judge at which the government bears the burden of justifying their continued detention. *See* Order and Prelim. Inj. (Dkt. 255), *Rodriguez v. Robbins*, CV07-03239 (C.D. Cal. Sept. 13, 2012) (granting preliminary injunction requiring the government to provide bond hearings to a subclass of detainees held under § 1226(c) for six months or longer). These decisions did not turn on individual circumstances of the petitioners or the procedural postures of their immigration cases. Rather, they stand for the basic principle that any detention scheme that purports to authorize prolonged detention without rigorous procedural protections would raise serious due process concerns. The Ninth Circuit has repeatedly adopted narrowing constructions of immigration detention statutes that pose such concerns.

35. Should this Court decide that § 1226(c) is not amenable to a narrowing construction, the statute would violate the Due Process Clause of the Constitution. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S. at 690. Accordingly, prolonged civil detention is unconstitutional unless accompanied by adequate procedural

safeguards and a sufficiently strong justification. *Id.*; *cf. Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (striking down insanity-related detention scheme that placed the burden on the detainee to prove eligibility for release); *United States v. Salerno*, 481 U.S. 739, 750-52 (1987) (upholding pretrial detention statute providing for a "full-blown adversary hearing" before a "neutral decisionmaker" where the government bore the burden of proving dangerousness).

8 U.S.C. § 1226(c) Only Authorizes Mandatory Detention of Noncitizens Taken into Immigration Custody "When…Released" from Criminal Custody.

36. Petitioner Mejia also submits that she is not properly subject to § 1226(c) because the statute is written and designed to mandate the detention of noncitizens who are taken into immigration custody when released from criminal custody, not months or years later.

37. In one continuous sentence, paragraph (1) of § 1226(c) states that the Attorney General "shall take into custody any alien" who is removable on specified criminal grounds "when the alien is released" from criminal custody. Paragraph (2) provides that "an alien described in paragraph (1)" may be released only in exceptional circumstances. Together, these two paragraphs impose mandatory detention on a limited class of noncitizens.

38. The language of § 1226(c) is plainly inapplicable to Petitioner Mejia, who was not arrested by ICE "when…released" from criminal custody, as required by paragraph (1), but almost a year after her last arrest. Thus, she is not "an alien described in paragraph (1)" and her detention is not governed by § 1226(c), but rather by § 1226(a), which allows for release on bond.

39. Mandatory detention of a noncitizen taken into immigration custody long after her release from criminal custody is inconsistent with the structure and purpose of the immigration detention scheme. As the First Circuit has explained, the immigration statutes outline "specific, serious circumstances" under which custody review by an Immigration Judge is not available. *Saysana v. Gillen*, 590 F.3d 7, 17 (1st Cir. 2009). § 1226(c) sets forth one such circumstance—

the case of a noncitizen who is completing a criminal sentence and is presumed to be a poor bail risk due to a lack of community ties. It makes little sense, however, to presume that noncitizens who were released back into the community months or years before and have since reintegrated into society are, as a group, poor bail risks. *See id.* To the contrary, "it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be." *Id.*

40. The application of § 1226(c) to noncitizens detained by ICE months or years after being released from criminal custody also raises serious constitutional concerns. In upholding § 1226(c) in *Demore v. Kim*, the Supreme Court explained that Congress may legislate based on "reasonable presumptions"—in this case, that a narrow class of alleged criminal aliens would pose a risk of flight or danger to the community if not detained during their removal proceedings. 538 U.S. at 526 (citing *Reno v. Flores*, 507 U.S. 292, 313 (1993)). With respect to noncitizens who have led law-abiding lives and reestablished community ties in the months and years since their release from criminal custody, however, the blanket presumption underlying § 1226(c) is patently unreasonable. A statute that denies these noncitizens individualized bond determinations would raise due process concerns, but this result is readily avoided through an interpretation that limits mandatory detention to noncitizens who were taken into immigration custody when released from criminal custody.

41. Contrary to the plain language and purpose of § 1226(c), the Board of Immigration Appeals has held that the provision imposes mandatory detention on all noncitizens who are removable on criminal grounds, regardless of when they were released from criminal custody, and regardless of whether they have lived in the community for years after being released. *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001).

42. Numerous district court decisions on this issue, including nearly all of the

decisions within this circuit, have disagreed with the BIA's position in *Rojas*. For example, in *Quezada-Bucio v. Ridge*, the court held that § 1226(c) only applies to noncitizens taken into immigration custody ***immediately*** after their release from criminal custody, explaining that if Congress had intended otherwise, "it easily could have used the language '*after* the alien is released,'…or other words to that effect." 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004) (emphasis in original); *see also Zabadi v. Chertoff*, No. C05-03335, 2005 WL 3157377, at *5 (N.D. Cal. Nov. 22, 2005) (interpreting similar predecessor statute as authorizing mandatory detention "only immediately upon release, or within a reasonable period thereafter"); *Christie v. Elwood*, No. 11-7070, 2012 WL 266454, at *6-7 (D.N.J. Jan. 30, 2012) (agreeing with the dissenting Board members in *Rojas*). While the Fourth Circuit recently approved the BIA's interpretation in *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012), many district courts outside the Fourth Circuit have rejected the *Hosh* opinion as unpersuasive. *See, e.g.*, *Bogarin-Flores v. Napolitano*, No. 12CV0399, 2012 WL 3283287, at *3 (S.D. Cal. Aug. 10, 2012) ("The Fourth Circuit…did not present any independent reasoning or statutory construction…This Court finds that that the plain language is not ambiguous and clearly applies the mandatory detention provision to those aliens who are detained upon release from criminal custody.").

8 U.S.C. § 1226(c) Does Not Authorize Mandatory Detention of Noncitizens With Substantial Claims for Immigration Relief.

43. Finally, Petitioner Mejia argues that she is not subject to mandatory detention under § 1226(c) because she is eligible for a U visa, and therefore not "inadmissible" or "deportable" within the meaning of the statute. Noncitizens who may have qualifying criminal convictions but who also have substantial claims for immigration relief fall outside the intended scope of the statute.

44. By its terms, § 1226(c) applies to noncitizens who are "inadmissible" or

"deportable" for having committed specified criminal offenses. However, the terms "inadmissible" and "deportable" are used in different ways throughout the Immigration and Nationality Act and are not defined in § 1226(c). *See Demore*, 538 U.S. at 578 (Breyer, J., concurring in part and dissenting in part) ("the relevant statutes literally say nothing about an individual who, armed with a strong argument against deportability, might, or might not, fall within their terms").

45. Again, the canon of constitutional avoidance warrants interpreting the statute narrowly, to exclude noncitizens who have substantial claims for immigration relief. To comply with due process, immigration detention must be reasonably related to its basic purpose of "assuring the alien's presence at the moment of removal." *Zadvydas*, 533 U.S. at 699. If a noncitizen has a substantial claim for relief from removal, there is a strong chance that she ultimately will not be removed and her detention will serve no legitimate purpose. *See, e.g.*, *Gonzalez v. O'Connell*, 355 F.3d 1010, 1020 (7th Cir. 2004) (*Demore* "left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable."). Moreover, noncitizens with substantial claims for relief have every incentive to "press their legal claims" and little reason to flee, further undermining the justification for mandatory detention. *Tijani*, 430 F.3d at 1247 (Tashima, J., concurring) (only "those immigrants who could not raise a 'substantial' argument against their removability" should be subject to § 1226(c)). This Court can avoid these constitutional problems by construing "inadmissible" and "deportable" within the context of § 1226(c) not to apply to individuals who have substantial claims for immigration relief.

CLAIMS FOR RELIEF

COUNT ONE
Violation of the Immigration and Nationality Act – Prolonged Detention Without Custody Review

46. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs.

47. Respondents' continued detention of Petitioner violates the Immigration and Nationality Act because 8 U.S.C. § 1226(c) does not authorize detention for a prolonged period of time absent a bond hearing before an Immigration Judge.

COUNT TWO
Violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution – Prolonged Detention Without Custody Review

48. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs.

49. Respondents' continued detention of Petitioner without a bond hearing violates her right to be free of prolonged civil detention without adequate justification and sufficient procedural safeguards, as guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution.

COUNT THREE
Violation of the Immigration and Nationality Act – Mandatory Detention of a Noncitizen Not Taken Into Immigration Custody When Released from Criminal Custody

50. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs.

51. Respondents' detention of Petitioner without a bond hearing violates the Immigration and Nationality Act because 8 U.S.C. § 1226(c) does not authorize the mandatory detention of noncitizens who were not taken into immigration custody when released from criminal custody.

COUNT FOUR
Violation of the Immigration and Nationality Act – Mandatory Detention of a Noncitizen with a Substantial Claim for Immigration Relief

52. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs.

53. Respondents' detention of Petitioner without a bond hearing violates the Immigration and Nationality Act because 8 U.S.C. § 1226(c) does not authorize the mandatory detention of noncitizens who have substantial claims for immigration relief.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that the Court grant the following relief:

a. Assume jurisdiction of this matter;

b. Grant the Order to Show Cause as requested in the application filed herewith;

c. Grant the writ of habeas corpus and order Petitioner's immediate release from custody under reasonable conditions of supervision; or in the alternative, order a constitutionally adequate hearing before an Immigration Judge, at which Respondents bear the burden of proving by clear and convincing evidence that Petitioner's continued detention remains justified;

d. Grant Petitioner reasonable attorneys' fees, costs, and other disbursements pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

e. Grant such other relief as the Court deems just and proper.

Dated: February 6, 2013

Respectfully submitted,

Jingni (Jenny) Zhao
Julia Harumi Mass
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA

By: _____
Jingni (Jenny) Zhao

Rosy H. Cho
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Attorneys for Petitioner