

300 F.R.D. 28  
United States District Court,  
D. Massachusetts.

Clayton Richard GORDON, on behalf of himself  
and others similarly situated, Plaintiff/Petitioner,

v.

Jeh Charles JOHNSON, Secretary of Homeland  
Security; Eric H. Holder, Jr., Attorney General;  
John Sandweg, Acting Director, Immigration and  
Customs Enforcement; Sean Gallagher, Acting  
Field Director, Immigration and Customs  
Enforcement; 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,  
Defendants/Respondents.

No. 13–CV–30146–MAP. | Signed March 27, 2014.

### Synopsis

**Background:** Alien, a lawful permanent resident who was subjected to mandatory detention pending removal five years after his arrest for narcotics possession, petitioned for a writ of habeas corpus on his own behalf and on behalf of a class of similarly situated individuals, seeking an individualized bond hearing to challenge his ongoing detention. Petitioner filed motion for class certification.

**Holding:** The District Court, Ponsor, J., held that class certification was appropriate.

Ordered accordingly.

### Attorneys and Law Firms

\*29 Adriana Lafaille, Matthew Segal, American Civil Liberties Union, Boston, MA, Elizabeth A. Badger, Lutheran Social Services, Worcester, MA, Eunice Lee, Michael Tan, American Civil Liberties Union Federation, San Francisco, CA, Judy Rabinovitz, American Civil Liberties Union, New York, NY, for Plaintiff/Petitioner.

Aram A. Gavoov, Sarah B. Fabian, United States Department of Justice, Elizabeth J. Stevens, Office of

Immigration Litigation, Washington, D.C., Karen L. Goodwin, United States Attorney's Office, Springfield, MA, Jeffrey T. Collins, Office of the Attorney General, Boston, MA, for Defendants/Respondents.

### **ORDER REGARDING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION, PLAINTIFF CESAR CHAVARRIA RESTREPO'S INDIVIDUAL HABEAS PETITION, AND DEFENDANTS' MOTION TO DISMISS (Dkt. Nos. 16, 99, 102, & 105)**

PONSOR, District Judge.

Plaintiffs are individuals who, subsequent to their release from criminal confinement, were taken into Immigration & Customs Enforcement ("ICE") custody under the mandatory detention provisions of 8 U.S.C. § 1226(c). They seek to certify a class of all individuals who are or will be detained under that provision, but who, in their view, were not detained "when ... released," as the statute requires.

Plaintiff Cesar Chavarria Restrepo, the proposed class representative, also seeks individual relief through his habeas petition. (2d Am. Class Action Compl. & Pet. for Writ of Habeas Corpus, Dkt. No. 99.) The parties have agreed that, if the court orders Plaintiff Chavarria's remedy concurrent with class certification, no further amendment of the complaint to ensure a live controversy will be necessary. (Joint Statement, Dkt. No. 100.)

The sole question this case presents is whether the "when ... released" language of 8 U.S.C. § 1226(c) imposes an immediacy requirement upon the government's power to detain and thus limits the class of individuals subject to mandatory detention, or whether the phrase merely states the time at which the government's power to detain commence—permitting that power to be exercised at *any* time thereafter, no matter how far off. On October 23, 2013, and subsequently on December 31, 2013, this court concluded that "when ... released" means "at the time of release." *Gordon v. Johnson*, 991 F.Supp.2d 258, 2013 WL 6905352 (D.Mass. Dec. 31, 2013); *Gordon v. Napolitano*, No. 13–cv–30146, 2013 WL 5774843 (D.Mass. Oct. 23, 2013).

To reach that conclusion, the court first determined that there was no ambiguity in the language—given its plain meaning, the purpose of the Act, and the structure of the law—and thus deference to the Board of Immigration Appeal's ("BIA") decision in *Matter of Rojas*, 23 I & N

Dec. 117 ( BIA 2001), was not warranted. *Gordon*, 991 F.Supp.2d at 263–67, 2013 WL 6905352 at \*4–8. The court further held that even if the language were ambiguous, the BIA’s interpretation—finding a complete absence in the statute of any temporal limit on the government’s power to detain—was unreasonable and not entitled to deference.<sup>1</sup> *Id.* at 267–68, at \*8–9.

<sup>1</sup> This analysis is applicable to Plaintiff Chavarria, and justifies an individualized bond hearing in his case.

The court now concludes that, pursuant to Fed.R.Civ.P. 23, class treatment is appropriate. First, each requirement of Rule 23(a) has been satisfied. Defendants do not object to Plaintiffs’ numerosity arguments—anchored on ICE’s focus on detaining aliens with criminal convictions, Plaintiffs counsel’s \*30 investigation at one facility, and a list of 20 current or recent cases in Massachusetts. (Pls’ Mem. in Supp., Dkt. No. 17.) Based on the information provided by Plaintiffs, it is reasonable to conclude that the class is over the forty-person threshold generally required in the First Circuit. See *George v. Nat’l Water Main Cleaning Co.*, 286 F.R.D. 168, 173 (D.Mass.2012). Further, the class is dispersed across different facilities, is inherently transient, and is filled with individual class members unknown (and to some extent unknowable) to Plaintiffs: joinder is therefore impracticable.

The requirements of commonality, typicality, and adequacy are also easily met. A single question of law, previously addressed by the court, binds together the entire class. A single, statutory interpretation governs the answer to the entire case, and no factual differences—Defendants’ disagreement notwithstanding—will have any bearing on the analysis of the issues. Plaintiffs’ claims are therefore common and typical of the class, and Plaintiff Chavarria is an adequate representative. Plaintiffs’ counsel, given their experience in this area of law, are also more than adequate under Rule 23(a)(4) and Rule 23(g).

The class, seeking solely injunctive or declaratory relief, also falls neatly into Rule 23(b)(2). Though the court is reserving judgment at this point as to the availability of injunctive relief under 8 U.S.C. § 1252(f)(1), the class will still be entitled, at a minimum, to some form of declaratory judgment. See, e.g., *Reid v. Donelan*, 297 F.R.D. 185, 2014 WL 545144 (D.Mass. Feb. 10, 2014). The class can therefore be certified as a Rule 23(b)(2) class.

A final note about the class is necessary. In defining the contours of the class, the court has limited it to all

individuals not detained within forty-eight hours of release from criminal custody. It has done this solely to ease the burden on the government, since it may be impractical, or in some instances impossible, to arrange a direct transfer from criminal custody to immigration detention. Nonetheless, in defining the class in this way, the court is *not* intending to say that “when ... released” necessarily permits *any* gap at all. Instead, any individual detained within that forty-eight hour window is simply not part of this class and will need to seek a separate, individualized remedy.

To permit Plaintiff Chavarria to obtain individual relief, while also avoiding the unnecessary and continual amendment of Plaintiffs’ complaint to ensure a live controversy, the court is issuing this order with the expectation that a more detailed memorandum will follow. That memorandum will accompany the court’s decision and order, once rendered, on the Plaintiffs’ Motions for Summary Judgment. (Dkt. Nos. 83 & 107.)

For these reasons, which are subject to amplification in a further memo, the court hereby **ALLOWS** Plaintiffs’ Motions for Class Certification, (Dkt. Nos. 16 & 102), **GRANTS** Plaintiff Chavarria’s petition for habeas corpus, (Dkt. No. 99), and **DENIES** Defendants’ Motion to Dismiss, (Dkt. No. 105).

Defendants’ shall provide Plaintiff Chavarria an individualized bond hearing as detailed in the parties’ joint submissions. (Dkt. No. 100.) The court also hereby certifies the following class:

all aliens who are or will be detained in Massachusetts under 8 U.S.C. § 1226(c), whom the government alleges to be subject to a ground of removability as described in 8 U.S.C. § 1226(c)(1)(A)-(D), and who were not taken into immigration custody within forty-eight hours (or, if a weekend or holiday intervenes, within no more than five days) of release from the relevant predicate custody.

Plaintiff Chavarria is appointed class representative, and Attorneys Adrianna Lafaille, Matthew Segal, Jessie Rossman, Judy Rabinovitz, Eunice Lee, Michael Tan, and Elizabeth Badger are appointed class counsel.

It is So Ordered.