

Lawrence S. Lustberg
Jonathan M. Manes
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500

Counsel of Record for the Plaintiffs

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

GARFIELD GAYLE, SHELDON FRANCOIS, NEVILLE
SUKHU, and all others similarly situated within the State of New
Jersey,

Plaintiffs/Petitioners,

v.

JANET NAPOLITANO, in her official capacity as Secretary of
the Department of Homeland Security; ERIC HOLDER, in his
official capacity as Attorney General of the United States; JOHN
MORTON, in his official capacity as Director of Immigration and
Customs Enforcement; JUAN OSUNA, in his official capacity as
Director of the Executive Office of Immigration Review; JOHN
TSOUKARIS, in his official capacity as Field Office Director for
Enforcement and Removal Operations, Newark Field Office of
U.S. Immigration and Customs Enforcement; CHRISTOPHER
SHANAHAN, in his official capacity as the Field Office Director
for Enforcement and Removal Operations, New York City Field
Office of U.S. Immigration and Customs Enforcement; RAY
SIMONSE, in his official capacity as the Acting Field Office
Director for Enforcement and Removal Operations, New York
City Field Office of U.S. Immigration and Customs Enforcement;
ROBERT BIGOTT, in his official capacity as Warden of the
Bergen County Jail; JOSEPH TRABUCCO, in his official
capacity as Director of the Delaney Hall Detention Facility;
ORLANDO RODRIGUEZ, in his official capacity as Warden of
the Elizabeth Contract Detention Facility; ROY L. HENDRICKS,
in his official capacity as Warden of the Essex County
Correctional Facility; OSCAR AVILES, in his official capacity as
Director of the Hudson County Correctional Facility; and BRIAN
ELWOOD, in his official capacity as Warden of the Monmouth
County Correctional Institution,

Defendants/Respondents.

No. 3:12-cv-02806-FLW

**AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND CLASS ACTION
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This is a class action complaint for declaratory and injunctive relief or, in the alternative, a class action habeas, brought on behalf of individuals unlawfully subject to mandatory immigration detention in New Jersey under 8 U.S.C. § 1226(c). Plaintiffs bring suit to challenge the standard and procedures for determining whether an individual in removal proceedings is subject to mandatory detention — that is, detention without possibility of a bond hearing or any other determination of whether detention is justified based on danger or flight risk. Plaintiffs do not seek their release from custody, but rather an order prohibiting the government from mandatorily detaining them without the opportunity for a fair hearing at which an Immigration Judge ascertains whether they have a substantial challenge to removal and are therefore eligible for an individualized bond hearing. Further, this initial determination must be governed by appropriate standards of due process, including adequate notice of the availability of such a hearing; placement of the initial burden of proof on the government to establish *prima facie* deportability or inadmissibility on a ground that triggers mandatory detention; an opportunity for the detainee to rebut this showing by demonstrating a substantial challenge to removal; and a requirement that a contemporaneous record of such proceedings be made and maintained so that the Immigration Judge’s determination is subject to meaningful review.

2. Named Plaintiffs Garfield Gayle, Sheldon Francois, and Neville Sukhu are currently subject to mandatory detention, even though they have strong claims for relief against deportation that would entitle them to retain their lawful permanent residence in the United States. Mr. Gayle and Mr. Sukhu also seek termination of their removal proceedings due to the

government's failure to meet its burden of proving that they are deportable based on their alleged criminal convictions.

3. Mr. Gayle, Mr. Francois, and Mr. Sukhu are not alone. On any given day, the government detains more than a thousand individuals in facilities throughout the District of New Jersey. Hundreds of these individuals are subjected to mandatory detention under 8 U.S.C. § 1226(c), which applies to noncitizens who are "deportable" or "inadmissible" based on certain crimes, including various misdemeanors and minor drug offenses. Even though many of these individuals may ultimately be found to be neither "deportable" nor "inadmissible," pursuant to the decision of the Board of Immigration Appeals (BIA) in *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999), they are automatically subject to mandatory detention whenever the government charges them with a ground of removal designated in the statute, unless they can meet the nearly insurmountable burden of demonstrating to an Immigration Judge that the government is "substantially unlikely" to prevail on the charges against them. Moreover, such detention continues until removal proceedings conclude, even if the individual wins his case before an Immigration Judge and the government decides to appeal to the BIA. As a result, hundreds of individuals — including many longtime, lawful permanent residents — suffer mandatory detention for months, or even years, even though they may have substantial challenges to removability (including claims to U.S. citizenship) or claims to discretionary relief that would ultimately entitle them to retain, or obtain, lawful permanent residence in the United States.

4. The government also subjects individuals to mandatory detention without providing certain basic procedural safeguards. In particular, the government provides no notice of the right to request a hearing to contest mandatory detention. Indeed, the form that the government uses to notify a detainee of its determination to subject him to mandatory detention on

is affirmatively misleading, misstating that such detainees “may *not* request a review of this determination by an Immigration Judge.” Form I-286, Notice of Custody Determination (emphasis added). Still worse, even where a detainee does affirmatively request and obtain such a hearing, the government does not require that a contemporaneous record of proceedings be made and maintained, as is necessary to ensure a meaningful right of appeal.

5. Plaintiffs bring this action on their own behalf, and on behalf of all individuals in New Jersey who are or will be detained pursuant to 8 U.S.C. § 1226(c), to end the government’s sweeping misapplication of the mandatory detention statute and its failure to provide these basic safeguards. As set forth below, the Immigration and Nationality Act (INA) does not authorize mandatory detention under the *Joseph* standard, nor does it allow determinations regarding mandatory detention to be based upon a hearing with such inadequate procedures. If it did, the statute would raise serious constitutional concerns, as due process requires that immigration detention be both reasonably related to its purpose and accompanied by appropriate procedural protections. Plaintiffs therefore bring this action seeking declaratory and injunctive relief from their unlawful and unconstitutional imprisonment.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 2201 -02 (declaratory relief); 28 U.S.C. § 2241 (habeas corpus); and the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

7. Venue is proper in the District of New Jersey pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to these claims occurred in this District. In the alternative, venue is proper in the District pursuant to 28 U.S.C. § 2241(d) because Plaintiffs and proposed class members are detained at facilities within this District.

PARTIES

Plaintiffs-Petitioners

8. Named Plaintiff **Garfield Gayle** is a 53 -year-old citizen of Jamaica, who has lived in the United States for approximately 30 years and has been a lawful permanent resident since 1989. On March 24, 2012, he was arrested by U.S. Immigration and Custom Enforcement (ICE) agents at his home in Brooklyn, New York and mandatorily detained pursuant to 8 U.S.C. § 1226(c) based on a March 2007 misdemeanor drug conviction for which he was sentenced to ten days in jail. Since that time — a period of nearly eight months — he has been imprisoned at the Monmouth County Correctional Institution in Freehold, New Jersey without having had a bond hearing, even though he poses no danger or flight risk and even though he has a substantial claim that he is not deportable. His current address is Monmouth County Correctional Institution, 1 Waterworks Road, Freehold, NJ 07728.

9. Named Plaintiff **Sheldon Francois** is a 31 -year-old citizen of Trinidad and Tobago who has lived in the United States for nearly 20 years as a lawful permanent resident. On August 6, 2012, he was arrested by ICE and mandatorily detained pursuant to 8 U.S.C. § 1226(c) based on three minor misdemeanor convictions for which he served a total of approximately one month in jail. Since that time — a period now exceeding three months — he has been imprisoned at the Hudson County Correctional Facility in Kearny, New Jersey without having had a bond hearing, even though he has a substantial claim that he is not deportable and poses no danger or flight risk. His current address is Hudson County Correctional Facility, 30 - 35 Hackensack Avenue, Kearny, NJ 07032.

10. Named Plaintiff **Neville Sukhu** is a 61-year-old citizen of Guyana who has lived in the United States for nearly 20 years as a lawful permanent resident. On August 15, 2011, he

was arrested by ICE and mandatorily detained pursuant to 8 U.S.C. § 1226(c) based on a 1997 conviction for assault in the second degree, for which he served 90 -days imprisonment, and a 2011 misdemeanor for turnstile jumping, for which he was sentenced to time served, or approximately 24 hours in custody. Since that time — more than 14 months — he has been imprisoned at the Monmouth County Correctional Institution in Freehold, New Jersey without having had a bond hearing, even though he poses no danger or flight risk and has a substantial claim that he is not deportable. His current address is Monmouth County Correctional Institution, 1 Waterworks Road, Freehold, NJ 07728.

Defendants-Respondents

11. Defendant Janet Napolitano is the Secretary of Homeland Security and heads the Department of Homeland Security, the arm of the federal government responsible for enforcement of immigration laws. Ms. Napolitano is the ultimate legal custodian of Plaintiffs. Ms. Napolitano is sued in her official capacity. Her address is U.S. Department of Homeland Security, Washington, D.C. 20528.

12. Defendant Eric Holder is the Attorney General of the United States and the head of the Department of Justice, which includes within its purview the Board of Immigration Appeals and the immigration courts as a subunit known as the Executive Office of Immigration Review. Mr. Holder shares responsibility for the implementation and enforcement of immigration laws along with Defendant Napolitano and Defendant Osuna. Mr. Holder is sued in his official capacity. His address is U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, D.C. 20530-0001.

13. Defendant John Morton is the Director of U.S. Immigration and Customs Enforcement. In this capacity, he has responsibility for the enforcement of the immigration laws.

As such, he is a legal custodian of Plaintiffs. Mr. Morton is sued in his official capacity. His address is U.S. Immigration and Customs Enforcement, 500 12th St., SW, Washington, D.C. 20536.

14. Defendant Juan Osuna is the Director of the Executive Office of Immigration Review, and agency within the Department of Justice. Mr. Osuna shares responsibility for the implementation and enforcement of immigration laws along with Defendant Holder and Defendant Napolitano. Mr. Osuna is sued in his official capacity. His address is Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041.

15. Defendant John Tsoukaris is the Field Office Director for Enforcement and Removal Operations in the Newark Field Office of U.S. Immigration and Customs Enforcement. In this capacity, he has responsibility for the following detention facilities in which Plaintiffs are held: the Delaney Hall Detention Facility in Newark, New Jersey; the Elizabeth Contract Detention Facility in Elizabeth, New Jersey; and the Essex County Correctional Facility in Newark, New Jersey. He is authorized to release Plaintiffs and is a legal custodian of Plaintiffs. Mr. Tsoukaris is sued in his official capacity. His address is ICE Newark Field Office, 614 Frelinghuysen Ave., 3rd Floor, Newark, NJ 07102.

16. Defendant Christopher Shanahan is the Field Office Director for Enforcement and Removal Operations in the New York City Field Office of U.S. Immigration and Customs Enforcement. In this capacity, he has responsibility for the following detention facilities in which Plaintiffs are held: the Bergen County Jail in Hackensack, New Jersey; the Hudson County Correctional Facility in Kearney, New Jersey; and the Monmouth County Correctional Institution in Freehold, New Jersey. He is authorized to release Plaintiffs and is a legal custodian

of Plaintiffs. Mr. Shanahan is sued in his official capacity. His address is ICE New York Field Office, 26 Federal Plaza, 9th Floor, Suite 9-110, New York, NY 10278.

17. Defendant Ray Simonse is the Acting Field Office Director for Enforcement and Removal Operations in the New York City Field Office of U.S. Immigration and Customs Enforcement when Defendant Shanahan is out of the office. In this capacity, he has responsibility for the following detention facilities in which Plaintiffs are held: the Bergen County Jail in Hackensack, New Jersey; the Hudson County Correctional Facility in Kearney, New Jersey; and the Monmouth County Correctional Institution in Freehold, New Jersey. He is authorized to release Plaintiffs and is a legal custodian of Plaintiffs. Mr. Simonse is sued in his official capacity. His address is ICE New York Field Office, 26 Federal Plaza, 9th Floor, Suite 9-110, New York, NY 10278.

18. Defendant Robert Bigott is the Warden of the Bergen County Jail in Hackensack, New Jersey. He is the legal custodian of persons detained at the Bergen County Jail. Mr. Bigott is sued in his official capacity. His address is Bergen County Jail, 160 South River Street, Hackensack, NJ 07601.

19. Defendant Joseph Trabucco is the Director of the Delaney Hall Detention Facility in Newark, New Jersey. He is the legal custodian of persons detained at the Delaney Hall Detention Facility. Mr. Trabucco is sued in his official capacity. His address is Delaney Hall Detention Facility, 451 Doremus Avenue, Newark, NJ 07105.

20. Defendant Orlando Rodriguez is the Warden of the Elizabeth Contract Detention Facility in Elizabeth, New Jersey. He is the legal custodian of persons detained at the Elizabeth Contract Detention Facility. Mr. Rodriguez is sued in his official capacity. His address is Elizabeth Contract Detention Facility, 625 Evans Street, Elizabeth, NJ 07201.

21. Defendant Roy L. Hendricks is the Warden of the Essex County Correctional Facility in Newark, New Jersey. He is the legal custodian of those detained at the Essex County Correctional Facility. Mr. Hendricks is sued in his official capacity. His address is Essex County Correctional Facility, 354 Doremus Avenue, Newark, NJ 07105.

22. Defendant Oscar Aviles is the Director of the Hudson County Correctional Facility in Kearny, New Jersey. He is the legal custodian of persons detained at the Hudson County Correctional Facility. Mr. Aviles is sued in his official capacity. His address is Hudson County Correctional Facility, 30-35 Hackensack Avenue, Kearny, NJ 07032.

23. Defendant Brian Elwood is the Warden of the Monmouth County Correctional Institution in Freehold, New Jersey. He is the legal custodian of persons detained at the Monmouth County Correctional Institution. Mr. Elwood is sued in his official capacity. His address is Monmouth County Correctional Institution, 1 Waterworks Road, Freehold, NJ 07728.

FACTUAL ALLEGATIONS REGARDING NAMED PLAINTIFFS-PETITIONERS

Garfield Gayle

24. Plaintiff Garfield Gayle is a Jamaican national and a lawful permanent resident of the United States. He has lived in the United States for approximately 30 years, most of this time in New York City. He has a close extended family in the New York area, including two U.S. citizen daughters, two U.S. citizen grandchildren, and his U.S. citizen ex-wife, with whom he maintains a close and supportive relationship.

25. Mr. Gayle has a solid work history. In particular, for the past 12 years, he has worked as a union carpenter with the American Brotherhood of Carpentry Local 157. He has worked on various construction projects in the New York area, including the Fulton Street Mall

in downtown Brooklyn. He is highly respected for his skills and has a standing offer of employment from P.P.E.E. Construction, Inc..

26. According to documents filed by ICE, in May 1995, Mr. Gayle was convicted after a bench trial of criminal possession of a controlled substance with the intent to sell in the third degree under New York State Penal Law § 220.16. Mr. Gayle served approximately two years of jail time and was released on parole in June 1997. He satisfied all conditions of parole and was discharged from parole in May 2001.

27. On March 24, 2012 — nearly 17 years after this conviction — a team of ICE officers arrested Mr. Gayle at his home in Brooklyn.

28. Mr. Gayle subsequently learned that ICE was charging him with removal on the grounds that his 1995 conviction rendered him deportable under 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substance offense) and 8 U.S.C. § 1227(a)(2)(A)(iii) (drug trafficking aggravated felony). According to documents in his immigration court file, he is subject to mandatory detention based on a March 2007 misdemeanor controlled substance offense for which he was sentenced to ten days in jail, and a six-month suspension of his driver's license.

29. Mr. Gayle has substantial challenges to removal. First, he is seeking termination of his removal proceedings based upon the government's failure to meet its burden of proving the existence of the alleged 1995 conviction. In addition, even assuming that ICE ultimately proves the conviction, Mr. Gayle disputes that his conviction constitutes an aggravated felony, and maintains that he is therefore eligible to seek cancellation of removal — a form of immigration relief that would entitle him to retain his lawful permanent resident status. *See* 8 U.S.C. § 1229b.

30. Nonetheless, since his arrest by ICE in March 2012 — a period of nearly eight months — Mr. Gayle has been subjected to mandatory detention under 8 U.S.C. § 1226(c) at the Monmouth County Correctional Facility in Freehold, New Jersey. This means he has not received a bond hearing or any individualized determination that he poses a danger or flight risk that would justify his detention; nor will he receive any such determination until his removal proceedings conclude.

31. On October 23, 2012, the Immigration Judge denied Mr. Gayle's motion to terminate his removal proceedings. Mr. Gayle was scheduled for a master calendar hearing on October 31, 2012, at which time the Immigration Judge would have ruled on his eligibility for cancellation of removal. However, the Varick Street Immigration Court was closed for the week due to Hurricane Sandy. Mr. Gayle's master calendar hearing has yet to be rescheduled. Should the Immigration Judge find Mr. Gayle eligible for cancellation, the hearing on the merits of his cancellation application will likely not be scheduled for an additional several months, during which time Mr. Gayle will remain in mandatory detention. In addition, even if the Immigration Judge grants Mr. Gayle cancellation of removal, should the government appeal that decision to the BIA, Mr. Gayle will remain subject to mandatory detention for an additional period of at least four to six months. Finally, should the BIA find Mr. Gayle removable and ineligible for discretionary relief, he will petition for review by the United States Court of Appeals for the Second Circuit and will likely obtain a stay of removal, which could extend his mandatory detention by well over a year.

32. Mr. Gayle poses no flight risk or threat to the community. If released, he would live with his ex-wife, Antoinette Vanderveer, and will readily comply with all immigration court

dates. He is also willing to submit to reasonable conditions of supervision to ensure his appearance.

Sheldon Francois

33. Plaintiff Sheldon Francois is a national of Trinidad and Tobago and a lawful permanent resident of the United States. He came to the United States at the age of twelve and has lived here for nearly twenty years, almost entirely in the New York City area. Mr. Francois's mother, seven younger siblings, and nine -year-old daughter are all U.S. citizens and live in New York, and he has a large extended family of aunts, uncles, and cousins in New York as well.

34. Mr. Francois has worked continuously since high school as a fashion model, fashion designer, actor, and promoter of concerts, nightclubs, and parties. Prior to his detention, he was living with his mother and siblings in Washington Heights, and provided significant help with childcare.

35. Mr. Francois has several minor misdemeanor convictions, including, (1) a June 2011 conviction for petit larceny under New York State Penal Law § 155.25, for which he was sentenced to time served of approximately 24 hours; (2) a September 2011 conviction for criminal possession of a controlled substance in the seventh degree under New York State Penal Law § 220.03, for which he was sentenced to time served of approximately 24 hours, and a six - month suspension of his driver's license; and (3) a March 2012 conviction for petit larceny under New York State Penal Law § 155.25, for which he was initially sentenced to a conditional discharge and five days community service, and later resentenced to 30 days imprisonment.

36. On August 6, 2012, ICE arrested Mr. Francois and placed him in removal proceedings on the grounds that his 2011 misdemeanor possession offense renders him deportable under 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substance offense), and his two petit

larceny convictions render him deportable under 8 U.S.C. § 1227(a)(2)(A)(ii) (crimes of moral turpitude). Since that time, a period now exceeding three months, Mr. Francois has been held in mandatory detention under 8 U.S.C. § 1226(c), at the Hudson County Correctional Facility in Kearny, New Jersey.

37. Mr. Francois has a substantial challenge to removal. The Immigration Judge presiding over his case has acknowledged that he is eligible for cancellation of removal — a form of immigration relief that would entitle him to retain his lawful permanent residence status. *See* 8 U.S.C. § 1229b. Mr. Francois also has a strong claim for asylum, withholding of removal, and relief under the Convention Against Torture.

38. Mr. Francois will be submitting his applications for relief on December 10, 2012. However, the immigration court likely will not schedule a hearing on his applications until February at the earliest. Should the government or Mr. Francois appeal the Immigration Judge's decision to the BIA, it will likely take the BIA at least four to six months to render decision, during which time the government will continue to subject Mr. Francois to mandatory detention. Furthermore, should the BIA find Mr. Francois removable and ineligible for relief, he will petition for review by the United States Court of Appeals for the Second Circuit and will likely obtain a stay of removal, which could extend his mandatory detention by well over a year.

39. Mr. Francois poses no flight risk or threat to the community. If released, he will reside with his mother and siblings at their family home in Washington Heights, and will readily comply with all immigration court dates. He is also willing to submit to reasonable conditions of supervision.

Neville Sukhu

40. Neville Sukhu is a Guyanese national and a lawful permanent resident of the United States. He has lived in the United States for nearly twenty years, nearly all of that time in New York City. His wife of 35 years is a U.S. citizen, and he has four children and ten grandchildren, all of whom are U.S. citizens or lawful permanent residents.

41. In June 1997, Mr. Sukhu pleaded guilty to assault in the second degree in violation of New York State Penal Law § 120.05(6) and was sentenced to 90 -days imprisonment. Mr. Sukhu satisfied all conditions of parole and was discharged from parole in September 2002.

42. In May, 2011, Mr. Sukhu was placed in criminal custody at Rikers' Island following an arrest that ultimately resulted in a guilty plea for disorderly conduct. On August 15, 2011, as he was due to be released, ICE took him into immigration custody, at which point Mr. Sukhu learned that ICE was charging him with removal on the grounds that his 1997 conviction was allegedly a crime involving moral turpitude that rendered him deportable. *See* 8 U.S.C. § 1227(a)(2)(A)(i). ICE subsequently charged Mr. Sukhu as also removable under 8 U.S.C. § 1227(a)(2)(A)(ii) based on the combination of the 1997 conviction and a 2011 misdemeanor offense for turnstile jumping under New York State Penal Law § 165.15, for which he was sentenced to time served of approximately 24 hours.

43. Mr. Sukhu has substantial challenges to removal. First, Mr. Sukhu has a substantial argument for termination of his removal proceedings because his conviction under New York State Penal Law § 120.05(6) is not a crime involving moral turpitude. Although the Immigration Judge denied Mr. Sukhu's motion to terminate on March 17, 2012, Mr. Sukhu will appeal that decision if he is ordered removed. Mr. Sukhu will likely ultimately prevail before the

Second Circuit, as the Immigration Judge's denial of termination relied on an erroneous legal premise that has already been rejected by several other circuits.

44. Second, Mr. Sukhu is eligible to seek adjustment of status based on a relative petition filed by his U.S. citizen daughter, Debra Persaud. U.S. Citizenship and Immigration Services granted the petition in May 2012, and the application for adjustment is pending before the Immigration Judge.

45. Nonetheless, since his arrest by ICE in August 2011 — a period of approximately 14 and a half months — Mr. Sukhu has been subject to mandatory detention under 8 U.S.C. § 1226(c) at the Monmouth County Correctional Institution in Freehold, New Jersey.

46. A hearing on Mr. Sukhu's adjustment application is scheduled for December 19, 2012, more than one month from now. Should the Immigration Judge find that Mr. Sukhu is eligible for adjustment of status, an individual merits hearing on the application would likely be scheduled no earlier than February 2013, or three months from now. If Mr. Sukhu prevails on his adjustment application, the government will likely appeal to the BIA. It would then take the BIA at least four to six months to render a decision, during which time the government would continue to subject Mr. Sukhu to mandatory detention. Moreover, should the BIA deny Mr. Sukhu relief, he will petition for review to the United States Court of Appeals for the Second Circuit and likely obtain a stay of removal, which could extend his mandatory detention well over another year.

47. Mr. Sukhu poses no flight risk or threat to the community. If released, Mr. Sukhu will live with his wife, his daughter, and his daughter's family and will readily comply with all immigration court dates. He is also willing to submit to reasonable conditions of supervision.

LEGAL BACKGROUND

48. Title 8 U.S.C. § 1226(a) authorizes the Attorney General to detain noncitizens “pending a decision on whether the alien is to be removed.” Individuals detained under 8 U.S.C. § 1226(a) are entitled to a bond hearing before an Immigration Judge on whether their detention is necessary to prevent flight or danger to the community, or whether they should be released on bail or their own recognizance. In contrast, individuals subject to mandatory detention under 8 U.S.C. § 1226(c) must be detained pending completion of removal proceedings, including appeals, and are not entitled to a bond hearing, even if they pose no danger or flight risk. By its terms, 8 U.S.C. § 1226(c) applies to individuals who are “deportable” or “inadmissible” on designated criminal grounds, and who were released from criminal custody for such offenses after October 1998.

49. Pursuant to regulation, individuals whom the government deems subject to mandatory detention can obtain only a limited form of review of their detention: a hearing before an Immigration Judge on whether they are “properly included” under the statute. 8 C.F.R. § 1003.19(h)(2)(ii). In *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999), the BIA established the standard for this determination, holding that an individual is “deportable” or “inadmissible” within the meaning of 8 U.S.C. § 1226(c) based solely upon the government having charged removability on a ground triggering the statute, unless the individual demonstrates to the Immigration Judge that the government is “substantially unlikely” to prevail on the charges. *Id.* at 800. Indeed, the government is not even required to produce a certified record of the triggering conviction in order to subject the individual to mandatory detention. *See id.* at 807.

50. The *Joseph* standard is nearly impossible to satisfy. As a practical matter, detainees who request and obtain a *Joseph* hearing can prevail only if they show that the

government's charges are frivolous — *i.e.*, that their criminal offense clearly does not render them “deportable” or “inadmissible.”

51. Moreover, because the custody determination notice that the government provides to individuals subject to mandatory detention states that no review of their custody determinations is available, many, and perhaps most, of these detainees are not even aware that they may request a *Joseph* hearing and certainly do not know what they must prove at such a hearing in order to prevail and obtain a bond hearing.

52. As a result, many detainees, including many longtime lawful permanent residents, are subject to mandatory detention for months or even years, even though they have strong challenges to removal on which they ultimately prevail. Such detainees may either win termination of their removal proceedings upon a finding that they are not actually deportable or inadmissible in the first place, or win discretionary relief from removal that allows them to retain, or obtain, lawful permanent resident status.

53. Notwithstanding the standard set out in *Joseph*, both 8 U.S.C. § 1226(c) and its implementing regulations are silent as to the standard or burden of proof for determining whether an individual is “deportable” or “inadmissible” within the meaning of the statute. This silence contrasts with other provisions in the INA that expressly set forth the standard and burden of proof for determining when an individual is “deportable” or “inadmissible” for the purpose of removal proceedings. Moreover, the terms “deportable” and “inadmissible,” and the related term “removable,” are ambiguous and used in different ways throughout the INA.

54. Although in *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court upheld the constitutionality of mandatory detention, in that case the detainee had *conceded* both his deportability and that he was properly subject to mandatory detention under 8 U.S.C. § 1226(c).

Moreover, the Court placed great weight on the availability of an individualized hearing to determine whether the mandatory detention statute was properly applied, while specifically declining to address the adequacy of the *Joseph* standard and hearing procedures. *Demore*, 538 U.S. at 514 n.3; *see also id.* at 531-32 (Kennedy, J., concurring).

55. In contrast to *Demore*, where the petitioner had raised no challenge to deportability, subjecting an individual to mandatory detention who has substantial challenges to deportability (or inadmissibility) would raise serious constitutional concerns, in light of such an individual's heightened due process interests against detention and reduced risk of flight.

56. Consequently, in light of the significant constitutional issues presented by such detention, 8 U.S.C. § 1226(c) should be read not to authorize the mandatory detention of individuals who have a substantial challenge to deportability or inadmissibility. It should also be read to require the opportunity for a constitutionally adequate hearing to determine whether an individual is properly subject to mandatory detention. This hearing should include adequate notice; require that the government bear the burden of establishing *prima facie* deportability or inadmissibility on a ground that triggers mandatory detention; provide the detainee the opportunity to demonstrate that he has a substantial challenge to deportability or inadmissibility on those grounds; and require that a contemporaneous record of proceedings be made and maintained so that the determination is amenable to meaningful review.

CLASSWIDE ALLEGATIONS

57. Plaintiffs are among hundreds of detainees in New Jersey held pursuant to the government's sweeping misapplication of the mandatory immigration detention statute, 8 U.S.C. § 1226(c). Pursuant to *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999), the government subjects individuals to mandatory detention during removal proceedings unless these individuals can

show that the government is “substantially unlikely” to prevail on the charges against them. Moreover, the government imposes mandatory detention without providing basic procedural safeguards, including notice of the right to a custody hearing and a contemporaneous record of proceedings.

58. Plaintiffs bring this action on behalf of themselves and all other similarly-situated persons in New Jersey pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) or, in the alternative, as a class action habeas for similarly-situated persons in New Jersey.

59. Plaintiffs propose to represent a class of all individuals in New Jersey who are or will be detained under the mandatory immigration detention statute, 8 U.S.C. § 1226(c), pending completion of their removal proceedings, under the unlawful *Joseph* standard and the agency’s inadequate procedures. These individuals are detained in detention facilities throughout New Jersey, including the Monmouth County Correctional Institution, the Hudson County Correctional Facility, the Bergen County Jail, the Delaney Hall Detention Facility, the Elizabeth Contract Detention Facility, and the Essex County Correctional Facility.

60. The proposed class meets the requirements of Federal Rules of Civil Procedure 23(a)(1). On any given day, there are roughly 200 -400 proposed class members in New Jersey who, like Plaintiffs, are subject to mandatory detention under the *Joseph* standard and agency’s deficient procedures. In addition, other persons will be subject to the government’s mandatory detention policy in the future. Joinder of all members of this class is therefore impracticable.

61. The proposed class also meets the requirements of Federal Rule of Civil Procedure 23(a)(2). Specifically, there are several common questions of law and fact in this action, including (1) whether the government’s policy of subjecting non -citizens to mandatory

detention under the unlawful *Joseph* standard and deficient hearing procedures is authorized by statute and (2) whether this detention policy violates the Due Process Clause.

62. The proposed class additionally meets the requirements of Federal Rule of Civil Procedure 23(a)(3). The claims of the Named Plaintiffs are typical of the claims of the proposed class in that, like all the proposed class members, the Named Plaintiffs are individuals who, pursuant to the government's policy, have been subjected to mandatory detention under the *Joseph* standard and deficient hearing procedures pending completion of removal proceedings.

63. Next, the proposed class meets the requirements of Federal Rule of Civil Procedure 23(a)(4), in that the Named Plaintiffs will fairly and adequately represent the interests of all members of the proposed class because they seek relief identical to the relief sought by all class members, and because they have no interests adverse to other class members. Moreover, the Named Plaintiffs are represented by *pro bono* counsel from the ACLU Immigrants' Rights Project, the ACLU of New Jersey, and the law firm of Gibbons P.C.. Counsel has extensive experience litigating class actions, as well as matters on behalf of detainees, including immigration detainees.

64. Finally, the proposed class meets the requirements of Federal Rule of Civil Procedure 23(b)(2) in that Defendants have acted on grounds generally applicable to the class through their policy of subjecting individuals to mandatory immigration detention under the *Joseph* standard and the inadequate hearing procedures described herein, making classwide declaratory and injunctive relief appropriate.

CLAIMS FOR RELIEF

CLASS CLAIMS

FIRST CAUSE OF ACTION

VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

65. The foregoing allegations are realleged and incorporated herein.

66. Immigration detention violates the Due Process Clause of the Fifth Amendment to the Constitution unless it is reasonably related to the purpose of ensuring availability for removal and protecting the community, and is accompanied by adequate procedural protections.

67. Named Plaintiffs and proposed class members are currently subject to mandatory immigration detention without the substantive and procedural protections that such a significant deprivation of liberty requires. By subjecting Named Plaintiffs and proposed class members to mandatory detention under the BIA's *Joseph* standard — rather than a standard that exempts from mandatory detention those individuals who have a substantial challenge to removal — the government's policy results in the mandatory detention of individuals with substantial claims to remain in the United States, even where they are neither a risk of flight nor a danger to the community. Furthermore, the government's procedures for making the mandatory detention determination lack essential elements of due process, such as adequate notice of the right to such a hearing; the allocation of the initial burden on the government to establish *prima facie* deportability or inadmissibility on a ground that triggers mandatory detention; and a contemporaneous record of proceedings so as to ensure meaningful review.

68. Because such mandatory detention is neither reasonably related to the purpose of ensuring availability for removal and protecting the community, nor accompanied by adequate procedural safeguards, it violates the Due Process Clause.

**SECOND CAUSE OF ACTION
VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT**

69. The foregoing allegations are realleged and incorporated herein.

70. Title 8 U.S.C. § 1226(c), the mandatory detention statute, is silent with regard to the standard and procedures for determining whether an individual is “deportable” or “inadmissible” on the statute’s enumerated grounds, and thus properly included under the statute.

71. The mandatory detention of individuals with a substantial challenge to removal and without the procedural protections described herein presents serious constitutional problems. Thus, in the absence of any evidence that Congress intended mandatory detention to apply in these circumstances, this Court should construe the statute as applying only where a detainee lacks a substantial challenge to removal on a ground that triggers mandatory detention, and where the detainee has a right to a constitutionally adequate hearing before an immigration judge to make that determination — one that includes adequate notice; places the initial burden of establishing deportability or inadmissibility on the government; provides the detainee an opportunity to establish that he has a substantial challenge to removal; and requires a contemporaneous record of proceedings.

72. Because Plaintiffs have been subject to mandatory detention under the BIA’s unlawful *Joseph* standard and in the absence of such a hearing, their continued mandatory detention violates the statute.

ADDITIONAL INDIVIDUAL CLAIMS OF PLAINTIFFS-PETITIONERS

**THIRD CAUSE OF ACTION
VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT
(GARFIELD GAYLE)**

73. The foregoing allegations are realleged and incorporated herein.

74. Title 8 U.S.C. § 1226(c) provides that the Attorney General “shall take into custody an alien who is deportable by reason of having committed any offense covered in [section 1227(B)] of this title . . . *when the alien is released* . . . for the same offense” (emphasis added).

75. Mr. Gayle is allegedly subject to mandatory detention based on his 2007 misdemeanor possession offense. However, Mr. Gayle was not taken into immigration custody until March 24, 2012, or more than five years after his release from criminal custody on March 22, 2007.

76. Because Mr. Gayle was not taken into custody “when released” for his offense, his mandatory detention violates the plain language of 8 U.S.C. § 1226(c), which only authorizes mandatory detention for those individuals who are taken into ICE custody “when . . . released.” He is therefore entitled to an immediate bond hearing.

**FOURTH CAUSE OF ACTION
VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT
(NEVILLE SUKHU)**

77. The foregoing allegations are realleged and incorporated herein.

78. The Due Process Clause of the Fifth Amendment to the U.S. Constitution permits mandatory detention for only a reasonable period of time. When detention exceeds that reasonable period, the detainee is entitled to an individualized hearing at which the government must show that continued detention is necessary to prevent flight or danger to the community.

79. Moreover, the “constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [the one -and-a-half to five-month] thresholds” for removal proceedings contemplated by the Supreme Court in *Demore v. Kim, supra. Diop v. ICE/Homeland Security*, 656 F.3d 221, 234 (3d Cir. 2011).

80. Because his mandatory detention has exceeded, or certainly will exceed, a “reasonable” period, Mr. Sukhu is entitled to an individualized hearing where the government must show that his continued detention is necessary to prevent flight or danger to the community.

**FIFTH CAUSE OF ACTION
VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT
(NEVILLE SUKHU)**

81. The foregoing allegations are re alleged and incorporated herein.

82. Title 8 U.S.C. § 1226(c) permits mandatory detention for only a reasonable period of time. When detention exceeds that reasonable period, the detainee is entitled to an individualized hearing where the government must show that continued detention is necessary to prevent flight or danger to the community.

83. Because Mr. Sukhu has been subjected to, or will be subjected to, mandatory detention beyond the reasonable period permitted by statute, he is entitled to an individualized hearing at which the government must justify his continued detention.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray that this Court grant the following relief:

(a) Certify this matter as a Class Action , appoint the Named Plaintiffs as Class Representatives, and appoint the Named Plaintiffs’ Counsel as Class Counsel;

(b) Declare that Defendants’ policy and practice of subjecting Named Plaintiffs and proposed class members to mandatory detention under the BIA’s *Joseph* standard and the agency’s inadequate hearing procedures violate the Due Process Clause of the Fifth Amendment and/or the Immigration and Nationality Act, and that Defendants must provide constitutionally - adequate hearings to Named Plaintiffs and proposed class members – *i.e.*, hearings that use the proper standard for when mandatory detention applies and include adequate notice; place the

initial burden on the government to establish *prima facie* deportability or inadmissibility on a ground that triggers mandatory detention; provide the opportunity for Named Plaintiffs and proposed class members to show that they have substantial challenges to removal and are thus not properly subject to mandatory detention; and provide a contemporaneous record of such proceedings.

(c) Order Defendants to provide such constitutionally-adequate hearings to Named Plaintiffs and proposed class members.

(d) Declare that Mr. Gayle's mandatory detention is not authorized by the INA because he was not taken into immigration custody "when released" from the criminal custody related to his detention and order that Defendants provide him a prompt bond hearing.

(e) Declare that Mr. Sukhu's mandatory detention has already exceeded, or will by necessity exceed, a reasonable period of time, and order an individualized hearing where the government must show that his continued detention is necessary based on flight risk or danger.

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

(g) Grant any other and further relief that this Court deems just and proper.

Judy Rabinovitz
Dror Ladin
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2660 (tel)
(212) 549-2654 (fax)
jrabinovitz@aclu.org
dladin@aclu.org

Michael Tan*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
(415) 343-0779 (tel)
(415) 395-0950 (fax)
mtan@aclu.org
*admitted to practice in New York

Ahilan Arulanantham
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
1313 West 8th Street
Los Angeles, CA 90017
(213) 977-5211 (tel)
(213) 977-5297 (fax)
aarulanantham@aclu-sc.org

Respectfully submitted,

/s/Lawrence S. Lustberg
Lawrence S. Lustberg
Jonathan M. Manes
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500 (tel)
(973) 596-6285 (fax)
LLustberg@gibbonslaw.com
JManes@gibbonslaw.com

Edward Barocas
Jeanne LoCicero
Alexander Shalom
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
P.O. Box 32159
Newark, NJ 07102
(973) 854-1714 (tel)
(973) 642-6523 (fax)
ebarocas@aclu-nj.org
jlocicero@aclu-nj.org
ashalom@aclu-nj.org

Attorneys for the Plaintiffs

Dated: November 15, 2012