No. 13-1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Leiticia CASTANEDA,

Petitioner-Appellee

v.

Steve SOUZA,
Superintendent, Bristol County House of Correction
in his official capacity and his successors and assigns,

Respondent-Appellant

Bruce E. CHADBOURNE, Field Office Director, Boston Field Office, Office of Detention and Removal, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, in his official capacity and his successors and assigns; John T. MORTON, Director, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, in his official capacity and his successors and assigns; Jeh JOHNSON, Secretary, U.S. Department of Homeland Security, in his official capacity and his successors and assigns; Eric H. HOLDER, Jr., Attorney General, U.S. Department of Justice, in his official capacity and his successors and assigns,

Respondents

On Appeal From The United States District Court For The District of Massachusetts

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BRIEF OF *AMICI CURIAE*

DETENTION WATCH NETWORK, FAMILIES FOR FREEDOM, GREATER BOSTON LEGAL SERVICES, HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM, IMMIGRANT DEFENSE PROJECT, IMMIGRANT RIGHTS CLINIC, MAINE PEOPLE'S ALLIANCE, NATIONAL IMMIGRANT JUSTICE CENTER, POLITICAL ASYLUM/IMMIGRATION REPRESENTATION (PAIR) PROJECT, UNIVERSITY OF MAINE SCHOOL OF LAW IMMIGRANT AND REFUGEE RIGHTS CLINIC

IN SUPPORT OF PETITIONER-APPELLEE AND IN SUPPORT OF AFFIRMANCE

ALINA DAS, ESQ.
Sean McMahon, Legal Intern
Etan Newman, Legal Intern
Washington Square Legal Services, Inc.
Immigrant Rights Clinic
245 Sullivan Street, 5th Floor
New York, NY 10012
Tel: (212) 998-6430
alina.das@nyu.edu
Counsel for *Amici Curiae*

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *amici curiae* state that no publicly held corporation owns 10% or more of the stock of any of the parties listed herein, which are nonprofit organizations and community groups.

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state that no counsel for the party authored any part of the brief, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

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STATEMENT OF INTEREST

Amici curiae are community groups, immigrant rights organizations, and legal service providers whose members and clients are directly affected by the Government's application of *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), and its improper, expansive interpretation of the mandatory detention statute. *Amici* include the following local and national organizations: Detention Watch Network, Families for Freedom, Greater Boston Legal Services, Harvard Immigration and Refugee Clinical Program, Immigrant Defense Project, Immigrant Rights Clinic, Maine People's Alliance, National Immigrant Justice Center, Political Asylum/Immigration Representation (PAIR) Project, University of Maine School of Law Immigrant and Refugee Rights Clinic. Detailed statements of interest for each organization are submitted as Appendix A.

Amici share a profound interest in exposing the unjust, harsh, and arbitrary consequences of *Matter of Rojas*. *Amici* agree with the Appellee's arguments in this case, and submit this brief to provide the Court with the broader context in which *Matter of Rojas* operates. In Point I, *infra*, *amici* describe Congress's chosen statutory scheme and the limited role that mandatory detention serves within it. In Points II and III, *infra*, *amici* provide case stories to illustrate how *Matter of Rojas* is contrary to this statutory scheme and leads to unreasonable and arbitrary results. As these cases illustrate, *Matter of Rojas* contravenes Congress's

chosen scheme by depriving the government of its authority to release individuals most likely to demonstrate that they are not flight risks or dangerous given their long history of reintegration into their communities prior to their immigration detention and their strong incentives to pursue substantial challenges to removal. Moreover, these cases demonstrate how *Matter of Rojas* creates unreasonable and arbitrary results by disrupting the lives of individuals, families, and communities after years of stability and even voluntary contact with immigration authorities, and raises serious constitutional concerns. Because of the harsh consequences for our members and clients, unintended by Congress in enacting its detention scheme, *amici* urge this Court to reject the Government's interpretation in *Matter of Rojas*.

ARGUMENT

I. By Applying Mandatory Detention To Noncitizens Who Have Reintegrated Into Their Communities, *Matter of Rojas* Contravenes Congress's "Limited But Focused Purpose"

Mandatory detention—detention without the opportunity to seek bond—has profound effects on noncitizens, their families, and communities. Noncitizens subject to mandatory detention are held in immigration custody without any individualized assessment of their risk of flight or danger to the community. 8 U.S.C. § 1226(c); 8 C.F.R. § 1003.19(h)(2)(i)(D) (depriving immigration judges of jurisdiction to consider whether to release detainees subject to 8 U.S.C. § 1226(c)).

In the First Circuit, several county jails and prison facilities hold immigrant

detainees, who come from both within the circuit's jurisdiction and from other states like Connecticut and Vermont.[1] Mandatory detention in these facilities forces many individuals to litigate their cases in immigration and federal courts far from their homes.[2] As a result, these detained noncitizens are significantly more likely to lack legal representation than non-detained noncitizens.[3]

Those subject to mandatory detention face additional obstacles in effectively defending their cases. A study of immigrants detained in Massachusetts, for example, found that detainees often lack access to legal resources, including adequate law libraries.[4] For these reasons and others, non-detained immigrants are up to twenty-five times more likely to achieve successful outcomes in their

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[1] The Boston Field Office of Immigrations and Customs Enforcement (ICE), based in Burlington, Massachusetts, has jurisdiction over Massachusetts, Rhode Island, Connecticut, Vermont, Maine, and New Hampshire. *See* Contact ICE, Enforcement and Removal Operations, at http://www.ice.gov/contact/ero/.

[2] Several of the individuals whose stories are detailed in this brief live in Connecticut but were transferred to detention centers in Massachusetts and forced to litigate in courts within this circuit. *See, e.g.,* Points II.A.1 & III.A.1, *infra*.

[3] Eighty-four percent of detained noncitizens lack representation, compared to fifty-seven percent of all noncitizens in removal proceedings. American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-10 (2010), http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.

[4] *See* American Civil Liberties Union of Massachusetts, *Detention and Deportation in the Age of ICE* 8 (2008), http://www.aclum.org/sites/all/files/education/aclu_ice_detention_report.pdf.

immigration case than those who were detained.[5] Moreover, noncitizens subject to mandatory detention must remain detained for the entirety of their administrative removal proceedings—whether such proceedings take days, months, or years—at significant taxpayer expense.[6]

As this Court has previously observed in a related context, mandatory detention is not the fallback rule for immigrants in removal proceedings. *See Saysana v. Gillen*, 590 F.3d 7, 17 (1st Cir. 2009). Ordinarily, immigrants may be released on bond or parole pending their proceedings. *Id.*; *Matter of Patel*, 15 I&N Dec. 666, 666 (BIA 1976) (stating that a noncitizen should not be detained unless he is "a poor bail risk."). Congress created mandatory detention as a limited exception to the "ordinary procedures for release on bond," applicable only to individuals whom Congress deemed to be presumptive flight risks and dangers to the community. *See Saysana*, 590 F.3d at 7.

Congress set forth this statutory scheme for detention in 8 U.S.C. § 1226. Section 1226(a) maintains the Government's longstanding authority to detain *and*

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[5] *See* New York Immigrant Representation Study Group, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* 19 (2011), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

[6] Immigration detention costs taxpayers $119 per person per day (not including administrative expenses), for a total of $1.84 billion a year. *See* DHS, *FY14 Congressional Budget Justification* 1375-76, https://www.dhs.gov/sites/default/files/publications/MGMT/DHS-%20Annual%20Performance%20Report%20and%20Congressional-Budget-Justification-FY2014.pdf.

release noncitizens in removal proceedings. The section states that a noncitizen "may be arrested and detained pending a decision on whether alien is to be removed" and that the Government "may release the alien" on bond or other conditions, "[e]xcept as provided in subsection (c)." 8 U.S.C. § 1226(a). Section 1226(c), the mandatory detention provision, provides that "[t]he Attorney General shall take into custody any alien who [is inadmissible or deportable based on certain enumerated offenses] when the alien is released . . . without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense. " 8 U.S.C § 1226(c)(1). Section 1226(c)(2) states that the Attorney General may only release noncitizens "described in paragraph (1)" under certain witness-related circumstances. 8 U.S.C. § 1226(c)(2). Read in its entirety, 8 U.S.C. § 1226 provides the Attorney General with the authority to detain and release immigrants pending removal proceedings, except for a specified class of noncitizens whom the Attorney General must detain "when . . . released" from custody for enumerated offenses.

This Court has declared that the "when . . . released" language reflects Congress's desire to prevent the return to the community of certain incarcerated immigrants pending removal proceedings. As this Court explained in a related context:

> The mandatory detention provision does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply. . . . [F]inding that the "when released" language serves this more limited but focused purpose of preventing the return to the community of those released in connection with the enumerated offenses, as opposed to the amorphous purpose the Government advances, avoids attributing to Congress the sanctioning of the arbitrary and inconsequential factor of any post-[Oct. 8, 1998] custodial release becoming the controlling factor for mandatory detention.

Saysana, 590 F.3d at 17. In other words, Congress intended for mandatory detention to serve a specific and limited function—to ensure that individuals incarcerated for certain types of removable offenses will remain in a continuous chain of custody until the timely completion of their removal proceedings. This "focused purpose" is not served when mandatory detention applies to individuals long released from criminal custody.

In *Matter of Rojas*, however, the BIA adopted a much more expansive view of the scope of mandatory detention. *See* 23 I&N Dec. at 127. Notably, the BIA acknowledged that the "when . . . released" clause in § 1226(c) "does direct the Attorney General to take custody of aliens immediately upon their release from criminal confinement." *Id.* at 122. However, the BIA held that the "when . . . released" clause was a "statutory command" rather than a "description of an alien who is subject to detention," and therefore mandatory detention could apply to any noncitizens with a relevant conviction, even if months or years had passed since their release from criminal custody. *See id*. at 121, 122.

The majority of federal courts, and all federal district courts in this circuit to have considered the question, have rejected the BIA's reasoning in *Matter of Rojas*.[7] These courts have held that mandatory detention applies only when the Government detains a noncitizen "on or about the time he is released from custody for the offense that renders him removable." *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010). For noncitizens who are detained months or years after their release from criminal custody, § 1226(a) applies and the Government retains the authority to release that person. As these courts have explained, this reading of § 1226 and the "when . . . released" clause gives meaning to Congress's plain language and overall statutory scheme.[8]

Contrary to this view, the Third and Fourth Circuits have endorsed the Government's interpretation supporting a sweeping application of mandatory detention, though on differing grounds. In *Hosh v. Lucero*, 80 F.3d 375 (4th Cir. 2012), the Fourth Circuit deferred to *Matter of Rojas*, basing its conclusion that § 1226(c) applied to those detained long after release on its assumption of Congress's general "aggressive[]" intent against "criminal aliens." *Id.* at 380. The

[7] *See* Appendix B for a list of federal court decisions on challenges to *Matter of Rojas*.

[8] *Amici* do not suggest that they agree with Congress's choice to deprive bond hearings to noncitizens who are detained at the time of their release from incarceration for an enumerated offense. Regardless of the merits of Congress's choice, however, *amici* submit that *Matter of Rojas* goes much further than Congress intended.

Third Circuit, by contrast, in *Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 157 (3d Cir. 2013), found that regardless of the interpretation of the statutory language, the government does not lose authority to impose mandatory detention due to its delay in pursuing detention. *Id.* at 158-61. That panel, too, relied on an assumption of Congress' "public-interest" rationale for "keeping the most dangerous aliens off the streets." *Id.* at 159.

Both *Sylvain* and *Hosh* misread the plain meaning of the statute and imputed to Congress an intent in enacting § 1226(c) contrary to that discerned by the careful reading of this Court and others around the country. For example, the *Hosh* panel explicitly declined to apply various rules of statutory construction, 80 F.3d at 381 n.7, including the longstanding immigration rule of lenity. *Id.* at 383-84.[9] Similarly, the *Sylvain* panel cited an inapposite "rule" that the Government does not lose authority when it fails to comply with a deadline. 714 F.3d at 158-161 (citing *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990)). Yet it failed to consider that mandatory detention itself restricts the Government's discretion to detain or release noncitizens, and is not a "grant of authority" to the agency.

In contrast to the Third and Fourth Circuit's erroneous reasoning, this Court has noted that those who have resumed their lives in the community are *most* likely

[9] *See infra* Point III.A.

to demonstrate *lack of* flight risk or danger, meaning that Congress's intent is best served by understanding § 1226(c) to have a limited application. *See Saysana*, 590 F.3d at 17 ("By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in the community, the lower his bail risk is likely to be."). This reasoning is underscored by numerous case stories from this Circuit and others. The stories in Points II and III below illustrate how *Matter of Rojas* limits the Government's authority by preventing immigration officials from releasing noncitizens with strong challenges to removal who pose no flight risk or danger, contrary to Congressional intent; and how *Matter of Rojas* produces unreasonably harsh and arbitrary outcomes that raise constitutional concerns.

II. As Case Examples Illustrate, *Matter of Rojas* Is Contrary To Congressional Intent Because It Deprives The Government Of Its Authority To Release Noncitizens Most Likely To Establish That They Are Not A Flight Risk Or Danger To The Community.

In the years following *Matter of Rojas*, the Government has vigorously applied that decision by detaining, without bond, untold numbers of noncitizens months or years after their release from criminal custody. This application of mandatory detention flies in the face of Congress's statutory scheme, which intended to prevent the return to the community of those presumed to be flight risks or dangerous. *See Saysana*, 590 F.3d at 17. Far from "keeping the most

dangerous aliens off the streets," *Sylvain*, 714 F.3d at 159, *Matter of Rojas* has routinely prevented the Government from holding bond hearings for the individuals *most likely* to demonstrate they are not flight risks nor dangers to the community due to their long years building ties in the community and their substantial challenges to removal.

A. Individuals Subject To *Matter of Rojas* Are Likely To Have Developed Positive Equities Relevant To Bond During Their Reintegration Into The Community.

Matter of Rojas fails to consider the demonstrable differences in likelihood of flight risk and dangerousness between those detained "when . . . released" from criminal custody and those who have long been living peaceably in the community. *See Saysana*, 590 F.3d at 17. The following cases demonstrate that after their release from criminal custody, noncitizens are often able to engage in the process of rehabilitation, obtain jobs, marry, and start families. Thus, *Matter of Rojas* ensnares those noncitizens who, after a past offense, are most likely to possess the very qualities that support release on bond, including "length of residence in the community," the "existence of family ties," and "stable employment history." *Matter of Andrade*, 19 I&N Dec. 488, 489 (BIA 1987).

1. Clayton Richard Gordon

Matter of Rojas sweeps up noncitizens who have worked hard to become valuable community members since their criminal convictions—as in the case of

Clayton Richard Gordon. Mr. Gordon is a lawful permanent resident from Jamaica who has lived in the United States for more than thirty years, since he was six-years-old. *See Gordon v. Johnson*, No. 13–cv–30146–MAP, 2013 WL 6905352, at *2 (D. Mass. Dec. 31, 2013). Mr. Gordon served in the National Guard and in active duty with the U.S. Army, from which he was honorably discharged in 1999. *Id.* In 2008 Mr. Gordon was arrested on a non-violent drug charge. *See id*. He was released one day later and was sentenced to probation, which he completed without incident. *Id*.

After his arrest, Mr. Gordon returned to his community and, according to the district court, "re-established himself as a productive member of society." *Id.* He met his fiancé in 2008, and they had a son two years later. *Id.* They bought a house together in Bloomfield, Connecticut. *Id.* Mr. Gordon began his own contracting business. *Id*. He became very active in the community, including initiating plans to open a halfway house for women released from incarceration. *Id*.

Yet in June 2013, nearly five years after his release from arrest, ICE seized Mr. Gordon one day while he was driving to work. *Id.* He was taken to Franklin County Jail in Greenfield, Massachusetts and was denied bond pursuant to *Matter of Rojas*. *Id.* The separation from his fiancé and three-year-old son, living in Connecticut, caused his family severe emotional and financial hardship. Mr. Gordon's fiancé had difficulty making mortgage payments without the income

from his business, and his son constantly asked for his father and began to "act out." *See* Mem. Supp. Mot. Prelim. Inj. at 6, *Gordon v. Johnson*, No. 3:13-cv-30146-MAP, ECF No. 3. Moreover, Mr. Gordon's community suffered, as he was unable to move forward with plans for the halfway house. *Id*. Mr. Gordon was detained for five months before the federal court rejected *Matter of Rojas* and ordered a bond hearing, which finally gave him the opportunity to return to his family and resume his efforts to help the community. *See Gordon*, 2013 WL 6905352, at *3 n.4.

2. Gustavo Ferreira

Mr. Gustavo Ferreira is a lawful permanent resident who immigrated to the United States from Brazil in 2004. *See* Mem. Supp. Mot. Order to Show Cause at 2, *Gordon v. Johnson*, No. 3:13-cv-30146-MAP, ECF No. 75. In June 2010, Mr. Ferreira turned himself into authorities after learning that police had a warrant for his arrest on drug charges. Decl. of Gustavo Ferreira, *Gordon v. Johnson*, No. 3:13-cv-30146-MAP, ECF No. 75, Attach. 3. In 2011, Ferreira pleaded guilty to a nonviolent drug charge and received a suspended sentence and probation, which was terminated early in 2013. *Id.*

In the years since his conviction, Mr. Ferreira turned to faith as the foundation for his transformation. In late 2010, he joined an Assembly of God Pentecostal Church and became Minister for Music. *Id.* He had a key to the

church and would go before services to set up. *Id.* He began studies in theology in the hopes of becoming a Christian Counselor. *Id.* Having overcome his addiction, Mr. Ferreira turned his attention to helping others, counseling those suffering from addiction through his church and speaking at Waterbury High School in Connecticut to warn students away from drugs. *Id.*

That same year, Mr. Ferreira met his wife and they moved in together. Three years later, on January 21, 2013, their son was born. Mr. Ferreira not only took care of his newborn son while his wife suffered from blindness connected to childbirth, but worked steadily as a carpenter to support his family. *Id.*

Mr. Ferreira was seized by ICE on June 16, 2013, while driving his son to a babysitter. *Id.* ICE determined that he was subject to mandatory detention under *Matter of Rojas* based on his three-year-old drug conviction. *Id.* His detention had a devastating impact on his family, forcing his wife to move in with a friend because she could not afford rent. *Id.* He missed his son's first words, first teeth, and first birthday. *Id.* Mr. Ferreira spent eight months in detention before Judge Ponsor granted his habeas petition and he was released by an Immigration Judge on bond in March 2014. *See* Mem. Supp. Mot. Dismiss for Fail. State Claim at 2, *Gordon v. Johnson*, No. 3:13-cv-30146-MAP, ECF No. 106.

Like Mr. Gordon and Mr. Ferreira, all individuals affected by *Matter of Rojas* have, by definition, been convicted of no further offenses designated in the

mandatory detention statute, 8 U.S.C. § 1226(c)(1)(A)-(D), since their release. The fact of the noncitizens' years of living honorably and peaceably in the community indicates they are not likely to be hazardous to public safety. *See, e.g.*, *Monestime*, 704 F. Supp. 2d at 458 (explaining that a bond hearing "is particularly important when, as here, an alien is being deported for an offense committed many years prior to his detention and removal charges."). *Matter of Rojas*'s categorical denial of bond hearings to such individuals undermines Congress's purpose—to detain those who pose a serious risk of flight or danger.

B. Individuals Subject To *Matter of Rojas* Are Likely To Have Challenges To Removal And An Incentive To Pursue Their Case.

Appellant nonetheless argues that *Matter of Rojas* comports with Congressional purpose to prevent immigrants from absconding because those facing "certain" removal "possess a strong incentive to flee after—but not necessarily before—immigration authorities turn their attention to them." Appellant Br. at 30 (citations omitted). However, this Court has rejected that argument before. *See Saysana*, 590 F.3d at 17 (rejecting BIA's reasoning in *Matter of Saysana*, 24 I&N Dec. 602, 607 (BIA 2009), that individuals convicted of enumerated crimes years earlier have "little likelihood of relief from removal and . . . therefore have little incentive to appear for their hearings."). As case examples demonstrate, far from facing "certain" removal, noncitizens living in the

community often have avenues of relief from removal and thus a strong incentive to return to Immigration Court to pursue their case. These individuals must often spend months or years in detention at taxpayer expense as they pursue relief.

1. Leiticia Castaneda

Leiticia Castaneda—the Appellee in this case—is the perfect example of a noncitizen detained under *Matter of Rojas* whose avenue to relief provides a clear incentive to appear for her hearings. Ms. Castaneda has applied for a U Visa, provided to immigrant victims of serious crimes, and is currently waiting for adjudication by U.S. Citizenship and Immigration Services (CIS). Decl. of Greg Romanovsky (on file with *amici*) (hereinafter "Romanovsky Decl."); *see* 8 U.S.C. § 1101(a)(15)(U).

Ms. Castaneda has lived in the United States since the year 2000, when she arrived from Brazil at age seventeen. *See Castaneda v. Souza*, 952 F. Supp. 2d 307, 310 (D. Mass 2013). In 2007, Ms. Castaneda's life was upended when she became involved with an abusive and controlling man. Romanovsky Decl. By 2008, his control was so complete that he kept her forcibly imprisoned in his house; when she attempted to escape several times, he attacked her with a knife. *Id.* For six months, Ms. Castaneda was subjected to extreme emotional, physical, and sexual abuse, resulting in permanent physical scars on her hand and head, memory loss, and psychological trauma. *Id.* Her abuser also exposed Ms. Castaneda to drugs,

using her addiction as an instrument of control. *Id.* In fall 2008, Ms. Castaneda was riding in a car with her abuser, when police pulled them over and discovered narcotics in the car. *Id.* Her abuser forced Ms. Castaneda to report that the substance belonged to her, resulting in a drug possession conviction which the government alleges makes her removable. *Id.* She was sentenced to one and a half years probation, which she completed without incident in 2010. *See Castaneda*, 952 F. Supp. 2d at 310.

Ms. Castaneda was finally able to escape her abuser's grasp when she was located by her mother, working with the police. Romanovsky Decl. Ms. Castaneda struggled to overcome the immense trauma of her forced imprisonment, and in the five years after her ordeal she slowly achieved some stability in her life. *Id.* By 2013 her son, a U.S. citizen, was attending school, and she had managed to get a job as a night cleaner. *Id.* Meanwhile she cooperated closely with the police to prosecute her abuser. *Id.* She has since applied for a U Visa based on this cooperation. *See* 8 U.S.C. § 1101(a)(15)(U).

Yet in March 2013, ICE agents inexplicably arrived at Ms. Castaneda's home, detained her, and refused her a bond hearing under *Matter of Rojas*. Her confinement at Bristol County House of Corrections in North Dartmouth, Massachusetts triggered memories of her captivity, leading to panic attacks. Romanosky Decl. Her son also experienced significant problems in school. *Id.* In

June, Judge Young finally granted her habeas petition and ICE released her on her own recognizance. *Castaneda*, 952 F. Supp. 2d at 309.

As she is actively pursuing relief by applying for a U Visa, Ms. Castaneda is not at risk of absconding. However, because of *Matter of Rojas*, Ms. Castaneda was forced to suffer through months of unnecessary detention and re-traumatization. Counter to Appellant's arguments, individuals like Ms. Castaneda, who have developed bases for relief in the time since their criminal convictions, are *most likely* to demonstrate that they have an incentive not to flee, but to remain and pursue their case.

2. Patrick Monestime

Moreover, many noncitizens around the country who are detained under *Matter of Rojas* ultimately prevail in their removal proceedings. For example, after a federal court ordered a bond hearing for Patrick Monestime, he was released to his family. *See Monestime*, 704 F. Supp. 2d at 458. Mr. Monestime eventually won his case, three years after federal immigration officials initiated removal proceedings. *See In re: Monestime* (BIA Oct. 2012) (on file with *amici*) (terminating Mr. Monestime's removal case after his misdemeanor conviction was vacated in state criminal court). No purpose would have been served by detaining him that entire time.

Nor is his case unusual. In Fiscal Year 2014,[10] 49.6% of all noncitizens in removal proceedings nationwide, 58.7% in Massachusetts, and 66.9% in Puerto Rico were ultimately allowed to stay in the United States.[11] Many individuals subject to *Matter of Rojas*—lawful permanent residents and others with extensive ties to the community and years of rehabilitation—are successfully pursuing relief, yet are deprived of a bond hearing during this lengthy process.

C. *Matter of Rojas* Improperly Restricts the Government's Authority to Exercise Discretion, Preventing The Release Of Those Who Are Not A Flight Risk Or Danger

Contrary to the Government's assertion, *see* Br. at 43, the Government loses no authority when mandatory detention is contained to its limited purpose; rather, the BIA's expansive reading of 1226(c) *restricts* the authority of ICE officers and immigration judges who ordinarily exercise discretion in determining custody conditions. Under § 1226(a), immigration officials may still detain a noncitizen after an individualized hearing. However, when district courts have rejected *Matter of Rojas* and ordered a bond hearing, immigration officials often choose to release.

[10] Data is through February 2014. Transactional Records Access Clearinghouse, *U.S. Deportation Outcomes By Charge*, last visited Mar. 28, 2014, http://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php.

[11] *Id.* Cases with hearings in Maine, New Hampshire, Rhode Island, Vermont, Connecticut, and at Ray Brook federal prison in New York are included in the Massachusetts data, as they are administratively assigned to Massachusetts-based immigration courts.

The Government's own actions thus indicate that applying 1226(c) only to those stepping directly out of criminal custody is not a "sanction," but rather allows immigration officials to release noncitizens who have demonstrated positive equities.

Indeed, the Appellee in this case would have easily been released were it not for *Matter of Rojas*. Ms. Castaneda was clearly never a danger to the community nor a flight risk; she helped the police to prosecute her abuser and has been deeply rooted in her life in Massachusetts. *See* Point II.B.1, *supra*. When Ms. Castaneda's habeas petition was granted in June 2013, Judge Young ordered a bond hearing within nine days. Appellant Br. at 7. With the authority to exercise discretion reinstated, ICE released Ms. Castaneda on her own recognizance within four days, before the Immigration Judge could even hold a hearing. *Id*. This case reveals that *Matter of Rojas* binds the Government, forcing them to hold noncitizens like Ms. Castaneda at taxpayer expense, even when the agency has determined that the individual merits release.

III. As Case Examples Illustrate, *Matter of Rojas* Is Unreasonable Because It Leads To Harsh And Arbitrary Results.

The Government's assertion that the intent underlying § 1226(c) was to prevent noncitizens from receiving bond hearings when detained years, possibly over a decade, after release for their removable offense, "even where the alien had

lived an exemplary life for all those decades," *Gordon*, 2013 WL 6905352, at *8, is "flatly unreasonable." *Id.* The Government's misreading of the statute produces perverse and arbitrary outcomes that disrupt the contributions of noncitizens to their communities. The Government's application of *Matter of Rojas* also raises pressing constitutional concerns, which are avoided by cabining mandatory detention only to noncitizens detained at the time of release.

A. By Disrupting the Stable Lives of Individuals, Families, and Communities, *Matter of Rojas* Leads to Harsh Results.

Matter of Rojas's utter lack of a temporal limitation is a "glaring problem," *Gordon*, 2013 WL 6905352, at *8, that creates considerable hardship for noncitizens, their families and communities. Its application often results in harsh and unnecessary deprivation of liberty for individuals in removal proceedings who otherwise would be able to remain with their families while pursuing relief from removal. These important liberty interests underscore why courts such as the one below have seen fit to invoke the rule of lenity as an alternative ground for refusing to apply *Matter of Rojas*. *See, e.g., Castaneda*, 952 F. Supp. 2d at 320.[12]

[12] The rule of lenity should apply to the extent that this Court finds "any lingering ambiguities" in the deportation statute (which includes the detention provisions at issue here). *See INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *but see Hosh*, 680 F.3d at 383-84 (declining to apply the rule of lenity).

1. Arnold Giammarco

Arnold Giammarco was a lawful permanent resident from Italy who arrived in the United States when he was four years old and had lived with his family in Connecticut for approximately fifty years before being detained by ICE primarily in Bristol County, Massachusetts. *See* Compl., *Giammarco v. Beers*, No. 3:13-cv-01670-VLB (D. Conn. filed Nov. 12, 2013), ECF No. 1 (hereinafter "Giammarco Compl."), at ¶4. As a young man, Mr. Giammarco served nearly seven years in the U.S. Army and the Connecticut National Guard, achieving the rank of Sergeant, and was honorably discharged from both. *Id.*, ¶¶16-19. He applied for naturalization while a service-member but his application was never adjudicated. *Id.*, ¶23. After his military service and a divorce, Mr. Giammarco suffered emotional difficulties, struggled with drug addiction, and spent nights in homeless shelters. *Id.* ¶¶46-47.

Yet following his release from incarceration for a non-violent drug possession conviction in 2008, Mr. Giammarco began to rebuild his life. He got a job at McDonalds and was promoted several times, becoming a nighttime production manager. *Id.*, ¶50. He married his long-time partner Sharon, a U.S. citizen, and helped her recover from her own addiction, eventually supporting her efforts to become an addictions counselor. Decl. of Sharon Giammarco (on file with *Amici*) (hereinafter "Giammarco Decl."). Their daughter was born in late

2008 and they began to create a clean and productive life together, even saving for her one-day college tuition. Giammarco Compl., ¶¶51, 65. Mr. Giammarco worked nights, took care of his daughter during the day, and often spent weekends visiting his parents and siblings, mending the relationships that had been strained during his period of addiction. *Id.*, ¶52.

In the spring of 2011, nearly seven years after his last removable conviction, armed ICE agents arrested Mr. Giammarco while he stood outside on his porch. *Id.*, ¶¶56-57. Despite his positive equities, ICE and the Immigration Judge refused to set bond based on a years-old drug conviction. *See id.*, ¶¶57-60. His detention had a devastating impact on his family and community. Without her husband's income, Sharon was forced to work 70 hours a week and moved in with her sister. Giammarco Decl. Mr. Giammarco's mother liquidated her savings to pay for legal fees. *Id.* Though the jail's Chief of Immigration Services described Mr. Giammarco as a "model detainee," on visits Sharon and their daughter were separated from Mr. Giammarco by a glass partition; he was unable to hold his two-year-old daughter. Giammarco Compl., ¶¶59, 63. After eighteen months in detention, the cost of further appeals and the anguish of imprisonment forced Mr. Giammarco to accept deportation to Italy. Giammarco Decl. However, Mr. Giammarco and his community have not given up; more than 3,000 people have

signed a petition to officials requesting his return to the United States, though his case remains pending.[13] *See* Point III.C, *infra*.

2. Nhan Phung Vu

Matter of Rojas has had a similarly devastating effect on the family of Nhan Phung Vu, a lawful permanent resident from Vietnam who has lived in the United States since 1975 when he was four years old. *See* Mem. Supp. Mot. Order to Show Cause at 5, *Gordon v. Johnson*, No. 3:13-cv-30146-MAP, ECF No. 75. Mr. Vu is married to Natasha Lewis, a U.S. citizen, and has two daughters, a son, and one stepson, all U.S. citizens. Decl. of Natasha Lewis, *Gordon v. Johnson*, No. 3:13-cv-30146-MAP, ECF No. 75, Attach. 2 (hereinafter "Lewis Decl."). In his wife's words, Mr. Vu is a "loyal and devoted husband and father" who follows up on his daughters' progress in school, checked in on Ms. Lewis's elderly mother, and took care of Ms. Lewis's son when he was diagnosed with Hodgkin's lymphoma last year. *Id.* Mr. Vu has worked as a machinist for nine years—a job with a good salary and benefits. *Id.* Ms. Lewis declares that since his release from custody for a criminal conviction more than ten years ago Mr. Vu "learned from

[13] Mr. Giammarco's story garnered significant media attention. *See, e.g.*, John Cristofferson, "Former Connecticut Army vet expelled from U.S. fights deportation," *Boston Globe* (Nov. 12, 2013), http://www.bostonglobe.com/metro/2013/11/12/former-connecticut-army-vet-expelled-from-fights-deportation/SAvXjyDAuPoITpFRktRC9L/story.html.

his mistakes" and turned his life around. *Id*. However, on August 12, 2013, ICE detained Mr. Vu as he left his house to run an errand. *Id.* ICE held him without bond at Franklin County House of Corrections and Jail in Greenfield, Massachusetts pursuant to *Matter of Rojas* for seven months. *See* Mem. Supp. Mot. Dismiss for Fail. State Claim at 2, *Gordon v. Johnson*, ECF No. 106.

The impact of Mr. Vu's mandatory detention on his family was grave. His wife and children lost the health insurance that was provided through his employer. Lewis Decl. His stepson stopped receiving the follow-up treatments he needs to continue his recovery from cancer. *Id*. His daughter was unable to access physical therapy to treat the stiffness in her hands. *Id*. Mr. Vu's daughters were plagued by nightmares, and Ms. Lewis struggled to make her mortgage payments without Mr. Vu's salary. *Id.* Mr. Vu won his habeas petition and was released on bond, *see* Mem. Supp. Mot. Dismiss for Fail. State Claim at 2. However, the damage to his family—imposed more than ten years after his offense—had already been wrought.

B. *Matter of Rojas* Arbitrarily Requires Detention of Noncitizens At Any Moment Months or Years After an Enumerated Offense, Even When They Have Previously Been in Voluntary Contact With Immigration Authorities

Matter of Rojas arbitrarily subjects noncitizens to detention without bond, though many of these individuals have been in contact with immigration officials for years after their enumerated offense. Since their release from criminal custody,

many noncitizens have applied to renew their green cards, applied for citizenship, appeared for immigration inspection after a brief trip abroad, or even presented themselves at immigration offices multiple times before being detained under *Matter of Rojas*. The Government cannot rationally explain why it would wait months or years to detain an individual who by virtue of voluntary interaction with the immigration system is not a flight risk, and then later deny that noncitizen an individualized bond hearing on the premise that they are suddenly a presumptive flight risk and danger to the community.

1. Arnold Giammarco

Mr. Giammarco, *see* Point III.A.1, *supra*, had been in contact with immigration officials for years before ICE suddenly detained him, denying him a bond hearing. Indeed, were it not for the Government's lengthy delays, Mr. Giammarco would be a naturalized citizen today, rather than a man stranded in a country where he barely knows the language.

Mr. Giammarco resided in the United States since the age of four, has many relatives in this country, and served honorably in the Armed Forces, following in the footsteps of his grandfather who fought for the United States in World War I. Giammarco Compl., ¶¶7-19. Mr. Giammarco sought to become a citizen in the early 1980s, properly filing his naturalization application in 1982. *Id.*, ¶¶20-23.

Through a series of bureaucratic blunders, Mr. Giammarco's naturalization application was never adjudicated by INS nor its successor agency, CIS. *Id.*, ¶¶24-43, Neither agency ever informed Mr. Giammarco what happened with his application. *Id.*, ¶¶37-40, 55. In the meantime, for nearly three decades Mr. Giammarco was in touch with immigration authorities; he even renewed his legal permanent resident status two years before his detention without incident. Giammarco Decl. Despite this evidence that Mr. Giammarco was not a flight risk, ICE intruded upon Mr. Giammarco's life seven years after his drug conviction. Giammarco Compl., ¶56. ICE held him under *Matter of Rojas* for eighteen months, ultimately forcing Mr. Giammarco to give up his attempts to press CIS to adjudicate his citizenship application. *See* Point III.A.1, *supra*. *Matter of Rojas* arbitrarily applies mandatory detention to noncitizens like Mr. Giammarco, who have demonstrated their diligence through years of good-faith interaction with immigration officials.

2. Y Viet Dang

Similarly, the story of Mr. Y Viet Dang underlines the arbitrary nature of *Matter of Rojas*. Mr. Dang is a longtime lawful permanent resident from Vietnam who was detained pursuant to *Matter of Rojas* on February 9, 2010, when he applied for U.S. citizenship and came to immigration authorities to check the status of his application. *See Dang v. Lowe,* No. 1:CV-10-0446, 2010 U.S. Dist. LEXIS

49780, at *12 (M.D. Pa. May 7, 2010) (Report and Recommendation). He was placed in removal proceedings based on two decade-old convictions, though he was eligible for relief from removal. *See id.* at *11.

In the ten years that followed Mr. Dang's release from criminal custody, Mr. Dang had returned to his community to work and raise his U.S. citizen child with his wife, a U.S. Army lieutenant, while pursuing his citizenship. *See id.* at *15 n.8. As the magistrate judge noted, "it appears that [Immigration and Customs Enforcement (ICE)] was able to take Mr. Dang into custody long before February 2010, i.e., during the proceedings with respect to the various other applications he filed with ICE throughout the [ten] years after his release from incarceration requesting permission to remain in the United States." *Id.* at *35. Finding no statutory justification of such an arbitrary application of mandatory detention, the judge also observed that "it appears from the record that Petitioner Dang is very likely to appear for his removal proceedings based on the various other applications he has filed over the years with ICE and the fact that he appeared to have cooperated with ICE with respect to these applications." *Id*. at *15 n.8. The court thus found ICE's delay to be unreasonable and its reading of the statute unsupportable. *Id.* at *45.

Mr. Dang and Mr. Giammarco are not alone. The Government has arbitrarily and inexplicably waited months and often years to detain numerous lawful

permanent residents for their past criminal convictions. *See, e.g.*, *Rosciszewski v. Adducci*, No. 13–14394, 2013 WL 6098553, at *2 (E.D. Mich. Nov. 14, 2013) (eleven years, detained after applying for naturalization); *Gomez-Ramirez v. Asher*, No. C13–196–RAJ, 2013 WL 2458756, at *1 (W.D. Wash. June 5, 2013) (twelve years). To deny these individuals bond without any notice or opportunity to present their history of rehabilitation turns the mandatory detention scheme into an unreasonable and arbitrary trap for immigrants who had long since returned to their stable lives.

C. Detention Pursuant To Matter of Rojas Often Raises Serious Constitutional Concerns.

Depriving individuals of their liberty without the opportunity for a bond hearing presents substantial due process concerns. Though in *Demore v. Kim*, the Supreme Court upheld the constitutionality of mandatory detention for the brief period of time necessary to complete removal proceedings for a noncitizen who had conceded removability, 538 U.S. 510, 532 (2003), Justice Kennedy indicated that a bond hearing may be necessary when the government "cannot satisfy the minimal threshold burden of showing the relationship between detention and its purpose." *Id.* at 533 (Kennedy, J., concurring). Since *Demore,* federal courts have recognized that mandatory detention may pose constitutional concerns when the presumption of flight risk and dangerousness is no longer reasonable due to an

individual's years living peaceably in the community. *See, e.g.*, *Monestime*, 704 F Supp. 2d at 458 (given the length of time since noncitizen's last removable offense, "DHS can only determine whether [the petitioner] poses a risk of flight or danger to the community through an individualized bond hearing"); *Espinoza v. Aitken*, No. 5:13-cv-00512 EJD, 2013 WL 1087492, at *7 (N.D. Cal. Mar. 13, 2013) ("[T]he liberty interest . . . makes it unsurprising why Congress would want to limit its application to a particular class of individuals detained at a particular time.").

Mr. Giammarco's case, *see* Point III.A.1, *supra*, highlights how *Matter of Rojas* leads to unreasonable detention sufficiently removed from Congress's purpose. Without a bond hearing, noncitizens like Mr. Giammarco with significant equities who have rebuilt their lives and maintained voluntary contact with immigration authorities cannot demonstrate that their ongoing detention is unwarranted.

Furthermore, *Matter of Rojas* tends to lead to the prolonged detention of noncitizens with substantial challenges to their removability, raising additional constitutional concerns.[14] Mr. Giammarco, for example, was detained for eighteen months without a bond hearing while he pursued relief before his prolonged

[14] Justice Breyer noted that the mandatory detention of individuals with substantial claims against their removability raised serious due process concerns. *See Demore*, 538 U.S. at 577 (Breyer, J., concurring in part and dissenting in part).

detention forced him to accept removal. *See, e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127, 1139 (9th Cir. 2013) (holding that mandatory detention longer than six months is unreasonable); *Reid v. Donelan*, No. 13–cv–30125–MAP, 2014 WL 105026, at *5 (D. Mass, Jan. 9, 2014) (same). *Matter of Rojas*, which sweeps up many individuals with substantial challenges to removability that may take months or years to resolve, often results in such prolonged detention. In light of the high stakes, each day of unlawful mandatory detention comes at too high of a cost.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reject *Matter of Rojas* and the Government's interpretation of the mandatory detention statute as contrary to Congressional intent and wholly unreasonable. Doing so will ensure that our community members and clients will receive bond hearings where they may present their individual circumstances, so that the months and years of evidence of their rehabilitation and reintegration into their families and our communities will not be ignored.

Dated: March 31, 2014
New York, NY

Respectfully submitted,

/s/ Alina Das

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Alina Das, Esq.
Sean McMahon, Legal Intern
Etan Newman, Legal Intern
Washington Square Legal Services, Inc.

New York University School of Law
Immigrant Rights Clinic
245 Sullivan Street, 5th Floor
New York, NY 10012
Tel: (212) 998-6467
alina.das@nyu.edu

Counsel for Amici Curiae

APPENDIX A:
STATEMENTS OF INTEREST OF *AMICI CURIAE*

Detention Watch Network

As a coalition of approximately 200 organizations and individuals concerned about the impact of immigration detention on individuals and communities in the United States, Detention Watch Network (DWN) has a substantial interest in the outcome of this litigation. Founded in 1997, DWN has worked for more than two decades to fight abuses in detention, and to push for a drastic reduction in the reliance on detention as a tool for immigration enforcement. DWN members are lawyers, activists, community organizers, advocates, social workers, doctors, artists, clergy, students, formerly detained immigrants, and affected families from around the country. They are engaged in individual case and impact litigation, documenting conditions violations, local and national administrative and legislative advocacy, community organizing and mobilizing, teaching, and social service and pastoral care. Mandatory detention is primarily responsible for the exponential increase in the numbers of people detained annually since 1996, and it is the primary obstacle before DWN members in their work for meaningful reform of the system. Together, through the "Dignity Not Detention" campaign, DWN is working for the elimination of all laws mandating the detention of immigrants.

Families for Freedom

Families for Freedom (FFF) is a multi-ethnic network for immigrants and their families facing deportation. FFF is increasingly concerned with the expansion of mandatory detention. This expansion has led to the separation of our families without the opportunity for a meaningful hearing before an immigration judge and has resulted in U.S. citizen mothers becoming single parents; breadwinners becoming dependents; bright citizen children having problems in school, undergoing therapy, or being placed into the foster care system; and working American families forced to seek public assistance.

Greater Boston Legal Services

Greater Boston Legal Services (GBLS), is the second oldest legal services program in the country and the largest in New England. The Immigration Unit of GBLS provides advice, referrals and direct representation to low-income individuals throughout Commonwealth of Massachusetts who are seeking lawful immigration status in the United States or seeking protection against removal from the United States. In this capacity, the Immigration Unit has provided representation and other services to thousands of individuals seeking protection against removal from the United States. Since January, 2011 GBLS has provided services to individuals from over seventy countries. In addition, the staff of the Immigration Unit

provides training to students, attorneys and government officials regarding matters of asylum immigration law; and they have submitted *amicus curiae* briefs to the Board of Immigration Appeals and Circuit Courts of Appeal. GBLS, through its work on behalf of immigrants, has an interest in the proper application of the immigration laws and ensuring access of low-income individuals to protection under the law.

Harvard Immigration and Refugee Clinical Program

The Harvard Immigration and Refugee Clinical Program at Harvard Law School (Clinic) has been a leader in the field of immigration law for nearly 30 years. The Harvard Immigration Project (HIP) is a student organization supervised by the Clinic's staff and faculty. Both the Clinic and HIP represent immigration detainees in the Boston Immigration Court. Specifically, HIP operates a bond hearing project where students, under supervision from the Clinic, represent ICE detainees seeking release from detention on bond. The Clinic and HIP have an interest in the appropriate application and development of immigration law and the proper interpretation of the mandatory detention statute so that claims for release on bond and claims for immigration relief receive full and fair consideration. *Amicus curiae* regard the issues in this case as especially important to ensure the fair and consistent application of the mandatory detention statute. *Amicus curiae* can aid

the U.S. Court of Appeals for the First Circuit in its consideration of the issues in this case through its extensive experience and expertise in the area of immigration law.

Immigrant Defense Project

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. IDP provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seek to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens convicted of criminal offenses the full benefit of their constitutional and statutory rights.

Immigrant Rights Clinic

Immigrant Rights Clinic (IRC) of Washington Square Legal Services, Inc., has a longstanding interest in advancing and defending the rights of immigrants. IRC has been counsel of record or *amicus* in several cases involving federal courts' interpretation of the government's mandatory detention authority under 8 U.S.C. §

1226(c). *See, e.g., Demore v. Kim*, 538 U.S. 371 (2005) (*amicus*); *Desrosiers v. Hendricks*, 532 Fed. Appx. 283 (3d Cir. 2013) (*amicus*); *Sylvain v. Atty. Gen. of the United States*, 714 F.3d 150 (3d Cir. 2013) (*amicus*); *Hosh v. Lucero*, 80 F.3d 375 (4th Cir. 2012) (*amicus*); *Straker v. Jones*, No. 13 civ 6915(PAE), 2013 WL 6476889 (S.D.N.Y. Dec. 10, 2013) (counsel of record); *Beckford v. Aviles*, No. 10-2035 (JLL), 2011 WL 3444125 (D.N.J. Aug. 5, 2011) (*amicus*); *Jean v. Orsino*, No. 11-3682 (LTS) (S.D.N.Y. June 30, 2011) (*amicus*); *Louisaire v. Muller*, 758 F.Supp.2d 229 (S.D.N.Y. 2010) (counsel of record); *Monestime v. Reilly*, 704 F. Supp. 2d 453 (S.D.N.Y. 2010) (counsel of record); *Garcia v. Shanahan*, 615 F. Supp. 2d 175 (S.D.N.Y. 2009) (counsel of record); *Matter of Garcia-Arreola*, 25 I. & N. Dec. 267 (BIA 2010) (*amicus*).

Maine People's Alliance

Maine People's Alliance (MPA) focuses on leadership development to increase the number of citizen leaders prepared to work for positive social change. MPA is known for its ability to do grassroots organizing and education that reaches more than 100,000 Mainers each year with direct personal contact and quality leadership development work that has yielded dozens of leaders and staff for MPA and other organizations. MPA organizes in immigrant communities, training emerging leaders and ensuring that those people most affected by immigration policy are

advocates for change. MPA is also very active in the Maine Immigrants' Rights Coalition (MIRC), which advocates for immigrants' rights in the state of Maine. Due to its organizing work in immigrant communities, MPA works closely with immigrant families that are affected by the harsh consequences of mandatory detention. As such, MPA has a strong interest in humane immigration enforcement and reform that prevents unnecessary detention, keeps families together and protects the civil rights of all people.

National Immigrant Justice Center

Heartland Alliance's National Immigrant Justice Center (NIJC) is a Chicago-based organization working to ensure that the laws and policies affecting non-citizens in the United States are applied in a fair and humane manner. NIJC provides free and low-cost legal services to approximately 10,000 noncitizens per year, including 2000 per year who are detained. NIJC represents hundreds of noncitizens who encounter serious immigration obstacles as a result of entering guilty pleas in state criminal court without realizing the immigration consequences.

Political Asylum/Immigration Representation (PAIR) Project

The Political Asylum/Immigration Representation Project (PAIR) is a non-profit organization in Boston and the leading provider of *pro bono* legal services to

indigent asylum-seekers in Massachusetts and immigrants detained in Massachusetts. At any given time, PAIR is representing or advising *pro bono* several hundred low-income asylum-seekers and immigration detainees with active removal cases. PAIR regularly conducts legal rights presentations and individual intakes for immigration detainees at the Suffolk County House of Corrections, the Plymouth County Correctional Facility, and the Bristol County House of Corrections. PAIR typically visits one of these facilities every week. PAIR staff and *pro bono* attorneys have frequently met and represented immigration detainees whom ICE considers to be subject to mandatory detention under 8 U.S.C. § 1226(c), many of whom were not detained upon release from criminal custody. Thus, the matters at issue in this case, such as detainees' opportunity to seek release from immigration detention and return to their community and family while proceedings are pending in Immigration Court, are central to countless detained immigrants whom PAIR represents or advises.

University of Maine School of Law Refugee and Human Rights Clinic

The Refugee and Human Rights Clinic (RHRC) is a clinical program of the University of Maine School of Law. The program aims to help address an acute need in Maine for legal representation (and broader advocacy) on behalf of low-income immigrants, in a broad range of cases and projects. Clients include, for

example, asylum applicants who have fled human rights abuses in their home countries and are seeking refuge in the U.S.; immigrant survivors of domestic violence; immigrant victims of certain crimes; and abandoned, abused or neglected children seeking status in the U.S. Students also participate in a range of advocacy projects, including, e.g., conducting Know-Your-Rights presentations and intakes of immigrant detainees at the Cumberland County Jail in Portland and creating educational materials to assist immigrants appearing *pro se*. As such, the clinic has an interest in ensuring that the mandatory detention statute is not improperly expanded.

Appendix B:
Courts That Have Considered Challenges To *Matter of Rojas*:

I. The following courts (78) have rejected *Matter of Rojas*, holding that § 1226(c) applies only to noncitizens detained at the time of their release from criminal custody for their specified removable offense

Khoury v. Asher, No. C13–1367RAJ, 2014 WL 954920, at *12 (W.D. Wash. Mar. 11, 2014) (certifying class and granting declaratory judgment in favor of those held subject to mandatory detention under *Rojas*)

Debel v. Dubois, No. 13 Civ. 6028(LTS)(JLC), 2014 WL 708556, at *7 (S.D.N.Y. Feb. 25, 2014) (Report and Recommendation)

Olmos v. Holder, No. 13–cv–3158–RM–KMT, 2014 WL 222343, at *6 (D. Colo. Jan. 17, 2014)

Gordon v. Johnson, No. 13–cv–30146–MAP, 2013 WL 6905352, at *5 (D. Mass. Dec. 31, 2013)

Sanchez-Penunuri v. Longshore, No. 13–cv–02586–CMA–CBS, 2013 WL 6881287, at *19 (D. Colo. Dec. 31, 2013)

Castillo-Hernandez v. Longshore, No. 13–cv–02675–CMA–BNB, 2013 WL 6840192, at *19 (D. Colo. Dec. 27, 2013)

Sanchez-Gamino v. Holder, No. CV 13–5234 RS, 2013 WL 6700046, at *5 (N.D. Cal. Dec. 19, 2013)

Rosciszewski v. Adducci, No. 13–14394, 2013 WL 6098553, at *4 (E.D. Mich. Nov. 14, 2013)

Castaneda v. Souza, No. 13–10874–WGY, 2013 WL 3353747, at *8 (D. Mass. July 3, 2013)

Gomez-Ramirez v. Asher, No. C13–196–RAJ, 2013 WL 2458756, at *3 (W.D. Wash. June 5, 2013)

Bacquera v. Longshore, No. 13–cv–00543–RM–MEH, 2013 WL 2423178,

at *4 (D. Colo. June 4, 2013)

Deluis-Morelos v. ICE Field Office Dir., No. 12CV–1905JLR, 2013 WL 1914390, at *5 (W.D. Wash. May 8, 2013)

Aguasvivas v. Ellwood, No. 13–1161 (PGS), 2013 WL 1811910, at *8 (D.N.J. Apr. 29, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Pellington v. Nadrowski, No. 13–706 (FLW), 2013 WL 1338182, at *5 (D.N.J. Apr. 1, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Martinez-Cardenas v. Napolitano, No. C13–0020–RSM–MAT, 2013 WL 1990848, at *9 (W.D. Wash. Mar. 25, 2013)

Pujalt-Leon v. Holder, 934 F. Supp. 2d 759, 766 (M.D. Pa. 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Marin-Salazar v. Asher, No. C13–96–MJP–BAT, 2013 WL 1499047, at *5 (W.D. Wash. Mar. 21, 2013)

Santos-Sanchez v. Elwood, No. 12-6639 (FLW), 2013 WL 1165010, at *6 (D.N.J. Mar. 20, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Dighero-Castaneda v. Napolitano, No. 2:12–cv–2367 DAD, 2013 WL 1091230, at *7 (E.D. Cal. Mar. 15, 2013)

Burmanlag v. Durfor, No. 2:12–cv–2824 DAD P, 2013 WL 1091635, at *7 (E.D. Cal. Mar. 15, 2013)

Gayle v. Napolitano, No. 12–2806 (FLW), 2013 WL 1090993, at *5 (D.N.J. Mar. 15, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Espinosa v. Aitkin, No. 5:13–cv–00512 EJD, 2013 WL 1087492, at *6 (N.D. Cal. Mar. 13, 2013)

Snegirev v. Asher, No. C12–1606MJP, 2013 WL 942607, at *1 (W.D. Wash. Mar. 11, 2013)

Thai Hong v. Decker, No. 3:CV–13–0317, 2013 WL 790010, at *2 (M.D. Pa. Mar. 4, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Vicencio v. Shanahan, No. 12-7560 (JAP), 2013 WL 705446, at *5 (D.N.J. Feb. 26, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Almonte v. Shanahan, No. 12-05937 (CCC) (D.N.J. Feb. 25, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Ferguson v. Elwood, No. 12-5981 (AET), 2013 WL 663719, at *4 (D.N.J. Feb 22, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Popo v. Aviles, No. 13-0331 (JLL) (D.N.J. Feb. 21, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Nikolashin v. Holder, No. 13-0189 (JLL), 2013 WL 504609, at *5 (D.N.J. Feb. 7, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Foster v. Holder, No. 12-2579 (CCC), 2013 U.S. Dist. LEXIS 20320 (M.D. Pa. Feb. 4, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Balfour v. Shanahan, No. 12-06193 (JAP), 2013 WL 396256, at *6 (D.N.J. Jan. 31, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Rodriguez v. Shanahan, No. 12-6767 (FLW), 2013 WL 396269, at *4 (D.N.J. Jan. 30, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Dussard v. Elwood, No. 12-5369 (FLW), 2013 WL 353384, at *4 (D.N.J.

Jan. 29, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Davis v. Hendricks, No. 12–6478 (WJM), 2012 WL 6005713, at *10 (D.N.J. Nov. 30, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Morrison v. Elwood, No. 12–4649 (PGS), 2012 WL 5989456, at *4 (D.N.J. Nov. 29, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Castillo v. ICE Field Office Dir., 907 F. Supp. 2d 1235, 1238 (W.D. Wash. 2012)

Kerr v. Elwood, No. 12–6330 (FLW), 2012 WL 5465492, at *3 (D.N.J. Nov. 8, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Baguidy v. Elwood, No. 12–4635 (FLW), 2012 WL 5406193, at *9 (D.N.J. Nov. 5, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Nabi v. Terry, 934 F. Supp. 2d 1245, 1248 (D.N.M. 2012)

Charles v. Shanahan, No. 3:12–cv–4160 (JAP), 2012 WL 4794313, at *8 (D.N.J. Oct. 9, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Kporlor v. Hendricks, No. 12–2744 (DMC), 2012 WL 4900918, at *7 (D.N.J. Oct. 9, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Campbell v. Elwood, No. 12–4726 (PGS), 2012 WL 4508160, at *4 (D.N.J. Sept. 27, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Martinez v. Muller, No. 12–1731 (JLL), 2012 WL 4505895, at *4 (D.N.J. Sept. 25, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Nimako v. Shanahan, No. 12–4909 (FLW), 2012 WL 4121102, at *8 (D.N.J. Sept. 18, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Cox v. Elwood, No. 12–4403 (PGS), 2012 WL 3757171, at *4 (D.N.J. Aug. 28, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Martial v. Elwood, No. 12–4090 (PGS), 2012 WL 3532324, at *3 (D.N.J. Aug. 14, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Bogarin-Flores v. Napolitano, No. 12cv0399 JAH(WMc), 2012 WL 3283287, at *3 (S.D. Cal. Aug. 10, 2012)

Dimanche v. Tay-Taylor, No. 12–3831, 2012 WL 3278922, at *2 (D.N.J. Aug. 9, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Munoz v. Tay-Taylor, No. 12–3764 (PGS), 2012 WL 3229153, at *3-4 (D.N.J. Aug. 2, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Gonzalez-Ramirez v. Napolitano, No. 12–2978 (JLL), 2012 WL 3133873, at *5 (D.N.J. July 30, 2012), *rev'd sub nom. Gonzalez-Ramirez v. Sec'y of United States Dep't of Homeland Sec.*, 529 Fed. Appx. 177, 179 (3d Cir. 2013)

Kot v. Elwood, No. 12–1720 (FLW), 2012 WL 1565438, at *8 (D.N.J. May 2, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Valdez v. Terry, 874 F. Supp. 2d 1262, 1265 (D.N.M. 2012)

Nunez v. Elwood, No. 12–1488 (PGS), 2012 WL 1183701, at *3 (D.N.J., Apr. 9, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Ortiz v. Holder, No. 2:11CV1146 DAK, 2012 WL 893154, at *3 (D. Utah Mar. 14, 2012)

Harris v. Lucero, No. 1:11–cv–692, 2012 WL 603949, at *3 (E.D. Va. Feb 23, 2012), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Zamarial v. Lucero, No. 1:11–cv–1341, 2012 WL 604025, at *2 (E.D. Va. Feb. 23, 2012), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Jaghoori v. Lucero, No. 1:11–cv–1076, 2012 WL 604019 (E.D. Va. Feb. 22, 2012), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Christie v. Elwood, No.11–7070 (FLW), 2012 WL 266454, at *9 (D.N.J. Jan. 30, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Rosario v. Prindle, No. 11–217, 2011 WL 6942560, at *3 (E.D. Ky. Nov. 28, 2011), *adopted by* 2012 WL 12920, at *1 (E.D. Ky. Jan. 4, 2012)

Parfait v. Holder, No. 11–4877 (DMC), 2011 WL 4829391, at *9 (D.N.J. Oct. 11, 2011), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Rianto v. Holder, No. CV–11–0137–PHX–FJM, 2011 WL 3489613, at *3 (D. Ariz. Aug. 9, 2011)

Beckford v. Aviles, No. 10-2035 (JLL), 2011 WL 3515933, at *9 (D.N.J. Aug. 5, 2011), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Keo v. Lucero, No. 11-614 (JCC), 2011 WL 2746182 (E.D. Va. July 13, 2011), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Jean v. Orsino, No. 11-3682 (LTS) (S.D.N.Y. June 30, 2011)

Sylvain v. Holder, No. 11-3006 (JAP), 2011 WL 2580506, at *7 (D.N.J. June 28, 2011), *rev'd sub nom.*, *Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Aparicio v. Muller, No. 11-cv-0437 (RJH) (S.D.N.Y. Apr. 7, 2011)

Louisaire v. Muller, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010)

Gonzalez v. Dep't of Homeland Sec., No. 1:CV-10-0901, 2010 WL 2991396, at *1 (M.D. Pa. July 27, 2010), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Bracamontes v. Desanti, No. 2:09cv480, 2010 WL 2942760 (E.D. Va. June 16, 2010), *adopted by*, 2010 WL 2942757 (E.D. Va. July 26, 2010), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Dang v. Lowe, No. 1:CV-10-0446, 2010 WL 2044634, at *2 (M.D. Pa. May 20, 2010), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Monestime v. Reilly, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010)

Khodr v. Adduci, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010)

Scarlett v. U.S. Dep't of Homeland Sec., 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009)

Waffi v. Loiselle, 527 F. Supp. 2d 480 (E.D. Va. 2007), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Bromfield v. Clark, No. C06-0757-JCC2006, 2007 WL 527511, at *4 (W.D. Wash. Feb. 14, 2007)

Roque v. Chertoff, No. C06 0156 TSZ, 2006 WL 1663620, at *4-5 (W.D. Wash. June 12, 2006)

Zabadi v. Chertoff, No. C05-03335, 2005 WL 3157377, at *5 (N.D. Cal. Nov. 22, 2005)

Quezada-Bucio v. Ridge, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004)

II. The following courts (21) have deferred to *Matter of Rojas*:

Hosh v. Lucero, 680 F.3d 375, 380 (4th Cir. 2012)

Mora-Mendoza v. Godfrey, No. 3:13–cv–01747–HU, 2014 WL 326047, at *3 (D. Or. Jan. 29, 2014)

Straker v. Jones, No. 13-cv-6915(PAE), 2013 WL 6476889, at *9 (S.D.N.Y. Nov. 20, 2013) (deferring to *Matter of Rojas* but finding that petitioner was not subject to mandatory detention because he had not been "released" for the purposes of § 1226(c))

Johnson v. Orsino, 942 F. Supp. 2d 396, 407 (S.D.N.Y. 2013)

Cisneros v. Napolitano, No. 13–700 (JNE/JJK), 2013 WL 3353939, at *9 (D. Minn. July 3, 2013)

Khetani v. Petty, 859 F. Supp. 2d 1036, 1038 (W.D. Mo. 2012)

Castillo v. Aviles, No. 12–2388 (SRC), 2012 WL 5818144, at *4 (D.N.J. Nov. 15, 2012)

Silent v. Holder, No. 4:12–cv–00075–IPJ–HGD, 2012 WL 4735574, at *2 (N.D. Ala. Sept. 27, 2012)

Espinoza-Loor v. Holder, No. 11–6993 (FSH), 2012 WL 2951642, at *4 (D.N.J. July 2, 2012)

Santana v. Muller, No. 12 Civ. 430(PAC), 2012 WL 951768, at *4 (S.D.N.Y. Mar. 21, 2012)

Guillaume v. Muller, No. 11 Civ 8819, 2012 WL 383939 (S.D.N.Y. Feb. 7, 2012)

Mendoza v. Muller, No. 11 Civ. 7857(RJS), 2012 WL 252188 (S.D.N.Y. Jan. 25, 2012)

Hernandez v. Sabol, 823 F. Supp. 2d 266, 270 (M.D. Pa. 2011)

Desrosiers v. Hendricks, No. 11–4643 (FSH) (D.N.J. Dec. 30, 2011), *aff'd,* 532 Fed. Appx. 283, 284 (3d Cir. 2013)

Garcia Valles v. Rawson, No. 11-C-0811, 2011 WL 4729833 (E.D. Wis. Oct. 7, 2011)

Diaz v. Muller, No. 11-4029 (SRC), 2011 WL 3422856, at *3 (D.N.J. Aug. 4, 2011)

Gomez v. Napolitano, No. 11-cv-1350, 2011 WL 2224768 (S.D.N.Y. May 31, 2011)

Garcia-Valles v. Rawson, No. 11–C–0811, 2011 WL 4729833, at *3 (E.D. Wis. Oct. 7, 2011)

Sidorov v. Sabol, No. 09–cv–1868 (M.D. Pa. Dec. 18, 2009)

Sulayao v. Shanahan, No. 09-Civ.-7347, 2009 WL 3003188 (S.D.N.Y. Sept. 15, 2009).

Serrano v. Estrada, No. 3–01–CV–1916–M, 2002 WL 485699, at *3 (N.D. Tex. Mar. 6, 2002)

III. <u>The following courts (4) have refused to decide the issue of deference to *Matter of Rojas* but instead found mandatory detention to apply to those not detained "when . . . released" based on the theory that officials do not lose authority to impose mandatory detention if they delay</u>

Desrosiers v. Hendricks, 532 Fed. Appx. 283, 285 (3d Cir. 2013) (following *Sylvain*)

Gonzalez-Ramirez v. Sec'y of United States Dep't of Homeland Sec., 529 Fed. Appx. 177, 179 (3d Cir. 2013) (same)

Sylvain v. Att'y Gen. of the United States, 714 F.3d 150, 161 (3d Cir. 2013)

Guttierez v. Holder, No. 13–cv–05478–JST, 2014 WL 27059, at *5 (N.D. Cal. Jan. 2, 2014)

IV. The following courts in the Fourth Circuit (5) have not specifically examined *Matter of Rojas* but have found the *Hosh* opinion controlling

Pasicov v. Holder, 488 Fed. Appx. 693, 694 (4th Cir. 2012)

Thakur v. Morton, No. ELH–13–2050, 2013 WL 5964484, at *3 (D. Md. Nov. 7, 2013)

Ozah v. Holder, No. 3:12–CV–337, 2013 WL 709192, at *4 (E.D. Va. Feb. 26, 2013)

Velasquez-Velasquez v. McCormic, No. CCB–12–1423, 2012 WL 3775881, at *2 (D. Md. Aug. 28, 2012)

Obaid v. Lucero, No. 1:12cv415 (JCC/JFA), 2012 WL 3257827, at *2 (E.D. Va. Aug. 8, 2012)

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: March 31, 2014
New York, NY

/s/ Alina Das

Alina Das, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
Tel. (212) 998-6430
Fax (212) 995-4031
alina.das@nyu.edu

CERTIFICATE OF SERVICE

I, Alina Das, hereby certify that on March 31, 2014 copies of this Brief of Amici Curiae were electronically filed via the Court's CM/ECF system. Hard copies have also been served via UPS Next Day Air to:

Greg Romanovsky
Romanovsky Law Offices
12 Marshall Street
Boston, MA 02108
Tel. (617) 787-0000
Facsimile (617) 977-9770
Email: gr@romanovskylaw.com

Counsel for Petitioner-Appellee

and

Elianis N. Perez
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division, U.S. Dept. of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044

Michael P. Sady
United States Attorney's Office
John Joseph Moakley Courthouse
1 Courthouse Way, Ste. 9200
Boston, MA 02210

Counsels for Respondent-Appellant

Dated: March 31, 2014
New York, NY

/s/ Alina Das

Alina Das, Esq.
Sean McMahon, Legal Intern
Etan Newman, Legal Intern

Washington Square Legal Services, Inc.
245 Sullivan Street, 5th Floor
New York, NY 10012
(212) 998-6430
alina.das@nyu.edu