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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GARFIELD GAYLE, *et al.*, Plaintiffs/Petitioners v. JANET NAPOLITANO, *et al.*, Defendants/Respondents	No. 3:12-cv-02806-FLW

REPLY BRIEF/TRAVERSE IN SUPPORT OF PETITIONS FOR WRIT OF HABEAS CORPUS BY GARFIELD GAYLE, SHELDON FRANCOIS, AND NEVILLE SUKHU

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INTRODUCTION

Plaintiffs Garfield Gayle, Sheldon Francois, Neville Sukhu, and the class they seek to represent are subject to mandatory immigration detention under the government's sweeping misinterpretation of the Immigration and Nationality Act (INA), 8 U.S.C. § 1226(c). Pursuant to the Board of Immigration Appeals' (BIA) decision in *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999), the government has placed Plaintiffs in mandatory detention based solely on its decision to charge them with removal on a ground listed under the statute. Plaintiffs are ineligible for a bond hearing unless they bear the heavy burden of proving to an Immigration Judge (IJ) that the government is "substantially unlikely to prevail" on the charges—a standard that is generally insurmountable. Moreover, the only process for contesting mandatory detention—the "*Joseph* hearing"—lacks basic safeguards, including adequate notice of the right to the hearing and a contemporaneous record of proceedings to ensure a meaningful right of appeal.

As a result, Plaintiffs—and hundreds of other individuals in New Jersey whom they seek to represent—face mandatory detention for months or even years while their removal cases are decided. This is so regardless of whether they are lawful permanent residents (LPRs) and have substantial challenges to removal that would allow them to maintain their LPR status, even though such individuals have heightened liberty interests against detention and do not present the categorical flight risk or danger to the community that led Congress to make detention mandatory for a limited class of noncitizens.

Mandatory detention under these circumstances raises serious due process concerns. However, this Court need not—and should not—reach these constitutional issues. Rather, in the absence of any evidence that Congress intended to authorize the mandatory detention of such individuals under the overbroad *Joseph* standard and the agency's inadequate procedures, this Court should construe § 1226(c) to authorize mandatory detention only where an individual lacks

a substantial challenge to removal on the grounds triggering the statute, and to require that the hearing over whether mandatory detention applies provide by basic safeguards. Thus, on statutory grounds alone, Plaintiffs are entitled to a constitutionally adequate hearing to determine whether they have a substantial challenge to removal and therefore are not subject to § 1226(c).

Defendants fail to even acknowledge, much less refute, Plaintiffs' statutory argument. Instead, Defendants seek dismissal of Plaintiffs' lawsuit on the grounds that the Supreme Court upheld the constitutionality of § 1226(c) in *Demore v. Kim*, 538 U.S. 510 (2003). *See* Dkt. 21 at 40-43. But Plaintiffs do not challenge the Supreme Court's *Demore* decision, which merely upheld the constitutionality of mandatory detention under § 1226(c) in certain circumstances. Specifically, *Demore* upheld the mandatory detention, for a brief period of time, of an LPR who *conceded* that he was deportable and thus properly subject to § 1226(c).[1] *Demore* did *not* address Plaintiffs' claims here, which concern the constitutionality of and the statutory authority for the mandatory detention of individuals who raise a substantial challenge to removal on the grounds allegedly triggering their mandatory detention. Defendants also assert that the *Joseph* hearing provides adequate procedural safeguards. *See* Dkt. 21 at 42-44. But a custody hearing that lacks such basic protections as adequate notice and a contemporaneous record of proceedings nowhere approaches the strong procedural protections that such a severe deprivation of liberty requires. The Court should therefore reject Defendants' request for dismissal.[2]

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[1] Defendants suggest that the Court did not view the respondent in *Demore* to have conceded removal because he intended to challenge the charges against him. *See* Dkt. 21 at 41. However, the Court expressly rested its holding on Mr. Kim's prior concession of removability. *Demore*, 538 U.S. at 522 n.6.

[2] Defendants assert that 8 U.S.C. § 1252(f)(1) bars Plaintiffs' claims for classwide injunctive relief. *See* Dkt. 21 at 2, 51-52. But § 1252(f)(1) does not bar injunctions against statutory violations, as alleged here. *See* Reply Br. in Support of Class Certification at 12-14; *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010). Because this Court can rule for Plaintiffs on statutory grounds, it need not consider whether § 1252(f)(1) bars injunctive relief

STATEMENT OF FACTS

Garfield Gayle

Garfield Gayle is an LPR who has lived in the country for approximately 30 years. For more than nine months, he has been subject to mandatory immigration detention under § 1226(c) at the Monmouth County Correctional Institution in Freehold, New Jersey. He incorporates by reference the facts set forth in his Reply in support of his individual habeas claims, *see* Dkt. 23 at 2-3, and sets forth the following additional facts regarding his removal proceedings.

Mr. Gayle is pursuing two challenges to removal. First, Mr. Gayle seeks termination of his removal proceedings based upon the government's failure to meet its burden of proving the existence of his alleged 1995 conviction for an attempted drug sale. *See* Lauterback Decl., Ex. A (Mot. to Terminate). Second, even assuming that ICE is found to have proven the conviction, Mr. Gayle disputes that his conviction constitutes an aggravated felony, and maintains that he is therefore eligible for cancellation of removal—a form of immigration relief that would entitle him to retain his LPR status. *See* 8 U.S.C. § 1229b; *see also* Lauterback Decl., Ex. C (Br. in Support of Cancellation). Mr. Gayle is a strong candidate for cancellation in light of his close ties to his family, his long residence in the United States, and other equities. *See id.*, Ex. B (Application for Cancellation).

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for constitutional claims. Moreover, contrary to the government's assertions, the Third Circuit did not address injunctive relief in *Alli v. Decker*, 650 F.3d 1007 (3d Cir. 2011), which involved a claim for classwide *declaratory* relief alone. As Defendants concede, § 1252(f)(1) does not bar Plaintiffs' claim for classwide declaratory relief, on either statutory or constitutional grounds. *See* Dkt. 21 at 51; *see also Alli*, 650 F.3d at 1009.

Defendants also assert that certain class members lack standing. *See* Dkt. 21 at 23. This argument misses the mark. Individuals challenging unlawful process need not show that they would be entitled to a different result if the government used lawful procedures—and particularly when it comes to detention procedures. *See* Reply Br. in Support of Class Certification at 4-5 (collecting cases).

On October 23, 2012, the IJ denied Mr. Gayle's motion to terminate. *Id.* ¶ 5. Mr. Gayle's next hearing is scheduled for January 30, 2013, at which point the IJ is expected to make a determination regarding Mr. Gayle's eligibility for cancellation. *Id.* ¶ 6. Should the IJ find Mr. Gayle eligible for cancellation, the hearing on the merits of his claim will likely not be scheduled for an additional several months, *id.*, during which time Mr. Gayle will remain in mandatory detention. Alternatively, if the IJ finds him ineligible for cancellation, Mr. Gayle will appeal this decision to the BIA, and to the Court of Appeals if necessary, a period of months or possibly years during which he will remain subject to mandatory detention. *See* Gayle Decl. ¶ 3. Indeed, even if the IJ grants Mr. Gayle cancellation, should the government decide to appeal that decision to the BIA, Mr. Gayle will remain in mandatory detention until the appeal is decided. *See Joseph*, 22 I&N Dec. at 801.

Sheldon Francois

Sheldon Francois is a national of Trinidad and Tobago and an LPR. *See* Lauterback Decl., Ex. E (Notice to Appear). He came to the United States at the age of twelve and has lived here for nearly twenty years. Francois Decl. ¶ 1. Mr. Francois's mother, seven younger siblings, and nine-year-old daughter are all U.S. citizens and live in New York, along with his large extended family of aunts, uncles, and cousins. *See id.* ¶¶ 5, 9, 15.

Mr. Francois has several minor misdemeanor convictions, including (1) a June 2011 conviction for petit larceny under N.Y. 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 N.Y. 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) two convictions for petit larceny under N.Y. Penal Law § 155.25—a March 2012 conviction for which he was initially sentenced to a conditional discharge and five days'

community service, and later resentenced to 30 days' imprisonment, and an August 2012 conviction for which he was sentenced to 30 days' imprisonment. *See id*. ¶¶ 10-11.

On August 8, 2012, ICE took Mr. Francois into custody following his August 2012 petit larceny conviction. *Id*. ¶ 11. ICE placed him in removal proceedings based on his 2011 misdemeanor possession offense, *see* 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substance offense), and his September 2011 and March 2012 petit larceny convictions, *see* 8 U.S.C. § 1227(a)(2)(A)(ii) (crimes of moral turpitude). *Id*., Ex. E. Since that time, a period of nearly five months, Mr. Francois has been held in mandatory detention under § 1226(c) at the Hudson County Correctional Facility in Kearny, New Jersey. *Id*. ¶ 9.

Mr. Francois has a substantial claim to cancellation of removal. On December 11, 2012, Mr. Francois submitted his application for cancellation, as well as an application for asylum, withholding of removal, and relief under the Convention Against Torture (CAT), *see id*. ¶ 14, Ex. F & G, and the IJ has scheduled a merits hearing on March 18, 2013. *Id*. ¶ 15. Thus, Mr. Francois will remain in mandatory detention until at least that time. Moreover, even if he wins before the IJ, the government can appeal that decision to the BIA, during which time Mr. Francois will remain subject to mandatory detention. *See Joseph*, 22 I&N Dec. at 801.

Mr. Francois poses no flight risk or threat to the community. If he receives a bond hearing and is ordered released, he will reside with his family and comply with all immigration court dates. He is also willing to submit to conditions of supervision, including electronic monitoring if deemed necessary. *See* Francois Decl. ¶¶ 21-24. Meanwhile, his mandatory detention has caused tremendous emotional and financial hardship to himself and his loved ones. *See id*. ¶¶ 9-20; Dormeus Decl. ¶¶ 4-9; Allistair Francois Decl. ¶¶ 3-6.

Neville Sukhu

Neville Sukhu is a Guyanese national who entered the United States as an LPR in December 1993. Gillman Decl., Ex. A (Notice to Appear). His wife of 35 years is a U.S. citizen; they have four children and ten grandchildren, all of whom are U.S. citizens or LPRs. Sukhu Decl. ¶ 6; Mathrani Sukhu ¶¶ 1-2.

In June 1997, Mr. Sukhu pleaded guilty to assault in the second degree in violation of N.Y. Penal Law § 120.05(6) and was sentenced to 90 days' imprisonment. Gillman Decl. ¶ 4. In May 2011, Mr. Sukhu pleaded guilty to a misdemeanor offense of intent to obtain transportation without paying—"turnstile jumping"—in violation of N.Y. Penal Law § 165.15 and was sentenced to time served of approximately 24 hours. *Id*. ¶ 5.

In May 2011, Mr. Sukhu was placed in criminal custody at Rikers Island following an arrest that subsequently resulted in a guilty plea to disorderly conduct and a conditional discharge of one year. *Id*. ¶ 6. On August 15, 2011, when he was due to be released for that offense, ICE took MR. Sukhu into immigration custody. Since his arrest—a period of more than 17 months—Mr. Sukhu has been in mandatory detention under 8 U.S.C. § 1226(c) at the Monmouth County Correctional Institution in Freehold, New Jersey. *Id*. ¶ 7.

Mr. Sukhu's first master calendar hearing was held on September 13, 2011, and his case was adjourned for two months so that he could obtain counsel. *Id*. ¶ 10. At the next hearing on November 17, 2011, the Legal Aid Society of New York appeared on his behalf[3] and informed the court that Mr. Sukhu would be moving to terminate proceedings. *Id*. ¶ 11. The IJ set a date to file the motion to terminate and a briefing schedule, and adjourned the case to the next available date on the court calendar, January 18, 2012. *Id*. Meanwhile, on December 27, 2011,

[3] The government errs in stating that Legal Aid did not appear on Mr. Sukhu's behalf at this hearing. *See* Dkt. 21 at 28; Boyd Decl. ¶ 33.

Mr. Sukhu filed his motion to terminate, arguing that his assault conviction was not a crime of moral turpitude (CMT), and that he was thus not deportable. *See id*., Ex. C (Mot. to Terminate).

On January 18th, the IJ again continued Mr. Sukhu's case until March 7, 2012, the next available hearing date, so that the government could submit the plea minutes from his 1997 offense, and so that Mr. Sukhu could prepare additional briefing on his motion to terminate, as well as an application for adjustment of status. *Id*. ¶ 13. On February 12, 2012, Mr. Sukhu's U.S. citizen daughter, Debra Persaud, filed a Form I-130 Petition for Alien Relative with U.S. Citizenship and Immigration Services (USCIS) in support of his adjustment application. *See id*., Ex. D (Form I-130). On February 29, 2012, Mr. Sukhu filed his adjustment application in immigration court, as well as his related application for a waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h). *See id*., Ex. E & F (Form I-485 and Form I-601).

At the hearing on March 7, 2012, the IJ found that Mr. Sukhu's 1997 conviction was a CMT and denied his motion to terminate. *Id*. ¶ 16. The IJ then adjourned Mr. Sukhu's case until April 27, 2012, the next available hearing date, to allow for adjudication of the I-130 petition. *Id*. ¶ 18. However, at the April 27th hearing, USCIS had not yet decided the I-130 petition and therefore the adjustment application could not move forward. Thus, the IJ again adjourned the case to the next available hearing date on July 5, 2012. *Id*.

USCIS approved Mr. Sukhu's I-130 petition on May 7, 2012. *Id*., Ex. G (approval notice).[4] Thus, at the next hearing on July 5th, Mr. Sukhu requested that a merits hearing be scheduled on his adjustment application. However, the earliest date on the court calendar was

[4] Defendants fault Mr. Sukhu for not providing the approved I-130 petition at this time. *See* Dkt. 21 at 30. However, there was no reason for Mr. Sukhu to do so, as the immigration court had already set the next hearing date for July 5th. Thus, submitting the approved I-130 would not have expedited matters. And Mr. Sukhu did in fact provide the approved I-130 at the July 5th hearing. *See* Gillman Decl. ¶¶ 19-20.

October 2, 2012, or three months later. *Id*. ¶ 20. That hearing was briefly adjourned for nine days to October 11, 2012 due to a medical emergency befalling Mr. Sukhu's attorney. *Id*. ¶¶ 21-22.

Mr. Sukhu expected that the court would set a final hearing date on his adjustment application at the October 11th hearing. However, on that date, the government raised an entirely new argument—namely, that the IJ should apply a heightened standard of proof to Mr. Sukhu's application for a § 212(h) waiver because of the nature of his 1997 offense—even though the government had been aware of his conviction since the outset of proceedings and Mr. Sukhu had filed his waiver application seven months earlier in February 2012. *See id*. ¶ 23. As a result, the IJ adjourned Mr. Sukhu's proceedings once again, until December 19, 2012, to permit briefing on this issue. *Id*. At the December 19th hearing, the IJ reserved decision on Mr. Sukhu's application for a § 212(h) waiver, but set a merits hearing on Mr. Sukhu's adjustment application for March 7, 2013. *Id*. ¶ 24. Should Mr. Sukhu be denied adjustment, he will appeal to the BIA and, if necessary, to the Court of Appeals, during which time he will remain in mandatory detention. Moreover, even if the IJ grants adjustment, the government may appeal the decision to the BIA, during which time Mr. Sukhu will be mandatorily detained. *Id*. ¶¶ 25-27; *see also Joseph*, 22 I&N Dec. at 801.

Mr. Sukhu poses no flight risk or threat to the community. If he receives a bond hearing and is ordered released, Mr. Sukhu will live with his family and comply with all immigration court dates. He is also willing to submit to conditions of supervision, including electronic monitoring if deemed necessary. *See* Sukhu Decl. ¶¶ 16-19. Meanwhile, his continued detention has caused great emotional and financial hardship to himself and his family. *See* Sukhu Decl. ¶¶ 8-15; Mathrani Sukhu Decl. ¶¶ 5-10; Malisa Sukhu Decl. ¶¶ 3-7, 9.

ARGUMENT

I. THE INA DOES NOT AUTHORIZE MANDATORY DETENTION WITHOUT A CONSTITUTIONALLY ADEQUATE HEARING TO DETERMINE WHETHER THE INDIVIDUAL HAS A SUBSTANTIAL CHALLENGE TO REMOVAL.

As the Supreme Court held in *Zadvydas v Davis*, 533 U.S. 678, 690 (2001), "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." Thus, due process requires a "sufficiently strong special justification" to "outweigh[]" immigration detention's significant deprivation of liberty, as well as strong procedural protections. *Id*. at 690-91; *accord Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011). This is especially the case for LPRs, such as Plaintiffs, who have heightened due process rights. *See Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982).

Indeed, even in *Demore* the Court recognized the liberty interest at stake in pre-final-order detention and upheld mandatory detention under the circumstances presented because it bore a reasonable relationship to its purpose—*i.e.*, preventing flight and ensuring removal. *See Demore*, 538 U.S. at 527-28 (upholding the mandatory detention, for a reasonable period, of an LPR who raised no challenges to deportability because it "necessarily serve[d] [those] purpose[s]"). In contrast to the circumstances in *Demore*, the mandatory detention of noncitizens with substantial challenges to removal that would allow them to maintain or obtain their LPR status raises serious constitutional concerns. This is particularly the case with the mandatory detention of noncitizens, such as Plaintiffs, who already have LPR status. Moreover, the government's existing procedures for determining when such individuals are subject to mandatory detention lack basic safeguards, including notice of the right to a hearing and a contemporaneous record of proceedings to ensure a meaningful right of appeal.

However, this Court need not—and should not—decide the serious due process issues raised by mandatory detention under the *Joseph* standard and the agency's hearing procedures. Principles of statutory construction require that, where possible, courts construe statutes to avoid serious constitutional problems. Moreover, because § 1226(c) unquestionably applies to LPRs, it must be construed in all its applications with their due process interests in mind. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380-82 (2005) (explaining, in construing the post-final-order detention statute, 8 U.S.C. § 1231(a)(6), that avoidance canon requires adopting a limiting construction of the statute even if same constitutional problems would not be raised in all the statute's applications); *Diouf v. Napolitano*, 634 F.3d 1081, 1088-89 (9th Cir. 2011) (same).

Here, § 1226(c) is silent as to both the standard and the hearing procedures necessary to determine if an individual is subject to mandatory detention. In the absence of any evidence that Congress intended to authorize mandatory detention under the overly broad *Joseph* standard and the agency's inadequate hearing procedures, this Court should construe § 1226(c) to authorize mandatory detention only where the individual lacks a substantial challenge to removal on the grounds that allegedly trigger mandatory detention, and where the government provides a hearing with basic procedural safeguards.

A. Mandatory Detention Under The *Joseph* Standard And Current Hearing Procedures.

Section 1226(c) requires the detention of noncitizens who are "deportable" or "inadmissible" on designated criminal grounds during the pendency of their removal proceedings. 8 U.S.C. § 1226(c). Pursuant to regulation and BIA caselaw, individuals whom the government deems subject to mandatory detention are entitled to a hearing before an IJ on whether they are "properly included" under the statute. 8 C.F.R. § 1003.19(h)(2)(ii); *Joseph*, 22 I&N Dec. at 799.

In practice, however, a detainee has virtually no ability to challenge the government's view that detention is mandatory. In *Joseph*, the BIA established the standard for this custody determination, holding that an individual is "deportable" or "inadmissible" within the meaning of § 1226(c) merely when the government *charges* removability on a ground triggering the statute.[5] Notably, the government is not even required to produce a certified record of the triggering conviction at the outset of proceedings in order for mandatory detention to apply. *See id.* at 807; *see also* Dona, Julie, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, at 14-16 (June 1, 2011) (forthcoming in Georgetown Immigration Law Journal), *available at* http://ssrn.com/abstract=1856758.

To obtain a bond hearing, the detainee must show the IJ that the government is "substantially unlikely to prevail" on its claim that his conviction triggers mandatory detention. *Id*. at 800. As one judge has observed, this burden is "all but insurmountable." *Tijani v. Willis*, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring). In practice, the BIA interprets the *Joseph* standard to exempt a detainee from mandatory detention only where he shows the government's charges are frivolous—*i.e.*, that the detainee's criminal offense clearly does not render him "deportable" or "inadmissible." *See Matter of Flores-Lopez*, 2008 WL 762690 (BIA Mar. 5, 2008) (finding for government in *Joseph* challenge despite unpublished decision from governing Court of Appeals finding conviction was not a removable offense); Dona, *supra*, at 5 (reviewing *Joseph* decisions between November 2006 through October 2010 and finding that the

[5] The government asserts that § 1226(c), and not *Joseph*, dictates which individuals are subject to mandatory detention. *See, e.g.*, Dkt. 21 at 43. This is a distinction without a difference. *Joseph* defines the individuals who are "deportable" or "inadmissible" within the meaning of the statute. Because it adopts an overbroad construction of these terms—and one that raises serious constitutional concerns—the *Joseph* standard is an impermissible construction of § 1226(c).

BIA construes the "substantially unlikely" standard "to require that nearly all legal and evidentiary uncertainties be resolved in favor of the [government]").[6]

Moreover, a detainee cannot challenge mandatory detention by showing a likelihood of securing relief from removal, including a claim to discretionary relief, such as cancellation of removal, *see* 8 U.S.C. § 1229b, that would permit him to maintain lawful permanent residence in the United States. *See, e.g.*, *In re Mu Yong Henry*, 2003 WL 23508663 (BIA Dec. 24, 2003) (upholding mandatory detention despite IJ's grant of cancellation of removal); *In re Jurado-Delgado*, 2006 WL 1558688 (BIA May 2, 2006) (same); Lauterback Decl., Ex. K, Deposition of Chief IJ Ivan Fong, at 88:23-89:21, *Rodriguez v. Robbins*, No. 2:07-cv-03239 (C.D. Cal. filed June 25, 2012) (explaining his "understanding" that a detainee's eligibility for relief "would not be a basis" for finding him or her not subject to mandatory detention)).

Finally, under the *Joseph* standard, even if a detainee *wins* his challenge to removal before an IJ and remains detained only because the government has appealed the IJ's decision to the BIA, mandatory detention continues to apply. *See Joseph*, 22 I&N Dec. at 801.

The *Joseph* hearing also suffers from basic procedural deficiencies. First, the government does not even inform a detainee of his right to seek a *Joseph* hearing. In fact, the form supplied to a detainee held under § 1226(c) misstates that he "may *not* request a review of this determination by an [IJ]." *See* Dkt. 13-7 (Form I-286 provided to Mr. Francois) (emphasis added); Dkt. 13-8 (Deposition of Wesley Lee, AFOD, ICE Los Angeles Field Office, at 208:18-

[6] Although the detainee in *Joseph* successfully challenged his mandatory detention, his case is an outlier. The government had charged Mr. Joseph as removable for an aggravated felony based on obstruction of justice, but offered no "convincing argument" that his offense satisfied the aggravated felony definition where he had only sought to evade his own arrest by fleeing the authorities. *See Joseph*, 22 I&N Dec. at 800, 807-08. Moreover, although Mr. Joseph ultimately won his *Joseph* claim, he was nonetheless subject to mandatory detention for six months, four of these pending the government's appeal to the BIA of the IJ's decision ordering his release on his own recognizance. *See id*. at 801.

209:4 and 243:16-22, *Rodriguez v. Robbins*, No. 2:07-cv-03239-TJH-RNB (C.D. Cal. filed June 25, 2012) (confirming notice policy)).[7] Nor is the IJ required to provide notice to a detainee of his right to a *Joseph* hearing. Second, even if an immigrant manages to demand a bond hearing, the immigration court does not make or maintain a contemporaneous record of the proceedings, either by transcript, audiotape, or otherwise, *see* Dkt. 21 at 4, thereby frustrating his ability to meaningfully appeal adverse determinations.

B. The Mandatory Detention Of Lawful Permanent Residents With Substantial Challenges To Removal And In The Absence Of Adequate Procedural Safeguards Raises Serious Constitutional Concerns.

The mandatory detention of LPRs, such as Plaintiffs, under the *Joseph* standard and the agency's inadequate hearing procedures, raises serious constitutional concerns. Contrary to the government's assertions, *see* Dkt. 21 at 40-43, these concerns were *not* before the Supreme Court in *Demore*. *Demore* upheld the mandatory detention, "for the brief period necessary for . . . removal proceedings," *Demore*, 538 U.S. at 513, of an LPR who had *no* substantial challenge to deportability, *id*. at 513-14. Thus, the Court had no occasion to address the constitutionality of mandatorily detaining LPRs who have substantial challenges to removability or substantial claims to discretionary relief, such as cancellation of removal, that would permit them to maintain their LPR status. *See Gonzalez v. O'Connell*, 355 F.3d 1010, 1019-20 (7th Cir. 2004) (noting that this "important issue" was left open in *Demore*).

Defendants further assert that *Demore* and *Diop* "rejected" Plaintiffs' arguments concerning the adequacy of the *Joseph* hearing. *See* Dkt. 21 at 40-41, 42. This is simply incorrect. Both the Supreme Court and the Third Circuit specifically declined to this issue,

[7] In some instances, as with Mr. Gayle and Mr. Sukhu, ICE may mistakenly check the box indicating that a detainee "may request" IJ review. *See* Dkt. 21-3, 21-18; *see also* Dkt. 21 at 47 (explaining that the I-286 provides an "accurate summary" of mandatory detention by informing a detainee held under § 1226(c) that he may not seek IJ review of his custody).

finding that it was not properly before them. *Demore*, 538 U.S. at 514 n.3 (the Court had "no occasion to review the adequacy of *Joseph* hearings generally"); *id*. at 531-32 (Kennedy, J., concurring) (same); *Diop*, 656 F.3d at 231 n.8 (the "constitutional adequacy of a *Joseph* hearing" is an "open" issue).

In contrast to the petitioner in *Demore*, the mandatory detention of LPRs, such as Plaintiffs, with substantial challenges to removal does raise serious constitutional concerns. *See Demore*, 538 U.S. at 577 (Breyer, J., dissenting) (concluding that the constitutional claim to bail where a noncitizen raises a substantial challenge to removal is "strong"); *accord Tijani*, 430 F.3d at 1244, 1246-47 (Tashima, J., concurring) (concluding that *Joseph* standard is "egregiously" unconstitutional in case of LPR challenging deportability); *Papazoglou v. Napolitano*, No. 1:12-cv-00892, 2012 WL 1570778, *5 (N.D. Ill. May 03, 2012) (mandatory detention of LPR whom the IJ had granted new adjustment of status to lawful permanent residence "present[ed] a question of constitutionality"); *see also Krolak v. Ashcroft*, No. 04-C-6071 (N.D. Ill. Dec. 1, 2004) (mandatory detention of LPR raising "colorable" claim to citizenship violates due process).

This is so for two reasons. First, LPRs with substantial challenges to removal that will allow them to retain their LPR status possess particularly strong liberty interests. *See Landon*, 459 U.S. at 32 ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly"); *Patel v. Zemski*, 275 F.3d 299, 307 (3d Cir. 2001), *rev'd on other grounds, Demore v. Kim*, 538 U.S. 510 (2003).

At the same time, the government's countervailing interest in mandatory detention is far weaker. Such individuals do not pose the categorical flight risk that Congress sought to prevent

when enacting mandatory detention for a limited class of noncitizens, *see Demore*, 538 U.S. at 520-21, as they have strong incentives to appear for their proceedings, *see United States v. Castiello*, 878 F.2d 554, 555 (1st Cir. 1989) (holding that, "as a matter of common sense, the likelihood of succeeding on appeal is relevant to flight risk"). This is particularly so for LPRs seeking cancellation, which is granted in a large percentage of cases. *See* Lauterback Decl. ¶ 22 (summarizing EOIR data showing that detainees in the Elizabeth, Newark, and Varick Street Immigration Courts were granted LPR cancellation in nearly 67% of cases between October 2009 and August 2011).[8]

Nor do LPRs with substantial challenges to removal present the categorical risk to public safety that Congress had in mind when it enacted § 1226(c). Many such LPRs will ultimately be found not to have committed offenses that render them removable on the grounds that Congress determined warranted mandatory detention. Moreover, LPRs who are removable on those grounds, but are still eligible for discretionary relief such as cancellation, do not pose the kind of *per se* danger that Congress envisioned when it mandated detention for certain serious criminals whose ties to the country it found to be categorically outweighed by the potential gravity of their crimes. Otherwise, Congress would not have preserved their eligibility for discretionary relief, which would allow them to remain at liberty in the United States permanently.[9]

[8] *Cf. INS v. St. Cyr*, 533 U.S. 289, 296 & n.5 (2001) (relying on statistic that a "substantial percentage"—over 50%—of applications for former INA § 212(c) relief—the predecessor form of cancellation of removal—were granted from 1989 to 1995).

[9] For this reason, the *Joseph* standard is also an arbitrary and capricious interpretation of § 1226(c) because it is "unmoored from the purposes and concerns" of § 1226(c)—*i.e.*, the prevention of flight and danger. *Judulang v. Holder*, 132 S.Ct. 476, 490 (2011); *cf. Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring) (noting that "aliens are entitled to be free from detention that is arbitrary or capricious" in light of the purposes of the statute (internal quotation marks omitted)). As a result, *Joseph* is not entitled to this Court's deference. In addition, LPRs with substantial challenges to removal are particularly vulnerable to unreasonable periods of

Defendants nowhere acknowledge that the mandatory detention of such LPRs is distinct from the detention at issue in *Demore*. Instead, Defendants emphasize that *Demore* upheld the mandatory detention of individuals who ultimately may not be removed. *See* Dkt. 21 at 40-41. But Plaintiffs do not argue that constitutional concerns arise whenever an individual who may not ultimately be removed is subjected to mandatory detention. This position would prove too much, as § 1226(c) by definition provides for the mandatory detention of noncitizens *pending* a decision on removal.

Indeed, there are many classes of noncitizens for whom mandatory detention does not raise the same constitutional concerns. First, many LPRs—and in particular, those convicted of aggravated felonies—have no challenges to removal apart from withholding of removal, or withholding or deferral of removal under CAT. *See* 8 U.S.C. § 1229b(a)(3); 8 C.F.R. § 1208.16. The mandatory detention of such individuals does not raise the same constitutional concerns—even though those individuals ultimately may not be removed—because these claims do not permit individuals to maintain or obtain LPR status, or any legal status, for that matter.[10] Moreover, such individuals *may* be removed if, for example, conditions in their countries of origin improve, or if the government identifies a third country of removal.

Second, in a large number of cases, the mandatory detention of non-LPRs who have substantial challenges to removal on the grounds that subject them to mandatory detention will

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mandatory detention that the Third Circuit held unlawful in *Diop*, as they are likely to suffer prolonged detention while pursuing their defenses to removal.

[10] For this reason, the Supreme Court's recognition, in a footnote, that Respondent Kim might not "ultimately be deported," *Demore*, 538 U.S. at 522 n.6, does not support Defendants' position. *See* Dkt. 21 at 40. That footnote refers only to the fact that Mr. Kim was applying for withholding of removal. An individual granted withholding is still "deportable"; his removal merely cannot be effectuated to a country where he would face persecution. Thus, even if Mr. Kim ultimately won withholding—and thus avoided removal—he still would have been found "deportable" and, indeed, received a final order of removal.

not raise the same constitutional concerns. Such individuals may still be removable on other grounds, or eligible only for relief—such as voluntary departure, or withholding or deferral of removal—that would not grant them LPR status either. Of course, other non-LPRs do have substantial claims to cancellation of removal, *see* 8 U.S.C. § 1229b(b), or adjustment of status, *see* 8 U.S.C. § 1255, that would grant them LPR status. The mandatory detention of this subset of non-LPRs thus raises serious due process concerns, despite their current lack of LPR status.

1. The Joseph Standard Raises Serious Constitutional Concerns By Misallocating The Burden Of Proof.

As set forth above, the *Joseph* standard raises constitutional concerns because it improperly places the burden on LPRs to show that the government is "substantially unlikely" to prevail on the charges that trigger the statute in order to avoid mandatory detention. This approach turns Supreme Court precedent on its head. Because detention is so severe a deprivation of liberty, the Supreme Court has consistently required that *the government* justify an individual's inclusion under a civil detention scheme, and under a heightened standard of proof. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418, 431-33 (1979); *United States v. Salerno*, 481 U.S. 739, 750–51 (1987). Due process requires that the government carry such a heightened burden of proof because of the "value society places on individual liberty," *Addington*, 441 U.S. at 425 (internal quotation marks omitted), and "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," *Salerno*, 481 U.S. at 755; *see also Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (observing that the "standard of proof . . . reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants").

In *Foucha v. Louisiana*, 504 U.S. 71 (1992), for example, the Court struck down a civil detention statute under which "the State need prove nothing to justify continued detention, for

the statute places the burden on the detainee to prove that he is not dangerous." *Id.* at 81-82; s*ee also Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) ("[D[ue process places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake are both particularly important and more substantial than mere loss of money.'") (quotation marks and alteration omitted) (quoting *Santosky*, 455 U.S. at 756)). By placing a heightened burden of proof on the *detainee* instead of the government, the *Joseph* standard mandates a standard and burden of proof that the Supreme Court has clearly deemed inadequate for individuals threatened with detention.

Defendants do not even acknowledge, much less distinguish, this case law, but simply assert that the existing *Joseph* procedures resolve any constitutional concerns. *See* Dkt. 21 at 49. But the BIA's analysis fails to properly address whether the burden of proof assigned by the *Joseph* standard "fairly allocates the risk of error between the parties" in light of "the private and public interests at stake" in mandatory detention. *E.B. v. Verniero*, 119 F.3d 1077, 1110 (3d Cir. 1997). Notably, the BIA decided *Joseph* prior to the Supreme Court's acknowledgment in *Zadvydas* that immigration detention requires a "strong" justification to "outweigh[]" its severe deprivation of liberty, as well as "strong" procedural safeguards. *See Zadvydas*, 533 U.S. at 690-91. The BIA did not take these due process requirements into account, ruling instead that the IJ must have "*very substantial grounds* to override the custodial effect of the [government's] charge." *Joseph*, 22 I&N Dec. at 806 (emphasis added).

As noted by the dissent in *Joseph*, this approach is "inappropriately deferential" to the government in light of the "constitutionally-protected liberty interests" of LPRs subjected to mandatory detention. *Id*. at 809-10 (Schmidt, concurring in part and dissenting in part). Indeed, by placing a nearly "insurmountable" burden on the individual to prove he is not subject to

mandatory detention, the *Joseph* standard almost entirely places the risk of error on the detainee, while "plac[ing] little to no risk [of error] on the broad shoulders of the government." *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring). Clearly, such a blatant misallocation of the burden of proof raises serious due process concerns.[11]

2. The *Joseph* Hearing Lacks Other Basic Safeguards.

Furthermore, the government's hearing procedures fail to provide detainees with basic procedural protections, much less the "strong" protections that due process requires. *See Zadvydas*, 533 U.S. at 690-91; *Diop*, 656 F.3d at 231.[12] First, the government fails to provide adequate notice of an individual's right to contest his mandatory detention. *See Vitek v. Jones*, 445 U.S. 480, 495 (1980) (affirming order requiring civil commitment to include "effective" notice of prisoner's procedural rights). Instead, the government provides a document—the Form I-286—that (1) informs an individual held under § 1226(c) that he "*shall* be detained in the custody of the [DHS]" pending a determination on removal, and (2) misinforms him through a checkbox that he "may not request a review of *this determination* by an [IJ] because the [INA] prohibits [his] release from custody." *See* Dkt. 13-7 (I-286 for Mr. Francois) (emphases added). Thus, the I-286 clearly misinforms a detainee held under § 1226(c) that he may *not* seek IJ review of ICE's decision to subject him to mandatory detention. Such misleading "notice" does not satisfy due process. *See United States v. Charleswell*, 456 F.3d 347, 357-58 (3d Cir. 2006)

[11] *See also Verniero*, 119 F.3d at 1111 ("Because 'the possible injury to the individual . . . is significantly greater than any possible harm to the state,' the [individual], consistent with due process, cannot 'be asked to share equally with society the risk of error.'" (quoting *Addington*, 441 U.S. at 427)).

[12] The government notes that Congress has enacted its detention rules pursuant to its plenary power over immigration. *See* Dkt. 21 at 44-45. But the government does not—and could not—dispute that, notwithstanding its plenary power, immigration detention must still comport with due process, and thus bear a "reasonable relation to its purpose" and be accompanied by "strong" procedural safeguards. *See Zadvydas*, 533 U.S. at 690-91 (internal quotation marks omitted).

(notice of reinstatement form misled petitioner to believe he had no opportunity for judicial review and thus rendered his proceedings fundamentally unfair).

The government asserts that the I-286 accurately reflects that individuals properly subject to § 1226(c) are ineligible for release on bond. *See* Dkt. 21 at 47. But that is irrelevant: the issue is whether the form provides accurate notice of the detainee's right to contest his mandatory detention at a hearing, which it clearly does not. Indeed, the government essentially concedes that it fails to provide notice of the availability of such a hearing in any systematic way. *See* Dkt. 21 at 46-47.[13]

Nonetheless, the government points to additional checkboxes towards the bottom of the form where a detainee can indicate whether he "do[es]" or "do[es] not request a redetermination of this custody decision by an [IJ]." Dkt. 13-7. This argument is disingenuous at best: these boxes do not cure the misleading nature of the form, which clearly states that an individual whose detention is mandatory cannot request IJ review. *See id.* Moreover, the fact that all three Plaintiffs checked the box requesting IJ review—as even Mr. Francois did, notwithstanding the fact that his notice stated that he was ineligible for such review—did not lead the government to provide any of the Plaintiffs with a *Joseph* hearing with regard to his mandatory detention.[14] *See* Gayle Decl. ¶¶ 1-2 ; Francois Decl. ¶¶ 3-4; Sukhu Decl. ¶¶ 3-5.

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[13] Although the government did indicate on Mr. Gayle and Mr. Sukhu's I-286s that they were entitled to request IJ review, these notices were clearly in error, presumably because ICE did not recognize at the time that they were subject to mandatory detention. Defendants concede that, for individuals subject to mandatory detention, the I-286 is intended to advise them that they have no right to request a hearing before an IJ. *See* Dkt. 21 at 47.

[14] Nor does the fact that a detainee may make a written or oral request for a *Joseph* hearing cure this lack of notice, as the government suggests. *See* Dkt. 21 at 47. The issue raised here is not whether a detainee has the opportunity to request a hearing in court, but rather whether he receives *notice* of his right to do so in the first place. Similarly without merit is Defendants' suggestion that publication of 8 C.F.R. § 1003.19(h)(2)(ii) provides sufficient notice of the right to a hearing. *See* Dkt. 21 at 4, 48 n.17. Defendants cite *Cervase v. Office of Fed. Register*, 580

In addition, the *Joseph* hearing lacks any contemporaneous record of the hearing to ensure a meaningful right of appeal. As the Third Circuit has recognized, "a complete record of the proceeding" is one "of the most basic of due process protections." *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996). Indeed, courts have long required a record of "'sufficient completeness'" to guard against the erroneous deprivation of individual liberty. *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011) (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 194 (1971)). Although such a record need not always be a verbatim transcript, due process requires that the government provide at least an "equivalent report of the events at trial," *Mayer*, 404 U.S. at 194 (internal quotation marks omitted), such as a recording of the proceedings. Moreover, the burden on the government of providing such a recording is minimal given that the immigration courts are already equipped with recording devices and routinely record merits hearings. *See Singh*, 638 F.3d at 1209.[15]

C. This Court Should Construe § 1226(c) Not To Authorize The Mandatory Detention Of Individuals With Substantial Challenges To Removal On The Grounds Alleged To Trigger Mandatory Detention, And To Require Constitutionally Adequate Hearing Procedures.

Given the serious constitutional concerns presented by mandatory detention under the *Joseph* standard and the agency's hearing procedures, the rule of constitutional avoidance requires construing § 1226(c) not to authorize the mandatory detention of individuals with

F.2d 1166, 1168-70 (3d Cir. 1978), but the case only addressed a statutory requirement that agency law be published; it did not address the requirements of due process. Publication of a regulation in the Federal Register is obviously inadequate to inform detained persons of their right to a hearing.

[15] The government cites the EOIR practice manual and BIA case law to assert that no transcript is required, *see* Dkt. 21 at 51, but agency guidance cannot override the constitutional requirement that immigration detention be accompanied by "strong" procedural protections. *See Zadvydas*, 533 U.S. at 690-91; *Singh*, 638 F.3d at 1208-09.

substantial challenges to removal on the grounds alleged to trigger mandatory detention, and to require a constitutionally adequate hearing to determine whether the statute applies.[16]

Under the avoidance canon, a statute must be read to avoid serious constitutional concerns unless no other construction is "'fairly possible.'" *Zadvydas*, 533 U.S. at 689 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381. The Supreme Court has consistently applied the avoidance canon to the immigration statutes. Thus, in *Zadvydas*, the Court held that the detention statute governing post-final order detention, 8 U.S.C. § 1231(a)(6), was insufficiently clear to authorize prolonged and indefinite detention. 533 U.S. at 697 ("[I]f Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."); *see also id*. at 689, 699. Similarly, in *Diop*, the Third Circuit held that § 1226(c) was not sufficiently clear to authorize "prolonged, unreasonable, detention without a bond hearing," and construed the statute to contain "an implicit limitation of reasonableness." *Diop*, 656 F.3d at 235.

Applying the avoidance canon here, § 1226(c) should be construed not to apply where an individual—whether an LPR or not—raises a substantial challenge to removal on the grounds alleged to trigger mandatory detention, unless no other construction is "fairly possible."

[16] The government asserts that *Joseph* warrants *Auer* deference because the BIA was construing its own regulations. Dkt. 21 at 44 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)). But the regulations simply authorize an IJ to determine whether an individual is "deportable" or "inadmissible," and thus "properly included," under § 1226(c). *See* 8 C.F.R. § 1003.19(h)(2)(ii) & (h)(2)(i)(D). Because "the underlying regulation does little more than restate the terms of the statute itself," *Auer* deference does not apply. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). And in any event, where possible, regulations must be construed to avoid constitutional problems. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 599 (1953). Moreover, any regulation that is inconsistent with § 1226(c) as construed to avoid constitutional problems is ultimately *ultra vires*.

Zadvydas, 533 U.S. at 689. It is indisputable such a construction is "fairly possible" here. Section 1226(c) is not sufficiently clear to authorize detention under the *Joseph* standard. Indeed, if Congress had intended for mandatory detention to apply to any individual who was merely charged with deportability on a ground designated under the statute, it could have said so, instead of using the language it chose: "is deportable" and "is inadmissible."

Significantly, the *Joseph* standard is not required by either the plain language of § 1226(c) or its implementing regulations, which 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. *See Demore*, 538 U.S. at 578 (Breyer, J., dissenting) (observing that "the relevant statutes literally say nothing about an individual who, armed with a strong argument against deportability, might, or might not, fall within their terms"). 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. *See* 8 U.S.C. § 1229a(c)(3)(A) (placing burden on government to "establish[] by clear and convincing evidence that . . . the alien is deportable"); *id.* § 1229a(c)(2)(A) (placing burden on alien applying for admission to show "clearly and beyond doubt" that he is "entitled to be admitted and is not inadmissible under [8 U.S.C. § 1182]").

Moreover, although *Joseph* interprets the terms "deportable" and "inadmissible" in § 1226(c) to refer to the government's *charges* of removability, *see Joseph*, 22 I&N Dec. at 800, those terms—as well as the related term, "removable"—are ambiguous and used in different ways. Thus, the terms may merely describe someone who is potentially subject to the grounds of removability, or may instead refer to an actual finding of removability and a finding on relief. *See, e.g.*, 8 U.S.C. § 1101(a)(47) (using "deportable" to refer to "order of deportation," which

includes a decision on both removability and relief); *id.* § 1229a(c)(1)(A), (c)(5) (using "removable" to refer to a "removal order," which includes a decision on both removability and relief). Notably, § 1226(c) does *not* use language, as do other statutory provisions, that would plainly require the detention of individuals who are merely "charged" as deportable or inadmissible, or who "may be" deportable or inadmissible. *Cf., e.g.*, 8 U.S.C. § 1222(b) (providing for the "detention and examination of all arriving aliens *who it is suspected* may be inadmissible" on medical grounds (emphasis added)); *id.* § 1235(c) (providing for expedited removal of individuals who "*may be* inadmissible" on specified grounds (emphasis added)).

Clearly then, it is "fairly possible" to construe § 1226(c) to avoid the constitutional concerns presented by the *Joseph* standard. Indeed, in his dissent in *Demore*, Justice Breyer proposed the very construction endorsed here—that § 1226(c) does not apply to an individual with a substantial challenge to removal—in order to avoid the constitutional concerns that would otherwise be raised by subjecting LPRs with substantial challenges to removal to mandatory detention. Under his construction, modeled after federal bail standards for criminal defendants, a noncitizen who raises a "substantial question" as to removability, or a "substantial" claim to discretionary relief, would be neither "deportable" nor "inadmissible" under § 1226(c), and would thus be entitled to a bond hearing. As Justice Breyer explained, this standard—which the majority in *Demore* did not reject[17]—"give[] considerable weight to any special governmental interest in detention" while being appropriately "more protective of a detained alien's liberty interest." *Demore*, 538 U.S. at 578 (Breyer, J., dissenting) (citing 18 U.S.C. § 3143); *see also Tijani*, 430 F.3d at 1247 (Tashima, J., concurring) (same); *Papazoglou*, 2012 WL 1570778, at *5

[17] The majority in *Demore* did not address Justice Breyer's construction because Mr. Kim had conceded that he was deportable and properly subject to § 1226(c). *See, e.g.*, *Demore*, 538 U.S. at 513-14. Thus, the Court had no occasion to reach Plaintiffs' statutory argument.

(mandatory detention of individual with a "legitimate and good faith" challenge to removal violates due process); *Krolak*, No. 04-C-6071 at *1 (same, where individual has a "colorable" challenge to removal). This Court should adopt the same construction here.

Moreover, § 1226(c) must be interpreted in the same manner for all the individuals to whom it applies—that is, to LPRs and non-LPRs alike. This is because, like the statute in *Clark*, § 1226(c) "appl[ies] without differentiation to all [noncitizens] that are its subject." *Clark*, 543 U.S. at 378. Thus, the Supreme Court in *Clark* applied the construction of § 1231(a)(6) it adopted in *Zadvydas* to all classes of noncitizens subject to detention under the statute, regardless of whether their indefinite detention raised the same constitutional concerns as the indefinite detention of the admitted noncitizens in *Zadvydas*. *Id*. As the Supreme Court explained, courts must avoid interpretations that raise constitutional problems in some of the statute's applications "whether or not those constitutional problems pertain to the particular litigant before the Court." *Id*. at 381; *see also id*. at 380 (explaining that "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern").

Like the statute in *Clark*, the operative phrases of § 1226(c)—"is deportable" and "is inadmissible"—"appl[y] without differentiation to all [noncitizens] that are its subject." *Id*. at 378. Thus, whether any given detainee under § 1226(c) is an LPR is irrelevant to how the statute must be construed. "What matters is that [§ 1226(c)] . . . applies to some [LPRs]." *Diouf*, 634 F.3d at 1088 (citing *Clark*, 543 U.S. at 380-81). Indeed, "[t]o give these same words a different meaning for each category [of noncitizen] would be to invent a statute rather than interpret one." *Clark*, 543 U.S. at 378.

Section 1226(c) is also silent as to the hearing procedures required to determine whether a noncitizen is subject to mandatory detention. Thus, in the absence of any evidence that Congress intended otherwise, this Court should construe § 1226(c) to require that the government provide a hearing with adequate notice and a contemporaneous record of proceedings, and to require that the government bear the burden of showing that the individual lacks a substantial challenge to removal in order for mandatory detention to apply. *Cf. Diop*, 656 F.3d at 235 (construing the statute to require a bond hearing where government bears the burden of proof of justifying continued detention beyond a reasonable period of time). Specifically, a reasonable construction of the statute would place the initial burden on the government to charge deportability or inadmissibility on a ground that triggers the statute;[18] provide an opportunity for the detainee to show that she has a substantial challenge to removal, and is thus not properly subject to mandatory detention; and an opportunity for the government to rebut that showing.

Significantly, the relief Plaintiffs seek does *not* require "certitude" that the individual is deportable before he can be placed in mandatory detention, as Defendants assert. *See* Dkt. 21 at 40-41 (quoting *Diop*, 656 F.3d at 230); *id* at 49-50. Rather, the IJ would need to determine only whether the detainee has a substantial challenge to removal, though a final decision would not be made. *See United States v. Smith*, 793 F.2d 85, 88, 89-90 (3d Cir. 1986) (holding, in the context of the Bail Reform Act, that "a substantial question" is either "significant in addition to being novel, not governed by controlling precedent or fairly doubtful" or "fairly debatable"). Notably, under the current *Joseph* standard, IJs are *already* tasked with determining the government's

[18] Although Defendants complain that it would be "unworkable" for them to bear this initial burden, *see* Dkt. 21 at 48, Plaintiffs merely propose that the government have a "reason to believe" that a triggering ground of removability applies and charge the detainee accordingly, as the *Joseph* framework already requires it to do so in order to subject the detainee to mandatory detention. *See Joseph*, 22 I&N Dec. at 803.

likelihood of prevailing on its charges of removability. *Joseph*, 22 I&N Dec. at 800. Thus, the additional burden would be slight.

Finally, if and only if this Court holds that § 1226(c) *does* authorize mandatory detention under the *Joseph* standard and the agency's existing hearing procedures, the statute as applied to Plaintiffs—who are all LPRs with substantial challenges to removal—is unconstitutional. *See* Point I.B, *supra*.

II. MR. SUKHU'S MANDATORY DETENTION HAS EXCEEDED OR WILL LIKELY EXCEED A REASONABLE PERIOD OF TIME.

In addition, because Mr. Sukhu's prolonged mandatory detention has exceeded a reasonable period of time, pursuant to *Diop*, this Court should order the government to provide him an immediate bond hearing at which the government will bear the burden of justifying his continued detention.

In *Diop*, the Third Circuit held that the Due Process Clause permits mandatory detention for only a "reasonable period of time," and construed § 1226(c) to authorize mandatory detention for only a reasonable period. When detention exceeds that period, the noncitizen 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. 656 F.3d at 223.

As *Diop* explained, reasonableness is a "function of the length of the detention." *Id*. at 232. Thus, a period of mandatory detention will become "unreasonable" at some point in time. *Id*. Although the Court did not set a specific length of time at which mandatory detention becomes "unreasonable," it made clear that the "constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [the average one-and-a-half to five-month] thresholds" for removal proceedings contemplated by the Supreme Court in *Demore*. *Diop*, 656 F.3d at 234. Thus, as this Court has explained, "any

detention exceeding five months is presumptively unreasonable." *Nwozuzu v. Napolitano*, 2012 WL 3561972, at *4 (D.N.J. Aug. 16, 2012).

Mr. Sukhu's prolonged mandatory detention clearly exceeds a reasonable period of time. He already has been detained more than 17 months pending proceedings before the IJ—a period that far exceeds the thresholds in *Demore*. Indeed, Mr. Sukhu's imprisonment surpasses by more than 11 times the average 47 days *Demore* contemplated for the 85% of detainees whose cases conclude before the IJ, and by more than three times the average five month period contemplated for those 15% of detainees who appeal their cases to the BIA. *See Demore*, 538 U.S. at 529-30.

Mr. Sukhu's prolonged mandatory detention is particularly unreasonable given the government delays that have extended his removal case. *See Diop*, 656 F.3d at 234. Notably, *Diop* made clear that detainees are *not required* to show error or delay by the government in order for mandatory detention to be unreasonably prolonged. Rather, the Court specifically recognized that "individual actions by various actors in the immigration system, each of which takes only a reasonable amount of time to accomplish, can nevertheless result in the detention of a removable alien for an unreasonable, and ultimately unconstitutional, period of time." *Id*. at 223. However, as in *Diop*, the delay in Mr. Sukhu's case makes it especially clear that his detention is unreasonably prolonged.

First, Mr. Sukhu's proceedings have been delayed by backlogs on the immigration court calendar. As the government concedes, these delays include the nine-week period between the April and July 2012 master calendar hearings. *See* Dkt. 21 at 54 n.19. The Court was also unable to schedule Mr. Sukhu's individual hearings until October 2012 and March 2013, resulting in an additional three-month delay and a two-and-a-half-month delay, respectively, for a total of approximately eight months.

Second, and more importantly, Mr. Sukhu's adjustment application has been delayed by the government's belated challenge to his inadmissibility waiver. The government raised an entirely new argument in October 2012—that a heightened standard of proof applied to his waiver application due to the nature of his 1997 offense—even though the government was aware of this conviction at the outset of his proceedings, and even though Mr. Sukhu had filed his adjustment application and waiver in February 2012. As a result of this delay, there will be no final ruling on Mr. Sukhu's application for relief until March 2013 at the earliest—an additional delay of approximately five months.

Nonetheless, the government asserts that Mr. Sukhu is responsible for any delay in his removal case. *See* Dkt. 21 at 53-54. This argument mischaracterizes Mr. Sukhu's proceedings and conflicts with Third Circuit precedent. Mr. Sukhu requested only three continuances: (1) a two-month continuance from September to November 2011 to obtain counsel; (2) a two-month continuance from November 2011 to January 2012 to prepare his motion to terminate; and (3) a nine-day continuance in October 2012 due to a medical emergency that befell Mr. Sukhu's counsel.[19] These continuances were entirely reasonable based on the "exigencies of [his] case," and hardly constitute unreasonable delay. *Diop*, 656 F.3d at 234.

First, the two-month continuance for Mr. Sukhu to retain counsel was not unreasonable. As the Third Circuit has recognized, noncitizens have a statutory and constitutional right to seek counsel in removal proceedings. *Leslie v. Attorney General*, 611 F.3d 171, 180-81 (3d Cir. 2010); *see also* 8 U.S.C. § 1229a(b)(4)(A). The right to counsel is a fundamental component of the noncitizen's right to fairly present his claims. *See Leslie*, 611 F.3d at 181; *see also Ardestani*

[19] The IJ adjourned the case in January 2012 for the benefit of *both* parties, so that the government could produce Mr. Sukhu's plea minutes and Mr. Sukhu could prepare a reply brief and adjustment application. *See* Gillman Decl. ¶ 13.

v. INS, 502 U.S. 129, 138 (1991) (noting that "the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important").[20] Nor are continuances to obtain counsel unusual, but rather are the most common reason for adjournment. *See* Lauterback Decl., Ex. L (Office of the Inspector General, Management of Immigration Cases and Appeals by the Exec. Office for Immigration Rev. 31 (2012)). And the government has itself acknowledged that allowing a detainee to obtain counsel promotes the *speedier* resolution of immigration proceedings. *See id.* at 33.

Second, the two-month continuance from November 2011 to January 2012 was necessary for Mr. Sukhu's counsel, who had only just appeared in the case, to prepare his motion to terminate. Because this time was necessary for Mr. Sukhu to prepare a *bona fide* challenge to removal, it cannot be used to justify his prolonged mandatory detention. As the Third Circuit held in *Leslie v. Attorney General*, "'[a]lthough an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take.'" 678 F.3d 265, 271 (3d Cir. 2012) (quoting *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003)); *accord Nwozuzu*, 2012 WL 3561972 at *4. Indeed, "[t]o conclude that [a detainee's] voluntary pursuit of such challenges renders the corresponding increase in time of detention reasonable, would effectively punish [him] for pursuing applicable legal remedies"—a result the Court squarely rejected. *Leslie*, 678 F.3d at 271 (internal quotation marks omitted). Although the government suggests that this Court should fault Mr. Sukhu because the IJ denied his motion to terminate, *see* Dkt. 21 at 53, this Court has refused to penalize a detainee for pursuing a "*bona fide* legal argument,"

[20] A recent study in New York determined that "having representation and being free from detention" are the two most important variables affecting the ability to win a removal case. Lauterback Decl., Ex. M (Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* 3 (2011)). Detainees with counsel were almost six times more likely to win their cases than detainees without counsel. *Id*. at 19-20.

even if that argument is rejected. *Nwozuzu*, 2012 WL 3561972, at *5.[21] Finally, the nine-day continuance due to his attorney's medical emergency scarcely constitutes unreasonable delay.

In addition, Mr. Sukhu faces an unreasonable period of future mandatory detention, as it is entirely likely that it will take more than another year until his case is finally resolved. *See* Gillman Decl. ¶¶ 25-27.[22] The prospect of such detention makes his continued detention unreasonable. *See, e.g.*, *Tijani*, 430 F.3d at 1242 (noting that, in ordering the petitioner a bond hearing, the "the foreseeable process" of his appeal of removal "is a year or more"); *Alli v. Decker*, 644 F. Supp. 2d 535, 543-44 (M.D. Pa. 2009); (considering the "probable extent of future removal proceedings" in assessing the reasonableness of mandatory detention), *rev'd on other grounds*, 650 F.3d 1007 (3d Cir. 2011); *Madrane v. Hogan*, 520 F. Supp. 2d 654, 667 (M.D. Pa. 2007) (noting that "the forecast of additional future appeals or proceedings that could result in Petitioner being detained for many [additional] months"); *Gupta v. Sabol*, 2011 WL

[21] Indeed, Mr. Sukhu is likely to show on appeal that the IJ erred in applying the Attorney General's opinion in *Matter* of *Silva-Trevino* to deem his 1997 conviction a CMT. See 24 I&N Dec. 687, 699 (AG 2008) (allowing an IJ to consider evidence beyond the record of conviction, where "necessary and appropriate," to determine whether an offense is a CMT). Notably, three circuits—including the Third Circuit—have already rejected *Silva-Trevino*, *see Jean-Louis v. Attorney General*, 582 F.3d 462, 470 (3d Cir. 2009); *Fajardo v. U.S. Attorney General*, 659 F.3d 1303, 1310 (11th Cir. 2011); *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010), and the Second Circuit has continued to apply the traditional categorical and modified categorical approach after *Silva-Trevino*. *See* Gillman Decl., Ex. C at 3 n.4 (citing cases). Indeed, the IJ himself opined that the Second Circuit was likely to reject *Silva-Trevino*, but held that he was bound by the Attorney General's opinion. *See id.* ¶ 17.

[22] Mr. Sukhu's merits hearing will not take place until March 7, 2013. Gillman Decl. ¶ 24. Thus, he will remain in mandatory detention until at least that time, for a total period of nearly 19 months. Even if Mr. Sukhu wins adjustment of status before IJ, the government may appeal to the BIA, and it will take at least an additional three to four months for the BIA to render a decision, during which time Mr. Sukhu will remain in mandatory detention. *See id.* ¶ 27; *Joseph*, 22 I&N Dec. at 801. Alternatively, if he loses, he will pursue an appeal to the BIA, and to the Court of Appeals if necessary; it will likely take well over a year for this appeal to be decided, subjecting Mr. Sukhu to further prolonged mandatory detention. Gillman Decl. ¶ 25-26; *see* Lauterback Decl., Ex. N (Administrative Office of the U.S. Courts, Judicial Business of the U.S. Courts, Table B-4C (reporting median time of 14 months for agency appeals in the Second Circuit from September 2010 to September 2011)).

3897964, at *3 (M.D. Pa. Sept. 6, 2011) (noting that petitioner's "administrative and appellate process will be time-consuming and could result in petitioner being detained for many [additional] months").[23]

CONCLUSION

For the foregoing reasons, this Court should (1) deny the Defendants' request for dismissal; (2) order that government provide Mr. Gayle, Mr. Francois, and Mr. Sukhu a constitutionally-adequate hearing to determine whether they have substantial challenges to removal and are therefore not subject to § 1226(c); (3) declare that Mr. Gayle is not subject to § 1226(c) because he was not taken into immigration custody "when . . . released" from the criminal custody related to his detention and order that the government provide him an immediate bond hearing; and (4) declare that that Mr. Sukhu's mandatory detention has already exceeded, or will exceed, a reasonable period of time, and order an individualized hearing where the government must show his continued detention is necessary based on flight risk or danger.

[23] Petitioner Gayle continues to argue that his mandatory detention is not authorized by § 1226(c) because he was not taken into custody "when . . . released" from criminal custody for his predicate offense, but more than five years afterwards. He incorporates by reference the arguments set forth in his Reply in support of his individual habeas claims. *See* Dkt. 23 at 3-14.

Respectfully Submitted,

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