

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

AUGUSTIN SAJOUS,
on behalf of himself and all others similarly situated,
Plaintiff-Petitioner,

v.

THOMAS DECKER,
as Field Office Director,
New York City Field Office,
U.S. Immigration & Customs Enforcement;
THOMAS FEELEY,
as Field Officer Director,
Buffalo Field Office,
U.S. Immigration & Customs Enforcement;
JEFFREY SEARLS
as Assistant Field Office Director,
Buffalo Field Office,
U.S. Immigration & Customs Enforcement;
KIRSTJEN NIELSEN
as Secretary,
U.S. Department of Homeland Security;
JAMES MCHENRY,
as Director,
Executive Office for Immigration Review.
JEFFERSON B. SESSIONS,
as Attorney General,
U.S. Department of Justice;
Defendants-Respondents.

Each Defendant-Respondent is sued in his/her official capacity.

No. 18-cv-2447 (AJN)

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

CLASS ACTION

INTRODUCTION

1. This class action challenges the federal government’s recent decision to deny certain immigrants the opportunity to seek release from detention while they contest their deportation, even when many pose no risk to public safety or risk of flight and ultimately will win their immigration cases and remain in the United States. As a result of this recent change, these immigrants face the prospect of prolonged and even indefinite detention in jail, resulting in

destruction of familial and social relations, loss of their livelihoods, and irreparable emotional, psychological, and even physical harm.

2. Plaintiff-Petitioner Augustin Sajous is one victim of this recent change. He is a sixty-year-old longtime lawful permanent resident who came to the United States at the age of fourteen but now faces deportation to Haiti based on two convictions for misusing subway MetroCards for which he served 60 days in jail in 2015. After being taken into immigration custody in September 2017, Mr. Sajous had a hearing scheduled for March 19, 2018, at which an immigration judge would determine whether he should be released. At the last minute, however, that hearing was canceled under the federal government's new practice. As a result, Mr. Sajous, who suffers from schizophrenia and who now has been held in immigration custody for nearly 200 days, faces the prospect of indefinite detention in a jail while he contests the government's misguided efforts to deport him.

3. In the coming months, scores of other immigrants in this class-action case would have had hearings at which immigration judges would have determined whether to release them if the judges found them not to pose a public-safety or flight risk. Under the government's new practice, however, none of them will receive those hearings and thus will languish in jail.

4. The government ended its practice of providing hearings to immigrants in New York following a February 2018 United States Supreme Court decision in a case out of California in which the Court held that federal immigration law does not allow such hearings. But the Supreme Court expressly declined to consider whether the Due Process Clause of the United States Constitution independently requires such hearings and sent the case back to the federal appeals court in California to address that issue. Meanwhile, numerous federal courts in New York, including the United States Court of Appeals for the Second Circuit, have recognized that

immigrant detainees like those in this case have a constitutional due process right to these hearings. Nothing in the recent Supreme Court decision undermines that right.

5. Preventive civil detention is rare in the United States legal system and in free societies. The mandatory detention of an entire class of people without determining whether each individual's imprisonment serves a strong government interest is even more anomalous. When such detention becomes prolonged, it presents a constitutional crisis. The plaintiffs-petitioners thus seek, amongst other relief, a declaration that the government's new practice violates their due process rights and an order that would entitle them to the same hearings the government had provided until last month.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. 2241 (habeas corpus), 28 U.S.C. § 1651 (All Writs Act), 28 U.S.C. § 1361 (mandamus), 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act), the Suspension Clause of Article I of the U.S. Constitution, the Due Process Clause of the Fifth Amendment to the United States Constitution, and Article III of the United States Constitution.

7. The federal government has waived its sovereign immunity and permitted judicial review of agency action under 5 U.S.C. § 702. Moreover, sovereign immunity does not bar claims against federal officials seeking solely to prevent future violations of federal law.

8. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. §§ 1391(b), (e), because the defendants-respondents are officers or employees of the United States acting in their official capacities, and a substantial part of the events giving rise to these claims occurred in the Southern District. Venue is also proper under 28 U.S.C. §§ 2241 *et seq.*, because the defendants-respondents exercise control over the plaintiffs-petitioners' custody, the plaintiff-

petitioner was detained in the custody of the defendants-respondents within the Southern District at the time this Court assumed jurisdiction over his petition for a writ of habeas corpus, and the federal government is prosecuting his removal proceedings within the Southern District at the immigration court located at 201 Varick Street in New York City.

PARTIES

9. Plaintiff-Petitioner (hereinafter, “the plaintiff”) Augustin Sajous is a citizen of Haiti. He has been detained under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1226(c), for over six months while his removal case has been pending. He has never been afforded a hearing to determine whether his prolonged incarceration is justified.

10. Defendant-Respondent Thomas Decker is the Field Office Director of the New York City Field Office of U.S. Immigration and Customs Enforcement (“ICE”), which has jurisdiction over Mr. Sajous and individuals with removal proceedings pending at the Varick Street Immigration Court in New York City. He is a legal custodian with authority over such individuals’ detention and is named in his official capacity.

11. Defendant-Respondent Thomas Feeley is the Field Office Director of the Buffalo Field Office of ICE, which has jurisdiction over individuals with removal proceedings pending at the Batavia Immigration Court in Batavia, New York. He is a legal custodian with authority over such individuals’ detention and is named in his official capacity.

12. Defendant-Respondent Jeffrey Searls is an Assistant Field Office Director of the ICE Buffalo Field Office with responsibility for the Buffalo Federal Detention Facility in Batavia, New York, where the ICE Buffalo Field Office incarcerates individuals during removal proceedings at the Batavia Immigration Court located inside the Buffalo Federal Detention Facility. He is named in his official capacity.

13. Defendant-Respondent Kirstjen Nielsen is the Secretary of the U.S. Department of Homeland Security (“DHS”), an agency of the United States of which ICE is a component. She is responsible for the administration of the immigration laws. Secretary Nielsen is a legal custodian of the plaintiffs-petitioners. She is named in her official capacity.

14. Defendant-Respondent James McHenry is the Director for the Executive Office for Immigration Review (“EOIR”), which is the federal agency that operates the immigration courts. Mr. McHenry is responsible for the supervision of the Deputy Director of the EOIR, the Chairman of the BIA, the Chief Immigration Judge, the Chief Administrative Hearing Officer, and all agency personnel in the execution of their duties. He is sued in his official capacity.

15. Defendant-Respondent Jefferson Beauregard Sessions III is the Attorney General of the United States and the most senior official in the U.S. Department of Justice (“DOJ”). He has the authority to interpret the immigration laws and adjudicate removal cases. The Attorney General delegates this responsibility to the Executive Office for Immigration Review (“EOIR”), which administers the immigration courts and the Board of Immigration Appeals (“BIA”). He is named in his official capacity.

FACTS PERTAINING TO PLAINTIFF-PETITIONER

16. Augustin Sajous is a sixty-year-old Haitian man who has been a lawful permanent resident of the United States since coming here in 1972, at the age of fourteen. He has not left this country in forty-six years. As a young adult, Mr. Sajous led a productive life, working steadily and studying mechanics. In the following years, however, he experienced symptoms of schizophrenia and periods of homelessness and was convicted on various non-violent charges. Mr. Sajous has no convictions for a felony or any offense involving violence.

17. The government has charged Mr. Sajous as deportable based on two 2015 convictions for bending New York City MetroCards such that even with a zero balance they could be used to swipe through a subway turnstile, which DHS contends constitute crimes involving moral turpitude. *See* 8 U.S.C. § 1227(a)(2)(A)(ii) (providing that noncitizens convicted of two or more crimes involving moral turpitude are deportable). The first conviction, on July 6, 2015, resulted in an “A” misdemeanor conviction under New York Penal Law (“N.Y.P.L.”) § 170.20, criminal possession of a forged instrument in the third degree, with a sentence of thirty days of jail. The second conviction, on August 20, 2015, resulted in a “B” misdemeanor conviction under N.Y.P.L. §§ 110.00-170.05, attempted forgery in the third degree, with a sentence of thirty days of jail.

18. Mr. Sajous was released from criminal custody for the more recent of these two convictions in approximately August 2015.

19. DHS officers took Mr. Sajous into custody on September 21, 2017, outside of a courthouse in Brooklyn after he appeared at a hearing for charges involving drug possession and bent MetroCards, all of which have since been adjourned in contemplation of dismissal.

20. The government has imprisoned Mr. Sajous without a bond hearing for 197 days and counting since taking him into custody on September 21, 2017.

21. The government contends that Mr. Sajous’s two 2015 MetroCard-related convictions mandate his detention without bond pursuant to 8 U.S.C. § 1226(c).

22. During the first 54 days of his imprisonment, the government never brought Mr. Sajous before an immigration judge for an initial “master calendar” hearing to begin his removal proceedings. Under federal regulations, the initial master calendar hearing is when the immigration judge first gives the individual a “non-technical” explanation of his rights and the

factual allegations and removal charges against him. *See* 8 C.F.R. § 1240.10 (mandating these and other procedures at opening of removal proceedings). As a matter of practice, if the client has an attorney, immigration judges typically rely on counsel to provide the required explanation and take appropriate steps to move the case forward. The government commonly does not schedule the initial master calendar hearing at the Varick Street Immigration Court for many weeks after taking an individual into custody on charges of removability, sometimes for a period exceeding two months. Upon information and belief, delays in providing the initial master calendar hearing at Batavia Immigration Court also commonly last many weeks.

23. The government does not provide appointed counsel to immigration detainees, including indigent detainees, at any stage of removal proceedings. However, low-income detainees in New York State are provided counsel funded by New York City and/or New York State.

24. On November 13, 2017, the date of his first appearance before Immigration Judge Thomas Mulligan, Mr. Sajous first met an immigration attorney from Brooklyn Defender Services, Jesse Rockoff, who entered an appearance to represent him.

25. On November 21, 2017, Mr. Rockoff, having learned that Mr. Sajous had been the subject of removal proceedings some years ago, requested that DHS counsel produce documents relating to the resolution of that prior removal case, as those facts could bear on Mr. Sajous's ability to obtain relief from removal in the current proceedings. DHS refused to produce those documents, leaving Mr. Rockoff with no choice but to pursue a federal Freedom of Information Act ("FOIA") request for the records. Mr. Rockoff submitted a FOIA request to United States Citizenship and Immigration Services ("USCIS") for Mr. Sajous's immigration records (also known as an "alien file" or "A file") on December 6, 2017. As of the filing of this amended

petition and complaint, however, USCIS has not produced any records or any substantive response to the request.

26. On November 30, 2017, Mr. Sajous filed a motion to terminate his removal proceedings on the grounds that his two MetroCard-related convictions did not require the *mens rea* or level of objectionable behavior necessary to constitute crimes of moral turpitude. *Cf.* 8 U.S.C. § 1227(a)(2)(A)(ii) (providing that noncitizens convicted of two or more crimes involving moral turpitude are deportable).

27. On December 6, 2017, the immigration judge denied the motion to terminate, stating that he would provide a detailed explanation for his decision at the close of removal proceedings. The immigration judge requested that applications for relief from removal be filed at the next hearing. Mr. Rockoff explained, however, that he could not yet submit applications for immigration relief at that time because he had not yet received Mr. Sajous's A file from opposing counsel or through his FOIA request.

28. At Mr. Sajous's next hearing on December 27, 2017, Mr. Rockoff informed the immigration judge that USCIS still had not produced any records in response to the FOIA request and asked the immigration judge to order DHS to produce all relevant documents. The immigration judge refused to order DHS to produce documents but urged DHS to consider doing so. Mr. Rockoff informed the immigration judge that Mr. Sajous was approaching the six months of detention after which a bond hearing would be required under *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). The immigration judge set a bond hearing for February 20, 2018, at 1:00 pm.

29. On December 29, 2017, Mr. Rockoff again requested records relevant to Mr. Sajous's prior proceedings from DHS counsel by email. On January 9, 2018, DHS finally provided a copy

of an immigration judge's order from 2008 showing that the prior proceedings against Mr. Sajous had been terminated without prejudice. Only then, once it was clear that Mr. Sajous had not previously been granted the one-time-only remedy of cancellation of removal, was Mr. Rockoff able to prepare Mr. Sajous's applications for relief from removal. Still, the requested FOIA records are necessary in order for Mr. Rockoff to identify, *inter alia*, important biographical and immigration history, the reason the prior proceedings were terminated, whether any rulings or stipulations in the prior proceedings create issue-preclusion in the current case, and what statements or representations Mr. Sajous has made to immigration authorities. Mr. Sajous's ability to provide these facts to his attorney on his own is limited by his mental health and memory as well as ongoing symptoms of schizophrenia.

30. On the morning of February 20, 2018, the immigration court informed Mr. Rockoff by phone that there had been a scheduling error and that Mr. Sajous's bond hearing would be adjourned to March 19, 2018.

31. On February 27, 2018, the United States Supreme Court issued a decision in *Jennings v. Rodriguez*, 138 S. Ct. 838 (2018), a case from the Ninth Circuit in which the Supreme Court held that Section 1226(c) does not entitle immigrants to bond hearings. The Court expressly declined, however, to consider whether the Due Process Clause independently requires such hearings and remanded the case to the Ninth Circuit to address that issue. Relatedly, on March 5, the Supreme Court vacated the Second Circuit's judgment in *Lora v. Shanahan*, a case in which the Second Circuit had held that section 1226(c) required bond hearings after six months, 804 F.3d at 616, and in which the Court expressly endorsed the position that the Due Process Clause also requires such hearings, *id.* at 606, 613. Neither *Jennings* nor the vacatur of the judgment in *Lora* undermines the Second Circuit's treatment of the requirements of due process.

32. On March 16, 2018, Mr. Rockoff submitted a follow-up request seeking information on the status of his December 6, 2017 FOIA request. As of the date of this filing, Mr. Rockoff has not received a response.

33. At the hearing on March 19, 2018, Mr. Rockoff requested that Mr. Sajous's bond hearing go forward. The immigration judge stated that, in light of *Lora's* vacatur, he no longer would hold a bond hearing for Mr. Sajous.

34. At the March 19 hearing, Mr. Sajous filed applications for cancellation of removal and asylum. Mr. Sajous is eligible for "cancellation of removal for certain permanent residents"—a form of immigration relief that would allow him to maintain his lawful permanent resident status in the United States—because he has continuously lived in the United States after having been admitted as a lawful permanent resident and because he has never been convicted of an aggravated felony. *See* 8 U.S.C. § 1229b(a) (listing eligibility criteria). He also has applied for asylum based on the likelihood that he would be persecuted on account of his mental illness if deported to Haiti. *See* 8 U.S.C. § 1158 (providing asylum procedures).

35. At the March 19 hearing, Mr. Rockoff informed the immigration judge that he still had not received a substantive FOIA response and reiterated his request that the judge order DHS to provide a complete copy of Mr. Sajous's A file. The immigration judge again requested that DHS counsel provide Mr. Sajous with a copy of his A file, but did not order DHS to do so. DHS counsel stated that he could not provide any documents because the A file had been sent to USCIS to process the FOIA request. Mr. Sajous's proceedings were then adjourned to May 1, 2018, for another status conference regarding the FOIA request.

36. Mr. Sajous's detention will foreseeably last many more months. The hearing on his applications for relief from removal has not yet been scheduled and due to court congestion, will

not occur for at least several months from the date of his next hearing. If that hearing is not completed in the three-hour time slot the defendants-respondents commonly allot to such hearings, his case likely would be adjourned for several additional months. Even after those hearings, he will remain detained pending the immigration judge's decision on those applications and appeals taken by either party.

37. In cases where an appeal of an immigration judge decision to the Board of Immigration Appeals is taken, statistics from the Executive Office of Immigration Review show that the average length of detention under Section 1226(c) is 382 days. *See* Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Hon. Scott S. Harris, Clerk, Supreme Court at 3, in *Demore v. Kim* (No. 01-1491) (“The corrections EOIR has now made yield an average and median of 382 and 272 days, respectively, for the total completion time in cases where there was an appeal . . .”).

38. Mr. Sajous's schizophrenic symptoms have recurred in immigration detention. Mr. Sajous is currently working with a licensed social worker to prepare a plan to better stabilize his life and avoid future contact with the criminal justice system if released from custody.

39. The defendants-respondents have held Mr. Sajous at the Hudson County Correctional Facility in conditions identical to those of county jail inmates serving criminal sentences. They have brought him in a jail jumpsuit to his immigration court hearings, throughout which his hands are shackled.

CLASS ALLEGATIONS

40. This case is brought on behalf of the following class:

All people subject to the jurisdiction of the New York or Buffalo ICE Field Offices who have been or will be detained for six months pursuant to 8 U.S.C. § 1226(c) and who have not been afforded a bond hearing before an immigration judge where the government bears the burden of justifying

further detention by clear and convincing evidence that the person poses a risk of flight or danger to the community.

41. Prior to the Second Circuit's 2015 decision in *Lora*, individuals posing no risk of flight or danger commonly languished in jail cells for prolonged periods pursuant to Section 1226(c). The Second Circuit observed that "a non-citizen detained under section 1226(c) who contests his or her removal regularly spends many months and sometimes years in detention due to the enormous backlog in immigration proceedings." 804 F.3d at 605. While some individual noncitizens subjected to detention under Section 1226(c) managed to file habeas petitions challenging their prolonged detention, the outcomes of that litigation varied dramatically. *Id.* at 615.

42. Pursuant to *Lora*, the government held hundreds of bond hearings. In many cases, the immigration judge set bond or ordered the individual's outright release. Many individuals later prevailed in their immigration proceedings and are on a pathway to United States citizenship.

43. In light of the "pervasive inconsistency and confusion exhibited by district courts in this Circuit when asked to apply a reasonableness test on a case-by-case basis" to assess the constitutionality of prolonged detention without a bond hearing, the Second Circuit adopted a rule requiring bond hearings within six months of detention. *Id.* It explained that "without a six-month rule, endless months of detention, often caused by nothing more than bureaucratic backlog, has real-life consequences for immigrants and their families." *Id.* at 616.

44. Absent judicial intervention, members of the proposed class once again will be subjected to these disastrous and unnecessary consequences.

45. Today, many individuals facing removal charges in New York immigration courts are detained pursuant to Section 1226(c). Upon information and belief, during the next six months,

over one hundred such individuals will not be provided bond hearings by the government when they reach six months of detention.

46. The proposed class is sufficiently numerous so as to make joinder impracticable. The class consists of more than 40 members. Joinder is also impracticable because many in the proposed class are *pro se*, indigent, have limited English proficiency, and/or have a limited understanding of the U.S. judicial system.

47. There are common questions of law and fact affecting members of the proposed class, including (a) whether members of the class have been or will be incarcerated for at least six months under Section 1226(c); (b) whether the government has a practice of incarcerating individuals pursuant to Section 1226(c) for six months or longer without providing a bond hearing to determine whether further detention is justified; and (c) whether, once an individual's period of incarceration under Section 1226(c) lasts for six months, the Due Process Clause requires a bond hearing before an immigration judge where the government bears the burden of justifying further detention by clear and convincing evidence.

48. Mr. Sajous's claim is typical of the proposed class. He has been detained for six months or more under Section 1226(c) without having been afforded a hearing where the government must show that his prolonged incarceration is justified.

49. Mr. Sajous will fairly and adequately protect the interests of the class and is aware of no conflict that would preclude fair and adequate representation.

50. Proposed class counsel are qualified to serve as class counsel and have extensive experience litigating similar matters.

51. The defendants-respondents' practice of imprisoning class members for six months or more without providing a bond hearing makes classwide relief appropriate.

52. The issues in this case warrant class treatment, as individual habeas actions against the defendants-respondents challenging prolonged mandatory detention would create a risk of inconsistent and varying adjudications that would establish variable standards of conduct for the defendants-respondents. Furthermore, litigating individual habeas claims on behalf of each class member would consume court and attorney resources and lead to further delays in providing relief to class members facing prolonged mandatory detention.

CAUSES OF ACTION

Class Claim – Violation of the Due Process Clause

53. The defendants-respondents' detention of the plaintiff and other class members under Section 1226(c) without a bond hearing where the government shows by clear and convincing that their prolonged incarceration is necessary to prevent their flight or protect the community from danger violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

Plaintiff's First Individual Claim – Violation of the INA

54. Section 1226(c) does not authorize the defendants-respondents' detention of the plaintiff.

Plaintiff's Second Individual Claim – Violation of the Due Process Clause

55. To the extent Section 1226(c) authorizes the mandatory detention of the plaintiff, who presents substantial challenges to removal, it violates the Due Process Clause.

PRAYER FOR RELIEF

WHEREFORE the plaintiffs-petitioners respectfully requests that the Court:

56. Assume jurisdiction over this matter;

57. Declare that the defendants-respondents may not imprison the class members for six months or more without providing them bond hearings before an immigration judge where the

government bears the burden of justifying further detention by clear and convincing evidence that the person poses a risk of flight or danger to the community warranting continued detention;

58. Order the defendants-respondents to provide Augustin Sajous with a bond hearing before an immigration judge where the government bears the burden of justifying his further detention by clear and convincing evidence that he poses a risk of flight or danger to the community warranting his continued detention;

59. Order the defendants-respondents to provide class members with bond hearings before an immigration judge where the government bears the burden of justifying further detention by clear and convincing evidence that the person poses a risk of flight or danger to the community warranting continued detention;

60. Award reasonable attorneys' fees and costs for this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412;

61. Grant such other relief as the Court deems just and equitable.

Dated: April 5, 2018
New York, N.Y.

Respectfully submitted,

/s/ Jordan Wells

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* Application for admission or *pro hac vice* forthcoming