IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HANAD ABDI and JOHAN BARRIOS RAMOS, on behalf of themselves and all others similarly situated, **Petitioners,** **v.** **ELAINE C. DUKE, Acting Secretary of the U.S. Department of Homeland Security, *et al.*,** **Respondents.**	**CIVIL NO. 17-CV-0071-EAW** **MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS THE FIRST AMENDED PETITION FOR A WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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I. INTRODUCTION

Petitioners—each of whom had been detained at an immigration detention facility but has since been released—challenge the conditions of their detention. Even if Petitioners' parole and bond hearing-related claims were not moot by virtue of their release, which they are, they would still fail for several reasons.

First, this Court lacks jurisdiction over Petitioner's challenge to U.S. Immigration and Customs Enforcement's ("ICE") parole decisions, which are statutorily committed to agency discretion. Second, even if ICE's parole decisions were reviewable, Petitioners' claims fail on the merits—the internal agency memorandum on which they rely is not legally enforceable, their unsupported and largely inaccurate factual allegations fall outside the scope of habeas review, and their due process claim lacks a legal basis. Finally, because Abdi and Barrios Ramos are arriving aliens, they have no viable statutory or due process challenge to their detention without a bond hearing. Accordingly, this Court should grant Respondents' motion and dismiss this case.

II. FACTUAL BACKGROUND

Petitioners filed the instant putative class action with only two named petitioners: Johan Barrios Ramos ("Barrios Ramos"), a Cuban national, and Hanad Abdi ("Abdi"), a Somali national (collectively "Petitioners"). (First Amended Petition for a Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, ECF No. 17 ("Am. Pet."), ¶¶ 7, 8.) Both petitioners seek asylum in the United States and are awaiting asylum hearings before an immigration judge. (*Id*. ¶¶ 7, 8, 24, 57.)

Pending their asylum hearings, Petitioners were detained at an ICE facility in Batavia, New York, pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii). (Am. Pet. ¶ 2.) Each petitioner applied for parole and was initially denied. However, after providing new identity information, both were

later released from detention—Abdi on August 16, 2017 (*id*. ¶ 75), and Barrios Ramos on September 7, 2017 (Declaration of Thomas P. Brophy ("Brophy Decl." ¶ 3)).

III. STATUTORY AND REGULATORY FRAMEWORK

The Secretary of Homeland Security is responsible for "[s]ecuring the borders," enforcing the immigration laws, and "control[ling] and guard[ing] the boundaries and borders of the United States against the illegal entry of aliens." 6 U.S.C. § 202(2) and (3); 8 U.S.C. § 1103(a)(5). The longstanding rule is that aliens who arrive at our Nation's doorstep seeking admission, but who are "not clearly and beyond a doubt entitled to be admitted," "shall be detained" pending the outcome of proceedings before an immigration judge ("IJ") to determine whether the alien should be removed from the country. 8 U.S.C. § 1225(b)(2)(A). The Supreme Court long ago held that such detention of aliens seeking admission, even for a prolonged period of time, does not deprive aliens "of any statutory or constitutional right." *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (upholding detention of lawful permanent resident seeking to re-enter following trip abroad detained for over a year and a half); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid.").

Pursuant to 8 U.S.C. § 1225(b), if a U.S. Department of Homeland Security ("DHS") immigration officer determines that an alien "who is arriving in the United States" lacks valid documents or is inadmissible due to fraud, the officer "shall order the alien removed from the United States without further hearing or review." 8 U.S.C. § 1225(b)(1)(A)(i). If the alien indicates an intention to apply for asylum or expresses a fear of persecution or torture, a DHS asylum officer determines whether the alien has a credible fear. *Id.* § 1225(b)(1)(A)(ii). The

alien "shall be detained pending a final determination of credible fear of persecution." *Id.* § 1225(b)(1)(B)(iii)(IV). If such an alien is found to lack (or never asserts) a credible fear, he "shall be detained" until removed. *Id.* If he has a credible fear, he "shall be detained for further consideration of the application for asylum" by an IJ. *Id.* § 1225(b)(1)(B)(ii).

Congress has provided a potential avenue for release of an alien detained under 8 U.S.C. § 1225(b): The Secretary, "in his discretion" and "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit," may parole any alien "into the United States temporarily under such conditions as he may prescribe." 8 U.S.C. § 1182(d)(5)(A). For aliens detained under § 1225(b), including those lacking proper documentation who have established a credible fear, regulations provide that DHS may grant parole if the alien is "neither a security risk nor a risk of absconding" and (1) has a serious medical condition; (2) is pregnant; (3) falls within certain categories of juveniles; (4) will be a witness; or (5) if continued detention is otherwise "not in the public interest." 8 C.F.R. § 212.5(b); *see also id.* § 235.3(c) (providing that aliens referred for § 240 removal proceedings, including those who have a credible fear of persecution or torture, may be paroled under 8 C.F.R. § 212.5(b) standards). "Each alien's eligibility for parole should be considered and analyzed on its own merits and based on the facts of the individual alien's case." *See* ICE Policy No. 11002.1: *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* (Dec. 8, 2009) ("Morton Memo"), at ¶ 6.2. However, generally speaking, "when an arriving alien found to have a credible fear *establishes to the satisfaction of [ICE]* his or her identity and that he or she presents neither a flight risk nor danger to the community, [ICE] *should*, absent additional factors … parole the alien on the basis that his or her continued detention is not in the public interest." *Id.* (emphasis added).

Parole does not constitute lawful admission or a determination of admissibility, and reasonable conditions may be placed on the parole. 8 U.S.C. §§ 1182(d)(5)(A), 1101(a)(13)(B); 8 C.F.R. § 212.5(d); *see also* Morton Memo ¶ 5.3. When parole is not granted, the alien is detained during the pendency of the inquiry into whether he should be removed. 8 U.S.C. § 1225(b).

Under the Immigration and Nationality Act ("INA"), such discretionary parole decisions are not subject to judicial review. Notwithstanding any other provision of law, including 28 U.S.C. § 2241, "no court shall have jurisdiction to review … any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security," except for asylum determinations. 8 U.S.C. § 1252(a)(2)(B)(ii).

IV. LEGAL STANDARDS

A. Motion to Dismiss for Lack of Jurisdiction

Federal courts are courts of limited jurisdiction, possessing only that power authorized by Article III of the U.S. Constitution and statutes enacted by Congress pursuant thereto. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Thus, federal courts have no power to consider claims for which they lack subject matter jurisdiction. *Id.* The burden of establishing that a cause lies within this limited jurisdiction rests upon the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

The case-or-controversy requirement of Article III of the U.S. Constitution subsists through all stages of federal judicial proceedings. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998). A petitioner "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Cont'l Bank*

Corp., 494 U.S. 472, 477 (1990). A moot case deprives a court of the power to act when there is nothing to remedy. *See Spencer*, 523 U.S. at 17-18.

When, as here, a movant challenges subject matter jurisdiction, a district court may "'consider affidavits and other materials beyond the pleadings'" and "'weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Iqbal v. Sec'y, U.S. Dep't of Homeland Sec.*, 190 F. Supp. 3d 322, 326-27 (W.D.N.Y. 2016) (Wolford, J.) (citations omitted). "'[J]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.'" *Id.* at 326 (citation omitted). Courts should review Rule 12(b)(1) challenges before others. *See Leveraged Leasing Admin. Corp. v. PacifiCorp Capital, Inc.*, 87 F.3d 44, 47 (2d Cir. 1996) ("we must address jurisdictional questions before reaching the merits").

B. Motion to Dismiss for Failure to State a Claim

In order to survive a Rule 12(b)(6) challenge to the legal sufficiency of the pleadings, they must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While the Court must accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff, *Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 2009), that tenet "is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. Further, "[d]etermining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. A claimant must do more than simply "'plead facts that are merely

consistent with a defendant's liability,'" *id.* at 678; rather, "'[t]o survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level,'" *Kleinman v. Elan Corp., plc*, 706 F.3d 145, 152 (2d Cir. 2013) (citations omitted). Regardless of facts alleged, the Court must dismiss claims not legally cognizable. *See, e.g.*, *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989) ("[I]f as a matter of law, 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one."); *Doe v. Metro. Police Dep't*, 445 F.3d 460, 467 (D.C. Cir. 2006).

V. ARGUMENT

A. The Court Lacks Jurisdiction to Review Petitioners' Challenges to DHS's Discretionary Parole Decisions; At Any Rate, Those Challenges are Meritless.

This Court lacks jurisdiction over Petitioners' First and Second Claims. In their First Amended Petition, Petitioners purport that ICE's denials of parole to Abdi, Barrios Ramos, and the putative class at Batavia violate 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5, and the Due Process Clause of the Fifth Amendment. (Am. Pet. ¶¶ 106-107.) Despite the inherently discretionary and fact-intensive nature of ICE's parole determinations, Petitioners take issue with what they deem to be an impermissibly low rate of parole grants for asylum-seekers detained at Batavia. (*Id.* ¶¶ 88-90.) Yet, the INA and implementing regulations could not be clearer: the decision to grant or deny parole is expressly committed to DHS's discretion and, as such, judicial review of such discretionary determinations is completely barred. 8 U.S.C. § 1252(a)(2)(B)(ii).

The INA provides that the Secretary of DHS "*may … in his discretion* parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for

admission to the United States." 8 U.S.C. § 1182(d)(5)(A) (emphasis added). The relevant regulation provides for parole of an arriving alien seeking asylum who passes a credible fear interview when DHS "*in the exercise of discretion*" determines that the alien "presents neither a security risk nor a risk of absconding" and "continued detention is not in the public interest …" 8 C.F.R. § 212.5(a), (b) (emphasis added).

The INA further provides:

> Notwithstanding any other provision of law …, no court shall have jurisdiction to review … any other decision or action of the Attorney General … the authority for which is specified under this subchapter to be in the discretion of the Attorney General …, other than the granting of [asylum] relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii). "[T]his subchapter" refers to Subchapter II in Chapter 12 of Title 8 of the U.S. Code, which comprises 8 U.S.C. §§ 1151-1381 and encompasses § 1182. *Sanusi v. Gonzales*, 445 F.3d 193, 198 (2d Cir. 2006). While discretionary authority based solely in a regulatory grant absent an express statutory provision may not implicate § 1252(a)(2)(B)(ii)'s jurisdictional bar, where a statute unambiguously places a determination within the government's discretion—as does 8 U.S.C. § 1182(d)(5)(A)—the Supreme Court has held that § 1252(a)(2)(B)(ii) bars review. *See, e.g., Kucana v. Holder*, 558 U.S. 233, 237 (2010) ("§ 1252(a)(2)(B) applies … to Attorney General determinations made discretionary by statute.").

It is undisputed that Petitioners seek to challenge "[t]he parole denials of the petitioners and the proposed class" as unlawful. (Am. Pet. ¶¶ 106-107.) Because the statutory source of DHS's parole authority, 8 U.S.C. § 1182(d)(5)(A), expressly provides that the Secretary of DHS "may … in his discretion" release an alien under parole, the INA provides an express grant of discretionary authority such that § 1252(a)(2)(B)(ii) explicitly deprives this Court of jurisdiction to review any challenge—whether legal or factual—to DHS's discretionary parole decisions.

Altagracia v. Sessions, No. 6:16-cv-6647, 2017 WL 908211, *2 (W.D.N.Y. Mar. 7, 2017) (Wolford, J.) ("the Attorney General's decision regarding humanitarian parole is generally non-reviewable"); *Milardo v. Kerilikowske*, No. 3:16-MC-99, 2016 WL 1305120, *6, 9 (D. Conn. Apr. 1, 2016) (ICE's discretionary parole decisions are "generally not subject to judicial review, and [are] never subject to judicial review by a district court"). Consequently, the Court lacks jurisdiction over Petitioners' claims concerning parole.[1]

To the extent the Court nevertheless delves into the substance of Petitioners' parole challenges, it is clear that they lack merit. First, Petitioners' exclusive complaint is that ICE's parole denials are not in accordance with the Morton Memo.[2] (Am. Pet. ¶¶ 80-87, 96, 100; *see also id.* ¶¶ 112-113 (seeking an order requiring that ICE's parole adjudications conform to, and detention of class members comply with, the Morton Memo).) The Morton Memo, however, is an "internal policy statement" that is meant to provide "guidance" to ICE personnel for exercising discretion to consider parole. (Morton Memo ¶¶ 1, 10.) "It is not intended to, shall not be construed to, may not be relied upon to, and does not create, any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States …"[3] (*Id.*

[1] Although some district courts have nevertheless exercised jurisdiction to review constitutional claims and questions of law related to discretionary decisions concerning parole, they have done so relying on 8 U.S.C. § 1252(a)(2)(D). *See, e.g.*, *Viknesrajah v. Koson*, No. 09-cv-6442, 2011 WL 147901, *4-5 (W.D.N.Y. Jan. 18, 2011). On its face, however, that provision preserves only "review of constitutional claims or questions of law raised upon a *petition for review filed with an appropriate court of appeals* in accordance with this section." 8 U.S.C. § 1252(a)(2)(D) (emphasis added). This, of course, is not the circumstance here.

[2] Indeed, the First Amended Petition is completely devoid of any allegation that DHS has violated a specific provision of 8 U.S.C. § 1182(d)(5)(A) or 8 C.F.R. § 212.5.

[3] Similarly, the February 20, 2017, internal memorandum issued by then-DHS Secretary John Kelly (*see* Am. Pet. ¶ 82), constitutes "only internal DHS policy guidance" which "is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter."

¶ 10.) The Morton Memo thus lacks the force of law and cannot sustain either a constitutional claim or claim based on a question of law—even if such claims were reviewable in light of § 1252(a)(2)(B)(ii)'s jurisdictional bar. *Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981) (alleged breach of agency's Claims Manual could not provide basis for legal claim because it "is not a regulation" but was meant "for internal use" by agency employees; it "has no legal force, and it does not bind the [agency]"); *Cruz-Miguel v. Holder*, 650 F.3d 189, 200 (2d Cir. 2011) (INS's memoranda and DHS's manual concerning parole "were internal guidance documents"—"not binding agency authority"); *Binder & Binder PC v. Barnhart*, 481 F.3d 141, 151 (2d Cir. 2007) (agency's Program Circular was "an internal document" for use in a training manual and did "not constitute properly enacted policy or have the force of law"); *Edwards v. U.S. Dep't of Agr.*, 584 F. Supp. 2d 595, 598 (W.D.N.Y. 2008) (plaintiff's allegation that defendants failed to comply with USDA manuals "would not give rise to any cognizable claim" because the manuals "do not have the force of law"); *James v. U.S. Parole Comm'n*, 159 F.3d 1200, 1205-06 (9th Cir. 1998) (same, in context of Parole Commission's internal guidelines).

Second, the Petition is replete with multiple factual arguments—not purely legal issues—surrounding ICE's application of discretionary relief. Yet, these are precisely the types of factual and discretionary issues that federal habeas jurisdiction under 28 U.S.C. § 2241 precludes. *Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001) (affirming district court's dismissal of habeas petition seeking review of denial of discretionary waiver of deportation because that "sort of fact-intensive review is vastly different from what the habeas statute plainly provides: review for

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(Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017) ("Kelly Memo"), at 13.) Notably, the Kelly Memo reinforces that "ICE retains ultimate discretion whether it grants parole in a particular case" and advises that "such authority should be exercised sparingly." (*Id.* at 9-10.)

statutory or constitutional errors"); *Duamutef v. INS*, 386 F.3d 172, 181-82 (2d Cir. 2004) ("the pace at which the Attorney General proceeds with Duamutef's deportation is within his discretion and, thus, beyond the District Court's § 2241 purview"). For example, at the core of Petitioners' parole claims is their disagreement with ICE's assessment of materials submitted by Abdi and Barrios Ramos in support of their parole requests, the weight that ICE gave to certain information, and the bases for ICE's denials. (Am. Pet. ¶¶ 26-31, 60-69.) They further assert that the overall number of parole denials at Batavia proves that ICE is not in compliance with the Morton Memo's guidance. (*Id.* ¶¶ 3, 88-90.) Based on nothing more than hearsay information, Petitioners allege the existence of "only *two* parole grants for asylum-seekers who passed a [credible fear interview] in Batavia in 2017 as of the original filing of this case on July 28, 2017 … an approximately *8%* parole grant rate." (*Id.* ¶ 90 (emphasis added); *see also id.* ¶¶ 25, 32, 69, 93-95 (Petitioners' allegations concerning statements that were purportedly made by ICE personnel).) Resolution of these claims with respect to Abdi, Barrios Ramos, and, if certified, the entire class would necessarily entail a "fact-intensive review" that is plainly outside the scope of § 2241.

In any event, "conclusory statements" about the outcome of *other* aliens' parole adjudications have no bearing on whether ICE's denials of parole for Abdi and Barrios Ramos were unlawful. *See Viknesrajah*, 2011 WL 147901, at *4-5 (rejecting petitioner's reliance on hearsay information provided by his attorney concerning other aliens' parole grants). And, contrary to Petitioners' assertion, between January 1, 2017, and July 28, 2017, ICE granted

parole requests at Batavia at a rate of 22%—nearly three times the figure alleged by Petitioners.[4] (*See* Brophy Decl. ¶ 4.)

Abdi and Barrios Ramos were both considered for parole and notified of ICE's denials; and Abdi was specifically told *twice* that he failed to establish his identity to ICE's satisfaction. (*See* Am. Pet. ¶¶ 29, 31, 61-62, 68; Morton Memo ¶ 8.8.) Once Abdi and Barrios Ramos cured the deficiencies in their submitted materials by providing original photograph identifications, ICE re-adjudicated Abdi's prior request and adjudicated Barrios Ramos's new request, and granted them both parole. (Brophy Decl. ¶¶ 2-3; *see also* Morton Memo ¶ 8.3(1).) There is simply no plausible claim that ICE failed to consider the guidance in the Morton Memo—let alone violated 8 U.S.C. § 1182(d)(5)(A) or 8 C.F.R. § 212.5. *See Viknesrajah,* 2011 WL 147901, at *4 ("a threshold requirement in any asylum case is that the alien establish his identity and nationality to DHS's satisfaction" and, thus, DHS's denial of parole on that basis was not unlawful); *Thevarajah v. McElroy*, No. 01-cv-3009, 2002 WL 923914, *5 (E.D.N.Y. Apr. 30, 2002) (even if ICE was bound to apply criteria contained in parole memorandum—an issue that the court did not decide—the court was satisfied that ICE took those standards into appropriate consideration).

Third, Petitioners' due process claim likewise lacks a legal basis. "[A] constitutionally protected [liberty] interest cannot arise from relief that the executive exercises unfettered

[4] Respondents reject Petitioners' reliance on statistics and their underlying implication that a minimum percentage of parole grants is required in order to demonstrate that ICE's parole adjudications are lawful. By its very nature, parole eligibility is a circumstance-specific inquiry and depends on a variety of factual considerations pertaining to the requesting alien. Therefore, depending on the individual circumstances of the aliens requesting parole and when parole is requested, it may be perfectly appropriate for ICE to exercise its discretion in denying 100% of parole requests during a particular timeframe, while granting 100% of parole requests during a different timeframe.

discretion to award." *Tefel v. Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999) (citing *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981)); *see also Ashish v. Att'y Gen. of United States*, 490 Fed. App'x 486, 487 (3d Cir. 2013) (due process claim could not be asserted based on DHS's denial of discretionary relief—i.e, parole); *Ferreras v. Ashcroft*, 160 F. Supp. 2d 617, 625 (S.D.N.Y. 2001) ("Supreme Court authority establishes that there is no constitutional right to bail, such that Congress has the power to deny bail entirely without violating any constitutional right, including in deportation cases"); *Singh v. Still*, No. C 00-2923, 2001 WL 114436, *3-4 (N.D. Cal. Jan. 22, 2001) ("In other words, an excludable alien does not have a constitutional right to parole; 'the alien has only such rights as Congress has granted.'") (citing *Clark v. Smith*, 967 F.2d 1329, 1332 (9th Cir. 1992)). As the Supreme Court noted in *Mathews v. Eldridge*, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." 424 U.S. 319, 333 (1976) (internal quotation marks omitted). Here, both Abdi and Barrios Ramos were afforded that opportunity, pursuant to § 1182(d)(5)(A), which provides for case-by-case determinations of parole eligibility. Abdi and Barrios Ramos had, and several times took advantage of, the opportunity to make submissions in support of their requests for parole. ICE considered those requests, ultimately granting parole after being satisfied that it was appropriate. On these facts, any due process owed to Abdi and Barrios Ramos is satisfied. *See Ferreras*, 160 F. Supp. 2d at 627-33 (holding that parole statutory scheme did not violate either procedural or substantive due process).

"'[T]he Attorney General's exercise of his broad discretionary power must be viewed at the outset as presumptively legitimate and bona fide in the absence of strong proof to the contrary.'" *Altagracia*, 2017 WL 908211, at *2 (citing *Bruce v. Slattery*, 781 F. Supp. 963, 968

(S.D.N.Y. 1991)). Because Petitioners' assertions fall far short of "strong proof," the First and Second Claims should be dismissed.

B. Petitioners' Challenges to their Detention Without Bond Fail to State Valid Claims for Relief.

Petitioners' assertions that their detention without a bond hearing violates 8 U.S.C. § 1225(b) and due process fail as a matter of law. (Am. Pet. ¶¶ 108-109.) As noted above, Abdi and Barrios Ramos are both arriving aliens. As aliens who have not entered the country for immigration purposes, *see* 8 U.S.C. § 1101(a)(13)(A), they are not afforded the same due process protections as aliens who have entered the United States. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."). Rather, Abdi and Barrios Ramos are "'treated,' for constitutional purposes, 'as if stopped at the border'" and are thus ineligible for the constitutional protections available to persons *inside* the United States. *Zadvydas*, 533 U.S. at 693. Consequently, they may be detained at the border pending a decision on admissibility, even for a prolonged period of time, without being "depriv[ed] … of any statutory or constitutional right." *Mezei*, 345 U.S. at 215 (finding that physical presence in the United States alone does not extend to an inadmissible alien the constitutional protections which are due those persons legally admitted or who have gained entry to the United States); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative").

The detention of arriving aliens seeking asylum, like Abdi, Barrios Ramos, and the proposed sub-class therefore does not violate any cognizable due process right. "'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is

concerned.'" *Mezei*, 345 U.S. at 212 (upholding the indefinite detention of a lawful permanent resident at the border for 21 months without a hearing as he sought to return to the United States after a nearly two-year trip abroad) (citation omitted). In *Demore v. Kim*, the Supreme Court reinforced this tenet, noting that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal" and holding that mandatory detention without a bail hearing pre-removal-order is a "constitutionally permissible part" of the removal process. 538 U.S. 510, 528, 531 (2003).[5] "This statutory scheme, presuming detention in connection with ongoing deportation proceedings while permitting parole under specified circumstances, does not impose arbitrary or capricious constraints on the liberty of detained aliens and thus does not on its face violate the constitutional rights of those aliens." *Ferreras*, 160 F. Supp. 2d at 627; *see also Naul v. Gonzales*, No. 05-4627, 2007 WL 1217987, *4-5 (D.N.J. Apr. 23, 2007) (detention of inadmissible aliens does not violate due process where "'appropriate provisions for parole are available'") (quoting *Chi Thon Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999)). Here, both Abdi and Barrios Ramos have received an opportunity—in fact, multiple opportunities—to be heard on their request for parole and ICE provided written notice of its decisions. (Am. Pet. ¶¶ 27-31, 59-68.) Due process requirements were therefore met.

[5] *Demore* is not otherwise applicable here, as the alien in that case was detained under 8 U.S.C. § 1226(c), which calls for mandatory detention of certain criminal aliens. For the same reason, *Lora* has absolutely no bearing on the issues presented in this case because its holding applies only to detention under § 1226(c). *Lora v. Shanahan*, 804 F.3d 601, 603 (2d Cir. 2015). As Abdi and Barrios Ramos were detained under a different statute, 8 U.S.C. § 1225(b)—a statute not discussed or considered in *Lora*—that case should not be extended to cover detention of aliens who are seeking admission to the United States and are thus entitled to a lesser amount of due process rights.

Nevertheless, there is currently a split of authority regarding whether due process requires that a reasonableness limitation be read into 8 U.S.C. § 1225(b). Some courts have concluded that the Constitution at some point necessitates the provision of a bond hearing for aliens who are detained while seeking admission to the United States. *See, e.g., Rodriguez v. Robbins*, 804 F.3d 1060, 1081-84 (9th Cir. 2015), cert. granted sub nom., *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). These courts, however, rely heavily on reasoning from cases that dealt with detention under 8 U.S.C. § 1226(*c*). *See, e.g., Rodriguez*, 804 F.3d at 1070 (noting that the court "found no basis for distinguishing between non-citizens detained under [§ 1226(b) and under § 1226(c)") (internal quotations omitted); *Morris v. Decker*, No. 17-cv-2224, 2017 WL 1968314, *3 (S.D.N.Y. May 11, 2017); *Heredia v. Shanahan*, No. 16-cv-2024, 2017 WL 1169645, *4-5 (S.D.N.Y. Mar. 28, 2017). Analogizing mandatory detention of arriving aliens under § 1225(b) to mandatory detention of criminal aliens under § 1226(c), however, fails to recognize immigration law's clear distinction between "an alien who has effected an entry into the United States and one who has never entered." *Zadvydas*, 533 U.S. at 693. Such a comparison is also directly at odds with § 1225(b)'s unambiguous text requiring detention without a bond hearing for *all* arriving aliens who are seeking admission to the United States during their entire removal proceedings. *See* 8 U.S.C. § 1225(b)(2)(A) ("if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title"); *see also id.* § 1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV) (establishing separate mandatory detention provision for arriving aliens applying for asylum). Notably, the text of § 1226 includes not only a mandatory detention provision in subsection (c), but also a general detention provision in subsection (a), the latter of which expressly discusses release on bond. *See* 8 U.S.C. §

1226(a). In contrast, § 1225(b) does not contain a provision providing for bond hearings for arriving aliens and an IJ "may not" release such an alien on bond. *Id.* § 1225(b); 8 C.F.R. § 1003.19(h)(2)(i)(B). The *sole* exception to § 1225(b) mandatory detention is a discretionary grant of parole.[6] *See* 8 U.S.C. § 1182(d)(5)(A).

To the extent those courts that have imported a reasonableness requirement into § 1225(b) have relied on the Ninth Circuit's *Rodriguez* decision, Respondents submit that the case was wrongly decided. But even if that case is sound, by its own terms, it would not apply here, as its reasoning is limited by the fact that it addressed the application of § 1225(b)(2)(A) in the context of a large Rule 23(b)(2) class of arriving aliens, which included lawful permanent residents ("LPRs"). *Rodriguez* addressed in part earlier Ninth Circuit precedent, the *en banc* decision in *Barrera-Echavarria v. Rison*, which held that arriving aliens (including LPRs) subject to the entry fiction may be detained for a prolonged period of time and that, therefore, the statutory scheme at issue at the time lawfully permitted their prolonged detention. 44 F.3d 1441, 1446-47, 1450 (9th Cir. 1995). The *Rodriguez* panel acknowledged *Barrerra-Echavarria* as good law, stating that its "reasoning [is sound] as it relates to aliens in the 1225(b) subclass to whom the entry fiction clearly applies (*likely the vast majority*)." *Rodriguez,* 715 F.3d at 1141

[6] If courts ordered bond hearings for aliens detained under § 1225(b)—despite parole being the INA's sole exception to § 1225(b) detention—it would undeniably overstep Congress' express grant of discretionary authority to DHS to parole arriving aliens into the United States, authority that is at the height of the political branches' power over immigration. *See, e.g., United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004) (noting that the political branches' broad power over immigration is "at its zenith at the international border"); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 & n.6 (1972) (noting that the Supreme Court's "general reaffirmations" of the political branches' exclusive authority to admit or exclude aliens "have been legion"); *id.* at 766 (noting that the Supreme Court "without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (internal quotations omitted).

(emphasis added). However, because the class could have contained a LPR, the *Rodriguez* panel construed the statute as though all class members were LPRs. *Id.*; *accord Rodriguez v. Robbins*, 804 F.3d 1060, 1083-84 (9th Cir. 2015). Notably, however, *Rodriguez* clarified that if the case involved a single alien clearly subject to the entry-fiction, its reasoning would not apply. *See* 715 F.3d at 1142 n.11 ("this analysis also disposes of the government's reliance on *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094 (9th Cir. 2004) [a case addressing the entry fiction], which involved an individual petition for review brought by an alien who entered the United States without inspection and thus clearly was subject to the doctrine described in *Mezei* and *Barrera-Echavarria*"). Because Abdi and Barrios Ramos and the putative sub-class are *not* LPRs, but rather true arriving, non-admitted aliens, the analysis in *Rodriguez* should not apply.

Given these crucial distinctions, the Court should not be swayed by case law interpreting § 1226(c) to cover § 1225(b). Instead, the Court should join other courts—notably, courts in this very District—that have concluded that mandatory detention under § 1225(b) is consistent with the Constitution, and that the sole avenue for an arriving alien's release from custody is DHS's exclusive, statutorily-authorized grant of parole. *See Salim v. Tryon*, No. 13-cv-6659, 2014 WL 1664413, *2 (W.D.N.Y. Apr. 25, 2014); *Viknesrajah*, 2011 WL 147901, at *5-6 (W.D.N.Y. Jan. 18, 2011); *see also Cardona v. Nalls-Castillo*, 177 F. Supp. 3d 815, 815-16 (S.D.N.Y. 2016) (rejecting argument that case law interpreting § 1226(c) can be extended to § 1225(b)); *Perez v. Aviles*, 188 F. Supp. 3d 328, 332 (S.D.N.Y. 2016) (concluding that alien detained under § 1225(b) who sought an order directing that he be afforded an individualized bond hearing was not entitled to the relief he seeks); *Ferreras*, 160 F. Supp. 2d at 624 (S.D.N.Y. 2001) ("Aliens detained pursuant to [§ 1225(b)] may be released from custody pending a final order of deportation only in accordance with [§ 1182(d)(5)(A)"); *Abassi v. Sec'y, Dep't of Homeland*

Sec., No. 09-cv-7605, 2010 WL 199700, *3 (S.D.N.Y. Jan. 11, 2010) ("Petitioner's parole has been denied pending a determination regarding his excludability. Detention in such circumstances is constitutionally permissible," citing *Demore*); *Codina v. Chertoff*, No. 06-105, 2006 WL 2177673, *2, 5 (D.N.J. July 31, 2006) (alien being detained pre-removal-order under § 1225(b)(2)(A) was not entitled to bond hearing); *Mejia v. Ashcroft*, 360 F. Supp. 2d 647, 652-53 (D.N.J. 2005) (§ 1225(b)(2)(A) mandatory detention without a bond hearing during removal proceedings did not offend petitioner's Fifth Amendment due process rights). Simply put, because Abdi and Barrios Ramos are arriving aliens, they have no viable statutory or due process challenge to their detention without a bond hearing.

Should the Court nevertheless interject a reasonableness limitation into § 1225(b), Abdi's and Barrios Ramos's periods of detention—totaling less than ten and eight months, respectively, were reasonable. *See, e.g.*, *Ferreras*, 160 F. Supp. 2d at 622-27 (holding alien lawfully detained during removal proceedings under § 1225(b)(2)(A) for over 15 months); *Viknesrajah*, 2011 WL 147901, at *5-6 (holding § 1225(b) authorized continued detention of alien in custody for over two years during pendency of removal proceedings). Petitioners are arriving aliens who chose to seek admission to the United States and are still pursuing administrative avenues to determine whether they are entitled to be admitted. That process neared completion, but was halted, in large part, by their unilateral requests to continue their merits hearings. (*See, e.g.*, Am. Pet. ¶ 35.[7]) "This Circuit does not, however, permit an alien to rely on the lengthening of detention caused by his litigation strategy to claim that his prolonged detention violates substantive due process." *Thevarajah*, 2002 WL 923914, at *5; *see also Viknesrajah*, 2011 WL 147901, at *6;

[7] Abdi requested two continuances in his immigration proceedings: one on February 16, 2017, and another on August 3, 2017. Barrios Ramos, through his attorney, similarly asked for continuances on April 12, 2017, and August 15, 2017.

Abassi, 2010 WL 199700, at *4. Petitioners' challenges to prolonged detention without a bond hearing must therefore fail.

C. This Case Cannot Proceed with Adbi and Barrios Ramos, Whose Claims are Moot, as the Sole Named Petitioners.

1. Abdi's and Barrios Ramos's Claims are Moot Because They were Released from Detention.

When parties have no legally cognizable interest or practical personal stake in a dispute and a court is therefore incapable of granting a judgment that will affect the legal rights as between the parties, their claims become moot. *See Davis v. New York*, 316 F.3d 93, 99 (2d Cir. 2002) (Under Article III, section 2 of the Constitution, federal courts lack jurisdiction to decide questions that cannot affect the rights of litigants in the case before them); *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc*., 485 F.3d 85, 93 (2d Cir. 2007); *Lewis*, 494 U.S. at 477–478 ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings . . . The parties must continue to have a 'personal stake in the outcome' of the lawsuit."). In the Second Circuit, district courts that "have considered the issue have found that where an alien challenging his detention under 28 U.S.C. § 2241 is released during the pendency of his petition under an order of supervision, the petition is rendered moot." *Harvey v. Holder*, 63 F. Supp. 3d 318, 320 (W.D.N.Y. 2014) (internal quotation and citation omitted); *see also Williams v. INS*., No. 02-CIV-3814, 2005 WL 1994102, *2 (S.D.N.Y. Aug. 18, 2005) (petitioner "lacks any interest in the outcome of this suit inasmuch as the relief he has requested—release from detention—has already been afforded to him"); *Johnson v. Reno*, 143 F. Supp. 2d 389, 391 (S.D.N.Y. 2001) ("A habeas corpus petition seeking release from [INS] custody is moot when the petitioner is no longer in [INS] custody.").

In this case, Respondents granted Abdi and Barrios Ramos the sole relief they seek—release from custody. After their attorneys provided ICE with identity documents, Abdi was

released on August 16, 2017, as Petitioners concede[8] (Am. Pet. ¶ 75), and Barrios Ramos was released on parole on September 7, 2017 (Brophy Decl. ¶ 3). Because neither Abdi nor Barrios Ramos retains a legally cognizable interest in the case, there is no longer a case or controversy within the meaning of Article III; accordingly, their claims are moot. *See ABN Amro Verzekeringen*, 485 F.3d at 94; *see also Preiser v. Newkirk*, 422 U.S. 395, 401-04 (1975).

2. The Putative Class Action Cannot Survive with Named Petitioners Who Lack Standing.

Any argument that the petition survives in its current iteration because Petitioners framed it as a putative class action would fail.

"[I]n general, if the claims of the named plaintiffs become moot prior to class certification, the entire action becomes moot." *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994). In the context of class actions, however, where the named petitioners represent the interests of a putative class in addition to their own, special mootness rules may apply. *See Gesualdi v. Reliance Trucking of CG Inc.*, 2015 WL 1611313, *8 (S.D.N.Y. Nov. 8, 2006) (quoting *Lusardi v. Xerox*, 975 F.2d 964, 975 (3d Cir. 1992)). Courts have applied a mootness exception in cases where the named plaintiff's claims have expired prior to certification and the nature of the claims is transient. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 110 (1975); *Comer*, 37 F.3d at 800. In such cases, courts can "respond to the pre-certification mooting of a class representative's claims by permitting substitution of a new class representative." *In re Thornburgh*, 869 F.2d 1503, 1509 (D.C. Cir. 1989)); *see also* 1 Newberg on Class Actions § 2:26 (4th ed. 2006) ("When mootness of the named plaintiff's claims occurs, intervention by absentee

[8] Although Abdi's parole was revoked by the St. Paul, Minneapolis Enforcement and Removal Operations Field Office on August 23, 2017, ICE, at this time, has no intention of taking him back into custody. (Brophy Decl. at ¶ 2.)

members is freely allowed in order to substitute them as class representatives.") (collecting cases).

Here, Petitioners claim that "[u]pon information and belief, the class consists of more than 40 members." (Am. Pet. ¶ 99.) Yet, since Barrios Ramos was released on parole, Petitioners have not moved to substitute the current named plaintiffs with new class representatives. Assuming, *arguendo*, this Court finds that (1) Petitioners' claims are have merit, (2) it has jurisdiction to consider them, and (3) an exception to the mootness doctrine applies, it should decline to allow the case to proceed until Petitioners identify individuals who have a personal stake in the outcome of the case and can substitute Abdi and Barrios Ramos as class representatives. If Petitioners are unable or unwilling to do so, this Court should dismiss the case on mootness grounds.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court dismiss the First Amended Petition in its entirety.

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DATED: September 12, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2017, I filed the foregoing document with the Clerk of the Court through the Court's ECF system.

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