UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HANAD ABDI and JOHAN BARRIOS RAMOS, on behalf of himself and all others similarly situated, Petitioners, v. ELAINE DUKE, in her official capacity as Acting Secretary of U.S. Department of Homeland Security; THOMAS BROPHY, in his official capacity as Acting Director of Buffalo Field Office of Immigration and Customs Enforcement; JEFFREY SEARLS, in his official capacity as Acting Administrator of the Buffalo Federal Detention Facility, and JEFFERSON SESSIONS, in his official capacity as Attorney General of the United States, Respondents.	Case No. 17-cv-721 (EAW)

MEMORANDUM OF LAW IN OPPOSITION TO THE RESPONDENTS' MOTION TO DISMISS

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Dated: October 4, 2017
New York, N.Y.

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INTRODUCTION

The Government seeks to dismiss the claims of the petitioners—asylum-seekers who have fled danger in their home countries, have a significant possibility of winning the right to live in the safety of this country, and yet remain detained at the Federal Detention Facility at Batavia—on the basis that it has the sweeping power to detain this group of people indefinitely without any judicial scrutiny. The Government's position that this Court lacks jurisdiction to review this case and its attempt to dismiss on the merits the claims challenging the failure to provide a fair opportunity for parole and bond hearings misconstrue the petitioners' case and are contrary to binding Second Circuit and Supreme Court law.

First, the Government is wrong that this Court lacks jurisdiction to review the case. As an initial matter, the Government cannot claim that the case is moot because of its decision to release the two named petitioners. Case law is clear that class claims like the petitioners' do not become moot when a defendant grants relief to a named petitioner and that the voluntary cessation of unlawful conduct does not moot a case. In addition, the Government's argument that the Court cannot review a discretionary decision to grant or deny parole fundamentally misapprehends the petitioners' claims. The petitioners do not challenge the outcome of parole proceedings but rather the Government's failure to abide by its non-discretionary duty to follow statutory and constitutional obligations when administering the parole process. As to such claims, the Government does not dispute, and precedent recognizes, this Court's jurisdiction.

Second, the Government argues, remarkably, that the petitioners' allegations regarding the summary denial of parole at Batavia fail to state a claim while also arguing that the petitioners do not have a right to bond hearings because the only process that the petitioners are due are the parole proceedings. The Government is wrong on both counts. On parole, the

Government's argument is premised on an improper attempt to insert factual assertions at a motion to dismiss stage, ignores Second Circuit case law requiring the Government to adhere to the policy that it claims to be following (here a 2009 ICE Parole Directive that the Government has represented to the Supreme Court is in full effect), and disregards Second Circuit case law requiring the Government to provide facially legitimate and bona fide reasons for parole denials. On bond, the Government urges the Court to contradict the only circuit court that has decided this precise question and neglects the seminal Second Circuit case on the right to bond hearings for those in immigration detention. Based on binding precedent and the factual allegations, the Court should deny the motion to dismiss because the petitioners have stated a claim that the Government is unlawfully denying asylum-seekers at Batavia fair access to parole and bond hearings—and therefore the opportunity to be free from detention as they await and prepare for their asylum hearings.

FACTUAL AND LEGAL BACKGROUND

This is a challenge to the unlawful detention of a putative class of asylum-seekers held at Batavia without the opportunity to be released on parole or pursuant to a bond hearing. *See* First Amended Petition ¶¶ 97-98 (Aug. 21, 2017) (ECF No. 17) ("First Am. Pet."). All of the putative class members fled dangerous conditions in their home countries, and the Government itself has found that all the class members have a significant possibility of winning asylum in the United States. First Am. Pet. ¶¶ 78, 97-98; *see also* 8 U.S.C. § 1225(b)(1)(B)(v). As arriving asylum-seekers who passed credible fear interviews, the petitioners are detained inside the U.S. under 8 U.S.C. § 1225(b)(1)(B)(ii) while they pursue asylum in full immigration proceedings.

There are two mechanisms by which these asylum-seekers could secure release from detention while awaiting the conclusion of their asylum proceedings. Parole is one of these

mechanisms and is available under 8 U.S.C. § 1182(d)(5)(A) for an "urgent humanitarian reason" or "significant public benefit," with a regulation interpreting that statutory provision to make parole available to asylum-seekers "whose continued detention is not in the public interest," 8 C.F.R. § 212.5(b)(5). A 2009 directive issued by Immigration and Customs Enforcement ("ICE"), the stated purpose of which is to "ensure transparent, consistent, and considered ICE parole determinations for arriving aliens seeking asylum," explains when "detention is not in the public interest." ICE Policy No. 11002.1: Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009) ("Parole Directive") (attached to First Am. Pet.). Specifically, the Directive provides that

> 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 . . . parole the alien on the basis that his or her continued detention is not in the public interest . . . . [absent] exceptional, overriding factors.

Id. ¶¶ 6.2, 8.3. The Parole Directive also contains a series of procedural protections designed to ensure that the parole process is fair, including requirements of notice, translation services, an opportunity to present evidence, an automatic interview, a reasoned adjudication, and an opportunity for reconsideration in the event of a negative outcome. *See id.* ¶¶ 6.1, 8.2, 8.4.

Although the Government has represented publicly, including to the Supreme Court the day before this brief was filed,[1] that the Parole Directive remains in full effect, *see* First Am. Pet. ¶¶ 82-85, after the President's January inauguration the Government implemented a broad

[1] At the October 3, 2017, argument in *Jennings v. Rodriguez*, the Government stated that "it's the policy of DHS that if an alien passes a credible fear screening, and DHS is . . . able adequately to verify his identity, is satisfied that the alien is not a flight risk and will not be dangerous if released into the community. Unless there's some countervailing consideration, the policy of DHS is to parole those individuals into the country." Transcript of Oral Argument at 5-6, *Jennings v. Rodriguez*, No. 15-1204 (rehearing Oct. 3, 2017), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/15-1204_m6hn.pdf.

practice of summarily denying parole to asylum-seekers without providing reasons and without following the procedural protections of the Parole Directive, *see, e.g.*, First Am. Pet. ¶ 3 (describing dramatic drop in parole rate following inauguration); ¶¶ 32, 69 (explaining that petitioners were told by Deportation Officers that parole was no longer available and that "everything changed" in January and parole has "all stopped"); ¶¶ 61-68 (detailing Abdi's receipt of denial notices that do not comply with the Directive); ¶¶ 25-31 (explaining that Barrios Ramos was never given written notification or advisal about parole, was never given a parole interview, and received denial notices that do not comply with the Directive).

The second mechanism for the release of asylum-seekers from detention is bond hearings, which are available to many individuals in immigration detention. Relying on 8 C.F.R. § 1003.19(h)(2)(i)(B), however, the Government takes the position that detainees held pursuant to section 1225(b), like the petitioners, are categorically ineligible for bond hearings no matter how long their detention. Given this position and the slow pace of immigration proceedings for those held at Batavia, arriving asylum-seekers are regularly detained there for over six months without receiving a bond hearing. *See* First Am. Pet. ¶ 99 (alleging that the majority of asylum-seekers at Batavia will remain incarcerated for six months or more without a bond hearing given the calendar at Batavia Immigration Court); *id.* ¶ 8 (alleging that named petitioner Abdi spent over eleven months in detention without a bond hearing); *id.* ¶ 24 (alleging that named petitioner Barrios Ramos spent over six months in detention without a bond hearing).

PROCEDURAL HISTORY

This suit commenced on July 28, 2017, as a habeas petition on behalf of Hanad Abdi. *See* Petition for a Writ of Habeas Corpus (July 28, 2017) (ECF No. 1). On August 21, the petitioners amended their petition, adding Johan Barrios Ramos as a named petitioner and making class-

action allegations on behalf of a putative class of asylum-seekers who have passed a credible fear interview and who are or will be detained at Batavia. *See* First Am. Pet. ¶¶ 7, 97-98. On August 25, the petitioners filed a motion for class certification. Motion to Certify Class (Aug. 25, 2017) (ECF No. 19).

Following first the filing of the initial habeas petition and then the First Amended Petition, the Government conditionally released each named petitioner. First Am. Pet. ¶75 (release of Abdi); Paige Austin Declaration ¶18 (Sept. 25, 2017) (ECF No. 38-3) (release of Barrios Ramos). At his first check-in with the ICE Field Office in Minneapolis, however, Mr. Abdi was informed that his parole had been revoked. Austin Decl. ¶17. Despite the conditional release of the two named petitioners at least 32 putative class members remained detained at Batavia without access to parole as of September 5, at least 18 of whom have been in detention for over six months. Michelle Shames Declaration ¶11 (Sept. 25, 2017) (ECF No. 38-17).

ARGUMENT

I. THE COURT HAS JURISDICTION TO HEAR THIS CASE.

As a threshold matter, the Government argues this Court lacks jurisdiction over this case, contending that all claims are moot and that the Court does not have subject-matter jurisdiction over the petitioners' parole claims.[2] Both contentions are without merit, as the Government's mootness argument fails to grapple with the fact that this case is a putative class action and its parole-jurisdiction argument fails to recognize that the petitioners' challenge is not to discretionary parole outcomes in individual cases but instead to a broad unlawful government

[2] The Government does not dispute that this Court has subject-matter jurisdiction over the petitioners' bond claims. *See* Memorandum of Law in Support of Respondents' Motion to Dismiss at 6-8 (Sept. 12, 2017) (ECF No. 27-1) ("Gov. Mem.").

practice, which plainly is within this Court's jurisdiction under Supreme Court and Second Circuit case law.

As this Court has noted, when considering a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a court "must accept as true all material factual allegations in the complaint;" however, jurisdiction must still "be shown affirmatively," and a 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.) (internal quotations omitted). Here, the petitioner's allegations and supplemental evidence properly considered on the Government's 12(b)(1) motion establish that this Court has jurisdiction to ensure that the Government is complying with its statutory and constitutional obligations.

A. <u>The Case Is Not Moot</u>.

Relying on the fact that it chose to release the two named petitioners after this litigation commenced, the Government contends that the case is now moot and that the Court should dismiss it if other named petitioners are not added. *See* Memorandum of Law in Support of Respondents' Motion to Dismiss at 19-21 (Sept. 12, 2017) (ECF No. 27-1) ("Gov. Mem."). But the Government concedes, as it must, the well-established principle that putative class actions like this one involving petitioners with transitory claims do not become moot simply because the named petitioners' claims are resolved prior to certification. *See id.* at 20. This principle forecloses the Government's mootness contention.

This is precisely the type of case to which the transitory claims mootness exception applies because it involves detainees who may well be released or removed from custody before the case can be finally resolved. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (holding

that a class action seeking injunctive relief on behalf of pre-trial detainees was not moot even though the named plaintiffs had been convicted because "[p]retrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted"); *Amador v. Andrews*, 655 F.3d 89, 99-101 (2d Cir. 2011) (holding that class action seeking injunctive relief for prisoners was not moot even though named plaintiffs had been released prior to ruling on class certification motion); *Zurak v. Regan*, 550 F.2d 86, 89-90, 92 (2d Cir. 1977) (holding same for jail inmates serving up to two years). The mootness exception is particularly appropriate in cases like this where the Government itself released the petitioners from detention after the filing of the lawsuit; otherwise "the [defendant] could avoid judicial scrutiny of its procedures by the simple expedient of granting [relief] to plaintiffs who seek, but have not yet obtained, class certification." *White v. Mathews*, 559 F.2d 852, 857 (2d Cir. 1977).

Although this mootness exception for class actions is sufficient in itself to defeat the Government's mootness argument, here the Government is also wrong that the petitioners' individual claims are moot because of its decision to release them. The Government has not met the "heavy" and "formidable" burden it bears upon voluntarily ceasing unlawful conduct to make it "absolutely clear" that the challenged conduct will not recur in order to show that a case should be dismissed as moot. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189-90 (2000). As long as they remain in removal proceedings, the petitioners can, under the regulations, be re-detained at any time, *see* 8 C.F.R. 212.5(e)(2)(i) (permitting termination of parole when "in the opinion" of a local ICE official, "neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States"), a situation that courts have recognized defeats a claim of mootness, *see Farez-Espinoza v.*

Napolitano, No. 08-cv-11060, 2009 WL 1118098, at *7 (S.D.N.Y. Apr. 27, 2009) (applying the voluntary cessation exception because "[e]ven if [the petitioner's] habeas petition otherwise would have been rendered moot by virtue of her release from ICE custody, under the Government's view, it has full statutory authority to revoke the bond and re-detain her"); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1117-18 (9th Cir. 2010) (finding petitioner's claim not moot because, although released from custody on parole, he was subject to redetention at ICE's discretion and if redetained he would benefit from the procedural protections sought in his petition).[3] The cases that the Government cites, Gov. Mem. At 19, are readily distinguishable, as they involved claims that became moot because ICE lost its authority to re-detain the petitioner, whether because the petitioner had been deported after being released, *Harvey v. Holder*, 63 F. Supp. 3d 318 (W.D.N.Y. 2014) (Wolford, J.); *Williams v. I.N.S.*, No. 02-cv-3814, 2005 WL 1994102 (S.D.N.Y. Aug. 18, 2005), or had had their deportation case dropped, *Johnson v. Reno*, 143 F. Supp. 2d 389 (S.D.N.Y. 2001).

In any event, given the Government's acknowledgment that an exception to mootness exists for class actions, the only argument that it is left with as a practical matter is that the petitioners should be required to amend to add class representatives who are currently detained. *See* Gov. Mem. at 21. But the case law does not require such amendment, *see supra*, and the case and treatise cited by the Government for this proposition explain only that such substitution is *permitted* "when mootness of the named plaintiff's claims occurs," *see id.* at 20 (quotations omitted). Should the Court deem it necessary, however, the petitioners are prepared to designate

[3] The timing of the petitioners' releases also tracks each's addition to this case, further undermining the Government's mootness claim. *See Mhany Mgmt. Inc v. County of Nassau*, 819 F.3d 581, 604 (2d Cir. 2016) (expressing "deep[] skeptic[ism]" that Defendants have met their burden of showing mootness where their "various actions with respect to the [challenged conduct] appear to track the development of this litigation.").

named petitioners from the numerous class members who have submitted detailed affidavits in support of their motion for preliminary injunction.

B. The Court Has Subject Matter Jurisdiction Over the Petitioners' Challenge to Parole Practices.

The Government also argues that the Court lacks subject matter jurisdiction over the petitioners' parole claims, contending that a provision of the Immigration and Nationality Act ("INA") bars federal courts from adjudicating challenges to the Government's discretionary authority to deny parole. *See* Gov. Mem. at 6-8. This contention simply misapprehends the petitioners' parole challenge. Although the INA does bar judicial review of discretionary decisions by the Attorney General, *see* 8 U.S.C. § 1252(a)(2)(B)(ii), the petitioners here are not challenging discretionary decisions to deny parole. Rather, they challenge the Government's practice of failing to adhere to its non-discretionary duty to comply with its statutory and constitutional obligations when administering the parole process.

Notably, the Government does not argue that this Court lacks the authority to review claims challenging the Government's failure to comply with legally mandated parole procedures, nor could it do so under existing Second Circuit precedent. In cases that the Government fails to cite, the Second Circuit has made clear that section 1252(a)(2)(B)(ii) does not bar judicial review of the Government's failure to follow legally mandated procedures governing discretionary decisions. Thus, in *Sharkey v. Quarantillo* the court held that section 1252(a)(2)(B)(ii) does not bar judicial review of a challenge to the Government's failure to follow its mandatory procedures for adjustment of status, even where it could not review the merits of the decision to deny adjustment of status. *See* 541 F.3d 75, 86 (2d Cir. 2008). Similarly, in *Firstland International, Inc. v. U.S. I.N.S*, the Second Circuit found it had jurisdiction to hear a challenge to the agency's failure to follow a mandatory statutory notice requirement in visa revocation, even though

section 1252(a)(2)(B)(ii) bars review of "the substance of the decision that there should be a revocation," which "is committed to the discretion of the Attorney General." 377 F.3d 127, 131 (2d Cir. 2004).[4] These cases confirm that it is never within the Government's discretion to violate the law. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (recognizing that section 1252(a)(2)(B)(ii) does not prevent courts from reviewing "the extent of the Attorney General's authority" as "the extent of that authority is not a matter of discretion"); *Demore v. Kim*, 538 U.S. 510, 517 (2003) (recognizing that petitioners who challenge the legality of their detention are "not challeng[ing] a 'discretionary judgment'"); *see also Sierra v. I.N.S.,* 258 F.3d 1213, 1217 (10th Cir. 2001) (stating, in the parole adjudication context, that "[i]t is never within the Attorney General's discretion to act unconstitutionally").

The cases the Government cites, *see* Gov. Mem. at 8, are not to the contrary. The first case, a decision by this Court, involved a *pro se* detainee at Batavia who does not appear to have raised any challenge to the fairness of the parole procedures to which he was subject and instead challenged only the particular outcome of his parole request. *See Altagracia v. Sessions*, No. 16-cv-06647, 2017 WL 908211, at *1-3 (W.D.N.Y. Mar. 7, 2017) (Wolford, J.). The second case was entirely inapposite in that it did not involve a challenge to detention but rather a request to

[4] The REAL ID Act's amendments to section 1252(a)(2), *see* P.L. 109-13, 119 Stat. 231 (May 11, 2005), do not change the analysis. There, Congress amended the INA to clarify that challenges to certain types of removal orders should be brought in petitions before the circuit courts. 8 U.S.C. § 1252(a)(2)(D). But district courts continue to have jurisdiction over habeas corpus challenges to detention after REAL ID. *See Sandher v. Gonzales*, 481 F.3d 108, 110 (2d Cir. 2007) (finding that the REAL ID Act only "divests district courts of habeas jurisdiction to review final administrative orders of removal"); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006) (exercising jurisdiction over a habeas claim that ICE had abused its discretion in denying parole because "in cases that do not involve a final order of removal, federal habeas corpus jurisdiction remains in the district court"); H.R. Conf. Rep. No. 109-72, at 175 (2005) (the Act's changes to the INA's jurisdictional provisions were not intended to "preclude habeas review over challenges to detention that are independent of challenges to removal orders").

allow the petitioner to travel to the United States to testify before a legislative body; in the course of that decision, the court merely noted in dicta the uncontroversial point that the decision to deny parole is a discretionary one that is generally not subject to judicial review. *See Milardo v. Kerilikowske*, No. 16-cv-00099, 2016 WL 1305120, at *4 (D. Conn. Apr. 1, 2016).

The Government is also wrong that the petitioners' claim is unreviewable because it is "replete with multiple factual arguments." Gov. Mem. at 9. That the petitioners have set forth facts in support of their legal argument does not make this case unreviewable, as the petitioners provide those facts not to have the Court assess the propriety of individual parole decisions but instead to allow it to adjudicate the petitioners' legal challenge to the broad parole practices at Batavia. As the Second Circuit recognized in *Chen v. Gonzales*, a challenge alleging that a discretionary decision was made "without rational justification or based on a legally erroneous standard" is a challenge that raises a question of law. 471 F.3d 315, 329 (2d Cir. 2006).[5]

The presumption in favor of judicial review of administrative action is strong, especially in cases like this one that lie at the "historical core" of the writ of habeas corpus's purpose to protect against illegal Executive detention. *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001). Nothing in section 1252(a)(2)(B)(ii) overcomes the presumption of judicial review over the petitioners'

[5] Furthermore, the two Second Circuit cases the Government cites for the proposition that the petitioners' claims are unreviewable, *see* Gov. Mem. at 9-10, in fact indicate that this Court does have jurisdiction over the petitioners' legal challenge. In *Duamutef v. I.N.S.*, the court found that, unlike in this case, the petitioner had "not alleged any constitutional or statutory right." 386 F.3d 172, 181 (2d Cir. 2004). And in *Sol v. I.N.S.*, the Second Circuit, in rejecting jurisdiction over a habeas petition seeking review of immigration judge and Board of Immigration Appeals decisions that would involve reassessment of the evidence, explained that "[t]his sort of fact-intensive review is vastly different from what the habeas statute plainly provides: review for statutory or constitutional errors." 274 F.3d 648, 651 (2d Cir. 2001). In contrast, as discussed above, the petitioners' claims assert statutory and constitutional rights to fair process in parole decisions, not to any particular outcome.

challenge to the Government's failure to follow legally-mandated procedures governing the availability of parole at Batavia.

II. THE PETITIONERS STATE CLAIMS CHALLENGING THE GOVERNMENT'S PAROLE AND BOND HEARING PRACTICES.

Beyond the Rule 12(b)(1) jurisdictional issues, the Government contends that this Court should dismiss the petitioners' parole and bond claims because they do not state a cause of action under Rule 12(b)(6). *See* Gov. Mem. at 8-19. In doing so, the Government argues, as it did before the Supreme Court, that the petitioners are not entitled to bond hearings because the only process that they are due is access to parole. At the same time, it attempts to dismiss the petitioners' allegations that parole all but ended at Batavia after the inauguration.

As this Court has explained, a petitioner withstands a 12(b)(6) challenge where, as here, the petition "set[s] forth enough facts to state a claim to relief that is plausible on its face," meaning that the petitioner "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Spikes Bell v. Cont'l Sch. of Beauty*, 11 F. Supp. 3d 403, 406 (W.D.N.Y. 2014) (Wolford, J.) (internal quotations omitted). The Court "may only consider facts stated in the complaint or documents attached to the complaint . . . accepting all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Id.* In contesting the merits of the petitioners' parole and bond claims, the Government improperly relies on facts outside the petition, as described more fully below.

A. <u>The Petitioners State a Claim Challenging the Denial of Access to Parole</u>.

In seeking dismissal of the parole claims, the Government argues that the petitioners do not have a right to a particular outcome on parole and, though it appears to concede that the petitioners have some due process right to *process*, it argues that the petitioners received all the

process that they are due. *See* Gov. Mem. at 8-13 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), for the proposition that petitioners are entitled to "the opportunity to be heard at a meaningful time and in a meaningful manner"). As an initial matter, the Government's argument that there is no due process right to a particular outcome in parole proceedings is irrelevant because, as explained above, the petitioners are not seeking any particular outcome on parole. Moreover, its argument that the petitioners have received the process that they are due fails because it improperly relies on its own version of the facts, ignores the *Accardi* line of cases requiring adherence to the Parole Directive, and neglects the petitioners' arguments under *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982).

First, in arguing for dismissal the Government improperly interjects its own facts and inferences to dispute the petitioners' allegations that ICE is summarily denying parole at Batavia and has abandoned the Parole Directive. *See* Gov. Mem. at 10-11 (citing to the declaration of Thomas Brophy, an ICE official, to dispute the petition's allegation regarding the parole grant rate at Batavia); *id.* at 11 (citing Brophy Decl. to assert that named petitioners were released because they "cured the deficiencies in their submitted materials by providing original photograph identifications"); *id.* at 12 (asserting that the named petitioners had "the opportunity" to receive "case-by-case determinations of parole eligibility"). Although the petitioners disprove the Government's facts in the preliminary injunction motion through analysis of the Government's own data and through affidavits from the petitioners and thirteen current and former class members, for the purposes of resolving the motion to dismiss the Court must of course accept as true the factual allegations as pled by the petitioners. And the petition plainly alleges that the Government has "a policy or practice of not following the procedures and criteria" set forth in the Parole Directive, First. Am. Pet. ¶ 100; that this new policy or practice is

evidenced in part by a drastic reduction in the parole grant rate from 88% to 8%, *id.* ¶¶ 88, 90; that the named petitioners and the putative class they represent have been summarily denied parole without adequate process or explanation for these denials, *id.* ¶¶ 1, 29, 31, 68, 100; and that detention officers at Batavia have represented to the petitioners that "parole was no longer available," and had "all stopped," *id.* ¶¶ 32, 69, 95. These are the facts that control the Government's Rule 12(b)(6) motion.

Second, the Government disregards decades of Supreme Court and Second Circuit law following the *Accardi* doctrine in arguing that it is free to ignore the Parole Directive, which sets out the procedural steps and substantive criteria the Government must follow to determine whether arriving asylum seekers should be paroled. *See* Gov. Mem. at 8-9. In a line of cases starting with *United States ex rel. Accardi v. Shaughnessy*, the Supreme Court long ago recognized that agencies are bound to follow the internal directives they claim to be following. *See* 347 U.S. 260 (1954); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959) (vacating the dismissal of employee because agency failed to "conform to the procedural standards" of an internal departmental order); *Morton v. Ruiz,* 415 U.S. 199, 235 (1974) (striking down a Bureau of Indian Affairs determination that did not comply with procedures set forth in the Indian Affairs Manual administrated by the Bureau). The Second Circuit has made clear that *Accardi* requires agencies to follow policies and procedures "where the rights of individuals are affected," even when those policies and procedures are contained in agency policy documents that are not regulations. *Montilla v. I.N.S.*, 926 F.2d 162, 167 (2d Cir. 1991); *see also Blassingame v. Sec'y of the Navy*, 866 F.2d 556, 560 (2d Cir. 1989) (vacating dishonorable discharge and ordering further agency proceedings in compliance with Marine Corps Separation Manual procedures); *Smith v. Resor*, 406 F.2d 141, 145-47 (2d Cir. 1969) (staying military call-

up determination that violated Army Bulletin, ordering court to direct the Army to follow its own policy in readjudicating the issue, and noting that Bulletin procedure "cannot be ignored . . . even where discretionary decisions are involved"). In a case extraordinarily similar to this one, the Southern District of New York, citing *Morton* and *Montilla*, remanded for reconsideration the parole denial of an asylum-seeker because the Government failed to "adhere to its internal directives" laid out in a memorandum entitled "Parole Project for Asylum Seekers," which like the current Parole Directive established "a procedure which must be complied with" and "uniform criteria under which certain detainees may be paroled." *Zhang v. Slattery*, 840 F. Supp. 292, 295 (S.D.N.Y. 1994); *see also Noorani v. Smith,* 810 F. Supp. 280, 282, 285 (W.D. Wash. 1993) (ordering parole readjudication pursuant to the same "Parole Project for Asylum Seekers" criteria and ordering a reasoned written decision in the case of any denial).

The Government ignores this entire line of controlling cases. *See* Gov. Mem. at 8-9. Instead, it relies on cases that arise in circumstances far afield from the Parole Directive or the *Accardi* doctrine. Thus, in *Schweiker v. Hansen* the Supreme Court held, without citing or distinguishing *Accardi*, that a "minor breach" by an employee of a "13-volume handbook" intended for internal Social Security Administration use cannot be used to estop the Government. *See* 450 U.S. 785, 789 (1981). In *Binder & Binder PC v. Barnhart,* the Second Circuit, relying on *Schweiker*, rejected the Social Security Administration's attempt to use the terms of its own operations manual to avoid paying attorneys' fees. *See* 481 F.3d 141, 151 (2d Cir. 2007). And in *Cruz-Miguel v. Holder*, the court held that memoranda and a manual concerning parole are "unworthy of *Chevron*-style deference," meaning only that the *court* was not under any

obligation to defer to the agency's reliance on such documents. *See* 650 F.3d 189, 200 (2d Cir. 2011).[6]

The cases upon which the Government relies do not control the petitioners' parole claim. Rather, their claim follows directly in the footsteps of *Accardi* and its progeny, which the Second Circuit has recognized since *Schweiker* have "continued vitality" as applied to agency guidance that affects individual rights. *See Montilla*, 926 F.2d at 167; *see also Singh v. U.S. Dep't of Justice*, 461 F.3d 290, 296 (2d Cir. 2006) (the Second Circuit has "expressly adopted the *Accardi* doctrine," and the doctrine applies "where a petitioner's rights are 'affected'") (internal quotation omitted). The 2009 Parole Directive clearly affects the rights and liberty of asylum-seekers, *see* Parole Directive ¶ 1 ("The purpose of this ICE policy directive is to ensure transparent, consistent, and considered ICE parole determinations for arriving aliens seeking asylum."); it specifies a number of procedural requirements that "shall" be met, *see id.* ¶ 6.4 ("DRO shall follow the procedures set forth in section 8 of this directive"); and as a result of ICE's systemic failure to abide by the directive, the class members are left to languish at Batavia without adequate instructions, notifications, and explanations for denials, *see* First Am. Pet. at ¶¶ 88-96. These violations are particularly egregious because the agency has "continually represented" to the other branches of government and the public that its directive remains in effect, *see Morton*,

[6] The two other cases cited by the Government on this issue are non-binding and similarly unpersuasive. In *Edwards v. U.S. Department of Agriculture*, the District Court noted that the plaintiff had "failed to show that [USDA manuals] were not followed," 584 F. Supp. 2d 595, 598 (W.D.N.Y. 2008), rendering its cursory reference to *Schweiker* dicta. And in *James v. U.S. Parole Commission*, the Ninth Circuit applied a standard that had developed specifically within that circuit to hold that an agency's internal handbook had failed to create a rule that was "legislative in nature" or "in conformance with the procedural requirements imposed by Congress," 159 F.3d 1200, 1205 (9th Cir. 1998) (internal quotations omitted), requirements not reflected in the Second Circuit's much broader interpretation of *Accardi*'s applicability, *see Montilla*, 926 F.2d at 167 (noting differing interpretations of *Accardi* but stating that, in the Second Circuit, the doctrine has "continued vitality . . . where a petitioner's rights are affected").

415 U.S. at 236; First Am. Pet. at ¶¶ 82-83; *supra* note 1 (describing the Government's representation to the Supreme Court), which is exactly the type of public affirmation the Supreme Court has found to establish a "legitimate expectation" of compliance for those to whom it applies*, see Morton*, 415 U.S. at 236.

Third, the Government's memorandum does not mention the Second Circuit's decision in *Bertrand*, 684 F.2d 204, a decision that provides the petitioners with an independent basis for their parole claim. As they explained in their preliminary-injunction memorandum, regardless of whether the Parole Directive is independently enforceable under *Accardi,* under *Bertrand* parole denials must be "facially legitimate and bona fide," a standard that would not be satisfied when denials departed without explanation from established policies (such as the 2009 Parole Directive) and that would not be satisfied when ICE fails to provide any reason for a denial. *See* Petitioners' Memorandum of Law in Support of Preliminary Injunction at 22-24 (Sept. 25, 2017) (ECF No. 38-1) ("PI Mem.").

The petitioners do not dispute that, as this Court has stated, parole decisions "must be viewed at the outset as presumptively legitimate and bona fide in the absence of strong proof to the contrary." *Altagracia v. Sessions*, 2017 WL 908211, at *2 (quoted in Gov. Mem. at 12-13). But the petition alleges precisely such "strong proof" and must be read for purposes of a motion to dismiss as establishing that the Government has departed dramatically from established policy and is summarily denying parole at Batavia for reasons that are not legitimate and bona fide. *See* First Am. Pet. ¶¶ 32, 69 (explaining that both Abdi and Barrios Ramos were told by Deportation Officers that parole was no longer available and that "everything changed" in January and parole has "all stopped"); ¶¶ 88-96 (alleging that the parole grant rate dropped from 88% in 2015 to approximately 8% in the first six months of the new administration and that the Government has

abandoned adherence to the Parole Directive); ¶ 68 (describing how, after the new administration took office, named petitioner Abdi received a form denial notice that did not provide an explanation for his parole denial); ¶¶ 25-31 (explaining that named petitioner Barrios Ramos never received a written notification or advisal about parole, was never given a parole interview, and received form denial notices lacking explanation).[7] Under *Bertrand*, summary denials of parole that stem from sweeping departures from stated parole policies violate the Government's obligations to "set forth a facially legitimate, bona fide reason for denying parole." *Zhang*, 840 F. Supp. at 295-96; *see also Noorani*, 810 F. Supp. at 282.

B. The Petitioners State a Claim Challenging the Government's Failure to Provide Bond Hearings.

The Government also asks the Court to dismiss the petitioners' bond claims, arguing they have no due process right to a bond hearing, no matter how long they are held in custody. *See* Gov. Mem. at 13-19. Yet as the Government recognizes, the only Court of Appeals to address this precise question has held that those detained under the provision under which the petitioners are detained have a right to a bond hearing within six months of detention. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1136-39 (9th Cir. 2013) ("*Rodriguez I*"). And in *Lora v. Shanahan,* 804 F.3d 601, 616 (2d Cir. 2015), the Second Circuit heavily relied on the analysis in *Rodriguez I* to hold that the Government must provide bond hearings within six months in a closely related context, which in turn led to numerous District Courts in New York relying on the *Rodriguez-Lora* analysis to hold that asylum-seekers like the petitioners are entitled to six-month bond

[7] The Government argues that it would be "perfectly appropriate for ICE to exercise its discretion in denying 100% of parole requests during a particular timeframe." Gov. Mem. at 11 n.4. But what is important here is the dramatic change in the parole grant rate following the inauguration, which is only one piece of striking evidence that ICE abandoned all adherence to its own stated policies.

hearings. The Government, however, fails to distinguish *Rodriguez I*, relegates *Lora* to a footnote, and largely neglects the District Court decisions.

The Government's primary argument against providing bond hearings for petitioners is that, because arriving asylum seekers have not technically "entered the country," they have few if any due process rights. *See* Gov. Mem. at 13-14. But under the reasoning of *Rodriguez I*, which petitioners urge this Court to adopt, that argument is inapposite. As explained in detail in the petitioners' preliminary injunction briefing, the Ninth Circuit in *Rodriguez I* based its decision on two fundamental propositions established by Supreme Court precedent: (1) in those instances where immigrant detainees have due process rights, the Due Process Clause limits how long the Government can detain them without an opportunity to seek release; and (2) when some immigrant detainees covered by a statutory provision are entitled to constitutional protections, all immigrant detainees covered by the same provision must be accorded the same rights, even if they themselves may not be able to invoke the constitutional protections on their own. *See Rodriguez I*, 715 F.3d at 1136-39 (discussing Supreme Court decisions recognizing temporal limits on detention of immigration detainees who have due process rights); *id*. at 1139-44 (discussing Supreme Court precedent, particularly *Clark v. Martinez*, 543 U.S. 371 (2005), establishing that protections afforded some encompassed within statutory immigration provision must be extended to all persons covered by that provision, regardless of their independent entitlement to constitutional rights). Applying these principles, the Court of Appeals held that because section 1225(b) authorizes detention of some persons who indisputably have due process rights—namely, lawful permanent residents detained upon re-entry after a short absence from the U.S.—all persons detained under section 1225(b) likewise are entitled to bond hearings, pursuant to *Clark*. *See* 715 F.3d at 1139-44 (affirming preliminary injunction ordering bond hearings for

class of detainees held under section 1225(b) although class did not include lawful permanent residents). And contrary to the Government's suggestion, *see* Gov. Mem. at 16-17, the Ninth Circuit's reasoning did not require the presence of a lawful permanent resident in the class; rather, the court held that it could not adopt a construction of 1225(b) that would raise constitutional problems "whether or not those . . . problems pertain to the particular litigant before the Court." 715 F.3d at 1141 n. 9 (quoting *Clark,* 543 U.S. at 380–81).[8]

In arguing that this Court should reject *Rodriguez I*'s holding that mandatory detention of longer than six months violates due process, the Government all but ignores the seminal Second Circuit case, *Lora v. Shanahan*, and post-*Lora* District Court cases in the circuit. *See* Gov. Mem. at 14 n.5 (citing *Lora* in a footnote). In *Lora*, the Second Circuit held that criminally convicted immigrants subject to mandatory detention under 8 U.S.C. § 1226(c) are entitled to bond hearings within six months even though that detention scheme, like the one at issue here, does not explicitly provide for bond hearings. *See* 804 F.3d at 616, *discussed in* PI Mem. at 10-12. In so holding in *Lora*, the Second Circuit relied heavily on *Rodriguez I*. The court also considered and rejected precisely the case-by-case approach to reasonableness in detention length suggested by the Government, *see* Gov. Mem. at 18 (arguing that detention of Mr. Abdi and Mr. Barrios Ramos were reasonable at ten and eight months, respectively, due to their

[8] The Ninth Circuit also rejected the Government's argument that any minimal due process rights petitioners have are satisfied by the parole process. Gov. Mem. at 14. Even if properly administered, the parole process does not discharge the petitioners' constitutional right to seek release from custody before a judge once their detention becomes prolonged. *See Rodriguez v. Robbins,* 804 F.3d 1060, 1081 (9th Cir. 2015) (discussing ways in which the parole process is inadequate given petitioners' liberty deprivation after six months), *cert granted sub nom. Jennings v. Rodriguez,* 136 S. Ct. 2489 (2016) ("*Rodriguez II*"); *see also Clerjuste v. Decker*, No. 17-cv-4252, at *8 (S.D.N.Y. Aug. 12, 2017) (Broderick, J.) (rejecting the Government's argument that parole provides arriving asylum seekers adequate process even after six months); *Sammy v. Decker,* No. 17-cv-2615 (S.D.N.Y. May 25, 2017) (Engelmayer, J.) (same), *appeal docketed*, No. 17-2260 (2d Cir. July 21, 2017).

applications for asylum and requests for continuances),[9] and instead created a bright-line rule that detention becomes prolonged at six months and a bond hearing is required by that point for all class members detained under the same statutory scheme. *See Lora*, 804 F.3d at 614-15.

As the petitioners noted in their preliminary injunction briefing, while neither this Court nor any other Court in the Western District has addressed the issue of bond hearings under section 1225(b) since *Lora*, numerous courts in the Southern District of New York have followed the *Lora-Rodriguez* analysis and concluded that asylum seekers held under section 1225(b) are entitled to bond hearings within six months. *See* PI Mem. at 13-14.[10] In urging the Court to ignore this growing consensus among judges in this circuit, the Government relies almost exclusively on cases that pre-date *Lora*. *See* Gov. Memo at 17-18. And the two cases the Government cites in its motion to dismiss that were decided after *Lora* do not provide persuasive reasons to depart from this trend. *See Cardona v. Nalls-Castillo*, 177 F. Supp. 3d 815 (S.D.N.Y. 2016) (containing no analysis); *Perez v. Aviles*, 188 F. Supp. 3d 328, 332-33 (S.D.N.Y. 2016)

[9] The Government has provided no factual basis for this contention, which in any event is impermissible for the Government to unilaterally assert at the motion to dismiss stage.

[10] *See, e.g.*, *Jacques v. Decker,* 17-cv-2040 (S.D.N.Y. Aug. 24, 2017) (Failla, J.) (attached as Ex. F to Austin Decl.); *Sammy v. Decker,* No. 17-cv-2615 (S.D.N.Y. May 25, 2017) (Engelmayer, J.) (attached as Ex. G to Austin Decl.), *appeal docketed*, No. 17-2260 (2d Cir. July 21, 2017); *Francois v. Decker*, No. 17-cv-5809 (S.D.N.Y. Aug. 16, 2017) (Engelmayer, J.) (attached as Ex. H to Austin Decl.); *Nord v. Decker*, No. 17-cv-3679 (S.D.N.Y. Aug. 23, 2017) (Broderick, J.) (attached as Ex. I to Austin Decl.); *Clerjuste v. Decker*, No. 17-cv-4252 (S.D.N.Y. Aug. 12, 2017) (Broderick, J.) (attached as Ex. J to Austin Decl.); *Celestin v. Decker*, No. 17-cv-2419 (S.D.N.Y. Apr. 17, 2017) (Abrams, J.) (attached as Ex. K to Austin Decl.), *appeal docketed*, No. 17-1895 (2d Cir. June 15, 2017); *see also Saleem v. Shanahan*, No. 16-cv-808, 2016 WL 4435246, at *3 (S.D.N.Y. Aug. 22, 2016) (ordering a bond hearing for a non-LPR subjected to prolonged detention under 1225(b)) (Abrams, J.), *appeal docketed*, No. 16-3587 (2d Cir. Oct. 21, 2016).

(relying almost exclusively on case law pre-dating *Lora* and failing to heed the Second Circuit's rejection of a case-by-case analysis for what detention length violates due process).[11]

Finally, the Government's suggestion that the petitioners have no due process rights to bond in light of *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), simply because they have never technically entered the country, *see* Gov. Mem. at 13-14, is foreclosed by a post-*Mezei* case in which the Supreme Court distinguished *Mezei* and held that *some* people who had never technically entered the country have due process rights. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (holding that certain returning lawful permanent residents have due process rights). As many District Court judges have noted, *Mezei* is of limited applicability because it was decided under a now-outdated immigration scheme,[12] and the petitioners are technically in a different position from *Mezei* or other noncitizens "stopped at the border," Gov. Mem. at 13, because they have been screened into the U.S. through a process created by Congress, granted the right to pursue asylum in full removal proceedings, and protected from removal until those asylum claims are adjudicated. 8 U.S.C. § 1225(b)(1)(B)(ii).[13] Given that the Supreme Court has

[11] Moreover, since *Perez* and *Cardona* all other courts in the Southern District, to petitioners' knowledge, have held that lawful permanent residents held under section 1225(b) are entitled to bond hearings. *See, e.g.*, *Galo-Espinal v. Decker*, No. 17-cv-3492, slip op. at 4 (S.D.N.Y. June 30, 2017) (Hellerstein, J.), *appeal docketed*, No. 17-2691 (2d Cir. Aug. 28, 2017); *Gutierrez Arias v. Aviles*, No. 15-cv-9249, 2016 WL 3906738, at *4 (S.D.N.Y. July 14, 2016) (Abrams, J.), *appeal docketed*, No. 16-3186 (2d Cir. Sept. 12, 2016); *Morris v. Decker*, No. 17-cv-02224, 2017 WL 1968314, at *4 (S.D.N.Y. May 11, 2017) (Caproni, J.), *appeal docketed*, No. 17-2121 (2d Cir. July 7, 2017); *Heredia v. Shanahan*, No. 16-cv-2024, 2017 WL 1169645, at *5 (S.D.N.Y. Mar. 28, 2017) (Wood, J.), *appeal docketed*, No. 17-1720 (2d Cir. May 26, 2017); *Ricketts v. Simonse*, No. 16-cv-6662, 2016 WL 7335675, at *4 (S.D.N.Y. Dec. 16, 2016) (Schofield, J.).

[12] *Clerjuste v. Decker*, No. 17-CV-4252, at *7 (S.D.N.Y. Aug. 12, 2017) (Broderick, J.) (attached as Ex. J to Austin Decl); *Arias v. Aviles*, No. 15-CV-9249, 2016 WL 3906738, at *7 (S.D.N.Y. July 14, 2016); *see also Rodriguez I*, 715 F.3d at 1140.

[13] *Mezei* was predicated on national-security evidence, which led the Supreme Court to conclude that his release would "nullif[y] the very purpose of the exclusion proceeding." 345 U.S. at 216; *see also Heredia v. Shanahan*, 245 F. Supp. 3d 521, 526 (S.D.N.Y. 2017) (*Mezei* should be "narrowly construed" given that the Court stripped him of due process rights due to abandoning

held that due process limits the detention of noncitizens with criminal convictions, *Demore*, 538 U.S. at 528; noncitizens already ordered deported, *Zadvydas*, 533 U.S. at 688; and noncitizens ordered deported after never having been admitted in the first place, *Clark*, 543 U.S. at 722, there would be no "intellectually honest reason," as one district judge in the circuit has noted, to find that the petitioners, who are seeking asylum after presenting themselves lawfully at the U.S. border and establishing a strong possibility of success on immigration relief, would not have an equally strong claim to protection against prolonged, unreviewable detention. *See Jacques v. Decker,* 17-cv-2040, transcript of oral decision at 70 (S.D.N.Y. Aug. 24, 2017) (Failla, J.) (attached as Ex. F to Austin Decl.)*; see also Diouf v. Napolitano*, 634 F.3d 1081, 1086-87 (9th Cir. 2011) (detainees still seeking relief before the immigration court have a greater liberty interest than those already ordered removed).[14]

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not only his residence but also his loyalty to the U.S.); *Arias v. Aviles*, No. 15-CV-9249, 2016 WL 3906738, at *7 (S.D.N.Y. July 14, 2016) (same). By contrast, here, the petitioners pose no security threat, *see* 8 U.S.C. § 1226a(a) (providing alternative ground of detention for noncitizens who threaten national security), and thus their release on bond would not "nullify" the purpose of their removal proceeding, which is to adjudicate their asylum claims.

[14] Because the petitioners' release on bond would not constitute legal admission to the country and would not entitle them to remain in the country unless they win their asylum case, the Government's authority to remove or exclude noncitizens from the U.S. under the plenary power doctrine is not implicated and the Government's citations to a case about its power to deny noncitizens' visas, *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972), and to search vehicles at the border without suspicion, *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004), are inapposite. Gov. Mem. at 16. Even assuming that the plenary power doctrine is at issue in this case, which it is not, plenary "power is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695. Here, as in *Zadvydas,* for the Court to defer to the Government's view of the reasonableness of detention is tantamount to "abdicating [its] legal responsibility to review the lawfulness of an alien's continued detention." *Id*. at 700.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that this Court deny the Government's motion to dismiss.

Respectfully Submitted,

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Dated: October 4, 2017
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