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-00721-EAW

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS THE FIRST AMENDED PETITION FOR A WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. Petitioners' Parole Claims are Statutorily Barred and Fail as a Matter of Law.

In their petition, Petitioners challenge the "parole denials of the petitioners and the proposed class" as violative of 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5, and due process. (ECF No. 17, Am. Pet. ¶¶ 106-07.) Now that Respondents have moved to dismiss those claims on, *inter alia*, 8 U.S.C. § 1252(a)(2)(B)(ii) grounds, Petitioners attempt to re-characterize their claims as "not challenging discretionary decisions to deny parole," but, rather, as "challeng[ing] 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." (ECF No. 48, Opp. at 9.) No matter how Petitioners try to repackage their parole claims, however, those claims are still beyond the jurisdictional reach of this Court.

First, the Supreme Court has made clear that a decision "specified by statute 'to be in the discretion of the Attorney General'" is "shielded from court oversight by § 1252(a)(2)(B)(ii)." *Kucana v. Holder*, 558 U.S. 233, 248 (2010). Petitioners readily concede that § 1252(a)(2)(B)(ii) bars judicial review of ICE's discretionary parole decisions. (Opp. at 9.) Part and parcel of ICE's unreviewable discretion to grant or deny parole is the process by which ICE implements that discretion—which forecloses Petitioners' challenges here. *Kucana*, 558 U.S. at 248.[1]

Second, Petitioners argue that—despite the discretionary nature of parole and §

[1] *See also Giammarco v. Kerlikowske*, 665 Fed. App'x 24, 25-26 (2d Cir. 2016) (petitioner's indirect challenge to discretionary denial of parole was barred by § 1252(a)(2)(B)(ii)); *Loa-Herrera v. Trominski*, 231 F.3d 984, 990-91 (5th Cir. 2000) ("'the Attorney General's discretionary judgment regarding the application of' parole—including the *manner* in which that discretionary judgment is exercised, and whether the procedural apparatus supplied satisfies regulatory, statutory, and constitutional constraints—is 'not … subject to review,'" quoting 8 U.S.C. § 1226(e)); *Hatami v. Chertoff*, 467 F. Supp. 2d 637, 640-41 (E.D. Va. 2006) (challenge to the "manner and form" of alien's bond hearing was unreviewable under § 1252(a)(2)(B)(ii)); *Mohsenzadeh v. Kelly*, No. 3:14-CV-2715-L-RBB, 2017 WL 3896702, *2-*5 (S.D. Cal. Sept. 6, 2017) (§ 1252(a)(2)(B)(ii) bars judicial review of "discretionary intermediate decisions or actions" in the process of USCIS's adjudication of adjustment of status application that is within Secretary's "full discretion," including the pace of adjudication).

1252(a)(2)(B)(ii)'s explicit bar on review of the exercise of that discretion—the Court still has habeas jurisdiction to review their challenges to ICE's purported failure to follow the Morton Memo's guidance. (Opp. at 9-10.) Yet, their cited cases are inapposite, as they all concern agency procedures that were dictated by statute or regulation. *See Sharkey v. Quarantillo*, 541 F.3d 75, 86 (2d Cir. 2008) (permitting APA review of unlawful rescission claim based on agency's non-discretionary duty to commence rescission procedures, *as required by regulation*); *Firstland Int'l Inc. v. INS*, 377 F.3d 127, 131 (2d Cir. 2004) (in visa revocation challenge, court retained jurisdiction to review whether mandatory notice requirements *established by statute* were met); *Demore v. Kim*, 538 U.S. 510, 517 (2003) (habeas jurisdiction existed to review respondent's constitutional challenge to 8 U.S.C. § 1226(c)'s *statutory framework* authorizing his detention without bail); *Sierra v. INS*, 258 F.3d 1213, 1218 (10th Cir. 2001) (concerning alien's challenge to constitutionality of procedures used to withdraw his parole pursuant to *regulations* at 8 C.F.R. § 212.12).[2] Here, in contrast, Petitioners fail to identify the requisite constitutional, statutory, or regulatory hook for their claims—even if those claims were not precluded by § 1252(a)(2)(B)(ii).

Third, Petitioners' claims cannot rest on ICE's alleged failure to follow to the letter the Morton Memo—an "internal policy statement" that is intended to provide "guidance" to "[ICE] personnel" for exercising discretion to consider parole and that, on its face, "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 …"

[2] Petitioners' reliance on *Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001), is misguided (*see* Opp. at 10), as the Court was only explaining that § 1252(a)(2)(B)(ii)—one of several statutory provisions that Congress enacted to limit judicial review of deportation decisions—did not apply in that context because the challenge there concerned the extent of the Attorney General's authority under 8 U.S.C. § 1231, not his exercise of discretion.

(Morton Memo ¶¶ 1, 10.) It is this memo that Petitioners ask the Court to find creates "legally mandated parole procedures" and a "non-discretionary duty" by which ICE must comply. (Opp. at 9.) Case law simply does not support their contention. (ECF No. 27-1, MTD at 8-9.)

For example, the court in *Thevarajah* declined to hold that INS was bound by certain standards in a 1992 INS internal parole memo; instead, the court was "satisfied" that INS "took [those standards] into appropriate consideration." *Thevarajah v. McElroy*, No. 01-cv-3009, 2002 WL 923914, *4-*5 & n.3 (E.D.N.Y. Apr. 30, 2002). The *Naul* court reached a similar conclusion about the same 1992 INS internal parole memo, finding that it did not "contain any directive whatsoever to the Attorney General regarding parole," but, rather, provided "guidance to asylum pre-screening interviewers concerning the decision to recommend parole or not." *Naul v. Gonzales*, No. 05-4627, 2007 WL 1217987, *3 (D.N.J. Apr. 23, 2007); *see also id.* at *3 n.8; *Yousif v. Perryman*, No. 96-C-7581, 1997 WL 160748, *2 (N.D. Ill. Apr. 2, 1997) (same, regarding 1992 INS internal parole memo). The *Ferreras* court also declined the petitioner's invitation to "hold the government to its own words" in a 1998 INS internal directive, finding that "[w]hether the INS followed through on its directive in Petitioner's case is not a constitutional matter generally, nor is it determinative of the statutory provision governing Petitioner's detention." *Ferreras v. Ashcroft*, 160 F. Supp. 2d 617, 624 (S.D.N.Y. 2001). Petitioners' opposition neglects to address any of these cases.

Petitioners nonetheless proffer *Zhang v. Slatter*, 840 F. Supp. 292 (S.D.N.Y. 1994), and *Noorani v. Smith*, 810 F. Supp. 280 (W.D. Wash. 1993)—cases premised on jurisdictional bases that are plainly obsolete in light of Congress's subsequent 1996 enactment of § 1252(a)(2)(B)(ii). Indeed, *Zhang* states that "District Courts may review, on petition for habeas corpus, the discretionary decisions of INS officials to deny parole to persons detained by the INS pending

the determination of their applications for asylum," and holds that "a parole determination will not be disturbed where it is based on a 'facially legitimate and bona fide reason.'" 840 F. Supp. at 294. On that basis, the *Zhang* court considered the petitioner's claim that INS abused its discretion by failing to consider the criteria for parole set forth in a 1992 INS internal parole memo.[3] *Id.*; *see also Noorani*, 810 F. Supp. at 281 ("INS rejection of a parole request must be upheld by courts 'if the agency advanced a facially legitimate and bona fide reason for the denial.'"). Now, of course, it is well-settled that courts may not review such discretionary parole decisions, under a "facially legitimate and bona fide" standard or otherwise.[4] 8 U.S.C. § 1252(a)(2)(B)(ii). Petitioners identify *no* post-§ 1252(a)(2)(B)(ii) case where a court has reviewed a challenge to parole procedures solely on the basis of guidance in an agency memo.

Petitioners also argue that the *Accardi* doctrine and its progeny have somehow transformed the Morton Memo's internal guidance to ICE personnel into judicially enforceable rights of detained asylum-seekers. As an initial matter, *Accardi*'s directive that an agency must follow its own regulations concerning the rights and interests of others is of no consequence here because, of course, the Morton Memo is not a regulation. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). In *Morton v. Ruiz*, the Court held that the Bureau of Indian Affairs was required to comply with its own internal publication policy where individuals' "entitlement" and "rights" to government benefits was affected by those procedures.

[3] *Zhang* and *Noorani* both concern the same parole memo, entitled *Parole Project for Asylum Seekers*, that was found legally unenforceable in *Thevarajah*, *Naul*, and *Yousif*.

[4] For this reason, Petitioners' reliance on *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982) (Opp. at 17), is misplaced. *See Viknesrajah v. Koson*, No. 09-cv-6442, 2011 WL 147901, *2 (W.D.N.Y. Jan. 18, 2011) (explaining that, while in *Bertrand*, "the Second Circuit determined that federal courts had jurisdiction to review [discretionary decisions denying parole to aliens seeking asylum] … Congress subsequently enacted 8 U.S.C. § 1252(a)(2)(B)(ii) … Consequently, this Court lacks jurisdiction to review discretionary decisions concerning parole").

415 U.S. 199, 233-35 (1974); *see also Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991) (extending *Morton* to agency rules that have not attained the status of formal regulations). While the Morton Memo is intended to "ensure transparent, consistent, and considered ICE parole determinations for arriving aliens seeking asylum in the United States" (Morton Memo ¶ 1), these expressions of intent simply reflect the goals underlying ICE's "guidance" and "policy" with respect to the exercise of its unfettered discretion. It is neither the nature nor the purpose of the Morton Memo to confer a legally enforceable benefit or right in any person, as the Memo itself expressly acknowledges.[5] (Morton Memo ¶ 10.) This renders *Morton* and *Mortilla* inapposite. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1152-53 (D.C. Cir. 2006) (distinguishing *Morton* and declining to address alleged non-compliance with DOJ guidelines that "expressly state that they do 'not create or recognize any legally enforceable right in any person'"; "[g]iven the nature of the guidelines themselves, and the function they govern, we conclude that the guidelines provide no enforceable rights to any individuals, but merely guide the discretion of the prosecutors"); *United States v. Loften*, 518 F. Supp. 839, 857 (S.D.N.Y. 1981), *aff'd*, 819 F.2d 1130 (2d Cir. 1987) ("internal Government policies do not create rights in private citizens. The United States Attorney's Manual itself specifically states that it is not intended to, does not, and may not be relied upon to, create any rights whatever in any party").

Notably, the Court retreated from the broadest reading of *Morton* in *Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981), where it refused to bind the Secretary of Health and Human

[5] The United States' representations in *Rodriguez* are not inconsistent. As the United States maintained in *Rodriguez* and again in this case, the Morton Memo constitutes ICE's "policy" and "guidance" to its personnel; that, however, does not mean that ICE deems the Memo to be legally binding and judicially enforceable, especially when the four corners of the Memo explicitly disclaim as much. (Morton Memo ¶ 10.)

Services to the internal rules set forth in its Claims Manual because the manual "is not a regulation," noting that "[i]t has no legal force, and it does not bind the [agency]." Relatedly, the Second Circuit has found that "*Montilla*'s holding is limited to its express terms," concluding that where an agency regulation does not affect fundamental rights derived from the Constitution or a federal statute, a challenged proceeding will not be invalidated absent a showing of prejudice to the rights sought to be protected by the subject regulation. *Waldron v. INS*, 17 F.3d 511, 517-18 (2d Cir. 1993) (reasoning that, if an agency's "failure to strictly adhere to its regulations" relating to "less fundamental, agency-created rights and privileges" resulted in a wholesale remand in immigration cases, it "would place an unwarranted and potentially unworkable burden" on the agency). Thus, even if ICE did not strictly adhere to the non-regulatory guidance in the Morton Memo, the record reveals that Petitioners were in fact considered, several times, for parole and eventually released on parole. *Ali v. Mukasey*, 524 F.3d 145, 149-50 (2d Cir. 2008) (dismissing habeas petitioners' claim that DHS's alleged failure to comply with regulation deprived aliens of chance to seek discretionary referral where petitioners were actually given the chance to seek discretionary relief from DHS); *Singh v. Napolitano*, 500 Fed. App'x 50, 53 (2d Cir. 2012) (even if INS's procedures did not comply with regulation, they satisfied constitutional requirements of a meaningful opportunity to be heard).

Fourth, if application of the *Accardi* doctrine is "premised on fundamental notions of fair play underlying the concept of due process," *Montilla*, 926 F.2d at 167, then it is significant that Petitioners have no due process rights in parole. Petitioners gloss over this dispositive issue, again mischaracterizing Respondents' argument and seeking to reframe their own claims as "not seeking any particular outcome on parole," as if that would somehow salvage them from dismissal. (Opp. at 12-13.) To be clear: Petitioners have no constitutionally protected liberty

interest in parole, whatsoever—whether it pertains to ICE's parole decisions or the procedures it employs to reach those decisions. (MTD at 11-12.)[6] Rather, they possess only the *statutory* rights and privileges granted by Congress, none of which Petitioners have argued, much less shown, have been violated. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

Fifth, Petitioners proffer no satisfactory showing that their fact-intensive claims fall within the narrow scope of habeas jurisdiction under § 2241. Aside from failing to convincingly distinguish *Duamutef* and *Sol*, Petitioners' reliance on *Chen v. Gonzales*, 471 F.3d 315 (2d Cir. 2006), misses the point. *Chen* grappled with the meaning of "constitutional claims or questions of law" in 8 U.S.C. § 1252(a)(2)(D), which does not apply to the instant habeas petition. As Respondents have shown, Petitioners' challenges exceed the scope of habeas review because they are not based on the application of pure legal principles to undisputed facts, but, rather, are immersed in myriad factual contentions regarding ICE's application of discretionary relief, as illustrated by their voluminous preliminary injunction motion. (MTD at 9-10.) Both *Duamutef* and *Sol* are clear that, in this instance, habeas review is precluded. *See also Osses v. McElroy*, 287 F. Supp. 2d 199, 206-07 (W.D.N.Y. 2003) ("Consideration of 'purely legal issues' does not require a federal court to re-evaluate 'the agency's factual findings or the … exercise of discretion.'") (quoting *Sol v. INS*, 274 F.3d 648, 650 (2d Cir. 2001)).

II. Neither *Lora* nor *Rodriguez* Compels Bond Hearings in § 1225(b)(1) Detention.

Petitioners have identified no binding authority requiring the Court to read a bond

[6] *See also Darif v. Holder*, 739 F.3d 329, 336 (7th Cir. 2014) ("We have repeatedly held that the opportunity for discretionary relief from removal is not a protected liberty interest because aliens do not have a legitimate claim of entitlement to it."); *Jean v. Nelson*, 727 F.2d 957, 972 (11th Cir. 1984) ("excludable aliens cannot challenge either admission or parole decisions under a claim of constitutional right"); *Sierra*, 258 F.3d at 1218-19 (alien's due process challenge to INS's procedures used to withdraw his parole under regulations "face a high hurdle" because the "Due Process Clause does not provide him a liberty interest in being released on parole").

requirement into § 1225(b)(1) mandatory detention. *Lora* imposed a six-month, bright line rule for detention under § 1226(c), and the Ninth Circuit's *Rodriguez* decision on § 1225(b) is non-binding and, for the reasons in Respondents' opening brief, unpersuasive. (MTD at 13-18.) At the border, Congress's interests and authority over immigration are at its "zenith," *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004), and the fact that Petitioners are seeking admission to the United States makes this case fundamentally different than *Lora* and renders those district court decisions applying *Lora* in this context wrong. *Cardona v. Nalls-Castillo*, 177 F. Supp. 3d 815, 816 (S.D.N.Y. 2016) ("*Lora* addressed the issue of detention under Section 1226(c) only, and does not extend to individuals detained under Section 1225(b).").[7]

Moreover, contrary to Petitioners' argument, *Rodriguez*'s holding hinged on the fact that LPRs were in the § 1225(b) certified class. The *Rodriguez* court specifically recognized that the *Mezei* and *Barrera-Echavarria* holdings were still applicable to arriving aliens, like Abdi, Barrios Ramos, and the putative subclass, "to whom the entry fiction clearly applies." *Rodriguez v. Robbins*, 715 F.3d 1127, 1140-41 (9th Cir. 2013). But, because "it is clear that the 1225(b) subclass includes at least some aliens who are not subject to the entry fiction doctrine"—i.e., LPRs who enjoy due process protection—the court employed a "lowest common denominator" theory to find that all members of the § 1225(b) subclass were entitled to enjoy the constitutional protections extended to the class's most sympathetic member.[8] *Id.* at 1142. That logic has no

[7] Numerous other courts have either declined to extend *Lora* to § 1225(b) or expressed skepticism that it applies beyond § 1226(c). *Cardona v. Taylor*, No. 1:17-cv-320, 2017 WL 1291996, *1-*2 (S.D.N.Y. Apr. 3, 2017); *Gomez v. Decker*, No. 1:17-cv-1726, 2017 WL 1423959, *2 (S.D.N.Y. Mar. 10, 2017); *Manu v. Shanahan*, No. 1:16-cv-7581, 2016 WL 5794000, *1 (S.D.N.Y. Sept. 30, 2016); *Perez v. Aviles*, 188 F. Supp. 3d 328, 332 (S.D.N.Y. May 24, 2016).

[8] The *Rodriguez* court's conclusion that the parole system available to § 1225(b) detainees is insufficient to overcome the constitutional concerns raised by prolonged detention, 715 F.3d at 1144, is inconsistent with binding precedent, *Demore*, 538 U.S. at 528, 531.

force here, as Petitioners and the entire proposed subclass are arriving aliens whose due process protection is determined by the procedure authorized by Congress. *Mezei*, 345 U.S. at 212; *see also Mathews v. Diaz*, 426 U.S. 67, 78-80 (1976) (while the Fifth Amendment may apply to some aliens, it does not apply to all classes of aliens equally).

Rodriguez's holding was also premised on the court's rejection of the Government's argument that § 1225(b) is too unambiguous for the canon of constitutional avoidance to apply, and the court being bound to Ninth Circuit precedent where it had already applied the canon to § 1225(b). 715 F.3d at 1142. There is no Second Circuit precedent finding § 1225(b) ambiguous; accordingly, this Court is free to find that canon inapplicable to § 1225(b)'s plain terms mandating that petitioners "shall be detained." *See Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) ("The canon [of constitutional avoidance] 'is a tool for choosing between competing plausible interpretations' of a provision," and "'[i]t has no application in the absence of … ambiguity.'") (citations omitted); *Clark v. Martinez*, 543 U.S. 371, 382 (2005) (constitutional avoidance canon is "a means of giving effect to congressional intent, not of subverting it").

Furthermore, Petitioners' argument that *Mezei*'s holding is limited or inapplicable to Petitioners, who they argue are somehow not "arriving aliens," is utterly specious. The Court's holding in *Landon v. Plasencia*, 459 U.S. 21 (1982), that certain returning LPRs have some due process rights does not elevate Petitioners' legal footing or foreclose *Mezei*'s application. Petitioners are not LPRs, but are arriving aliens "seeking initial admission to the United States" who "have no constitutional rights regarding [their] application," *id.* at 32, and are "treated,' for constitutional purposes, 'as if stopped at the border,'" *Zadvydas*, 533 U.S. at 693. As such, their mandatory detention without a bail hearing pre-removal-order is a "constitutionally permissible part" of the removal process. *Demore*, 538 U.S. at 528, 531. While Petitioners seek admission to

the United States and have applied for asylum, they have not been admitted and their eligibility for relief from removal has yet to be determined. As the Supreme Court held long ago, deportation proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character." *Id*. at 523 (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)). Petitioners' bond claims are thus legally implausible.

III. Petitioners' Claims are Fraught with Justiciability Issues.

Having been released from detention, the claims of the named petitioners are undeniably moot. (MTD at 19-20.) *See also Altagracia v. Sessions*, No. 6:16-cv-6647, 2017 WL 908211 (W.D.N.Y. Mar. 7, 2017) (Wolford, J.). Therefore, if Petitioners' claims survive dismissal, Respondents maintain that the Court should require Petitioners to substitute Abdi and Barrios Ramos for class representatives with justiciable claims, as Petitioners purport they are ready and willing to do.[9] (Opp. at 8-9.)

CONCLUSION

Respondents therefore request that the Court grant their motion and dismiss this case.

DATED: October 11, 2017

Respectfully submitted,

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[9] Petitioners argue that Respondents have "improperly interject[ed] its own facts and inferences" in their motion. (Opp. at 13-14.) Yet, the majority of Respondents' factual assertions were taken directly from the petition or based on undisputed facts set forth in the parties' joint status reports, of which the Court may take judicial notice. With respect to the parole data in Thomas Brophy's declaration, apparently Petitioners want the Court to believe their erroneous allegation that ICE only granted *two* parole requests between January and July 2017 (Am. Pet. ¶ 90) for purposes of this dismissal motion, while they seek a preliminary injunction relying on ICE's comprehensive parole data. In any event, the Court is not bound to Petitioners' legal conclusions, nor must it assume that Petitioners can prove facts that they have not alleged or that Respondents have violated laws in ways that have not been alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Assoc. Gen. Contractors of Ca., Inc. v. Ca. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2017, I filed the foregoing document with the Clerk of the Court through the Court's ECF system.

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