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' OPPOSITION TO PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

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I. INTRODUCTION

Parole has been recognized as "an act of extraordinary sovereign generosity, since it grants temporary admission into our society to an alien who has no legal right to enter." *Jean v. Nelson*, 727 F.2d 957, 972 (11th Cir. 1984). Petitioners nevertheless seek a preliminary injunction that would instruct the Government on exactly how it should exercise its discretion in bestowing this "extraordinary sovereign generosity" and would require the Government to conduct bond hearings for arriving aliens who, absent a discretionary grant of parole, the law unambiguously mandates "shall be detained" pending their immigration proceedings. The limited due process rights of arriving aliens in this context are clear, and Petitioners identify no binding legal authority supporting their unprecedented request. Instead, they rely on speculation, hearsay, and the non-binding touchstones of an internal agency memorandum guiding the agency's exercise of discretion. Yet, Petitioners simply face far too many insurmountable hurdles to succeed on the merits of their claims, to demonstrate that irreparable harm is likely absent injunctive relief from the Court, and to show that a balance of the equities weighs in their favor. Because they have not made a clear showing that the drastic tool of preliminary injunctive relief is warranted, the Court should deny their motion.

II. 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). Congress has expressly dictated 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); *see also id.* § 1225(b)(1)(B)(ii), (iii)(IV). 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." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953); *see also Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

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, however, 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) (emphasis added). For aliens detained under § 1225(b), including those lacking proper documentation, but 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." 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). Although "ICE retains ultimate discretion whether it grants parole in a particular case," DHS has advised that "such authority should be exercised sparingly." 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), at 9-10.

A paroled alien is not regarded as having been "admitted" into the United States 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. 8 U.S.C. § 1252(a)(2)(B)(ii).

III. LEGAL STANDARD

"'[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a *clear showing*, carries the burden of persuasion.'" *Mazurek v.*

Armstrong, 520 U.S. 968, 972 (1997) (citation omitted) (emphasis added); *see also Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 273 (2d Cir. 1986) (a preliminary injunction "'is one of the most drastic tools in the arsenal of judicial remedies'"). A "heavy burden" is therefore imposed on Petitioners to show (1) a substantial likelihood of success on the merits,[1] (2) a substantial threat of irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008); *Town of Riverhead v. CSC Acquisition NY, Inc*, 618 F. Supp. 2d 256, 264 (E.D.N.Y. 2009); *see also ACLU v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015).

"A showing of irreparable harm is 'the single most important prerequisite for the issuance of a preliminary injunction.'" *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation omitted). In this regard, a mere "possibility" of harm is insufficient. *Winter*, 555 U.S. at 22. Rather, Petitioners must demonstrate that a substantial threat of an injury "that is neither remote nor speculative" is "likely" in the absence of an injunction. *Id.*; *Murray v. New York*, 604 F. Supp. 2d 581, 584 (W.D.N.Y 2009) (citation omitted). "[A] request for preliminary injunctive relief, even if warranted at one time, may become moot if the underlying factual circumstances have changed in the movant's favor. In other words, if, due to changed circumstances, the threatened harm dissipates, or ceases to be 'actual and imminent,' then injunctive relief may be denied." *Murray*, 604 F. Supp. 2d at 584 (citation omitted).

In determining the likelihood of success, "[i]t is not enough that the chance of success on the merits be 'better than negligible'"; "more than a mere 'possibility' of relief is required."

[1] Because Petitioners seek an injunction "altering, rather than maintaining, the status quo," they "must meet the more rigorous standard of demonstrating a clear or substantial showing of a likelihood of success on the merits." *Almontaser v. New York City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008) (marks and citation omitted).

Nken v. Holder, 556 U.S. 418, 434 (2009) (citation omitted). Petitioners must make a "clear or substantial" showing of likely success on the merits. *Town of Riverhead*, 618 F. Supp. 2d at 263.

The balance of equities and consideration of the public interest factors are also "pertinent in assessing the propriety of any injunctive relief" and the Court must weigh them with "serious consideration." *Winter*, 555 U.S. at 27, 32. When the Government is a party, these last two factors merge. *Nken*, 556 U.S. at 435.

The purpose of a preliminary injunction "is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (citations omitted). Therefore, even if preliminary relief is warranted, "a court 'need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case.'" *Id.* (citation omitted).

ARGUMENT

I. PETITIONERS HAVE NOT SHOWN THAT THEY ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS

A. Petitioners are Unlikely to Succeed on Parole Claims that the Court Lacks Subject-Matter Jurisdiction to Consider.

1. 8 U.S.C. § 1252(a)(2)(B)(ii) preludes jurisdiction over Petitioners' parole claims.

Petitioners cannot demonstrate success on their claims, because the Court lacks jurisdiction to consider them. *See Bus. & Residents All. of East Harlem v. Martinez*, No. 03-civ-5363, 2003 WL 21982960, *3 (S.D.N.Y Aug. 20, 2003) (viable arguments regarding jurisdiction indicated that plaintiffs were unlikely to prevail on the merits). There is indeed no jurisdiction over Petitioners' First and Second Claims challenging 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.) Whether Petitioners challenge ICE's denials of parole or

ICE's internal procedures underlying its parole decisions, the INA could not be clearer: both the decision to grant or deny parole and the manner in which ICE's discretionary judgment is exercised in making parole decisions are expressly committed to DHS's discretion and, thus, beyond the jurisdictional reach of this Court. 8 U.S.C. § 1252(a)(2)(B)(ii).

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546 (1996) ("IIRIRA"), and in doing so, made sweeping changes to the INA. "[M]any provisions of the IIRIRA were aimed at protecting from court review exercises of the Executive's discretion." *Kucana v. Holder*, 558 U.S. 233, 252 (2010). Of importance here, IIRIRA amended 8 U.S.C. § 1252(a)(2)(B)(ii), which previously gave federal courts habeas corpus jurisdiction to review the Government's decisions concerning detention, release on bond, or parole pending a final determination of deportability, to now read

> *Notwithstanding any other provision of law* (statutory or nonstatutory), *including section 2241 of Title 28*, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, *no court shall have jurisdiction to review—*
> …
> (ii) *any other decision or action* of the [Government] … the authority for which is *specified under this subchapter to be in the discretion of the [Government]* …, other than the granting of [asylum] relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added); *see also Kucana*, 558 U.S. at 238-39; *Marriott v. Ingham*, 990 F. Supp. 209, 211 (W.D.N.Y. 1998).[2]

"[T]his subchapter" in § 1252(a)(2)(B)(ii) encompasses § 1182. *Sanusi v. Gonzales*, 445 F.3d 193, 198 (2d Cir. 2006). Section 1182(d)(5)(A) provides that the Secretary of DHS "*may*

[2] Section 1252 was later amended by § 106 of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, but those amendments did not change the operative language of § 1252(a)(2)(B)(ii) as enacted in 1996. *Kucana*, 558 U.S. at 238 n.1.

… *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." (Emphasis added). *See also* 8 C.F.R. § 212.5(a), (b).

The Supreme Court has clarified that a decision unambiguously "specified by statute 'to be in the discretion of the [Government]'"—as in 8 U.S.C. § 1182(d)(5)(A)—is "shielded from court oversight by § 1252(a)(2)(B)(ii)." *Kucana*, 558 U.S. at 248. No judicial review of ICE's discretionary parole decisions that occurred prior to 1996, therefore, is available after IIRIRA's 1996 enactment of § 1252(a)(2)(B)(ii). *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"); *Yousif v. Perryman*, No. 96 C 7581, 1997 WL 160748, *1 (N.D. Ill. Apr. 2, 1997) (acknowledging that some review of the denial of an alien's release on parole was possible through writ of habeas corpus *until* effective date of IIRIRA).[3]

[3] And post-IIRIRA cases indeed recognize the non-reviewability of parole determinations in light of § 1252(a)(2)(B)(ii). *Altagracia v. Sessions*, No. 6:16-cv-6647, 2017 WL 908211, *2 (W.D.N.Y. Mar. 7, 2017) (Wolford, J.) ("the [Government'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"); *United States v. Bush*, No. CR 12-92, 2015 WL 7444640, *1 (W.D. Pa. Nov. 23, 2015) (finding that 1252(a)(2)(B)(ii) "explicitly denies courts the jurisdiction to review" parole decisions, "except insofar as those claims raise constitutional issues, then only the appropriate court of appeals shall hear the case"); *Naul v. Gonzales*, No. 05-4627, 2007 WL 1217987, *2-*3 (D.N.J. Apr. 23, 2007) (parole denial pursuant to § 1182(d)(5)(A) "is a discretionary decision outside this Court's review").

Not only does § 1252(a)(2)(B)(ii) apply to ICE's discretionary grant or denial of parole, but it also extends to the procedures ICE employs in exercising that discretion. *See, e.g.*, *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 [Government'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)). Consequently, with jurisdiction lacking, Petitioners are unlikely to prevail on their parole claims.

2. Petitioners' parole claims exceed the narrow scope of habeas jurisdiction.

Petitioners' parole claims face another insurmountable jurisdictional hurdle: they fall far outside the narrow scope of habeas jurisdiction under 28 U.S.C. § 2241. A habeas petition may be used to challenge detention that is only "in violation of the Constitution or laws or treaties of the United States," *id.* § 2241(c)(3)—an analysis of "*purely* legal statutory and constitutional claims." *Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001) (emphasis added). As their petition and voluminous motion evince, Petitioners' claims are not based on the application of pure legal principles to undisputed facts, but, rather, are immersed in myriad factual assertions regarding ICE's application of discretionary relief. These are precisely the types of factual and discretionary issues that are precluded under § 2241. *Id.* (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 statutory or constitutional errors"); *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*, 274 F.3d at 650). For this additional reason, Petitioners' parole claims are not likely to succeed.

B. Even on the Merits, the Likelihood of Success on Petitioners' Parole Claims is Low.

1. Petitioners have no cognizable due process rights in ICE's discretionary parole.

To the extent the Court nevertheless delves into the substance of Petitioners' parole challenges, their due process challenge to ICE's parole procedures is legally meritless. "[A] constitutionally protected [liberty] interest cannot arise from relief that the executive exercises unfettered 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)). Petitioners therefore 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. *See Menechino v. Oswald*, 430 F.2d 403, 408-09 (2d Cir. 1970) (alien seeking entry into the United States does not qualify for procedural due process in seeking 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").[4]

[4] *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."); *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); *Jean*, 727 F.2d at 972 ("excludable aliens cannot challenge either admission or parole decisions under a claim of constitutional right"); *Sierra v. INS*, 258 F.3d 1213, 1218-19 (10th Cir. 2001) (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"); *Singh v. Still*, No. C

Petitioners possess only the *statutory* rights and privileges granted by Congress, *Mezei*, 345 U.S. at 212, none of which Petitioners have even argued, much less shown, ICE has violated. Pursuant to § 1182(d)(5)(A), both Abdi and Barrios Ramos were afforded case-by-case determinations of parole eligibility and had the opportunity to submit materials in support of their requests for parole. (ECF No. 17, Am. Pet. ¶¶ 27-31, 59-68; ECF No. 38-5, Abdi Decl. ¶¶ 23-35; Ensminger Decl. ¶ 5 (attached).) ICE considered those requests, ultimately granting parole after being satisfied that it was appropriate. (ECF No. 27-2, Brophy Decl. ¶¶ 2-3.) 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).

2. The Morton Memo lacks the force of law and cannot sustain Petitioners' claims.

Moreover, Petitioners' exclusive argument is that ICE's parole denials are not in accordance with the Morton Memo. Yet, 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 …" Morton Memo ¶¶ 1, 10. It is this memo that Petitioners ask the Court to find creates a "legal obligation" and a "non-discretionary duty" by which ICE must comply. (ECF No. 38-1, PI Mot. at 2, 17.) Case law simply does not support their contention and the Court should reject it. *Dumschat*, 452 U.S. at 465 ("The ground for a constitutional

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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)).

claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising" the discretion at issue).

For example, the court in *Thevarajah* declined to hold that INS was bound by certain standards in a 1992 INS internal parole memorandum; 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 memorandum, finding that it did not "contain any directive whatsoever to the [Government] regarding parole," but rather provided "guidance to asylum pre-screening interviewers concerning the decision to recommend parole or not." *Naul*, 2007 WL 1217987, at *3; *see also id.* at *3 n.8; *Yousif*, 1997 WL 160748, at *2 (same, regarding 1992 INS internal parole memorandum). 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*, 160 F. Supp. 2d at 624; *see also Loa-Herrera*, 231 F.3d at 988-89 (district court erred in relying on 1990 internal INS policy memorandum in granting injunctive relief to plaintiffs because "merely articulates internal guidelines for INS personnel" and "did not establish judicially enforceable rights").

Petitioners' proffered cases, *Zhang v. Slatter*, 840 F. Supp. 292 (S.D.N.Y. 1994), and *Noorani v. Smith*, 810 F. Supp. 280 (W.D. Wash. 1993), are inapposite, as they are premised on jurisdictional bases that are plainly obsolete in light of Congress's subsequent 1996 enactment of § 1252(a)(2)(B)(ii). Indeed, after finding that it had jurisdiction to review "the discretionary decisions of INS officials to deny parole" under a "facially legitimate and bona fide" standard,

the *Zhang* court reviewed 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 memorandum.[5] 840 F. Supp. at 294; *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 parole decisions, under a "facially legitimate and bona fide" standard or otherwise.[6] 8 U.S.C. § 1252(a)(2)(B)(ii).

Petitioners further 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 asylum-seekers detained at Batavia. *Accardi*'s directive that an agency must follow its own regulations concerning the rights and interests of others is immaterial here because, of course, the Morton Memo is not a regulation. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). Similarly, *Morton*'s holding that the Bureau of Indian Affairs was required to comply with its own internal publication policy where individuals' "entitlement" and "rights" to government benefits were affected by that policy, is not illustrative here, where Petitioners simply have no such entitlements or rights to the discretionary grant of parole. *Morton v. Ruiz*, 415 U.S. 199, 233-35 (1974); *see also Montilla v. INS*, 926 F.2d 162, 167 (2d

[5] *Zhang* and *Noorani* both concern the same 1992 INS internal parole memorandum, entitled *Parole Project for Asylum Seekers*, that the court found legally unenforceable in *Thevarajah*, *Naul*, and *Yousif*.

[6] For this reason, Petitioners' reliance on *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982), and other pre-IIRIRA cases (ECF No. 38-1, PI Mot. at 22-24) is misplaced. *See Viknesrajah*, 2011 WL 147901, at *2 (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"); *Yousif*, 1997 WL 160748, at *1 (explaining that some review of denial of alien's release on parole was possible through writ of habeas corpus until effective date of IIRIRA).

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.[7] *Id.* ¶ 10. This distinction renders *Morton* and *Montilla* 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").

Notably, the Supreme Court retreated from the broadest reading of *Morton* in *Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981), where it refused to bind an agency 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]." *See also Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("not all agency publications are of binding force"). Relatedly, the Second Circuit has found that "*Montilla*'s holding is limited to its express terms," acknowledging that "[a]n administrative

[7] 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. Recognition of any such purported "right" stemming from the Memo would also directly conflict with case law holding that no due process rights in parole exist. *See supra* at 9-10.

agency is not a slave of its rules" and 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).[8] Thus, even if ICE did not strictly adhere to the non-regulatory guidance in the Morton Memo, the record reveals that Abdi, Barrios Ramos, and members of the putative class were considered, often multiple times, for parole and eventually released on parole. (ECF No. 17, Am. Pet. ¶¶ 27-31, 59-68; ECF No. 38-5, Abdi Decl. ¶¶ 23-35; Ensminger Decl. ¶¶ 5, 8, 11, 14, 20 (attached); ECF No. 27-2, Brophy Decl. ¶¶ 2-3.) *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 record revealed that 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).

3. Petitioners have no "strong proof" that ICE's exercise of its broad discretionary parole power is not legitimate and bona fide.

[8] The Second Circuit appears to have departed even further from *Montilla* where non-regulatory internal agency materials are concerned. *See 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"); *see also 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").

It is also worth mentioning that Petitioners' parole claims are unlikely to succeed because they are premised on faulty factual bases. Without conceding that district court review of ICE's parole decisions and procedures is ever appropriate under any standard, for purposes of defeating this motion Respondents point out that Petitioners have not presented "strong proof" to rebut the presumption that ICE's exercise of its broad discretionary power is legitimate and bona fide. *Altagracia*, 2017 WL 908211, at *2. Contrary to Petitioners' allegations, the ICE Buffalo Field Office began tightening standards for documentary proof in considering parole requests *prior* to President Trump's inauguration. (Brophy Decl. ¶¶ 2, 4-8 (attached).) Prompted by events that gained nationwide attention in late-2016, the ICE Buffalo Deputy Field Office Director concluded that parole requests should no longer be granted on the mere basis of *photocopies*, but, at a minimum, should be accompanied by *original* government-issued photographic identity documents that could be properly authenticated to prevent fraud. (*Id.* ¶¶ 5-7.) This decision is fully within ICE's discretion and is consistent with the Morton Memo's guidance that an arriving alien found to have a credible fear should establish his or her identity "to the satisfaction" of ICE. (Morton Memo ¶ 6.2.) *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"). Regardless, of course, Petitioners cannot show that ICE's past practices could have created a constitutionally protected liberty interest that current practices deprive. *Dumschat*, 452 U.S. at 465 ("No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution.").

Additionally, each of the deportation officers specifically identified in petitioners' declarations denies ever telling any detainee at Batavia or his attorney that parole changed,

ceased, or was unavailable, or ever preventing or deterring any detainee from requesting parole. While the parole process at Batavia is admittedly informal, with parole "interviews" often occurring in a relaxed group setting, the deportation officers have attested to explaining parole requirements to detainees, submitting requests for parole, and, in the case of a denial, identifying information that could support a request for parole re-adjudication. (*See* Ball Decl. ¶¶ 3-4; Ensminger Decl. ¶¶ 3-24; McCartan Decl. ¶¶ 3-5; Muehlig Decl. ¶¶ 4-10 (all attached); *see also* ECF No. 38-5, Abdi Decl. ¶ 31.) And although Petitioners complain that parole adjudications were untimely, the bottom line is that they did occur. (ECF No. 38-17, Shames Decl. at Ex. A.)

Also, since April 2015, written denials of parole requests at Batavia have been indicated on a Notification Declining to Grant Parole form (which includes boxes identifying the specific reason for denial) or in standard denial letters—neither of which is precluded by statute or regulation. (Brophy Decl. ¶ 3 (attached); *see, e.g.*, ECF No. 38-5, Abdi Decl. ¶¶ 27, 29.) Further, ICE has provided a legitimate and bona fide reason, rooted in statute and regulation, for each of the parole denials identified in the data provided by ICE and relied on by Petitioners. (ECF No. 38-17, Shames Decl. at Ex. A.)

Accordingly, even if ICE's discretionary parole decisions and procedures were reviewable—which the Government argues they are not—the Court cannot find that Petitioners have demonstrated "strong proof" or "bad faith" from the full record before it.

C. As a Matter of Law, Petitioners are Not Substantially Likely to Succeed on their Bond Claims.

1. Neither *Lora* nor *Rodriguez* compels bond hearings in § 1225(b)(1) detention.

Petitioners' claim that their detention without a bond hearing violates due process fails as a matter of law and, thus, has little likelihood of success. *See Fallis v. Ambach*, 710 F.2d 49, 54 (2d Cir. 1983) (likelihood of success or serious question could not be demonstrated on basis of

challenge that failed to state a claim). Abdi and Barrios Ramos are both arriving aliens, who have not entered the country for immigration purposes. 8 U.S.C. § 1101(a)(13)(A). As such, 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. *Id*. 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 subclass, 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) (internal marks and citation omitted); *see also Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990). 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). "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*, 2007 WL 1217987, at *4-5. Any due process owed Abdi, Barrios Ramos, and the proposed subclass was therefore satisfied when they were considered for parole and notified of ICE's decisions.

Petitioners have identified no binding authority requiring the Court to read a bond requirement into § 1225(b)(1) mandatory detention. They chiefly rely on the Ninth Circuit's decision on § 1225(b) in *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013), which is neither binding nor persuasive. First, *Rodriguez* relied heavily on reasoning from cases that dealt with detention under § 1226(*c*). 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)(1)(B)(ii), (b)(1)(B)(iii)(IV) (requiring that alien "*shall* be detained" in case of arriving aliens applying for asylum); *see also id.* § 1225(b)(2)(A). 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. *See* 8 U.S.C. § 1182(d)(5)(A).

Second, *Rodriguez*'s 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"). 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*, 715 F.3d at 1140-41. 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.[9] *Id.* at 1142. That logic has no force in this case, as Petitioners and the entire proposed subclass are *not* LPRs, but, rather, are arriving, non-admitted 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).

Third, the Ninth Circuit further premised the *Rodriguez* holding on the court's rejection of the Government's argument that § 1225(b) is too unambiguous for the canon of constitutional

[9] 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 entirely inconsistent with binding Supreme Court precedent on this issue, *Demore*, 538 U.S. at 528, 531.

avoidance to apply, as well as the fact that the court was bound to Ninth Circuit precedent where it had previously applied the canon to § 1225(b). 715 F.3d at 1142. Of course, this Court is bound by no such Second Circuit precedent finding § 1225(b) ambiguous; accordingly, the 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.") (internal quotation marks and 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"). *Rodriguez* therefore has no proper application in the context of this case.

The Court should similarly reject Petitioners' assertion that *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), applies to § 1225(b) detention. *Lora* imposed a six-month, bright line rule for the detention of criminal aliens under § 1226(*c*) only. The fact that Petitioners are aliens seeking admission to the United States makes this case fundamentally different than *Lora*, which did not address the unique legal status of arriving aliens or the Nation's supreme interests in controlling its border. 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." *Demore*, 538 U.S. at 523 (quoting *Wong Wing*, 163 U.S. at 235). Thus, pre-*Lora* cases in this Circuit, holding that mandatory detention under § 1225(b) is consistent with the Constitution, remain good law. *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); *Ferreras*, 160 F. Supp. 2d at 624 (S.D.N.Y. 2001); *Abassi v. Sec'y, Dep't of Homeland Sec.*, No. 09-cv-7605, 2010 WL 199700, *3 (S.D.N.Y. Jan. 11, 2010). The same is true for post-*Lora* cases that have

either declined to extend *Lora* to § 1225(b) or expressed skepticism that it extends beyond § 1226(c). *See Cardona v. Nalls-Castillo*, 177 F. Supp. 3d 815, 816 (S.D.N.Y. 2016); *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).

Should the Court nevertheless interject a limitation into § 1225(b), it is important to note that "[t]his Circuit does not … 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; *Abassi*, 2010 WL 199700, at *4. Here, both Abdi and Barrios Ramos unilaterally requested to continue their merits hearings twice, thereby lengthening their detention, and the same may be true concerning other members of the putative subclass. (*See, e.g.*, ECF No. 17, Am. Pet. ¶ 35.) Under these circumstances, Petitioners cannot prevail on their bond claims.

2. 8 U.S.C. § 1252(f)(1) precludes the class-wide injunctive relief sought by Petitioners on their bond claims.

Congress has proscribed class-wide injunctive relief under the INA. *See* 8 U.S.C. § 1252(f)(1). "By its plain terms, and even by its title, [8 U.S.C. § 1252(f)] is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). More specifically, § 1252(f)(1) provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221-1231], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated."

Petitioners ask the Court to order Respondents "to provide bond hearings to all petitioners who have been detained for more than six months." (ECF No. 38-1, PI Mot. at 2; *see also* ECF No. 17, Am. Pet. ¶ 114.) But, to grant the relief Petitioners seek, the Court would need to specifically enjoin ICE's operations in carrying out its delegated powers under § 1225(b)(1) on a class-wide basis—precisely the type of relief that § 1252(f)(1) prohibits.

II. PETITIONERS HAVE NOT SHOWN THAT A SUBSTANTIAL THREAT OF IRREPARABLE HARM IS LIKELY, ABSENT INJUNCTIVE RELIEF

Petitioners' showing on this requirement also falls short. As an initial matter, the Court has stayed briefing on the issue of class certification (ECF No. 35, Text Order), and Petitioners therefore cannot base their assertions of irreparable harm on the speculative claims of a putative class that has not yet been certified, and who Petitioners may not even have standing to represent. Although Petitioners purport that the Court "may rely on evidence of likely harm to putative class members" (ECF No. 38-1, PI Mot. at 8 n.6), the *LaForest* case they cite for this proposition noted that the "procedural posture of [that] case is relevant in this regard," in that the district court relied on six affidavits submitted by unnamed plaintiffs in granting a preliminary injunction *after* the court had awarded summary judgment to the plaintiffs on the issue of liability. *LaForest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 57 (2d Cir. 2004). The circumstances here are dissimilar, as Petitioners' proffered declarations come *before* the Court has even found that it has subject-matter jurisdiction over Petitioners' claims, much less found Respondents liable for any misconduct.

Moreover, even if the Court considers Petitioners' class allegations, none of them has sufficiently alleged that any purported injury would "likely" be redressed by a favorable decision from this Court. Petitioners' putative injury their "ongoing and prolonged detention" and the myriad alleged harms resulting from that detention. (ECF No. 38-1, PI Mot. at 8-9.) Not only is

their detention constitutional, however, but it is simply a part of the immigration process that Petitioners actively sought out and in which they voluntarily chose to partake. *See, e.g., Kasneci v. Dir., Bureau of Immigration & Customs Enf't*, No. 12-12349, 2012 WL 3930378, *3 (E.D. Mich. Sept. 10, 2012) (detention pending removal hearings did not constitute irreparable harm, but was "part of the entire removal process").

Even if their detention could constitute irreparable harm, Petitioners acknowledge that they "do not seek the release of any individual." (ECF No. 38-1, PI Mot. at 2.) It follows then, that their requested relief would not clearly address the harm they allege to be suffering, because only a release from detention could cure their alleged harms—and release on parole or bond is not guaranteed, even with injunctive relief. In short, the possibility that Petitioners' requested relief would redress their alleged harms is not "likely," but is, rather, remote and contingent on far too many considerations that extend beyond any preliminary injunctive relief.

The fact is that Abdi and Barrios Ramos have been released on parole, as is the case with the majority of the putative subclass declarants. (ECF No. 27-2, Brophy Decl. ¶¶ 2-3; Ensminger Decl. ¶¶ 8, 11, 14, 20 (attached).) Where the named petitioners and the bulk of the proposed subclass have been released from detention, they cannot claim to be suffering irreparable harm from ICE's decision to detain them. *Murray*, 604 F. Supp. 2d at 584.

III. THE BALANCE OF EQUITIES WEIGHS AGAINST PETITIONERS BECAUSE THE REQUESTED INJUNCTION IS NOT IN THE PUBLIC INTEREST

The balance of hardships and public interest weigh in favor of the Government and heavily against Petitioners. As mentioned above, granting the preliminary injunctive relief Petitioners seek would alter, rather than preserve, the status quo. Interference with the manner in which ICE exercises its discretionary authority, 8 U.S.C. § 1182(d)(5)(A), and carries out its statutory mandates, 8 U.S.C. § 1225(b), on a preliminary and class-wide basis (before any class

has even been certified) significantly harms the Government and cannot truly be said to be in the public interest.

It is well-settled that the public's interest in enforcement of U.S. immigration laws is paramount, and even more so where, as here, Congress has exercised its supreme legislative authority and control over the Nation's border. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1220-21 (D.C. Cir. 1981). Here, Petitioners ask this Court to intervene in an area where the actions about which they complain are plainly outside this Court's jurisdiction, 8 U.S.C. § 1252(a)(2)(B)(ii), 28 U.S.C. § 2241; clearly delegated to ICE's unreviewable discretion, 8 U.S.C. § 1182(d)(5)(A); or mandated by unambiguous statutory provisions, 8 U.S.C. § 1225(b). It cannot be in the public's interest to disregard these statutory mandates—and certainly not on the mere basis of an internal agency guidance memo or non-binding legal authority.

It is especially important that the Court tread extremely carefully in this case because of the unprecedented relief that Petitioners seek: an injunction instructing ICE *how* to exercise its discretion in a parole system that Congress has expressly delegated to DHS's domain and altogether removed from district court review. An injunction of this magnitude should come, if at all, only after a full and fair consideration of all the legal and factual issues, and not until Petitioners have met their burden to satisfy Rule 23 requirements. *Infra* at 24-25.

IV. IF GRANTED, ANY INJUNCTION SHOULD BE LIMITED TO ABDI AND BARRIOS RAMOS

Petitioners seek class-wide injunctive relief, asserting that the Court "may conditionally certify the class or otherwise award a broad preliminary injunction, without a formal class ruling, under its general equity powers." (ECF No. 38-1, PI Mot. at 8.) The Advisory Committee Notes

to Rule 23 explicitly disapprove of such an approach. Fed. R. Civ. P. 23 Advisory Committee Notes 2003 Amendments ("The provision that a class certification 'may be conditional' is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."). At any rate, "in order to use these general equity powers on behalf of the class, at least one named plaintiff must first have standing." *Gardner v. CNA Fin. Corp.*, No. 3:13-cv-1918, 2016 WL 96141, *8 (D. Conn. Jan. 8, 2016). As explained in Respondents' motion to dismiss, standing of the two named petitioners is questionable. (ECF No. 27-1, MTD at 19-21.) Given this, Respondents submit that the prudent course is for the Court to decline awarding class-wide relief unless and until Petitioners have satisfied the rigorous requirements of Rule 23. *See Spinner v. City of New York*, No. CV-01-2715, 2003 WL 23648356, *7 (E.D.N.Y. Oct. 10, 2003) ("Insofar as the injunctive relief sought herein is sought on behalf of the class, not on behalf of the named plaintiffs, adjudication of the motion for class certification was a condition precedent to consideration of the motion for preliminary injunction.").[10]

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Petitioners' motion for a preliminary injunction.

DATED: October 20, 2017

Respectfully submitted,

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Trial Attorney

[10] *See also Telford v. Ideal Mortg. Bankers, Ltd.*, No. CV 09-5518, 2010 WL 3924790, *4 (E.D.N.Y. Aug. 17, 2010) (finding that it was necessary to determine whether Rule 23 was satisfied prior to awarding class-wide relief), *adopted at* 2010 WL 3909313 (E.D.N.Y. Sept. 27, 2010); *Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1371-72 (9th Cir. 1984) (agreeing that "in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs"); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974) (same).

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I filed the foregoing document with the Clerk of the Court through the Court's ECF system.

s/ T. Monique Peoples
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