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)

PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

In support of their preliminary injunction, the petitioners presented a substantial record demonstrating that Batavia officials abandoned individualized parole decisionmaking as required by the 2009 Parole Directive and instead instituted a broad practice of summarily denying parole following the inauguration of President Trump. In its opposition the Government does not dispute the data showing a dramatic drop in parole after the inauguration, nor does it contest the petitioners' evidence of systemic violations of the Parole Directive—the same Directive the Government has touted to the Supreme Court as grounds for denying bond hearings to detainees. Rather, it suggests that any changes at Batavia were attributable to a pre-inauguration decision by the local field office director to implement a more rigorous identification requirement. But this claim of a new identification policy is contradicted by virtually every other piece of evidence in the record and even if true would do nothing to excuse the systemic violations of the 2009 Parole Directive. In fact, such a policy would itself constitute a further violation of the Directive.

That the petitioners are challenging a systemic practice of abandoning individual parole decisionmaking as required by the Directive explains why the controversy is not about the Government's undisputed and unreviewable discretion to make individualized parole decisions. Rather, the dispute here concerns an unlawful practice that the Government had no discretion to adopt and that violates statutory and constitutional duties the Government has no choice but to obey. This critical distinction gives this Court jurisdiction over the parole claims and establishes the legal violations for which the petitioners seek preliminary injunctive relief.

As for the petitioners' bond claims, the Government largely repeats arguments previously made to this Court, and the petitioners address them briefly before turning to the parole claim. As

an initial matter, however, they address the Government's arguments about irreparable harm, the public interest and the balance of equities, and the availability of class-wide relief.

I. THE PETITIONERS ARE BEING IRREPARABLY HARMED, THE BALANCE OF EQUITIES FAVORS GRANTING PRELIMINARY RELIEF, AND NO BASIS EXISTS FOR NOT GRANTING CLASS-WIDE RELIEF.

Starting with irreparable harm, the Government ignores that the petitioners' ongoing detention is severely prejudicing their ability to prepare for asylum hearings and is inflicting serious physical and emotional damage on people who came to this country as victims of violence and persecution. Rather, it first contends that its having sought a stay of briefing on class certification somehow means class members unlawfully held at Batavia are not suffering harm. *See* PI Opp. (ECF No. 50) at 22. Nothing in that tactical decision by the Government's lawyers, however, negates the very real harm the petitioners are suffering in fact.[1] The Government next callously asserts this Court should ignore the harm the petitioners are suffering because it is part of an immigration process "they voluntarily chose to partake in," *id*. at 23, but that ignores the central contention in this case: the petitioners are being grievously harmed by unlawful government detention, which certainly is not something they chose to partake in.

The harm is compounded by the Government's near total failure to advise asylum-seekers why they have been denied parole or what they can do to remedy their denial. *See* PI Mem. (ECF No. 38-1) at 17-19. Indeed, if Director Brophy's claim of new identification requirements as of December 2016 is to be believed, the Government has affirmatively misled asylum-seekers and

[1] The Government also argues that, in the absence of class certification, this Court cannot grant the requested relief. *See* PI Opp. at 24-25. The Government simply cites an Advisory Committee note that offers the unexceptional proposition that certification is inappropriate when Rule 23 requirements have not been met. *Id.* Here, by contrast, the petitioners submitted a substantial record meeting all Rule 23 requirements, Class Cert. Mot. (ECF No. 19), and District Courts have well-established authority to provisionally certify classes in granting preliminary relief, *see, e.g.*, *Ligon v. City of New York*, 925 F. Supp. 2d 478, 539 (S.D.N.Y. 2013).

their attorneys for nearly a year by failing to inform them of that change and continuing to disseminate standard paperwork from pre-December 2016 stating that *copies* of identification documents are acceptable to establish identity. *See infra* at 6-7.

As for the claim the relief the petitioners seek "would not clearly address the harm they allege" because the petitioners seek only parole adjudications and bond hearings rather than outright release, *see* PI Opp. at 23, that similarly ignores that fair parole adjudications and appropriate bond hearings are the route by which petitioners can escape the harm they are suffering. And the argument that those whom the Government released after the filing of this case cannot claim irreparable harm, *see id*., is irrelevant, as the only petitioners seeking preliminary relief are those who remain in custody. At the time of this filing, the petitioners' counsel know of at least 27 members of the parole class and 21 members of the prolonged-detention bond subclass still in custody. Austin Decl. (attached to this memorandum) ¶ 2.

With respect to the issue of the balance of equities and the public interest, the Government merely argues that enforcing immigration law is in the public interest. *See* PI Opp. at 23-24. What the Government does not and cannot argue is that it is in the public interest for it to act unlawfully and in violation of its nondiscretionary duties, which is what the petitioners have established is happening here. If the petitioners are able to prevail on the merits, the balance of equities and public interest plainly support preliminary injunctive relief, which would not entitle them to release but only to a fair parole process and to bond hearings which immigration judges hold regularly in this context and many similar ones.

The Government is also wrong that 8 U.S.C. § 1252(f)(1) precludes class-wide injunctive relief in this case. *See* PI Opp. at 24-25. That section only precludes injunctive relief that "enjoin[s] or restrain[s] the operation of" the relevant INA sections, including section 1225. As

the Ninth Circuit explained in allowing *Rodriguez* to proceed as a class action, section 1252(f)(1) does not bar injunctive relief where, as here, the petitioners do not "seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct [they] assert[] is not authorized by the statutes." *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (*Rodriguez I*).

II. PETITIONERS ARE LIKELY TO SUCCEED ON THEIR BOND CLAIMS.

In opposing the petitioners' bond claim, the Government takes the same approach it took in its motion to dismiss: disagreeing with the Ninth Circuit's holding in *Rodriguez*, which affirmed the same preliminary injunctive relief sought here, *see* 715 F.3d 1127, 1130-31 (9th Cir. 2013) (*Rodriguez II*)[2]; trying to ignore the Second Circuit's ruling in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3562 (Mar. 25, 2016), *cross-petition for cert. denied*, 136 S. Ct. 2496 (2016); and relying on District Court cases decided before *Lora*. *See* PI Opp. at 16-21. The petitioners addressed all of this in previous briefing, *see* MTD Opp. (ECF No. 48) at 18-23; PI Mem. at 10-14, and do not repeat those arguments.

The petitioners do reiterate that the Supreme Court and Second Circuit have read limitations on prolonged detention into statutes covering a wide range of noncitizens, including noncitizens with criminal convictions, *Lora*, 804 F.3d at 614-15; noncitizens already ordered deported, *Zavydas v. Davis*, 533 U.S. 678, 701 (2011); and non-citizens ordered deported after never having been admitted in the first place, *Clark v. Martinez*, 543 U.S. 371, 385-86 (2005).[3] In fact, even asylum-seekers who enter the country without inspection and who subsequently

[2] The Supreme Court is currently reviewing an appeal from the final injunction entered in the case. *See Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) (*Rodriguez III*), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

[3] The petitioners' opposition on the motion to dismiss overstated the ruling in *Demore v. Kim*, 538 U.S. 510 (2003), which held that the brief detention of noncitizens with criminal convictions does not raise due process concerns, *see* MTD Opp. at 23—but *Lora*, in interpreting *Demore*, held that a detention of six months or more does raise due process concerns, *see* 804 F.3d at 614.

pass a credible fear interview are entitled to bond hearings under section 1226(a) when they are placed in immigration proceedings. *See Matter of X-K-*, 23 I&N Dec. 731, 735 (BIA 2005). Petitioners and putative class members, who are in the same situation but declared themselves at the border to seek asylum, plainly should be accorded the same protection from prolonged detention and access to bond hearings within six months of detention.

III. PETITIONERS ARE LIKELY TO SUCCEED ON THEIR PAROLE CLAIMS.

In opposing the petitioners' parole claim, the Government does not dispute the petitioners' analysis showing the parole grant rate dropped from 50% in December 2016 and January 2017 to 12-14% between the inauguration and the filing of this suit in late July, only to rebound to nearly 50% after that filing. Nor does the Government contest the petitioners' extensive factual record demonstrating a systemic failure to adhere to the procedures set out in the 2009 Parole Directive. *See* PI Mem. at 17-21.[4]

Rather, the Government's defense is premised on its oft-repeated assertion of unbridled discretion and a new factual assertion from an ICE official that a November 2016 incident involving a Somali student at Ohio State University prompted him to unilaterally change practices at Batavia to require original photo identification from those seeking parole. *See* PI Opp. at 15; Brophy Decl. (ECF No. 50-2) ¶¶ 5-6. Based on this newly asserted change of policy, the Government argues that the petitioners' parole claim is not about a post-inauguration policy of summarily denying parole but instead is nothing more than a dispute about whether parole denials based on non-original photo identification are lawful.

[4] The Government does dispute that Deportation Officers informed individuals that parole had ended after the inauguration, *see* PI Opp. at 16 (citing officer declarations), but the Court should discount these self-serving denials in light of the undisputed data and numerous statements not only from detainees but also from lawyers attesting to Deportation Officers having told them parole policies changed after the arrival of the new administration.

First, Mr. Brophy's explanation—and thus the Government's legal arguments—cannot be squared with the full and largely uncontested record before this Court, which demonstrates that in truth the Government instituted a practice of denying parole without explanation to virtually all asylum-seekers at Batavia after the January inauguration, including several who provided original identification. As an initial matter, Mr. Brophy's declaration is conspicuously silent about his having ever communicated the claimed new identification requirement to anyone, and the declaration comes without any of the corroboration one would expect to accompany such a significant change of government practice—no internal policy directive, memorandum to staff, or even email. *See* Brophy Decl.[5] Not one of the Government declarations from other Batavia officials mentions an original document requirement, *see* Ball Decl. (ECF No. 50-1); Ensminger Decl. (ECF No 50-3); McCartan Decl. (ECF No 50-4); Muehlig Decl. (ECF No. 50-5), and none of the petitioners' 25 current and former class member declarants were told of this purported new identification requirement by anyone at Batavia prior to the filing of this lawsuit. Austin Decl. ¶ 7.[6] Moreover, none of the parole denials issued in the six-month window mentioned a requirement for original identification—indeed, 11 declarants currently in custody, out of 14 adjudicated during that time, received a form denial with no reasoning, *see id.* ¶ 6—and Batavia

[5] Indeed, the Government's own data, which it claims includes "legitimate" reasoning for each parole denial, *see* PI Opp. at 16, does not specify a failure to provide *original* identification for any denials that occurred post-inauguration, *see* Shames Decl. (ECF No. 38-17), Ex. A. Moreover, 61% of these "legitimate" reasons consist solely of a tautological phrase referring to generic statutory language (e.g. "no public benefit" or "humanitarian issue"). Shames Decl. ¶ 15.

[6] While a few asylum-seekers were told of such a requirement *after* the filing of the lawsuit, *see* Austin Decl. ¶ 7(c); others, including those who could get a photo ID if needed, have never been told, *see id.* Even post-lawsuit, ICE has denied some applications that included original photo ID with no explanation, *see id.* ¶ 7(a), or failed to adjudicate the applications at all, *see id.* ¶ 7(b). The arbitrary nature of these denials is demonstrated by one petitioner who submitted original photo ID and whose family was told around October 16 that he would be paroled after they provided transport funds, but who, on October 23, then received an undated form parole denial letter and no further explanation. *See* Austin Decl., Ex. 3 (A. Mohamed Decl.).

officials continue to give detainees advisal forms stating that *copies* of identification documents may be acceptable when seeking parole, *see id*. ¶ 9, Exs. 9, 16, 17, 18 (recent advisals).

Next, Mr. Brophy's claim of having "immediately" instituted this practice in December 2016, *see* Brophy Decl. ¶ 8, simply cannot be squared with the undisputed data establishing that the parole grant rate in December 2016 and January 2017 was 50% and only dropped precipitously to 12-14% after the inauguration, *see* PI Mem at 5. As such, Mr. Brophy's explanation does not in any way actually explain the timing of this precipitous drop.

Finally, Mr. Brophy provides no explanation as to how the OSU incident would have any bearing on Batavia parole practices. Public reporting describes the attacker as a lawful permanent resident who had arrived as a child refugee, with no connections to parole, false identification, or Batavia.[7] The only discernible trait the student shared with the asylum-seekers at Batavia is that, like several men at Batavia, he was of Somali origin. If anything, Mr. Brophy's invocation of the incident suggests he was motivated by impermissible animus to enact a policy both at odds with the agency's established policy and resulting in the prolonged detention and needless suffering of dozens of bona fide asylum-seekers. *See Bertrand v. Sava*, 684 F.2d 204, 212 (2d Cir. 1982) (noting that Government may not use its discretion on parole to "discriminate invidiously against a particular race or group").

The myriad problems with the Government's claim of a new identification practice, combined with the Government's failure to contest virtually any of the substantial record adduced by the petitioners (including the parole grant data), leaves this Court with a record that establishes for the purpose of preliminary injunctive relief one overriding key fact: after the

[7] *See*, M. Smith & A. Goldman, *From Somalia to U.S.: Ohio State Attacker's Path to Violence,* N.Y. Times (Dec. 1, 2016), *available at* http://nyti.ms/2i2Eytc; *Ohio attack: Possible terror link being investigated, say police*, BBC (Nov. 29, 2016), *available at* http://bbc.in/2goqf0s.

inauguration of President Donald Trump, Batavia officials abandoned the individualized decision-making process and adherence to established policy required by law and adopted a practice of summarily denying parole to virtually all asylum seekers.[8] It is this key fact that disposes of all of the Government's legal arguments about the petitioners' parole claims.

First, the Government renews its contention this Court lacks jurisdiction to review discretionary parole decisions. *See* PI Opp. at 5-8 (section 1252(a) argument); *id*. at 8-9 (section 2241 argument). This is irrelevant, however, as the petitioners challenge a broad practice of abandoning mandatory procedures and summarily denying parole, and even the Government does not suggest it has the discretion to adopt such a practice. Federal courts remain empowered to intervene where, as here, ICE ignores mandatory procedures and exceeds its statutory authority. *See* MTD Opp. at 9-12; *Bertrand*, 684 F.2d at 209 (holding that review of parole denials under a facially legitimate and bona fide standard raises a legal challenge over which federal courts have jurisdiction under section 2241).[9]

Next, while the Government continues to argue that ICE is not bound by the 2009 Parole Directive, *see* PI Opp. at 10-14, it makes no effort to refute the petitioners' evidence establishing a total breakdown at every step in the parole process, from notification to adjudication, *see* PI

[8] Batavia may also be no outlier. *See* Human Rights First, *Asylum Seekers Denied Parole in Wake of Trump Executive Order* (September 2017), *available at* http://bit.ly/2yIvpjR.

[9] The Government's suggestion that 1996 legislation extinguished federal court jurisdiction over *Bertrand* claims concerning bona fide and legitimate reasons for parole denials, *see* PI Opp. at 12 & n.6, is wrong. The requirement to provide such reasons is a nondiscretionary constitutional duty. *See Sierra v. INS*, 258 F.3d 1213, 1217 (10th Cir. 2001) (holding that section 1252(a)(2)(B)(ii) does not bar a challenge to the constitutionality of parole procedures and that a court may review whether a parole decision is facially legitimate and bona fide, noting "[i]t is never within the Attorney General's discretion to act unconstitutionally"); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1082 (9th Cir. 2006) (recognizing that ICE's discretion over parole is "not without limits" and that immigration officials' decisions are only "unreviewable" if they have advanced a facially legitimate and bona fide reason for their decisions).

Mem. at 17-22.[10] The evidence clearly establishes the existence of a parole practice at Batavia that does not adhere to the 2009 Parole Directive, which thus violates the *Accardi* doctrine as adopted by the Second Circuit. *See* PI Mem. at 15-22.

Even to the extent that Mr. Brophy's claims about a new "originals-only" policy are to be believed, the implementation of that purported change conflicts with ICE's Parole Directive—the same policy trumpeted by the Government to the Supreme Court—in two ways, both of which would be remedied by this Court ordering compliance with the Directive. First, the purported new policy does nothing to cure the top-to-bottom abandonment of required procedures described by the petitioners, and it renders particularly egregious the failure to notify applicants of required documents or explain denials. *See* PI Mem. at 17-22. Second, a bright-line rule requiring original photo identification directly contradicts the Directive's instructions to adjudicators to exercise flexibility in allowing vulnerable asylum-seekers—who may have fled their homes in haste, lost their documents on their journey, or come from countries that restrict access to government issued identification, *see* Austin Decl. ¶ 7(d)—to establish their identities through other means. *See* Parole Directive ¶ 8.3.1."[11]

The case that the Government suggests provides a basis for distinguishing the *Accardi* cases the petitioners cite—because the policy at issue in that case came with a similar legal disclaimer that it was not intended to confer any rights—does no such thing. *See* PI Opp. at 13 (citing *in re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006)). The Court there did not find that the DOJ guidelines at issue had actually been violated, and it looked to the

[10] One egregious example of this breakdown is the fact that two declarants appear to have never met with their Deportation Officers for over 9 months. Austin Decl. ¶ 11 (citing declarations of A. Ahmed, S. Abdi, Muehlig, and Ensminger)..

[11] Mr. Brophy's unilateral decision to upend the parole process at Batavia would also defy one of the driving purposes behind the 2009 Parole Directive, which is to ensure "consistent" parole determinations across the country. *See* Parole Directive ¶ 1.

nature of the policy and the functions it governed—not just the disclaimer—to analyze enforceability, *id.* at 1152-53.[12] Crucially, unlike here, the guidelines in *Miller* had never been trumpeted to the Supreme Court as remaining in effect or as providing a robust set of procedural protections to a vulnerable group. *Compare id.*, *with Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (public pronouncement created a "legitimate expectation" of compliance with agency manual).

Finally, with respect to the petitioners' claim under *Bertrand,* the Government is wrong to suggest the petitioners have failed to provide "'strong proof' that ICE's exercise of its broad discretionary parole power is not legitimate and bona fide." PI Opp. at 14-16. A broad practice of departing without explanation from the Parole Directive—whether by summarily denying parole, denying without reason, or imposing an original identification requirement without telling asylum-seekers—plainly violates *Bertrand*'s requirement of a "legitimate and bona fide reason" for denials, and the petitioners have presented strong proof of precisely such a practice at Batavia. And the Supreme Court, the Second Circuit, and this Court all have recognized that strong proof of bad faith extinguishes any presumption of legitimacy that the Government may otherwise enjoy on parole. *See* PI Mem. at 24, n. 16 (citing *Am. Acad. of Religion v. Napolitano,* 573 F.3d 115, 137 (2d Cir. 2009) (when a party makes a "well-supported allegation of bad faith," a court may "look behind" a parole decision or policy)).

CONCLUSION

For these reasons, the petitioners respectfully request that this Court grant a preliminary injunction.

[12] Here, the fact that the 2009 Parole Directive contains a disclaimer similarly does not defeat the *Accardi* claim as the Government argues because the policy taken as a whole is clearly intended to impact individual rights. *Cf. Gotcher v. Wood*, 66 F.3d 1097, 1100 (9th Cir. 1995) (noting that if a policy directive "create[s] a right of 'real substance'….the State cannot then emasculate that right merely by issuing [a] disclaimer that it was not its intent to create a liberty interest"), *cert. granted, judgment vacated on other grounds*, 520 U.S. 1238 (1997).

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