**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NEW YORK**

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| HANAD ABDI and JOHAN BARRIOS RAMOS, on behalf of himself and all others similarly situated,<br><br>Petitioners,<br><br>v.<br><br>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,<br><br>Respondents. | Case No. 17-cv-721 (EAW) |

**PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION**

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Dated: November 17, 2017
New York, NY

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## INTRODUCTION

In opposing the petitioners' motion for class certification, the Government largely repeats arguments it made in its motion to dismiss about mootness and the viability of the petitioners' parole and bond claims, relying once again on mischaracterizations of those claims. As the Court recognized in its decision denying the Government's motion to dismiss and granting the petitioners' motion for a preliminary injunction, not only are those arguments without merit, they also have little or no bearing on the issue of class certification.

## ARGUMENT[1]

### I. MR. BARRIOS RAMOS ADEQUATELY REPRESENTS THE CLASS.

The Government's initial contention that the Court should not grant class certification because the conditional release of Mr. Barrios Ramos makes him an inadequate class representative, *see* Class Cert. Opp. (ECF No. 55) at 8-10, is baseless. The Government ignores the well-established principle that "mootness of the Petitioner's claim is not a basis for denial of class certification."[2] *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) (certifying class of detained immigrants seeking bond hearings despite the fact that the named petitioner had been conditionally released). *See also Boyland v. Wing*, 487 F. Supp. 2d 161, 166–67 (E.D.N.Y. 2007) ("[I]t is well settled that a named plaintiff whose individual claim is mooted may remain an adequate class representative under Rule 23 of the Federal Rules of Civil Procedure."); *Jobie O.*

[1] The Government has chosen to forego challenging numerosity, *see* Class Cert. Opp. (ECF No. 55) at 7, n. 2, recognizing that there is a sizeable population of vulnerable asylum-seekers detained at Batavia who are too poor and unfamiliar with the American legal system to challenge these practices and policies in individual suits.

[2] Though the respondents also cite several cases for the proposition that a class representative must have individual standing, they make no argument that Mr. Barrios Ramos lacks standing. Class Cert. Opp. at 9-10.

*v. Spitzer*, No. 03-cv-8331, 2007 WL 4302921, at *7 (S.D.N.Y. Dec. 5, 2007) ("[I]n the context of a putative class action involving transitory claims, even if the named plaintiff's claim has become moot, a decision on class certification can relate back to the filing of the complaint and he may continue to represent the class"). And the sole authority to which the Government points, a case from 1972, *Norman v. Connecticut State Bd. of Parole*, 458 F.2d 497 (2d Cir. 1972), predates circuit authority making clear that a named petitioner's live controversy at the time the class certification motion is filed is "sufficient . . . to enable th[e] suit to proceed as a class action." *White v. Mathews*, 559 F.2d 852, 857 (2d Cir.1977).[3] Moreover, as this Court has recognized, Mr. Barrios Ramos's claims are not moot because they fall under both the transitory class action and voluntary cessation exceptions to the mootness doctrine. *Abdi v. Duke*, No. 17-cv-721 at 30-41, 48-50 (W.D.N.Y. Nov. 17, 2017) (ECF No. 56) ("PI and MTD Decision"). To the extent the Court determines that Mr. Barrios Ramos will not adequately protect the interests of the class, *see id.* at 50, the petitioners will readily substitute a member of the putative class as the class representative, *see* MTD Opp. (ECF No. 48) at 8-9.

## II. THE PAROLE AND BOND CLAIMS SATISFY RULE 23'S COMMONALITY AND TYPICALITY REQUIREMENTS.

The Government next argues that Rule 23's commonality and typicality requirements are not met because the petitioners' parole and bond claims are not legally viable and because adjudication of any such claims turns on individual factual determinations. *See* Class Cert. Opp. at 10-16. In making these arguments, the Government continues to mischaracterize the

[3] The other case cited by respondents, *Kenavan v. Empire Blue Cross & Blue Shield*, No. 91-cv-2393, 1996 WL 14446, at *4 (S.D.N.Y. Jan. 16, 1996), is irrelevant because it stands for the unremarkable proposition that a subclass must be dismissed where the named plaintiffs are not members of that subclass unless another subclass member is granted leave to intervene.

petitioners' claims, repeats merits arguments that have no bearing on class certification, and highlights why class certification is appropriate in this case.

Starting with the petitioners' argument that common and typical claims arise out of the Government's systematic violation of the 2009 Parole Directive, the Government has made no effort to refute the petitioners' extensive evidence showing a breakdown at every step in the parole process. *See* PI and MTD Decision at 56-59. Instead, the Government reverts to its familiar refrain that "no alien has a right to parole." Class Cert. Opp. at 12. As the Court has recognized, however, the petitioners do not claim any right to release on parole but instead only a right to have the Government adhere to its own nationwide agency policy in making parole determinations. *See* PI and MTD Decision at 46-47; PI Mem. at 15-22. Whether the petitioners have that right is a common question of law affecting the entire class. Resolution of that single legal issue disposes of the parole claims of the entire class, without requiring a pronouncement on any abstract "right to parole."

The Government also argues that the petitioners cannot satisfy the commonality and typicality requirements on their parole claims because "even if the Petitioners [] raised cognizable legal questions, [their] request to certify a class fails as to commonality (and typicality) . . . because their claims require individualized factual determinations." Class Cert. Opp. at 13. This is because, the Government argues, adjudication of the petitioners' parole claims will involve fact-specific inquiries into individual class members' circumstances because "there are numerous bases upon which ICE may deny parole." *Id.* at 14. It is of course uncontestable that ICE may have several legitimate reasons to deny parole, and the petitioners do not seek redress for class members whose parole may be denied for such reasons. *See* PI and MTD Decision at 12. Rather, the petitioners challenge the legality of a single, uncontested

practice: the wholesale abandonment of the 2009 Parole Directive at Batavia. *See id.* at 46. And the petitioners have presented far more than mere "allegations of systemic violations of the law," *see* Class Cert. Opp. at 15; rather they have adduced an extensive and virtually undisputed record that includes an analysis of the government's own data establishing a dramatic change in the parole grant rate at Batavia beginning in January 2017 and declarations from 25 current and former class members describing the myriad ways in which ICE has violated the 2009 Parole Directive. *See* PI Mem. at 17-21; PI Reply Mem. at 6-7.[4]

As for the bond claim, the Government argues that the petitioners cannot establish a common question of law because their prolonged detention "does not violate any cognizable due process right." Class Cert. Opp. at 13. Setting aside that the petitioners' claim does not turn on the status of their due process rights, *see* PI and MTD Decision at 30, the Government does not dispute that the petitioners' bond claim turns on a single legal issue common to the entire bond subclass: whether those held under section 1225(b) are entitled to bond hearings within six months in light of the rulings in *Rodriguez, Lora,* and a growing number of district courts in this circuit. PI Mem. at 10-14; MTD Opp. at 18-23. That is the common question of law that would, in a single stroke, dispose of all the subclass members' bond claims.

[4] The two district court cases the Government cites on this point, *see* Class Cert. Opp. at 16, only further demonstrate the strengths of the petitioners' case. In *Morgan v. Metro. Dist. Comm'n*, the court held that the petitioners could not meet the typicality and commonality requirements mainly because they had relied on anecdotal evidence and had failed to provide any statistical evidence of the practice they were challenging. *See* 222 F.R.D. 220, 231 (D. Conn. 2004). In *LeGrand v. N.Y. City Transit Auth.*, by contrast, the court found the plaintiffs' sole reliance on statistical evidence and failure to submit affidavits from aggrieved persons beyond the named plaintiffs undermined their claims of commonality and typicality. *See* No. 95-cv-0333, 1999 WL 342286, at *6 (E.D.N.Y. May 26, 1999). Here, unlike in *Morgan* and *LeGrand*, the petitioners have submitting both statistical evidence of the plummeting parole grant rate in 2017 (a statistic the Government does not dispute), as well as declarations from 25 current and former class members, all providing anecdotal evidence of the policy to which the data points.

## III. THE PROPOSED PAROLE CLASS AND BOND SUBCLASS ARE ASCERTAINABLE.

The Government's next argument—that the petitioners' class and subclass do not meet the "implied . . . requirement that a class be identifiable before it may be properly certified" because "the Court would be required to engage in speculation about who *will be* detained at BFDF and, further, who *will be* detained for more than six months," Opp. Class Cert. at 17-18 (emphasis in original)—both conflates an open class with an unascertainable class and ignores clear statements by the Second Circuit, District Courts within this circuit, and other Courts of Appeals that class certification even for amorphous classes may be appropriate where only injunctive relief is sought.

First, the Government's suggestion that the petitioners' proposed class is somehow unascertainable because it contemplates future class members is meritless. Strikingly similar open classes—with objective criteria that describe current and future members—are routinely certified in this circuit and others. *See, e.g.*, *Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997) (certifying a class of "[a]ll children who are or will be in the custody of the [ACS], and those children who, while not in the custody of ACS, are or will be at risk of neglect or abuse and whose status is or should be known to ACS"); *Floyd v. City of New York*, 283 F.R.D. 153, 160 (S.D.N.Y. 2012) (certifying a class of all persons who "have been, or in the future will be, subjected to" stop-and-frisk policies by the NYPD); *Shook v. El Paso County*, 386 F.3d 963, 966 (10th Cir. 2004) (reversing denial of class certification for class of "all persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail"). Indeed, the petitioners' proposed class is easily identifiable because a person flows into the class only once they are in ICE's custody in Batavia, have passed a credible fear interview, and are subject to the unlawful parole and bond policies challenged in this lawsuit. The Government

would be hard-pressed to demonstrate it cannot easily identify all such persons in its custody, especially now that it already furnished to petitioners' counsel a list of parole class members who had received a parole adjudication as of September 5, 2017. *See* Shames Decl. Ex. A (ECF No. 38-17). And it offers no argument explaining how it could ever fail to identify bond subclass members based simply on the length of their detention.

Furthermore, even though the petitioners submit that their proposed class and subclass are defined by objective membership criteria that make them plainly ascertainable, the Second Circuit has impliedly rejected the ascertainability requirement in Rule 23(b)(2) cases, like this one, seeking only injunctive relief. *See Marisol*, 126 F.3d at 378 ("'[C]ivil rights cases seeking broad declaratory or injunctive relief for a large and amorphous class . . . fall squarely into the category of 23(b)(2) actions'") (quoting *Jeanine B. by Blondis v. Thompson*, 877 F. Supp. 1268, 1288 (E.D. Wis. 1995)). And four Circuit Courts of Appeals have expressly rejected this requirement in Rule 23(b)(2) cases. *See Cole v. Memphis*, 839 F.3d 530, 541 (6th Cir. 2016) (noting that the First, Third, and Tenth Circuits have also held that the ascertainability requirement is inapplicable to Rule 23(b)(2)); *Shook*, 386 F.3d at 972 (noting that "many courts have found Rule 23(b)(2) well suited for cases where the composition of a class is not readily ascertainable; for instance, in a . . . suit on behalf of a shifting prison population").[5] The Government cites no case supporting its argument that strict ascertainability requirements apply

[5] Even to the extent that the Court finds that an "ascertainability" requirement exists here, the Second Circuit has expressly "decline[d] to adopt" the heightened "administrative feasibility requirement" proposed by the Government. *In re Petrobas Securities*, 862 F.3d 250, 265, 269 (2d Cir. 2017) (holding that, even in the 23(b)(3) damages context, ascertainability is a "modest threshold requirement" that "will only preclude certification if a proposed class definition is indeterminate in some fundamental way"); *contra* Class Cert. Opp. at 17 (citing *Mike v. Safeco Ins. Co. of Am.*, 223 F.R.D. 50, 52-53 (D. Conn. 2014), another 23(b)(3) damages case, for the proposition that the court must consider administrative feasibility in certifying a class).

to Rule 23(b)(2) class claims for injunctive relief. Indeed, it has almost exclusively cited dissimilar cases involving Rule 23(b)(2) classes seeking damages or Rule 23(b)(3) classes, *see* Class Cert. Opp. at 17-18, which for the reasons described above do not bear on whether this case should be certified.

## IV. THE PETITIONERS HAVE SATISFIED THE COHESIVENESS REQUIREMENT OF RULE 23(b)(2).

The Government's final argument is that certification is improper under Rule 23(b)(2) because both parole and bond "are fact-specific inquiries unique to each alien" rendering a single class-wide remedy inappropriate. *Id.* at 20. In advancing this claim, the Government ignores the petitioners' explicit disavowal of relief that mandates the release of any individual on parole or bond. *See* Class Cert. Mem. at 12, n. 6; PI Mem. at 2. However, on parole, as this Court has recognized, "[a] decision in favor of Petitioners would not compel a particular result with respect to parole, but rather would impact only the execution of the policies and procedures surrounding the ultimate parole decision." PI and MTD Decision at 12. Similarly, on bond, the Government's suggestion that the petitioners' claims cannot satisfy the Rule 23(b)(2) requirement fails because it is premised on the notion—rejected not only by this Court, but by the Second Circuit in *Lora*, the Ninth Circuit in *Rodriguez*, and the majority of district courts in New York—that asylum-seekers who "unilaterally prolong[] their own detention will not be eligible for relief." *See* Class Cert. Opp. at 20. As the petitioners have already discussed at length, and as this Court has now ruled, the petitioners are eligible for bond hearings within six months regardless of the reason for delay. *See* PI and MTD Decision at 30; MTD Opp. at 20-21.

## CONCLUSION

For the foregoing reasons, the petitioners respectfully request that this Court grant this motion for class certification.

Respectfully Submitted,

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