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 CLASS CERTIFICATION

CHAD A. READLER
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

WILLIAM C. SILVIS
Assistant Director

J. MAX WEINTRAUB
Senior Litigation Counsel
STACEY I. YOUNG
Senior Litigation Counsel
T. MONIQUE PEOPLES
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 598-8717
Facsimile: (202) 305-7000
Email: monique.peoples@usdoj.gov

Attorneys for Respondents

DATED: November 13, 2017

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL AND PROCEDURAL BACKGROUND.....2

III. STATUTORY AND REGULATORY FRAMEWORK.....3

1. Parole Determinations by the Department of Homeland Security.....4

2. Bond Determinations by an immigration judge.....6

IV. LEGAL STANDARD FOR CLASS CERTIFICATION 6

V. ARGUMENT.....8

1. Barrios Ramos is not an Adequate Class Representative 8

2. The Parole Class and the Bond Subclass fail to satisfy the commonality requirement of Rule 23(a)(2) and typicality requirement of Rule 23(a)(3).....10

a. Petitioners have failed to meet the commonality requirement of Rule 23(a)(2).....11
b. Petitioners have failed to meet the typicality requirements of Rule 23(a)(3).....15

3. The Proposed Classes Are Not Adequately Defined.....17

4. Certification is not proper under Rule 23(b)(2) 19

VI. CONCLUSION.....21

TABLE OF AUTHORITIES

CASES

Abassi v. Sec'y, Dep't of Homeland Sec.,
No. 09-cv-7605, 2010 WL 199700 (S.D.N.Y. Jan. 11, 2010) 13

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 7, 10, 17

Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,
222 F.3d 52 (2d Cir. 2000) 11

Califano v. Yamasaki,
442 U.S. 682 (1979) 6

Caridad v. Metro-North Commuter R.R.,
191 F.3d 283 (2d Cir. 1999) 11

Colozzi v. St. Joseph's Hosp. Health Ctr.,
275 F.R.D. 75 (N.D.N.Y. 2011) 17

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) 6, 19

Darif v. Holder,
739 F.3d 329 (7th Cir. 2014) 12

Denney v. Deutsche Bank AG,
443 F.3d 253 (2d Cir. 2006) 9

DG ex rel. Stricklin v. Devaughn,
594 F.3d 1188 (10th Cir. 2010) 15

Doherty v. Thornburgh,
943 F.2d 204 (2d Cir. 1991) 18, 20

Dunnigan v. Metro. Life Ins. Co.,
214 F.R.D. 125 (S.D.N.Y. 2003) 17

Easterling v. Conn. Dept. of Corr.,
265 F.R.D. 45 (D. Conn. 2010) 15

Ellis v. Costco Wholesale Corp.,
657 F.3d 970 (9th Cir. 2011) 15

Fallick v. Nationwide Mut. Ins. Co.,
162 F.3d 410 (6th Cir. 1998) 9

Gen. Tel. Co. v. Falcon,
457 U.S. 147 (1982) 7,11

Gonzalez v. City of Waterbury,
No. 3:06-cv-89 (CFD), 2008 WL 747666 (D. Conn. Mar. 18, 2008) 16

Gratz v. Bollinger,
539 U.S. 244 (2003) 9

Greeley v. KLM Royal Dutch Airlines,
85 F.R.D. 697 (S.D.N.Y. 1980) 10

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 8

In re Am. Int'l Group, Inc. Sec. Litig.,
689 F.3d 229 (2d Cir. 2012) 16

In re Currency Conversion Fee Antitrust Litig.,
229 F.R.D. 57 (S.D.N.Y. 2005) 18

In re Currency Conversion Fee Antitrust Litig.,
230 F.R.D. 303 (S.D.N.Y. 2004) 11

In re Initial Public Offerings Sec. Litig.,
471 F.3d 24 (2d Cir. 2006) 8, 15

In re Frito–Lay N. Am., Inc. All Natural Litig.,
No. 12–MD–2413 RRM RLM, 2013 WL 4647512 (E. D. N.Y. Aug. 29, 2013) 9

In re J.P. Morgan Chase Cash Balance Litig.,
242 F.R.D. 265 (S.D.N.Y. 2007) 11

Jean v. Nelson,
727 F.2d 957 (11th Cir. 1984) 12

Kenavan v. Empire Blue Cross and Blue Shield,
No. 91CV2393, 1996 WL 14446 (S.D.N.Y. Jan. 16, 1996) 9

LeGrand v. New York City Transit Auth.,
No. 95-CV-0333 (JG), 1999 U.S. Dist. LEXIS 8020 (E.D.N.Y. May 26, 1999) 16

Lightbourn v. Cnty. of El Paso, Tex.,
118 F.3d 421 (5th Cir. 1997)..... 11

Lightfoot v. District of Columbia,
273 F.R.D. 314 (D.D.C. 2011)..... 15

Mathews v. Diaz,
426 U.S. 67..... 13

Mike v. Safeco Ins. Co. of Am.,
223 F.R.D. 50 (D. Conn. 2004)..... 17, 19

Miles v. Merrill Lynch & Co. (*In re Initial Pub. Offerings Sec. Litig.*),
471 F.3d 24 (2d Cir. 2006)..... 14

Morgan v. Metro. Dsit. Comm'n,
222 F.R.D 220 (D. Conn. 2004)..... 16

Norman v. Connecticut State Bd. of Parole,
458 F.2d 497 (2d Cir. 1972)..... 9

People United for Children, Inc. v. City of New York,
214 F.R.D. 252 (S.D.N.Y. 2003)..... 17

Perez v. Aviles,
188 F. Supp. 3d 328 (S.D.N.Y. 2016)..... 13

Rappaport v. Katz,
62 F.R.D. 512 (S.D.N.Y. 1974)..... 18

Robidoux v. Celani,
987 F.2d 931 (2d Cir. 1993)..... 8

Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953)..... 4, 13

Sierra v. I.N.S,
258 F.3d 1213 (10th Cir. 2001) 12

Simon v. Am. Tel. & Tel. Corp.,
No. 99-11641, 2001 WL 34135273 (C.D. Cal. Jan. 26, 2001) 18

Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.,
262 F.3d 134 (2d Cir. 2001) 8

United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 12

Viknesrajah v. Koson,
No. 09-cv-6442, 2011 WL 147901 (W.D.N.Y. Jan. 18, 2011) 18, 20

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) ..... *passim*

Walker v. Asea Brown Boveri, Inc.,
214 F.R.D. 58 (D. Conn. 2003) 15

Wong Wing v. United States,
163 U.S. 228 (1896) 4

Zadvydas v. Davis,
533 U.S. 678, 693 (2001) 13

STATUTES

6 U.S.C. § 202(2) 3

8 U.S.C. § 1101(a)(13)(B) 5

8 U.S.C. § 1103(a)(5) 3

8 U.S.C. § 1182(d)(5)(A) ..... *passim*

8 U.S.C. § 1225(b) ..... *passim*

8 U.S.C. § 1225(b)(1)(A)(i) 4

8 U.S.C. § 1225(b)(1)(A)(ii) 4

8 U.S.C. § 1225(b)(1)(B)(ii) 2, 3

8 U.S.C. § 1225(b)(1)(B)(iii)(IV) 3, 4

8 U.S.C. § 1225(b)(2)(A) 3, 13

8 U.S.C. § 1226(a) 5

8 U.S.C. § 1252(a)(2)(B)(ii) 5, 12

28 U.S.C. § 2241 5

REGULATIONS

8 C.F.R. § 212.5 ..... 2,4, 6, 14, 19

8 C.F.R. § 212.5(b) 4, 5, 14

8 C.F.R. § 212.5(d) 4

8 C.F.R. § 212.5(d)(5) 6

8C.F.R. § 235.3(b)(2)(iii) 6

8 C.F.R. § 235.3(b)(4)(ii) 6

8 C.F.R. § 235.3(c) 4, 6

8 C.F.R. § 236.1(c)(8) 5

8 C.F.R. § 236.1(c)(11) 5

8 C.F.R. § 240 4

8 C.F.R. § 1003.19(h)(2)(i)(B) 5, 13

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 23 ..... 1,6, 9

Fed. R. Civ. P. 23(a) ..... *passim*

Fed. R. Civ. P. 23(a)(2) 10, 15

Fed. R. Civ. P. 23(a)(3) 10, 15, 16

Fed. R. Civ. P. 23(a)(4) 9, 10

Fed. R. Civ. P. 23(b) 7

Fed. R. Civ. P. 23(b)(2) 1,7, 18, 19, 20

OTHER AUTHORITIES

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 10

Memorandum from Department of Homeland Security Secretary John Kelly, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017) 5

Memorandum from ICE Director John Morton, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* (Dec. 8, 2009)(ICE Policy No. 11002.1) 5

I. INTRODUCTION

Respondents respectfully submit this memorandum of law in opposition to Petitioners' motion for class certification. This case involves Petitioners'—each of whom had been detained at an immigration detention facility but has since been released— attempt to challenge, as a class action, the conditions of their detention. The Court should deny Petitioners' request for class certification because Petitioners' have failed to meet the requirements of Federal Rule of Civil Procedure 23. As an initial matter and as set forth more fully in Respondents' motion to dismiss, Petitioners' parole and bond hearing-related claims are moot by virtue of their release, and alternatively, even if not moot, this Court lacks jurisdiction over Petitioner's challenge to U.S. Immigration and Customs Enforcement's ("ICE") parole decisions. ECF No. 27-1, at 20-26. In addition, because Petitioners are arriving aliens, they have no viable statutory or due process challenge to their detention without a bond hearing. *Id.* The Court should therefore deny Petitioners' motion to certify a class because: (1) Petitioners' sole proposed representative is an inadequate class representative for the parole class and bond subclass because his individual claims are moot and, to the extent a mootness exception applies, the Court either lacks jurisdiction over his claims or he fails to state valid claims as a matter of law; (2) Petitioners fails as to both commonality and typicality with respect to either the proposed parole class or bond subclass where they cannot establish a common question of law; (3) Petitioners' proposed class and subclass definitions are inadequate; and (4) Petitioners fail to meet the requirement of Rule 23(b)(2) of demonstrating that the factual differences in the class are unlikely to bear on the individual's entitlement to declaratory relief. Petitioners' motion should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Hanad Abdi, a Somali national, first initiated this habeas action on July 28, 2017, later expanded the action on August 21, 2017, to include a second petitioner, Johan Barrios Ramos, a Cuban national, and to seek class-wide relief. *See generally*, First Amended Petition for a Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, ECF No. 17 ("Am. Pet."). Both Abdi and Barrios Ramos seek asylum in the United States and are awaiting asylum hearings before an immigration judge. *Id.* ¶¶ 7, 8, 24, 57. Pending their asylum hearings, Petitioners were detained at an Immigration and Customs Enforcement ("ICE") facility in Batavia, New York, pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii). *Id.* ¶ 2. Additionally, each petitioner applied for parole, a form of discretionary relief under 8 U.S.C. § 1182(d)(5)(A), and was initially denied. ECF No. 17 ¶¶ 27-31, 59-68. Petitioners contend that their parole denials violate 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5, and the Due Process Clause of the Fifth Amendment. *Id.* ¶¶ 106-107. They further challenge their prolonged detention without a bond hearing as violative of 8 U.S.C. § 1225(b) and the Due Process Clause. ECF No. 17 ¶¶ 108-109.

Abdi was granted parole and released from ICE detention on August 16, 2017, and ICE granted Barrios Ramos parole on September 7, 2017. *See* Declaration of Thomas P. Brophy, ECF No. 27-2 ("Brophy Decl.") at ¶¶ 2-3. Shortly after his release, Abdi's immigration case was transferred to Buffalo Immigration Court, and he relocated to Minnesota. See Respondents' Exhibit A, Declaration of Thomas P. Brophy, ("Second Brophy Decl.") at ¶ 2. Similarly, Barrios Ramos moved to Florida after being released on parole, where his immigration proceedings have been transferred. Second Brophy Decl. at ¶ 3. On information and belief, Abdi and Barrios Ramos had each requested two continuances in his immigration proceedings: Abdi on February 16, 2017, and August 3, 2017; and Barrios Ramos on April 12, 2017, and August 15, 2017.

On August 25, 2017, Petitioners filed a Motion for Class Certification, asking the Court to certify as follows:

> *Class*: All arriving asylum-seekers who have passed a credible fear interview and who are or will be detained at the Buffalo Federal Detention Facility and who have not been granted parole ("parole class").

and

> *Subclass*: All arriving asylum-seekers who are detained at the Buffalo Federal Detention Facility, have passed a credible fear interview, and have been or will be detained for more than six months without a bond hearing before an immigration judge ("bond subclass").

See Pet.'s Motion for Class Certification, ECF No. 19 ("Cert. Mot.") at 1.[1] Although Abdi and Barrios Ramos are named in the caption as putative class representatives, "Abdi is not serving as a class representative in this action." *See* Pet.'s Mem. of Law in Support of Motion for Class Certification, ECF No. 19-1 ("Cert. Mem.") at 13 n.7. Barrios Ramos is the sole named representative of the proposed class and subclass.

III. 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*

[1] Petitioners suggest that, alternatively, the class may be certified as a "representative habeas corpus action." ECF No. 19-1 at 8 n.3. Using the habeas petition as a class vehicle does not save Petitioners from having to satisfy Rule 23 grounds for class certification. *Zinser*, 253 F.3d at 1186 ("While the trial court has broad discretion to certify a class, its discretion must be exercised within the framework of Rule 23.").

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).

1. Parole Determinations by the Department of Homeland Security

Congress has provided only one potential avenue for release of an alien detained under 8 U.S.C. § 1225(b): The DHS 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. 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. Notwithstanding any other provision of law, including 28 U.S.C. § 2241, "no court shall have jurisdiction to review … any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security," except for asylum determinations. 8 U.S.C. § 1252(a)(2)(B)(ii).

2. Bond Determinations by an immigration judge

By regulation, immigration judges are specifically prohibited from holding bond hearings for applicants for admission (i.e., "arriving aliens") detained under 8 U.S.C. § 1225(b). 8 C.F.R. § 1003.19(h)(2)(i)(B) ("[A]n immigration judge may not redetermine conditions of custody imposed by the Service with respect to . . . [a]rriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act."). As discussed above, the exclusive means for release of an alien seeking admission at a port of entry, found inadmissible and placed in proceedings, is DHS's *discretionary* parole authority. 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. §§ 212.5(b), 235.3(b)(4)(ii), 235.3(b)(2)(iii), 235.3(c).

For aliens who have been admitted to the United States and are detained during removal proceedings (except for those criminal aliens who qualify for § 1226(c) mandatory detention), Congress designed a system for the possible release of an alien on bond. *See* 8 U.S.C. § 1226(a). Only under § 1226(a) are immigration judges permitted to conduct individualized hearings to consider release on bond. *Id.*; 8 C.F.R. § 236.1(c)(11). Regulations place the burden on the alien seeking release on bond to demonstrate to the immigration judge that he is neither a flight risk nor a danger to the public. 8 C.F.R. § 236.1(c)(8).

IV. LEGAL STANDARD FOR CLASS CERTIFICATION

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To fall within the exception, Petitioners "must affirmatively demonstrate [their] compliance" with Federal Rule of Civil Procedure 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Under Rule 23(a), the party seeking certification must first demonstrate that:

(1) The class is so numerous that joinder is impractical ("numerosity");[2]

(2) There are questions of law or fact common to the class ("commonality");

(3) The claims or defenses of the named plaintiffs are typical of claims or defenses of the class ("typicality"); and

(4) The named plaintiffs will fairly and adequately protect the interest of the class ("adequacy of representation").

Fed. R. Civ. P. 23(a).

"Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Wal-Mart*, 564 U.S. at 345. In this case, Petitioners seek certification under Rule 23(b)(2), which permits class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart*, 564 U.S. at 360.

The party seeking class certification bears the burden of demonstrating they have satisfied all four Rule 23(a) prerequisites and that their class lawsuit falls within one of the three types of actions permitted under Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). The Supreme Court has held that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982). Indeed, "Rule 23 does

[2] Defendants do not at this time address whether the proposed class meets the numerosity requirement of Rule 23(a), but reserve the right to do so in the future should grounds arise for such a challenge.

not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 564 U.S. at 350 (emphasis in original). Consequently, the Court must conduct a "rigorous" class certification analysis, which may "entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 351. If the Court is not fully satisfied that all Rule 23 requirements are met, the Court cannot certify the class. *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). Even when all of Rule 23's requirements are met, the Court retains broad discretion to determine whether to certify a class. *See Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd*., 262 F.3d 134, 139 (2d Cir. 2001) ("[T]he district court is often in the best position to assess the propriety of the class and has the ability ... to alter or modify the class, create subclasses, and decertify the class whenever warranted."); *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) (discussing the broad discretion afforded the district court in class certification questions).

V. ARGUMENT

1. Barrios Ramos Is Not An Adequate Class Representative.

Certification is not appropriate unless Petitioners identify an adequate class representative. As of this filing, however, Petitioners lack a suitable representative necessary for class certification. Fed. R. Civ. P. 23(a). Here, Barrios Ramos, the sole proposed representative, is an inadequate class representative for the parole class and the bond subclass because his individual claims are moot and, to the extent a mootness exception applies, the Court either lacks jurisdiction over his claims or he fails to state valid claims as a matter of law. *See generally* Resp.'s Motion to Dismiss and Reply, ECF Nos. 27 & 49. A named representative whose claims

are not justiciable or legally valid is in no position to sustain his own claims and thus cannot prosecute the action vigorously on behalf of the class. *See Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998) ("Threshold individual standing is a prerequisite for all actions, including class actions. A potential class representative must demonstrate individual standing vis-as-vis [sic] the defendant; he cannot acquire such standing merely by virtue of bringing a class action.... Once his standing has been established, whether a plaintiff will be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in Rule 23 of the Federal Rules of Civil Procedure.") (internal citations omitted); *cf. In re Frito–Lay N. Am., Inc. All Natural Litig.*, No. 12–MD–2413 RRM RLM, 2013 WL 4647512, at *11 (E. D. N.Y. Aug. 29, 2013) ("[O]nce there is at least one named plaintiff for every named defendant who can assert a claim directly against that defendant, Article III standing is satisfied and only then will the inquiry shift to a class action analysis."); *Gratz v. Bollinger*, 539 U.S. 244, 262–63 (2003) (noting that, as long as plaintiff has standing to seek injunctive relief against the defendant, the proper scope of the injunction against the defendant is potentially a Rule 23 "adequacy" problem rather than a standing problem). Even more, Barrios Ramos cannot demonstrate the adequacy requirement of Rule 23(a)(4) because, having been released from detention, he is not part of the very classes he seeks to represent. *Cf. Norman v. Connecticut State Bd. of Parole*, 458 F.2d 497 (2d Cir. 1972) (where the claims of the named plaintiff were rendered moot, dismissing action without prejudice on the grounds of inadequate representation, but first allowing thirty days for another member of the class to seek leave to intervene); *Kenavan v. Empire Blue Cross and Blue Shield*, No. 91CV2393, 1996 WL 14446 at *4 (S.D.N.Y. Jan. 16, 1996) (same).

The adequacy requirement serves to protect the due process rights of absent class

members who will be bound by the judgment. *Greeley v. KLM Royal Dutch Airlines*, 85 F.R.D. 697, 700 (S.D.N.Y. 1980). A determination of legal adequacy is two-fold: the proposed class representative (1) must have an interest in vigorously pursuing the claims of the class, and (2) must have no interests antagonistic to the interests of other class members. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). In order to satisfy Rule 23(a)(4), "a class representative *must* be part of the class and possess *the same interest* and suffer the same injury as the class members." *Amchem*, 521 U.S. at 625-26 (emphasis added).

As applied to this case, Petitioners fail to meet their burden to demonstrate how Barrios Ramos can vigorously prosecute this action challenging parole and bond denials when he was granted parole and released from detention over two-months ago and where, further, his immigration case has been transferred to an entirely different district. And, although Barrios Ramos may have "want[ed] to help everyone in [his] situation" when he was detained, ECF No. 17-1 at ¶¶ 18-19, there is no reason to believe that he maintains any interest aligned with the interests of putative class members who are currently in detention at BFDF. Nor can Petitioners meet their burden to establish that Barrios-Ramos would fairly and adequately protect the rights and interests of potential class members, as the sole representative of classes to which he no longer belongs. Therefore, this Court should deny Petitioners' motion to serve as class representatives.

2. The Parole Class and the Bond Subclass fail to satisfy the commonality requirement of Rule 23(a)(2) and typicality requirement of Rule 23(a)(3).

Petitioners' request to certify a class fails as to both commonality and typicality with respect to either the proposed parole class or the proposed bond subclass. Rule 23(a)(2) requires that Plaintiffs establish that "there are questions of law or fact common to the class." Thus, litigants seeking class certification must show that a court would be able to fairly and efficiently

resolve the issue raised by the class "in one stroke." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2545. "What matters to class certification . . . is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131-32 (2009)). Rule 23(a)'s commonality and typicality requirements occasionally merge, as both serve as guideposts for determining whether maintenance of a class action is economical and whether the named plaintiff and the class claims are so interrelated that the interests of the class members would be fairly and adequately protected in their absence. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 n.5 (quoting *Falcon*, 457 U.S. at 157-58). The typicality requirement pairs with the commonality requirement and "focuses on the similarity between the named Petitioners' legal and remedial theories and the theories of those whom they purport to represent." *Lightbourn v. Cnty. of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997).

a. Petitioners have failed to meet the commonality requirement of Rule 23(a)(2).

While the "factual background" of each named plaintiff/petitioner need not be "identical to that of all class members," *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 273 (S.D.N.Y. 2007) (quoting *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999)), a court must be particularly mindful of legal arguments or other "unique defenses" to which the representative may be subject and that "threaten to become the focus of the litigation." *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 308 (S.D.N.Y. 2004) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59 (2d Cir. 2000)). Here, Petitioners assert that their proposed parole class shares the common question of fact whether the Government has a policy or practice of routinely denying parole to arriving alien asylum-seekers

who have passed a credible fear interview; the common questions of law are whether that policy or practice violates the Parole Directive, the INA and its regulations, and the Due Process Clause. ECF No. 19-1, at 12. Petitioners further argue that the common question of proposed bond subclass is whether class members are held in detention for more than six months without being granted a bond hearing, and the common questions of law are whether that policy or practice of prolonged detention violates the INA and the Due Process. *Id.*

As initial matter, Petitioners cannot establish a common question of law with regard to the parole class, because no alien has a right to parole. 8 U.S.C. § 1252(a)(2)(B)(ii). As set forth in Respondents' motion to dismiss, the decision to grant or deny parole is expressly committed to DHS's discretion and, as such, judicial review of such discretionary determinations is completely barred. *Id.* Moreover, Petitioners have no constitutionally protected liberty interest in parole, whatsoever—whether it pertains to ICE's parole decisions or to the procedures ICE employs to reach those decisions. *See Darif v. Holder*, 739 F.3d 329, 336 (7th Cir. 2014) ("We have repeatedly held that the opportunity for discretionary relief from removal is not a protected liberty interest because aliens do not have a legitimate claim of entitlement to it."); *Jean v. Nelson*, 727 F.2d 957, 972 (11th Cir. 1984) ("excludable aliens cannot challenge either admission or parole decisions under a claim of constitutional right"); *Sierra v. I.N.S*, 258 F.3d 1213 at 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"). Rather, Petitioners possess only the statutory rights and privileges granted by Congress, none of which Petitioners have argued – much less shown – Respondents have violated. *United States ex rel. Knauff v.*

Shaughnessy, 338 U.S. 537, 544 (1950). With no constitutional, statutory, or regulatory basis for the relief they seek, Petitioners' parole class cannot establish *any* common questions of law.

Petitioners likewise cannot establish a common question of law with regard to the bond subclass. As Respondents argue in their motion to dismiss, the detention of arriving aliens seeking asylum, like Abdi, Barrios Ramos, and the proposed sub-class therefore does not violate any cognizable due process right. ECF No. 27.1, at 21-22; *see Perez v. Aviles*, 188 F. Supp. 3d 328, 332 (S.D.N.Y. 2016); *Abassi v. Sec'y, Dep't of Homeland Sec.*, No. 09-cv-7605, 2010 WL 199700, *3 (S.D.N.Y. Jan. 11, 2010)*; see also 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."). Petitioners and the entire proposed subclass are arriving aliens whose due process protection is determined solely by what Congress authorizes. *Mezei*, 345 U.S. at 212*; see also Mathews v. Diaz*, 426 U.S. 67, __ (1976) (while the Fifth Amendment may apply to some aliens, it does not apply to all classes of aliens equally). As arriving aliens, Congress has mandated their detention under 8 U.S.C. § 1225(b)(2)(A). Importantly, § 1225(b) does not contain a provision providing for bond hearings for arriving aliens, and an immigration judge "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. With no constitutional or statutorily basis for the relief sought, therefore, Petitioner's bond subclass cannot establish common questions of law.

In any event, even if Petitioners had raised cognizable legal questions, Petitioners' request to certify a class fails as to commonality (and typicality) with respect to either the proposed main class or the proposed subclass because their claims require individualized factual determinations regarding the circumstances surrounding the individual's parole and bond

determinations. As the Supreme Court instructed in *Wal-Mart*, Petitioners must do more to demonstrate commonality than merely allege that they and the proposed class have suffered violations of the same provisions of law. 564 U.S. at 349-350. Moreover, Petitioners cannot simply identify questions they are common to the entire class. *Id*. at 350 ("'What matters to class certification . . . is not the rising of common questions . . ., but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.'") (internal quotations omitted). Here, Petitioners fail to establish commonality because they do not address or demonstrate that any purported common questions will "generate common answers apt to drive resolution of the litigation." *Id*. To clarify, Petitioners cannot in any way establish that common facts apply to each purported class member, meaning there are not sufficient "common answers," because ICE's parole adjudications are fact-specific inquiries unique to each alien requesting parole.

Indeed, there are numerous bases upon which ICE may deny parole. *See, e.g.*, 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5; *see also* ECF No. 38-17, Shames Decl. at Ex. A. ICE's discretionary denials of relief are, therefore, not attributable to grounds that "apply generally" to the entire parole class. For example, there could be a class member for whom ICE denied parole because he or she had not established identity to ICE's satisfaction, and another whom ICE deemed to be a flight risk, or another who was determined to be a national security risk. *See* 8 C.F.R. § 212.5(b). The statute is explicit in its mandate that these discretionary determinations must be made "*only on a case by case basis*." 8 U.S.C. § 1182(d)(5)(A) (emphasis added). The resolution of the legal questions Petitioners present would not readily resolve the different claims of all three of these hypothetical individuals. Rather, Petitioners base the legal questions they proffer on a presumption of common facts that may well not be present for all class members—

as evidenced by the above examples. *See Wal-Mart*, 564 U.S. at 349 (finding that recitation of questions is "not sufficient to obtain class certification"). Petitioners must instead demonstrate that they and the proposed class members all necessarily suffer the same injury. *Wal-mart*, 564 U.S. at 349–50; *Miles v. Merrill Lynch & Co.* (*In re Initial Pub. Offerings Sec. Litig.*), 471 F.3d 24, 41 (2d Cir. 2006) (commonality determinations "can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement"). Because any analysis requires a case-by-case evaluation, Petitioners cannot so show.

Further, Petitioners' "allegations of systemic violations of the law . . . will not automatically satisfy Rule 23(a)'s commonality requirement." *See, e.g., Lightfoot v. District of Columbia*, 273 F.R.D. 314, 324 (D.D.C. 2011) (decertifying a class for failure to meet the commonality required by Rule 23(a)(2)) (quoting *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010)). Instead, the Court must examine the merits of the claims as necessary to determine whether there was a "common pattern or practice that could affect the class as a whole." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011). As noted *supra*, the distinctions in the various potential facts that underlie each potential claim prevent a finding of a "common pattern or practice." Accordingly, Petitioners have failed to meet their burden to establish the commonality requirements of Rule 23(a)(2), and their motion should be denied.

b. Petitioners have failed to meet the typicality requirements of Rule 23(a)(3).

Rule 23(a)(3)'s typicality requirement requires Petitioners to demonstrate that "'each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Easterling v. Conn. Dept. of Corr.*, 265 F.R.D.45, at 52 (D. Conn 2010) (quoting *Walker v. Asea Brown Boveri, Inc.*, 214 F.R.D. 58,

63 (D. Conn. 2003)). As one court recently observed, a plaintiff must allege the specific circumstances that caused the harm, as well as that "these circumstances are the same for the rest of the proposed class members." *Gonzalez v. City of Waterbury*, No. 3:06-cv-89 (CFD), 2008 WL 747666, at *2 (D. Conn. Mar. 18, 2008) (dismissing Petitioners' complaint for, inter alia, failure to satisfy the typicality requirement of Rule 23(a)). Here, however, Petitioners simply assert that the typicality requirement is met because "[t]he challenged policy or practice to which he has been subjected is the same with respect to the parole class members: ICE's routine denial of parole." ECF No. 19-1, at 17. They similarly proffer that the typically requirement is met with regard to the bond subclass because "he has been detained for more than six months without a hearing before an immigration judge." *Id.* The reasoning discussed above regarding the need for individualized determinations to evaluate Petitioners' claims makes clear that Petitioners have not and cannot meet the typicality requirement of Rule 23(a)(3). Contrary to Petitioners' assertion, the factual variations in individual cases are exactly why typicality cannot be established in this case. Moreover, because of the uniqueness of each Petitioners' claims, they cannot possibly establish that they are typical of any Class. Instead, courts have consistently held that class certification is not appropriate under such circumstances. *See Morgan v. Metro. Dist. Comm'n*, 222 F.R.D 220, 231 (D. Conn. 2004), (finding lack of commonality and typicality where class members vary greatly regarding their individual circumstances so that fact finder will have to consider each of named Petitioners' claims on case-by-case basis); *LeGrand v. New York City Transit Auth.*, No. 95-CV-0333 (JG), 1999 U.S. Dist. LEXIS 8020, at *17 (E.D.N.Y. May 26, 1999) (plaintiffs did not establish commonality or typicality because "the details underlying each named plaintiffs circumstances are sufficiently varied that it appears doubtful their claims present common questions of fact").

3. The Proposed Classes Are Not Adequately Defined.

Although Rule 23(a) does not expressly require that a class be definite in order to be certified, Second Circuit courts have implied a requirement that a class be identifiable before it may be properly certified. *See, e.g., Dunnigan v. Metro. Life Ins. Co.*, 214 F.R.D. 125, 135 (S.D.N.Y. 2003). The requirements of Rule 23(a) and (b) are "designed to protect absentees by blocking unwarranted or overbroad class definitions." *In re Am. Int'l Group, Inc. Sec. Litig.*, 689 F.3d 229, 239 (2d Cir. 2012) (quoting *Amchem*, 521 U.S. at 620). Thus, apart from the explicit requirements of Rule 23(a), a class definition must be "'precise, objective, and presently ascertainable.'" *People United for Children, Inc. v. City of New York*, 214 F.R.D. 252, 256 (S.D.N.Y. 2003) (citation omitted). This means that "a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Mike v. Safeco Ins. Co. of Am.*, 223 F.R.D. 50, 52-53 (D. Conn. 2004). Further, a class should be narrowly tailored to include only aggrieved parties. *See Colozzi v. St. Joseph's Hosp. Health Ctr.*, 275 F.R.D. 75, 86 (N.D.N.Y. 2011)

Petitioners' overbroad and imprecise definitions do not abide by these standards. Petitioners ask this Court to certify a parole class defined as:

> All arriving asylum-seekers who have passed a credible fear interview and who are *or will be detained* at the Buffalo Federal Detention Facility and who have not been granted parole.

and a bond subclass consisting of:

> All arriving asylum-seekers who are detained at the Buffalo Federal Detention Facility, have passed a credible fear interview, and have been *or will be detained* for more than six months without a bond hearing before an immigration judge.

ECF No. 19-1 at 1 (emphasis added). As currently defined, the boundaries of the parole class are endless as it includes countless persons who *will be* detained at BFDF at some unidentified point in the future. Similarly, the bond subclass would include virtually any asylum-seeker detained at BFDF who has passed a credible fear interview—on the basis that he or she *might* be detained for more than six months. On its face, such class definitions are too broad, imprecise, and unascertainable 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. Further, both class definitions would impermissibly include persons who have yet to suffer any alleged harm, given that they are not even being detained at BFDF—much less in excess of six months. *See In re Currency Conversion Fee Antitrust Litig.*, 229 F.R.D. 57, 63 (S.D.N.Y. 2005) ("While a class may contain future members, an individual cannot be a putative class member if he suffers no injury or is not under imminent threat of injury.") (internal citation omitted); *Rappaport v. Katz*, 62 F.R.D. 512, 513-15 (S.D.N.Y. 1974) (rejecting class definition that "constitute[d] an amorphous, imprecise group which is neither distinguishable nor definable" and was "subject to change from day to day"); *see also Simon v. Am. Tel. & Tel. Corp.*, No. 99-11641, 2001 WL 34135273, *3 (C.D. Cal. Jan. 26, 2001) (proposed injunctive class including future purchasers was not ascertainable because, by "its very nature, a class definition that includes members not presently aggrieved is imprecise").

Additionally, the Court should refuse to certify the bond subclass because it could encompass detainees who have contributed to their own prolonged detention. Second Circuit law is clear: an alien may not rely on delays due to his litigation strategy to establish a due process violation. *Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991); *Viknesrajah v. Koson*, No. 09-cv-6442, 2011 WL 147901, *6 (W.D.N.Y. Jan. 18, 2011). Determining whether

a potential subclass member has violated this prohibition would involve impermissibly delving into the facts of each detainee's immigration proceedings. A proposed class definition is plainly untenable where determining class membership is not founded on generalized proof, but, rather, "requires a fact-specific, individualized determination for each plaintiff prior to addressing the merits of the claims in the complaint." *Mike*, 223 F.R.D. at 54 ("Where a threshold inquiry is necessary to determine class membership, the benefits of proceeding as a class are eviscerated.").

Given these deficiencies, the proposed class definitions are inadequate.

4. Certification is not proper under Rule 23(b)(2).

Finally, the Court should deny certification because, Petitioners fail to meet the requirement of Rule 23(b)(2). For certification under Rule 23(b)(2), Petitioners must show that "declaratory relief is available to the class as a whole" and that the challenged conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360. Accordingly, under Rule 23(b)(2), Petitioners must prove that Respondents have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Petitioners cannot meet their burden of demonstrating that the factual differences in the class are unlikely to bear on the individual's entitlement to declaratory relief.

Here, Petitioners purport that Rule 23(b)(2) is satisfied because Respondents "are subjecting class members to the same policy or practice of routinely denying them parole," and are "subjecting subclass members to a policy of detention without a bond hearing." ECF No. 19-1 at 14-15. A party seeking class certification, however, cannot rely on bare allegations or pleadings alone but must "satisfy through evidentiary proof at least one of the provisions of Rule

23(b)." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Apart from their conclusory assertions, Petitioners have proffered absolutely no evidence that they can meet Rule 23(b)(2)'s requirements. As discussed in detail *supra*, ICE's parole adjudications are fact-specific inquiries unique to each alien requesting parole. Accordingly, Petitioners cannot show that Respondents have "acted or refused to act on grounds that apply generally to the class," where there are numerous bases upon which ICE may deny parole. *See, e.g.*, 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5; *see also* ECF No. 38-17, Shames Decl. at Ex. A. ICE's discretionary denials of relief are, therefore, not attributable to grounds that "apply generally" to the entire parole class. Indeed, if such a uniform ground existed, then *no one* would have been granted parole at BFDF. However, ICE has, in fact, granted parole to aliens detained at BFDF before this suit was filed, and has continued to do so while this case has been pending. ECF No. 27-2, Brophy Decl. ¶¶ 2-4; ECF No. 38-17, Shames Decl. at Ex. A.

The bond subclass faces similar deficiencies. Even if the Court concluded that classwide relief was appropriate with respect to the bond subclass, it would still have to evaluate individual adjudications to weed out any subclass members who have unilaterally prolonged their own detention and who are not, therefore, entitled to relief. *Doherty*, 943 F.2d at 211; *Viknesrajah*, 2011 WL 147901, at *6. With so many factual and legal variations among the proposed classes, classwide relief would be inappropriate, if not impossible. *Wal-Mart*, 564 U.S. at 360 (Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant") (emphasis in original).

Even if the Court's "rigorous analysis" concludes that the requirements of Rule 23 are met, the certification of a class action is ultimately within the Court's discretion. In this case, the

Court's exercise of discretion should result in a determination not to certify either class.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Petitioners' motion for class certification.

DATED: November 13, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

WILLIAM C. SILVIS
Assistant Director

s/ J. Max Weintraub
J. MAX WEINTRAUB
Senior Litigation Counsel
STACEY I. YOUNG
Senior Litigation Counsel
T. MONIQUE PEOPLES
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 598-8717
Facsimile: (202) 305-7000
Email: monique.peoples@usdoj.gov

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, I filed the foregoing document with the Clerk of the Court through the Court's ECF system.

s/ J. Max Weintraub
J. MAX WEINTRAUB
Senior Litigation Counsel