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Mills Legal Clinic Stanford Law School Immigrants' Rights Clinic

PRACTICE ADVISORY
PROLONGED DETENTION CHALLENGES AFTER *JENNINGS V. RODRIGUEZ*

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Contents

INTRODUCTION

This practice advisory discusses the U.S. Supreme Court's decision in *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018). In *Jennings*, the Supreme Court held that the Immigration and Nationality Act ("INA") authorizes the prolonged detention of certain noncitizens without a custody hearing during their removal cases. The Court reversed a decision by the Ninth Circuit Court of Appeals construing 8 U.S.C. §§ 1225(b) and 1226(c) to authorize detention for only six months, at which point the detainee must receive a custody hearing before an immigration judge. The Court remanded for the Ninth Circuit to address whether the Fifth Amendment's Due Process Clause entitles immigrants to a hearing over prolonged detention.

Jennings abrogates decisions by several courts of appeals that, like the Ninth Circuit, construed Section 1226(c) to require custody hearings over prolonged detention. However, these detainees may still challenge their prolonged detention on constitutional grounds. Moreover, the circuit court decisions recognizing that prolonged mandatory detention raises serious due process concerns remain strong persuasive authority for the argument that the Constitution requires hearings over prolonged detention.

Attached to this advisory is a sample habeas petition setting forth these arguments. The ACLU is available to provide support and technical assistance in habeas actions seeking prolonged detention hearings on constitutional grounds. If you are filing new litigation, please contact us at ProlongedDetention@aclu.org. ***Please contact the ACLU immediately if you have a prolonged detention case pending before a court of appeals***. This advisory will be updated as new developments occur.[1]

I. *JENNINGS V. RODRIGUEZ*

Jennings v. Rodriguez is a class action lawsuit, filed originally in the Central District of California, challenging the federal government's practice of jailing immigrants for months or years without a custody hearing while they fight their deportation cases. Specifically, *Jennings* addressed the detention beyond six months of three classes of immigrants:

(1) Immigrants subject to mandatory detention under 8 U.S.C. § 1226(c), who are charged with removal based on a criminal offense;

(2) Immigrants detained under 8 U.S.C. § 1225(b)—i.e., arriving asylum seekers who are determined to have a credible fear of persecution and referred for removal proceedings, and certain others (primarily returning lawful permanent residents) who present facially valid documents but are found not clearly and beyond a doubt entitled to admission;

[1] This advisory is not a substitute for independent legal advice by a lawyer who is familiar with an individual's case.

(3) Immigrants detained under 8 U.S.C. § 1226(a). Although these immigrants receive a custody hearing at the outset of their detention, many are subject to prolonged detention if the immigration judge denies release on bond or sets a bond the immigrant cannot afford to post.

Plaintiffs in *Jennings* challenged their prolonged detention without hearings on both constitutional and statutory grounds. They won a class-wide permanent injunction in the district court requiring custody hearings after six months of detention.[2]

In the decision below, the Ninth Circuit held that prolonged detention without a hearing under Sections 1225(b), 1226(a), and 1226(c) raised serious due process concerns and concluded that none of the detention provisions at issue clearly authorized such detention.[3]Applying the canon of constitutional avoidance,[4] the court thus construed the statutes to require an automatic bond hearing before the immigration judge at six months of detention.[5] Applying established Ninth Circuit precedent, the court held that due process requires the government to bear the burden of justifying continued detention by clear and convincing evidence. The court further required that the immigration judge consider releasing individuals on reasonable conditions of supervision and the length of the individual's detention in making the custody decision. Finally, the court ordered periodic bond hearings, every six months, for detainees who are not released after their first hearing.[6]

Critically, the Ninth Circuit did *not* reach Plaintiffs' claim that *due process* requires a custody hearing over prolonged detention, but instead ordered the government to provide custody hearings on statutory grounds.

What did the Supreme Court hold in *Jennings v. Rodriguez*?

In a 5-3 decision,[7] the Supreme Court reversed the judgment of the Ninth Circuit and remanded for further proceedings. The Court rejected the lower court's "implausible constructions" of the three detention statutes, holding that the plain language of Sections 1226(c) and 1225(b) authorized detention without custody hearings until the conclusion of removal proceedings.[8] Moreover, the Court held that Section 1226(a) could not be read to require periodic custody hearings and the hearing procedures ordered by the Ninth Circuit.[9] However, the Court

[2] *See Rodriguez v. Holder*, No. CV 07-3239, 2013 WL 5229795, at *1 (C.D. Cal. Aug. 6, 2013) (order granting permanent injunction).
[3] *Rodriguez v. Robbins*, 804 F.3d 1060, 1074-77 (9th Cir. 2015).
[4] *Zadvydas v. Davis*, 533 U.S. 678, 689 (courts should construe statutes to avoid serious constitutional concerns when it is "fairly possible" to do so).
[5] *Rodriguez*, 804 F.3d at 1078-85.
[6] *Id*. at 1087-89.
[7] After two rounds of briefing and two oral arguments, Justice Kagan recused herself from the case.
[8] *Jennings*, 138 S.Ct. at 836, 842-47.
[9] *Id*. at 847-48.

remanded for the Ninth Circuit to decide in the first instance whether due process requires a hearing in cases of prolonged detention.[10]

II. CHALLENGING PROLONGED DETENTION WITHOUT A HEARING AFTER *JENNINGS*—NINTH CIRCUIT

A. Central District of California

The government has agreed that the class-wide permanent injunction entered by the district court in *Jennings* for detainees held in the Central District of California "remains in place in the Central District of California until it is vacated by some further action by [the district court] or the Ninth Circuit."[11] Until such time, class members are still entitled to the custody hearings required by the injunction.

Specifically, the injunction applies to the following class of immigrants:

> All noncitizens within the Central District of California who: (1) Are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review; (2) Are not and have not been detained pursuant to a national security detention statute; and (3) Have not been afforded a hearing to determine whether their detention is justified. [12]

The district court also approved subclasses, which correspond to the four general immigration detention statutes under which the class members are detained: 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a).[13] The district court clarified that the injunction requires hearings for all noncitizens detained more than six months with pending cases, including noncitizens with reinstated removal orders and those in withholding-only proceedings.[14]

The permanent injunction requires an automatic bond hearing before the immigration judge at six months of detention, where the government bears the burden of justifying continued detention by clear and convincing evidence.[15] The court further required that the immigration

[10] *Id*. at 851.
[11] Joint Status Report, *Rodriguez v. Marin*, No. CV 07-3239, at *2 (C.D. Cal. Mar. 5, 2018) (ECF No. 478).
[12] *Rodriguez v. Holder*, No. CV 07-3239, 2013 WL 5229795, at *1 (C.D. Cal. Aug. 6, 2013) (order granting permanent injunction).
[13] *Id.* On appeal, the Ninth Circuit had reversed the injunction as to Section 1231(a) subclass after concluding that "the § 1231(a) subclass does not exist." *Rodriguez*, 804 F.3d at 1086. For this reason, Section 1231(a) detainees' right to a prolonged detention hearing was not before the Court in *Jennings*.
[14] *Rodriguez*, 2013 WL 5229795, at *1.
[15] *Id*. at *1-2.

judge consider releasing individuals on reasonable conditions of supervision in making its custody decision.[16]

B. Outside the Central District of California

Jennings abrogates the prior rulings of the Ninth Circuit requiring bond hearings at six months for individuals detained under Sections 1225(b), 1226(a), and 1226(c). However, individuals may file habeas petitions in federal district court seeking custody hearings at six months on constitutional grounds. In particular, the Ninth Circuit's prior rulings continue to provide strong persuasive authority for arguing that due process limits prolonged mandatory detention under Section 1226(c) to a reasonable period of time.[17] We address prolonged detention under Section 1225(b) in more detail below.

C. Ninth Circuit Precedent That Remains Good Law Post-*Jennings*

Jennings did *not* abrogate all of the Ninth Circuit's case law imposing limits on prolonged detention without a hearing. The following categories of immigrants likely still remain entitled to prolonged detention hearings under two Ninth Circuit cases: *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011), and *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008).

Notably, a district court is bound by circuit court law unless the circuit decision is "clearly irreconcilable" with an intervening higher authority. *United States v. Robertson*, 875 F.3d at 1281, 1291 (9th Cir. 2017) (citing *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)). "The clearly irreconcilable requirement is a high standard." *Id*. (internal quotation marks omitted). "So long as the court can apply our prior precedent without running afoul of the intervening authority, it must do so." *Id*. (internal quotation marks omitted). Thus, a district court hearing a habeas petition by an immigration detainee seeking to vindicate his or her rights under *Diouf II* or *Casas-Castrillon* must apply those circuit precedents unless the court deems them "clearly irreconcilable" with the Supreme Court's ruling in *Jennings*.[18]

Diouf v. Napolitano – Detainees Held Under Section 1231(a)(6)

In *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011), the Ninth Circuit held that prolonged detention under **8 U.S.C. § 1231(a)(6)** is prohibited without an individualized hearing to determine whether the person is a flight risk or a danger to the community. Because prolonged

[16] *Id*. at *2.
[17] *See, e.g.*, *Rodriguez v. Robbins*, 804 F.3d 1060, 1072-78 (9th Cir. 2015); *Rodriguez v. Robbins*, 715 F.3d 1127, 1134-36 (9th Cir. 2013); *Casas–Castrillon v. Dep't of Homeland Security*, 535 F.3d 942, 949-51 (9th Cir. 2008).
[18] *See Ramos v. Sessions*, No. 18-cv-00413-JST, 2018 WL 1317276, at *3 (N.D. Cal. Mar. 13, 2018) (applying *Robertson* to affirm the continued validity of *Diouf II*).

detention without a hearing presents serious due process concerns, and the statute did not plainly authorize such detention, the Court construed Section 1231(a)(6) to require a custody hearing before an immigration judge where detention has lasted six months. *Diouf II*, 634 F.3d at 1086.[19]

Jennings did *not* abrogate the Ninth Circuit's ruling in *Diouf II*.[20] The question of whether Section 1231(a)(6) can be construed to require a custody hearing over prolonged detention was not before the Court in *Jennings*. Moreover, citing its prior decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court underlined that, in contrast to the other general immigration detention statutes, Section 1231(a)(6) may be construed to limit prolonged detention, as the Ninth Circuit did in *Diouf II*.[21] Thus, individuals subject to prolonged detention under Section 1231(a)(6) in the Ninth Circuit should continue to receive custody hearings.

Diouf II requires a bond hearing for the following groups of detained immigrants if they have been detained for six months, or if it is otherwise clear that they will face prolonged detention:

1. *Individuals detained pending withholding-only proceedings before the immigration judge or Board of Immigration Appeals ("BIA").*[22]

NB: The government's failure to provide *Diouf II* hearings to individuals in withholding-only proceedings is the subject of ongoing litigation. *See Baños v. Asher*, 2:16-cv-01454-JLR, 2017

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[19] *Diouf II* clarified that "[a]s a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months." *Id.* at 1092 n.13. The court also made clear that the government should not presumptively detain individuals for six months without a hearing. Rather, the government "should be encouraged to afford an alien a hearing before an immigration judge before the 180-day threshold has been reached if it is practical to do so and it has already become clear that the alien is facing prolonged detention." *Id*.

[20] *See Ramos*, 2018 WL 1317276, at *3 ("*Jennings* . . . left untouched the Ninth Circuit's requirement of such hearings for immigrants detained under section 1231(a)(6).").

[21] As the Court explained, discussing its analysis of Section 1231(a)(6) in *Zadvydas*:

> [T]he Court detected ambiguity in the statutory phrase "may be detained." "'[M]ay,'" the Court said, "suggests discretion" but not necessarily "unlimited discretion. In that respect the word 'may' is ambiguous." The Court also pointed to the absence of any explicit statutory limit on the length of permissible detention following the entry of an order of removal.

Jennings, 138 S.Ct. at 843 (quoting *Zadvydas*, 533 U.S. at 697). As a result, unlike the other general detention statutes, Section 1231(a)(6) can be read to contain an "implicit time limit on detention." *Id*. at 844. *See also Ramos*, 2018 WL 1317276, at *3 (*Jennings* concluded that the text of Section 1231(a)(6) "left space for constitutional avoidance" and "negative space for an implied limitation").

[22] There is a circuit split on what statute governs detention pending withholding-only proceedings. *Compare Padilla-Ramirez v. Bible*, 882 F.3d 826, 830-32 (9th Cir. 2017) (holding that Section 1231 authorizes detention pending withholding-only proceedings) *with Guerra v. Shanahan*, 831 F.3d 59, 61-64 (2d Cir. 2016) (holding that Section 1226(a) applies). However, the Ninth Circuit has found that Section 1231 applies.

WL 3479451 (W.D. Wa. Jan. 23, 2018) (R&R) (ordering government to provide *Diouf* hearings to class of immigrants detained six months or longer pending "withholding-only" proceedings)

2. *Individuals seeking review of a reinstated order, as well as people seeking review of a negative reasonable fear determination.*

3. *Individuals petitioning for review of a denied motion to reopen, regardless of whether they have a stay of removal.*

4. *Individuals who have a final order of removal and remain detained pending administrative adjudication of a motion to reopen, whether before the immigration judge or BIA, and regardless of whether they have obtained an administrative stay of removal.*

5. *Individuals petitioning for direct review of a removal order and for whom no stay of removal has been issued.*

6. *Other individuals with final orders of removal who have no pending challenges to removal and no stay of removal.*

For more information on *Diouf II*, please see this ACLU practice advisory.

Casas-Castrillon v. Department of Homeland Security

In *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), the Ninth Circuit held that immigrants who were previously ineligible for a custody hearing under Section 1226(c), but who are detained pending a petition for review of their removal order and have a stay of removal, are eligible for a custody hearing before the immigration judge under Section 1226(a). Citing *Demore v. Kim*, 538 U.S. 510 (2003), the Ninth Circuit explained that Section 1226(c) "'was intended only to 'govern[ ] detention of deportable criminal aliens *pending their removal proceedings*.'" *Casas-Castrillon*, 535 F.3d at 948 (quoting *Demore*, 538 U.S. at 527-28). Likewise, the regulations implementing Section 1226(c) interpret the statute as applying only "during removal proceedings." 8 C.F.R. § 1236.1(c)(l)(i). In contrast, Section 1226(a) governs detention "pending a decision on whether the alien is to be removed from the United States"—a period which includes not only the administrative removal process but also the process of judicial review. Thus, the Ninth Circuit concluded that Section 1226(a) governs the detention of noncitizens whose removal is stayed pending judicial review of their removal orders. *See Casas-Castrillon*, 535 F.3d at 948.[23]

[23] The Ninth Circuit in *Casas* also construed Section 1226(c) to impose mandatory detention only where removal proceedings are "expeditious." *Casas-Castrillon*, 535 F.3d at 951 (citing *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005)). That aspect of *Casas-Castrillon* has been abrogated by the Supreme Court's holding in *Jennings* that Section 1226(c) authorizes mandatory detention until the conclusion of removal proceedings. *See Jennings*, 138 S. Ct. at 846-47.

Reasoning in *Jennings* reaffirms the Ninth Circuit's construction of Section 1226(c). As the Court in *Jennings* explained:

> In *Demore v. Kim*, 538 U.S., at 529, we distinguished § 1226(c) from the statutory provision in *Zadvydas* by pointing out that detention under § 1226(c) has "a definite termination point": *the conclusion of removal proceedings*. As we made clear there, that "definite termination point"—and not some arbitrary time limit devised by courts—marks the end of the Government's detention authority under § 1226(c).

Jennings, 138 S. Ct. at 846 (emphasis added). However, the Court in *Jennings* also suggested that Section 1226(c) "mandates detention 'pending a decision on whether the alien is to be removed from the United States . . . .'" *Id*. (quoting Section 1226(a)). The government may cite this language to argue that *Jennings* construes Section 1226(c) to authorize mandatory detention beyond removal proceedings before the immigration judge and BIA. However, because the Court in *Jennings* did not squarely address the issue presented in *Casas-Castrillon*—i.e., detention pending judicial review of the removal order—and because the discussion on page 846 of the opinion suggests that the Court did not consider that a final "decision on whether the alien is to be removed" may not occur until well after "the conclusion of removal proceedings," *Casas-Castrillon* remains the circuit precedent unless and until revisited by the Ninth Circuit. *See Robertson*, 875 F.3d at 1291.

Notably, *Jennings* supports a similar construction of Section 1225(b)—i.e., that the statute authorizes detention only pending proceedings before the immigration judge and BIA, and not pending judicial review of a removal order. As the Supreme Court explained:

> Section 1225(b)(1) aliens are detained for "further consideration of the application for asylum," and §1225(b)(2) aliens are in turn detained for "[removal] proceeding[s]. *Once those proceedings end, detention under §1225(b) must end as well*.
>
> [. . . .]
>
> [Sections] 1225(b)(1) and (b)(2) . . . provide for detention for a specified period of time. Section 1225(b)(1) mandates detention "for further consideration of the application for asylum," § 1225(b)(1)(B)(ii), and § 1225(b)(2) requires detention "for a [removal] proceeding," § 1225(b)(2)(A). The plain meaning of those phrases is that detention must continue *until immigration officers have finished "consider[ing]" the application for asylum, § 1225(b)(1)(B)(ii), or until removal proceedings have concluded, § 1225(b)(2)(A).*

Id. at 842, 844 (emphasis added). Thus, arriving aliens who were initially detained under Section 1225(b) pending removal proceedings, but are now detained pending judicial review of a removal order that has been stayed by the court of appeals, should argue that their detention is governed by Section 1226(a) under the reasoning of *Casas-Castrillon*, and they are entitled to a custody hearing before an immigration judge.

D. Procedural Requirements at a Prolonged Detention Hearing (including *Diouf* and *Casas* hearings)

In *V. Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), the Ninth Circuit held that *due process* requires that the government (1) bear the burden of justifying continued detention by clear and convincing evidence at a prolonged detention hearing and (2) provide a contemporaneous recording of that hearing so there is an adequate record for appeal. *Id*. at 1203-09 (citing, *inter alia*, *Addington v. Texas*, 441 U.S. 418, 427 (1979), and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). *V. Singh* remains good law after *Jennings*.

Although *V. Singh* specifically required these procedural safeguards at *Casas* hearings, the Ninth Circuit has recognized that individuals detained under Section 1231 have the same liberty interest against prolonged detention. Thus, the same procedures apply at *Diouf* hearings as well, as numerous district courts have concluded.[24] In addition, the court in *Diouf II* specifically held that the post-order custody regulations for Section 1231 detainees "do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge."[25]

III. OUTSIDE THE NINTH CIRCUIT—CHALLENGING PROLONGED MANDATORY DETENTION UNDER SECTION 1226(c)

As noted above, several circuits had held prior to *Jennings* that prolonged detention mandatory detention under Section 1226(c) raises serious due process concerns. These decisions provide strong persuasive authority for arguing that due process requires a hearing over prolonged

[24] *See Diouf II*, 634 F.3d at 1086 (finding "no basis for withholding from aliens detained under § 1231(a)(6) the same procedural safeguards accorded to aliens detained under § 1226(a)"); *see also, e.g.*, *Villalta v. Sessions*, No. 17-cv-05390-LHK, 2017 WL 4355182, *6-7 (N.D. Cal. Oct. 2, 2017) (requiring that the government justify continued detention by clear and convincing evidence at a *Diouf* hearing); *accord Ramos v. Sessions*, No. 18-cv-00413-JST, 2018 WL 905922 at *4-6 (N.D. Cal. Feb. 15, 2018); *Sales v. Johnson*, No. 16-cv-01745-EDL, 2017 WL 6855827, at *5 (N.D. Cal. Sept. 20, 2017); *Gonzalez v. Asher*, No. C15-1778-MJP-BAT, 2016 WL 871073 at *1, *4-5 (W.D. Wa. Feb. 16, 2016) (R&R), 2016 WL 865351 (W.D. Wa. Mar. 7, 2016) (order adopting R&R); *Mansoor v. Figueroa*, No. 3:17-cv-01695-GPC (NLS), 2018 WL 840253, at *3 (S.D. Cal. Feb. 13, 2018); *Castaneda v. Aitken*, No. 15–cv–01635–MEJ, 2015 WL 3882755 at *6 (N.D. Cal. June 23, 2015).

[25] *Diouf II*, 634 F.3d at 1091.

detention. Moreover, the Third Circuit *already* has held that mandatory detention under Section 1226(c) for an unreasonable period of time violates the Due Process Clause. Thus, *Jennings* does not affect the Third Circuit's case law limiting prolonged mandatory detention.

A. District of Massachusetts

Individuals detained six months under Section 1226(c) in **Massachusetts** are currently still entitled to custody hearings pursuant to the class-wide permanent injunction entered in *Reid v. Donelan*, 22 F. Supp. 3d 84 (D. Mass. 2014). The government has agreed that the injunction must remain in effect until it is vacated by the First Circuit or the district court.

B. Third Circuit

Prior to *Jennings*, the Third Circuit held as a *constitutional* matter that due process prohibits mandatory detention for an unreasonable period of time. As the court explained in *Diop v. ICE/Homeland Security*,

> Under the Supreme Court's holding [in *Demore v. Kim*, 538 U.S. 510 (2003)], Congress did not violate the Constitution when it authorized mandatory detention without a bond hearing for certain criminal aliens under § 1226(c). This means that the Executive Branch must detain an alien at the beginning of removal proceedings, without a bond hearing—and may do so consistent with the Due Process Clause—so long as the alien is given some sort of hearing when initially detained at which he may challenge the basis of his detention. *However, the constitutionality of this practice is a function of the length of the detention*. At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) *becomes unconstitutional* unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community . . . . *In short, when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute*.

656 F.3d 221, 232-33 (3d Cir. 2011) (emphasis added) (citing *Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring). *Accord Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 470, 473-75 (3d Cir. 2015). The court in *Diop* also construed Section 1226(c) to include an implicit time limit and authorize mandatory detention for only a "reasonable" period.[26] Although

[26] *Diop*, 656 F.3d at 235.

that holding has been abrogated by *Jennings*, the Third Circuit's conclusion that unreasonable periods of mandatory detention violate due process remains good law.[27]

The Third Circuit held that the analysis of whether mandatory detention violates due process is "necessarily a fact-dependent inquiry that will vary depending on individual circumstances." *Diop*, 656 F.3d at 233, and clarified this framework in *Chavez-Alvarez*. Please see this ACLU practice advisory for more information on prolonged detention challenges in the Third Circuit.

C. Other Circuits

Jennings abrogates holdings in the First, Second, Sixth, and Eleventh Circuits construing Section 1226(c) to authorize mandatory detention for only a reasonable period of time. However, those rulings were primarily decided based on the serious due process problems presented by prolonged mandatory detention. Thus, they all remain strong persuasive authority for the argument that due process requires a custody hearing over prolonged detention.

- **First Circuit**: *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016)

- **Second Circuit:** *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015)

  NB: Several district courts in the Second Circuit have found prolonged mandatory detention to violate the Due Process Clause.

  - *See also Faure v. Decker*, No. 15 Civ. 5128 (JGK), 2015 WL 6143801, at *2-4 (S.D.N.Y. Oct. 19, 2015)
  - *Minto v. Decker*, 108 F. Supp. 3d 189, 195-96 (S.D.N.Y. 2015)
  - *Gordon v. Shanahan*, No. 15 Cv. 261, 2015 WL 1176706, at *3-5 (S.D.N.Y. Mar. 13, 2015)
  - *Bugianishvili v. McConnell*, No. 1:15-CV-3360 (ALC), 2015 WL 3903460, at *9 (S.D.N.Y. June 24, 2015)
  - *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 544-50 (S.D.N.Y. 2014)
  - *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458-59 (S.D.N.Y. 2010)
  - *Fuller v. Gonzales*, No. Civ.A.3:04CV2039SRU, 2005 WL 818614, at *6 (D. Conn. Apr. 8, 2005)

- **Sixth Circuit:** *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (requiring release when mandatory detention exceeds a reasonable period of time)

  - *See also Hamama v. Adducci*, --- F. Supp. 3d ----, 2018 WL 263037 (E.D. Mich. 2018) (ordering custody hearings for a nationwide class Iraqi Christians subject to

[27] *See, e.g., Wilkins v. Doll*, No. 1:17-cv-2354 (M.D. Pa. Feb. 22, 2018) (ECF No. 9) (R&R) & (ECF No. 11) (M.D. Pa. Mar. 19, 2018) (post-*Jennings* order granting habeas relief and ordering bond hearing under *Chavez-Alvarez*)

detention under Sections 1226(c) and 1231(a)(6) for six months, unless the government presents evidence that the class member has extended their detention through bad faith or frivolous litigation tactics or other factors for why that detainee should not receive a bond hearing)

NB: Several district courts in the Sixth Circuit have found prolonged mandatory detention to violate the Due Process Clause.

- *Diomande v. Wrona*, No. 05-73290, 2005 WL 3369498, at *1 (E.D. Mich. Dec. 12, 2005)
- *Parlak v. Baker*, 374 F. Supp. 2d 551, 561 (E.D. Mich. 2005), *order vacated on other grounds, appeal dismissed sub nom. Parlak v. U.S. Immigration & Customs Enf't*, No. 05-2003, 2006 WL 3634385 (6th Cir. Apr. 27, 2006)
- *Uritsky v. Ridge*, 286 F. Supp. 2d 842, 847 (E.D. Mich. 2003)

- **Eleventh Circuit**: *Sopo v. Attorney General*, 825 F.3d 1199 (11th Cir. 2016)

Similarly, prior to *Jennings*, district courts in the Fourth, Fifth, and Eighth Circuits applied the canon of constitutional avoidance to limit prolonged mandatory detention under Section 1226(c).

Fourth Circuit

- *Mauricio-Vasquez v. Crawford*, No. 1:16-cv-01422 (AJT), 2017 WL 1476349 (E.D. Va. Apr. 24, 2017)
- *Haughton v. Crawford*, No. 1:16-cv-634 (LMB), 2016 WL 5899285 (E.D. Va. Oct. 7, 2016)
- *Jarpa v. Mumford*, 211 F. Supp. 3d 706 (D. Md. Sept. 30, 2016)
- *Bracamontes v. Desanti*, No. 2:09-cv-480, 2010 WL 2942760 (E.D. Va. June 16, 2010) (R&R), 2010 WL 2942757 (E.D. Va. July 26, 2010) (order adopting R&R).

Fifth Circuit

- *Ramirez v. Watkins*, No. 10-cv-126, 2010 WL 6269226 (S.D. Tex. Nov 03, 2010).

Eighth Circuit

- *Tindi v. Sec'y, Dep't of Homeland Sec.*, No. 17-cv-3663, 2018 WL 704314 (D. Minn. Feb. 5, 2018) (granting release)
- *Bah v. Cangemi*, 489 F. Supp. 2d 905 (D. Minn. 2007) (granting release)
- *Moallin v. Cangemi*, 427 F. Supp. 2d 908 (D. Minn. 2006) (granting release)

Prior to *Jennings*, the lower courts had split on how to determine when mandatory detention has become unreasonably prolonged. Several courts had required custody hearings after six months

of mandatory detention.[28] Other courts determined whether mandatory detention had become unreasonable on a case-by-case basis.[29] Until the circuits have decided this issue, advocates should argue that due process entitles their client to a custody hearing under both approaches.

IV. CHALLENGING PROLONGED DETENTION UNDER SECTION 1225(b)

Two main groups of arriving noncitizens[30] are subject to prolonged detention under Section 1225(b): (1) certain returning lawful permanent residents and (2) arriving asylum seekers who have passed a credible fear screening and been referred for removal proceedings on their asylum claims.

A. Returning Lawful Permanent Residents

It is clear that returning lawful permanent residents detained under Section 1225(b) have due process rights against arbitrary detention. Section 1225(b) applies to several categories of lawful permanent residents who may be treated as seeking admission under 8 U.S.C. § 1101(a)(13)(C).[31] "It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the

[28] *See Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015).
[29] *See Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Sopo v. Attorney General*, 825 F.3d 1199 (11th Cir. 2016).
[30] *See* 8 C.F.R. § 1.2 (defining an "arriving alien" as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport").
[31] Section 1101(a)(13)(C) provides that:

> An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
> (i) has abandoned or relinquished that status,
> (ii) has been absent from the United States for a continuous period in excess of 180 days,
> (iii) has engaged in illegal activity after having departed the United States,
> (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
> (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or
> (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

Fifth Amendment." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). Moreover, a lawful permanent resident who returns from a brief trip abroad is assimilated to that same constitutional status. *Id*. The Supreme Court specifically has held that a lawful permanent arrested for alien smuggling upon return from a brief trip abroad is entitled to due process. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).[32]

Several district courts have recognized that the prolonged detention without a hearing of returning lawful permanent residents raises serious due process concerns or violates the Due Process Clause.

Second Circuit

- *Arias v. Aviles*, No. 15-cv-9249, 2016 WL 3906738, at *8 (S.D.N.Y. July 14, 2016), *appeal filed*, No. 16–3186 (2d Cir. Sept. 12, 2016) (ordering custody hearing on statutory grounds)
- *Galo-Espinal v. Decker*, No. 17-cv-3492, 2017 WL 4334004, at *4-5 (S.D.N.Y. June 30, 2017) (same)
- *Morris v. Decker*, No. 17-cv-02224 (VEC), 2017 WL 1968314, at *3 (S.D.N.Y. May 11, 2017), *appeal filed*, No. 17-cv-2121 (2d Cir. July 7, 2017) (same)
- *Heredia v. Shanahan*, 245 F. Supp. 3d 521, 526 (S.D.N.Y. 2017), *appeal filed sub nom. Heredia v. Decker*, No. 17–1720 (2d Cir. May 26, 2017) (same)
- *Ricketts v. Simonse*, No. 15-cv-6662, 2016 WL 7335675, at *4 (S.D.N.Y. Dec. 16, 2016) (same)

Third Circuit

- *Cruz-Nails v. Castro*, No. 16-cv-1587, 2017 WL 6698709, at *5-6 (D.N.J. Sept. 19, 2017) (ordering hearing on due process grounds)
- *Swarray v. Lowe*, No. 1:17-cv-0970, 2017 WL 3585868, at *7-10 (M.D. Pa. June 27, 2017) (R&R), 2017 WL 3581710, at *1-2 (M.D. Pa. Aug. 18, 2017) (order adopting R&R) (same)
- *Bautista v. Sabol*, 862 F. Supp. 2d 375, 379-82 (M.D. Pa. 2012) (same)

Ninth Circuit

- *Chen v. Aitken*, 917 F. Supp. 2d 1013, 1016-19 (N.D. Cal. 2013) (ordering hearing on statutory grounds)

[32] *See Plasencia*, 459 U.S. at 34 (holding that *Mezei* "did not suggest that no returning resident alien has a right to due process," and that "it does not govern this case, for *Plasencia* was absent from the country only a few days").

For further discussion of the due process rights of returning lawful permanent residents, *see* the Brief of *Amici Curiae* Detained Legal Service Providers, *Jennings v. Rodriguez*, No. 15-1204 (U.S. filed Oct. 24, 2016).

B. Arriving Asylum Seekers with a Credible Fear of Persecution

In contrast, there is a dispute about whether arriving asylum seekers with a credible fear of persecution have constitutional rights against arbitrary detention. In *Jennings*, the government maintained that, pursuant to the "entry fiction," such asylum seekers lack due process rights against arbitrary imprisonment.[33] Notably, the majority in *Jennings* did *not* endorse this view. Justice Breyer, in a dissent joined by Justices Ginsburg and Sotomayor, rejected the government's argument. *See Jennings*, 138 S.Ct. at 862-63 (Breyer, J., dissenting) (declining to apply the entry fiction because "the Constitution does not authorize arbitrary detention."). Moreover, in his dissent in *Zadvydas*, Justice Kennedy previously wrote that "inadmissible aliens" who are "stopped at the border" are "entitled to be free from detention that is arbitrary or capricious."[34]

The Third and Sixth have held that excludable noncitizens have due process rights against indefinite detention after the entry of a removal order. *See Rosales-Garcia v. Holland*, 322 F.3d 386, 408-15 (6th Cir. 2003) (en banc); *Ngo v. INS*, 192 F.3d 390, 397-98 (3d Cir. 1999). [35] These cases provide support to the argument that arriving noncitizens have a due process right to custody hearings over their prolonged detention.

Several district courts have required prolonged detention hearings for arriving asylum seekers on due process grounds:

- *Shire v. Decker*, No. 1:17-cv-01984, 2018 WL 509740, at *3-4 (M.D. Pa. Jan. 23, 2018)
- *Martinez-Paredes v. Lowe*, No. 1:17-cv-00353, 2017 WL 4883197, at *3-4 (M.D. Pa. Oct. 30, 2017)
- *Mancia-Salazar v. Green*, No. 17-cv-147, 2017 WL 2985392, at *3-5 (D.N.J. July 13, 2017) (same), *vacated as moot* 2017 WL 4159138 (D.N.J. July 20, 2017)
- *Singh v. Sabol*, No. 1:16-cv-2246, 2017 WL 1659029, at *4-5 (M.D. Pa. Apr. 6, 2017) (R&R), 2017 WL 1541847 (M.D. Pa. Apr. 28, 2017) (order adopting R&R) (same), *appeal filed* No. 17-2383 (3d Cir. June 27, 2017)
- *Ahmed v. Lowe*, No. 3:16-cv-2082, 2017 WL 2374078, at *3-5 (M.D. Pa. May 31, 2017), *appeal filed* No. 17-2653 (3d Cir. Aug. 3, 2017)
- *Singh v. Lowe*, No. 3:17-cv-0119, 2017 WL 1157899, at *7-10 (M.D. Pa. Mar. 7, 2017) (R&R), 2017 WL 1134413 (M.D. Pa. Mar. 27, 2017) (order adopting R&R)

[33] *See* Petitioners' Supplemental Brief at 21-24, *Jennings v. Rodriguez*, No. 15-1204 (U.S. filed Jan. 31, 2017).
[34] *Zadvydas*, 533 U.S. at 720-21.
[35] The Ninth Circuit did not squarely address this issue in *Rodriguez III*, and it remains an open issue in the circuit. *See Rodriguez III*, 804 F.3d at 1082.

- *Ahad v. Lowe*, 235 F. Supp. 3d 676, 686-90 (M.D. Pa. 2017), *appeal filed* No. 17-1492 (3d Cir. filed Mar. 9, 2017)

- *See also Maldonado v. Macias*, 150 F. Supp. 3d 788, 798-808 (W.D. Tx. 2015) (holding that prolonged detention without hearing of arriving asylum seeker raised serious due process concerns and ordering custody hearing on statutory grounds)
- *Crespo v. Baker*, No. 11-cv-3019 (IEG), 2012 WL 1132961, at *8-9 (S.D. Cal. Apr. 3, 2012) (same)[36]

The government likely will argue—as it did in *Jennings*—that due process does not apply to arriving asylum seekers under the Supreme Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). However, *Mezei* is distinguishable for three reasons:

First, even if arriving asylum seekers have limited due process rights with respect to the procedures for *admission*, they still have a right to freedom from prolonged *detention* that is not needed to serve its purpose. Indeed, *Zadvydas* makes clear that the government's power to exclude and its power to detain are distinct for due process purposes. The detainees there had lost all legal right to reside in the United States, but the Supreme Court nonetheless recognized their interest in "[f]reedom from . . . physical restraint," 533 U.S. at 690, which protects against arbitrary imprisonment. *See also Rosales-Garcia*, 322 F.3d at 412-13.

Although the Court in *Mezei* conflated the power to detain with the power to remove, that holding must be read in light of its peculiar circumstances: an exclusion resting on national security. *See Rosales-Garcia*, 322 F.3d at 413-14. As the Court in *Mezei* explained, "to admit an alien barred from entry on security grounds nullifies the very purpose" of the exclusion order because it could unleash the very threat that the order sought to avoid. 345 U.S. at 216. That rationale does not apply to asylum seekers who are in proceedings to determine whether they may live in the U.S. permanently.

Second, arriving asylum seekers have been determined to have a credible fear of persecution, and been referred for full adjudication of that claim in removal proceedings. Congress has afforded them a right to be in the U.S. while their asylum claim is pending. They therefore stand in a fundamentally different position from the detainee in *Mezei*, who had been ordered excluded from the U.S. Indeed, the record in *Jennings* established that *two-thirds* of arriving asylum seekers subject to prolonged detention (defined as six months or more) win asylum and thus the right to live permanently in the U.S. *See Jennings*, 138 S.Ct. at 860 (Breyer, J., dissenting).

[36] *See also Salazar v. Rodriguez*, No. 17-1099, 2017 WL 3718380, at *5-6 (D.N.J. Aug. 29, 2017) (due process required custody hearing for arriving alien granted deferred inspection); *Centeno-Ortiz v. Culley*, No. 11-cv-1970-IEG, 2012 WL 170123, at *8-9 (S.D. Cal. Jan. 19, 2012) (ordering custody hearing on statutory grounds for arriving alien detained under Section 1225(b)(2)); *Lakhani v. O'Leary*, No. 1:08-cv-2355, 2010 WL 3239013, at *4, *6-9 (N.D. Ohio Aug. 16, 2010) (due process required custody hearing for parolee), *vacated as moot* 2010 WL 3730157 (N.D. Ohio Sept. 17, 2010).

Third, asylum seekers with a credible fear of persecution cannot voluntarily end their detention by returning to the countries from which they fled. The liberty interests of such individuals, who have often suffered persecution and torture in their countries of origin, cannot be dismissed on the ground that they are somehow free to go home.

For more information, please see Respondents' Supplemental Brief, *Jennings v. Rodriguez*, No. 15-1204 (U.S. filed Jan. 31, 2017).

Note: Arriving asylum seekers held in the Western District of New York are currently entitled to a custody hearing after six months pursuant to a class-wide preliminary injunction entered in *Abdi v. Duke*, --- F. Supp. 3d ---, 2017 WL 5599521 (W.D.N.Y. 2017).

V. THE REDETENTION OF INDIVIDUALS RELEASED AS A RESULT OF A PROLONGED DETENTION HEARING

Presently it is unclear whether the government intends to revoke the bonds and re-detain individuals who were released as a result of a prolonged detention hearing. The ACLU is monitoring the situation closely. **If you have clients or learn of cases where individuals are re-detained, please contact the ACLU immediately at ProlongedDetention@aclu.org.**

IN THE UNITED STATES DISTRICT COURT
FOR THE _____

_____, (A _____) Petitioner, v. Kirsten Nielsen, Secretary of the Department of Homeland Security; Jefferson Beauregard Sessions III, Attorney General of the United States; _____, Director of the _____ Field Office; _____, Warden of the _____, Respondents.	Case No. _____ **Petition for Writ of Habeas Corpus**

PETITION FOR A WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2241

Petitioner respectfully petitions this Honorable Court for a writ of habeas corpus to remedy Petitioner's unlawful detention by Respondents, as follows:

INTRODUCTION

1. Petitioner is currently detained by Immigration and Customs Enforcement ("ICE") at the _____ detention center pending removal proceedings.

2. Petitioner has been detained in immigration custody for over ___ months even though no neutral decisionmaker—whether a federal judge or an immigration judge—has conducted a hearing to determine whether this lengthy incarceration is warranted based on danger or flight

risk, the only two permissible bases for immigration detention prior to entry of an executable removal order.

3. Petitioner's prolonged detention without a hearing on danger and flight risk violates the Due Process Clause of the Fifth Amendment and the Eighth Amendment's Excessive Bail Clause.

4. Petitioner therefore respectfully requests that this Court issue a writ of habeas corpus, determine that Petitioner's detention is not justified because the government has not established by clear and convincing evidence that Petitioner presents a risk of flight or danger in light of available alternatives to detention, and order Petitioner's release, with appropriate conditions of supervision if necessary, taking into account Petitioner's ability to pay a bond.

5. In the alternative, Petitioner requests that this Court issue a writ of habeas corpus and order Petitioner's release within 30 days unless Defendants schedule a hearing before an immigration judge where: (1) to continue detention, the government must establish by clear and convincing evidence that Petitioner presents a risk of flight or danger, even after consideration of alternatives to detention that could mitigate any risk that Petitioner's release would present; and (2) if the government cannot meet its burden, the immigration judge orders Petitioner's release on appropriate conditions of supervision, taking into account Petitioner's ability to pay a bond.

JURISDICTION AND VENUE

6. Petitioner is detained in the custody of Respondents at _____ detention center.

7. Jurisdiction is proper under 28 U.S.C. §§ 1331, 2241; the Suspension Clause, U.S. Const. art. I, § 2; and 5 U.S.C. § 702.

8. Congress has preserved judicial review of challenges to prolonged immigration detention. *See Jennings v. Rodriguez*, __ U.S. __, 2018 WL 1054878 at *7-*9 (Feb. 27, 2018) (holding that 8 U.S.C. §§ 1226(e), 1252(b)(9) do not bar review of challenges to prolonged immigration detention); *see also id.* at *44 (Breyer, J., dissenting). ("8 U.S.C. § 1252(b)(9), . . . by its terms

applies only with respect to review of an order of removal") (internal quotation marks and brackets omitted).

9. Section 1252(f)(1) does not repeal this Court's authority to grant the relief Petitioner seeks because, *inter alia*, Petitioner is in removal proceedings. *See* 8 U.S.C. § 1252(f)(1) (exempting claims by "an individual alien against whom proceedings . . . have been initiated"); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (Section 1252(f) "does not extend to individual cases").

10. If Section 1252(f)(1) did bar the relief Petitioner seeks, it would violate the Suspension Clause.

11. Even if otherwise applicable, Section 1252(f)(1) does not bar declaratory relief.

VENUE

12. Venue is proper in this District under 28 U.S.C. § 1391 because at least one Defendant is in this District, the Petitioner is detained in this District, and a substantial part of the events giving rise to the claims in this action took place in this District.

PARTIES

13. Petitioner, _____, is a noncitizen currently detained by Respondents pending removal proceedings.

14. Respondent Kirsten Nielsen is the Secretary of the U.S. Department of Homeland Security ("DHS"), an agency of the United States. She is responsible for the administration of the immigration laws. 8 U.S.C. § 1103(a). Secretary Nielsen is a legal custodian of Petitioner. She is named in her official capacity.

15. Respondent Jefferson Beauregard Sessions III is the Attorney General of the United States and the most senior official in the U.S. Department of Justice ("DOJ"). He has the authority to interpret the immigration laws and adjudicate removal cases. The Attorney General delegates this responsibility to the Executive Office for Immigration Review ("EOIR"), which

administers the immigration courts and the Board of Immigration Appeals ("BIA"). He is named in his official capacity.

16. Respondent _____ is the Field Office Director responsible for the Field Office of ICE with administrative jurisdiction over Petitioner's case. She/he is a legal custodian of Petitioner and is named in his official capacity.

17. Respondent _____ is the warden of the facility where Petitioner is held. She/he is a legal custodian of Petitioner and is named in his official capacity.

STATEMENT OF FACTS

18. Petitioner is a noncitizen currently detained by Respondents pending immigration removal proceedings. Petitioner is pursuing the following claims in removal proceedings:

_____

_____

(include all claims presented, including any applications for asylum; withholding of removal; Convention Against Torture; cancellation of removal; adjustment of status; termination of proceedings; U visa; T visa; or any other applications.

19. Petitioner has been detained in DHS custody since _____.

20. Petitioner has been detained by ICE for more than ___ months, yet has not been provided a bond hearing before a neutral decisionmaker to determine whether his prolonged detention is justified based on danger or flight risk.

21. Additional facts that support Petititioner's entitlement to relief are:

_____

_____

_____

LEGAL BACKGROUND

22. "'It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'" *Demore v. Kim*, 538 U.S. 510, 523 (2003) (quoting *Reno v. Flores,* 507 U.S. 292, 306 (1993)). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause

protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also id*. at 718 (Kennedy, J., dissenting) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention."). This fundamental due process protection applies to all noncitizens, including both removable and inadmissible noncitizens. *See id.* at 721 (Kennedy, J., dissenting) ("both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious").

23. Due process therefore requires "adequate procedural protections" to ensure that the government's asserted justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* at 690 (internal quotation marks omitted). In the immigration context, the Supreme Court has recognized only two valid purposes for civil detention—to mitigate the risks of danger to the community and to prevent flight. *Id*.; *Demore*, 538 U.S. at 528.

24. Following *Zadvydas* and *Demore*, every circuit court of appeals to confront the issue has found either the immigration statutes or due process require a hearing for noncitizens subject to unreasonably prolonged detention pending removal proceedings. *See Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199 (11th Cir. 2016) (detention under 8 U.S.C. § 1226(c)); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016) (8 U.S.C. § 1226(c)); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) (8 U.S.C. § 1226(c)); *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015) (8 U.S.C. § 1226(c) and 8 U.S.C. § 1225(b)); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011) (8 U.S.C. § 1226(c)); *Diouf v. Holder (Diouf II)*, 634 F.3d 1081 (8 U.S.C. § 1231(a)); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (8 U.S.C. § 1226(c)) (requiring release when mandatory detention exceeds a reasonable period of time).

25. Recently, the Supreme Court held that the Ninth Circuit erred by interpreting Sections 1226(c) and 1225(b) to require bond hearings as a matter of statutory construction. *Jennings v. Rodriguez*, __ U.S. __, 2018 WL 1054878 at *10 (Feb. 27, 2018). Because the Ninth Circuit had not decided whether the Constitution itself requires bond hearings in cases of prolonged detention, the Court remanded for the Ninth Circuit to address the issue. *Id*. at *10. The majority

opinion did not express any views on the constitutional question, and left it to the lower courts to address the issue in the first instance.

26. Due process requires that the government provide bond hearings to noncitizens facing prolonged detention. "The Due Process Clause foresees eligibility for bail as part of due process" because "[b]ail is basic to our system of law." *Id.* at *28 (Breyer, J., dissenting) (internal quotations and citations omitted). While the Supreme Court upheld the mandatory detention of a noncitizen under Section 1226(c) in *Demore*, it did so based on the petitioner's concession of deportability and the Court's understanding that detentions under Section 1226(c) are typically "brief." *Demore*, 538 U.S. at 522 n.6, 528. Where a noncitizen has been detained for a prolonged period or is pursuing a substantial defense to removal or claim to relief, due process requires an individualized determination that such a significant deprivation of liberty is warranted. *Id.* at 532 (Kennedy, J., concurring) ("individualized determination as to his risk of flight and dangerousness" may be warranted "if the continued detention became unreasonable or unjustified"). *See also Jackson v. Indiana*, 406 U.S. 715, 733 (1972) (detention beyond the "initial commitment" requires additional safeguards); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249-50 (1972) ("lesser safeguards may be appropriate" for "shortterm confinement"); *Hutto v. Finney*, 437 U.S. 678, 685-86 (1978) (in Eighth Amendment context, "the length of confinement cannot be ignored in deciding whether [a] confinement meets constitutional standards").

27. Consistent with this view, the federal courts have made clear that prolonged detention pending removal proceedings without a bond hearing likely violates due process. *See supra*; *Jennings*, 2018 WL 1054878 at *37 (Breyer, J, dissenting) ("an interpretation of the statute before us that would deny bail proceedings where detention is prolonged would likely mean that the statute violates the Constitution"). In addition, numerous circuit and district courts have expressly found that the Constitution requires bond hearings in cases of prolonged detention. *See, e.g.*, *Diop*, 656 F.3d at 233; *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 544-50 (S.D.N.Y. 2014); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458-59 (S.D.N.Y. 2010).

28. Detention without a bond hearing is unconstitutional when it exceeds six months. *See Demore*, 538 U.S. at 529-30 (upholding only "brief" detentions under Section 1226(c), which last "roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal"); *Zadvydas*, 533 U.S. at 701 ("Congress previously doubted the constitutionality of detention for more than six months").

29. The recognition that six months is a substantial period of confinement—and is the time after which additional process is required to support continued incarceration—is deeply rooted in our legal tradition. With few exceptions, "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term . . . ." *Duncan v. State of La*., 391 U.S. 145, 161 & n.34 (1968). Consistent with this tradition, the Supreme Court has found six months to be the limit of confinement for a criminal offense that a federal court may impose without the protection afforded by jury trial. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion). The Court has also looked to six months as a benchmark in other contexts involving civil detention. *See McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249, 250-52 (1972) (recognizing six months as an outer limit for confinement without individualized inquiry for civil commitment). The Court has likewise recognized the need for bright line constitutional rules in other areas of law. *See Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (14 days for re-interrogation following invocation of Miranda rights); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991) (48 hours for probable cause hearing).

30. Even if a bond hearing is not required after six months in every case, at a minimum, due process requires a bond hearing after detention has become unreasonably prolonged. *See Diop*, 656 F.3d at 234. Courts that apply a reasonableness test have considered three main factors in determining whether detention is reasonableness. First, courts have evaluated whether the noncitizen has raised a "good faith" challenge to removal—that is, the challenge is "legitimately raised" and presents "real issues." *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469,

476 (3d Cir. 2015).[37] Second, reasonableness is a "function of the length of the detention," with detention presumptively unreasonable if it lasts six months to a year. *Id*. at 477-78; *accord Sopo*, 825 F.3d at 1217-18. Third, courts have considered the likelihood that detention will continue pending future proceedings. *Chavez-Alvarez*, 783 F.3d at 478 (finding detention unreasonable after ninth months of detention, when the parties could "have reasonably predicted that Chavez–Alvarez's appeal would take a substantial amount of time, making his already lengthy detention considerably longer"); *Sopo*, 825 F.3d at 128; *Reid*, 819 F.3d at 500..

31. At a bond hearing, due process requires certain minimal protections to ensure that a noncitizen's detention is warranted: the government must bear the burden of proof by clear and convincing evidence to justify continued detention, taking into consideration available alternatives to detention; and if the government cannot meet its burden, the noncitizen's ability to pay a bond must be considered in determining the appropriate conditions of release.

32. To justify prolonged immigration detention, the government must bear the burden of proof by clear and convincing evidence that the noncitizen is a danger or flight risk. *See Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011). Where the Supreme Court has permitted civil detention in other contexts, it has relied on the fact that the Government bore the burden of proof at least by clear and convincing evidence. *See United States v. Salerno*, 481 U.S. 739, 750, 752 (1987) (upholding pre-trial detention where "full-blown adversary hearing," requiring "clear and convincing evidence" and "neutral decisionmaker"); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (striking down civil detention scheme that placed burden on the detainee); *Zadvydas*, 533 U.S. at 692 (finding post-final-order custody review procedures deficient because, *inter alia*, they placed burden on detainee).

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[37] Notably, "aliens should [not] be punished for pursuing avenues of relief and appeals." Sopo, 825 F.3d at 1218 (citing *Ly*, 351 F.3d at 272). Thus, courts should notcount a continuance against the noncitizen when he obtained it in good faith to prepare his removal case. Instead, only "[e]vidence that the alien acted in bad faith or sought to deliberately slow the proceedings"—for example, by "[seeking] repeated or unnecessary continuances, or [filing] frivolous claims and appeals"—"cuts against" providing a bond hearing. *Id*.; *see also Chavez–Alvarez*, 783 F.3d at 476; *Ly*, 351 F.3d at 272.

33. The requirement that the government bear the burden of proof by clear and convincing evidence is also supported by application of the three-factor balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). First, prolonged incarceration deprives noncitizens of a "profound" liberty interest. *See Diouf II*, 634 F.3d at 1091–92 (9th Cir. 2011). Second, the risk of error is great where the government is represented by trained attorneys and detained noncitizens are often unrepresented and frequently lack English proficiency. *See Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (requiring clear and convincing evidence at parental termination proceedings because "numerous factors combine to magnify the risk of erroneous factfinding" including that "parents subject to termination proceedings are often poor, uneducated, or members of minority groups" and "[t]he State's attorney usually will be expert on the issues contested"). Moreoever, detainees are incarcerated in prison-like conditions that severely hamper their ability to obtain legal assistance, gather evidence, and prepare for a bond hearing. *See infra* ¶ 39. Third, placing the burden on the government imposes minimal cost or inconvenience, as the government has access to the noncitizen's immigration records and other information that it can use to make its case for continued detention.

34. Due process also requires consideration of alternatives to detention. The primary purpose of immigration detention is to ensure a noncitizen's appearance during removal proceedings. *Zadvydas*, 533 U.S. at 697. Detention is not reasonably related to this purpose if there are alternative conditions of release that could mitigate risk of flight. *See Bell v. Wolfish*, 441 U.S. 520, 538 (1979). ICE's alternatives to detention program—the Intensive Supervision Appearance Program—has achieved extraordinary success in ensuring appearance at removal proceedings, reaching compliance rates close to 100 percent. *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (observing that ISAP "resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings"). It follows that alternatives to detention must be considered in determing whether prolonged incarceration is warranted.

35. Due process likewise requires consideration of a noncitizen's ability to pay a bond. "Detention of an indigent 'for inability to post money bail' is impermissible if the individual's

'appearance at trial could reasonably be assured by one of the alternate forms of release.'" *Id.* at 990 (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc)). It follows that—in determining the appropriate conditions of release for immigration detainees—due process requires "consideration of financial circumstances and alternative conditions of release" to prevent against detention based on poverty. *Id*.

36. Evidence about immigration detention and the adjudication of removal cases provide further support for the due process right to a bond hearing in cases of prolonged detention.

37. Each year, thousands of noncitizens are incarcerated for lengthy periods pending the resolution of their removal proceedings. *See Jennings*, 2018 WL 1054878 at *27 (Breyer, J., dissenting). Among a class of immigration detainees in the Central District of California held for at least six months ("*Rodriguez* class"), the average length of detention was over a year, with many people held far longer. In numerous cases, noncitizens are incarcerated for years until winning their immigration cases. *Id*. (identifying cases of noncitizens detained for 813, 608, and 561 days until winning their cases). For noncitizens who have some criminal history, their immigration detention often dwarfs the time spent in criminal custody, if any. *Id.* ("between one-half and two-thirds of the class served sentences less than six months").

38. Noncitizens are detained for lengthy periods because they pursue meritorious claims. Among the *Rodriguez* class, 40 percent of noncitizens subject to Section 1226(c) won their cases, and two-thirds of asylum seekers subject to Section 1225 won asylum. *See id*. Detained noncitizens are able to succeed at these dramatically high rates despite the challenges of litigating in detention, particularly for the majority of detainees who lack counsel. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 36 (2015) (reporting government data showing that 86% of immigration detainees lack counsel).

39. Immigration detainees face severe hardships while incarcerated. Immigration detainees are held in lock-down facilities, with limited freedom of movement and access to their families: "the circumstances of their detention are similar, so far as we can tell, to those in many

prisons and jails." *Jennings*, 2018 WL 1054878 at *28 (Breyer, J., dissenting); *accord Chavez–Alvarez*, 783 F.3d at 478; *Ngo v. INS*, 192 F.3d 390, 397-98 (3d Cir. 1999); *Sopo*, 825 F.3d at 1218, 1221. "And in some cases the conditions of their confinement are inappropriately poor." *Jennings*, 2018 WL 1054878 at *28 (Breyer, J., dissenting) (citing Dept. of Homeland Security (DHS), Office of Inspector General (OIG), *DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities* (2017) (reporting in-stances of invasive procedures, substandard care, and mistreatment, e.g., indiscriminate strip searches, long waits for medical care and hygiene products, and, in the case of one detainee, a multiday lock down for sharing a cup of coffee with another detainee)).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION

40. Petitioner re-alleges and incorporates by reference the paragraphs above.

41. The Due Process Clause of the Fifth Amendment forbids the government from depriving any "person" of liberty "without due process of law." U.S. Const. amend. V.

42. To justify Petitioner's ongoing prolonged detention, due process requires that the government establish, at an individualized hearing before a neutral decisionmaker, that Petitioner's detention is justified by clear and convincing evidence of flight risk or danger, even after consideration whether alternatives to detention could sufficiently mitigate that risk.

43. For these reasons, Petitioner's ongoing prolonged detention without a hearing violates due process.

SECOND CLAIM FOR RELIEF

VIOLATION OF THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION

44. Petitioner re-alleges and incorporates by reference the paragraphs above.

45. The Eighth Amendment prohibits "[e]xcessive bail." U.S. Const. amend. VIII.

46. The government's categorical denial of bail to certain noncitizens violates the right to bail encompassed by the Eighth Amendment. *See Jennings*, 2018 WL 1054878 at *29 (Breyer, J, dissenting).

47. For these reasons, Petitioner's ongoing prolonged detention without a bond hearing violates the Eighth Amendment.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

1) Assume jurisdiction over this matter;
2) Issue a Writ of Habeas Corpus; hold a hearing before this Court if warranted; determine that Petitioner's detention is not justified because the government has not established by clear and convincing evidence that Petitioner presents a risk of flight or danger in light of available alternatives to detention; and order Petitioner's release, with appropriate conditions of supervision if necessary, taking into account Petitioner's ability to pay a bond.
3) In the alternative, issue a Writ of Habeas Corpus and order Petitioner's release within 30 days unless Defendants schedule a hearing before an immigration judge where: (1) to continue detention, the government must establish by clear and convincing evidence that Petitioner presents a risk of flight or danger, even after consideration of alternatives to detention that could mitigate any risk that Petitioner's release would present; and (2) if the government cannot meet its burden, the immigration judge order Petitioner's release on appropriate conditions of supervision, taking into account Petitioner's ability to pay a bond.
4) Issue a declaration that Petitioner's ongoing prolonged detention violates the Due Process Clause of the Fifth Amendment and the Eighth Amendment;

5) Award Petitioner his costs and reasonable attorneys' fees in this action as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412, other statute; and
6) Grant such further relief as the Court deems just and proper.

_____

Dated:

PRACTICE ADVISORY: *DAMUS V. NIELSEN* PAROLE OF ARRIVING ASLYUM SEEKERS WHO HAVE PASSED CREDIBLE FEAR

Updated as of July 30, 2018

I. Introduction

On July 2, 2018, the U.S. District Court for the District of Columbia issued an order in *Damus v. Nielsen*, No. 18–578 (JEB), 2018 WL 3232515 (D.D.C. July 2, 2018), a class action lawsuit challenging the Department of Homeland Security's ("DHS") policy of detaining asylum seekers without considering their suitability for release on parole. The Court provisionally certified a class of arriving asylum-seekers found to have a credible fear of persecution or torture who are detained by U.S. Immigration and Customs Enforcement ("ICE") after having been denied parole under the authority of the following five ICE Field Offices: **Detroit, El Paso, Los Angeles, Newark, and Philadelphia**.[1] The Court entered a preliminary injunction directed at the five ICE Field Offices (1) requiring them to follow the 2009 ICE Parole Directive; (2) prohibiting them from detaining class members absent an individualized determination that they present a flight risk or danger to the community; and (3) prohibiting them from denying parole based on categorical criteria applicable to all class members.

This advisory provides a summary of the decision and order and the timeline for DHS to provide new parole redeterminations to class members. The decision, order, ICE Parole Directive, and a sample parole request also are attached. At this time, it is unclear whether the government will seek a stay of the injunction pending any appeal. However, until such time as a stay is granted, DHS must administer parole determinations as set out in the order.

We will update this advisory as circumstances change. In the meantime, we are interested to hear how the Court's decision is impacting DHS custody determinations. Please contact **Michael K.T. Tan and Stephen B. Kang of the ACLU Immigrants' Rights Project (mtan@aclu.org; skang@aclu.org)** if you have any questions about the ruling or require technical assistance.[2] ***If you believe that one of the five ICE Field***

[1] A list of DHS facilities that are covered by the five ICE Field Offices is included at the end of the advisory.

[2] This advisory is not a substitute for independent legal advice by a lawyer who is familiar with an individual's case.

Offices is not complying with the* Damus *injunction, please contact the ACLU immediately.

The *Damus* class is represented by the ACLU, the Center for Gender and Refugee Studies, Human Rights First, and Covington & Burling LLP.

If you are a *Damus* class member, you can contact class counsel by emailing damusparole@aclu.org or by writing us at:

ACLU Immigrants' Rights Project
c/o Class Counsel for *Damus v. Nielsen*
125 Broad Street, 18th Floor
New York, NY 10004

II. Background

Under the immigration statute, a person who is subjected to expedited removal who requests asylum at a port of entry to the United States is entitled to an interview with an asylum officer, where the individual must demonstrate a "credible fear of persecution or torture" in his or her home country.[3] If an individual establishes a credible fear, they are entitled to a hearing before an immigration judge to adjudicate the asylum claim.[4] It typically takes several months before an asylum seeker who has passed credible fear receives a final decision on their asylum claim; it can take more than a year or even several years if there are appeals to the Board of Immigration Appeals ("BIA") or a federal court of appeals.

Pursuant to the statute and regulations, asylum seekers who do not pose a flight risk or a danger to the community may be paroled by DHS during the pendency of their immigration cases on a "case-by-case basis for urgent humanitarian reasons or significant public benefit."[5]

In 2009, DHS issued a policy directive titled "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture" (the "Parole Directive") that defines the circumstances in which there is a "significant public benefit" to granting parole. The Parole Directive provides that, absent exceptional overriding factors, an asylum seeker who has established a credible fear of persecution should be granted parole in the "public interest" and released from detention while pursuing his or her asylum claims if the individual (a) establishes his or her identity to the satisfaction of DHS; and (b) presents neither a flight risk nor danger to the community. Parole Directive ¶ 6.2.

The Directive also sets forth several procedural requirements on the adjudication of parole. These include that the agency must:

[3] 8 U.S.C. § 1225(b)(1)(B)(v).
[4] *See id.* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f).
[5] 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5(b); *see also* 8 C.F.R. § 235.3(c).

- Provide arriving noncitizens with notice of their right to seek parole, which "shall be explained . . . in a language they understand," "as soon as practicable" following the credible fear determination, *id.* ¶ 6.1;

- *Automatically* conduct a parole interview within "seven days following a finding that an arriving [noncitizen] has a credible fear," unless an "additional reasonable period of time is necessary"—*regardless* of whether the individual submits a request for release on parole, *id*. ¶ 8.2;

- Provide written notification of the parole decision that contains "a brief explanation of the reasons for any decision to deny parole" within seven days of the interview, "absent reasonable justification for delay," along with "reasonable access to translation or interpreter services," *id.* ¶ 6.5-6.6;

- Notify applicants whose applications are denied that they may request a redetermination based on changed circumstances or additional evidence relevant to identity, flight risk, or danger, *id.* § 8.2;

- "Review all relevant documentation offered" by the asylum seeker, as well as "any other information available," in determining identity, *id*. ¶ 8.3.1.b;

- "[C]onsider whether setting a reasonable bond and/or" an alternative to detention program would mitigate any flight risk concerns, *id*. ¶ 8.3.2.c; and

- Engage in supervisory review of individual officers' decisions, *id.* ¶ 8.5-8.6.

The Parole Directive remains in effect. In February 2017, then-DHS Secretary John Kelly stated that the Parole Directive "remain[s] in full force and effect" pending the DHS Secretary's "further review and evaluation."[6] The government also represented to the U.S. Supreme Court later that year that the Parole Directive remains "in 'full force and effect,'" and emphasized that the Parole Directive generally requires DHS "to release the alien if he establishes his identity [and] demonstrates that he is not a flight risk or danger," and requires an individualized analysis that "calls for far more than checking a box on a form."[7]

Nevertheless, DHS has, since the Trump administration took office last year, implemented a de facto policy of denying parole in virtually all cases at its Detroit, El Paso, Los Angeles, Newark, and Philadelphia Field Offices ("the ICE Field Offices"). Altogether, these ICE Field Offices detain approximately 24 percent of ICE's total average daily detention population. ICE data show that between February and September

[6] Memorandum from John Kelly, DHS Secretary, Implementing the President's Border Security and Immigration Enforcement Improvement Policies, at 9-10 (Feb. 20, 2017).
[7] Pet. Suppl. Reply Br., *Jennings v. Rodriguez*, No. 15-1204, at 6-7 (U.S. filed Feb. 21, 2017) (quoting Kelly Memorandum at 10).

2017, Detroit officers denied parole in 98 percent of cases; El Paso denied 100 percent of cases; Los Angeles denied 92 percent; Newark denied 100 percent; and Philadelphia denied 100 percent of cases.[8] As a result, many asylum seekers who clearly satisfy the Parole Directive's criteria for release have been denied parole. This is a dramatic change from ICE's past practice pursuant to the Parole Directive. Between 2011 and 2013, the ICE Field Offices granted parole to 92 percent of arriving asylum seekers pursuant to the Directive.[9]

In March 2018, nine asylum seekers detained in the five ICE Field Offices filed a class action lawsuit in the United States District Court for the District of Columbia challenging the change in policy, and sought relief for themselves and others. They raised three claims: that the administration had violated the Administrative Procedure Act ("APA") in failing to follow and/or de facto rescinding the 2009 Parole Directive; that the administration had adopted a blanket no-parole policy in order to deter asylum seekers from traveling to the United States, in violation of the immigration statute and the Constitution's guarantee of due process; and that the administration had failed to provide them an individualized determination that detention was warranted by flight risk or danger, also in violation of the statute and due process.

III. What did the District Court do in *Damus v. Nielsen*?

In its order, Court both provisionally certified a class and granted a preliminary injunction against the change in parole policy.

The Court defined the class as

> arriving asylum-seekers who are found to have a credible fear of persecution or torture and who are or will be detained by ICE after having been denied parole under the authority of the five ICE Field Offices.

Memorandum at 13, 2018 WL 3232515 at *7. The Court then entered a preliminary injunction that:

- Prohibits DHS "from denying parole to any provisional class members absent an individualized determination, through the parole process, that such provisional class member presents a flight risk or a danger to the community," Order ¶ 3;

- Specifies that the "individualized determinations of flight risk and danger to the community referenced above shall be based on the specific facts of each

[8] *See* Memorandum at 31, 2018 WL 3232515 at *15.
[9] *See id.*

provisional class member's case" and "shall not be based on categorical criteria applicable to all provisional class members," Order ¶ 4;[10] and

- Directs DHS to "provide provisional class members with parole determinations that conform to all of the substantive and procedural requirements of U.S. Immigration and Customs Enforcement, Directive No. 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009)." Order ¶ 5.

The Court found that Plaintiffs were likely to prevail on their claim that DHS had violated the APA by failing to follow the 2009 Parole Directive. Memorandum at 24-36, 2018 WL 3232515 at *11-17. The Court held that the agency was bound by the Directive, and that evidence of near complete parole denials in the five field offices demonstrated an impermissible departure from the Directive. The Court did not reach Plaintiffs' statutory or due process claims.

IV. What does the District Court's decision mean for me or my clients?

The following individuals are covered by the Order:

- Arriving asylum seekers with a credible fear of persecution who are currently detained by one of the five ICE Field Offices and making an *initial* request for release on parole;

- Arriving asylum seekers with a credible fear of persecution who were *denied* release on parole prior to July 3, 2018 and are currently detained by one of the five ICE Field Offices; and

- Arriving asylum seekers with a credible fear of persecution who were *denied* release on parole by one of the five ICE Field Offices prior to July 3, 2018, but were subsequently *transferred* and are currently detained outside the five ICE Field Offices.

[10] In its Memorandum Opinion, the Court specifically prohibited DHS from denying parole based on categorical and non-individualized criteria, such as the fact that an asylum seeker is a "recent entrant." *See* Memorandum at 35, 2018 WL 3232515 at *16 (concluding that the denial of parole based on a finding that a plaintiff "was a recent entrant and thus presented a flight risk is contrary to the very concept of giving each applicant an 'individualized determination,' as 'recent entry' is a categorical characteristic of most, if not all, asylum-seekers" (internal quotation marks and citation omitted)). The Court also criticized DHS' use of "summary" and "boilerplate" parole denials for failing to demonstrate individualized reviews and compliance with the Parole Directive. *See id.*

- Arriving asylum seekers who were initially detained in a jurisdiction outside the five ICE Field Offices, but were subsequently *transferred* to one of the five ICE Field Offices and were *denied* parole by ICE prior to July 3, 2018.

Note that the asylum seekers remain eligible to apply for parole so long as they have not received a final order of removal that the government may execute.
If you were denied parole after July 3, 2018, you may still request reconsideration of the parole denial based on changed circumstances or additional evidence relevant to identity, flight risk, or danger. Parole Directive ¶ 8.2

As a result of the Order:

- The five ICE Field Offices should make parole decisions based on individualized flight risk and danger, in accordance with the substantive and procedural requirements of the Parole Directive.

- Unless asylum seekers individually pose a danger or flight risk that requires their detention, or fail to establish their identity, ICE should order their release on their own recognizance, a reasonable bond, or other conditions of supervision. *See* Parole Directive ¶¶ 6.2, 8.3.2.c.

- DHS should provide new parole determinations to all class members who were previously denied release. Although DHS is required under the injunction to provide these new parole reviews automatically, we advise detainees and their advocates to file a request for a new DHS parole determination with accompanying evidence to help ensure that their custody is reassessed under the proper standard and procedures—i.e., based on an individualized determination of flight risk and danger.

The government has not yet indicated whether it intends to appeal and seek a stay of the district court's decision. But for the time being, the Court's order is in effect and detainees should receive parole determinations pursuant to the Order's requirements.

V. What effect does the *Damus* injunction have on detained asylum seekers who were not denied release on parole by one of the ICE Field Offices?

The *Damus* injunction applies only to the five ICE Field Offices who were named in the lawsuit. However, *Damus* provides strong persuasive authority that the Parole Directive is binding on DHS, and that DHS must follow the substantive and procedural requirements of the Directive when deciding parole requests. Indeed, other district courts have reached the same conclusion.[11] If your or your client's parole application is pending

[11] *See Abdi v. Duke*, 280 F. Supp. 3d 373 (W.D.N.Y. 2017) (preliminary injunction requiring that DHS follow the Parole Directive in the ICE Buffalo Field Office); *Aracely R. v. Nielsen*, No.: 17-1976, 2018 WL 3243977 (D.D.C. July 3, 2018) (same, for individual asylum seekers detained in Texas).

or has recently been denied, you might consider supplementing the request with citation to the Court's decision in *Damus* or requesting reconsideration based on the decision.

VI. What should I do to obtain a parole review pursuant to *Damus v. Nielsen*?

If you or your client was previously denied parole by one of the five ICE Field Offices, ICE should afford you a new parole determination pursuant to the preliminary injunction's terms. The timeline for the government to provide these redeterminations is explained below. But if you are ready to go forward now and present a request for a new parole determination pursuant to the Order's requirements, you should go ahead and do so.

If you or your client is applying for parole from one of the five ICE Field Offices for the first time, then your process for obtaining parole should follow the requirements of the Parole Directive itself. This means that "as soon as practicable" after a positive credible fear finding, the noncitizen should receive a "Parole Advisal and Scheduling Notification" that includes a date and time for the parole interview by an ICE officer. Parole Directive ¶ 8.1. The noncitizen should receive a parole interview by an ICE officer within seven days after a positive credible fear finding, unless "an additional reasonable period of time is necessary." *Id*. ¶ 8.2. The noncitizen should receive a written parole decision within seven days of the interview, unless there is a "reasonable justification for delay." *Id*. ¶ 6.6.

VII. What is the timeline for the government to provide parole redeterminations?

The Court has set a timeline for the government to provide parole redeterminations that meet the requirements of the injunction.[12]

- The deadline for the government to provide parole advisals to **all** the class members is **August 14, 2018**.
- The government will provide parole advisals to class members on a staggered basis. "[A]bsent compelling reason":
    - Approximately **one third** of the advisals must be provided by **July 31, 2018.**
    - The **second third** must be provided by **August 7, 2018**.
    - The **final third** must be provided by **August 14, 2018**.

[12] *See* Minute Order, *Damus v. Nielsen*, No. 1:18-cv-00578-JEB (D.D.C. July 24, 2018).

- **Parole interviews** shall occur **within seven days** of the advisal unless the class member requests more time to prepare, or an exception in the Parole Directive applies.

- **Parole determinations** shall be made **within seven days** of the interview unless an exception in the Parole Directive applies.

VIII. How should I submit a parole request?

The Parole Directive contains detailed information about how the parole process works, as well as what evidence ICE should consider when examining a parole request. You should compile as much evidence as possible to support your or your client's parole request.

The key elements are:

(1) proving your or your client's **identity**, either through government-issued documents, sworn testimony, or other evidence;

(2) showing that you or your client is **not a flight risk**, meaning that you or your client will show up for immigration court, have a stable address, have an employment history, etc.;

(3) showing that you or your client is **not a danger to the community**, or that you or your client have rehabilitated from any previous criminal or harmful behavior.

See id. ¶ 8.3.

Evidence to submit with your parole request could include:

- letters from friends and family in the United States about why you or your client is a good and reliable person who will show up for court and not commit crimes if released;
- documents or letters that show your or your client's name and prove who they are;
- documents or letters that show your or your client's sponsor's name and who they are;
- documents that show you or your client and your sponsor have worked or paid taxes;
- or any other documents that show you or your client will show up for court and will not commit crimes if released.

Attached to this advisory is a sample parole application. For additional information on how to prepare a parole application, please see CLINIC, Practitioner's Guide: Obtaining Release from Immigration Detention (May 2018).

IX. List of Detention Centers Covered By the Five ICE Field Offices

Detroit Field Office

- Michigan facilities: Calhoun County Correctional Center, Chippewa County Jail, Monroe County Jail, St. Clair County Jail

- Ohio facilities: Butler County Correctional Complex, Morrow County Correctional Facility, Seneca County Jail, Geauga County Safety Center

El Paso Field Office

- New Mexico facilities: Cibola County Correctional Center, Otero County Prison Facility, and Otero County Processing Center

- Texas facilities: El Paso Processing Center, FSL La Tuna, West Texas Detention Center ("Sierra Blanca")

Los Angeles Field Office:

- Adelanto ICE Processing Center, James A. Musick Facility, Theo Lacy Facility

Newark Field Office:

- Elizabeth Contract Detention Facility, Essex County Correctional Facility, Hudson County Correctional Facility

Philadelphia Field Office:

- Abraxas Youth Center, Berks Family Residential Center, Cambria County Prison, Clinton County Correctional Facility, Pike County Correctional Facility, York County Prison

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANSLY DAMUS, *et al.*,

Plaintiffs,

v.

KIRSTJEN NIELSEN, Secretary of the Department of Homeland Security, *et al.*,

Defendants.

Civil Action No. 18-578 (JEB)

MEMORANDUM OPINION

As the events of recent months make clear, the question of how this nation will treat those who come to our shores seeking refuge generates enormous debate. While arriving foreigners may have myriad reasons for wanting to settle in the United States, a subset claims a fear of persecution in their native lands. They seek asylum here. Since 2009, the detention of those asylum-seekers has, in part, been governed by a set of principles and procedures set forth in a "Parole Directive" issued by Immigration and Customs Enforcement, a component of the Department of Homeland Security. This document establishes the process by which ICE must determine whether an individual who has passed a credible-fear interview – the first step toward gaining asylum status – will be released from detention on parole pending a full hearing.

Plaintiffs (and other members of the class they seek to represent) are noncitizens being held at five ICE Field Offices who have received a credible-fear determination but have been denied parole. Although, in the past, individuals deemed to have a "credible fear" of persecution and thus a significant possibility of being granted asylum were overwhelmingly released, Plaintiffs contend that there is a new reality in place. Pointing to the fact that parole rates have

plummeted from over 90% to nearly zero, as well as to testimony from detained asylum-seekers and their counsel, they assert that the Government is no longer following its own Parole Directive. Plaintiffs allege that, rather than providing individualized determinations and procedural safeguards, DHS is now engaging in systematic detention.

Seeking the protections spelled out in the Directive, Plaintiffs have now turned to the courts. They filed suit in March of this year against DHS Secretary Kirstjen Nielsen, as well as Thomas Homan, the Acting Director of ICE, U.S. Attorney General Jefferson B. Sessions, and the directors of the five ICE Field Offices. Their Complaint alleges that Plaintiffs have been denied parole in violation of the ICE Directive, and that the Government has thereby violated the Administrative Procedure Act, the Immigration and Nationality Act, and the Due Process Clause of the Fifth Amendment. Defendants have now moved to dismiss, contending that this Court lacks subject-matter jurisdiction over the various counts and that Plaintiffs have failed to state a viable claim for relief. The asylum-seekers both oppose dismissal and request a preliminary injunction requiring DHS to comply with the Parole Directive and to provide individualized parole determinations while this suit is pending.

Finding that the circumstances here merit that extraordinary form of relief, the Court will grant Plaintiffs' Motion. In so doing, this Opinion does no more than hold the Government accountable to its own policy, which recently has been honored more in the breach than the observance. Having extended the safeguards of the Parole Directive to asylum-seekers, ICE must now ensure that such protections are realized.

I. Background

A. Statutory and Regulatory Framework

Plaintiffs in this case are detained pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1225(b). This statute provides that if a noncitizen "who is arriving in the United States" demonstrates an intention to apply for asylum or expresses a fear of persecution or torture, he is referred for an interview to determine whether the fear is credible. See 8 U.S.C. § 1225(b)(1)(A)(ii). If the interviewing officer determines this to be the case, the INA provides that the individual "shall be detained for further consideration of the application for asylum," which includes a full asylum hearing before an immigration court and, if unsuccessful, an administrative appeal with the Board of Immigration Appeals (BIA). See 8 C.F.R. § 208.30(f); 8 U.S.C. § 1225(b)(1)(B)(ii). This detention requirement is not, however, entirely inflexible. Instead, an individual detained under § 1225(b) can be paroled "into the United States temporarily" pursuant to the discretion of the Attorney General. See 8 U.S.C. § 1182(d)(5)(A). According to agency regulations, the Secretary of Homeland Security "may invoke" this parole authority for individuals who are "neither a security risk nor a risk of absconding," and who meet one or more of a series of conditions – namely, "for urgent humanitarian reasons or significant public benefit." Id.; 8 C.F.R. § 212.5(b).

It is this last factor – "public benefit" – that is the focus of the 2009 Directive, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," issued by Immigration and Customs Enforcement ("ICE Directive" or "Parole Directive"). See ECF No. 22-1 (ICE Directive 11002.1). The Directive explains the agency's interpretation of "public benefit" for the purposes of determining parole and sets out a number of procedural requirements for assessing asylum-seekers' eligibility for release. On a broad level, the Directive states that

"[e]ach 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," and that if an asylum-seeker establishes his identity and that he presents neither a flight risk nor a danger to the public, "[ICE] should, absent additional factors . . . parole the alien on the basis that his or her continued detention is not in the public interest." Id., ¶ 6.2 (emphasis added). More specifically, the Directive sets out a series of procedures ICE must undertake to determine whether a given asylum-seeker should be granted parole, including, *inter alia*, that the individual shall be provided written notice of the parole process explained in a language he understands, id., ¶¶ 6.1, 8.1, shall be granted a parole interview within seven days of a credible-fear finding, id., ¶ 8.2, shall be provided written notification of a parole determination, id., ¶ 6.5, and shall be given a "brief explanation of the reasons for any decision to deny parole." Id., ¶ 6.5. As a result, although the Directive affirms that parole decisions are discretionary, it also establishes certain minimum procedures and processes that are to be utilized in making these determinations. Id., ¶ 4.4 (Directive "explains how the term [public interest] is to be interpreted by [ICE] when it decides whether to parole arriving aliens determined to have a credible fear" and "mandates uniform recordkeeping and review requirements for such decisions").

B. Plaintiffs' Detention

The nine named Plaintiffs and other members of the class they seek to represent are "asylum seekers who traveled to the United States, were found to have a credible fear of persecution, and were referred for immigration proceedings to decide their asylum claims." Compl., ¶ 2. During the pendency of their asylum determinations, however, each has remained detained, allegedly "with no individualized review of whether their detention is necessary." Id.

The lead plaintiff, Ansly Damus, is a former ethics teacher who is seeking asylum in the United States after fleeing political persecution in Haiti. Id., ¶ 11. Damus entered the United States in October 2016 and was referred for immigration proceedings after an asylum officer determined that he had a credible fear of persecution. He was subsequently granted asylum twice, but the Government appealed both determinations; meanwhile, the Detroit ICE Field Office denied his requests for parole in January 2017 and February 2018. Id. He has therefore remained detained – at this point – for over a year and a half. Id.

Plaintiff L.H.A. (the Court has permitted certain named Plaintiffs to proceed under pseudonyms) has been detained for even longer – over two years. Id., ¶ 16. He entered the United States in May 2016, upon fleeing threats in El Salvador. After receiving a credible-fear determination, L.H.A. applied for parole on June 14, 2017, but his request was denied by the El Paso Field Office and he remains detained. Id.

Plaintiffs Alexi Castro, H.A.Y., A.M.M., E.E.C.S., and L.I.L.M. have been detained for shorter periods (so far), but their experiences mirror those of Damus and L.H.A. Each was found to have a credible fear of persecution, each requested parole, and each was subsequently denied release and remains detained. Id., ¶¶ 14, 15, 17, 18. For two of the Plaintiffs, however, the story takes a slightly different twist. Abelardo Callol, who presented himself to immigration officers in December 2017 after fleeing persecution in Cuba, was denied parole and had been detained for over three months at the time the Complaint was filed. Id., ¶ 13. N.J.J.R., who presented himself to immigration in October 2017 after fleeing Venezula, had been detained for over four. Id., ¶ 12. In the time since the Complaint was filed, however, both men have been granted asylum and released from detention. See ECF No. 32 (Pl. Class Cert. Reply) at 15 n.6.

According to Plaintiffs, this shared experience of being found to have a credible fear of

persecution but then being denied parole is indicative of the issue at the crux of this case – namely, the allegation that certain ICE Field Offices are no longer providing individualized parole determinations pursuant to the 2009 Directive. In support of this claim, Plaintiffs point to the steep descent of parole-grant rates in the initial months of the current administration. Citing figures showing that nearly 100% of parole requests processed by the five Field Offices at issue have been denied, Plaintiffs allege that the Government is no longer following its own parole policies.

This past spring, the asylum-seekers looked elsewhere to vindicate their claims. On March 15, 2018, they brought a class-action suit in this Court, challenging the parole regime currently in place at the Detroit, El Paso, Los Angeles, Newark, and Philadelphia ICE Field Offices. See Compl., ¶¶ 21-25. They claim that these Field Offices are categorically denying parole, an approach that Plaintiffs contend is contrary to law and arbitrary and capricious in contravention of the APA and the INA. Id., ¶¶ 66-74. They additionally bring a freestanding allegation that the current state of the parole system violates the Due Process Clause of the Fifth Amendment. Id., ¶¶ 75-80. Presently before the Court are Plaintiffs' Motions for a preliminary injunction requiring that Defendants follow the Parole Directive during the pendency of this suit, as well as for provisional class certification for purposes of the requested injunction. Defendants oppose both Motions and separately seek dismissal of the suit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In keeping with the expedited nature of a preliminary-injunction proceeding, the Court held a hearing on May 17, 2018, after which it ordered further briefing on the issue of class certification. See ECF Order of May 29, 2018. That briefing complete, this Opinion regarding injunctive relief now follows. Given the result, the Court does not now tackle Defendants' Motion to Dismiss.

II. Legal Standard

"A preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. NRDC, 555 U.S. 7, 24 (2008). A party seeking preliminary relief must make a "clear 'showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest.'" League of Women Voters of United States v. Newby, 838 F.3d 1, 6 (D.C. Cir. 2016) (quoting Pursuing America's Greatness v. FEC, 831 F.3d 500, 505 (D.C. Cir. 2016)). "The moving party bears the burden of persuasion and must demonstrate, 'by a clear showing,' that the requested relief is warranted." Hospitality Staffing Solutions, LLC v. Reyes, 736 F. Supp. 2d 192, 197 (D.D.C. 2010) (citing Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006)).

Before the Supreme Court's decision in Winter, courts weighed these factors on a "sliding scale," allowing "an unusually strong showing on one of the factors" to overcome a weaker showing on another. Davis v. PBGC, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009); see Davenport v. Int'l Bhd. of Teamsters, 166 F.3d 356, 360-61 (D.C. Cir. 1999). This Circuit has hinted, though not held, that Winter – which overturned the Ninth Circuit's "possibility of irreparable harm" standard – establishes that "likelihood of irreparable harm" and "likelihood of success" are "'independent, free-standing requirement[s].'" Sherley v. Sebelius, 644 F.3d 388, 392-93 (D.C. Cir. 2011) (quoting Davis, 571 F.3d at 1296 (Kavanaugh, J., concurring)); see League of Women Voters, 838 F.3d at 7 (declining to address whether "sliding scale" approach is valid after Winter). Unresolved, too, is the related question of "whether, in cases where the other three factors strongly favor issuing an injunction, a plaintiff need only raise a 'serious legal question' on the merits." Aamer v. Obama, 742 F.3d 1023, 1043 (D.C. Cir. 2014) (citation

omitted). Regardless of the extent to which showings of irreparable harm and success on the merits can be diminished, however, it is clear that where the plaintiff can show neither harm nor success, no relief is warranted. See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 26 (D.D.C. 2016).

III. Analysis

At the heart of Plaintiffs' suit is their assertion that, under the current administration, the parole practices at the five Field Offices have drastically departed from the policies and protections enshrined in the 2009 ICE Directive. Offering comparative statistics as well as declarations from detained asylum-seekers and their counsel, Plaintiffs contend that parole has been effectively eliminated as an option and detention has instead become the status quo. They attribute this shift in part to the Trump administration's emphasis on "deterrence" and "zero-tolerance" when it comes to the treatment of undocumented individuals. Defendants contest this characterization, claiming instead that there is no "deterrence policy" in place, that they continue to implement the ICE Directive, and that parole remains available to asylum-seekers at the five Field Offices.

Before turning to its analysis of these issues, however, the Court must first address two threshold complications: justiciability and class certification. According to Defendants, the asylum-seekers' case cannot proceed because this Court lacks jurisdiction over their claims and because they do not present a proper class. Disagreeing on both fronts, the Court will discuss these points separately before tackling the merits of injunctive relief.

A. Preliminary Issues

1. *Jurisdiction*

Defendants raise a bevy of jurisdictional objections. Specifically, the Government alleges that Plaintiffs' claims challenging the parole process are barred by 8 U.S.C. § 1252(a)(2)(B)(ii) and their request for classwide injunctive relief by 8 U.S.C. § 1252(f)(1). Ultimately, the Court concludes that these alleged jurisdictional hurdles are easily cleared by the asylum-seekers, and that their claims may therefore proceed.

One arrow Defendants pluck from their justiciability quiver relies on on 8 U.S.C. § 1252(a)(2)(B)(ii), which provides:

> [N]o 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.

According to the Government, Plaintiffs are improperly attempting to challenge "ICE officers' discretionary weighing of the evidence." ECF No. 26 (Def. PI Reply) at 4.

To the extent Plaintiffs are challenging the determinations themselves – *i.e.*, the actual balancing of the merits of each application for parole – this Court agrees that it lacks jurisdiction. It will, therefore, not inquire into the specific strengths or weaknesses of the parole decisions under dispute, including Plaintiffs' allegation that certain of the proffered rationales for denial were "pretextual." ECF No. 24 at 8-10. Yet the asylum-seekers do not rest their case on a challenge to discrete parole determinations. Rather, they allege that ICE is, as a matter of general course, not complying with the policies and procedures of the Parole Directive. In other words, they are not challenging the outcome of ICE's decisionmaking, but the method by which

parole is currently being granted (or denied). The question, therefore, is whether such a claim falls within the scope of § 1252(a).

As the Supreme Court held in Zadvydas v. Davis, 533 U.S. 678 (2001), § 1252(a)(2)(B)(ii) does not entirely strip federal courts of jurisdiction over claims relating to the parole process. In that case, the petitioners challenged the Attorney General's authority to detain them indefinitely beyond the removal period. Id. at 682. The Court held that, although §1252(a) precludes judicial review of the discretionary determination to detain a noncitizen, the petitioners were not in fact challenging such decisionmaking. Instead, "they challenge[d] the extent of the Attorney General's authority," a claim that the Supreme Court held fell outside the scope of § 1252(a)(2)(B)(ii). Id. at 688.

This Court reached a similar conclusion when interpreting a parallel jurisdictional bar, 8 U.S.C. § 1226(e), in its decision in R.I.L-R. v. Johnson, 80 F. Supp. 3d 164 (D.D.C. 2015). As here, the provision at issue in that case precluded judicial review over any decision by the Attorney General regarding the "grant, revocation, or denial of bond or parole." Id. at 176. Yet, because Plaintiffs in R.I.L-R. were contesting the policies underlying their detention, and not "th[e] discretionary determinations granting or denying bond or parole in an individual case," the Court found that it had subject-matter jurisdiction. Id. at 177. Here, too, Plaintiffs are "challeng[ing] an overarching agency" action as unlawful – in this case, Defendants' systematic failure to follow the Parole Directive and to instead impose detention without its safeguards and individualized determinations. Id. at 176. As a district court held last year when presented with nearly identical claims by a putative class of asylum-seekers detained at the Buffalo Federal Detention Facility, Plaintiffs are not asking for this Court to review the propriety of any given parole decision, but, instead, "simply seek compliance with certain minimum procedural

safeguards when parole decisions are made" by requiring that Defendants follow the Directive. Abdi v. Duke, 280 F. Supp. 3d 373, 385 (W.D.N.Y. 2017). This Court agrees that such claims do not fall within the jurisdictional bar of 1252(a). Id. at 384 ("Petitioners are asking that this Court ensure that Respondents comply with certain policies and procedures in making th[e] parole decision – issues that are beyond the jurisdictional bar of § 1252(a)(2)(B)(ii).").

Defendants additionally assert that the classwide injunctive relief sought by Plaintiffs is jurisdictionally barred by a separate provision of the INA. See ECF No. 22 (Def. Opp. to PI) at 10-12. Specifically, they point to 8 U.S.C. § 1252(f)(1), which 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. §§ 1221-1232], other than with respect to . . . an individual alien against whom proceedings under such part have been initiated." According to Defendants, to grant relief in this case, the Court would need to enjoin the operations of ICE in carrying out its delegated powers on a classwide basis – relief that they allege is prohibited under 8 U.S.C. § 1252(f)(1). See Def. PI Opp. at 10-12.

Even assuming that Plaintiffs' claims fall within the provisions addressed by § 1252(f)(1) – a premise that is disputed by the parties – Defendants' jurisdictional argument is easily defeated. As this Court noted in R.I.L.-R., Section 1252(f)(1) "prohibits only injunction of 'the operation of' the detention statutes." 80 F. Supp. 3d at 184 (citing Rodriguez v. Hayes, 591 F.3d 1105, 1120 (9th Cir. 2010)). Put another way, "[w]here . . . a petitioner seeks to enjoin conduct that allegedly is not even authorized[,] . . . the court is not enjoining the operation of [the statute], and § 1252(f)(1) therefore is not implicated." Id. (citing Rodriguez, 591 F.3d at 1120) (internal quotations and citations omitted). Here, Plaintiffs do not seek to "enjoin or restrain the operation" of any provision of the INA. Instead, they ask that this Court mandate

compliance with the Parole Directive, which addresses the discretionary authority of the Attorney General to grant temporary parole. As a classwide injunction in this case would not obstruct the "operation of" any statute, but merely require conduct that complies with ICE's own Directive, 8 U.S.C. § 1252(f)(1) does not stand in the way.

2. *Class Certification*

To achieve meaningful relief with respect to DHS's allegedly unlawful actions, Plaintiffs sensibly ask this Court to provisionally certify a class. To obtain certification, a plaintiff must show that the proposed class satisfies all four requirements of Rule 23(a) and one of the three Rule 23(b) requirements. See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345-50 (2011). Rule 23(a) states that a class may be certified only if: (1) it is so numerous that joinder of all members is impracticable ("numerosity"), (2) there are questions of law or fact common to the class ("commonality"), (3) the claims or defenses of the representative are typical of those of the class ("typicality"), and (4) the class representative will fairly and adequately protect the interests of the class ("adequacy of representation"). Plaintiffs must show, in addition, that: (1) the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent adjudications, (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole, or (3) questions of law or fact common to the members of the class predominate over any questions affecting only individual members. See Fed. R. Civ. P. 23(b)(1)-(3).

In deciding whether class certification is appropriate, a district court must ordinarily undertake a "rigorous analysis" to see that the requirements of the Rule have been satisfied. See Gen. Tel. Co. of SW v. Falcon, 457 U.S. 147, 161 (1982). "Rule 23 does not set forth a mere

pleading standard." Wal-Mart, 564 U.S. at 350. Rather, the party seeking class certification bears the burden of "affirmatively demonstrat[ing] 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." Id. (emphasis in original).

Plaintiffs here, however, need only provisional class certification in order for the Court to grant their preliminary injunction. See Tr. of PI Hearing (May 17, 2018) at 6:6-8. In granting such provisional certification, the Court must still satisfy itself that the requirements of Rule 23 have been met. See Berge v. United States, 949 F. Supp. 2d 36, 49 (D.D.C. 2013) (citing Fed. R. Civ. P. 23 Advisory Committee Notes 2003 Amendments). Its analysis is tempered, however, by the understanding that such certifications "may be altered or amended before the decision on the merits." Bame v. Dillard, No. 05-1833, 2008 WL 2168393, at *5 (D.D.C. May 22, 2008) (internal quotation marks omitted).

Plaintiffs' proposed class consists of all arriving asylum-seekers who "are found to have a credible fear of persecution or torture" and "who are or will be detained by ICE . . . after having been denied parole under the authority of the [five] ICE Field Offices." Mot. for Class Cert. at 5-6. The Court must therefore consider whether this class, as defined, meets the requirements under Rule 23. It will begin by addressing Defendants' threshold contention that the class cannot be certified because certain members lack standing, and then briefly analyze the first and fourth prongs of Rule 23(a), neither of which Defendants contest. It then assesses the second and third specifications together, both of which are disputed. Finally, it considers whether Plaintiffs have satisfied their burden under Rule 23(b).

a. Standing

Defendants first attack Plaintiffs' standing to bring a classwide suit. According to the Government, Plaintiffs' request that this Court "certify a class that includes all arriving asylum seekers who are found to have a credible fear . . . who are or will be detained by ICE after having been denied parole under the authority of [the five] Field Offices" cannot proceed because the class definition "includes persons who have not experienced the harm Plaintiffs allege." Opp. to Class Cert. at 28. The asylum-seekers reply that "[t]o the contrary, all class members have been denied parole pursuant to Defendants' *de facto* parole denial policy and thus have suffered the injury alleged in Plaintiffs' Complaint." Pl. Class Cert. Reply at 14.

To establish standing, a plaintiff "must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." Bennett v. Spear, 520 U.S. 154, 162 (1997) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-472 (1982)). Standing is assessed "upon the facts as they exist at the time the complaint is filed," Natural Law Party of U.S. v. Fed. Elec. Comm'n, 111 F. Supp. 2d 33, 41 (D.D.C. 2000), and "Rule 23's requirements must be interpreted in keeping with Article III constraints." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 592 (1997).

Here, the Court concludes that Plaintiffs have adequately established the standing of their class members. As defined, the putative class includes only arriving asylum-seekers who have been or will be detained by the five ICE Field Offices after having been denied parole. Each of these individuals has suffered a concrete injury – detention imposed without the protections of the Parole Directive – from the Government's refusal to grant them the Directive's requisite

processes and protections. Although the Government asserts that "not all putative class members have been injured by Defendants' purported policy . . . [as] not all persons detained at the Field Offices were denied parole," Opp. to Class Cert. at 28, this line of argument entirely ignores Plaintiffs' definition of the class as including only those asylum-seekers who are or will be detained "after having been denied parole." Pl. Class Cert. Reply at 15 (emphasis altered). The (albeit negligible) percentage of asylum-seekers released by the Field Offices does not, therefore, undermine Plaintiffs' classwide standing, as they are explicitly excluded from the definition of the class.

For those individuals who are (or will be) detained after being denied release on parole, Plaintiffs adequately allege that the Government is engaging in injurious conduct, the resolution of which would likely be redressed by a favorable decision by this Court. According to Plaintiffs, their detention is the direct result of the Field Offices' current departure from the protections of the Parole Directive in favor of *de facto* detention – an allegation that, as discussed in more depth below, is robustly supported by statistics and other record evidence. In light of the prior substantial grant rates under the Directive and the near-uniform detention of asylum-seekers under the current administration, it is in no sense "speculative" that enjoining the Field Offices to implement the Directive would render Plaintiffs' release far more likely. As this Circuit has emphasized, "A significant increase in the likelihood that [a litigant] would obtain relief that directly redresses the injury suffered will suffice for standing." Nat'l Parks Conservation Ass'n v. Manson, 414 F.3d 1, 7 (D.C. Cir. 2005) (internal quotation marks omitted); accord Lichoulas v. FERC, 606 F.3d 769, 775 (D.C. Cir. 2010). Granting the injunctive relief in this case would mandate compliance with the procedures and policies of the Directive and would therefore result in a greater opportunity for class members' release on

parole. The Court is, consequently, satisfied that the requirements of Article III are met by the proposed class.

b. Numerosity

The numerosity requirement is determined case by case and "'imposes no absolute limitations.'" Bynum v. D.C., 214 F.R.D. 27, 32 (D.D.C. 2003) (quoting Gen. Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980)). Plaintiffs need not prove exactly how many people fall within the class to merit certification. See, e.g., Kifafi v. Hilton Hotels Retirement Plan, 189 F.R.D. 174, 176 (D.D.C. 1999) ("So long as there is a reasonable basis for the estimate provided, the numerosity requirement can be satisfied without precise numbers."). As a general benchmark, "courts have found that a proposed class consisting of at least forty members" satisfies this requirement. Johnson v. D.C., 248 F.R.D. 46, 52 (D.D.C. 2008) (internal quotation marks and citation omitted); accord Taylor v. District of Columbia Water & Sewer Auth., 241 F.R.D. 33, 37 (D.D.C. 2007); Bynum, 214 F.R.D. at 32.

Defendants do not challenge the numerosity of the proposed class, and rightly so. Plaintiffs have provided ample evidence that a large number of asylum-seekers – well over 40 – have been denied parole at the five Field Offices, see ECF No. 17-10 (Decl. of Anne Daher), ¶ 10, and state that the "Government itself has identified nearly 800 class members." Mot. for Class Cert. at 1. As discussed below, they have further demonstrated that the detention of class members is sufficiently tethered to ICE's compliance, or lack thereof, with the protections and procedures enshrined in the Parole Directive. Nothing more is needed to satisfy the numerosity requirement under Rule 23.

c. Adequacy of Representation

In order to satisfy this prerequisite, Plaintiffs must show both that (1) there is no conflict

of interest between the named members and the rest of the class, and that (2) counsel is competent to represent the class. See Twelve John Does v. D.C., 117 F.3d 571, 575 (D.C. Cir. 1997); Johnson, 248 F.R.D. at 53-54; Taylor, 241 F.R.D. at 45; Bynum, 214 F.R.D. at 35. No trace of a conflict exists here, and Plaintiffs are represented by very capable counsel from the American Civil Liberties Union and Covington & Burling LLP. Defendants, appropriately, do not dispute that these requirements have been met either.

d. Commonality and Typicality

The Government, conversely, finds greater traction in citing two other prongs of the certification test. Rule 23(a)(2) – commonality – requires that Plaintiffs establish that "there are questions of law or fact common to the class." Class members' claims must depend on "a common contention [that] is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, 131 S. Ct. at 2551. In other words, the representative plaintiffs must show that the class members have "suffered the same injury." Id. (citation omitted). As the D.C. Circuit explained, commonality is satisfied where there is "a uniform policy or practice that affects all class members." D.L. v. District of Columbia, 713 F.3d 120, 128 (D.C. Cir. 2013).

To demonstrate typicality, as required by Rule 23(a)(3), Plaintiffs must show that their claims are "typical of the claims . . . of the class." Typicality means that the representative plaintiffs must "possess the same interest and suffer the same injury" as the other class members. See Falcon, 457 U.S. at 156 (citations omitted). The commonality and typicality requirements often overlap because both "serve as 'guideposts'" to determine whether a class action is practical and whether the representative plaintiffs' claims are sufficiently interrelated with the class claims to protect absent class members. See Taylor, 241 F.R.D. at 44-45 (quoting Falcon,

457 U.S. at 157 n.13). Here, as Defendants' principal challenge to class certification goes to both, the Court considers them together.

Contending that Plaintiffs have been unable to establish a categorical practice affecting parole at the five Field Offices, Defendants argue that a class action is an improper vehicle to challenge their alleged failure to conform with the Parole Directive. According to the Government, Plaintiffs "allege a variety of procedural and substantive violations of the Parole Directive facially unconnected to any coordinated agency action." Def. Opp. to Cert at 1. They contend, therefore, that class certification is not available here because the asylum-seekers "cannot credibly identify any single policy or practice that bridges all their claims." Id. (internal quotation marks and citation omitted). Put another way, under the Government's view of the case, Plaintiffs are not challenging any uniform agency policy, but instead contest "the manner in which ICE has exercised its discretionary parole authority in more than a thousand different cases." Id. at 26 (internal quotation marks and citation omitted). DHS goes on to argue that the "fundamental flaw in Plaintiff's Motion for Class Certification is that it does not provide any evidence linking each Plaintiff's denied parole applications to a single or 'indivisible' government action capable of being enjoined 'in one stroke.'" Id. at 27 (citing Wal-Mart, 564 U.S. at 350) (emphasis added).

This argument bears a striking resemblance to Defendants' objection that Plaintiffs have not established a common injury for the purposes of standing, and, for similar reasons, the Court rejects it here as well. While it is true that the reasons for any given discretionary detention cannot necessarily be proven on an individualized basis, the Government has nonetheless conceded that ICE is required to follow the Directive when determining parole for asylum-seekers who have established a credible fear of persecution. See Def. Reply at 5. Plaintiffs here

have provided ample evidence that, in the initial months of the current administration, nearly every application for parole from such individuals has been denied. This is in sharp contrast to the prior parole-grant rates, and, as discussed in depth below, indicates a likely departure from the policies and processes mandated by the Parole Directive.

The Court can, therefore, conclude that a "common question[] of law and fact" unites the class members' claims – namely, the allegation that the five ICE Field Officers are no longer providing the "individualized determinations" of parole eligibility and procedural protections required by the Parole Directive. See D.L. v. D.C. (D.L. II), 860 F.3d 713, 724-26 (D.C. Cir. 2017) (evidence suggesting failure to follow statutory provisions satisfies commonality); R.I.L-R., 80 F. Supp. 3d at 182 (holding that "ample evidence that nearly every Central American family apprehended since June 2014 has been detained" supports conclusion that "common questions of law and fact united the class members' claims"). Such a showing provides the "glue holding" the alleged basis for the putative class's detention "together." Wal-Mart, 564 U.S. at 352. The asylum-seekers acknowledge that the circumstances of their detention may vary, but they have sufficiently identified a common cause and injury as a result of the current parole regime and ICE's departure from the mandates of the Parole Directive. See Pl. Class Cert. Reply at 5-6.

The fact that the precise role this alleged failure to follow the Directive played in any specific determination may differ among the Plaintiffs does not destroy the fact that all (or nearly all) class members were subjected to the same system of *de facto* parole denial. Indeed, as this Circuit has held, if there is a "single" common question, "factual variations among the class members will not defeat the commonality requirement." Hardy v. D.C., 283 F.R.D. 20, 24 (D.D.C. 2012) (quoting Bynum v. D.C., 214 F.R.D. 27, 33 (D.D.C. 2003)). As the court held in

Abdi when faced with the question of certifying the class of detained asylum-seekers at the Buffalo ICE Field Office, the question of whether Defendants were providing "certain procedural safeguards when adjudicating parole . . . determinations" is a common question that will "generate common answers apt to drive resolution of the litigation." 323 F.R.D. at 141 (citation omitted). The court therefore rejected the Government's contention, repeated here, that the request to certify the class could not proceed "because the claims require individualized factual determinations." Id.; see also Borum v. Brentwood Vill., LLC, 324 F.R.D. 1, 15-16 (D.D.C. 2018) (no requirement under Rule 23 that "all members of the putative class will be affected by the policy in the same way"); Nio v. Dep't of Homeland Sec., 323 F.R.D. 28, 32 (D.D.C. 2017) ("factual variations among class members" do not trump "the overarching questions common to the class" addressing the "legal authority to implement [the challenged] policies and practices").

This Court agrees with the sound reasoning of Judge Wolford of the Western District of New York. Contrary to the Government's assertion that "[i]f the class is certified, the Court will be forced to hear individualized evidence of ICE's compliance or alleged non-compliance with the Parole Directive for potentially every putative class member," the resolution of this case would require no such piecemeal litigation. See Def. Opp. to Cert. at 32. Rather, Plaintiffs ask this Court to determine only whether, as a general matter, the five Field Offices are following the Directive or are instead systematically denying parole. Analyzing this issue thus requires only a common, programmatic analysis, as the specific facts of each denial matter not if Plaintiffs are correct in their claim that the Directive is no longer in force overall.

Nor is commonality defeated by the fact that a small percentage of asylum-seekers were, in fact, released from two of the five Field Offices. As Plaintiffs correctly note, "A policy or

practice may satisfy Rule 23(a)(2), even when it is substantially less uniform than the near-100% parole-denial rates at issue here." Pl. Class Cert. Reply at 5. See, e.g., Hoyte v. D.C., 2017 WL 3208456, at *10 (D.D.C. July 27, 2017) (commonality found when 43% of claims conformed to alleged D.C. practice of failing to provide interim hearings).

Finally, the Court can also dispose of Defendants' contention that Plaintiffs are unable to establish commonality because they do not allege a common motive underlying the Field Offices' departure from the Parole Directive. See Opp. to Class Cert at 30-32, 39. As this Circuit held in D.L. II, a common motive is not required under Rule 23 when "liability does not depend on the reason for a defendant's failure" to follow the law. See 860 F.3d at 725 (distinguishing Wal-Mart on ground that "crux of the inquiry" under Title VII "is the reason for a particular employment decision"). Here, although Plaintiffs identify "deterrence" as the motivating factor behind the lack of individualized parole determinations and compliance with the Directive, the Court need not find any such common intention in order to certify the class. The asylum-seekers' claims rest not on the impetus behind the Field Offices' practices, but, instead, on the very fact that they are no longer following the binding guidance of the Parole Directive. See Pl. PI Brief at 17-19, 23-26, 28-31; see also Garnett, 2018 WL 1524748, at *5 ("The question the Court confronts is simply whether the applications are being . . . processed" lawfully, "not why they are . . . not.") (emphasis added).

The same reasoning applies to Defendants' challenge to typicality. The Government alleges that Plaintiffs "point to no evidence that the five ICE Field Offices have engaged in the 'unitary course of conduct' they allege . . . and so no named Plaintiff can say that his claim is 'typical' of anyone else's." Opp. to Class Cert. at 40 (citation omitted). Again, the typicality requirement is satisfied when the claims of the class representatives "arise from the same course

of conduct, series or events, or legal theories of other class members." Hoyte, 2017 WL 3208456, at *4 (citation omitted). Here, it is clear from Plaintiffs' filings and affidavits that the nine named class members have each alleged a personal deprivation of the protections of the Parole Directive, contending that they have instead been denied the opportunity for release under the Field Offices' current practice of nearly uniform detention. Although the specific details of each named Plaintiff's parole adjudication may vary, the crux of their allegations is typical of the claims of the putative class that the Government is no longer providing asylum-seekers with the individualized determinations and opportunities for release required under the Directive. In light of the record evidence of a current no-parole regime in place at the five Field Offices, see Section III. B, *infra*, such allegations are sufficiently tethered to a uniform course of governmental conduct. Defendants' various objections thus parried, the Court finds that commonality and typicality have been established.

e. Rule 23(b)(2)

To obtain certification, a proposed class must also satisfy just one of the three Rule 23(b) specifications. Plaintiffs here invoke Rule 23(b)(2), which sets forth two basic requirements: (1) the party opposing the class must have "acted or refused to act on grounds that apply generally to the class," and (2) "final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, must be appropriate." Put otherwise, Rule 23(b)(2) codifies the "presumption that the interests of the class members are cohesive." Lightfoot v. D.C., 273 F.R.D. 314, 329 (D.D.C. 2011).

In disputing that this cohesion requirement has been satisfied, Defendants regurgitate a variant of the same challenge they raised to standing, typicality, and commonality – to wit, that Plaintiffs have not shown that "all putative class members warrant the same relief for the same

reasons." Opp. to Class Cert. at 41. Once again, the Court cannot concur. Plaintiffs allege that the five Field Offices no longer follow the policies and procedures outlined in the 2009 Parole Directive. They seek declaratory and injunctive relief requiring compliance with the Directive and mandating that the Field Offices provide the individualized parole determinations and protections required by such agency guidance. Contrary to the Government's argument that "it is difficult to see how each individual alleged violation of the Parole Directive would be amenable to resolution on a classwide basis," id. at 42, the asylum-seekers are not asking for this Court to remedy discrete errors in their parole determinations or to interfere with ICE's discretionary decisionmaking. Rather, Plaintiffs ask only that the Court address an alleged systematic harm – the failure of the Field Offices to comply with the Directive. This departure from the Directive is an agency action "generally applicable" to all class members, and a determination of whether that practice is unlawful would therefore resolve all members' claims "in one stroke." Wal-Mart Stores, 564 U.S. at 350; see R.I.L-R., 80 F. Supp. 3d at 182 (Rule 23(b)(2) satisfied when class challenges agency action "generally applicable to all class members"). Rule 23(b)(2) thus poses no obstacle to class certification.

B. The Merits

The undercard bouts now concluded, the Court turns to the main event: the merits of Plaintiffs' request for a preliminary injunction. The Complaint provides three distinct grounds for such relief. Specifically, Plaintiffs allege that DHS's actions: (1) are contrary to law under the APA by failing to follow the Parole Directive; (2) violate the APA by failing to conform with the INA; and (3) abridge Plaintiffs' due-process rights under the Fifth Amendment. See Mot. for PI at 1-3. Because the Court concludes that Plaintiffs' first theory warrants relief, it will focus its

attention accordingly. In doing so, it addresses each of the four prongs of the preliminary-injunction analysis.

1. *Likelihood of Success*

To remind any reader whose attention may understandably have flagged: in Count I of their Amended Complaint, Plaintiffs allege that DHS is no longer complying with the ICE Directive, a practice they assert is "contrary to law" under the APA. See 5 U.S.C. § 706(2)(A). Likelihood of success, consequently, turns on the strength of their argument that Defendants are failing to follow the Directive, and that such a departure is unlawful. This is where the rubber meets the road.

Defendants contest both the premise and the substance of Plaintiffs' APA claims. DHS contends that the asylum-seekers do not have a cause of action under the statute, that the Parole Directive does not provide a sound basis for the relief they seek, and that they do not demonstrate that the agency is in fact failing to follow the necessary procedures. Because Plaintiffs' argument in support of this count rests in large part on a somewhat obscure area of law – the so-called Accardi doctrine – the Court will first lay out the fundamentals of this concept, next look at the question of whether Plaintiffs may raise such claims under the APA, and conclude with the alleged violations themselves.

a. The Accardi Doctrine

Plaintiffs' first APA count is based, in large part, on the "Accardi doctrine," which they allege requires Defendants to follow the ICE Directive in adjudicating parole determinations. This doctrine arises from a 1954 Supreme Court decision, United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954), in which the Court vacated a deportation order because it was issued without procedures that conformed to the relevant agency regulations. The Court

stated that "[r]egulations with the force and effect of law supplement the bare bones" of federal statutes, and that, even in areas of expansive discretion, agencies must follow their own "existing valid regulations." Id. at 266, 268. Two decades later, in Morton v. Ruiz, 415 U.S. 199, 232 (1974), the Supreme Court returned to the doctrine – this time striking down a Bureau of Indian Affairs benefits determination because it did not comply with the procedures set forth in the agency's internal manual. In doing so, the Court noted that Accardi's teachings apply with particular force in those cases in which "the rights of individuals are affected," stating that "it is incumbent upon agencies to follow their own procedures . . . even where [they] are possibly more rigorous than otherwise would be required." Id. at 235.

This Circuit and district courts here have subsequently invoked the doctrine, noting that "Accardi has come to stand for the proposition that agencies may not violate their own rules and regulations to the prejudice of others." Battle v. FAA, 393 F.3d 1330, 1336 (D.C. Cir. 2005); see also Steenholdt v. FAA, 314 F.3d 633, 639 (D.C. Cir. 2003) ("The Accardi doctrine requires federal agencies to follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions."); Wilkinson v. Legal Servs. Corp., 27 F. Supp. 2d 32, 34 n.3 (D.D.C. 1998) (citing Accardi and stating that "government agencies are bound to follow their own rules, even self-imposed procedural rules that limit otherwise discretionary decisions"); Vanover v. Hantman, 77 F. Supp. 2d 91, 103 (D.D.C. 1999), aff'd, 38 F. App'x 4 (D.C. Cir. 2002) (judicial review under Accardi available for "claims that an agency has acted in violation of its own binding procedures where those procedures are promulgated for the protection of individuals, even where the procedures were not issued as formal regulations"); Jefferson v. Harris, 285 F. Supp. 3d 173, 185 (D.D.C. 2018). And, in the immigration context, the Second Circuit has explained that the Accardi doctrine's "ambit is not limited to rules attaining the status of formal

regulation," and that it can be applied to internal agency guidance. See Montilla v. INS, 926 F.2d 162, 167 (2d Cir. 1991); see also Zhang v. Slattery, 840 F. Supp. 292, 296 (S.D.N.Y. 1994) (requiring that INS adhere to internal procedures in parole memorandum).

The doctrine is not without its limits, however. Courts have distinguished between those internal agency regulations that are enforceable and those that remain unreviewable – drawing a line "between procedural rules benefitting the agency . . . and procedural rules benefitting the party otherwise left unprotected . . . [or] cases in which the agency has failed to exercise discretion required by its regulations." Lopez v. FAA, 318 F.3d 242, 247 (D.C. Cir. 2003), as amended (Feb. 11, 2003). This Circuit has articulated this distinction as meaning that "agencies cannot relax or modify regulations that provide the only safeguard individuals have against unlimited agency discretion." Id. Similarly, the Supreme Court has held that the enforceability of agency policies depends upon whether they impose binding norms on the agency. Vitarelli, 359 U.S. at 539–40; Dulles, 354 U.S. at 372. Following that guidance, this Circuit has synthesized these considerations to conclude that "an agency pronouncement is transformed into a binding norm if so intended by the agency," a determination that takes into account the substance and intent of the agency action, as well as whether it confers individual protections or privileges. See Padula v. Webster, 822 F.2d 97, 100 (D.C. Cir. 1987) (citations omitted).

b. Accardi and Parole Directive

The next set of questions for the Court is therefore whether Plaintiffs can bring their Accardi claim pursuant to their first APA count, and whether the Parole Directive falls within the realm of agency rules, regulations, and guidance to which the doctrine can attach.

On the initial issue, Defendants contend that the asylum-seekers' Accardi allegations present a claim without a cause of action. According to the Government, Plaintiffs' assertion

that the Field Offices are failing to follow the Parole Directive is "not cognizable under Section 706(2) of the APA." Opp. to Class Cert at 26. Plaintiffs respond that the APA empowers them to challenge agency action that is arbitrary, capricious, and contrary to law, see 5 U.S.C. §§ 702, 706(2), and that their allegation that ICE's systematic departure from the Parole Directive is unlawful is thus actionable under that Act.

They are correct. "It has long been settled that a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated." Mass. Fair Share v. Law Enf't Assistance Admin., 758 F.2d 708, 711 (D.C. Cir. 1985). As numerous courts have held, the Accardi doctrine therefore provides plaintiffs with a means by which they can hold agencies accountable to their own policies. See, e.g., Burdue v. FAA, 774 F.3d 1076, 1082 n.2 (6th Cir. 2014) ("Under the doctrine outlined in Accardi, a party may always challenge an agency's failure to abide by its own regulations.") (internal citation omitted). It is clear, moreover, that such claims may arise under the APA. See Schaefer v. Geren, 607 F. Supp. 2d 61, 68-70 (D.D.C. 2009), aff'd sub nom. Schaefer v. McHugh, 608 F.3d 851 (D.C. Cir. 2010) (addressing Accardi claim pursuant to allegation that Army Board for Correction of Military Records "acted arbitrarily, capriciously, and contrary to law" in violation of APA § 706(2)(A)); Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 841, 852 (9th Cir. 2003) (upholding Accardi challenge under APA § 706 and finding that "[h]aving chosen to promulgate the [] policy, the [Fish and Wildlife Service] must follow that policy"); Alamo Exp., Inc. v. United States, 613 F.2d 96, 98 (5th Cir. 1980) (finding APA violation by Interstate Commerce Commission because it failed to comply with internal procedure).

This connection between § 706(2) and Accardi was carefully explained in a recent opinion from the Southern District of California addressing a different form of internal agency

guidance on immigration, the "Operating Procedures" governing Deferred Action for Childhood Arrivals. See Torres v. U.S. Dep't of Homeland Sec., 2017 WL 4340385, at *5-6 (S.D. Cal. Sept. 29, 2017). As the court spelled out in Torres, the plaintiffs' allegation that Defendants had "fail[ed] to follow their own procedures in terminating Plaintiff's DACA status" was properly framed as a claim that the agency's actions were "arbitrary, capricious, and an abuse of discretion." Id. at *5-6. Such allegations, Torres concluded, fell well within the scope of the Accardi doctrine: "While Defendants are granted broad discretion to commence, adjudicate, and execute removal orders, a fundamental principle of federal law is that a federal agency must follow its own procedures." Id. (citing Morton, 415 U.S. at 233-35). For an agency to violate this governing maxim, the court found, would amount to an "unlawful" action under the APA. Id. (quoting 5 U.S.C. § 706(2)). Agreeing with the analysis in Torres, and with the congeries of other cases addressing Accardi claims under the framework of administrative law, the Court rejects Defendants' assertion that Plaintiffs have failed to identify a cause of action under the APA.

The Court finds the Government's contention that Plaintiffs may not rely on the Parole Directive for their Accardi claim because it is not "binding" on the agency similarly unavailing. As discussed above, the premise underlying the Accardi doctrine is that agencies can be held accountable to their own codifications of procedures and policies – and particularly those that affect individual rights. Here, the policies and procedures contained within the Directive establish a set of minimum protections for those seeking asylum, including an opportunity to submit documentation, the availability of an individualized parole interview, and an explanation of the reasons for a parole denial. The Directive therefore falls squarely within the ambit of those agency actions to which the doctrine may attach. See Pacific Molasses Co. v. FTC, 356

F.2d 386, 389-90 (5th Cir. 1966) ("[O]nce an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules."); Pasquini v. Morris, 700 F.2d 658, 663 n.1 (11th Cir. 1983) ("Although the [INS] internal operating instruction confers no substantive rights on the alien-applicant, it does confer the procedural right to be considered for such status upon application.").

Defendants' reliance on language in the Directive disclaiming that the document confers any substantive rights does not prove otherwise. The ICE Directive provides that it "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." Parole Directive, ¶ 10. The Government points to this language in refuting Plaintiffs' Accardi claims, stating in its briefing that "the Parole Directive's statement that it places requirements on ICE and its officers without creating a private cause of action should be viewed by the Court as determinative evidence of the extent to which DHS intended to be bound by the Directive." Reply at 2-3. Yet the Government's subsequent statement at oral argument that the Directive is, in fact, binding compels the Court to find otherwise. See Tr. at 19:12-13. It would seem that this representation is in fact the "determinative evidence" of the extent to which the agency "intended to be bound." The Court will therefore take Defendants at their word that the Directive is binding agency policy and thus concludes that it can be challenged via an Accardi claim.

The Court additionally notes that, even absent such concession, the Accardi doctrine could well apply to the ICE Directive. This case is distinguishable from a prior Opinion in this Circuit addressing the effects of disclaimer language in agency guidance, In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006). In Miller, this Circuit held that DOJ

guidelines for issuing subpoenas to the media – which contained language similar to that in the ICE directive – did not create legally enforceable procedural rights. Yet although Miller relied in part on the express reservation at issue in that case, it does not stand for the proposition that such a disclaimer would necessarily defeat Plaintiffs' claim that the Directive is binding upon and enforceable against DHS. Instead, Miller explicitly distinguished Morton on the ground that the procedures contained in the BIA manual at issue in that case were "intended to benefit" individuals, whereas the DOJ guidelines provided no such protections and instead "exist[ed] to guide the Department's exercise" of its internal decisionmaking to seek subpoenas. See Miller, 438 F.3d at 1152. As discussed above, the ICE Directive falls clearly on the side of Morton rather than Miller, as "given the nature of the guidelines themselves, and the function they govern," the Directive was intended – at least in part – to benefit asylum-seekers navigating the parole process. Id. at 1153. The Court finds, therefore, that the disclaimer language contained within the Directive does not bar the application of the Accardi doctrine. See Abdi, 280 F. Supp. 3d at 389 (holding that agency cannot "avoid application of Accardi by simply disclaiming any binding effect in the [D]irective itself" and that "[t]o find otherwise would render the teachings of Accardi and its progeny meaningless").

c. Merits of Accardi Claim

Having determined that Plaintiffs may invoke the Accardi doctrine, the Court must now assess whether they are likely correct with respect to the substantive claim at the heart of this case – *viz.*, the allegation that ICE is no longer following the Directive. As an initial matter, the Court briefly addresses Plaintiffs' assertion that the current practice at the five Field Offices of "denying parole in virtually all cases" is motivated by deterrence. See Pl. PI Reply at 2. This line of argument may well be true, see Pl. Class Cert. Reply at 6 n.2 (contending that "evidence

of the Trump Administration's deterrence goals continues to accumulate"), but, as Plaintiffs acknowledge, it is not necessary for the Court to delve into the basis for the agency's alleged departure from the Directive. See Pl. PI Reply at 14-15 ("Plaintiffs are entitled to a preliminary injunction, regardless of whether Defendants have been motivated by deterrence."); Tr. at 5:17-19; 26:20-22. Because it need not resolve this issue of impetus, the Court turns instead to the record regarding the current parole regime at the various Field Offices.

It begins with the most compelling evidence in support of Plaintiffs' case: the raw numbers. Although Benjamin Disraeli decried "lies, damn lies, and statistics," the numbers here are irrefutable. According to records obtained by the asylum-seekers, "[D]uring the eight months from February to September 2017," ICE's El Paso, Philadelphia, and Newark Field Offices denied 100% of parole applications. See Pl. Reply at 1. During that same period, the Los Angeles and Detroit Offices denied 92% and 98% of applications, respectively. See Daher Decl., ¶¶ 5-1; Compl., ¶ 38. These figures, Plaintiffs assert, "constitute[] a marked departure from just a few years ago," when ICE was also implementing the Parole Directive and granted parole to more than 90% of asylum-seekers. See id.; Compl., ¶ 39.

The Government's response to these figures is underwhelming at best. Indeed, as counsel conceded at the hearing, in light of the numbers for the first months of the administration, "there are questions" as to whether the five Field Offices are following the Parole Directive. See Tr. at 19:19-25; Tr. at 20:17-25 ("[T]hose statistics certainly look like outliers" from the Parole Directive.); Tr. at 21:7-11 (Government is "trying to get more information" as to whether "these five offices are following the" Directive). Although Defendants now state that they are "trying to get th[e] numbers" for intervening years, see Tr. at 20:7-8, and are "in the process of retrieving more information on the parole data," ECF No. 31-1 (Decl. of David W.

Jennings), ¶ 10, the fact remains that the only statistics submitted in this case are those cited by Plaintiffs. While DHS may believe that such figures overcount the actual parole-denial rate, their speculation is not sufficient to rebut Plaintiffs' assertion that the current release rate at the five ICE Field Offices is approaching zero.

Defendants' assertion that the statistics were "cherry picked" is similarly unavailing. See PI Opp. at 14. The Government attempts to cast doubt on Plaintiffs' figures by arguing that they strategically selected the numbers from only five ICE Offices across the nations. Yet, as Plaintiffs very reasonably note, "[I]t is those five Field Offices, and only those five, whose practices are at issue in this case." PI Reply at 4. It therefore seems to make perfect sense for them to present numbers from those specific locales. Nor can Defendants allege that the asylum-seekers have manipulated the figures from the five Field Offices at issue. The statistics presented by Plaintiffs include every parole request – more than 800 cases – recorded by ICE at those offices during the first eight months of the current administration. See Daher Decl., ¶¶ 5-11. The Court therefore finds that Plaintiffs' analysis adequately supports their claims.

The Court notes, moreover, that the dramatic departure in parole-grant rates from years past has not been explained in any way by Defendants. The Government does not dispute Plaintiffs' assertion that "there has been no significant change in the types of asylum seekers traveling to the United States," Pl. Reply at 1, nor does it indicate any other change in circumstances that would lead to a shift in how the Parole Directive is being applied. See Pl. Reply at 3 (noting that "Defendants do not suggest that asylum seekers detained in 2017 suddenly became more apt to flee or more apt to commit crimes than those detained earlier, and they make no other effort to explain the numbers"). Instead, in February 2017, then-DHS Secretary John Kelly stated that the Parole Directive "remain[s] in full force and effect," and the

Government represented the same to the Supreme Court just last year. See Def. MTD, Exh. B at 9-10 (Kelly Memorandum); Pet. Suppl. Reply. Br., Jennings v. Rodriguez, No. 15-1204, at 6 n.2 (filed Feb. 21, 2017). Declarations submitted by Defendants in this case, moreover, also state that the Parole Directive remains in force. See ECF Nos. 22-3 (Decl. of Diane L. Witte), ¶ 3; 22-4-5 (Declaration of Rebecca Adducci), ¶¶ 3-4. Such representations – and the dearth of data supporting the allegation that Plaintiffs' numbers are off – place the Government in an untenable position. Defendants cannot claim that the ICE Directive remains fully in effect, and yet, at the same time, provide no explanation for the sudden shift in the day-to-day treatment of asylum-seekers under the current administration. Indeed, as the Government stated at argument, "The policy . . . certainly envisions case by case determinations that will result in parole." Tr. at 20:23-24. Defendants concede that such an aim is "clear from reading the Parole Directive." Id. Faced with the current record, the reasonable conclusion is that the five ICE Field Offices are not in fact putting this language into effect on the ground.

In addition to providing the Court with these troubling statistics, Plaintiffs support their claims with a number of declarations from asylum-seekers and their advocates. The record includes affidavits from each of the named Plaintiffs, all of whom assert various violations of the Parole Directive with respect to ICE's adjudication of their release requests. See, e.g., Pl. PI Mot., Exhs. 12 (N.J.J.R. Decl.), ¶ 13; 13 (Callol Decl.), ¶¶ 10, 15; 16 (A.M.M. Suppl. Decl.) at 3, Exh. C. Plaintiffs' evidence also includes the statements of attorneys such as Joan Del Valle, an experienced immigration lawyer, who asserts that she has been told by multiple ICE officials that "there is no more parole." Pl. Exh. 10 (Decl. of Joan Del Valle), ¶ 8; see also Pl. Exh. 4 (Declaration of Jessica Miles), ¶ 6 (stating that as an immigration attorney she has been told by ICE officers that agency is "not granting parole"). Finally, there are also declarations from

various immigration practitioners stating that ICE is now denying parole to individuals who, in years past, would have been granted release under the Parole Directive. See Pl. Mot. at 8 (collecting statements from nine declarations). In sum, Plaintiffs argue that "the evidence demonstrates that similarly situated individuals who routinely were granted parole in prior years are being denied parole under the current regime," and that the Parole Directive is thus no longer being implemented at these five locations. See Pl. Reply at 1.

DHS marshals its own declarations, asserting that the named Plaintiffs were in fact given individualized parole determinations and that the Directive remains in place. Yet, as Plaintiffs aptly note, Defendants' declarations rely on records that have not been submitted to the Court and are written by individuals who largely did not have direct involvement with the specific adjudications. See Pl. Reply at 5-6; Ramirez v. ICE, 2018 WL 1882861, at *14 (D.D.C. Apr. 18, 2018) (refusing to credit declarations from ICE officials when officials were not decisionmakers and instead based assertions on "purported review" of documents). And, even if given full weight by this Court, the statements by various ICE officials do little to rebut the overwhelming evidence presented by Plaintiffs. See Huynh v. Harasz, 2016 WL 2757219, at *18-19 (N.D. Cal. May 12, 2016) (denial of 215 out of 215 applications could support conclusion that agency had blanket policy of denying applications, even in light of evidence suggesting individualized review). Although Defendants have submitted copies of certain letters and forms sent to the named Plaintiffs regarding their parole determinations, these summary and often boilerplate records do little to shine light on whether the Field Offices did, in fact, provide individualized determinations and comply in full with the Directive.

Indeed, in certain cases, Defendants' evidences cuts against DHS's contention that it continues to follow the Parole Directive. In the case of Plaintiff H.A.Y., the Government has

provided a declaration from Diane Witte of the El Paso Field Office, stating that the office denied H.A.Y.'s parole request because she was "a recent entrant and thus presented a flight risk." Witte Decl., ¶ 23. This reasoning is contrary to the very concept of giving each applicant an "individualized determination," as "recent entry" is a categorical characteristic of most, if not all, asylum-seekers. For the El Paso Field Office to conclude that such entry is, itself, sufficient to demonstrate flight risk strongly suggests that it is not conducting the particularized assessments required by the Directive. Certain of Defendants' records similarly undermine their assertion that the processes mandated by the Directive remain in place, as they evince a lack of compliance with its enumerated procedures. See, e.g., ECF No. 22-6 (Declaration of Jennifer Ritchey), Exh. 2-5 (providing records showing that Plaintiffs Castro and Callol received letters advising them of the right to apply for parole only one day prior to receiving nearly identical boilerplate letters informing them of parole denial); compare ECF No. 23 (Decl. of Andre Quinones), ¶ 4 (stating that "parole interviews are not conducted in every case if the interview would be superfluous") with Parole Directive, ¶ 8.2 ("Unless an additional reasonable period of time is necessary . . . no later than seven days following a finding that an arriving alien has a credible fear, a [Detention and Removal Operations] officer . . . must conduct an interview with the alien to assess his or her eligibility for parole") (emphasis added); id., Witte Decl., ¶ 9 (discussing denial of parole for L.H.A. without interview).

In light of the drastic decline in parole-grant rates at the five ICE Field Offices, and the affidavits by the named Plaintiffs and their counsel regarding the processing of their parole applications, this Court finds that the asylum-seekers are able to demonstrate that individualized parole determinations are likely no longer par for the course. The Court therefore finds that Plaintiffs have demonstrated a likelihood of success on the merits of their Accardi claim that

Defendants are not abiding by their own policies and procedures. Having decided this critical issue, the Court moves on to the remaining three preliminary-injunction factors.

2. *Irreparable Harm*

To establish the existence of the second factor, a party must demonstrate that its injury is "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)). The injury must also be "both certain and great; it must be actual and not theoretical." Id. (quoting Wisconsin Gas, 758 F.2d at 674). Finally, the injury must be "beyond remediation." Id.

Plaintiffs have satisfied this inquiry here. As discussed above, the evidence they present suggests that asylum-seekers are being denied parole without the protections of the ICE Directive. The record indicates that, instead, they are subject to a *de facto* "no-parole" reality, under which detention has become the default option. It is evident, moreover, that being deprived of the safeguards of the Parole Directive harms putative class members in myriad ways. See ECF No. 17-23 (Declaration of Allen S. Keller), ¶¶ 11-24 (discussing "harmful effects of immigration detention on the health and well-being of asylum-seekers"); Abdi, 280 F. Supp. 3d at 407-08 (finding irreparable harm when asylum-seekers detained at facility failing to follow Parole Directive). Although Defendants contend that Plaintiffs can seek parole redeterminations, and thus are not subject to irreparable harm, they make no showing that such requests are any more likely to be granted than the initial applications. See Def. Opp. at 24. Given that this Court has already agreed with Plaintiffs' contention that parole requests are being nearly uniformly denied at the five Field Offices, it makes little sense to seek redetermination under the same

regime as a route to meaningful relief. See ECF No. 25-3 (Stambaugh Suppl. Decl.), ¶¶ 6, 10 (redetermination denial consisted solely of "original boilerplate parole denial letter").

The injuries at stake, furthermore, are "beyond remediation." Chaplaincy, 454 F.3d at 297. Members of the proposed class do not seek monetary compensation for their injuries. Instead, they seek injunctive and declaratory relief requiring that Defendants follow their own parole policies. Unlike economic harm, the harm from detention pursuant to an unlawful departure from agency procedure cannot be remediated after the fact. Cf. Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1295 (D.C. Cir. 2009) (economic losses are typically not irreparable because compensation can be awarded after a merits determination).

3. *Balance of Harms and Public Interest*

Under the circumstances of this case, factors three and four do not require in-depth analysis. As courts in this district have recognized, "The public interest is served when administrative agencies comply with their obligations under the APA." N. Mariana Islands v. United States, 686 F. Supp. 2d 7, 21 (D.D.C. 2009). The Parole Directive itself, moreover, states that the detention of asylum-seekers who are neither a flight risk nor dangerous is "not in the public interest" and therefore requires an individualized parole determination as to whether they should be released. See Parole Directive, ¶ 6.2 (emphasis added). In light of the Court's conclusion that DHS's current failure to follow the ICE Directive is likely unlawful, and that the parole practices in place at the five Field Offices cause irreparable harm to those seeking asylum, the Court finds that these last two factors favor Plaintiffs as well.

* * *

To be clear, in finding that injunctive relief is warranted in this case, this Court is simply ordering that Defendants do what they already admit is required – follow the ICE Directive when

adjudicating asylum-seekers' detention. The Directive provides a framework of minimum protections for those claiming refugee status, and, as Defendants acknowledge, it is binding on the Government. To mandate that ICE provide these baseline procedures to those entering our country – individuals who have often fled violence and persecution to seek safety on our shores – is no great judicial leap. Rather, the issuance of injunctive relief in this case serves only to hold Defendants accountable to their own governing policies and to ensure that Plaintiffs receive the protections they are due under the Parole Directive.

IV. Conclusion

For the aforementioned reasons, the Court will grant Plaintiffs' Motions for a Preliminary Injunction and will grant provisional class certification. A separate Order consistent with this Opinion shall issue this day.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: July 2, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANSLY DAMUS, *et al.*,

Plaintiffs,

v.

KIRSTJEN NIELSEN, Secretary of the Department of Homeland Security, *et al.*,

Defendants.

Civil Action No. 18-578 (JEB)

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Plaintiffs' Motion for a Preliminary Injunction is GRANTED;
2. Plaintiffs' Motion for Class Certification, dated March 20, 2018 (ECF No. 11), is GRANTED on a provisional basis for purposes of this preliminary injunction, and Plaintiffs' counsel are appointed as Class Counsel;
3. Defendants are hereby ENJOINED from denying parole to any provisional class members absent an individualized determination, through the parole process, that such provisional class member presents a flight risk or a danger to the community;
4. The individualized determinations of flight risk and danger to the community referenced above shall be based on the specific facts of each provisional class member's case. Such determinations, moreover, shall not be based on categorical criteria applicable to all provisional class members;

5. Defendants shall provide provisional class members with parole determinations that conform to all of the substantive and procedural requirements of U.S. Immigration and Customs Enforcement, Directive No. 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009);
6. Within seven days of this Order, the parties will meet and confer to develop a notice that explains the requirements of this Order and provides class members with contact information for Class Counsel; and
7. The parties shall appear for a status conference to discuss further proceedings in the case on July 10, 2018, at 11:30 a.m. in Courtroom 25.

IT IS SO ORDERED.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: July 2, 2018

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture

DISTRIBUTION:	**ICE**
DIRECTIVE NO.:	**11002.1**
ISSUE DATE:	**December 8, 2009**
EFFECTIVE DATE:	**January 4, 2010**
SUPERSEDES:	**See section 3.**
FEA NUMBER:	**601-05**

1. **PURPOSE.** The purpose of this ICE policy directive is to ensure transparent, consistent, and considered ICE parole determinations for arriving aliens seeking asylum in the United States. This directive provides guidance to Detention and Removal Operations (DRO) Field Office personnel for exercising their discretion to consider the parole of arriving aliens processed under the expedited removal provisions of section 235 of the Immigration and Nationality Act (INA) who have been found to have a "credible fear" of persecution or torture by U.S. Citizenship and Immigration Services (USCIS) or an immigration judge of the Executive Office for Immigration Review. This directive establishes a quality assurance process that includes record-keeping requirements to ensure accountability and compliance with the procedures set forth herein.

1.1. This directive does not apply to aliens in DRO custody under INA § 236. This directive applies only to arriving aliens who have been found by USCIS or an immigration judge to have a credible fear of persecution or torture.

2. **AUTHORITIES/REFERENCES.**

2.1. INA §§ 208, 212(d)(5), 235(b), and 241(b)(3); 8 U.S.C. §§ 1158, 1182(d)(5), 1225(b), and 1231(b)(3); 8 C.F.R. §§ 1.1(q), 208.30(e)-(f), 212.5 and 235.3.

2.2. Department of Homeland Security Delegation Number 7030.2, "Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Custom Enforcement" (Nov. 13, 2004).

2.3. ICE Delegations of Authority to the Directors, Detention and Removal and Investigations and to Field Office Directors, Special Agents in Charge and Certain Other Officers of the Bureau of Immigration and Customs Enforcement, No. 0001 (June 6, 2003).

3. **SUPERSEDED POLICIES AND GUIDANCE.** The following ICE directive is hereby superseded:

3.1. ICE Policy Directive No. 7-1.0, "Parole of Arriving Aliens Found to Have a 'Credible Fear' of Persecution or Torture" (Nov. 6, 2007).

4. **BACKGROUND.**

4.1. Arriving aliens processed under the expedited removal provisions of INA §235(b) may pursue asylum and related forms of protection from removal if they successfully demonstrate to USCIS or an immigration judge a credible fear of persecution or torture.

4.2. Arriving aliens who establish a credible fear of persecution or torture are to be detained for further consideration of the application for asylum. INA § 235(b)(1)(B)(ii). Such aliens, however, may be paroled on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding. 8 C.F.R. § 212.5(b); *see also* 8 C.F.R. § 235.3(c) (providing that aliens referred for INA § 240 removal proceedings, including those who have a credible fear of persecution or torture, may be paroled under § 212.5(b) standards).

4.3. The applicable regulations describe five categories of aliens who may meet the parole standards based on a case-by-case determination, provided they do not present a flight risk or security risk: (1) aliens who have serious medical conditions, where continued detention would not be appropriate; (2) women who have been medically certified as pregnant; (3) certain juveniles; (4) aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; and (5) aliens whose continued detention is not in the public interest. *See* 8 C.F.R. § 212.5(b). *But compare* 8 C.F.R. § 235.3(b)(4)(ii) (stating that arriving aliens who have not been determined to have a credible fear will not be paroled unless parole is necessary in light of a "medical emergency or is necessary for a legitimate law enforcement objective").

4.4. While the first four of these categories are largely self-explanatory, the term "public interest" is open to considerable interpretation. This directive explains how the term is to be interpreted by DRO when it decides whether to parole arriving aliens determined to have a credible fear. The directive also mandates uniform record-keeping and review requirements for such decisions. Parole remains an inherently discretionary determination entrusted to the agency; this directive serves to guide the exercise of that discretion.

5. **DEFINITIONS:**

5.1. **Arriving Alien.** For purposes of this directive, "arriving alien" has the same definition as provided for in 8 C.F.R. § 1.1(q) and 1001.1(q).

5.2. **Credible Fear.** For purposes of this directive, with respect to an alien processed under the INA § 235(b) "expedited removal" provisions, "credible fear" means a finding by USCIS or an immigration judge that, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts

as are known to the interviewing USCIS officer or immigration judge, there is a significant possibility that alien could establish eligibility for asylum under INA § 208, withholding of removal under INA § 241(b)(3), or protection from removal under the Convention Against Torture.

5.3. **Parole.** For purposes of this directive, "parole" is an administrative measure used by ICE to temporarily authorize the release from immigration detention of an inadmissible arriving alien found to have a credible fear of persecution or torture, without lawfully admitting the alien. Parole does not constitute a lawful admission or a determination of admissibility, *see* INA §§ 212(d)(5)(A), 101(a)(13)(B), and reasonable conditions may be imposed on the parole, *see* 8 C.F.R. § 212.5(d). By statute, parole may be used, in the discretion of ICE and under such conditions as ICE may prescribe, only for urgent humanitarian reasons or for significant public benefit. As interpreted by regulation, "urgent humanitarian reasons" and "significant public benefit" include the five categories set forth in 8 C.F.R. § 212.5(b) and listed in paragraph 4.3 of this directive, including the general category of "aliens whose continued detention is not in the public interest."

6. POLICY.

6.1. As soon as practicable following a credible fear determination by USCIS for an arriving alien detained by DRO, DRO shall provide the alien with the attached *Parole Advisal and Scheduling Notification*. This form informs the alien that he or she will be interviewed for potential parole from DRO custody and notifies the alien of the date of the scheduled interview and the deadline for submitting any documentary material supporting his or her eligibility for parole. The contents of the notification shall be explained to such aliens in a language they understand. In determining whether detained arriving aliens found to have a credible fear should be paroled from custody, DRO shall proceed in accordance with the terms of this directive.

6.2. 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. However, when an arriving alien found to have a credible fear establishes to the satisfaction of DRO his or her identity and that he or she presents neither a flight risk nor danger to the community, DRO should, absent additional factors (as described in paragraph 8.3 of this directive), parole the alien on the basis that his or her continued detention is not in the public interest. DRO Field Offices shall uniformly document their parole decision-making processes using the attached *Record of Determination/Parole Determination Worksheet*.

6.3. Consistent with the terms of this directive, DRO shall maintain national and local statistics on parole determinations and have a quality assurance process in place to monitor parole decision-making, as provided for in sections 7 and 8 of this directive.

6.4. In conducting parole determinations for arriving aliens in custody after they are found to have a credible fear of persecution or torture, DRO shall follow the procedures set forth in section 8 of this directive.

6.5. DRO shall provide every alien subject to this directive with written notification of the parole decision, including a brief explanation of the reasons for any decision to deny parole. When DRO denies parole under this directive, it should also advise the alien that he or she may request redetermination of this decision based upon changed circumstances or additional evidence relevant to the alien's identity, security risk, or risk of absconding. DRO shall ensure reasonable access to translation or interpreter services if notification is provided to the alien in a language other than his or her native language and the alien cannot communicate effectively in that language.

6.6. Written notifications of parole decisions shall be provided to aliens subject to this directive and, if represented, their representative within seven days of the date an alien is initially interviewed for parole or the date the alien requests a parole redetermination, absent reasonable justification for delay in providing such notification.

6.7. A decision to grant or deny parole shall be prepared by a DRO officer assigned such duties within his or her respective DRO Field Office. The decision shall pass through at least one level of supervisory review, and concurrence must be finally approved by the Field Office Director (FOD), Deputy FOD (DFOD), or Assistant FOD (AFOD), where authorized by the FOD.

7. RESPONSIBILITIES.

7.1. The **DRO Director** is responsible for the overall management of the parole decision-making process for arriving aliens in DRO custody following determinations that they have a credible fear of persecution or torture.

7.2. The **DRO Assistant Director for Operations** is responsible for:

1) Ensuring considered, consistent DRO parole decision-making and recordkeeping nationwide in cases of arriving aliens found to have a credible fear;

2) Overseeing monthly tracking of parole statistics by all DRO Field Offices for such cases; and

3) Overseeing an effective national quality assurance program that monitors the Field Offices to ensure compliance with this directive.

7.3. **DRO Field Office Directors** are responsible for:

1) Implementing this policy and quality assurance processes;

2) Maintaining a log of parole adjudications for credible fear cases within their respective geographic areas of responsibility, including copies of the *Record of Determination/Parole Determination Worksheet*;

3) Providing monthly statistical reports on parole decisions for arriving aliens found to have a credible fear;

4) Making the final decision to grant or deny parole for arriving aliens found to have a credible fear within their respective areas of responsibility or, alternatively, delegating such responsibility to their DFODs or AFODs (in which case, FODs nevertheless retain overall responsibility for their office's compliance with this directive regardless of delegating signatory responsibility to DFODs or AFODs); and

5) Ensuring that DRO field personnel within their respective areas of responsibility who will be assigned to make parole determinations are familiar with this directive and corresponding legal authorities.

7.4. **DRO Deputy Field Office Directors** are responsible for reviewing, and forwarding for their respective FODs' approval, parole decisions prepared by their subordinates in the cases of arriving aliens found to have a credible fear of persecution or torture. Alternatively, DFODs delegated responsibility under paragraph 7.3 of this directive are responsible for discharging final decision-making authority over parole determinations in such cases within their respective areas of responsibility.

7.5. **Assistant Field Office Directors** are responsible for reviewing, and forwarding for their respective DFODs' or FODs' approval, parole decisions prepared by their subordinates in the cases of arriving aliens found to have a credible fear of persecution or torture. Alternatively, AFODs delegated responsibility under paragraph 7.3 of this directive are responsible for discharging final decision-making authority over parole determinations in such cases within their respective areas of responsibility.

7.6. As applicable, **DRO field personnel** so assigned by their local chains-of-command are responsible for providing detained arriving aliens found to have a credible fear with the attached *Parole Advisal and Scheduling Notification* and for fully and accurately completing the attached *Record of Determination/Parole Determination Worksheet* in accordance with this directive and corresponding legal authorities.

8. PROCEDURES.

8.1. As soon as practicable following a finding that an arriving alien has a credible fear, the DRO Field Office with custody of the alien shall provide the attached *Parole Advisal and Scheduling Notification* to the alien and explain the contents of the notification to the alien in a language he or she understands, through an interpreter if

necessary. The Field Office will complete the relevant portions of the notification, indicating the time when the alien will receive an initial interview on his or her eligibility for parole and the date by which any documentary evidence the alien wishes considered should be provided, as well as instructions for how any such information should be provided.

8.2 Unless an additional reasonable period of time is necessary (e.g., due to operational exigencies or an alien's illness or request for additional time to obtain documentation), no later than seven days following a finding that an arriving alien has a credible fear, a DRO officer familiar with the requirements of this directive and corresponding legal authorities must conduct an interview with the alien to assess his or her eligibility for parole. Within that same period, the officer must complete the *Record of Determination/Parole Determination Worksheet* and submit it for supervisory review. If the officer concludes that parole should be denied, the officer should draft a letter to this effect for the FOD's, DFOD's, or AFOD's signature to be provided to the alien or the alien's representative and forward this letter for supervisory review along with the completed *Record of Determination/Parole Determination Worksheet*. The letter must include a brief explanation of the reasons for denying parole and notify the alien that he or she may request redetermination of parole based upon changed circumstances or additional evidence relevant to the alien's identity, security risk, or risk of absconding.

8.3. An alien should be paroled under this directive if DRO determines, in accordance with paragraphs (1) through (4) below, that the alien's identity is sufficiently established, the alien poses neither a flight risk nor a danger to the community, and no additional factors weigh against release of the alien.

1) Identity.

a) Although many individuals who arrive in the United States fleeing persecution or torture may understandably lack valid identity documentation, asylum-related fraud is of genuine concern to ICE, and DRO must be satisfied that an alien is who he or she claims to be before releasing the alien from custody.

b) When considering parole requests by an arriving alien found to have a credible fear, Field Office personnel must review all relevant documentation offered by the alien, as well as any other information available about the alien, to determine whether the alien can reasonably establish his or her identity.

c) If an alien lacks valid government-issued documents that support his or her assertion of identity, Field Office personnel should ask whether the alien can obtain government-issued documentation of identity.

d) If the alien cannot reasonably provide valid government-issued evidence of identity (including because the alien reasonably does not wish to alert that government to his or her whereabouts), the alien can provide for consideration sworn affidavits from third parties. However, third-party affiants must include copies of valid, government issued photo-identification documents and fully establish their own identities and addresses.

e) If government-issued documentation of identity or third-party affidavits from reliable affiants are either not available or insufficient to establish the alien's identity on their own, Field Office personnel should explore whether the alien is otherwise able to establish his or her identity through credible statements such that there are no substantial reasons to doubt the alien's identity.

2) Flight Risk.

a) In order to be considered for release, an alien determined to have a credible fear of persecution or torture must present sufficient evidence demonstrating his or her likelihood of appearing when required.

b) Factors appropriate for consideration in determining whether an alien has made the required showing include, but are not limited to, community and family ties, employment history, manner of entry and length of residence in the United States, stability of residence in the United States, record of appearance for prior court hearings and compliance with past reporting requirements, prior immigration and criminal history, ability to post bond, property ownership, and possible relief or protection from removal available to the alien.

c) Field Office personnel shall consider whether setting a reasonable bond and/or entering the alien in an alternative-to-detention program would provide reasonable assurances that the alien will appear at all hearings and depart from the United States when required to do so.

d) Officers should exercise their discretion to determine what reasonable assurances, individually or in combination, are warranted on a case-by-case basis to mitigate flight risk. In any event, the alien must be able to provide an address where he or she will be residing and must timely advise DRO of any change of address.

3) Danger to the Community.

a) In order for an alien to be considered for parole, Field Office personnel must make a determination whether an alien found to have a credible fear poses a danger to the community or to U.S. national security.

b) Information germane to the determination includes, but is not limited to, evidence of past criminal activity in the United States or abroad, of activity contrary to U.S. national security interests, of other activity giving rise to concerns of public safety or danger to the community (including due to serious mental illness), disciplinary infractions or incident reports, and any criminal or detention history that shows that the alien has harmed or would likely harm himself or herself or others.

c) Any evidence of rehabilitation also should be weighed.

4) Additional Factors.

a) Because parole remains an inherently discretionary decision, in some cases there may be exceptional, overriding factors that should be considered in addition to the three factors discussed above. Such factors may include, but are not limited to, serious adverse foreign policy consequences that may result if the alien is released or overriding law enforcement interests.

b) Field Office personnel may consider such additional factors during the parole decision-making process.

8.4. Assigned DRO officers should, where appropriate, request that parole applicants provide any supplementary information that would aid the officers in reaching a decision. The *Record of Determination/Parole Determination Worksheet* should be annotated to document the request for supplementary information and any response from the detainee.

8.5. After preparing and signing the *Record of Determination/Parole Determination Worksheet*, and in the case of a denial of parole, drafting a written response to the alien, the assigned DRO officer shall forward these materials and the parole request documentation to his or her first-line supervisor for review and concurrence.

8.6. Upon his or her concurrence, the first-line supervisor shall sign the *Record of Determination/Parole Determination Worksheet* where indicated and forward it, along with any related documentation, to the FOD (or, where applicable, the DFOD or AFOD) for final approval.

8.7. The FOD (or, where applicable, the DFOD or AFOD) shall review the parole documentation, consult with the preparing officer and supervisor as necessary, and

either grant or deny parole by signing the *Record of Determination/Parole Determination Worksheet* where indicated and, in the case of a denial, signing the written response to the alien.

8.8. Following a final decision by the FOD to deny parole (or, where applicable, the DFOD or AFOD), the Field Office shall provide the written response to the alien or, if represented, to the alien's legal representative, indicating that parole was denied. If parole is granted, the Field Office shall provide the alien with a date-stamped I-94 Form bearing the following notation: **"Paroled under 8 C.F.R. § 212.5(b). Employment authorization not to be provided on this basis."**

8.9. If an alien makes a written request for redetermination of an earlier decision denying parole, the Field Office may, in its discretion, reinterview the alien or consider the request based solely on documentary material already provided or otherwise of record.

8.10. The supporting documents and a copy of the parole decision sent to the alien (if applicable), the completed *Record of Determination/Parole Determination Worksheet*, and any other documents related to the parole adjudication should be placed in the alien's A-file in a record of proceeding format. In addition, a copy of the *Record of Determination/Parole Determination Worksheet* shall be stored and maintained under the authority of the FOD for use in preparing monthly reports.

8.11. On a monthly basis, FODs shall submit reports to the Assistant Director for Operations, or his or her designee, detailing the number of parole adjudications conducted under this directive within their respective areas of responsibility, the results of those adjudications, and the underlying basis of each Field Office decision whether to grant or deny parole. The Assistant Director for Operations, or his or her designee, in conjunction with appropriate DRO Headquarters components, will analyze this reporting and collect individual case information to review in more detail, as warranted. In particular, this analysis will rely on random sampling of all reported cases for in-depth review and will include particular emphasis on cases where parole was not granted because of the presence of additional factors, per paragraph 8.3(4) of this directive. Any significant or recurring deficiencies identified during this monthly analysis should be explained to the affected Field Office, which will take appropriate corrective action.

8.12. At least once every six months, the Assistant Director for Operations, or his or her designee, shall prepare a thorough and objective quality assurance report, examining the rate at which paroled aliens abscond and the Field Offices' parole decision-making, including any noteworthy trends or corrective measures undertaken based upon the monthly quality assurance analysis required by paragraph 8.11 of this directive.

9. **ATTACHMENTS.**

- *Parole Advisal and Scheduling Notification.*
- *Record of Determination/Parole Determination Worksheet.*

10. **NO PRIVATE RIGHTS CREATED.** This directive is an internal policy statement of ICE. It 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, its departments, agencies, or other entities, its officers or employees, or any other person.

Approved: 

John Morton
Assistant Secretary
U.S. Immigration and Customs Enforcement

[redacted] Suite [redacted]
Phone: [redacted]
Fax: [redacted]
www.[redacted].COM

February 26, 2018

Jennifer Ritchey, Acting Field Office Director
US Department of Homeland Security
Immigration and Customs Enforcement and
Removal Operations
114 North 8th Street
Philadelphia, PA 19107

Deportation Officer Foster
US Department of Homeland Security
Immigration and Customs Enforcement
and Removal Operations
YCP
3400 Concord Rd
York, PA 17402

Re: Request for Release for [redacted] A# [redacted]

Dear Director Ritchey and Officer Foster:

This is a request for the release of [redacted], who has been detained by the United States Department of Homeland Security (DHS) since [redacted]. He is classified as an arriving alien and is being held at the York County Prison. His next master hearing is scheduled for [redacted]. By the time he gets an individual hearing, he will be detained for six months or more.

I. FACTS

A. IMMIGRATION HISTORY & CLAIM FOR PROTECTION

Mr. [redacted] is a [redacted]-year-old from Cuba who presented himself at the United States border on or around [redacted] to request asylum. After expressing fear of returning, he was transferred to York where he passed a credible fear interview. His case is pending with the York court.

Mr. [redacted] left Cuba after being threatened several times by the Cuban government accusing him of unlawful exit from the country and opposing the Cuban government. He was told that he would be imprisoned. Mr. [redacted] has been very vocal against the Cuban government and his disagreement with the communist government. As such, he fears reprisal from the Cuban government, imprisonment and torture upon his return.

B. RESPONDENT HAS COMMUNITY TIES

Mr. [redacted] has his mother [redacted], step-father [redacted] and his sister [redacted] living in the United States. His mother and step-father are willing to allow him to live with them at their residence at [redacted]. Not only are they willing to provide housing, but they have indicated a willingness to support him and ensure that he appears at all future hearings and complies with any order set by the court. Mr. [redacted] parents have provided identification documents, proof of employment, and documents demonstrating a fixed address. In addition, there is a medical report for Respondent's mother showing that she is currently having medical issues.

C. RESPONDENT IS NOT A DANGER

Mr. [redacted] does not have a criminal history. Given the circumstances surrounding his persecution and torture in Cuba, Mr. [redacted] felt that he had no choice but to flee and seek assistance in the U.S. Upon arriving at the U.S. border, he immediately sought asylum and has since applied for asylum with the Immigration Court.

Mr. [redacted] runs a high risk of suffering psychological affects of detention, especially given his past threats by his government. Being placed into immigration custody and detained in a criminal facility can be a fearful process. Numerous medical studies have concluded that detention of asylum seekers exacerbates psychological symptoms. *See e.g.*, Bellevue/New York University Program for Survivors of Torture, *Mental Health of Detained Asylum Seekers,* LANCET 362:1721-3 (Nov. 22, 2003); Katy Robjant, Rita Hassan & Cornelius Katona, *Mental Health Implications of Detaining Asylum Seekers: Systemic Review;* THE BRITISH JOURNAL OF PSYCHIATRY (2009) 194, 306-302.

II. LAW

On February 20, 2017, DHS Secretary John Kelly released a Directive on Implementing the President's Border Security and Immigration Enforcement Improvements Policies. In this directive, Secretary Kelly indicated that pending further review and evaluation, the 2009 Directive still remains in affect. Specifically, Secretary Kelly indicates:

> "Notwithstanding any other provision of this memorandum, pending my further review and evaluation of the impact of operational changes to implement the Executive Order, and additional guidance on the issue by the Director of ICE, the ICE policy directive establishing standards and procedures for the parole of certain arriving aliens found to have a credible fear of persecution or torture shall remain in full force and effect. *ICE Policy No. 11002.1 : Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009).* **The ICE policy directive shall be implemented in a manner consistent with its plain language. In every case, the burden to establish that his or her release would neither pose a danger to the community, nor a risk of flight remains on the individual alien, and ICE retains ultimate discretion whether it grants parole in a particular case."**

Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or

Torture, guides adjudication of this request for release. According to the Directive, DRO officers considering "arriving alien[s]" for parole should assess whether continued detention is in the public interest and humanitarian concerns, such as whether the "arriving alien" is a juvenile or suffers from serious medical conditions. Jon Morton, Assistant Secretary ICE, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, Directive No. 11002.1 § 4.3, 5.3 (Jan. 4, 2010); see also, 8 C.F.R. § 212.S(b).

"When an arriving alien found to have a credible fear establishes to the satisfaction of DRO his or her identity and that he or she presents neither a flight risk nor danger to the community, DRO should, absent additional factors [such as foreign policy concerns] ... parole the alien on the basis that his or her continued detention is not in the public interest." Directive 11002.1 § 6.2.

Under the Directive, which clarifies adjudication of asylum seekers' requests for parole, factors indicating flight risk (or lack thereof) and dangerousness (or lack thereof) should be considered. Directive 11002.1 §§ 8.3(2)(b), (3)(b). Such factors indicating degree of flight risk include: community and family ties, stability of residence in the United States, prior immigration and criminal history, the number of disciplinary infractions while detained, ability to post bond and possible relief or protection from removal. Directive 11002.1 § 8.3(2)(b). Factors indicating degree of dangerousness include: evidence of past criminal activity or other activity giving rise to public safety concerns, disciplinary infractions and criminal history. Directive 11002.1 § 8.3(3)(b).

Mr. [redacted] release does not pose a danger to the community nor a risk of flight. Specifically, he has no criminal history; this is his first arrival to the U.S; he applied for admission to the U.S. instead of sneaking in; and he has a lawful permanent resident mother and step-father with a fixed address and means to support Mr. [redacted]. Even more, Mr. [redacted] came to the U.S. to seek asylum and has applied for asylum with the immigration court. As such, he has every inclination and benefit to continue his case. Perhaps most importantly, he will have been detained for 6 months at the time of his scheduled merits hearings. Significant detention, especially for those who have been previously persecuted and tortured, calls for significant humanitarian discretion for release.

III. CONCLUSION

Mr. [redacted] is not a flight risk or a danger to the community. The country conditions evidence provided shows that there is a "reasonable possibility" that he will suffer persecution or torture in Cuba. This, in conjunction with his age, the willingness of his family to house him in [redacted], the support promised by his family, the length of his detention, as well as the negative psychological impact that prolonged detention may have on him, leads to the conclusion that DHS should release Mr. [redacted]. As an arriving alien, he should be afforded the opportunity to be released so that he can gather the evidence needed to effectively present his case.

While parole pursuant to INA§ 212(d)(5) would be most appropriate, Mr. [redacted] family is happy to comply with an order of supervision setting reporting requirements and other reasonable terms of release and/or paying a bond for his release.
Should you have any questions or need additional information, feel free to contact me.

Sincerely,

[redacted], Esq.

EXHIBITS

A. Documents from Respondent's Family

- Letter of Support from [redacted], Respondent's Step-father
- Letter of Support from [redacted], Respondent's mother
  - i. ID of mother and step-father
  - ii. ID (LPR card) of [redacted], Respondent's sister
- Tax records
- Bank of America statement showing address
- Medical Report for Respondent's mother

B. Country Conditions Evidence on Cuba

1. **Country Reports on Human Rights Practices for 2016,**
   https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper
   - Arbitrary arrests and short-term detentions continued to be a common government method for controlling independent public expression and political activity. By law police have wide discretion to stop and question citizens, request identification, and carry out arrests and searches. Police used laws against public disorder, contempt, lack of respect, aggression, and failing to pay minimal or arbitrary fines as ways to detain civil society activists. Police officials routinely conducted short-term detentions, at times assaulting detainees. The law provides that police officials furnish suspects a signed "act of detention," noting the basis, date, and location of any detention in a police facility and a registry of personal items seized during a police search, but this law was not always followed. Arbitrary stops and searches were most common in urban areas and at government-controlled checkpoints at the entrances to provinces and municipalities.
   - The law allows a maximum four-year preventive detention of individuals not charged with an actual crime, with a subjective determination of "potential dangerousness," defined as the "special proclivity of a person to commit crimes, demonstrated by conduct in manifest contradiction of socialist norms." Mostly used as a tool to control "antisocial" behaviors, such as substance abuse or prostitution, authorities also used such detention to silence peaceful political opponents. On March 14, authorities charged UNPACU activist Luis Bello Gonzalez with pre-criminal social dangerousness and sentenced him to three years in prison. UNPACU leaders alleged authorities arrested and charged Gonzalez because of his regular participation in protests alongside other UNPACU members.
   - The Ministry of Interior exercises control over police, internal security forces, and the prison system. The ministry's National Revolutionary Police is the primary law enforcement organization. Specialized units of the ministry's state security branch are responsible for monitoring, infiltrating, and suppressing independent political activity. The police supported state

security agents by carrying out house searches, arresting persons of interest to the ministry, and providing interrogation facilities.

- Under criminal procedures, police have 24 hours after an arrest to present a criminal complaint to an investigative police official. The investigative police have 72 hours to investigate and prepare a report for the prosecutor, who in turn has 72 hours to recommend to the appropriate court whether to open a criminal investigation.
- Within the 168-hour detention period, detainees must be informed of the basis for the arrest and criminal investigation and have access to legal representation. Those charged may be released on bail, placed in home detention, or held in continued investigative detention. Once the accused has an attorney, the defense has five days to respond to the prosecution's charges, after which a court date usually is set. Prosecutors may demand summary trials "in extraordinary circumstances" and in cases involving crimes against state security.
- There were reports that defendants met with their attorneys for the first time only minutes before their trials and were not informed of the basis for their arrest within the required 168-hour period.
- Reports suggested bail was available, although typically not granted to those arrested for political activities. Time in detention before trial counted toward time served, if convicted.
- Detainees may be interrogated at any time during detention and have no right to request the presence of counsel during interrogation. Detainees have the right to remain silent, but officials do not have a legal obligation to inform them of that right.
- Freedom of Speech and Expression: The government had little tolerance for public criticism of government officials or programs and limited public debate of issues considered politically sensitive. State security regularly harassed the organizers of independent fora for debates on cultural and social topics to force them to stop discussing issues deemed controversial. Forum organizers reported assaults by state security, video surveillance installed outside of venues, and detention of panelists and guests on the days they were expected to appear.
- Several government workers reported being fired for expressing dissenting opinions or affiliating with independent organizations. For example, in August local radio station journalist Jose Ramirez Pandoja was fired for publishing a controversial speech by the deputy director of the CP's official newspaper, *Granma,* on his personal blog. The speech cited young journalists leaving traditional media outlets due to censorship policies and low salaries.
- Several university professors and researchers reported they were forced from their positions or demoted for expressing ideas or opinions outside of government-accepted norms.

2. **Amnesty International Cuba 2017/2018,**
https://www.amnesty.org/en/countries/americas/cuba/report-cuba/

- Arbitrary detentions, discriminatory dismissals from state jobs, and harassment in self-employment continued to be used to silence criticism. Advances in education were undermined by ongoing online and offline censorship. Cuba remained mostly closed to independent human rights monitors
- Human rights and political activists continued to be harassed, intimidated and arbitrarily detained in high numbers. The Cuban Commission for Human Rights and National Reconciliation, a Cuban NGO not officially recognized by the state, recorded 5,155 arbitrary detentions in 2017, compared to 9,940 in 2016.
- The Ladies in White, a group of female relatives of prisoners detained on politically motivated grounds, remained one of the primary targets of repression by the authorities. During detention, the women were often beaten by law enforcement officials and state security agents dressed as civilians.
- In January, Danilo Maldonado Machado, known as El Sexto, was released from a maximum-security prison. He had been arrested in November 2016, hours after the announcement of Fidel Castro's death, for having written Se fue ("He's gone") on a wall in the capital, Havana.
- In August, Yulier Perez, a graffiti artist known for painting dilapidated walls in Havana, was arbitrarily detained after months of intimidation and harassment from the authorities for freely expressing himself through his art.
- The leader of the pro-democracy Christian Liberation Movement, Dr Eduardo Cardet Concepción, remained in prison having been handed a three-year sentence in March for publicly criticizing Fidel Castro.
- A family of four human rights defenders were detained in Holguín, southeast Cuba, for allegedly leaving their house during the period of state mourning for Fidel Castro in 2016. The three siblings were given one-year prison sentences for "defamation of institutions, organizations and heroes and martyrs of the Republic of Cuba" and "public disorder" Their mother was sentenced to house arrest. On 2 April, after a prolonged hunger strike, the three siblings were freed under conditional release, but they continued to be intimidated by the authorities.
- Jorge Cervantes, a member of the political opposition group Patriotic Union of Cuba (UNPACU), was detained for approximately three months between May and August. Weeks before, UNPACU had published on its YouTube channel a video called "Horrors in jail" in which Jorge Cervantes interviewed a man who had allegedly been ill-treated in a Cuban prison, and a series of videos which alleged corruption by public officials.
- The authorities continued to present trumped-up charges for common crimes as a way to harass and detain political opponents, meaning there were likely many more prisoners of conscience than documented.

3. **Freedom in the World, 2015, Freedom House,** https://freedomhouse.org/report/freedom-world/2015/cuba

- All political organizing outside the PCC is illegal. Political dissent, whether spoken or written, is a punishable offense, and dissidents are systematically harassed, detained, physically assaulted, and frequently sentenced to years of imprisonment for seemingly minor infractions. The regime has called on its neighborhood-watch groups, known as Committees for the Defense of the Revolution, to strengthen vigilance against "antisocial behavior," a euphemism for opposition activity. This has led to the use of "acts of repudiation," or supposedly spontaneous mob attacks, to intimidate and silence political dissidents. In recent years, dissident leaders have reported an increase in intimidation and harassment by state-sponsored groups as well as short-term detentions by state security forces. According to the Cuban Commission for Human Rights and National Reconciliation (CCDHRN), a record number of politically motivated short-term detentions were recorded in 2014, with figures totaling 8,899 as opposed to the 6,424 cases documented in 2013.

4. **Human Rights Watch, World report: Cuba 2018,**
https://www.hrw.org/world-report/2018/country-chapters/cuba
   - The Cuban government continues to repress and punish dissent and public criticism. The number of short-term arbitrary arrests of human rights defenders, independent journalists, and others was significantly less than in 2016, but still remained high, with more than 3,700 reports of arbitrary detentions between January and August 2017. The government continues to use other repressive tactics, including beatings, public shaming, travel restrictions, and termination of employment.

   Arbitrary Detention and Short-Term Imprisonment
   - The Cuban government continues to employ arbitrary detention to harass and intimidate critics, independent activists, political opponents, and others. The number of arbitrary short-term detentions increased dramatically between 2010 and 2016, from a monthly average of 172 incidents to 827, according to the Cuban Commission for Human Rights and National Reconciliation, an independent human rights group that lacks official authorization and the government considers to be illegal.
   - The number of detentions dropped significantly in 2017, with 4,537 reports of arbitrary detentions from January through October, a decrease of 50 percent compared to the same period in 2016.
   - Security officers rarely present arrest orders to justify detaining critics. In some cases, detainees are released after receiving official warnings, which prosecutors can use in subsequent criminal trials to show a pattern of "delinquent" behavior.

   Freedom of Expression
   - The government controls virtually all media outlets in Cuba and restricts access to outside information. A small number of journalists and bloggers who are independent of government media manage to write articles for websites or blogs or publish tweets. The government routinely blocks access within Cuba to these websites and only a fraction of Cubans can read

independent websites and blogs because of the high cost of, and limited access to, the internet. In September 2017, Cuba announced it would gradually extend the home internet service to all the provinces in the country.

Political Prisoners

- The Cuban Commission for Human Rights and National Reconciliation reported scores of political prisoners—including 54 members of the group Cuban Patriotic Union (Unión Patriótica de Cuba)—as of May 2017. The government denies access to its prisons by independent human rights groups, which believe that additional political prisoners, whose cases they cannot document, remain locked up. Cubans who criticize the government continue to face the threat of criminal prosecution.
- They do not benefit from due process guarantees, such as the right to fair and public hearings by a competent and impartial tribunal. In practice, courts are subordinated to the executive and legislative branches, denying meaningful judicial independence

Travel Restrictions

- Reforms to travel regulations that went into effect in January 2013 eliminated the need for an exit visa to leave the island. Exit visas had previously been used to deny people critical of the government, and their families, the right to travel. Since then, many people who had previously been denied permission to travel have been able to do so, including human rights defenders and independent bloggers.
- Nonetheless, the reforms gave the government broad discretionary powers to restrict the right to travel on the grounds of "defense and national security" or "other reasons of public interest." Such measures have allowed authorities to deny exit to people who express dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

XXX,	)	
	)	
Plaintiff,	)	Case No. _____
	)	
v.	)	
	)	
DEPARTMENT OF HOMELAND SECURITY (DHS); KIRSTJEN NIELSEN, Secretary, Department of Homeland Security; U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS); L. FRANCIS CISSNA, Director, USCIS; DONALD NEUFELD, Associate Director of Service Center Operations; DALE J. SCHMIDT, Dodge County Sheriff,	)	
	)	
Defendants-Respondents.	)	
	)	

PETITION FOR A WRIT OF HABEAS CORPUS AND COMPLAINT FOR MANDAMUS AND ADMINISTRATIVE PROCEDURE ACT AND MANDAMUS RELIEF

INTRODUCTION

1. Petitioner XXX petitions this Court to issue a Writ of Habeas Corpus, ordering Defendants-Respondents to show cause within three days, providing reasons, if any, as to why Mr. XXX's detention is lawful. 28 U.S.C. § 2243. Because his detention has been unconstitutionally prolonged, Mr. XXX urges the Court to grant his petition and order Respondent to release him from detention. 28 U.S.C. § 2241.

2. Mr. XXX also files this complaint under the Administrative Procedure Act and the federal mandamus statute to compel the government to adjudicate his visa petition, which Defendant U.S. Citizenship and Immigration Services (USCIS) has unreasonably delayed.

3. Defendant Department of Homeland Security (DHS), through its agency Immigration and Customs Enforcement (ICE) has detained Mr. XXX at the Dodge County Jail for nearly nine months, even though no neutral decision-maker—whether a federal judge or an immigration judge—has conducted a hearing to determine whether this lengthy incarceration is warranted based on danger or flight risk.

4. In April 2017, an immigration judge entered a removal order against Mr. XXX, which is currently on appeal. At the same time, Mr. XXX has an avenue to stay in the United States through a "U" visa, which he applied for in December 2017. Receiving a U visa would preclude Mr. XXX's removal.

5. Due to bureaucratic delays, there is little likelihood that Defendant USCIS will adjudicate his application before ICE executes Mr. XXX's removal order and removes him from the United States. Due to changes in immigration enforcement priorities, ICE no longer pauses removal efforts while bona fide visa applications are pending with USCIS, frustrating the purpose of the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), which Congress enacted to protect immigrant victims of crime who come forward. *See* Pub. L. No. 106–386, 114 Stat. 1464 (2000).

6. A U visa is intended to provide a path to lawful status for immigrant victims of crime who cooperate with law enforcement in the investigation or prosecution of such crimes. 8 U.S.C. § 1101(a)(15)(U). Mr. XXX cooperated with the investigation and prosecution of a family member who abused his six-year-old daughter. The Madison Police Department submitted a certification form, attesting to his cooperation. Thus, he is statutorily eligible to apply for a U visa.

7. USCIS's failure to adjudicate Mr. XXX's U visa application within a reasonable amount of time violates the Administrative Procedure Act, in that it is unreasonably delayed, considering that Ms. XXX is in immigration detention and is facing removal. *See* 5 U.S.C. § 706(1).

8. Further, Mr. XXX's prolonged detention without a hearing on whether he constitutes a danger or a flight risk violates the Due Process Clause of the Fifth Amendment.

9. Accordingly, Mr. XXX asks the Court to order USCIS to either (a) make a *prima facie* determination that he is eligible for a U visa such that he can get a stay of removal from ICE; or (b) adjudicate his U visa application so that he can stay in the United States.

10. Mr. XXX also asks the Court to issue a writ of habeas corpus by determining that his detention is not justified because the government has not established by clear and convincing evidence that he presents a risk of flight or danger in light of available alternatives to detention, and order his release. In the alternative, Mr. XXX asks the Court to issue a writ of habeas corpus and order his release within 20 days unless Defendants schedule a bond hearing before an immigration judge.

JURISDICTION AND VENUE

11. This Court has jurisdiction pursuant to 28 U.S.C. § 2241, the general grant of habeas authority to the District Courts; 28 U.S.C. § 1651 (All Writs Act); 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 2201–02 (declaratory relief); 5 U.S.C. § 702 (Administrative Procedure Act); and 28 U.S.C. § 1361 (federal mandamus statute).

12. The Court has the authority to issue a declaratory judgement under the Declaratory Judgement Act, 28 U.S.C. §§ 2201-02 and Rule 47 of the Federal Rules of Civil Procedure.

13. Venue properly lies within the Eastern District of Wisconsin because ICE is detaining Mr. XXX at Dodge County Jail in Juneau, Wisconsin, within this judicial district. 28 U.S.C. § 1391(b); *see also* 28 U.S.C. § 2241(d); *Kholyavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006).

PARTIES

14. Mr. XXX is a Mexican national who has lived in the United States since 2000.

15. Defendant DHS is a department of the Executive Branch of the United States government, located in Washington, DC, and is responsible for enforcing federal laws governing border control, customs, trade and immigration to promote homeland security and public safety.

16. Defendant Kirstjen Nielsen is sued in her official capacity as the Secretary of the Department of Homeland Security. In this capacity, she directs each of the component agencies within DHS, including ICE. As a result, in her official capacity, Secretary Nielsen is responsible for the administration and enforcement of the immigration laws.

17. Defendant USCIS, also a component of DHS, is the agency charged with, among other things, adjudicating applications for U visas.

18. Defendant L. Francis Cissna is sued in his official capacity as the Director of USCIS, the Agency charged with adjudicating Plaintiff's U visa application.

19. Defendant Donald Neufeld is sued in his official capacity as the Associate Director of Service Center Operations. The Vermont Service Center, which Mr. Neufeld oversees, is charged with adjudicating all U visa applications.

20. Defendant Dale J. Schmidt is sued in his official capacity as the sheriff of Dodge County. ICE contracts with Dodge County to detain immigrants. Defendant Schmidt is Mr. XXX's immediate custodian.

STATEMENT OF FACTS

A. Mr. XXX's Background and Immigration History

21. Mr. XXX came to the United States in 2000. He and his partner of 16 years have two U.S. citizen children, ages 8 and 9.

22. Mr. XXX is a committed member of his community in Madison, Wisconsin, and is very involved in his daughters' lives, encouraging them in school and extracurricular activities.

23. Mr. XXX has worked many jobs to support his family while also completing his high school education. For the past few years, he has owned and run his own construction company, CSM Skilled Construction.

24. Mr. XXX was convicted in 2014 of Second-Degree Reckless Endangering Safety under Wisconsin Statute § 941.30(2). The conviction was related to drug-related charges. Mr. XXX has not been convicted of any drug-related crimes.

25. Because of his conviction, ICE officers detained Mr. XXX at his home on or about November 20, 2017, in the presence of his wife and young daughters. They also served him with a Notice to Appear (NTA) on that same date, initiating his removal proceedings. Mr. XXX has been detained at Dodge County Jail since that time—more than eight months.

26. Mr. XXX's NTA alleged removability on the basis of 8 U.S.C. § 1182(a)(6)(A)(i), being present in the United States without having been admitted or paroled, and 8 U.S.C. § 1182 (a)(2)(A)(i)(I), for his conviction of a crime involving moral turpitude.

27. ICE alleges that Mr. XXX XXX should therefore be detained under 8 U.S.C. § 1226(c).

B. Mr. XXX's U Visa Application

28. XXX

29. XXX

30. On December 11, 2017, Mr. XXX filed a U visa application based on XXX. USCIS sent him a receipt notice for his application dated December 26, 2017. Ex. A, USCIS Receipt Notice.

31. Because Mr. XXX is inadmissible to the United States, he needed a waiver of inadmissibility in order for the U visa petition to be approved. In the Seventh Circuit, either Immigration Judges in removal proceedings or USCIS can adjudicate the waiver of inadmissibility that accompanies U visas. *See Baez Sanchez v. Sessions*, 872 F.3d 854 (7th Cir. 2017).

32. On March 19, 2018, at a hearing on the merits of his request for a waiver before the Chicago Immigration Court, an immigration judge granted Mr. XXX a waiver under 8 U.S.C. § 1182(d)(3). However, the judge also denied Mr. XXX's motion to continue his case in light of the fact that his U visa application remained pending before USCIS. USCIS has exclusive authority to adjudicate U visa applications, even though immigration judges retain authority to adjudicate waivers of inadmissibility. *See* 8 C.F.R. § 214.14 (c)(1); *Baez Sanchez*, 872 F.3d 862. Thus, the immigration judge could not adjudicate Mr. XXX's U visa application.

33. As a result, Mr. XXX is still detained and still subject to a removal order (which he has appealed and is thus not yet final) while his U visa application remains pending.

34. On April 18, 2018, Mr. XXX filed an appeal with the Board of Immigration Appeals (BIA), resulting in a stay of removal until the appeal is adjudicated. The BIA appeal remains pending.

35. On April 15, 2018, counsel for Mr. XXX requested that USCIS expedite adjudication of his U visa application and make a prima facie determination of eligibility. Ex. B, 4/15/2018 Email Communication with USCIS Vermont Service Center.

36. Counsel again emailed USCIS on August 3, 2018, asking the agency to make a *prima facie* determination of eligibility and to expedite Mr. XXX's visa application due to his eight months in detention and the fact that an immigration judge granted him a waiver of inadmissibility. Ex. C, 8/3/2018 Email Communication to USCIS Vermont Service Center.

37. To date, Mr. XXX has not received a *prima facie* determination of U visa eligibility, nor has USCIS indicated when that will happen.

LEGAL BACKGROUND

A. The Mandamus Act

38. Under 28 U.S.C. § 1361, the federal mandamus statute, this Court has "original jurisdiction in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

39. "Mandamus relief will be granted if the plaintiff can demonstrate that the three enumerated conditions are present: (1) a clear right to the relief sought; (2) that the defendant has a duty to do the act in question; and (3) no other adequate remedy is available." *Iddir v. I.N.S.*, 301 F.3d 492, 499 (7th Cir. 2002) (internal citations omitted).

B. The Administrative Procedure Act

40. Under the Administrative Procedure Act (APA), the Court is authorized to compel agency action that has been unreasonably delayed. 5 U.S.C. § 706(1).

41. An agency must "conclude a matter presented to it . . . within a ***reasonable*** time." 5 U.S.C. § 555(b) (emphasis added).

42. Assessing reasonableness frequently involves a balancing test, in which a statutory requirement is a very substantial factor. *See Telecommunications Research & Action Center (TRAC) v. FCC*, 750 F.2d 70, 77-78 (D.C. Cir. 1984).[1]

43. In determining the reasonableness, the TRAC court considered the following factors:

> (1) whether the delay is "governed by a 'rule of reason,'" which can be provided by a "timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute";
>
> (2) the type of harm affected by the delay, as "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake";
>
> (3) whether "the effect of expediting delayed action on agency activities of a higher or competing priority";
>
> (4) "the nature and extent of the interests prejudiced by delay."

TRAC, 750 F.2d at 80.

44. In addition, the court noted that it "need not find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed." *Id.* (internal citations and quotations omitted).

C. The U Visa Adjudication Process

45. In 2000, Congress created a new visa category for immigrant victims of crime who cooperate with law enforcement in the investigation or prosecution of a crime. *See* Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), Pub. L. No. 106–386, 114 Stat. 1464 (2000).

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[1] The Seventh Circuit has not adopted a test equivalent to the *TRAC* test, but the Northern District of Illinois has adopted a four-factor test substantially similar to the *TRAC* test. *See Mohamed v. Dorochoff*, No. 11 C 1610, 2011 WL 4496228, at *5 (N.D. Ill. Sept. 22, 2011). Mr. XXX can show that USCIS has unreasonable delayed adjudication of his U visa application under both the *TRAC* test and the *Mohamed* test.

46. Congress enacted the U visa provision to strengthen law enforcement's ability to investigate and prosecute crimes "while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States." VTVPA, Pub.L. 106–386, at § 1513(a)(2)(A). "This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens." *Id.*

47. To be eligible for a U visa,[2] an applicant must show: (1) he was the victim of an enumerated crime in violation of law; [3] (2) he "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity"; (3) he possesses information concerning the criminal activity; and (4) he helped or is helping law enforcement or prosecutors in the investigation or prosecution of criminal activity. *See* 8 U.S.C. § 1101(a)(15)(U)(i)(III).

48. There is an annual statutory cap on U visas. By statute, USCIS may only issue 10,000 visas per year. 8 U.S.C. § 1184(p)(2). In the past several years, U visa applications have far exceeded the 10,000-per-year cap, resulting in a backlog of nearly 90,000 U visa applications awaiting adjudication.

49. Because of the backlog, there are two significant prefatory steps before the final adjudication, each discussed in detail below. First the statute contemplates a "prima facie adjudication," which is a prerequisite to ICE granting a stay of removal on the basis of a pending U visa application. 8 U.S.C. § 1227(d)(1). Second, USCIS created a U visa "wait list," wherein once placed on the wait list, a U visa applicant will be protected from removal and may be granted work authorization.

1. The Prima Facie Determination Process

[2] These visas are referred to as "U" visas due to their placement in the statute at 8 U.S.C. § 1101(a)(15)(U).
[3] Listed at 8 U.S.C. § 1101(a)(15)(U)(iii).

50. If a U visa applicant is *prima facie* eligible for a U visa, the Secretary of Homeland Security "may grant the alien an administrative stay of a final order of removal" until USCIS adjudicates the U visa application and that adjudication is administratively final. 8 U.S.C. § 1227(d)(1).

51. There are no regulations setting forth a procedure for making the *prima facie* determination described in § 1227(d)(1). The only guidance is an ICE policy memo that sets forth mandatory steps relating to the *prima facie* determination process. *See* Memorandum, David Venturella, ICE Acting Director to ICE Field Office Directors, *Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-visa) Applicants*, Sept. 24, 2009 [hereinafter 2009 ICE Stay Memo], https://www.ice.gov/doclib/foia/dro_policy_memos/11005_1-hd-stay_requests_filed_by_u_visa_applicants.pdf.

52. Pursuant to the 2009 memo, if USCIS determines that an individual is *prima facie* eligible then ICE "should view a Stay [of removal] request favorably, unless serious adverse factors exist." *Id.* at 3. Mr. XXX requests a *prima facie* determination from USCIS so that he can seek a stay of removal from ICE if his appeal is denied and his removal order becomes final and executable.

53. Here, despite Ms. XXX's counsel requesting a *prima facie* determination (*see* Exs. B & C), USCIS has not determined if he is *prima facie* eligible for a U visa.

2. The Regulatory Waiting List Process

54. To address this backlog, USCIS enacted a regulatory "waiting list," whereby USCIS conducts an initial adjudication and places "eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status . . . on a waiting list." 8 C.F.R. § 214.14(d)(2). While on the waiting list, USCIS will grant the applicant deferred action, which is a form of

prosecutorial discretion protecting and individual from removal,[4] and USCIS may grant work authorization. *Id.*

55. According to USCIS's published processing times, it currently takes nearly four years (45 months) to adjudicate this first phase of adjudication; *i.e.*, to receive deferred action by placement on the waiting list. *See* Ex. B, USCIS Vermont Service Center processing times.

56. The Seventh Circuit Court of Appeals has held that a U visa petitioner cannot "skip the line" via a mandamus and APA unreasonable delay action to receive the wait list determination. *See Calderon-Ramirez v. McCament*, 877 F.3d 272, 275 (7th Cir. 2017), *reh'g denied* (Jan. 19, 2018). However, the petitioner in *Calderon-Ramirez* was not detained or facing imminent removal. Indeed, the Court left open the possibility that a writ of mandamus or APA unreasonable delay order could issue where the individual is detained or otherwise may have a more urgent need for wait-list adjudication. The court stated:

> Ramirez fails to set forth any facts that differentiate himself from other petitioners waiting ahead of him for adjudication. The appellees did concede at oral argument that there are instances when the Immigrations and Customs Enforcement can and will expedite a petition. However, Ramirez fails to present a situation appropriate to warrant such an action. With nothing in the record to suggest his wait time has been any more unreasonable than other petitioners waiting in the same line, we have no reason to grant mandamus relief.

Id.

[4] Deferred action is a method of prosecutorial discretion that the immigration agencies may grant "[t]o ameliorate a harsh and unjust outcome." 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03 [2][h] (1998), *quoted in Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999). Through deferred action, ICE may "decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation." *Id.* "Approval of deferred action status means that . . . no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated." *Id.*

57. Here, Mr. XXX has a compelling reason to warrant APA relief in order to expedite his U visa wait list determination: (1) unlike most U visa applicants, he is in immigration detention and has been for almost nine months; and (2) he has a removal order, which will become final and executable if the BIA dismisses his appeal. Accordingly, not only does *Calderon-Ramirez* not control, but Mr. XXX falls into the clear exception that the Seventh Circuit carved out.

D. The Legality of Immigration Detention

1. Due Process Limits to Immigration Detention

58. The Supreme Court has stated that it "'is well established the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'" *Demore v. Kim*, 538 U.S. 510, 523 (2003) (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also id*. at 718 (Kennedy, J., dissenting) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention."). This fundamental due process protection applies to all noncitizens, including both removable and inadmissible noncitizens. *See id.* at 721 (Kennedy, J., dissenting) ("both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious").

59. Due process therefore requires "adequate procedural protections" to ensure that the government's asserted justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* at 690 (internal quotation marks omitted). In the immigration context, the Supreme Court has recognized only two valid

purposes for civil detention—to mitigate the risks of danger to the community and to prevent flight. *Id*.; *Demore,* 538 U.S. at 528.

60. Following *Zadvydas* and *Demore*, every circuit court of appeals to confront the issue has found either the immigration statutes or due process requires a hearing for noncitizens subject to unreasonably prolonged detention pending removal proceedings. *See Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199 (11th Cir. 2016) (detention under 8 U.S.C. § 1226(c)); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016) (8 U.S.C. § 1226(c)); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) (8 U.S.C. § 1226(c)); *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015) (8 U.S.C. § 1226(c) and 8 U.S.C. § 1225(b)); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011) (8 U.S.C. § 1226(c)); *Diouf v. Holder (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011) (8 U.S.C. § 1231(a)); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (8 U.S.C. § 1226(c)) (requiring release when mandatory detention exceeds a reasonable period of time).

61. Recently, the Supreme Court held that the Ninth Circuit erred by interpreting Sections 1226(c) and 1225(b) to require bond hearings as a matter of statutory construction. *Jennings v. Rodriguez*, __ U.S. __, 2018 WL 1054878 at *10 (Feb. 27, 2018). Because the Ninth Circuit had not decided whether the Constitution itself requires bond hearings in cases of prolonged detention, the Court remanded for the Ninth Circuit to address the issue. *Id*. at *10. The majority opinion did not express any views on the constitutional question, and left it to the lower courts to address the issue in the first instance.

62. Due process requires that the government provide bond hearings to noncitizens facing prolonged detention. “The Due Process Clause foresees eligibility for bail as part of due process” because “[b]ail is basic to our system of law.” *Id.* at *28 (Breyer, J., dissenting) (internal quotations and citations omitted). While the Supreme Court upheld the mandatory

detention of a noncitizen under Section 1226(c) in *Demore*, it did so based on the petitioner's concession of deportability and the Court's understanding that detentions under Section 1226(c) are typically "brief." *Demore*, 538 U.S. at 522 n.6, 528.

63. Where a noncitizen has been detained for a prolonged period or is pursuing a substantial defense to removal or claim to relief—such as a U visa—due process requires an individualized determination that such a significant deprivation of liberty is warranted. *Id.* at 532 (Kennedy, J., concurring) ("individualized determination as to his risk of flight and dangerousness" may be warranted "if the continued detention became unreasonable or unjustified"). *See also Jackson v. Indiana*, 406 U.S. 715, 733 (1972) (detention beyond the "initial commitment" requires additional safeguards); *McNeil v. Dir., Patuxent Inst*., 407 U.S. 245, 249-50 (1972) ("lesser safeguards may be appropriate" for "shortterm confinement"); *Hutto v. Finney*, 437 U.S. 678, 685-86 (1978) (in Eighth Amendment context, "the length of confinement cannot be ignored in deciding whether [a] confinement meets constitutional standards").

2. Due Process Requires Bond Hearings

64. Consistent with this view, the federal courts have made clear that prolonged detention pending removal proceedings without a bond hearing likely violates due process. *See supra*; *Jennings*, 2018 WL 1054878 at *37 (Breyer, J, dissenting) ("[A]n interpretation of the statute before us that would deny bail proceedings where detention is prolonged would likely mean that the statute violates the Constitution."). In addition, numerous circuit and district courts have expressly found that the Constitution requires bond hearings in cases of prolonged detention. *See, e.g.*, *Diop*, 656 F.3d at 233; *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 544-50 (S.D.N.Y. 2014); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458-59 (S.D.N.Y. 2010).

65. Detention without a bond hearing is unconstitutional when it exceeds six months. *See Demore*, 538 U.S. at 529-30 (upholding only "brief" detentions under Section 1226(c), which last "roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal"); *Zadvydas*, 533 U.S. at 701 ("Congress previously doubted the constitutionality of detention for more than six months").

66. The recognition that six months is a substantial period of confinement—and is the time after which additional process is required to support continued incarceration—is deeply rooted in our legal tradition. With few exceptions, "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term . . . ." *Duncan v. State of La.*, 391 U.S. 145, 161 & n.34 (1968). Consistent with this tradition, the Supreme Court has found six months to be the limit of confinement for a criminal offense that a federal court may impose without the protection afforded by jury trial. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion).

67. The Court has also looked to six months as a benchmark in other contexts involving civil detention. *See McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249, 250-52 (1972) (recognizing six months as an outer limit for confinement without individualized inquiry for civil commitment). The Court has likewise recognized the need for bright line constitutional rules in other areas of law. *See Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (14 days for re-interrogation following invocation of Miranda rights); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991) (48 hours for probable cause hearing).

68. Even if a bond hearing is not required after six months in every case, at a minimum, due process requires a bond hearing after detention has become unreasonably

prolonged. *See Diop*, 656 F.3d at 234. Courts that apply a reasonableness test have considered three main factors in determining whether detention is reasonable.

69. First, courts have evaluated whether the noncitizen has raised a "good faith" challenge to removal—that is, the challenge is "legitimately raised" and presents "real issues." *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015).

70. Second, reasonableness is a "function of the length of the detention," with detention presumptively unreasonable if it lasts six months to a year. *Id*. at 477-78; *accord Sopo*, 825 F.3d at 1217-18.

71. Third, courts have considered the likelihood that detention will continue pending future proceedings. *Chavez-Alvarez*, 783 F.3d at 478 (finding detention unreasonable after ninth months of detention, when the parties could "have reasonably predicted that Chavez–Alvarez's appeal would take a substantial amount of time, making his already lengthy detention considerably longer"); *Sopo*, 825 F.3d at 128; *Reid*, 819 F.3d at 500.

3. Immigration Court Bond Hearings Require Minimal Procedural Protections

72. At a bond hearing, due process requires certain minimal protections to ensure that a noncitizen's detention is warranted: the government must bear the burden of proof by clear and convincing evidence to justify continued detention, taking into consideration available alternatives to detention; and if the government cannot meet its burden, the noncitizen's ability to pay a bond must be considered in determining the appropriate conditions of release.

73. To justify prolonged immigration detention, the government must bear the burden of proof by clear and convincing evidence that the noncitizen is a danger or flight risk. *See Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011). Where the Supreme Court has permitted civil detention in other contexts, it has relied on the fact that the Government bore the burden of proof at least by clear and convincing evidence. *See United States v. Salerno*, 481 U.S. 739,

750, 752 (1987) (upholding pre-trial detention where there had been a "full-blown adversary hearing," requiring "clear and convincing evidence" and "neutral decisionmaker"); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (striking down civil detention scheme that placed burden on the detainee); *Zadvydas*, 533 U.S. at 692 (finding post-final-order custody review procedures deficient because, *inter alia*, they placed burden on detainee).

74. The requirement that the government bear the burden of proof by clear and convincing evidence is also supported by application of the three-factor balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). First, prolonged incarceration deprives noncitizens of a "profound" liberty interest. *See Diouf II*, 634 F.3d at 1091–92 (9th Cir. 2011). Second, the risk of error is great where the government is represented by trained attorneys and detained noncitizens are often unrepresented and frequently lack English proficiency. *See Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (requiring clear and convincing evidence at parental termination proceedings because "numerous factors combine to magnify the risk of erroneous factfinding" including that "parents subject to termination proceedings are often poor, uneducated, or members of minority groups" and "[t]he State's attorney usually will be expert on the issues contested"). Moreover, detainees are incarcerated in prison-like conditions that severely hamper their ability to obtain legal assistance, gather evidence, and prepare for a bond hearing. *See infra* ¶ 39. Third, placing the burden on the government imposes minimal cost or inconvenience, as the government has access to the noncitizen's immigration records and other information that it can use to make its case for continued detention.

75. Due process also requires consideration of alternatives to detention. The primary purpose of immigration detention is to ensure a noncitizen's appearance during removal proceedings. *Zadvydas*, 533 U.S. at 697. Detention is not reasonably related to this purpose if

there are alternative conditions of release that could mitigate risk of flight.[5] *See Bell v. Wolfish*, 441 U.S. 520, 538 (1979).

76. Due process likewise requires consideration of a noncitizen's ability to pay a bond. "Detention of an indigent 'for inability to post money bail' is impermissible if the individual's 'appearance at trial could reasonably be assured by one of the alternate forms of release.'" *Id.* at 990 (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc)). It follows that—in determining the appropriate conditions of release for immigration detainees—due process requires "consideration of financial circumstances and alternative conditions of release" to prevent against detention based on poverty. *Id*.

COUNT I

Violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution for individuals in detention beyond six months

77. Mr. XXX re-alleges and incorporates by reference each and every allegation contained above.

78. The Due Process Clause of the Fifth Amendment forbids the government from depriving any "person" of liberty "without due process of law." U.S. Const. amend. V.

79. Detention without a bond hearing is unconstitutional when it exceeds six months. *See Demore*, 538 U.S. at 529-30 (upholding only "brief" detentions under Section 1226(c), which last "roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal").

[5] ICE's alternatives to detention program—the Intensive Supervision Appearance Program—has achieved extraordinary success in ensuring appearance at removal proceedings, reaching compliance rates close to 100 percent. *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (observing that ISAP "resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings").

80. ICE has detained Mr. XXX for nearly nine months, since November 20, 2017. Because his detention has lasted beyond six months, his detention has become unconstitutionally prolonged. *See Maniar v. Warden Pine Prairie Correctional Ctr*., No. 6:18-CV-00544, Report & Recommendation, at 14 (W.D. La. July 11, 2018) (attached as Ex. E) ("Based on existing precedent this Court agrees detention for a period of time up to six months is presumably constitutional; however, after six months, detention without the opportunity to at least seek a hearing offends the Due Process Clause.").

81. Alternatively, under the case-by-case reasonableness approach adopted by the Third, Sixth, and Eleventh Circuits, Mr. XXX's detention has become unconstitutionally prolonged for the following reasons:

(1) Mr. XXX's detention has exceeded six months. *See Chavez-Alvarez*, 783 F.3d at 476; *Sopo*, 825 F.3d at 1217-18.

(2) Mr. XXX has raised a "good faith" challenge to removal—that is, the challenge is "legitimately raised" and presents "real issues." *Chavez-Alvarez*, 783 F.3d at 476. An Immigration Judge granted him a waiver of inadmissibility and he is otherwise eligible for relief—a U visa.

(3) It is likely that Mr. XXX's detention will continue pending future proceedings; namely, his BIA appeal, which may last several more weeks or months. *See id.* at 478 (finding detention unreasonable after ninth months of detention, when the parties could "have reasonably predicted that Chavez–Alvarez's appeal would take a substantial amount of time, making his already lengthy detention considerably longer"); *see also Sopo*, 825 F.3d at 128; *Reid*, 819 F.3d at 500.

82. To justify Mr. XXX's ongoing prolonged detention, due process requires that the government establish, at an individualized hearing before a neutral decisionmaker, that Mr.

XXX's detention is justified by clear and convincing evidence of flight risk or danger, even after consideration whether alternatives to detention could sufficiently mitigate that risk.

83. For these reasons, Mr. XXX's ongoing prolonged detention without a hearing violates due process.

COUNT II

Violation of Fifth Amendment Procedural Due Process As Applied to Individuals With Viable Legal Defenses to Removal

84. Mr. XXX repeats and realleges the allegations contained in the preceding paragraphs.

85. Mr. XXX, as a long-time inhabitant of the United States, is entitled to procedural due process protections. *See Reno v. Flores*, 507 U.S. 292, 306 (1993); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

86. The Supreme Court has upheld the mandatory detention statute against a facial constitutional challenge. *Demore v. Kim*, 538 U.S. 510, 516–17 (2003) (Kennedy, J. concurring). (Justice Kennedy's concurring opinion, as the narrowest ground for resolving *Demore*, is governing). However, the Supreme Court did not have occasion to consider whether mandatory detention statute was constitutional as applied.[6]

87. In fact, the removal process generally takes many months or years to conclude, particularly in cases where the noncitizen has a viable claim for relief. Indeed, Mr. XXX's removal proceedings have now lasted more than eight months and have no end in sight.

[6] Mr. XXX would further note that *Demore* cited statistics provided by the Government which turned out to be incorrect, as the Solicitor General later notified the Supreme Court. Ian Gershengorn, Acting Solicitor General, Letter to Scott Harris (Aug. 26, 2016).

88. As applied to those with viable claims for relief, such as a U visa, mandatory detention fails under *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The Supreme Court's test requires a court to weigh the individual's interest and the risk of erroneous deprivation of that interest against the government's interest.

89. Here, Mr. XXX's interest is substantial, *i.e.*, being free from physical restraint, is an interest that "lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. 678 at 690 (*citing Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)) – and no procedural safeguards are in place to review their detention.

90. The government's interest in detaining noncitizens during deportation proceedings is to effectuate removal. As to noncitizens with viable legal defenses, this interest is diminished. For instance, in Mr. XXX's case, where an Immigration Judge has granted a waiver of inadmissibility, there is a reduced likelihood that the government would be legally permitted to effectuate removal.

COUNT III

Writ of mandamus ordering DHS to make a *prima facie* determination.

91. Mr. XXX repeats and realleges the allegations contained in the preceding paragraphs.

92. DHS has failed to make a *prima facie* determination relating to Mr. XXX's U visa application.

93. Mr. XXX has a clear right to a *prima facie* determination of his U visa application. The Secretary of Homeland Security has a duty to make a *prima facie* determination under 8 U.S.C. § 1227(d)(1).

94. No other adequate remedy is available. Mr. XXX now has a removal order, which is on appeal to the BIA. A finding from USCIS that he is *prima facie* eligible for a U visa is a prerequisite to a stay or removal from ICE, according to Section 1227(d)(1) and ICE's 2009 policy memo. *See* 8 U.S.C. § 1227(d)(1) ("If the Secretary of Homeland Security determines that an application for [a (T) or (U) visa] sets forth a prima facie case for approval, the Secretary may grant the alien an administrative stay of a final order of removal under section 1231(c)(2) of this title . . . ."); 2009 ICE Stay Memo, *supra* at 17 ("The [Field Office Director] should favorably view an alien's request for a Stay of Removal if USCIS has determined that the alien has established prima facie eligibility for a U-visa.").

95. Mr. XXX has exhausted his administrative remedies. Counsel for Mr. XXX contacted USCIS via email on April 15, 2018, and August 3, 2018, asking the agency to seek a *prima facie* determination from USCIS and to expedite his petition. To date, Mr. XXX has not received a *prima facie* determination or any indication if or when USCIS will make the determination.

COUNT IV

Violation of the Administrative Procedure Act, 5 U.S.C. § 706(1), for DHS's failure to make a *prima facie* determination.

96. Mr. XXX repeats and realleges the allegations contained in the preceding paragraphs.

97. DHS violated the Administrative Procedure Act by failing to make a *prima facie* determination of Mr. XXX 's U visa application as required by 8 U.S.C. § 1227(d)(1).

98. As such, DHS has "unlawfully withheld" agency action in violation of the APA, 5 U.S.C. § 706(1).

99. Mr. XXX has exhausted his administrative remedies. Counsel for Mr. XXX contacted USCIS via email on April 18, 2018, and August 2, 2018, asking the agency to seek a *prima facie* determination from USCIS and to expedite his petition. To date, Mr. XXX has not received a *prima facie* determination or any indication if or when USCIS will make the determination.

COUNT V

Violation of the Administrative Procedure Act for USCIS's failure to place Mr. XXX on the U visa "waiting list" within a reasonable amount of time.

100. Mr. XXX repeats and realleges the allegations contained in the preceding paragraphs.

101. Mr. XXX's U visa petition has been pending for seven months.

102. USCIS has not adjudicated Mr. XXX 's application in a reasonable time. *See* 5 U.S.C. § 555(b).

103. Serious adverse factors exist in Mr. XXX's case that make USCIS's delays unreasonable as applied to him under the test laid out in *TRAC*, 750 F.2d at 80.

(1) ***Rule of reason.*** USCIS adjudicates U visa petitions in the order they receive them. While that rule makes sense for those individuals who are under no threat of deportation, USCIS's rule is unjustifiable as it pertains to individuals like Mr. XXX who are facing imminent deportation. Further, while USCIS may only grant 10,000 visas per year, Mr. XXX does not seek one of those 10,000 visas. He is merely asking USCIS to conduct the first phase of adjudication and place his application on the U visa waiting list so that he may receive deferred action from removal. 8 C.F.R. 214.14(c)(1)(ii). There is no numerical limit for the waiting list adjudication. *See id.* ("All eligible petitions

who, due solely to the cap, are not granted U-1 nonimmigrant status *must be placed on a waiting list . . . .*").

(2) ***Whether human health and welfare interests are at stake.*** This case is not about economic interests. It is about whether ICE will imminently deport Mr. XXX back to Mexico, away from his partner and U.S. citizen children, one of whom has been the victim of serious abuse, and whom Mr. XXX has provided emotional and financial support. Accordingly, there is a strong human health and welfare interest at stake in Mr. XXX's case.

(3) ***The effect of expediting delayed action on agency activities of a higher or competing priority.*** Mr. XXX recognizes that there are others awaiting the first phase of adjudication for a U visa. But Mr. XXX's interests are substantially different, as he now has a removal order, which will become final if the BIA dismisses his appeal. *See* 8 U.S.C. § 1231(a)(1)(B)(i). Once that happens, ICE is statutorily obligated to remove him within 90 days, and it will likely be much quicker than that, given that removals to Mexico happen on a weekly basis. So while there might be others awaiting a U visa, those individuals do not have the same urgent need for adjudication of their U visa applications. *Compare Calderon-Ramirez*, 877 F.3d at 275 ("Ramirez fails to set forth any facts that differentiate himself from other petitioners waiting ahead of him for adjudication. The appellees did concede at oral argument that there are instances when the Immigrations and Customs Enforcement can and will expedite a petition.").

(4) ***The nature and extent of the interests at stake.*** For Mr. XXX, the nature of the interests at stake could not be more compelling—his ability to stay in the United States with his family. Irreparable harm will result from Mr. XXX's deportation. If ICE forces Mr. XXX to leave the country, he will necessarily need to await adjudication of his U visa in Mexico. This will take at least another nine to ten years. And once his U visa is adjudicated, there is no certainty that he will be able to reenter, as he will need to seek a waiver from USCIS. This will not only cause harm to himself but also his family, who relies on him.

104. Mr. XXX has exhausted his administrative remedies. Counsel for Mr. XXX contacted USCIS via email on April 18, 2018, and August 2, 2018, asking the agency to seek a *prima facie* determination from USCIS and to expedite his petition. To date, Mr. XXX has not received a *prima facie* determination or any indication if or when USCIS will make the determination.

PRAYER FOR RELIEF

A. Assume jurisdiction over this matter;

B. Enter a writ of habeas corpus, ordering Mr. XXX's release from custody or, in the alternative, order a bond hearing where the government bears the burden of showing that he is a flight risk and danger by clear and convincing evidence, and where bond is considered in light of his ability to pay;

C. Declare that USCIS's failure to make a *prima facie* determination regarding Mr. XXX 's U visa application violates 5 U.S.C. § 706(1);

D. Issue a writ of mandamus and/or issue an order under 5 U.S.C. § 706(1) ordering DHS to make a determination whether Mr. XXX is *prima facie* eligible for a U visa;

E. Declare that USCIS has not made a "waiting list" determination regarding Mr. XXX's U visa application "within a reasonable time," in violation of the APA, 5 U.S.C. § 555(b);

F. Order USCIS to make a "waiting list" adjudication on Mr. XXX 's application;

G. Attorneys' fees and costs;

H. Any other relief the Court deems equitable, just, and proper.

Dated: August 10, 2018

s/ Katherine Melloy Goettel

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2018, I filed a true and correct copy of the foregoing document electronically on CM/ECF.

s/ Katherine Melloy Goettel
KATHERINE E. MELLOY GOETTEL