

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

HANAD ABDI and JOHAN BARRIOS RAMOS,
on behalf of himself and all others similarly
situated,

Petitioners,

v.

ELAINE DUKE, in her official capacity as
Acting Secretary of U.S. Department of
Homeland Security; THOMAS BROPHY, in his
official capacity as Acting Director of Buffalo
Field Office of Immigration and Customs
Enforcement; JEFFREY SEARLS, in his official
capacity as Acting Administrator of the Buffalo
Federal Detention Facility, and JEFFERSON
SESSIONS, in his official capacity as Attorney
General of the United States,

Respondents.

Case No. 17-cv-721 (EAW)

**FIRST AMENDED PETITION
FOR A WRIT OF HABEAS
CORPUS AND COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

CLASS ACTION

INTRODUCTION

1. This class action challenges the power of the federal government to deny parole summarily to arriving asylum-seekers and incarcerate them for prolonged periods even though the Government itself has determined they are likely to win the right to remain in the United States. In a case pending before the United States Supreme Court, the Government has represented—in arguing that immigrant detainees need not be given bond hearings to test the validity of their detention—that asylum-seekers have ready access to release on parole. But that representation cannot be squared with the experience of the petitioners and the proposed class members in this case—asylum-seekers who declared themselves at our nation’s borders, whose claims of persecution or torture were found credible, but who have nevertheless been detained without parole at the Buffalo

Federal Detention Facility in Batavia as the Government processes their asylum claims over many months and, in some cases, years.

2. Petitioners Barrios Ramos and Abdi were detained for many months from the moment they arrived at the U.S.-Mexico border and sought asylum in the United States. Mr. Barrios Ramos, a political prisoner who fled Cuba to avoid further detention, and Mr. Abdi, who fled persecution and torture in Somalia on account of his membership in a minority tribe, each passed an initial screening known as a “credible fear interview,” where the Government found that each man had established a significant possibility of being granted asylum. Despite passing that interview, each was then subject to prolonged detention as his immigration case slowly ground on, during which time his repeated requests for parole were denied without explanation. Mr. Abdi spent over ten months in ICE custody; Mr. Barrios Ramos, who has been incarcerated for over seven months, has no realistic possibility of release in the near future, as his next immigration court date is only scheduled for the end of November.

3. This prolonged and arbitrary detention of the named petitioners reflects a broader practice at Batavia, where ICE has abandoned its long-standing policy favoring the release of asylum-seekers. Although the Government is still touting that policy to the Supreme Court, the detention of asylum-seekers without the possibility of release on parole is the new norm at Batavia. So whereas approximately 88% of parole requests made by people who passed a credible fear interview were granted during the first nine months of 2015 (the most recent period for which data are available), only 8% of such requests appear to have been granted from the beginning of 2017 until the filing of this lawsuit on July 28, 2017.

4. The respondents' actions violate federal statutes, regulations, directives, and the United States Constitution and are severely harming those being held at Batavia. Mr. Barrios Ramos and the proposed class of arriving asylum-seekers detained at Batavia who have not been granted parole seek adjudication or readjudication of their parole requests in accordance with the procedures and criteria contained in the ICE parole directive that the Government has repeatedly claimed to be following. In addition, Mr. Barrios Ramos and a sub-class of asylum-seekers whose detention exceeds, or will exceed, six months seek a bond hearing before an immigration judge—a form of relief to which they are entitled under a recent ruling from the Second Circuit.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1651 (All Writs Act); 28 U.S.C. § 2201-02 (declaratory judgment); and 28 U.S.C. § 2241 (habeas corpus).

6. Venue is proper in the Western District of New York under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to these claims occurred in this district. Venue is also proper under 28 U.S.C. § 2241(d) because all potential class members are incarcerated within this District.

PARTIES

7. Petitioner Johan Barrios Ramos is a forty-year-old Cuban national seeking asylum in the United States. He has now spent more than seven months in ICE custody and is currently incarcerated at Batavia.

8. Petitioner Hanad Abdi is a twenty-six-year-old Somali national seeking asylum in the United States. He spent more than ten months in ICE custody before he was conditionally released on August 16, 2017, three weeks after this lawsuit was filed.

9. Respondent Elaine Duke is sued in her official capacity as Acting Secretary of the U.S. Department of Homeland Security, the agency directly responsible for the petitioners' detention.

10. Respondent Thomas Brophy is sued in his official capacity as Acting Field Office Director for the Buffalo District of ICE. Mr. Brophy has the authority to adjudicate parole for detainees held at Batavia.

11. Respondent Jeffrey Searls is sued in his official capacity as Acting Administrator at Batavia.

12. Respondent Jefferson B. Sessions is sued in his official capacity as the Attorney General of the United States. As the head of the Department of Justice, he oversees the operation the Executive Office of Immigration Review, which encompasses the immigration courts and Board of Immigration Appeals. Mr. Sessions shares responsibility for the implementation and enforcement of immigration laws along with Acting Secretary Duke.

FACTS PERTAINING TO INDIVIDUAL PETITIONERS

A. Johan Barrios Ramos

13. Mr. Barrios Ramos, a native and citizen of Cuba, was born in 1977 in Havana. Declaration of Johan Barrios Ramos ("Barrios Ramos Decl.") at ¶¶ 1-2.

14. Mr. Barrios Ramos became involved with the political opposition in Cuba around 2010. *Id.* ¶ 4.

15. A few years later, he visited an independent journalist and member of the political opposition who was incarcerated by the Cuban authorities. *Id.* ¶ 5.

16. As a result of visiting this political dissident, Mr. Barrios Ramos became known to the Cuban government who arrested, interrogated, and incarcerated him on suspicion of engaging in “anti-Cuban” activities for approximately eleven months. *Id.*

17. During his detention, he was held in solitary confinement for several weeks and was sometimes deprived of food. He was also beaten and abused by the prison guards. *Id.* ¶ 5.

18. After his release from prison, Mr. Barrios Ramos continued his involvement in political opposition to the Cuban government. *Id.* ¶ 6.

19. As a result the government continued to monitor him and to send its agents to harass him. *Id.* ¶ 7.

20. Afraid for his safety, Mr. Barrios Ramos attempted to leave Cuba on two occasions. In both instances, government authorities prevented him from leaving the country. *Id.*

21. In late 2016, shortly after Fidel Castro died, the police once again came to Mr. Barrios Ramos’s mother’s house looking for him and accusing him of anti-government activities. He was not home at the time. After this incident, his mother told him that he should not come home. *Id.* ¶ 8.

22. In December 2016, Mr. Barrios Ramos finally succeeded in fleeing Cuba. He left because he was afraid he would be redetained and tortured. *Id.* ¶ 8-9.

23. Mr. Barrios Ramos left Cuba on a raft that reached the coast of Mexico. From there, he traveled overland, arriving at the U.S.-Mexico border in Roma, Texas, on

January 14, 2017. He declared himself at the border post there and requested asylum. *Id.* ¶¶ 10, 11.

24. He was transferred to Batavia and given a credible fear interview on February 1, 2017. The officer who conducted that interview determined there was a significant possibility that Mr. Barrios Ramos's claims would be found credible in a full asylum hearing before an immigration judge. The officer also found that there appeared to be no potential bars to asylum. Finally, the officer noted that Mr. Barrios Ramos's identity had been determined with a reasonable degree of certainty. *See* Credible Fear Interview of Johan Barrios Ramos (dated February 1, 2017) at 3-5, Declaration of Desiree Lurf ("Lurf Decl."), Ex. A.

25. On the same day that he passed his credible fear interview, Mr. Barrios Ramos was told by a deportation officer that there is no parole at Batavia. He does not recall receiving any written notification or advisal about parole, nor does he believe anyone at Batavia conducted a parole interview for him. Barrios Ramos Decl. ¶¶ 11-12.

26. Mr. Barrios Ramos retained immigration counsel, Desiree Lurf, who has assisted him in preparing for his asylum hearing in immigration court. *Id.* ¶ 13.

27. On February 28, 2017, Ms. Lurf submitted a parole request on his behalf. In support of this request, she submitted a copy of his birth certificate, declarations from Mr. Barrios Ramos's sister (a lawful permanent resident) and a childhood friend (a U.S. citizen) with whom he would live if released supporting the parole request. Ms. Lurf also submitted five other letters of support from friends attesting to Mr. Barrios Ramos's identity and good character. Photo identifications were included for affiants. First Parole

Request for Johan Barrios Ramos with supporting exhibits (dated February 28, 2017), Lurf Decl. Ex. B.

28. On March 6, 2017, Ms. Lurf supplemented the parole request by submitting a copy of Mr. Barrios Ramos's passport. Updated Parole Request for Johan Barrios Ramos with supporting exhibits (email dated March 6, 2017), Lurf Decl. Ex. C.

29. On March 7, 2017, Ms. Lurf received a two-sentence letter from Acting Field Office Director Brophy denying parole. In its entirety the body of the letter states: "This letter is in response to your recent correspondence requesting Parole. After a careful review of the evidence you submitted and the immigration file, your request for Parole is denied." Ltr. from T. Brophy to D. Lurf (dated March 7, 2017), Lurf Decl. Ex. D.

30. On April 24, 2017, Ms. Lurf submitted a second parole request for Mr. Barrios Ramos. She provided evidence that Mr. Barrios Ramos's health was deteriorating in Batavia. For instance, Mr. Barrios Ramos's anxiety disorder has been exacerbated because his detention at Batavia constantly reminds him of the physical and psychological torture he suffered while detained in Cuba. Second Parole Request for Johan Barrios Ramos with supporting exhibits (dated April 24, 2017), Lurf Decl. Ex. E.

31. On May 4, 2017, Ms. Lurf received a two-sentence letter from Acting Field Office Director Brophy denying parole. In its entirety the body of the letter states: "This letter is in response to your recent correspondence requesting Parole. After a careful review of the evidence you submitted and the immigration file, your request for Parole is denied." Ltr. from T. Brophy to D. Lurf (dated May 4, 2017), Lurf Decl. Ex. F.

32. On at least two occasions, Mr. Barrios Ramos asked his deportation officer, Deportation Officer ("DO") Ensminger, why his parole requests were denied. DO

Ensminger indicated that parole was no longer available, saying that it was a matter of luck and that there was a one-in-a-million chance of anyone at Batavia being granted parole. Barrios Ramos Decl. ¶ 15.

33. Mr. Barrios Ramos is suffering in detention. His anxiety disorder, which he developed while incarcerated in Cuba, is exacerbated during his detention in the United States. *Id.* ¶ 16.

34. Mr. Barrios Ramos was eagerly awaiting his day in immigration court, which was scheduled for August 15, 2017. *Id.* ¶ 17. On that date, the hearing began and Mr. Barrios Ramos began to testify through a Spanish-language interpreter provided by the court. Lurf Decl. ¶ 10-11.

35. However, the interpreter, who spoke Mexican Spanish, was unable to fully understand Mr. Barrios Ramos's Cuban accent and could not adequately interpret his testimony. Ms. Lurf was forced to ask the court to adjourn the hearing and resume on another date with a different interpreter. Lurf Decl. ¶ 11.

36. She was subsequently informed that the immigration court was rescheduling Mr. Barrios Ramos's asylum hearing for November 29, 2017. Lurf Decl. ¶ 12. At that point, he will have been detained for eleven months.

B. Hanad Abdi

37. Mr. Abdi is a native and citizen of Somalia. He was born in 1991, in Buulo Mareer, a town about 75 miles south of Mogadishu, Somalia's capital city. *See* Declaration of Petitioner Hanad Abdi ("Abdi Decl.") ¶¶ 1-3. He and his family belong to a small minority tribe known as the Tunni. *Id.* ¶ 5.

38. Mr. Abdi lived in Buulo Mareer with his father, mother, and four younger siblings. His mother died during childbirth in 2008. *Id.* ¶¶ 3-4.

39. As the oldest child, Mr. Abdi has had to fill in the void left by his mother's death to take care of his younger siblings. *Id.* ¶ 4.

40. For most of Mr. Abdi's life, Somalia has been a failed state, mired in civil unrest and war. In the absence of a functioning government, tribal conflict, usually motivated by control for land and resources, has raged on.

41. As members of the Tunni, Mr. Abdi's family has been targeted and harassed for decades by members of a larger, more powerful tribe, the Habar-gidir. Mr. Abdi was taunted and bullied in school because of his tribal affiliation, and he remembers hearing Habar-gidir men harass his mother when he was a child. *Id.* ¶ 5.

42. More recently, members of the Habar-gidir wanted the plot of land that Mr. Abdi's family has owned and farmed for generations. In 2008, Mr. Abdi's father lost about half of this land to a man from the Habar-gidir tribe, who targeted the family because they are Tunni. *Id.* ¶ 6.

43. The man who seized the Abdis' land died in April 2016. The man's brother, who was the Chief of Police in the section of Buulo Mareer where Mr. Abdi's family lived believed that Mr. Abdi's father had conducted witchcraft that caused his brother's death. *Id.* ¶ 7.

44. As an act of vengeance, this Chief of Police shot and killed Mr. Abdi's father in May 2016. *Id.*

45. Mr. Abdi was attending English classes at the time his father was killed. He came home to see his aunt weeping, and they went to the family farm to collect his father's body. As the oldest child, Mr. Abdi was responsible for burying his father. *Id.* ¶ 8.

46. A week later, Mr. Abdi was confronted at his family farm by plain-clothes policemen employed by the man who murdered his father. *Id.* ¶ 9.

47. The men captured Mr. Abdi, tied him up, and severely beat him. He believes they would have killed him had he not been able to escape later that day as his captors got into a gunfight with a rival group. Amidst the chaos, Mr. Abdi managed to untie himself and run away. He fled into the bushes in the countryside and hid in a ditch in the ground for several hours. He heard the voices of his captors as they came to the area looking for him. He was terrified. *Id.* ¶ 10.

48. Around midnight, when he was sure his captors were gone, Mr. Abdi walked back to his house. There, he met his aunt who told him that his captors had just come to the house looking for Mr. Abdi and beaten her as they demanded she turn him over. *Id.* ¶ 11.

49. Mr. Abdi was suffering his own physical injuries from earlier in the day. But since the men were still looking for him, he believed he had to leave the area immediately. Aided by a family friend, he was hidden in the back of a vehicle and taken to Mogadishu. *Id.* ¶ 12.

50. Some days later, he began to receive threatening phone calls from the men who had captured him telling him they knew where he was and that they planned to kill him. *Id.* ¶ 13.

51. Mr. Abdi left Somalia on June 10, 2016, shortly after receiving those calls. The same family friend who secured his safe passage to Mogadishu paid smugglers to help him travel overland to Ethiopia and then onwards to Brazil by plane. *Id.* ¶ 15.

52. From Brazil, Mr. Abdi was passed from smuggler to smuggler and crossed overland through Peru, Ecuador, Colombia, Panama, Costa Rica, Nicaragua, Honduras, Guatemala, and Mexico, finally arriving at the southern border of the United States. *Id.* ¶ 16.

53. Mr. Abdi made the perilous journey to the United States because he believed that he could find safety and refuge in this country. *Id.* ¶ 17.

54. Mr. Abdi arrived at the U.S.-Mexico border in Brownsville, Texas on October 12, 2016. He declared himself at the border post there, and requested asylum in this country. *Id.* ¶¶ 16-17.

55. Mr. Abdi then spent approximately two weeks at a detention center in Texas and was transferred to Batavia on or around October 26, 2016. *Id.* ¶ 18.

56. Mr. Abdi was given a credible fear interview on November 21, 2016. The officer who conducted the interview determined there was a significant possibility that Mr. Abdi's claims would be found credible in a full asylum hearing before an immigration judge. The officer also found that there appeared to be no potential bars to asylum. Finally, the officer noted that Mr. Abdi's identity had been determined with a reasonable degree of certainty. *See* Credible Fear Interview of Hanad Abdi (dated Nov. 23, 2016) at 3-4, Abdi Decl. Ex. A.

57. On December 8, 2016, Mr. Abdi was provided notice that he would have the opportunity to present his claim for asylum before an immigration judge. *See* Notice to Appear (dated Nov. 23, 2016, served Dec. 8, 2016), Abdi Decl. Ex. B.

58. On December 8, 2016, he also received a form entitled “Parole Advisal and Scheduling Notification.” The advisal informed him that since he had passed his CFI, ICE would consider releasing him from custody on parole pending the resolution of his immigration case. The form went on to explain that ICE may grant parole if he established (1) his identity, (2) that he would appear for future court dates and enforcement appointments, and (3) that he was neither a security risk nor danger to the community. *See* Parole Advisal and Scheduling Notification (dated Dec. 8, 2016) at 1-2, Abdi Decl. Ex. C.

59. Mr. Abdi had a parole interview before his ICE deportation officer, Mitchell Muehlig, on December 15, 2016. Abdi Decl. ¶ 25.

60. In support of his application for parole, Mr. Abdi provided a copy of his birth certificate and he collected affidavits and supporting documentation from relatives and a family friend residing in the U.S. who verified they knew him personally. *Id.* ¶ 26.

61. In a letter dated December 19, 2016, Mr. Abdi received notice that his parole had been denied because he had failed to establish his identity to ICE’s satisfaction. The form he received, titled “Notification Declining to Grant Parole,” included checkboxes for various grounds under which ICE may deny parole. In Mr. Abdi’s case, only the “identity” checkboxes were marked. ICE did not check the boxes indicating he was ineligible for parole on the grounds that he was a flight risk or danger to the community, nor did it mark the boxes for “additional exceptional, overriding factors” related to law

enforcement or national security concerns that would warrant a denial of parole. *See* Notification Declining to Grant Parole (dated Dec. 19, 2016) at 1-2, Abdi Decl. Ex. D (“Dec. 19 Parole Denial”).

62. Mr. Abdi requested that ICE reconsider its decision. Abdi Decl. ¶ 29. In a letter dated January 10, he received another “Notification Declining to Grant Parole” form, also indicating that the reason ICE was denying his parole was because he had not established his identity to ICE’s satisfaction. On this form too, ICE did not find Mr. Abdi to be a flight risk or danger to the community, or to present “additional exceptional, overriding factors” against granting parole. *See* Notification Declining to Grant Parole (dated Jan. 10, 2017) at 1-2, Abdi Decl. Ex. E (“Jan. 10 Parole Denial”).

63. Both parole denial forms that Mr. Abdi received, dated December 19 and January 10 respectively, indicated that he could request redetermination if he provided additional documents like “government-issued documents such as passports, birth certificates, or identity cards” to establish his identity. The form also informed Mr. Abdi that his identity may be established “through written statements prepared by individuals whom [he] know[s] in the United States and whose identity ICE can verify to its satisfaction.” *See* Dec. 19 Parole Denial at 2; Jan. 10 Parole Denial at 2.

64. Mr. Abdi asked his deportation officer, DO Muehlig, why his parole requests were denied. Officer Muehlig told him it was because he had not submitted photo identification—even though ICE’s own parole guidance and parole denial form makes clear there is no requirement that an asylum-seeker provide photo identification. Abdi Decl. ¶ 31.

65. Mr. Abdi retained Siana McLean as his immigration lawyer on February 28, 2017. Abdi Decl. ¶ 32. Ms. McLean has assisted Mr. Abdi in preparing for his asylum hearing in immigration court.

66. Ms. McLean renewed Mr. Abdi's request for release on parole on April 20. Declaration of Siana McLean ("McLean Decl.") at ¶ 4. Ms. McLean submitted a cover letter along with the request and provided documentation directly responsive to ICE's previous determinations that Mr. Abdi had failed to establish his identity. She submitted a Somali government-issued photo identification card for Mr. Abdi along with a certified English translation. She also resubmitted an affidavit from Mr. Abdi's uncle, a lawful permanent resident, who welcomed Mr. Abdi to live with him, and affidavits from Mr. Abdi's aunt and family friend. All three affiants provided copies of their U.S.- or state-issued government photo-identification, and all three individuals stated they knew Mr. Abdi and his family and could confirm his identity. *See* Immediate Parole Requested for Hanad Abdi with supporting exhibits (dated April 20, 2017), McLean Decl. Ex. A.

67. In further support of the parole request, Ms. McLean submitted medical records for Mr. Abdi demonstrating the physical and psychological toll that continued detention was taking on him. *Id.*

68. On May 4, 2017, Ms. McLean received a two-sentence letter from Acting Field Office Director Brophy denying parole. The body of the letter states, in its entirety: "This letter is in response to your recent correspondence requesting that your client be released on parole. After a careful review of the evidence you submitted and the Immigration file, your request for your client's release is denied." No reasoning was offered, and no

notification form with checkboxes was provided. Ltr. from T. Brophy to S. McLean (dated May 4, 2017), McLean Decl. Ex. B.

69. After Mr. Abdi received his third parole denial on May 4, 2017, he asked his deportation officer why his request was rejected again. DO Muehlig said that there was nothing he could do, and the decision to deny parole had been made by his superiors. He told Mr. Abdi that “everything changed” in January and parole has “all stopped” under the new administration. Abdi Decl. ¶¶ 35-36.

70. While he was detained Mr. Abdi was unable to effectively assist Ms. McLean in preparing for his asylum hearing. To support his asylum claim he must track down documents and witnesses from Somalia including his father’s death certificate, the police report he filed in Mogadishu, and affidavits from his aunt and younger siblings corroborating the family’s persecution. However, he is unaware of his family’s present whereabouts in Somalia, and while detained, he could not reach out from detention to friends outside the United States to determine where they are. Abdi Decl. ¶¶ 40-41; McLean Decl. ¶ 11.

71. In Ms. McLean’s experience, non-detained clients can actively assist in the preparation of their cases by reaching out to family and friends in their home countries via social media, WhatsApp, and e-mail, achieving far greater results than a lawyer or other outside advocate ever could. They can connect with their networks, explain the need for documents to support their asylum applications, and enlist their friends’ and families’ help in collecting these documents. Detained clients are simply unable to carry out such basic tasks. McLean Decl. ¶ 12.

72. Mr. Abdi is also suffering from debilitating anxiety and depression resulting from the events that led to his fleeing Somalia, and these conditions are exacerbated by his lengthy detention in the United States. While at Batavia, he had nightmares when he slept and woke up screaming from them. Abdi Decl. ¶ 37.

73. In detention, Mr. Abdi did not have the opportunity to receive adequate counseling or therapy for the trauma he has suffered and his psychological situation deteriorated to the point where he had trouble sleeping and breathing. Abdi Decl. ¶ 38.

74. Mr. Abdi's anxiety and depression in detention were compounded by the fact that he has been unable to ascertain the whereabouts of his four younger siblings. When Mr. Abdi fled Buulo Mareer, he was forced to leave them behind. He hopes they ran away before the Habar-gidir came back to his house looking for him. He wants to call neighbors and friends to inquire about them, but he was unable to do so from detention. He is terrified that the reason he has not heard from his siblings is because they were captured like him or killed like his father. *Id.* ¶ 39.

75. After this lawsuit was filed, and as a direct result of the lawsuit, ICE paroled Mr. Abdi on August 16, 2017. His release is conditioned on a forensic analysis of his identity documents, which is not yet complete. The standards used in the analysis and the accuracy of any results are unknown to Mr. Abdi and his counsel. He also remains subject to restraints on his liberty, including around-the-clock GPS monitoring. Mr. Abdi has not yet received a full list of any other conditions that might be imposed upon his continued release. Declaration of Robert Hodgson ("Hodgson Decl.") ¶ 3.

BACKGROUND REGARDING PAROLE AND DETENTION PRACTICES

A. Asylum and Parole Practices

76. To enter the United States, non-citizens must present themselves for inspection at a port of entry and establish their admissibility. Persons who cannot demonstrate they are admissible are generally put into a streamlined removal process known as expedited removal, where they do not have the opportunity to present their case before an immigration judge (“IJ”).

77. However, there are two groups of applicants for admission who, despite appearing to be inadmissible, are eligible for full removal proceedings in immigration court. They are (a) asylum-seekers who have been found to have a credible fear of persecution and (b) persons, including lawful permanent residents (“LPRs”), with valid documents who are nevertheless not “clearly and beyond a doubt” entitled to be admitted.

78. To pass a credible fear interview (“CFI”), a person must demonstrate to the satisfaction of an immigration officer that he or she has a “significant possibility” of being granted asylum.

79. All persons deemed inadmissible are subject to mandatory detention. However, the government may release on parole any individual seeking admission to the U.S., including asylum-seekers in removal proceedings.

80. In 2009, ICE issued a directive aimed at ensuring transparency and consistency across the country in the issuance of parole for arriving asylum-seekers who have passed a CFI. *See* ICE Policy No. 11002.1: Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009) (“Parole Directive”), Declaration of Aadhithi Padmanabhan (“Padmanabhan Decl.”), Ex A.

81. The Parole Directive provides that “when an arriving alien found to have a credible fear establishes to the satisfaction of [ICE] his or her identity and that he or she presents neither a flight risk nor danger to the community, [ICE] should, absent additional factors...parole the alien on the basis that his or her continued detention is not in the public interest.”

B. Government’s Representations that Parole Directive Remains in Effect

82. On February 20, 2017, DHS Secretary Kelly issued a memorandum that addressed, among other things, parole procedures. *See* Memorandum from Secretary John Kelly, Implementing the President’s Border Security and Immigration Enforcement Improvement Policies, Padmanabhan Decl. Ex. B. That memorandum stated that the Parole Directive “shall remain in full force and effect” pending the Secretary’s “further review and evaluation....” *Id.* at 9-10.

83. The Government has also represented to the Supreme Court of the United States that the Parole Directive remains in full force and effect. In *Jennings v. Rodriguez*, a case in which the plaintiffs challenge the government’s policy of denying arriving asylum-seekers a bond hearing before an immigration judge—an alternative mechanism for detainees to seek release—the Government has assured the Supreme Court that ICE continues to apply the Parole Directive in an attempt to argue that asylum-seekers have a robust and navigable means of securing release from detention. Gov. Suppl. Reply Br., at 6 n. 2, *Jennings v. Rodriguez*, No. 15-1204 (brief filed Feb. 21, 2017 (quoting Secretary Kelly’s Feb. 20 memo)), Padmanabhan Decl., Ex. C.

84. The Government explicitly describes its parole policy as one that “automatically consider[s] parole for arriving aliens found to have a credible fear, and to release the alien

if he establishes his identity, demonstrates that he is not a flight risk or danger, and there are no countervailing considerations.” *Id.* at 6 (emphasis added). The brief goes on to say that the parole “policy calls for far more than ‘checking a box on a form, with no hearing, no record and no appeal’ . . . It provides notice to the alien, an interview, the opportunity to respond and present evidence, a custody determination by an officer who did not conduct the credible-fear screening, supervisory review, and further parole consideration based upon changed circumstances or new evidence.” *Id.* at 6-7.

85. Indeed, the Government has consistently relied on the fact that arriving asylum-seekers already enjoy “extensive safeguards” that protect them from “arbitrary deprivations of liberty”—in particular, the presumption of release on parole—to argue that any liberty interests this group may have are adequately protected and there is no need for additional process in the form of a bond hearing before an immigration judge. Gov. Suppl. Br., *Jennings v. Rodriguez*, No. 15-1204 (brief filed Jan. 31, 2017), at 7, Padmanabhan Decl., Ex. D; *see also id.* at 10-11; Gov. Supp. Reply Br. at 6. At oral argument in *Jennings*, then-Acting Solicitor General Ian Gershengorn told the Justices that “the government does use parole for a lot of these individuals” to demonstrate they “actually get process.” Excerpt of Transcript of Oral Argument at 68-69, *Jennings v. Rodriguez*, No. 15-1204. Padmanabhan Decl., Ex. E.

86. The Supreme Court did not decide the *Jennings* case in the 2016-17 term. Instead the case has been restored to the calendar for reargument in the next Supreme Court term.

87. Since the representations made by Secretary Kelly and the government in *Jennings*, there has been no formal modification or rescission of the Parole Directive.

C. Apparent Change in Parole Adjudication Practices at Batavia

88. Data obtained via a Freedom of Information request from the American Civil Liberties Union shows that between January and September 2015, 15 out of 17 requests for parole at Batavia by asylum seekers who had passed a CFI were granted—an 88% parole grant rate. *See* Padmanabhan Decl. ¶¶ 7-8.

89. There are only a small number of lawyers who regularly represent BFDf detainees. Since FOIA data for 2017 is not available, the petitioners' undersigned counsel has asked several of these practitioners about their experience with parole in 2017. *See Id.* ¶¶ 2-6.

90. Based on these conversations, the petitioners' counsel has confirmed only two parole grants for asylum-seekers who passed a CFI at Batavia in 2017 as of the original filing of this case on July 28, 2017. By contrast, 24 parole requests were denied in that time period—an approximately 8% parole grant rate. *Id.* ¶ 5.

91. In addition to this drastic reversal in parole adjudication outcomes, other indicators point to an abrupt change of parole practices at Batavia despite the administration's assurances that the Parole Directive remains in effect.

92. Siana McLean, Mr. Abdi's immigration lawyer, wrote to the Acting Field Office Director, Thomas Brophy, on April 26, 2017, to inquire whether the Field Office was still following the Parole Directive. McLean Decl. ¶ 6.

93. In response to her letter, she received a phone call from Deportation Officer Ball, who informed her that parole adjudication practices have changed under the new administration. McLean Decl. ¶ 7.

94. Desiree Lurf, Mr. Barrios Ramos's lawyer, spoke with a deportation officer, DO Ensminger, in early March about the parole policy. DO Ensminger also informed Ms. Lurf that the parole adjudication practices at Batavia have changed under the new administration. Lurf Decl. ¶ 9.

95. Both Mr. Abdi and Mr. Barrios Ramos were told by their respective deportation officers that parole is no longer available at Batavia.

96. The refusal to follow the Parole Directive at Batavia contradicts the public statements made by the Trump administration that the Parole Directive remains "in full force and effect," and it cannot be reconciled with the requirements of the Constitution, relevant statutes, and regulations.

CLASS ACTION ALLEGATIONS

97. The case is brought as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), or in the alternative, as a representative habeas action pursuant to procedures analogous to Rule 23 on behalf of all arriving asylum-seekers who have passed a credible fear interview and who are or will be detained at the Buffalo Federal Detention Facility and who have not been granted parole. All class members are detained pursuant to the mandatory detention provision of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(1)(B)(ii).

98. The case also is brought on behalf of a sub-class consisting of those arriving asylum-seekers who are detained at the Buffalo Federal Detention Facility, have passed a credible fear interview, and have been or will be detained for more than six months without a bond hearing before an immigration judge (the "prolonged detention sub-class").

99. The proposed class and prolonged detention sub-class are sufficiently numerous so as to make joinder impracticable. Upon information and belief, the class consists of more than 40 members. Given the court calendar at the Batavia Immigration Court, the majority of arriving asylum-seekers remain incarcerated for six months or more as they await adjudication of their asylum claims. Therefore, upon information and belief, the sub-class also consists of more than forty members. Joinder is also impracticable because many in the proposed class and sub-class are *pro se*, indigent, have limited English proficiency, and/or have a limited understanding of the U.S. judicial system.

100. There are common questions of law and fact affecting class members, including (a) whether the Government has a policy or practice of detaining arriving asylum-seekers who have passed a credible fear interview without parole at Batavia; (b) whether the Government has a policy or practice of not following the procedures and criteria of the 2009 Parole Directive at Batavia; (c) whether the Due Process Clause or the Immigration and Nationality Act and its implementing regulations authorize such detention without parole.

101. There are common questions of law and fact affecting prolonged detention sub-class members, including (a) whether the Government has a policy or practice of detaining arriving asylum-seekers who have passed a credible fear interview for longer than six months without providing a hearing to determine whether detention is justified; (b) whether the Immigration and Nationality Act authorizes this detention policy or practice; and (c) whether this detention policy or practice violates the Due Process Clause.

102. Mr. Barrios Ramos's claims are typical of those of the class and prolonged detention sub-class with respect to the legality of the Government's policies and practices

at issue. The prosecution of individual actions against the respondents would create a risk of inconsistent and varying adjudications, which would result in variable standards of conduct for the respondents.

103. Mr. Barrios Ramos will fairly and adequately protect the interests of the class and sub-class. He is unaware of any conflicts that would preclude fair and adequate representation.

104. Proposed class counsel has extensive experience litigating similar matters.

105. The respondents' policy or practice of detaining class members without parole or a bond hearing applies to the class and sub-class respectively, making class-wide injunctive and declaratory relief appropriate.

CAUSES OF ACTION

FIRST CLAIM

106. The parole denials of the petitioners and the proposed class violate 8 U.S.C. § 1182(d)(5)(A) and 8 C.F.R. § 212.5.

SECOND CLAIM

107. The parole denials of the petitioners and the proposed class violate the Due Process Clause of Fifth Amendment.

THIRD CLAIM

108. The prolonged detention of the petitioners and the proposed prolonged detention sub-class without a bond hearing violates 8 U.S.C. § 1225(b) of the Immigration and Nationality Act.

FOURTH CLAIM

109. The prolonged detention of the petitioners and the proposed prolonged detention sub-class without a bond hearing violates the Due Process Clause of the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE the petitioners respectfully request that the Court:

110. Assume jurisdiction over this matter;
111. Order the respondents to release Mr. Abdi and Mr. Barrios Ramos on parole under only those conditions authorized by the parole statute and regulation;
112. Order the respondents to adjudicate or readjudicate parole requests of all class members in conformance with the 2009 Parole Directive;
113. Declare that the respondents may not detain class members in violation of the 2009 Parole Directive;
114. Order the respondents to provide the prolonged detention sub-class members a bond hearing before an immigration judge where the Government bears the burden of justifying further detention by clear and convincing evidence;
115. Declare that the respondents may not detain the prolonged detention sub-class members for six months or more without providing them a bond hearing before an immigration judge where the Government bears the burden of justifying further detention by clear and convincing evidence;
116. Award the named petitioners and other members of the proposed class reasonable attorneys' fees and costs for this action;
117. Grant any other relief the Court deems just and proper.

Dated: August 21, 2017
New York, NY

Respectfully Submitted,

/s/ Aadhithi Padmanabhan
AADHITHI PADMANABHAN
ROBERT HODGSON
CHRISTOPHER DUNN
PAIGE AUSTIN*
New York Civil Liberties
Foundation
125 Broad Street, 19th Floor,
New York, NY 10004
Tel: (212) 607-3300
apadmanabhan@nyclu.org
rhodgson@nyclu.org
cdunn@nyclu.org
paustin@nyclu.org

Counsel for Petitioners

MARIKO HIROSE
International Refugee Assistance
Project
40 Rector Street, 9th Floor,
New York, NY 10006
Tel: (646) 459-3044
mhirose@refugeerights.org

Of Counsel

** Application for admission to
W.D.N.Y. pending*