**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| R.I.L.R., *et al.*, on behalf of themselves and others similarly situated,<br><br>*Plaintiffs,*<br><br>*v.*<br><br>Jeh JOHNSON, Secretary of the Department of Homeland Security, in his official capacity, *et al.*<br><br>*Defendants.* | Civil Action No. 1:15-cv-00011 (JEB) |

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

The Department of Homeland Security ("DHS") admits that it is detaining mothers and children fleeing persecution in Central America to send a message to others: if you come to America, you will be detained. This No-Release Policy is illegal. The Immigration and Nationality Act ("INA"), read as it must be to avoid serious constitutional problems, prohibits DHS from doing exactly that. Because vulnerable children and their mothers are suffering irreparable harm every day this unlawful policy remains in place, this Court should enjoin it.

DHS has three basic responses: (1) it insists that the No-Release Policy is immune from review; (2) it disputes that it has a No-Release Policy, despite admitting to all relevant aspects of such policy; and (3) it attempts to defend its policy as lawful by treating noncitizens who have entered the United States as if they have no due process protections, ignoring longstanding precedent to the contrary. All of these arguments fail.

First, case law uniformly rejects DHS's position that a restriction on judicial review for "discretionary" determinations forecloses judicial review of a claim that a DHS policy exceeds its legal authority. Neither is there any merit to DHS's argument that its conduct is immune from review because immigration judges ("IJs"), located within a *different* agency, are eventually sparing asylum-seeking families further harm. IJ determinations occur only after the families have suffered weeks or months of unlawful detention. These weeks or months in detention matter, particularly for children, and this case is about precisely that period of unlawful detention. Ultimate release by a different agency does not undo the wounds that DHS's No-Release Policy inflicts.

Nor can DHS wield the refusal of IJs to follow its No-Release Policy as a shield, by contending that any individual plaintiff's challenge to the No-Release Policy will be moot by the time relief can be secured. Well-established case law ensures that DHS cannot escape review of

its misconduct in this way. Plaintiffs brought this case as a class action. A claim brought on behalf of a class is not moot where, as here, government action harms an inherently transitory group of individuals and "the population as a whole retains a continuing live claim." *DL v. Dist. of Columbia*, 302 F.R.D. 1, 20 (D.D.C. 2013) (quoting Newberg on Class Actions § 2:13 (5th ed. 2014)). The proposed class in this case is simple and uncontroversial, and for the reasons set out in the supplemental memorandum in support of Plaintiffs' preliminary injunction motion, the Court should proceed to provisionally certify the class for purposes of the preliminary injunction.

Second, DHS's effort to deny the existence of a No-Release Policy fails. Indeed, DHS either fails to dispute or openly concedes the existence of all relevant elements of the Policy. DHS does not dispute that prior to June 2014 it routinely released or set bonds for asylum-seekers who passed a credible fear screening and were eligible for release on recognizance or bond. Nor does DHS dispute that it now refuses to release asylum-seeking mothers and children who meet these same criteria, or controvert the candid admission of its own officer that DHS has issued a "directive" not to grant release to such families. To the contrary, DHS *admits* that it treats deterrence of the migration of others as a justification for detention of such mothers and children – the core component of the No-Release Policy. And while DHS asserts that deterrence is just one factor among others in an "individualized consideration," it cannot deny – and its own statistics confirm – that nearly everyone in class members' position is denied release on generalized deterrence grounds. Isolated exceptions do not disprove the general rule: a No-Release Policy is in place. DHS's "there is no policy" defense is mere semantics.

Third, DHS attempts to sidestep the cases holding that civil detention for deterrence purposes is unconstitutional – and that the INA must therefore be read to prohibit it – by arguing that noncitizens who have unlawfully entered the United States are not entitled to due process.

But that argument contravenes more than a century's worth of Supreme Court precedent, and depends on the baseless claim that DHS can take a group of noncitizens with constitutional protections and unilaterally "assimilate" them to unprotected status. Moreover, as the Supreme Court has also made clear, the INA must be interpreted to avoid constitutional problems in *any* application. Accordingly, even if the detained individuals here were themselves deemed to lack due process rights, the relevant provision of the INA still could not validly be construed to permit their detention for deterrence purposes.

In sum, the No-Release Policy exists, is unlawful, and is subject to review by this Court. Because the class of individuals subject to the policy is inherently transitory, a provisional class should be certified and a preliminary injunction entered requiring DHS to make individualized custody determinations for asylum-seeking mothers and children on lawful grounds.

## ARGUMENT

### I. The Court Has Jurisdiction to Review and Enjoin the Illegal No-Release Policy.

#### A. DHS's Violation of the Law Is Not a "Discretionary Judgment" Exempt from Judicial Review.

DHS wrongly asserts that, even if it employs an illegal, agency-wide framework for making release determinations, that action is insulated from judicial review. DHS fails to mention, let alone satisfy, the standard requiring "clear and convincing" evidence that Congress intends to "restrict access to judicial review." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670-71 (1986) (internal quotation marks omitted). And it tries to explain away the case law refuting its position by inventing distinctions with no statutory basis.

The provision on which DHS relies, 8 U.S.C. § 1226(e), exempts from review only "discretionary judgment[s] regarding the application of [Section 1226]." No one disputes that "*discretionary* decisions granting or denying bond are not subject to judicial review." *Prieto-*

*Romero v. Clark*, 534 F.3d 1053, 1058 (9th Cir. 2008) (emphasis added). But this case is not about a "discretionary decision" to grant or deny bond to any particular individual based on the facts of her or his case. Rather, it is a challenge to an overarching policy that DHS applies in making bond decisions, one which violates Section 1226(a), its implementing regulations, and the Constitution. It obviously is not within DHS's "discretion" to decide whether it will be bound by the law. *Cf. Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986) ("A government official has no discretion to violate the binding laws, regulations, or policies that define the extent of his official powers."). Tellingly, DHS fails to cite a single case applying Section 1226(e) to bar a constitutional, statutory, or regulatory challenge to agency action.

As explained in our opening brief, every court of appeals to address the question has recognized the difference between discretionary judgments, to which Section 1226(e) applies, and legal challenges to agency authority, to which it does not. PI Br. 29 & n.22. DHS says that Plaintiffs cannot rely on cases relating to detention under Section 1226(c) (rather than Section 1226(a)), or cases that do relate to Section 1226(a) but that are brought in habeas rather than under the APA. But these are distinctions without a difference.

For example, the Third Circuit recently held that courts have jurisdiction to determine "whether the immigration officials had statutory authority to impose mandatory detention." *Sylvain v. U.S. Att'y Gen.*, 714 F.3d 150, 155 (3d Cir. 2013). It did so because "whether the officials had authority is not a 'discretionary judgment.'" *Id.* The holding had nothing to do with the fact that the alien in that case was detained under Section 1226(c) rather than Section 1226(a). Likewise, when the Seventh Circuit rejected DHS's claim that Section 1226(e) precluded a statutory and constitutional challenge to its bond decision in a habeas proceeding,

the Court so held because the Section 1226(e) bar on "review[ing] judgments designated as discretionary . . . does not deprive us of our authority to review statutory and constitutional challenges." *Al-Siddiqi v. Achim*, 531 F.3d 490, 494 (7th Cir. 2008).[1]

The same principle applies here. Plaintiffs challenge DHS's *legal authority* under Section 1226(a), its implementing regulations, and the Due Process Clause to deny release for reasons of deterrence. Section 1226(e) does not foreclose such a challenge, any more than it would in a Section 1226(c) or habeas context. What matters is that Plaintiffs are challenging DHS's overall illegal policy – not any particular "discretionary judgment" on DHS's part. Accordingly, Section 1226(e) does not apply.

**B. Plaintiffs Have Standing to Challenge the No-Release Policy.**

DHS's claim that Plaintiffs lack standing also is without merit. At the time the Amended Complaint was filed, Plaintiffs G.C.R. and J.A.R. were detained pursuant to the No-Release Policy. Accordingly, they have standing. *See Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) ("[S]tanding is assessed as of the time a suit commences." (internal quotation marks omitted)); *see also Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) ("To establish jurisdiction, the court need only find one plaintiff who has standing.").

DHS argues that G.C.R. and J.A.R. lack standing because they "in fact received an individualized custody determination from ICE in which permissible discretionary considerations were evaluated." DHS Br. 10. That, however, is an argument about the merits – not about standing. The substantive issue in this case is whether DHS may lawfully detain

[1] DHS's reliance on *Leonardo v. Crawford*, 646 F.3d 1157 (9th Cir. 2011), is unfounded. *Leonardo* simply states that Section 1226(e) does not divest "habeas jurisdiction" to review "bond hearing determinations for constitutional claims and legal error." *Id.* at 1160 (internal quotation marks omitted). That unremarkable statement does not remotely suggest that Section 1226(e) applies differently in habeas and non-habeas actions.

asylum-seeking families based on grounds of general deterrence. Plaintiffs G.C.R. and J.A.R. were detained on that basis when the case was filed, and they contend that they did *not* receive the kind of individualized custody determination based on permissible factors that Section 1226(a), its implementing regulations, and the Due Process Clause require. They thus clearly have standing to challenge the No-Release Policy.

DHS also argues that G.C.R.'s and J.A.R.'s harms are not "redressable" because the relief they seek (individualized consideration from ICE) does not address the alleged harm (detention). DHS Br. 11. DHS, however, ignores the well-established rule that when a plaintiff challenges the Government's *procedures*, she "never has to prove that if [she] had received the [proper] procedure the substantive result would have been altered." *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002). Plaintiffs were injured because DHS detained them for the illegal purpose of deterrence. An injunction requiring DHS to conduct lawful custody determinations would necessarily redress this injury, whatever the "substantive result" of those determinations.

In any event, Plaintiffs have indeed shown that lawful custody determinations would "likely" lead to release in most cases. Before DHS' massive expansion of the family detention system and adoption of the No-Release Policy, migrant families were generally not detained, and asylum-seekers found to have a credible fear of persecution were considered for release based on appropriate individualized factors. As a result they were typically released. Declaration of Michelle Brané ("Brané Decl.") ¶¶ 11-12 (Dec. 15, 2014) (Exhibit 1 to PI Br.); Declaration of Valerie Burch ("Burch Decl.") ¶¶ 7-9 (Jan. 15, 2015).[2] Since the No-Release Policy was

[2] Corrected versions of the Burch declaration and the declarations of Matthew Archambeault, Lauren Connell, and Virginia Raymond containing the language required by 28 U.S.C. § 1746 (continued…)

adopted, however, nearly *everyone* in Plaintiffs' position is denied release. In these circumstances, it is far from "speculative" to conclude that if the illegal No-Release Policy were enjoined, most asylum-seeking families would be released.

The fact that the named Plaintiffs have ultimately been granted release by IJs only confirms this point; it does not undermine it, as DHS suggests. After making individualized custody determinations based on permissible factors, IJs have ruled that each Plaintiff is entitled to release after posting an appropriate bond. Notably, the statistics presented by DHS reveal a similar picture: during the past six and a half months, at least 605 individuals who were denied release as a result of DHS's No-Release Policy were subsequently released on bond by IJs. Declaration of Marla M. Jones ("Jones Decl.") ¶ 6 (Jan. 23, 2014) (Exhibit D to DHS Br.). This is a clear indication that most asylum-seeking families would be spared weeks or months of detention but for DHS's application of the illegal No-Release Policy.

### C. Numerous Present and Future Asylum-Seekers Have Non-Moot Claims That Can Appropriately Be Reached Through Provisional Class Certification.

In appropriate cases, "a class action should not be deemed moot even if the named plaintiff's claim becomes moot prior to certification of the class." *Basel v. Knebel*, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977) (citing *Sosna v. Iowa*, 419 U.S. 393 (1975)). "The inherently transitory exception to mootness permits relation back [to the time the complaint is filed] in any situation where composition of the claimant population is fluid, but the population as a whole retains a continuing live claim." *DL*, 302 F.R.D. at 20 (internal quotation marks omitted).

This rule applies here. The period of unlawful detention at issue in this case is weeks or months, *i.e.*, the period between ICE's initial determinations based on the illegal No-Release

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are attached as Exhibits 1-4. There are no other material differences between the original and corrected versions of these declarations.

Policy and the time that detained families are able to obtain IJ redeterminations (*i.e.*, redeterminations from a different agency, the Department of Justice). *See* Hines Decl. ¶ 21; McLeod Decl. ¶ 14. This period of unlawful detention, while significant, has proven too short for the named Plaintiffs to obtain meaningful relief on their own behalves. The irreparable harm caused by the No-Release Policy unfortunately has run its course for them.

Meanwhile, however, the No-Release Policy continues in effect. New asylum-seeking families – including vulnerable children – become subject to the policy and suffer unlawful detention with no immediate recourse. This harm can only be effectively challenged if the current Plaintiffs are permitted to pursue their claims on behalf of a provisional class. There could hardly be a clearer case for applying the "inherently transitory" exception to mootness. *See Sosna*, 419 U.S. at 402 n.11 (inherently transitory doctrine is based on the "reality" that cases should be able to go forward when "otherwise the issue would evade review.").

DHS's only response is that "relation back" purportedly is unavailable because G.C.R. and J.A.R. were "scheduled to receive the very individualized determination they are seeking" at the time they filed the amended complaint. DHS Br. 13 n.2. That response is misleading. This case is about DHS's *initial* custody determinations, in which DHS has applied the No-Release Policy to detain asylum-seeking families in order to deter other migrants from coming to the United States. At the time they filed, G.C.R. and J.A.R. were detained pursuant to that policy. It is irrelevant that they were scheduled to receive IJ determinations in the future.

Finally, DHS ignores Plaintiffs' arguments for provisional class certification. DHS Br. 29 n.6. Contrary to DHS's claim, Plaintiffs have not attempted an "end-run" (*id.*) around the Court's decision to defer briefing on full class certification. To the contrary, Plaintiffs have been forthright with both the Court and the Government that they seek a preliminary injunction on

behalf of a provisional class. As Plaintiffs' uncontradicted supplemental memorandum showed, provisional certification in this case could not be more straightforward. *See* Supp. Memo. 1-5. The Government's own data demonstrates that the class is sufficiently numerous: between June and December 2014, *at least* 605 detained members of the proposed class were denied release as a result of DHS's No-Release Policy, only to be subsequently released on bond by IJs. Jones Decl. ¶ 6. Because all class members have been detained on unlawful deterrence grounds, commonality and typicality are also satisfied, and injunctive relief is appropriate to protect the class as a whole. Nor is there any serious dispute that the class will be adequately represented. Thus, provisional certification is warranted.[3]

**II. The No-Release Policy Exists.**

DHS has adopted a No-Release Policy. Since June 2014, DHS has been denying release to detained asylum-seeking families not because they pose a danger to the community or flight risk, but to deter other migrants from coming to the country. Indeed, in defending its no-release determinations in immigration court, DHS argues that a "'no bond' or 'high bond' *policy*" is necessary to "significantly reduce the unlawful mass migration of Guatemalans, Hondurans, and Salvadoran[s]." Immigration Court Declaration of Philip T. Miller, ICE Assistant Director of Field Operations for Enforcement and Removal Operations ("Miller Decl.") ¶ 9 (emphasis added) (Exhibit A to Declaration of Barbara Hines ("Hines Decl.") [PI Brief Exhibit 4]). Members of Congress, in turn, have criticized DHS's adoption of a "'no-bond/high bond' *policy*." Letter to Pres. Obama from Rep. Lofgren et al., at 2 (Oct. 27, 2014) (emphasis added), *available at* https://lofgren.house.gov/ uploadedfiles/family_detention_letter_october_2014.pdf.

[3] While G.C.R. and J.A.R. have standing and are adequate representatives of the provisional class they seek to represent, we would be prepared if necessary to file an amended complaint adding additional plaintiffs who continue to be detained pursuant to the No-Release Policy.

DHS's contention that it does not have a No-Release Policy is mere semantics. Critically, DHS *admits* that it treats deterrence as a reason to detain mothers and children who are not a flight risk or danger to the community. *See* DHS Br. 14-16. DHS thus concedes that, in making custody determinations, it has instituted a general policy of deterring migration by others. Even if that were the extent of the policy, it is illegal and subject to review. *See infra* Part III.A.

It also is clear from the record that deterrence is not just *one* factor in DHS's custody determinations; it is the *dispositive* factor in nearly every case. DHS's own statistics reflect only 32 alleged releases by ICE of bond-eligible individuals over the past six and a half months, involving 16 family units or fewer.[4] Jones Decl. ¶ 6. The number of these individuals who were released pursuant to an initial custody determination is likely significantly less.[5] And even the more conservative 32 number is less than 5% of the relevant families ICE detained. *See id.* It is thus clear that denial of release for deterrence reasons is the rule with respect to such detained families, and that exceptions are few and far between. This is entirely consistent with Plaintiffs' evidence. *See, e.g.*, Declaration of Allegra McLeod ("McLeod Decl.") ¶ 14 (Exhibit 5 to PI Br.) (comprehensive review of detention at Artesia showed that 99% of bond-eligible asylum-seekers were denied release); Declaration of Virginia Marie Raymond ("Raymond Decl.") ¶ 7 (Jan. 15, 2015) (Exhibit 4) (describing "directive" received by ICE officers of "no bonds to anyone").

[4] The Jones declaration notes another 15 releases on bond for which DHS could not determine if ICE or an IJ was responsible. Jones Decl. ¶ 6. The number of releases on parole cited in the Jones declaration (92) is irrelevant because ICE typically uses the term "parole" only to describe release of non-bond-eligible individuals and DHS has offered no suggestion that it instead applied the "parole" term to bond-eligible individuals in this instance. *See id.*

[5] DHS does not say that ICE released any of the 32 individuals on bond as a result of an initial custody determination. It is far more likely that most were initially denied release under the No-Release Policy, and only subsequently released based on extreme humanitarian considerations, or the closure of the Artesia facility. *See, e.g.*, McLeod Decl. ¶ 14.

The existence of a No-Release Policy since the summer of 2014 is made crystal clear by Plaintiffs' uncontradicted evidence that, before then, DHS did not detain migrant families on a mass scale and granted release to the vast majority of asylum-seekers who passed a credible fear screening. Since that time, however, DHS has not only dramatically expanded its detention of asylum-seeking families; it has *denied* release to almost all detained families, even after they pass a credible fear screening and become bond eligible. The abrupt and unprecedented change in DHS's practice can only plausibly be explained by an agency-wide policy. Brané Decl. ¶¶ 11-12; Burch Decl. ¶¶ 7-9. Notably, DHS does not dispute Plaintiffs' evidence that ICE officers have received a "directive" of "no bonds to anyone." Raymond Decl. ¶ 7; *see also CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) ("[T]he agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule . . . but the record indicates otherwise."); *Royer v. Fed. Bureau of Prisons*, 934 F. Supp. 2d 92, 99-100 (D.D.C. 2013) (rejecting defendant's argument that no formal policy exists as "splitting hairs," when agency did not deny it acted in accordance with policy alleged).

The record is thus clear that the No-Release Policy exists.

## III. The No-Release Policy Is Illegal.

### A. The No-Release Policy Violates Section 1226(a).

As shown in our opening brief, the only legitimate grounds for immigration detention under Section 1226(a) are "preventing flight" and "protecting the community" from danger. *See Zadvydas v. Davis*, 533 U.S. 687, 690-91 (2001). DHS itself acknowledges in its brief that "'[a]n alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to national security . . . or that he is a poor bail risk.'" DHS Br. at 4 (quoting *Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976)). A line of Supreme Court cases firmly establishes that deterrence of others is *not* a permissible rationale for civil detention,

pursuant to basic principles of due process. PI Br. 15-16 (citing, *inter alia*, *Kansas v. Crane*, 534 U.S. 407, 412 (2002)). Section 1226(a) must thus be read to preclude detention based on deterrence, as otherwise it would raise serious constitutional problems under the Due Process Clause. PI Br. at 13-14.

DHS acknowledges that it requires ICE officers to consider deterrence of others in making detention determinations, but argues that this is appropriate because "individualized factors are . . . also being considered." DHS Br. 20. This argument does not pass muster. Quite apart from the fact that the weight of Plaintiffs' evidence points to a blanket policy, rather than individualized determinations, DHS admits that its agenda is deterrence-driven. *See, e.g.,* DHS Br. at 16. This in itself is unlawful.

DHS's only defense for utilizing deterrence as a basis for denying release to bond eligible families is that former Attorney General Ashcroft endorsed the use of deterrence in making custody determinations in *Matter of D-J-*, 23 I. & N. Dec. 572 (AG 2003). DHS Br. 20. But DHS's reliance on that erroneous decision is misplaced.

First, contrary to DHS's argument, *D-J-* is not entitled to deference. The "canon of constitutional avoidance trumps *Chevron* deference" where, as here, the argument for applying the canon is "serious." *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (internal quotation marks omitted).[6]

Second, DHS is simply wrong when it states, in reliance on *Matter of D-J-*, that Plaintiffs and those similarly situated have "extremely limited" due process rights. DHS Br. 18. For more than 100 years, the Supreme Court has repeatedly reaffirmed that noncitizens who have entered the United States – even if unlawfully – are protected by the Due Process Clause. As the

[6] Moreover, even if DHS is correct that it is bound by *Matter of D-J-*, this Court plainly is not.

Supreme Court explained in *Zadvydas*, "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." 533 U.S. at 693. However, "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, *unlawful*, *temporary*, or permanent." *Id.* (emphasis added) (internal citations omitted)); *see also Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1036 (5th Cir. 1982) ("The government does not dispute the general proposition that even aliens who have entered the United States unlawfully are assured the protections of the Fifth Amendment due process clause.").[7]

DHS ignores this rule, and instead relies on cases limiting the rights of aliens who have *not* entered the United States, but rather were stopped at the border. *See* 8 C.F.R. § 1.2 (classifying this group, previously referred to as "excludable aliens," as "arriving aliens"). For example, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), involved an excludable alien stopped at the border and held at Ellis Island. *Id.* at 213. Indeed, *Mezei* holds that a noncitizen who has made an entry *does* have due process rights. *Id.* at 212 ("[A]liens who

[7] *See also Plyler v. Doe*, 457 U.S. 202, 215 (1982) ("That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter . . . ."); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to [due process] protection." (internal citations omitted)); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (same); *Wong Wing v. United States*, 163 U.S. 228, 235, 238 (1896) (same); *accord Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992) ("[A]n alien who has unlawfully entered the United States has a Fifth Amendment procedural due process right to petition the government for political asylum and a statutory procedural due process right to a 'meaningful or fair evidentiary hearing.'" (alterations omitted) (quoting *Maldonado-Perez v. INS*, 865 F.2d 328, 332-33 (D.C. Cir. 1989)).

have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.")*.*[8]

Plaintiffs and every member of the proposed class have "entered" the United States and are thus entitled to due process protection. Yet DHS asserts that they are somehow "'assimilated' to the status of 'arriving aliens.'" DHS Br. 4. The Supreme Court decisions DHS cites, however, involve "assimilating" an alien to the *protected* status of "entrant alien." *See, e.g.*, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953) (returning resident alien's status "as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him"). They provide no support for stripping someone who already has "entrant alien" status of her constitutional rights by administrative fiat.[9] While an INA provision cited by DHS (8 U.S.C. § 1225) applies expedited removal procedures to certain entering aliens, it does not and could not change these aliens' *constitutional* status, nor does it purport to convert entering aliens into "arriving aliens."

Moreover, even assuming that, as unlawful entrants, Plaintiffs lack due process rights with respect to the procedures for their *admission* into the United States, this does not mean that Plaintiffs lack due process rights with respect to their unlawful *detention*. Because freedom from

[8] *See also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (arriving alien who "sought to enter the United States"); *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated on other grounds*, 559 U.S. 131 (2010) (aliens captured abroad and detained at Guantanamo Bay).

[9] *Accord Rafeedie v. INS*, 880 F.2d 506, 522-23 (D.C. Cir. 1989). Only one district court decision, *M.S.P.C. v. U.S. Customs & Border Protection*, 2014 WL 6476125 (D.N.M. Oct. 16, 2014), arguably supports DHS's position. That decision, however, contravenes the long line of authority holding that the Due Process Clause protects unlawful entrants. *See, e.g.*, *United States v. Raya-Vaca*, 771 F.3d 1195, 1203 (9th Cir. 2014) (alien apprehended seven miles north of the border had due process rights). Moreover, *M.S.P.C.* was concerned only with procedural rights in connection with aliens' "applications for admission" and not with due process rights implicated by unlawful detention. *See M.S.P.C.*, 2014 WL 6476125, at *10.

unlawful detention is "at the heart of the liberty that [the Due Process] Clause protects," *Zadvydas*, 533 U.S. at 690, Plaintiffs' due process interests in this case are not diminished by the fact that they may have weaker due process rights in other contexts. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 971-75 (9th Cir. 2004) (although excludable aliens may have limited due process rights to admission, they retain other Fifth Amendment rights); *accord Zadvydas*, 533 U.S. at 698; *Rosales-Garcia v. Holland*, 322 F.3d 386, 408-10 (6th Cir. 2003) (en banc); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987).

Furthermore, even if members of the proposed provisional class were not themselves entitled to due process protection – and they are – the No-Release Policy still would violate Section 1226(a). That is because Section 1226(a) also governs aliens who unquestionably *do* have due process rights, such as lawful permanent residents (LPRs). *See Prieto-Romero*, 534 F.3d at 1058. Subjecting such individuals to detention in order to deter others would violate the Due Process Clause. Section 1226(a) must thus be read to foreclose detention for purposes of deterrence. The statute cannot plausibly be deemed to have a *different* meaning when applied to Plaintiffs and members of the proposed class than it has when applied to others who are subject to it, such as LPRs and others who have been formally admitted to the country. As the Supreme Court has explained, where the interpretation of a statute is compelled by the doctrine of constitutional avoidance, that interpretation necessarily also governs when the statute is applied to aliens who may lack the same constitutional rights. *See Clark v. Martinez*, 543 U.S. 371, 380 (2005).

Finally, there is no merit to DHS's suggestion that the language "may detain" in Section 1226(a) is so open ended as to permit consideration of any factor, even a factor that is constitutionally suspect. DHS Br. 16. The Supreme Court rejected this very argument in

*Zadvydas*. *See* 533 U.S. at 691 (adopting limited construction of phrase "may detain" in 8 U.S.C. § 1231(a) in order to avoid serious constitutional concerns).

In sum, Section 1226(a) precludes immigration detention as a means of deterring other migrants because a reading to the contrary would raise serious constitutional problems. DHS admits that it has adopted a deterrence-driven policy that has resulted in the detention of all but a handful of asylum-seeking mothers and children who have passed a credible fear screening since June 2014. That policy cannot be justified by Attorney General Ashcroft's erroneous decision in *Matter of D-J-*. Accordingly, the No-Release Policy violates Section 1226(a).

### B. The No-Release Policy Violates DHS Regulations and Is Arbitrary and Capricious.

DHS fails even to respond to our other arguments demonstrating that the No-Release Policy is illegal. We explained in our opening brief that the No-Release Policy violates 8 C.F.R. § 1236.1(c)(8) by stripping ICE officers of the discretion to make individualized custody determinations based on flight risk and danger to the community. PI Br. 18-22. The record evidence demonstrates that ICE officers have been given a "directive" of "no bonds on anyone." Raymond Decl. ¶ 7. That is flatly inconsistent with committing release decisions to "the officer's discretion" based on flight risk and community danger, as Section 1236.1(c)(8) requires. That ICE officers have granted release based on extenuating circumstances in a small number of cases does not contradict the fact that, as a general rule, ICE officers have been stripped of the discretion afforded them by the regulation.

We further explained in our opening brief that the No-Release Policy is not rationally related to DHS's asserted interest in deterring migration. Not only does DHS fail to respond; its brief makes clear just how untethered the No-Release Policy is from its deterrence goal. A central DHS theme is that its no-release decisions do not really matter because IJs are routinely

reversing them anyway. In other words, IJs are preventing the No-Release Policy from having its hoped-for deterrent effect. Even if it were legitimate to detain vulnerable mothers and children in order to deter migration by others – and it is not – such detention clearly cannot be justified when DHS itself effectively admits that the interest of deterrence is not being advanced.

## IV. The No-Release Policy Should Be Set Aside Under the APA.

### A. The No-Release Policy Is Final Agency Action.

We explained in our opening brief that the No-Release Policy both "mark[s] the consummation of the agency's decisionmaking process" and is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted); *see* PI Br. 24-26. DHS ignores the evidence about its policy and the case law showing why that policy is final agency action. Instead it responds with three misguided arguments.

1. *Purported Written Policy Requirement.* DHS wrongly contends that there can be no final agency action because there is no written memorialization of the No-Release Policy (or at least not one it has disclosed publicly). DHS Br. 22. D.C. Circuit precedent forecloses this position. In *Venetian Casino Resort. L.L.C. v. EEOC*, 530 F.3d 925 (D.C. Cir. 2008), the Court concluded (over the agency's objection) that "the record" as a whole "leaves no doubt" that a policy existed, even though "the details . . . are still unclear." *Id.* at 929. The only written evidence of that policy was an agency manual, which the Court emphasized did *not* constitute the policy itself, but rather "illuminate[d] the nature of the policy." *Id.* at 931.

So too here, the record is clear that there is a policy. *See supra* Part II. Indeed, Defendant Miller's written statement urging IJs to affirm all of DHS's no-release decisions by adhering to a "'no bond' or 'high bond' policy," Miller Decl. ¶ 9, while not constituting the policy itself, certainly "illuminates the nature of the policy."

Other courts have likewise rejected "the proposition that an agency action, to be final and judicially reviewable, must be in writing," holding that "[b]oth law and logic suggest the contrary." *Grand Canyon Trust v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249, 1252 (D.N.M. 2003); *see also Sierra-Nevada Mem'l Miners Hosps., Inc. v. Sec'y, Dep't of Health & Human Servs.*, 1993 WL 841091, at *9, *12-13 (D.D.C. Mar. 31, 1993) (agency decision to deny petition based on "unpublished and unwritten policy" was final agency action, despite defendant's claim of no binding policy), *report and recommendation adopted by* 1993 WL 841092 (D.D.C. Apr 26, 1993). As a matter of "common sense," DHS's position must be rejected because it "would allow an agency to shield its decisions from judicial review simply by refusing to put those decisions in writing." *Grand Canyon Trust*, 283 F. Supp. 2d at 1252. Denying review of agency action that DHS essentially admits, but that the agency has studiously avoided writing down, contravenes the Supreme Court's instruction that finality must be interpreted "in a pragmatic way." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980).

The only case DHS cites in support of its "written policy" requirement, *Bark v. U.S. Forest Serv.*, 2014 WL 1289446, *6 (D.D.C. Mar. 28, 2014), does not so hold. There, the court simply mentioned the lack of a written policy in concluding that there was no concrete policy *at all*. The court explained that the plaintiffs were instead challenging nothing more than their own "amorphous description of the Forest Service's practices." *Id.*

By contrast, DHS's policy here is anything but "amorphous." It is quite concrete. As discussed above, DHS essentially admits that it now requires ICE officers to make custody determinations on the basis of deterrence. Indeed, it does not dispute the evidence that ICE officers have received a "directive" not to release asylum-seekers for this reason. Raymond Decl. ¶ 7. Nor does it dispute that this policy has had obvious consequences: until June 2014

most asylum-seekers who passed a credible fear screening and were bond-eligible were released by ICE on their own recognizance or on bond. Since June 2014, however, detained families who meet these same criteria are being denied release. These facts establish that the No-Release Policy is final agency action, not some amorphous program. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000) (an agency's "marching orders" with direct consequences are final agency action).

2. *"Generalized Complaint About Agency Behavior."* DHS also compares this case to those that involved a "generalized complaint about agency behavior," such as "a weapons procurement program of the Department of Defense or a drug interdiction program of the Drug Enforcement Administration." *Bark*, 2014 WL 1289446, at *6 (quoting *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006)), and *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885, 890 (1990)). Those cases, however, simply hold that the APA may not be invoked to seek "wholesale improvement of [a regulatory] program by court decree." *Lujan*, 497 U.S. at 891 (emphasis omitted). A valid APA action must instead "attack . . . some particular 'agency action' that causes [the plaintiff] harm." *Id.* This lawsuit does precisely that. DHS's adoption of a No-Release Policy in June 2014 is a particular agency action that subjects members of the proposed class to unlawful detention on deterrence grounds. The policy is thus subject to APA challenge.

3. *Isolated Exceptions.* Finally, DHS argues that there is no final agency action because individualized factors can override deterrence in rare cases. That DHS may make exceptions to its policy in a handful of cases does not, however, demonstrate the absence of final agency action. A policy constitutes final agency action whenever it "define[s] a fairly tight framework to circumscribe" individual determinations. *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113

(D.C. Cir. 1974). A policy that requires ICE officers to make custody decisions based on deterring other migrants, and that results in the denial of release in nearly all cases, surely constitutes such a "tight framework" for custody determinations. *See, e.g.*, *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988) ("EPA's claim to have been open to consideration of other factors does not make the . . . model any less of a rule."); *see also Appalachian Power Co.*, 208 F.3d at 1023 (final agency action existed where EPA gave "marching orders," even though they were not always followed).

**B. There Is No Adequate Alternative Remedy That Precludes APA Relief.**

In conclusory fashion, DHS asserts that APA relief is unavailable because either immigration courts or habeas review provides an adequate alternative remedy. DHS does not actually explain why this is, nor does it grapple with any of the points made in our opening brief.

1. *Immigration Courts*. As DHS recognizes, an asylum-seeker has the *option* of seeking a custody redetermination by an immigration court. DHS Br. 26. As explained in our opening brief, however, "it would be inconsistent with the plain language of [the APA] for courts to require litigants to exhaust optional [administrative] appeals." *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). That alone disposes of DHS's argument.[10]

DHS's contention that immigration court review is "adequate" also ignores the critical fact that vulnerable mothers and their children are victims of the illegal No-Release Policy for weeks or months before they can secure any relief. Immigration courts offer no adequate remedy for the period of unlawful detention these mothers and children suffer *before* their appeals are heard, and that is what this case is about. DHS does not dispute Plaintiffs' evidence that children

[10] Neither does DHS have any explanation for how IJ review, which is created entirely by regulation, can constitute a "special *statutory* procedure[]" to which the "other adequate remedy" restriction is addressed. *Darby*, 509 U.S. at 146 (emphasis added).

in particular face irreparable trauma from such detention. *See, e.g.*, Declaration of Luis H. Zayas ("Zayas Decl.") ¶¶ 10-11 (Dec. 10, 2014) (Exhibit 15 to PI Br.).

DHS's reliance on *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008), is unfounded for this reason. The court there simply held that Congress did not "intend[] to authorize the long-term detention of aliens such as Casas without providing them access to a bond hearing before an immigration judge." *Id*. at 950.[11] It does not follow that immigration court review is an adequate substitute for APA relief, where, as here, such relief comes too late to prevent the harms caused by DHS's illegal No-Release Policy.

In sum, what DHS really means when it says immigration court review is "adequate" is that no court should stop it from breaking the law for weeks or months before the separate agency that administers the immigration courts intervenes in individual cases. This delayed and piecemeal relief is not an "adequate" alternative to an APA class action, which, if successful, can protect vulnerable mothers and children from a single day of illegal detention. *See also Cohen v. United States*, 650 F.3d 717, 732 (D.C. Cir. 2011) (en banc) (administrative remedy not adequate where "the relief would be individualized, not class wide as [Plaintiffs] seek").

2. *Habeas*. DHS's argument that habeas is an adequate alternative is even more cursory and unsupported. DHS Br. 27. DHS does not even address the Supreme Court's express holding that adverse immigration actions for which habeas is available "may also be reviewed by an action . . . under § 10 of the Administrative Procedure Act." *Brownell v. We Shung*, 352 U.S. 180, 181 (1956); *see also Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955); PI Br. 27 & n.21. Moreover, as the D.C. Circuit recently held, in cases where a detainee seeks relief that will only

[11] The relevance here of *Reno v. Flores*, 507 U.S. 292 (1993), in which the Supreme Court considered whether due process required "automatic" review for juveniles before an IJ as opposed to just a right to seek review, is even less apparent.

have a "probabilistic" impact on the duration of custody, "it could not be the case that Congress intended that prisoners asserting such claims should be limited to habeas." *Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660, 665 (D.C. Cir. 2013).[12]

### C. The No-Release Policy Is Not Committed to Agency Discretion.

Finally, DHS repeats its argument that it can exceed its authority and make custody determinations based on illegal considerations because it has "discretion" to do so. DHS Br. 24. As explained above, Plaintiffs do not challenge any discretionary release determination. They rather challenge an overarching policy that exceeds DHS's discretion and otherwise violates the law. *See supra* Part I.A. Such a challenge is authorized by the APA. 5 U.S.C. §§ 704, 706(2).

## V. Class-Wide Preliminary Injunctive Relief Is Appropriate.

For the reasons discussed above and in our opening brief, Plaintiffs have a strong likelihood of success on the merits. Because provisional class certification is appropriate, *see supra* Part I.C, and all other requirements for a preliminary injunction are met, the Court should enter a preliminary injunction that protects asylum-seeking families from the No-Release Policy.

### A. There Is No Bar to Class-Wide Relief.

DHS asserts that 8 U.S.C. § 1252(f)(1) bars this Court from granting a class-wide preliminary injunction. By its plain text, however, Section 1252(f)(1) "prohibits only injunction of 'the operation of' the detention statutes, not injunction of a *violation* of the statutes." *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (emphasis added); *see also Gordon v. Johnson*, 300 F.R.D. 31, 40 (D. Mass. 2014) ("[T]he court need not prohibit the operation of any

[12] Habeas relief also is not "adequate" because DHS could continue moving asylum-seekers across jurisdictional lines, and potentially argue that class-wide habeas relief is not available across jurisdictions. Similarly, there could be uncertainty in a habeas action over whether the court's orders have prospective effect, even in a class-wide habeas action. *See United States v.* (continued…)

part of the law to correct the government's *incorrect* application of it.").[13] A class-wide injunction in this case would not obstruct the "operation of" Section 1226(a); it would only enjoin Defendants from *violating* that statute and its implementing regulations.

### B. Members of the Proposed Provisional Class Are Suffering Irreparable Harm Because of the No-Release Policy.

DHS's response to Plaintiffs' argument that they are suffering irreparable harm is most notable for what it does not dispute: that women and children with a credible fear of persecution are suffering significant pain and trauma from each day of unlawful and unnecessary detention pursuant to the No-Release Policy. *See, e.g.*, Zayas Decl. ¶¶ 10-11; Declaration of R.I.L.R. ¶¶ 18, 20 (Dec. 12, 2014) (Exhibit 9 to PI Br.); Declaration of Z.M.R. ¶¶ 19-23 (Dec. 12, 2014) (Exhibit 10 to PI Br.); Declaration of W.M.C. ¶ 20 (Dec. 12, 2014) (Exhibit 12 to PI Br.); Declaration of G.C.R. ¶¶ 28-30 (Jan. 6, 2015) (Exhibit 16 to PI Br.). DHS's sole support for deeming this harm "purely speculative" is an irrelevant case considering the harm from the "inability to import elephant trophies." *Safari Club Int'l v. Jewell*, 2014 WL 2535948, at *4 (D.D.C. June 6, 2014).

DHS again recites its mantra that there is no irreparable harm because an asylum-seeking family denied release can seek a custody redetermination from an IJ. However, this case is about the weeks or months of unlawful detention that members of the proposed class suffer *before* they have access to such redeterminations (adjudicated by a separate agency not party to this case).

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*Greene*, 834 F.2d 1067, 1070 (D.C. Cir. 1987) (noting "familiar principle that *res judicata* is inapplicable in habeas proceedings" (internal quotation marks omitted)).

[13] This interpretation of Section 1252(f)(1) is supported by the longstanding principle that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also Rodriguez*, 591 F.3d at 1120 (applying canon).

*See* Hines Decl. ¶ 21; McLeod Decl. ¶ 14.[14] Such unlawful detention constitutes irreparable harm, which obviously is not mitigated by the availability of an immigration court hearing *after* such harm has already been suffered. *See Washington Free Cmty., Inc. v. Wilson*, 426 F.2d 1213, 1218 (D.C. Cir. 1969) (rule "that violates constitutional requirements inflicts an irreparable injury, even in a brief time period or a limited space"); *Gordon*, 300 F.R.D. at 41 ("Plaintiffs are suffering, and will continue to suffer, irreparable harm absent a permanent injunction. Each day Plaintiffs remain in detention without an opportunity to seek release on bail is time the class members cannot recover.").

### C. The Proposed Injunction Is in the Public Interest and Is Not "Vague."

In arguing that an injunction would be against the public interest, DHS invokes the interest in "enforcement of United States immigration laws." DHS Br. 33. But that is exactly why an injunction is appropriate: DHS is *breaking* those laws.

DHS also argues that the proposed injunction is against the public interest because it is "vague," going so far as to warn that "it would be difficult for [DHS] to understand how to comply," because it "appears to require [DHS] to do what they believe they already are doing." DHS Br. 33. Not true. While DHS insists it is providing "individualized determinations," it admits that it is considering deterrence of other migrants as a factor (in truth, the overriding factor) for denying release. *See supra* Part II. The proposed injunction would stop this practice in no uncertain terms: "Defendants may not detain class members for the purpose of deterring

[14] Only once in its brief does DHS mention this harm. In a stunning footnote, DHS washes its hands of it, pinning the harm on the immigration courts for *their* delay in scheduling hearings. DHS Br. 32 n.7. In other words, DHS maintains an unlawful policy that is the direct and immediate cause of detention for hundreds of asylum-seekers; IJs refuse to follow DHS's No-Release Policy and regularly reverse DHS's custody determinations; but the substantial harm from the intervening weeks and months *is the IJs' fault* for not overriding DHS's unlawful policy quickly enough. That position cannot be taken seriously.

future migrants from traveling to the United States or consider deterrence of such migration as a factor in the custody determination." Proposed Order ¶ 1.

If DHS is still, somehow, uncertain how to comply with the injunction, all it needs to do is consult its policies in place before June 2014 (*i.e.*, before adoption of the No-Release Policy), when it had no trouble making lawful custody determinations. An injunction would do nothing more than restore the pre-June 2014 status quo.[15]

**CONCLUSION**

For the foregoing reasons, the Court should provisionally certify the class, grant a preliminary injunction, and deny DHS's motion to dismiss.[16]

[15] In arguing that a preliminary injunction is not warranted, DHS suggests that the injunction Plaintiffs seek is intended to "alter the status quo," and should therefore be subject to "an additional hurdle." DHS Br. 29. As indicated, however, the preliminary injunction Plaintiffs seek would merely *restore* the status quo that existed before DHS's abrupt introduction of the No-Release Policy in June 2014. Moreover, as the case DHS cites makes clear, "[t]h[is] Circuit has neither adopted nor rejected a heightened burden . . . when the injunction would alter the status quo." *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. de C.V.*, 901 F. Supp. 2d 54, 56 n.1 (D.D.C. 2012). Finally, the preliminary injunction Plaintiffs seek would have only temporary, provisional effect. In the unlikely event that DHS were ultimately to prevail on the merits, it would be free to reinstate the No-Release Policy and detain future asylum-seeking mothers and children on deterrence grounds. In these circumstances, Plaintiffs should face no heightened burden to obtain a preliminary injunction.

[16] Even if the Court were to deny a preliminary injunction, it still should not dismiss the case under the very different standard that governs motions to dismiss.

Dated: January 28, 2015

Respectfully submitted,

/s/ Dennis B. Auerbach

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2015, I electronically transmitted the attached motion and exhibits using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants for this case.

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Signed: /s/ Dennis B. Auerbach

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**Corrected Declaration of Valerie Burch**

I, Valerie Burch, hereby declare:

1. I make this declaration based on my own personal knowledge and, if called to testify, I could and would do so competently as follows:
2. I have been a licensed attorney in Pennsylvania since 2004. I am currently an attorney at The Shagin Law Group LLC, a firm located in Harrisburg, Pennsylvania, that has specialized in immigration law for eighteen years. I have held this position since 2012. Since joining the firm, I have represented clients detained at the Berks Family Residential Center ("Berks")[1] in Leesport, Pennsylvania between November 2012 and January 2014.
3. For approximately three years (August 2004- June 2007), I was the managing attorney of the Pennsylvania Immigration Resource Center ("PIRC"). PIRC is a small nonprofit law office founded in 1996 that has been the main legal service provider for noncitizens detained at Berks and at the York County Prison in York, Pennsylvania. During my tenure at PIRC, the organization ranged in size from two to six staff members.
4. While at PIRC, I primarily learned of families detained at Berks in one or more of these three ways: 1) A family member contacted PIRC, usually by phone, to request assistance; 2) A York Immigration Court judge contacted PIRC by filling out a short referral form indicating the need for *pro bono* assistance; and/or 3) PIRC received from court staff copies of notices for the family members to appear in the court and/or the upcoming hearing schedule, on which the family members' names appeared.
5. Through these methods, I believe that I learned of practically all families detained at Berks for more than two weeks following the family's receipt of the result of their credible fear interview. I believe this because: 1) Nearly all families detained at Berks wished to seek asylum; 2) Upon receiving notice of the results of a family's credible fear interview, the York Immigration Court would promptly schedule the family for a hearing; and 3) PIRC received copies of all upcoming hearing schedules, which listed the name and detention location of all individuals appearing before the court.

[1] The facility was named "Berks County Family Shelter" when I began my work in 2004; the name has since been changed to "Berks Family Residential Center."

6. Upon receiving notice of a Berks family that could be in need of legal assistance, I or another PIRC staffer, whom I supervised, met with the family to explain the legal process and screen them for representation by either PIRC or cooperating *pro bono* counsel. We would only fail to conduct this meeting if we learned that the family already had counsel. As the vast majority of the detained families could not afford private counsel, I believe that I or my supervisees met with nearly all of the Berks population detained for more than two weeks following receipt of the results of a credible fear interview. Indeed, because I worked under a grant aimed at providing free legal services to all detained survivors of torture appearing in the York Immigration Court without private counsel, PIRC's screening of the Berks population was designed to ensure that no unrepresented Berks family that wished to seek asylum appeared in the court without having been interviewed by a PIRC staffer.
7. Between August 2004 and June 2007, the only families detained at Berks for more than two weeks after receiving the results of their credible fear interview were those who had failed their interview. The rare exception to this rule was families who did not have a sponsor to provide them with housing and support through the course of their proceedings. Of the countless cases of which I was aware, I never encountered a case in which a family who received a positive credible fear determination was denied release by DHS.
8. In the period I represented Berks detainees at the Shagin law Group (between November 2012 and January 2014), I represented one asylum-eligible family from Central America (a father and child) fleeing gang violence. The family was released by DHS after being found to have a credible fear of persecution.
9. I understand that DHS is now refusing to release bond-eligible Central American families who have passed their credible fear interviews. That is a 180-degree turnaround from what I experienced when representing clients held at Berks during the 2004 through 2007 and 2012 through 2014 time periods.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 15th day of January, 2015, at Harrisburg, PA.

Valerie Burch

**Corrected Declaration of Matthew Archambeault**

I, Matthew Archambeault, hereby declare:

1. I make this declaration based on my own personal knowledge and, if called to testify, I could and would do so competently as follows:

2. I have been a licensed attorney in Pennsylvania since 2002. I am a partner at Corpuz & Archambeault, a firm in Philadelphia, Pennsylvania that specializes in immigration law. I have held this position since August of 2011. I am also Of Counsel to Pozo Goldstein & Gomez, LLP, a position which I have held since 2006. I have practiced immigration law for ten years. From 2008 through 2011, I was a partner at Montano-Miranda & Archambeault, where I specialized in immigration law. From 2006 through 2007, I worked exclusively on immigration matters as an attorney with Schoener & Kascavage, which was a firm that focused on immigration law. Prior to that, I worked from 2004 through 2005 at the Law Office of Eduardo Soto, PA, where I focused on immigration law.

3. I have represented clients in immigration courts throughout the nation, before the Board of Immigration Appeals, in federal district court, and in federal courts of appeals.

4. I have represented countless non-citizens, both detained and non-detained, in removal, bond and asylum proceedings in my ten years of practicing immigration law.

5. In September of 2014, I began representing clients at the Berks County Family Shelter ("Berks").

6. I began representing clients at Berks in response to a call for help from Carol Anne Donohoe, one of my colleagues in the American Immigration Lawyers Association ("AILA"). Attorney Donohoe represents families detained at Berks. At the AILA meeting, she informed the group that, since DHS had suddenly started refusing to release families on bond or parole, there was an urgent need for legal representation that exceeded the capacity of the existing community of lawyers serving Berks.

7. I have taken on ten individual clients detained at Berks—five mothers and five children—all from Central America. Four of those individuals (two families) had received positive credible fear determinations and were eligible for release on recognizance or bond.

8. Passing a credible fear interview means that a noncitizen demonstrates a credible fear of persecution in their home countries. My Berks' clients who received positive credible fear determinations faced life-threatening violence in their home countries, where the police would not protect them. Additionally, they had family members in the United States who offered to serve as sponsors and ensure that they attended all future court dates. None had criminal histories. All presented strong claims for asylum.

9. Notwithstanding their strong showing on the traditional bond factors, DHS refused to release them on recognizance or any amount of bond.

10. It was my experience, prior to the summer of this year, that DHS either did not detain Central American families or released them on bond or recognizance. The decision to detain and continue to detain my clients at Berks without bond was a unique departure from DHS's past behavior, as I had seen it in my years of practice.

11. An average of five or six weeks elapsed between my clients' positive credible fear finding and the time that the individual has a bond hearing before an immigration judge.

12. I was able to get immigration judges ("IJ") to redetermine (and ultimately set) bond for my clients. That the IJs disagreed with DHS's custody decision suggests to me that the DHS custody decisions were not based on an individualized determination of flight risk or danger to the community.

13. Litigating their bond cases took a significant amount of time, for which my clients paid me a reasonable fee. Being forced to litigate bond cases before an immigration court decreases my clients' available funds for paying bond and litigating their case in chief—the asylum claim.

14. Assistance from an attorney, however, was necessary for my clients to present their bond cases. One mother had not even entered a request for an IJ bond redetermination because she didn't understand how to do so.

15. In the period of time DHS has detained my clients without bond, the small community of immigration attorneys that serves clients at Berks is strained in terms of resources. Other attorneys and I have to expend significant resources in trying to get DHS to release our clients on bond or recognizance. We have been attempting to find pro bono attorneys for other detained families, but there are few pro bono or low-fee options in the area.

16. Central American families continue to be detained in Berks and additional families are being brought to the facility.

17. My experience leads me to believe that even a short detention at Berks can be damaging to families who are fleeing persecution. For example, one of my clients was coerced into having sex with a guard repeatedly over a two-week period at various spots in the facility. The guard pursued my client, who came to the United States because she is fleeing sexual violence and is especially vulnerable. He preyed on that vulnerability. In a fit of possessiveness, he called her "a slut." She and the other detainees were afraid that they would get deported if they reported the guard's misconduct. An eight-year old girl who was detained at the facility saw the guard having sex with my client, which triggered the trauma of the sexual abuse that had caused the girl to flee her home country. This incident simply highlights the fragile psychological state of my client who, like many of my clients, is fleeing persecution and shows the way that detention can impact asylum-seekers like her, who are seeking safety and stability.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 21st day of January, 2015, at Philadelphia, PA.

Matthew Archambeault

**Corrected Declaration of Lauren Connell**

I, Lauren Connell, hereby declare:

1. I make this declaration based on my own personal knowledge and, if called to testify, I could and would do so competently as follows:
2. I am a law clerk at Akin Gump Strauss Hauer & Feld and my bar admission is pending in New York. Until December 23, 2014, I was the coordinator of the Karnes City Immigrant Family Pro Bono Project, serving families who were detained at the Karnes County Residential Center. I held that position since September 2014.
3. In late August, Akin Gump helped to form the Karnes City Immigrant Family Pro Bono Project with representatives from the University of Texas Law School Immigration Clinic, the Tahirih Justice Center in Houston, the American Immigration Lawyers Association in Austin and Human Rights First in Houston. Our Project's goal is to ensure that the women and children detained in Karnes City, Texas receive due process and are able to fairly pursue their asylum claims. We seek to provide pro bono representation to as many Karnes families as possible at all stages of the process, from credible fear interviews to bond proceedings to merits hearings.
4. As coordinator, I worked full time to secure pro bono representation for Central American refugee women and children who are detained in the Karnes County Residential Center. Until early December, detainees generally came to my attention through information provided by representatives from American Gateways, an organization that was conducting weekly know-your-rights presentations to detainees at Karnes, and other non-profit or pro bono attorneys who were serving clients at Karnes.
5. Organizations and individual attorneys provided me with names of detainees they encounter who lack counsel. I obtained the relevant documents from these detainees. These documents include detainees' Record of Determination/Credible Fear Worksheet Forms M-444, their Notice to Appear Forms I-862 (the charging documents through which they are referred for regular immigration court proceedings), and their Notice of Custody Determination Forms I-286.

6. Based on my review of the underlying documents, I determined whether these women passed their credible fear interview and were eligible for a bond hearing in order to determine the scope of representation that each family needs.
7. Based upon a review of my current list and the associated documents, as of December 15, 2014, there were at least 34 individuals detained at the Karnes County Residential Center who were eligible for release on bond or recognizance due to positive credible fear determinations and were denied release by the Department of Homeland Security ("DHS"). As of December 15, 2014, none of these individuals had a custody redetermination hearing before an immigration judge.
8. As of December 15, 2014, I had been able to find representation for 6 of these individuals, but at least 28 of these individuals did not have counsel.
9. The list of names I was able to generate is only a fraction of the total number of unrepresented detainees at Karnes. Because DHS did not provide me with any sort of unified list of the population and because there is no holistic system of referrals in place, I was reliant on ad hoc mechanisms to identify, screen, and ultimately match detainees with pro bono counsel. Accordingly, it is likely that the individuals I identified to have positive credible fear interviews who are bond eligible was a small subset of similarly situated detainees.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 20th day of January, 2015, at New York, NY.

Lauren Connell

Lauren Connell

**Corrected Declaration of Virginia Marie Raymond**

I, Virginia Marie Raymond, hereby declare:

1. I make this declaration based on my own personal knowledge and, if called to testify, I could and would do so competently as follows:
2. I became licensed to practice law in Texas in 1985. I opened my own law practice in Austin, Texas, in January 2013. Eighty percent of my work is in the arena of immigration law, and I have appeared before immigration courts in San Antonio, Houston, and Harlingen, Texas. The most time-consuming part of my practice has involved representation of people detained and in removal proceedings.
3. Since August of this year, I have represented twenty-four people making up nine families (nine mothers and fifteen children) who have been detained at the detention center in Karnes City, Karnes County, Texas. The facility I refer to is the one at 409 FM 1144, currently described as the "Karnes City Residential Facility" but until this summer known as the "Karnes County Civil Detention Center." Of the families detained at the Karnes facility, whom I have met since August, most are Central American women and children.
4. Six of the nine Karnes families who I have represented since August were eligible for release on recognizance or bond.[1] In five of the six families who qualified for release on recognizance or bond, the families had entered the United States without authorization and then the mothers had expressed fear of returning to their home countries and had passed a credible fear interview. At this point, the Department of Homeland Security issued Notices to Appear against each of the family members in these five families, beginning the removal proceedings. The families were then eligible for release on their own recognizance or on bond or other conditions. The sixth family had also entered the United States without authorization, and the mother expressed a fear of returning to her home

[1] Of the other three families, one mother did not pass the threshold screening interview, the negative fear finding was upheld by a judge, and the family shortly thereafter removed. A second mother was deemed not to have a reasonable fear and she is still detained at Karnes with her children; I am seeking a credible fear interview for each of her three minor daughters. The mother in the third of these families did pass a credible fear interview, but the government has alleged that she and her sons are "arriving" aliens who qualify only for ICE parole.

country. However, the Asylum Office determined that there would be too great a delay before it could obtain an interpreter in the woman's primary language, an indigenous one, in order to conduct a credible fear interview. Instead, the Department of Homeland Security issued a Notice to Appear placing the family into removal proceedings without an interview. Once placed in removal proceedings, this family was also eligible for release on recognizance or bond or other conditions.

5. For each of these six families, Immigration and Customs Enforcement ("ICE") refused to authorize release of my clients on recognizance or bond in its custody determination. In each case, I had to seek a custody redetermination hearing before an immigration judge to obtain an order allowing for release of the families on bond, even though none of these mothers or children had any criminal history and all had sponsors who could house them upon release and support them as they pursue their claims for asylum, withholding of removal, and protection under the Convention Against Torture.
6. Moreover, I am not aware of any Karnes families for whom ICE has authorized release in the ICE custody determination decision reached when placing families into removal proceedings. ICE has insisted on detention even where families have passed credible fear interviews and were eligible for release on recognizance or bond, and in most cases had close family or other sponsors who were ready to house them and provide support for appearances at hearings.
7. On August 27, 2014, I spoke with Officer Budd Ratliff, an ICE deportation officer who works at Karnes. I was at the Karnes facility for a reasonable fear interview for one of my clients and had the opportunity to speak with Officer Ratliff in the lobby of the facility. I believed that he would have information about the detention policies at Karnes. I told Officer Ratliff that I had heard that ICE was not releasing any of the families detained at Karnes, and I asked him if what I heard was true. He confirmed the report, telling me in these words or words very close to these: *Our directive is no bonds on anyone. We are keeping them here through the entire process, unless an immigration judge orders otherwise.*
8. The blanket "no bond" policy is further apparent in the hearings to redetermine custody status that take place in front of the immigration judges. In each of these hearings, the attorney for the Department of Homeland Security has opposed bond and has filed a set of

attorney for the Department of Homeland Security has opposed bond and has filed a set of documents in support of its allegation that it is necessary to detain the women and children at Karnes in order to deter future migrants. The documents filed in all cases are identical, and in the cases that I have handled, none of the documents proffered by DHS specifically referred to any of my clients.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 15 day of Jan., 2015, at Austin, Texas

Virginia Raymond

Virginia Marie Raymond, JD, PhD
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