No. 15-1204

IN THE

Supreme Court of the United States

DAVID JENNINGS, *ET AL.*,

Petitioners,

—v.—

ALEJANDRO RODRIGUEZ, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS FIRST IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE* [1]

Human Rights First is a non-governmental organization established in 1978 that works to ensure American leadership on human rights globally and compliance domestically with this country's human rights commitments. Human Rights First operates one of the largest programs for *pro bono* legal representation of refugees in the nation, working in partnership with volunteer lawyers at leading law firms to provide legal representation without charge to thousands of indigent asylum applicants, including those detained in immigration detention facilities across the United States. Human Rights First has conducted extensive research and issued reports regarding the current and historical practices of and legal framework governing the United States system of immigration detention and parole of asylum seekers.

INTRODUCTION AND SUMMARY OF ARGUMENT

On December 15, 2016, this Court issued a text order calling for supplemental briefing on three issues, including whether the Constitution requires the Government to afford bond hearings to individuals seeking admission to the United States who are subject to detention for six months under 8

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[1] The parties have consented in writing to the participation of *amicus*. Their written consents have been filed with the Clerk of the Court. No party in this case authored this brief in whole or in part, or made any monetary contribution to its preparation and submission.

U.S.C. § 1225(b).[2] Petitioners have argued that the availability of parole proceedings renders prolonged detentions under Section 1225(b) constitutional or that parole proceedings are an otherwise adequate substitute for a custody hearing by an immigration judge. That is not correct. As Respondents have demonstrated, the existence of parole authority under 8 U.S.C. § 1185(d)(5), even if exercised in accordance with relevant regulations and guidelines, cannot provide constitutionally sufficient due process because it does not provide a hearing before a neutral decision-maker and gives rise to prolonged arbitrary detention. Resp'ts Br. at 30-31 (citing J.A. 225-35, 334-35, 339; App. 39a-40a); *see* Resp'ts Supp. Br. at 24-25.

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[2] Human Rights First's first amicus brief with eight international law scholars explained that domestic statutes like the INA must be construed in a manner consistent with U.S. treaty commitments, *see Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), and that U.S. treaty commitments and settled international law prohibit arbitrary detention and require review of detentions by a court independent of the detaining authority. *See generally* Brief of *Amici Curiae* Human Rights First and International Law Scholars William Aceves, Denise Gilman, Guy S. Goodwin-Gill, James C. Hathaway, Manfred Nowak, Sarah Paoletti, Nigel Rodley, and Martin Scheinin in Support of Respondents. Human Rights First respectfully submits that those arguments are relevant to the constitutional issues on which the Court called for supplemental briefing because, as this Court has previously recognized, the opinion of the international community may provide persuasive guidance in deciding questions of constitutional interpretation, including under the Due Process Clause. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 577-78 (2005); *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003); *Atkins v. Virginia*, 536 U.S. 304, 306 n.21 (2002). Human Rights First refers the Court to its initial brief in that regard.

Human Rights First agrees with Respondents' analysis and submits this brief to explain that, in practice, even the basic parole criteria and procedures set out in the relevant regulations and guidelines are often not followed. Petitioners asserted in their opening brief that "aliens who establish a credible fear are automatically considered for parole, and are ordinarily released if they provide sufficient evidence of their identity and show they will not be a flight risk or danger." Pet'rs Br. at 4. Human Rights First's research and experience shows unequivocally that this is not so. Instead, arriving asylum seekers who establish a credible fear of persecution often do not receive parole interviews or determinations, and those who do are subject to arbitrary and inconsistent application of parole criteria. Moreover, as Petitioners indicate in their supplemental brief, the President's Executive Order of January 25, 2017 appears to signal a shift away from the policy Petitioners describe. *See* Pet'rs Supp. Br. at 11 n.3. The result is that the parole process contributes to, rather than ameliorates, the unconstitutional, arbitrary and prolonged detentions experienced by Respondents.

ARGUMENT

I. For Years, the Parole Authority Has Been Exercised Arbitrarily and Inconsistently

U.S. immigration authorities have, over the course of many years, implemented parole inconsistently, often failing to parole asylum seekers who meet the applicable parole criteria.

Under the expedited removal provisions of the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 10 Stat. 3009, immigration inspectors at ports of entry may order the removal, without further hearing, of "arriving aliens" who they determine are inadmissible for lack of proper documents or for fraud. 8 U.S.C. § 1225(b)(1)(A)(i). Those who indicate a fear of persecution or intent to apply for asylum are to be referred for "credible fear" screening interviews to determine whether they will be permitted to file for asylum before an immigration judge. *Id.* § 1225(b)(1)(A)(ii). Specifically, an alien must establish "a credible fear of persecution" in an interview with an asylum officer or in a subsequent review by an immigration judge to avoid immediate deportation. *Id.* § 1225(b)(1)(B).

Although IIRIRA provides for the initial detention of asylum seekers subject to expedited removal, an individual seeking asylum may be released on parole once she has established a credible fear of persecution. *Id.* § 1185(d)(5) (providing for parole "on a case-by-case basis for urgent humanitarian reasons or significant public benefit" for an alien applying for admission to the United States); 8 C.F.R. § 212.5(b). Shortly after IIRIRA's enactment, the Immigration and Naturalization Service ("INS") confirmed in a December 1997 Memorandum that "[p]arole is a viable option and should be considered for aliens who meet the credible fear standard." Michael A. Pearson, INS Executive Associate Commissioner for Field Operations, *Memorandum: Expedited Removal: Additional Policy Guidance* (Dec. 30, 1997).

Despite these statutory provisions and related INS guidelines, the INS failed to implement its parole authority effectively, fairly, or consistently,

with local INS officials routinely failing to follow the parole criteria. A 1999 Amnesty International report concluded that "local INS officials are indifferent to or ignorant of both international standards and the agency's own attempts to impose some national standards on decisions to detain or parole asylum seekers." Amnesty International USA, *Lost in the Labyrinth: Detention of Asylum-Seekers* 32 (1999). Other human rights organizations reached the same conclusion. *See generally* Lawyers Committee for Human Rights, *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act* (1998) (detailing INS failure to consistently and effectively implement parole and providing examples of asylum seekers who had been unnecessarily detained for long periods of time in the United States); Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (1998), https://www.hrw.org/legacy/repo rts98/us-immig/ (concluding that asylum parole program has suffered from "inconsistent application by INS district directors").

On May 17, 1999, the U.S. Secretary of State's Advisory Committee on Religious Freedom addressed the detention of asylum seekers and concerns about the variation in release policies among INS districts. The Committee stated in its Final Report: "The unnecessary detention of already traumatized victims of religious persecution, as well as other types of persecution, should be examined with the goal of providing release. Serious concerns have been raised over the length of time these traumatized individuals are spending in detention facilities, the conditions they are being kept in, the types of detention facility that are being used and the variation in policies from

district to district." Bureau for Democracy, Human Rights, and Labor, U.S. Dept. of State, *Final Report of the Advisory Committee on Religious Freedom Abroad to the Secretary of State and to the President of the United States*, (May 17, 1999), https://www.state.gov/www/global/human_rights/990517_report/execsumm_iv.html#recs.

A 2004 survey conducted by Human Rights First (then known as the Lawyers Committee for Human Rights) confirmed that the parole guidelines were often disregarded in many locations—leaving many asylum seekers in detention for long periods of time even though they met the criteria for release. Human Rights First, *In Liberty's Shadow: The Detention of Asylum Seekers in the Era of Homeland Security* 12-13, 17 (2004) [hereinafter *In Liberty's Shadow*]. *Pro bono* attorneys in California, Illinois, Louisiana, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and parts of Texas reported that the asylum seekers they represented were regularly denied parole from detention despite meeting the parole guidelines, and some reported that officials had advised them of "blanket" parole denial policies. *Id.*

The arbitrary implementation of parole during this period is reflected by the case of three Rwandan asylum seekers, which was detailed in Human Rights First's 2004 report:

- Three asylum seekers from Rwanda, a married couple and a relative, fled Rwanda after surviving direct threats on their lives because of their pro-democracy political affiliations. In search of refuge, they came to the United States because they had family here.

> Although they had traveled with valid passports and visas, the family was detained by the INS at the airport when they told officials that they had come to seek asylum—making their "non-immigrant" visas invalid in the eyes of immigration officers. The two men were taken to a large detention facility in one state and the young woman was moved to a prison for criminals in another state. At the prison, no one spoke her language. Prison authorities, without explanation, sheared off her long, braided hair. After passing their credible fear screening interviews, all three applied for parole so they could live with their U.S. relatives while final resolution of their cases was pending. The young woman was released on parole. The two men, however, were both denied parole by immigration officials in the other state. Even though both men had the same community ties and same proof of identity (their own valid passports), their parole applications were denied on different grounds. The INS found that one man did not have sufficient documentation of his identity—even though the INS's own forensic experts authenticated his passport and visa. The other man was denied on the ground that he "had not established sufficient community ties"—even though both men and the woman were being sponsored by the same U.S. citizen relative. The two men were only released after they were granted asylum.

In Liberty's Shadow at 12-13.

In February 2005, Congress directed the bipartisan U.S. Commission on International Religious Freedom ("USCIRF") to examine whether immigration officers, in exercising expedited removal authority over aliens who may be eligible for asylum, were improperly encouraging withdrawals of applications for admission; failing to refer qualifying aliens for credible fear determinations; incorrectly removing such aliens to countries where they may face persecution; or improperly detaining such aliens, or detaining them under inappropriate conditions. USCIRF issued a comprehensive 500-page report on these issues, based in part on U.S. Immigration and Customs Enforcement ("ICE") statistics not normally available to the public, detailing the ways in which parole rates continued to vary widely across the country: parole rates were, for example, as low as 0.5% in New Orleans, 8.4% in New York and 3.8% in Newark, New Jersey. 1 U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal* 33 (2005) [hereinafter 2005 Report]. The report found that "the formal release criteria are not being consistently applied," *id.* at 62, and it also found no evidence that ICE was following the parole criteria provided in the policy guidelines. The Commission concluded that variations in parole rates were associated with other non-guideline factors, including, for example, the airport or border entry post at which the asylum seeker had arrived. *Id.* at 62; *see also* U.S. Comm'n on Int'l Religious Freedom, *Expedited Removal Study Report Card: 2 Years Later* 5 (2007) [hereinafter USCIRF Report Card].

USCIRF made a number of recommendations to improve implementation of parole, and reiterated its

recommendations in subsequent reports. *See* 2005 report at 63-76; *see generally* USCIRF Report Card. In the February 2007 Report Card, USCIRF gave ICE a grade of "F" for its failure to codify the parole criteria into regulations and another "F" for its failure to ensure consistent and correct parole decisions by developing standardized forms and national review procedures. USCIRF Report Card at 6; *see also* Letter from Michael Cromartie, Chair, United States Commission on International Religious Freedom to Michael Chertoff, Secretary of Homeland Security, *USCIRF Expresses Concern to DHS Over New Policy Directive on Asylum Seekers*, (Dec. 14, 2007), http://www.uscirf.gov/news-room/press-releases/uscirf-expresses-concern-dhs-over-new-policy-directive-asylum-seekers (expressing concern that revised ICE parole criteria, issued in 2007, was not consistent with its recommendations).

Despite USCIRF's reporting and findings, inconsistencies and deficiencies persisted in parole implementation. A 2009 Human Rights First report concluded that "asylum seekers have been detained for months or sometimes for years, even when they can establish their identities, community ties, and that they do not present a flight risk or a danger to the community," and that the parole criteria specific to asylum seekers "have often been ignored by local officials who may base their decisions on other factors, such as the availability of detention 'bed space' at local facilities." Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* 5 (2009). As indicated in that report, ICE statistics showed that parole rates dropped from 62.5% in 2003 to 41.23% in 2004 before plummeting to 4.2% in 2007. *Id.* at 35. These statistics showed

that at least 2,200 asylum seekers who were taken into custody in 2007 were detained for six months or longer. *Id.* at 39.

The 2009 report included the following case studies of asylum seekers who could have been released from detention on parole, but instead were held by ICE in U.S. jails and immigration detention centers for months or longer:

- **A Colombian refugee detained in an Arizona immigration jail for over a year**. A Colombian asylum seeker, who had been detained and tortured following his participation in a political demonstration in Colombia, was detained in a U.S. immigration jail in Arizona for 14 months even though he could have been released to the care of his U.S. citizen father and daughter. ICE denied his request for release on parole, even after an immigration court had ruled he was a refugee eligible for asylum. This refugee was finally released from detention two weeks after the judge's ruling was affirmed on appeal.
- **A Tibetan monk detained in Texas for over a year.** A Tibetan monk, who supported the Dalai Lama and was arrested for participating in pro-Tibetan demonstrations, was detained at an immigration jail in south Texas while his request for asylum was pending. He remained in detention for more than a year even though his attorney had previously made a request to ICE for his release on parole and even though he had proof of his identity as well as a sponsor willing to house him. He was only released

from detention after an immigration court granted his request for asylum.

- **An Ethiopian refugee and torture victim detained for 10 months**. An Ethiopian refugee, who had suffered torture and persecution in his home country because of his ethnic background, was denied parole and detained for 10 months at the South Texas Detention Center after he requested asylum at a U.S. port of entry. His pro bono attorney submitted, in support of his parole application, proof of his identity, an affidavit of support from his U.S. citizen cousin, and proof that he would have a place to live if released. The man was only released from detention after an immigration judge ruled he was a refugee eligible for asylum.
- **Woman seeking asylum from Burma detained seven months.** After a Burmese woman requested protection at a United States border entry point, she was detained and brought to the Pearsall detention center in Texas. She began to experience intestinal bleeding. Her pro bono attorney requested that she be released on parole, providing a letter of support from the woman's cousin who had already been granted asylum in the U.S and information on her medical problems. The request was denied by ICE two weeks later. This Burmese refugee spent seven months in jail and was only released after an immigration judge granted her request for asylum.

Id. at 6, 36-37.

These examples and reports could be multiplied many times over. They show that the administration of parole for arriving asylum seekers has been characterized by inconsistent and arbitrary decision-making for many years. As discussed below, these problems persist today.

II. ICE's Parole Authority Continues to be Administered Arbitrarily, Inconsistently and Often Without Regard for Parole Guidance

The parole process for arriving asylum seekers continues to be marked by arbitrariness, inconsistency and ineffectiveness. Petitioners described in their summary judgment briefing in the district court and in their merits brief in this Court how the parole system purportedly functions: that an asylum seeker who establishes credible fear is provided with an advisal that he or she may seek parole and a date for a parole interview, and that they will be "ordinarily released if they provide sufficient evidence of their identity and show they will not be a flight risk or danger." Pet'rs Br. at 4; Respondent's Notice of Cross-Motion and Motion for Summary Judgment, *Rodriguez v. Hayes*, No. 07-cv-03239 (C.D. Cal. March 15, 2013) ECF No. 299 at 12-13 [hereinafter Pet'rs Summ. J. Br.]; *see* U.S. Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, §§ 4.3, 6.2, 8.3 [hereinafter Parole Directive] (arriving asylum seekers who meet certain criteria should generally, subject to various exceptions, be released on parole if they: pass credible

fear screening, sufficiently establish identity, present no danger, and do not pose a flight risk).[3]

As detailed below, many refugees who establish credible fear have not received parole interviews or individualized parole determinations. Those whose parole applications are actually considered receive decisions that often ignore that the applicant has met the relevant criteria or eschew any individualized assessment in favor of blanket and impermissible determinations based on the availability of bed space, local ICE detention practices, or a desire to deter other asylum seekers.

A. Asylum Seekers Entitled to Parole Interviews and Consideration Often Do Not Receive Them

Petitioners have asserted that under agency parole guidance, arriving aliens "who establish a credible fear are automatically considered for parole." Pet'rs Br. at 4. Reports from nonprofit legal providers, as well as United States Citizenship and Immigration Services ("USCIS") and ICE data indicates, however, that arriving asylum seekers who have been determined to meet the credible fear screening standard are often not provided parole interviews or parole consideration.

Nonprofit legal organizations recently reported to Human Rights First that ICE fails to automatically conduct parole interviews of asylum seekers determined to have credible fear in many

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[3] As discussed more fully in Section III of this brief, the President's recent Executive Order signals a shift toward increased use of detention and has directed DHS to issue new policy guidance relating to the use of detention.

detention locations.[4] Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* 17 (2016) [hereinafter *Lifeline on Lockdown*]; Human Rights First, *Detention of Asylum Seekers in New Jersey* 1-2 (2016) [hereinafter *New Jersey Report*]; Human Rights First, *Detention of Asylum Seekers in Georgia* 2-3 (2016) [hereinafter *Georgia Report*].

According to USCIS's 2015 Credible Fear Workload Summary Report, between January and September 2015 asylum officers issued 7,118 favorable decisions in credible fear determinations for arriving asylum seekers who had entered at a port-of-entry. U.S. Citizenship and Immigration Services, Credible Fear Workload Report Summary, FY 2015 Port of Entry (POE) Caseload, https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-FY15CF-and-RF-stats-2015-03-31.pdf. All of these individuals, under the system described by Petitioners, were entitled to parole consideration. Yet according to data provided to the American Civil Liberties Union,

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[4] Automatic consideration is critical because, according to a 2015 study, only 14% of immigrants held in detention nationwide have legal representation. Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 73 (2015). In some areas, representation rates are even lower; the Southern Poverty Law Center found that at Stewart Detention Center in Georgia only six percent of detained immigrants had legal counsel. Southern Poverty Law Center, *Shadow Prisons: Immigration Detention in the South* 36 (2016) [hereinafter *Shadow Prisons*]. Yet access to legal counsel significantly increases a noncitizen's odds of obtaining asylum or other relief. Katzmann Immigrant Representation Study Group & Vera Institute of Justice, *The New York Immigrant Representation Study: Preliminary Findings* (May 3, 2011), http://nylawyer.nylj.com/adgifs/decisions/050411 immigrant.pdf.

ICE reported that only 3,505 total cases were considered for parole during the same period. *Lifeline on Lockdown* at 17. Moreover, as described by Petitioners in the District Court, ICE reported that it conducted 1,836 parole interviews of arriving asylum seekers between January 4, 2010 and October 2011.[5] Pet'rs Summ. J. Br. at 12. But USCIS asylum division statistics indicate that during the same time period there were 4,156 arriving asylum seekers found to have met the credible fear standard. *See* U.S. Citizenship and Immigration Services, USCIS Asylum Division Stakeholder Meeting, Credible Fear Workload Report Summary FY 2011 Port of Entry (POE) Caseload 3 https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/November%202011/CredibleFearandReasonableFearWorkload.pdf (for FY 2011); U.S. Citizenship and Immigration Services, USCIS Asylum Division Stakeholder Meeting Credible Fear Workload Report Summary FY 2010 Port of Entry (POE) Caseload at 2 https://www.uscis.gov/sites/

[5] Petitioners indicated that 1,404 of these 1,836 asylum seekers were granted parole. Pet'rs Summ. J. Br. at 12. This does not reflect the true rate of parole grants among asylum seekers for that period, however, because it does not account for the much larger pool of individuals who established credible fear, and were thus entitled to parole interviews, but did not receive them. Even if those statistics accurately reflected parole rates, they would have represented only a short-term peak in January 2010 through October 2011; for the period October 2014 through May 2015, ICE granted only 47% of parole requests in cases where a parole request was made. American Civil Liberties Union of Northern California, *ACLU Files Suit Seeking Information on ICE Policies for Asylum Seekers*, (Oct. 20, 2016), https://www.aclunc.org/news/aclu-files-suit-seeking-information-ice-policies-asylum-seekers.

default/files/USCIS/Outreach/Upcoming%20National%20Engagements/National%20Engagement%20Pages/2010%20Events/October%202010/Credible%20Fear%20Workload%20%28thru%20Sept%202010%29.pdf (for Jan 2010-Sept 2010).

These figures suggest that a large population of asylum seekers entitled to parole interviews—roughly half—may never have received consideration.

B. Asylum Seekers Remain Detained Despite Meeting Parole Criteria

Contrary to Petitioners' contention that arriving asylum seekers who establish credible fear "are ordinarily released if they provide sufficient evidence of their identity and show they will not be a flight risk or danger," Pet'rs Br. at 4, reports from attorneys and nonprofit organizations indicate that asylum seekers continue to be held in detention and are regularly denied parole despite demonstrating a lack of flight risk in their individual cases and otherwise meeting parole criteria. In a 2016 survey of nonprofit attorneys assisting asylum seekers across the country, 91% reported that ICE denied parole in cases where arriving asylum seekers appeared to satisfy the parole criteria. *Lifeline on Lockdown* at 3, 13.

In particular, ICE officials often deny parole based on unexplained assertions that asylum seekers constitute a "flight risk" despite evidence of family or other community ties or on purported failures to sufficiently establish identity despite considerable documentation establishing their identities. *See Id.*, at 2-3, 13-19, 20-22; *Georgia Report* at 2-3; *New Jersey Report* at 2-3.

Human Rights First's 2016 survey of attorneys assisting asylum seekers in detention indicated that "flight risk" was the top reason given by ICE to deny parole. Factors for consideration in determining whether an asylum seeker is a flight risk include community and family ties. Parole Directive § 8.3(2)(b). But attorneys reported that parole was often denied in cases that appeared to satisfy the criteria for confirming lack of flight risk criteria—including cases where sponsor letters from U.S. family members were provided and ties to churches, family members, and community organizations were confirmed. *Lifeline on Lockdown* at 16. One experienced nonprofit attorney in Pennsylvania noted, "In the responses I've seen [from ICE], everyone is a flight risk." *Id.*

The 2016 Human Rights First report provides the following example:

- **Victim of severe domestic violence held in detention five months despite four U.S. citizen sponsors, including police officer**. A woman fled the Dominican Republic to escape years of severe domestic violence from her former partner. She arrived at a New York airport in March 2015, expressed a fear of return to her country, and was detained at the Delaney Hall Detention Facility in New Jersey. After she was determined to have a credible fear of persecution, her pro bono attorney submitted a parole request supported by letters from four U.S. citizens, including her U.S. citizen cousin who is a New York City police officer, and her U.S. citizen fiancé. Moreover, she had a valid passport that proved her identity and had no

> criminal history. ICE denied her parole request indicating that she was a "flight risk." She was ultimately granted asylum at the end of July 2015 after spending nearly five months in detention.

Id. at 2, 16.[6]

Other asylum seekers continue to be held in detention for failure to sufficiently establish their identity even when they have submitted considerable documentation establishing their identities. *See Id.* at 2-3, 13-19, 20-22. As a result, many asylum seekers—particularly those from Africa—who meet this parole criterion continue to be held in immigration detention for many months. *Id.* at 14-

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[6] In cases where there are real flight concerns, there are alternatives to detention that are more consistent with constitutional requirements and have proven effective in addressing flight risk, such as community-based case management programs. "Studies since 1996 have showed very high rates of compliance with proceedings by asylum seekers who were placed into alternatives to detention." American Immigration Council, *A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers* 2 (2015); *see* United States Conference of Catholic Bishops et al., *Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System* 28-29 (2015) (outlining use of alternatives to detention in the United States and their effectiveness in securing appearance for hearings and compliance with immigration appointments). A 2000 study by the Vera Institute concluded that "[a]sylum seekers do not need to be detained to appear for their hearings. They also do not seem to need intensive supervision." Eileen Sullivan et al., Vera Inst. of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* 31 (2000). And 93% of all non-detained immigrants with legal representation appear in immigration court. *See* Eagly & Shafer, *supra* note 4.

15; *see Georgia Report* at 2-3; *New Jersey Report* at 2-3. For example, a woman who fled persecution and severe sexual violence in Guinea was held in a Texas detention facility for nearly one year because she did not have an original passport despite having other evidence of identity, and a Syrian asylum seeker who submitted thirteen documents as evidence of his identity was found not to have established his identity. *Lifeline on Lockdown* at 14-15. In addition:

- **A Nigerian refugee who fled the Boko Haram was blocked from parole and detained for over five months despite presenting multiple forms of identification.** After his wife and oldest child were killed by the Boko Haram, a Nigerian man fled his country and sought protection in the United States. After he requested protection at an official port of entry along the southern border, ICE sent him to the South Texas Detention Complex in Pearsall, Texas. After passing his credible fear interview, he requested parole with assistance from a local nonprofit legal organization. Despite submitting a police identification card and his birth certificate, ICE denied parole citing a failure to establish identity. The applicant was later able to secure and submit to ICE his national Nigerian identity card. Eventually, ICE said they would only release him from detention on parole if he could pay a $7,500 bond attached as a condition of release. The man could not afford to pay the bond and remained in detention for nearly six months. *Id.* at 26.

A 2015 statistical analysis by the Center for American Progress ("CAP") found that a large percentage of LGBT asylum seekers eligible for release are nonetheless detained. *See generally* Sharita Gruberg & Rachel West, Center for American Progress, *Humanitarian Diplomacy: The U.S. Asylum System's Role in Protecting Global LGBT Rights* (2015). The report found that ICE elected to detain two-thirds of the LGBT immigrants who were recommended for release by ICE's internal automated detention recommendation system. *Id.* at 24-25. Half of these detainees were arriving asylum seekers who were denied parole. The report also concluded that the length of time LGBT asylum seekers and immigrants are held in detention had increased. *Id.* CAP later found that release rates for LGBT asylum seekers fell over the next year. *See* Sharita Gruberg, Center for American Progress, *ICE Officers Overwhelmingly Use Their Discretion to Detain LGBT Immigrants*, (Oct. 26, 2016), https://www.americanprogress.org/issues/lgbt/reports/2016/10/26/291115/ice-officers-overwhelmingly-use-their-discretion-to-detain-lgbt-immigrants/ (finding ICE officers detained 88% of LGBT asylum seekers and immigrants eligible for release).

By ignoring relevant parole criteria, ICE parole determinations are arbitrary and inconsistent, and lead to unnecessary and prolonged detention.

C. Parole Decisions Are Often Not Based on Individualized Factors

Asylum seekers who meet the parole criteria are often denied parole for reasons that have nothing to do with their individual circumstances. *Lifeline on Lockdown* at 19-22. For instance, asylum seekers

have been denied parole simply because detention bed space is available. *See* U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection* 47-48 (2016) (parole bond rates reported to be based on availability of detention beds); *c.f.* Dept. of Homeland Security, Office of Inspector General, *ICE's Release of Immigration Detainees*, OIG-14-116 at 1-2 (2014) (noting hundreds of detainees released in part due to lack of bed space), http://immigrantjustice.org/sites/immigrantjustice.org/files/OIG_Report_ICEdetaineerelease_2014_08.pdf.

Many detention and parole decisions appear to be based on an impermissible desire to deter other asylum seekers from seeking U.S. protection. One of Human Rights First's pro bono asylum clients, a victim of political persecution from Bangladesh, was told by ICE that he would not be released on parole because "no one from Bangladesh will be released from detention until they have been inside for at least six months." *Lifeline on Lockdown* at 23-24. And a Chinese woman who sought asylum was denied release from detention because she was an "irregular maritime arrival." *Id.* at 22. As detailed in a comprehensive legal analysis conducted by the Yale Law School's Allard K. Lowenstein International Human Rights, the prolonged detention and penalization of asylum seekers due to their manner of entry, or based on an objective of deterring others, is prohibited by the Refugee Convention, its Protocol, and the International Covenant on Civil and Political Rights (ICCPR). Lara Dominguez, et al., Allard K. Lowenstein Int'l Human Rights Clinic, Yale Law School, *U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis* 17-20 (2016). And in *R.I.L-R v. Johnson*, 80

F. Supp. 3d 164 (D.D.C. 2015), a federal judge enjoined DHS's policy of detaining Central American families who were apprehended in the interior of the country in order to deter future immigration, finding that justifying civil detention by deterrence raised serious constitutional concerns. *Id.* at 188-90 (citing *Kansas v. Crane*, 534 U.S. 407, 412 (2002)); *see also Crane*, 534 U.S. at 412 (warning that civil detention may not "become a mechanism for retribution or general deterrence—functions properly those of criminal law, not civil commitment") (internal quotation marks omitted) (Kennedy, J., concurring).

Asylum seekers are also denied parole based upon the idiosyncratic practices of their particular local ICE officials. In southern detention centers, for example, the Southern Poverty Law Center has characterized the odds of securing release on parole as "unsurmountable." *See Shadow Prisons* at 9, 11; *see also* Southern Poverty Law Center, *Immigrant detainees in Georgia more likely to be deported than detainees elsewhere*, (Aug. 23, 2016), https://www.splcenter.org/news/2016/08/23/immigrant-detainees-georgia-more-likely-be-deported-detainees-elsewhere. According to the Southern Poverty Law Center and Syracuse University's Transactional Records Access Clearinghouse, no immigrant detained at the Stewart Detention Center or Irwin County Detention Center in Georgia, which hold arriving asylum seekers as well as a range of other immigration detainees, was granted parole in fiscal year 2015. *See* Transactional Records Access Clearinghouse at Syracuse University, *Detainees Leaving ICE Detention from the Irwin County Detention Center*, http://trac.syr.edu/immigration/detention/201509/IRWINGA/exit/ (last visited Feb. 9,

2017); *see also* Transactional Records Access Clearinghouse at Syracuse University, *Detainees Leaving ICE Detention from the Stewart Detention Center*, http://trac.syr.edu/immigration/detention/201509/STWRTGA/exit/ (last visited Feb. 9, 2017); *Georgia Report* at 1.

In New Jersey, only three out of 80 arriving asylum seekers represented by the American Friends Service Committee between February 2015 and September 2016 were granted parole and subsequently released. *New Jersey Report* at 2. Not one of the 11 New Jersey detainee asylum seekers who were represented by Human Rights First and its pro bono attorneys in the 18 month period ending in November 2016 were granted parole. *Id.* Instead, they spent an average of eight months detained in New Jersey correctional or similar facilities before being granted asylum or other relief. *See id.* at 1-2. And a recent analysis of ICE data obtained through a Freedom of Information Act request indicates that for the months of January to August 2015, four field offices (Atlanta, FLO, SEa, and York), granted none of the parole requests submitted by arriving asylum seekers. An additional four field offices (ADE, FNL, New Orleans, and SEA) had grant rates of 1-13% for the parole requests they received during the same period.[7] In contrast, the Los Angeles Field Office granted 32% parole requests that it received in this time period.

ICE has also denied parole based on general immigration enforcement priorities rather than on

[7] The FOIA response containing these statistics did not contain a legend indicating which offices these abbreviations referred to.

individualized assessments of the particular individual's risk of flight or danger. For example, some ICE officers interpreted a 2014 Department of Homeland Security ("DHS") priorities memorandum as placing arriving asylum seekers who presented themselves at U.S. ports of entry in the highest priority level for detainment even after they had passed through the credible fear screening process.[8] This led some ICE officers to continue to detain some noncitizens due to this perception even when a particular asylum seeker appeared to have otherwise qualified for parole due to their individual circumstances, such as lack of flight risk and satisfying other parole criteria:

- **Colombian Family Separated and Detained as Enforcement Priority.** A family fled persecution in Colombia, and requested asylum after arriving at a U.S. airport. They were traveling with valid passports. Customs and Border Protection officers decided to consider their visas invalid because the family requested asylum, separated the family and sent them to different detention facilities. The wife and her daughter were sent to a "family"

[8] DHS confirmed in August 2016 that arriving asylum seekers whose cases originate at the border are not blocked from parole by the 2014 DHS enforcement priorities memorandum and should be assessed for potential parole eligibility after passing a credible fear screening. *See* C-SPAN, *Immigration and Asylum Detention Policies* (Aug. 3, 2016), https://www.c-span.org/video/?413552-1/discussion-focuses-detention-removal-asylum-seekers (Deputy Assistant Homeland Security Secretary for Immigration Policy confirming that asylum seekers who pass credible fear screening, establish identity and lack of flight risk, should generally be released).

detention facility while the husband and grandfather were sent to a detention facility in Georgia, where they were detained for six months. They were denied parole even though they had strong parole applications that included the valid passports that they had presented upon arrival. They were told only that they were denied parole because they were enforcement "priorities," and only released after advocacy and reporting by Human Rights First.

- **Honduran Woman Persecuted for Resisting Forced Abortion Detained as Enforcement Priority.** A Honduran woman who fled rape, torture, and abuse for resisting an abortion was detained for six months and told she was not eligible for parole because she was an enforcement "priority."

Lifeline on Lockdown at 3.

As these reports and examples indicate, asylum seekers are often unnecessarily held in detention arbitrarily and sometimes for prolonged periods without an individualized assessment of whether the particular asylum seeker is not a flight risk and meets other applicable parol criteria. The possibility of parole does not eliminate that problem.

D. Many Asylum Seekers Do Not Receive Adequate Explanations of Parole Denial

Even when ICE does consider an arriving asylum seeker for parole, ICE officers often fail to provide a clear reason—or at times, any explanation—for denials of parole. As described by Petitioners, any asylum seeker denied parole must be provided with

written notification of the denial, including an explanation of the reasons for denial and information regarding the procedure to request a redetermination of parole eligibility based on changed circumstances or additional evidence. Pet'rs Summ. J. Br. at 13; *see* Parole Directive § 6.6. But nonprofit attorneys have reported that asylum seekers held in facilities in New Jersey, Texas, California, and Pennsylvania have failed to receive written parole denials. *Lifeline on Lockdown* at 17. When ICE does provide written notification that parole has been denied, it often does so without indicating the reason for the denial. For example:

- **Asylum seeker with extensive U.S. ties denied parole without explanation and detained for six months.** A 19-year old victim of severe gang-based violence in El Salvador arrived at a port-of-entry along the U.S. southern border and requested asylum in 2015. She was placed in expedited removal proceedings and detained at the Tri-County Detention Center in Ullin, Illinois, where she was determined to have a credible fear of persecution. She did not receive an advisal concerning parole or an automatic interview. Her attorney later sought parole on her behalf, submitting a copy of her national identification card, and citing her lack of any criminal history and strong community ties. Both of her parents lived in Manassas, Virginia and had stable jobs, and her uncle, a U.S. citizen, provided a letter of support stating that he would sponsor her. Four days later, her attorney received a faxed, one-sentence denial stating, "Your parole

request for xxx-xxx-xxx has been denied." She ultimately spent over six months in detention.

- **Political asylum seeker from Belarus denied parole without adequate explanation and detained for four months**. An asylum seeker from Belarus was sent to the Pulaski County Detention Center in Kentucky in 2016. He passed his credible fear screening, reporting that he had suffered persecution, imprisonment and beatings due to his participation in political demonstrations against the Belarusian president. He did not receive an automatic parole interview. After he proactively requested parole, he was provided a one-sentence parole denial from ICE that did not even explain the reasons for the denial. He spent four months in detention and was released on parole only after considerable advocacy by a local nonprofit legal organization.
- **Refugee from Egypt denied parole without explanation and detained for nine months after immigration court ruled eligible for asylum.** An Egyptian man fled Egypt after he was pursued by the police for his journalistic and human rights activities. He arrived at a port of entry in November 2015 and was sent to the York County Detention Center in Pennsylvania, where he was found to have met the credible fear standard. He was never interviewed for parole. Instead, before his first court hearing, he received a letter from ICE stating that he would not be released because he was both a flight and security risk—with no

> additional detail or explanation. In April 2016, after nearly six months of detention, an immigration judge ruled that the man was a "refugee" and should be granted asylum, but ICE continued to hold him in detention. He submitted numerous requests for release to no avail. ICE responded with a decision stating that he would not be released because he was "subject to mandatory detention as an arriving alien," even though he had already passed out of the expedited removal process and was thus eligible for consideration of release on parole. ICE indicated that the reason for his continued detention was that the judge's "decision to grant [him] asylum may be overturned on appeal." Since then, the man has submitted numerous additional requests and letters of support from U.S. citizens, including a close friend who would sponsor him. He also submitted a copy of his Egyptian passport and his Egyptian national identification card. In response, a deputy field office director indicated that the man would be detained for the duration of his BIA appeal and that this "administrative decision is final and may not be appealed."

Lifeline on Lockdown at 18.

In sum, ICE has executed its parole authority arbitrarily and inconsistently, failing in many cases to conduct parole interviews or issue determinations at all. When ICE fulfills its obligation to make parole determinations, it often does so with disregard to the particular individual's eligibility for parole under the factors contained in the statute, regulations, and

guidance, based upon impermissible and non-individualized factors, or without explanation. The result is that the implementation of the parole authority, instead of operating as a procedural safeguard for detained asylum seekers, causes and contributes to prolonged and unconstitutional detentions.

III. Arbitrary Application of Parole Guidelines Results in Unconstitutional Arbitrary and Prolonged Detentions, Which Are Likely To Increase

Immigration detention is now at an all-time high, United Nations Working Group on Arbitrary Detention, *Preliminary 2016 Findings from its visit to the United States of America*, (Oct. 24, 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E#sthash.U0LK7hDR.dpuf; Devlin Barrett, *Record Immigrant Numbers Force Homeland Security to Search for New Jail Space*, Wall St. J., Oct. 21, 2016, https://www.wsj.com/articles/record-immigrant-numbers-force-homeland-security-to-search-for-new-jail-space-1477042202, and a larger proportion of those now held in immigration detention are asylum seekers, *see* Kate Morrissey, *Even before Trump, asylum seeker already caught up in clogged system*, San Diego Union-Tribune, Jan. 20, 2017, http://www.sandiegouniontribune.com/g00/news/immigration/sd-me-asylum-detention-20170120-story.html?i10c.referrer=https%3A%2F%2Fwww.google.coms%2F.

Recent reporting and analysis suggests that this trend results, at least in part, from arbitrary parole denials. *See Shadow Prisons* at 11-12. Without

prompt immigration court custody review, immigration detainees will have no recourse to prevent prolonged detention where parole has been arbitrarily denied. Consider these examples:

- **Political activist from Bangladesh with U.S. ties and identity documentation released from detention after seven months due to immigration court custody hearing.** A Bangladeshi man, now represented *pro bono* by Human Rights First, fled Bangladesh due to political persecution. After presenting himself to authorities at a formal port of entry along the southern U.S. border and requesting protection, he was classified as an arriving alien, placed in expedited removal, and detained in California. After passing his credible fear interview, he provided ICE with letters of support from three close friends, all U.S. citizens living in New York, who attested to his identity, were willing to house him and agreed to ensure his appearance at immigration hearings and appointments. His ICE deportation officer denied parole on the stated ground that he provided insufficient evidence of his identity. In response, the asylum seeker obtained an original birth certificate from family in Bangladesh and provided it to the officer. His deportation officer verbally told him "no one from Bangladesh will be released from detention until they have been inside for at least six months." ICE did not provide him with a written parole denial. After he was detained for about seven months, he had a *Rodriguez* bond hearing before an immigration judge in

California. The judge set his bond at $13,000, which was more than he could afford. His family had to borrow money to pay the bond. As a result of the bond hearing, he was released from detention after seven-and-a-half months. *Lifeline on Lockdown* at 23.

- **Victim of rape and torture, abused for resisting abortion, detained for six months and denied parole despite strong community ties.** A Honduran woman was raped and beaten by her domestic partner, who punched her in the stomach while she was pregnant and tried to yank her baby out when she refused to get an abortion. Country reports for Honduras show that there is a dire lack of state protection for women in similar situations. The woman fled this abuse and presented herself to immigration officials at a U.S. port of entry along the southern border in 2015. She was sent to the Mesa Verde Detention Facility in Bakersfield, California, where she passed her credible fear interview. Her five parole requests were supported by evidence that she would live with a close family friend who is a U.S. lawful permanent resident, that she had a U.S. citizen mother who lived near the family friend, and that she suffered from chronic headaches due to an injury that made her detention unbearable. A sponsor letter, financial records, identity documents of her sponsor, and medical documents relating to medical care received in detention were all submitted to ICE on five different occasions, both via email and fax. Each of the written parole denials provided to the woman

contained boilerplate language stating, "You have not established to ICE's satisfaction that you will appear as required for immigration hearings, enforcement appointments, or other matters, if you are paroled from detention." In December 2015, the woman was finally released after a *Rodriguez* bond hearing in which the immigration judge considered her eligibility for release and set her bond in the amount of $1,500, which the family was able to gather with the help of friends. *Id.* at 16-17.

- Transgender refugee denied parole, forced to remain in male housing unit of detention center where she was sexually assaulted multiple times. A 21-year-old transgender woman from Honduras sought protection at a U.S. port of entry on the southern border in 2016. She had fled Honduras after a brutal experience of persecution due to her gender identity. She was detained and sent to the Hudson County Correctional facility, where she was housed with men, despite identifying as a woman and requesting to not be housed with men. After she passed her credible fear interview, the refugee requested release from detention on parole. She provided ICE with her national identity card and letters of support from multiple family members who resided in Florida and were willing to sponsor her release from detention. Her *pro bono* attorney presented proof she had no criminal history, proof of her young age, and her high risk of sexual assault in detention as a transgender woman. However, ICE denied her request for parole. During her detention, she

was sexually assaulted numerous times. After six months in detention, she was ruled to be a refugee and was granted asylum by an immigration judge. Only then was she released from detention.[9] *See* Gemma Hallett, *Asylum Seekers Already Face Arbitrary and Prolonged Detention*, Human Rights First (Feb. 9, 2017), http://www.humanrightsfirst.org/blog/asylum-seekers-already-face-prolonged-detention-due-lack-parole.

- **Woman who sought asylum from political persecution in Cameroon held in detention as she cannot afford to pay $15,000 parole bond.** A woman who sought asylum at a U.S. port of entry along the southern border in 2016 reported that she had fled political persecution, arrest, rape, and detention in Cameroon due to her refusal to divulge information about a family member, a local opposition political

[9] This example highlights one of many ways that detention can harm the health of asylum seekers. In June 2003, Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture documented the impact of detention on the health of asylum seekers, including arriving asylum seekers who were held in detention instead of being released on parole. *See* Physicians for Human Rights & The Bellevue/NYU Program for Survivors of Torture, *From Prosecution to Prison: The Heath Consequences of Detention for Asylum Seekers* (2003). Their comprehensive report confirmed that detained asylum seekers suffer from extremely high levels of anxiety, depression and Post Traumatic Stress Disorder and that the already poor psychological health of asylum seekers worsens the longer that they are detained. *Id.* In fact, 86% of the interviewed asylum seekers suffered significant depression, 77% suffered anxiety and 50% suffered from Post Traumatic Stress Disorder. *Id.* at 1-2.

> leader who had gone into hiding. After she passed her credible fear interview, she attempted to secure release on parole. She provided to ICE her original national identity card and birth certificate as well as a supporting letter from a U.S. citizen friend who was willing at act as her sponsor. ICE would not release her on parole unless she could pay a $15,000 bond, an amount that she could not afford to pay. *Id.*

Concerns regarding the increasing escalation of arbitrary use of detention are further exacerbated by the President's January 25, 2017 Executive Order, entitled "Border Security and Immigration Enforcement Improvements." *See* Exec. Order No. 13767, 82 F.R. 8793 (Jan. 30, 2017) [hereinafter Executive Order]; Human Rights Watch, *US: Trump's Immigration Actions to Harm Millions* (Jan. 25, 2017), https://www.hrw.org/news/2017/01/25/us-trumps-immigration-actions-harm-millions. The Executive Order directs the Secretary of Homeland Security to "take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico." Executive Order Sec. 5(a). It further directs the Secretary of Homeland Security to "immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law" and to "issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of

lawful detention authority under the INA, including the termination of the practice commonly known as 'catch and release.'" *Id.* Sec. 6.

With respect to the exercise of parole, the Executive Order directs the Secretary to take "appropriate action to ensure that parole authority . . . is exercised . . . only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole." *Id.* Sec. 11(d).

The Government's discussion of the executive order in its supplemental brief indicates that ICE "has had"—rather than "has"—a policy "to consider parole automatically and ordinarily to release the alien unless he fails to provide sufficient evidence of his identity or fails to show that he will not be a flight risk or danger." Pet'rs Supp. Br. at 11 n.3. The Executive Order raises concerns that more asylum seekers may be held in immigration detention for the duration of their immigration proceedings, regardless of the need for detention in their individual case, and that DHS and ICE may take steps to further limit access to release on parole for arriving asylum seekers, including for those who do not present a danger or risk of flight and have sufficiently established their identities.

This shift toward an increased emphasis on the already-growing practice of immigrant detention suggests that the flawed parole process will not serve as a sufficient safeguard against arbitrary and prolonged detention. As the examples discussed in this brief demonstrate, the parole process available to arriving asylum seekers falls far short of providing a

constitutional safeguard against prolonged and arbitrary detention.

CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Appeals' decision in this case.

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