

**PETITION FOR RULEMAKING TO
PROMULGATE REGULATIONS GOVERNING CUSTODY DETERMINATIONS FOR
ARRIVING ALIEN ASYLUM SEEKERS**

**SUBMITTED TO
THE UNITED STATES DEPARTMENT OF JUSTICE
MARCH 15, 2010**

**National Immigrant Justice Center
The Advocates for Human Rights
The American Friends Service Committee
American Gateways
Amnesty International
Asian American Justice Center
Center for Gender & Refugee Studies
The Center for Victims of Torture
The Constitution Project
Florence Immigrant and Refugee Rights Project
Florida Immigrant Advocacy Center
Heartland Alliance Marjorie Kovler Center
Hebrew Immigrant Aid Society
Immigration Equality
Jubilee Campaign USA
The Immigrant Law Center of Minnesota
Lutheran Immigration and Refugee Service
Midwest Coalition for Human Rights
Northwest Immigrant Rights Project
Pennsylvania Immigration Resource Center
Physicians for Human Rights
The University of California-Davis Immigration Law Clinic
Professor Deborah Anker
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I. STATEMENT OF PETITION

The National Immigrant Justice Center and 30 other organizations and individuals hereby petition the Department of Justice (“Department” or “DOJ”) to initiate a rulemaking proceeding pursuant to the Administrative Procedures Act, 5 U.S.C. § 553, and to adopt a rule granting immigration judges the authority to review the custody of “arriving aliens”¹ who enter the United States at a port of entry and seek asylum based upon a credible fear of persecution or torture in their home countries. “Credible fear” exists when an immigration officer determines that there is a “significant possibility” based upon the asylum seeker’s testimony or other evidence that the asylum seeker will prove at a full hearing that he or she would suffer persecution or torture if returned to the home country.² Currently, even though the Immigration and Nationality Act (“INA” or “Act”) does not require mandatory detention of arriving aliens who have passed a credible fear interview, immigration judges lack the authority to review the custody of this narrow class of arriving aliens.³ This Petition proposes amendments to existing Section 1003.19 of 8 CFR part 1003 that would allow immigration judges to make custody determinations for arriving asylum seekers who have passed a credible fear interview. The amendments proposed promote due process and equal protection under the laws, are consistent with the Act and national security policies, promote U.S. compliance with international law and treaty obligations, save government resources, and prevent the unnecessary detention of those seeking freedom from persecution and torture.

II. STATEMENTS OF INTEREST

The Petitioners are immigration professors, instructors, advocates, and non-governmental organizations with extensive collective experience working with and representing detained asylum seekers, including advocacy organizations that have analyzed the legal and policy implications of the current immigration detention system.

The Advocates for Human Rights is a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages nearly 1000 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights provides *pro bono* legal assistance to indigent asylum seekers in the Upper Midwest. The Advocates for Human Rights has a strong interest in seeing that the United States construe legal protections for asylum seekers in a way that is consistent with international human rights standards in the Convention relating to the Status of Refugees and the Convention Against Torture.

The American Friends Service Committee (AFSC) is deeply committed to assure legal protections for asylum seekers consistent with international human rights standards and conventions. Our current work is grounded in decades of worldwide refugee and asylee work

¹ 8 C.F.R. § 1.1(q) (2009).

² 8 U.S.C. § 1225(b)(1)(B)(v).

³ 8 C.F.R. § 1003.19(h)(2)(i)(B) (2009).

dating back to the organization's founding in 1917. Since 1997 the organization has played a lead role in the representation of asylees in detention work in New Jersey. Its Immigrant Rights Program has provided legal counsel and "know your rights" presentations, matched pro bono attorneys with experienced immigration lawyers, and provided information and services to detainees and their families while advocating for fair and just immigration policy.

American Gateways has represented a number of asylum seekers, both detained and non-detained before DHS and the EOIR. Asylum seekers are some of the most vulnerable populations of individuals coming to the US. Allowing release on parole and review of any orders of detention for asylum seekers does not affect the security interest of the United States and ensures the protection of those individuals who have been persecuted and jailed in their home country. In addition, these new rules would honor the US' international treaty obligation and provide the needed protection for those who are seeking safety from persecution.

Amnesty International (AI) is a worldwide human rights movement of more than 2.8 million members and supporters in more than 150 countries and territories working for respect and promotion of internationally recognized human rights. It is independent of any government, political ideology, economic interest, or religion. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. As a general rule, Amnesty International is opposed to the use of detention for the purposes of immigration control. Everyone has the right to liberty and security of the person, including the protection from arbitrary arrest and detention, regardless of legal status. Detention of asylum seekers is lawful only when the authorities can demonstrate in each individual case that it is necessary and proportionate to the objective being achieved, that alternatives will not be effective, that it is on grounds prescribed by law, and where there is an objective risk of the person absconding.

Asian American Justice Center (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. Asian Americans make up a significant proportion of the United States' immigrant and refugee population, and AAJC has focused its efforts on protecting the rights of immigrants and refugees through advocacy for fair and humane immigration laws at the national level.

Center for Gender & Refugee Studies (CGRS) has a direct and serious interest in the development of immigration and refugee law and policy in a manner consistent with relevant international refugee and human rights law. Founded in 1999 at the University of California, Hastings College of the Law, CGRS is the nation's leading organization supporting women asylum seekers fleeing gender related harm, at both the practice and policy levels. Through its scholarship, expert consultations, advocacy, and appellate litigation, CGRS has played a central role in the development of refugee law and policy on a wide range of issues. The policy of detaining asylum seekers - which is contrary to the norms and principles of international law, is detrimental to the physical and mental health of asylum seekers, and negatively impacts their ability to secure legal representation or prepare their case - is an issue of great consequence to the Center.

The Center for Victims of Torture (CVT), established in 1985, provides comprehensive, interdisciplinary services to torture survivors, including medical, psychological and psychiatric treatment, social work services, and physical and massage therapy. CVT serves approximately 240 clients per year, of whom approximately sixty percent are asylum seekers.

The Constitution Project is an independent think tank that promotes and defends constitutional safeguards. The Constitution Project created its Liberty and Security Committee, a bipartisan, blue-ribbon committee of prominent Americans, to address the importance of preserving individual rights while also ensuring public safety. The Committee develops policy recommendations on a wide range of issues, including immigration detention and access to counsel.

Florence Immigrant and Refugee Rights Project (FIRRP) provides holistic, free legal services to the over 3,000 immigrants, refugees, and U.S. citizens detained by Immigration and Customs Enforcement (ICE) in Arizona. Through its Know-Your-Rights presentations, workshops, legal representation, and targeted services, FIRRP regularly identifies persons who are held in detention while pursuing claims before an immigration judge, the Board of Immigration Appeals, and the Ninth Circuit Court of Appeal. The Project serves men, women, and children, including those with mental health and social service needs, and advocates for a more just and efficient judicial system for individuals in immigration detention.

Florida Immigrant Advocacy Center (FIAC), a not-for-profit legal services organization, was founded in 1996 when federal funding restrictions prevented Legal Services agencies from handling immigration cases on behalf of indigent clients. FIAC's mission is to protect and promote the basic human rights of immigrants of all nationalities. FIAC serves the most vulnerable immigrant populations through direct services, federal court litigation, impact advocacy, and education. For more than fourteen years, FIAC attorneys have represented individual clients in proceedings before immigration judges, the Board of Immigration Appeals, and the U.S. Court of Appeals for the Eleventh Circuit. FIAC has successfully represented asylum seekers from all over the world. FIAC's detention team regularly visits local detention centers, provides "know your rights" presentations to immigration detainees, and monitors conditions of detention, including inadequate provision of medical care and mental health services. FIAC has also advocated on behalf of asylum seekers through testimony before the U.S. Senate Judiciary Subcommittee on Immigration; the House Subcommittee on International Operations and Human Rights; and the U.S. Commission on Civil Rights.

Heartland Alliance Marjorie Kovler Center is a treatment program devoted to the recovery and healing of individuals, families, and communities affected by torture. The comprehensive model of care includes, but is not limited to: mental health, medical care, case management, and interpretation and translation services. Our treatment approach is based on the key principles of empowerment, community building, and multidisciplinary services. Our staff and network of volunteers provide culturally competent care that enhances the natural resiliency of torture survivors and assists them in rebuilding their lives in Chicago.

Hebrew Immigrant Aid Society's (HIAS) central mission since its founding in 1881 has been to rescue Jews and others fleeing persecution and to assist them to start their lives anew in peace and security in the United States and elsewhere. In fulfillment of this mission, HIAS maintained staff at Ellis Island to assist individuals through the immigration process, including representation in exclusion proceedings. More recently, HIAS attorneys and accredited representatives have provided legal representation to asylum seekers in immigration courts in the New York area, including at immigration detention facilities. HIAS has successfully represented numerous asylum seekers throughout the appellate process, up to and including the U.S. Courts of Appeals. Through representing detained survivors of torture other asylum applicants, HIAS is highly aware of the conditions faced by detainees. HIAS supports the proposal to parole of certain eligible detainees who have passed their credible fear interview so that they may participate in the gathering of sufficient evidence for their claims to be adjudicated fairly. As set forth in the petition, HIAS believes these proposals to be very much in the public interest and consistent with U.S. treaty obligations where humanitarian principles are concerned. The adoption of these proposals will further ensure that individuals fleeing persecution have the fullest opportunity for full and fair judicial review of their cases.

Immigration Equality is a national organization whose mission is to end the discriminatory treatment of lesbian, gay, bisexual, transgender ("LGBT") and HIV-positive individuals under U.S. immigration law. Immigration Equality runs a pro bono asylum project, provides technical assistance to attorneys, maintains an informational website, and fields questions from LGBT and HIV-positive individuals from around the world. Additionally through education, outreach and advocacy, Immigration Equality works to change the laws that unfairly impact LGBT and HIV-positive immigrants. Immigration Equality regularly represents and provides mentoring to pro bono attorneys representing detained asylum seekers. We are deeply concerned about the detention of asylum seekers, especially those who are in vulnerable populations, such as LGBT and HIV-positive individuals.

The Immigrant Law Center of Minnesota (ILCM) is a Minnesota-based non-profit organization that engages in advocacy, direct services, education, outreach, and impact litigation to protect the civil rights of immigrants. It represents asylees and refugees throughout Minnesota in removal proceedings before the immigration courts and the Board of Immigration Appeals.

Jubilee Campaign USA is a non-governmental organization that promotes human rights and religious liberties for ethnic and religious minorities throughout the world. Jubilee has been granted Consultative Status by the United Nations (UN) and participates in raising issues with UN organs including the Human Rights Council and the High Commission for Refugees. We raise concerns on behalf of persecuted religious minorities, and we assist asylum seekers in the US seeking refugee protection from various parts of the world.

Lutheran Immigration and Refugee Service (LIRS) is a cooperative agency of the Evangelical Lutheran Church in America, the Lutheran Church - Missouri Synod and the Latvian Evangelical Lutheran Church in America. LIRS has been the U.S. Lutheran expression of service to refugees and migrants in America since 1939. From its beginnings helping refugees from Nazi Germany during World War II to its presence as advocates for the most vulnerable, LIRS seeks to bring new hope and new life to uprooted people all over the world through access

to services, resources, and justice. For some 20 years, LIRS has held a special interest in asylum seekers, torture survivors, children and other vulnerable migrants in immigration detention. LIRS supports a nationwide network of legal service providers for those in immigration detention, and continues to advocate for humane and fair laws for all migrants.

Midwest Coalition for Human Rights (MCHR) is a network of advocacy organizations, service providers, and university-based centers collaborating to promote and protect human rights in our Midwest region, in the United States, and internationally. Working together we provide broader visibility for urgent human rights issues in the Heartland and project a strong Midwest advocacy voice in the national and international human rights debate. Coalition members work to uphold the human rights and to protect the due process rights of immigrant detainees. The Coalition seeks to change detention conditions for immigrants, reframe the public debate on immigrant detainees within the larger scope of human rights, and create a constituency that promotes the rights of immigrants, refugees, and asylum seekers.

National Immigrant Justice Center is a Chicago-based, nonprofit organization dedicated to ensuring human rights protections and access to justice for all immigrants, refugees and asylum seekers. NIJC provides direct legal services to thousands of detained and non-detained immigrants and asylum seekers each year through legal orientation (or “know your rights”) presentations and individual representation in immigration proceedings. NIJC is accredited by the Board of Immigration Appeals to provide legal assistance to indigent and low-income immigrants, and has acted as a legal service provider and national policy-reform advocate for immigrants and immigrant detainees for more than 30 years. NIJC and its *pro bono* attorneys frequently represent and file habeas petitions on behalf of detained asylum seekers, some of whom have been detained for years. NIJC also conducts policy-reform advocacy and impact litigation to promote the rights of these individuals on a local, regional, national, and international scale. NIJC submits this Petition in furtherance of its commitment to the rights of individuals seeking protection from persecution in their home countries.

Northwest Immigrant Rights Project (NWIRP) is an organization dedicated to the defense and advancement of the rights of non-citizens in the United States. NWIRP provides direct representation to low-income immigrants who are applying for political asylum, both with affirmative applications before the U.S. Citizenship and Immigration Services, and as relief in removal proceedings before the Immigration Court, the Board of Immigration Appeals and the Federal Court of Appeals. NWIRP also recruits and trains *pro bono* attorneys to represent asylum seekers before U.S. Citizenship and Immigration Services, the Immigration Court, the Board of Immigration Appeals and in the Federal Court of Appeals. NWIRP is especially concerned with issues involving the scope of statutory and regulatory bars precluding eligibility for persons seeking political asylum, under INA § 208(a).

Pennsylvania Immigration Resource Center (PIRC) is a non-profit legal services organization founded in 1996 in the aftermath of the Golden Venture catastrophe. The Golden Venture ship beached off the coast of Long Island with nearly three hundred Chinese refugees aboard who were fleeing persecution. Consequent to immigration policies that mandate the detention of some asylum seekers, many Golden Venture refugees were detained at York County Prison in York, Pennsylvania, by the current Department of Homeland Security (DHS). Today,

PIRC continues to provide legal services for vulnerable populations detained in Pennsylvania, including families and survivors of torture. In providing legal and educational resources to detained populations, PIRC seeks to empower unrepresented immigrants to evaluate and manifest their defenses against deportation from the United States. PIRC believes that detained immigrants have a right to adequate information concerning their immigration status and access to effective legal resources. Our goal is to ensure access to justice for immigrants who are detained by ICE and facing removal from the United States.

Physicians for Human Rights (PHR) is a nonprofit organization that mobilizes health professionals across the United States to advance health, dignity, and justice. Harnessing the specialized skills, rigor, and passions of doctors, nurses, public health specialists, and scientists, PHR investigates and exposes human rights violations in the US and internationally. Health professional members of PHR have evaluated the mental and physical health of detained and non-detained asylum seekers and torture survivors since 1992. From *Persecution to Prison*, PHR's 2003 joint publication with the Bellevue-NYU Program for Survivors of Torture, called for an end to systematic immigration detention of asylum seekers and torture survivors, finding that detention frequently exacerbates harm resulting from torture and persecution.

The University of California-Davis Immigration Law Clinic primarily serves the detained immigrant population through the King Hall Immigrant Detention Project. The Clinic and the students provide Know Your Rights Presentations to the detainees in Northern California and provide direct representation to the individuals as well. The Clinic also represents asylees and refugees. This detained population is quite unique in the custody context in that many are charged as arriving aliens and thus rarely receive release from custody. One of the Clinic's goals is to serve this population, not only in removal proceedings, but also in federal challenges to their prolonged custody.

Professor Deborah Anker* is the Director of the Harvard Immigration and Refugee Clinic (HIRC). Professor Anker has been a leader in the field for over 20 years. She is a clinical professor of law at Harvard Law School and is one of the best-known asylum scholars and practitioners in the United States. Her work is cited frequently by international tribunals and the United States Supreme Court. She authored one of the leading treatise on American refugee and asylum law, *Law of Asylum in the United States*, now in its third edition. Ms. Anker has litigated extensively in domestic and international tribunals. She has conducted Ford Foundation research studies of immigration agencies and frequently publishes legal articles and essays in refugee and human rights periodicals.

Sabrineh Ardalan* is a Clinical and Advocacy Fellow at the Harvard Immigration and Refugee Clinical Program (HIRC). Prior to joining HIRC, she served as the Equal Justice America fellow at The Opportunity Agenda and as a litigation associate at Dewey Ballantine LLP. Ms. Ardalan clerked for the Honorable Michael A. Chagares of Third Circuit Court of Appeals and the Honorable Raymond J. Dearie, Chief District Judge for the Eastern District of New York. She holds a J.D. from Harvard Law School and a B.A. in History and International Studies from Yale College.

* Institutional affiliations provided for identification purposes only.

Professor Regina Germain* has practiced in the area of asylum and refugee law for over 20 years. She is the author of the Asylum Primer (AILA 2009) first published in 1998 and now in its 6th Ed. She currently teaches Asylum Law and an Asylum Practicum at the University of Denver Sturm College of Law and has also taught as a Fellow at Georgetown University Law Center. She was the Legal Director of the Rocky Mountain Survivors Center from 2005 to 2009. Prior to that, she was the Senior Legal Counsel of the United Nations High Commissioner for Refugees (UNHCR) Office in Washington DC. She is a frequent speaker on asylum issues at national and local conferences and also testified before Congress on issues regarding the UN Convention Against Torture and as an expert in immigration court proceedings.

Professors Denise Gilman and Barbara Hines* teach at the University of Texas School of Law Immigration Clinic in Austin, Texas. The clinic regularly represents asylum seekers, including arriving aliens and those subjected to expedited removal. Specifically, the clinic has represented asylum seekers detained at the T. Don Hutto detention facility since September 2006. Many detainees at the facility are arriving aliens who have passed their credible fear interviews and are pursuing their asylum claims. The proposed rulemaking would provide greater protections for this vulnerable population. Professor Hines has practiced in the field of immigration law for 35 years. Professor Gilman has practiced in the field of human rights and immigration law for 16 years.

Nancy Kelly* is a Clinical Instructor and Co-managing Director of the Harvard Immigration and Refugee Clinic (HIRC) at Greater Boston Legal Services. Professor Kelly is also an adjunct professor of immigration and asylum law at Northeastern University School of Law. She previously served as a Harvard Law School Human Rights Program fellow. At the Human Rights Program, Ms. Kelly initiated the nationally and internationally prominent Women Refugees Project, a centerpiece of the Clinic's work. Among other honors, Ms. Kelly received the 2000 John G. Brooks award of the Boston Bar Association for her work with refugee women and children, and for her teaching at the Clinic.

Eunice Lee* is currently the Albert M. Sacks Clinical Teaching and Advocacy Fellow at the Harvard Immigration and Refugee Clinical Program. Formerly, she was an Equal Justice Works Fellow at the Immigrants' Rights Project of the American Civil Liberties Union in New York, NY. Ms. Lee clerked for the Honorable Carlos F. Lucero of the Tenth Circuit Court of Appeals. She received her B.A. from Stanford University with honors and distinction and her J.D. from Yale Law School.

John Willshire-Carrera* is a Clinical Instructor and Co-managing Attorney of the Harvard Immigration and Refugee Clinic at Greater Boston Legal Services. Professor Willshire-Carrera is a nationally known researcher and practitioner with numerous, and prominent, immigration and asylum litigation victories to his credit. In 1987, he directed the Ford Foundation national research and organizing project on implementation of *Plyler v. Doe*, the Supreme Court decision that established the right of all immigrant students to a public education in the United States. He has received the Dow-Gardner-Landrum award for outstanding

commitment to legal services to the poor and the annual legal services attorney award from the Massachusetts Bar Association, among other awards.

Professor Shoba Sivaprasad Wadhia* is Director of Penn State Law's Center for Immigrants' Rights at Penn State School of Law, an immigration clinic with a mission to represent immigrants' interests through legal excellence, advocacy, education, and collaboration with key stakeholders and the community. Primarily through representation of organizations, students work on innovative advocacy and policy projects relating to U.S. immigration policy and immigrants' rights. Students have produced policy-oriented white papers, prepared practitioner toolkits on substantive areas of immigration law, and assisted with individual casework for detained immigrants, among other projects. She also teaches courses in immigration policy and asylum and refugee law. As former deputy director for legal affairs at the National Immigration Forum, an immigration advocacy organization in Washington, D.C., Professor Wadhia was immersed in issues surrounding the creation of the U.S. Department of Homeland Security and "Post 9-11" executive branch policies impacting immigrant communities, and in the debates surrounding "comprehensive immigration reform." She provided legal expertise and analysis of legislative and regulatory proposals; engaged in direct advocacy with Congress and the administration; and led an NGO-governmental work group on immigrant due process and civil liberties. Professor Wadhia has received awards from both the Department of Homeland Security Office for Inspector General and the Department of Homeland Security Office for Civil Rights and Civil Liberties for her leadership and in 2003, was named Pro Bono Attorney of the Year by the Arab-American Anti-Discrimination Committee.

III. BACKGROUND: ARRIVING ASYLUM SEEKERS IN DETENTION

Current Legal Scheme and Practice

Individuals apprehended at a port of entry to the United States who are deemed inadmissible are typically subject to expedited removal, unless they express a fear of returning to their country of origin or country of last residence.⁴ Individuals who express a fear of return are given an interview with an Asylum Officer for a "credible fear" determination.⁵ If an individual is found to possess a "credible fear" of returning to her home country or country of last residence, the individual is referred to an Immigration Judge.⁶ These asylum seekers are deemed "arriving aliens"⁷ and are detained in the custody of the Department of Homeland Security ("DHS"), although not subject to mandatory detention under the Act, as is further discussed in Section IV, *infra*. Current regulations divest immigration judges of the authority to make custody determinations in these cases.⁸

⁴ INA § 235(b)(1)(A)(i).

⁵ INA § 235(b)(1)(A)(ii).

⁶ 8 C.F.R. § 235.6(a)(1)(ii).

⁷ 8 C.F.R. § 1.1(q).

⁸ 8 C.F.R. § 1003.19(h)(2)(i).

At present, arriving asylum seekers who pass a credible fear interview may be released from detention pursuant to DHS's authority to parole applicants for admission under INA § 212(d)(5). However, the current regulations governing parole under INA § 212(d)(5) do not make special provision for parole of asylum seekers.⁹

In the absence of such regulatory language, DHS's Immigration and Customs Enforcement (ICE) has issued policy memoranda over the years outlining criteria for parole determinations. These parole decisions are entrusted exclusively to ICE officers and not subject to any review for reasonableness, fairness or consistency.¹⁰ Most recently, in 2009, ICE issued new parole guidelines under INA § 212(d)(5) and 8 C.F.R. § 212.5 for individuals who have passed a credible fear interview, thus overriding more restrictive guidelines previously issued in 2007.¹¹ The 2009 Parole Guidelines take two very significant steps in addressing the detention of arriving asylum seekers. First, the 2009 Parole Guidelines require that an individual who passes a credible fear interview automatically be considered for parole.¹² Second, the 2009 Parole Guidelines articulate the position that it is not in the public interest to continue to detain an individual who has passed a credible fear interview and can establish that he or she is neither a flight risk nor a danger to the community.¹³

The 2009 Parole Guidelines do not permit review of an adverse custody decision. The lack of this procedural safeguard – the ability to seek meaningful review of a decision to keep a person in custody – is not only in tension with the statute, but it conflicts with constitutional protections and international guidelines which govern the detention of asylum seekers, as outlined more fully at Section IV, *infra*. Without some review over custody determinations, arriving asylum seekers may be subjected to unnecessary and prolonged detention despite meritorious legal claims.

Confining asylum seekers in detention facilities for an indeterminate time is inconsistent with the Act, the humanitarian purpose of asylum law, and the international standards applicable to arriving asylum seekers who demonstrate a credible fear of persecution or torture. As is discussed more fully in the next section, long-term detention often has a devastating impact on the mental and physical well-being of individuals who are already vulnerable due to actual or threatened torture, abuse, and persecution in their home countries.

The proposed regulations do not in any way change current law that prohibits the release of those who would present a risk to the community. The current statutory and regulatory scheme mandates the detention of anyone deemed a threat to national security, and precludes such

⁹ 8 C.F.R. § 212.5.

¹⁰ See Memorandum from Michael A. Pearson, INS Executive Associate Commissioner Detention Guidelines Effective October 9, 1998, Oct. 7, 1998 (reprinted in 75 Interpreter Releases 1523 (1998)) (“Pearson 1998 Memorandum”); U.S. Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a ‘Credible Fear’ of Persecution or Torture*, Directive No. 7-1.0, (Nov. 6, 2007) [hereinafter, *ICE 2007 Parole Guidelines*]; U.S. Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a ‘Credible Fear’ of Persecution or Torture*, Directive No. 11002.1, (Dec. 8, 2009) [hereinafter, *ICE 2009 Parole Guidelines*].

¹¹ See ICE 2009 Parole Guidelines, *supra* note 10.

¹² See ICE 2009 Parole Guidelines, *supra* note 10.

¹³ ICE 2009 Parole Guidelines, *supra* note 10.

individuals from eligibility for asylum in the United States.¹⁴ Additionally, various law enforcement mechanisms are available to DHS to ensure that the safety and security of the country are not compromised. These include Federal Bureau of Investigation (“FBI”) fingerprint checks and coordinated background checks involving the FBI, the U.S. Department of State, and the Central Intelligence Agency (“CIA”). The proposed regulations do not disturb current laws and regulations that protect national security.

The Impact of Unreviewable Custody Decisions on Arriving Asylum Seekers

Prolonged Detention

The amount of time an individual is detained in the United States depends largely on whether he or she pursues relief – if relief is pursued, it can add to the length of detention for that individual.¹⁵ In comparison to the detained population overall, asylum seekers who file applications for relief in the United States stand to face a lengthy amount of time in detention while their asylum claims are adjudicated in the U.S. courts.¹⁶ Human Rights Watch (“HRW”) notes that for fiscal year 2006, of the 5,761 asylum seekers who were detained, 1,559 (27%) were detained for more than 180 days.¹⁷ On average, arriving aliens who eventually obtain asylum spend 10 months in detention.¹⁸ Moreover, in 2007, ICE detained more than 10,000 asylum seekers – almost double the number reported for 2006.¹⁹

Impact on Mental Health

Review of the continued detention of arriving asylum seekers who pass credible fear interviews is further necessitated by the fact that long-term detention of asylum seekers may be psychologically damaging to already fragile individuals, many of whom escaped from imprisonment and torture in their country of origin. A joint report issued in 2003 by Physicians

¹⁴ See INA §§ 236(c); 208(b)(2); 241(b)(3)(B); 8 C.F.R. § 1236.1; *see also Matter of Urena*, 25 I&N Dec. 140 (BIA 2009).

¹⁵ *Immigration Detention Overview and Recommendations*, U.S. Immigration & Customs Enforcement 6 (Oct. 6, 2009) (prepared by Dr. Dora Schriro) [hereinafter, *Schriro Report*].

¹⁶ This number is disproportionately more than the average number of total detainees held for more than 126 days: According to ICE statistics as of April 30, 2007, 25 percent of all detained immigrants were removed from the United States within 4 days, 50 percent within 18 days, 75 percent within 44 days, 90 percent within 85 days, 95 percent within 126 days, and 98 percent within 210 days. *See* Human Rights Watch, *Detained and Dismissed: Women’s Struggles to Obtain Health Care in United States Immigration Detention*, 17, n.40, (Mar. 2009) (prepared by Meghan Rhoad) [hereinafter *Human Rights Watch Report*]; *see also* U. S. Government Accountability Office, *Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance*, 48, GAO-07-875 (July 2007).

¹⁷ Human Rights Watch Report, *supra* note 16, at 17, n.41; *see also* U.S. Congressional Research Service, *Health Care for Noncitizens in Immigration Detention*, 19, RL34556 (June 27, 2008) (prepared by Alison Siskin) [hereinafter, *CRS Report*].

¹⁸ Physicians for Human Rights & NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, 2 (2003) [hereinafter, *PHR/Bellevue/NYU Report*].

¹⁹ Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, 1 (2009) [hereinafter *Human Rights First Report*], available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf>.

for Human Rights and the Bellevue/NYU Program for Survivors of Torture (“PHR/Bellevue/NYU Report”) found that of the 70 detained asylum seekers participating in the study, 67% had been extra-judicially detained in their home countries, 59% knew a friend or family member who had been murdered, 26% had been sexually assaulted, and 74% reported being tortured.²⁰ Most asylum seekers in the study did not understand why they were treated as criminals when they were actually victims.²¹ This perplexity exacerbated the psychological stress that many asylum seekers suffer as a result of the persecution they have endured.²²

Prolonged detention impacts the mental health of asylum seekers because it induces fear, isolation and hopelessness. In its 2003 study, the PHR/Bellevue/NYU Report found that 86% of asylum seekers in detention showed signs of depression, 77% experienced anxiety, and 50% had post-traumatic stress disorder.²³ For some asylum seekers, detention leads to suicidal thoughts and tendencies.²⁴ Moreover, mental health problems may be compounded by physical health issues. Nearly 90% of detained asylum seekers reported having at least one serious physical health problem while detained, including musculoskeletal pain, headaches and gastrointestinal problems.²⁵

Detention facilities are not adequately equipped to meet the mental and physical health issues that often plague detained asylum seekers.²⁶ More than half of the asylum seekers with serious health problems interviewed in the PHR/Bellevue/NYU study described significant or extreme difficulty accessing medical care.²⁷ For those who saw a doctor, many were told that their pre-existing conditions – for example, pain resulting from a gunshot wound suffered in a peaceful demonstration in a country of origin – could not be treated until the patients were released from detention.²⁸ In the face of such difficult physical and psychological challenges and to end their indefinite detention, some asylum seekers with meritorious claims abandoned their applications and were deported to countries where they feared persecution.²⁹ The proposed regulations would address the mental and physical health issues that individuals who are determined to have a credible fear and do not pose a threat to society are released from detention.

Government Resources

Moreover, the proposed amendments would result in more efficient and judicious use of government resources. Inasmuch as they would lead to the more timely and predictable release of asylum seekers who have passed credible fear interviews, these rules would permit the government’s enforcement resources to be reallocated. Release of these individuals would also save taxpayer dollars. The current average cost of detention is estimated at \$95 per individual

²⁰ PHR/Bellevue/NYU Report, *supra* note 18, at 50.

²¹ *Id.* at 10.

²² CRS Report, *supra* note 17; *See generally*, PHR/Bellevue/NYU Report, *supra* note 18, at 1-2, 9 (discussing the harmful psychological effects of detention on already fragile asylum seekers).

²³ PHR/Bellevue/NYU Report, *supra* note 18, at 2.

²⁴ *Id.* at 7.

²⁵ *Id.* at 9.

²⁶ Schriro Report, *supra* note 15, at 25-26.

²⁷ PHR/Bellevue/NYU Report, *supra* note 18, at 9.

²⁸ *Id.*

²⁹ *See generally*, Human Rights First Report, *supra* note 19.

per day.³⁰ The cost of detaining asylum seekers from 2003 to February 2009 exceeded \$300 million.³¹ In a 2009 report, the Constitution Project notes that:

Since 2003, the custody operations budget of U.S. Immigration and Customs Enforcement ...has doubled as the government's immigration detention program expands...[i]n its fiscal year 2009 report to Congress, ICE requested an additional \$72 million to support a planned increase in staffing and bed space, and by 2010 immigration detention is expected to cost taxpayers over \$1.7 billion.³²

While detained asylum seekers are only a percentage of those numbers, releasing an asylum seeker who has demonstrated a credible fear of returning to his or her home country is a more economical alternative to continued detention of that individual.

IV. LEGAL AUTHORITY TO PROMULGATE

The Attorney General possesses the authority to define the power of the Immigration Courts, and to prescribe procedures for Immigration Courts.³³ As only the regulations of the immigration courts prohibit jurisdiction over this subject matter, the Attorney General's legal authority to revise the regulations includes the power to authorize immigration judges to make custody decisions for arriving alien asylum seekers. In fact, current regulations permit immigration judges to make custody determinations for asylum seekers who have passed credible fear interviews if they are not arriving aliens, i.e., if they were apprehended within the United States rather than at a port of entry.³⁴

The Act does not require a different rule for arriving aliens. Under the Act, arriving aliens who have yet to pass their credible fear interviews and those who are found not to have a credible fear are subject to mandatory detention.³⁵ However, individuals who pass a credible fear interview are not subject to mandatory detention.³⁶ Therefore, the Act forms no barrier to immigration judges determining custody for arriving alien asylum seekers just as they do for other apprehended noncitizens who are not subject to mandatory detention.

The current rules – which divest immigration judges of the power to make custody decisions for *all* arriving alien asylum seekers – not only result in poor policy, they also trigger serious constitutional concerns. Individuals who have made an unlawful entry into the United States are processed similarly to arriving aliens, under the provisions of INA § 235(b), but once such individuals have passed a credible fear interview, they may obtain a bond hearing before an

³⁰ *Id.* at 25.

³¹ *Id.* at 8.

³² The Constitution Project, *Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*, 14 (2009) [hereinafter, *Constitution Project Report*].

³³ See INA § 103(g)(2) (stating that the Attorney General “shall establish such regulations” and “review such administrative determinations in immigration proceedings . . . as the Attorney General determines to be necessary for carrying out” immigration laws).

³⁴ See *Matter of X-K*, 23 I&N Dec. 731 (BIA 2005).

³⁵ See INA § 235(b)(1)(B)(iii)(IV).

³⁶ See INA § 235(b)(1)(B)(ii).

immigration judge.³⁷ Individuals who request asylum at a point of entry enjoy no similar procedural protections. Thus, the group of asylum seekers who unlawfully entered the United States may obtain custody review over their detention while applying for asylum, whereas individuals apprehended at a port of entry cannot. This scheme creates an arbitrary and illogical distinction between asylum seekers apprehended at ports of entry and those apprehended at any other location. It results in different treatment for similarly situated individuals without rational basis. Immigration court review is contingent on the happenstance of where an individual is apprehended. This type of disparate treatment is inconsistent with due process and equal protection provisions.³⁸

Nothing in the Act precludes immigration judges from exercising their authority to order release, including release without bond, for asylum seekers. Immigration judges currently exercise jurisdiction under INA § 236(a)(2) to determine whether to release individuals other than arriving aliens. INA § 236(a)(2) permits either release on bond, or release on “conditional parole.” INA § 236(a)(2)(B).³⁹ Because immigration judges have traditionally exercised authority under INA § 236(a)(2), and in the absence of statutory language mandating the detention of arriving asylum seekers, immigration judges should exercise their authority to review an individual’s custody in the case of arriving aliens who have passed a credible fear interview. To maintain clarity, regulatory provisions should be promulgated stating that the decision of the immigration judge to release an asylum seeker is pursuant to INA § 236(a)(2) and does not constitute parole under INA § 212(d)(5).

Additionally, longstanding U.S. precedent holds that domestic statutes should be construed together with international law.⁴⁰ Under international law, detention without procedural safeguards is prohibited.⁴¹ Article 9 of the Universal Declaration of Human Rights (“Universal Declaration”) states that, “No one shall be subject to arbitrary detention.”⁴² Likewise, Article 9 of the International Covenant on Civil and Political Rights (“ICCPR”) requires that certain procedural protections should accompany detention.⁴³ ICCPR Article 9(4) requires that any person who is deprived of liberty by arrest or detention be “entitled” to proceedings before a court that will decide “without delay” on the lawfulness of the detention,

³⁷ See *Matter of X-K*, 23 I&N Dec. 731 (BIA 2005).

³⁸ Administratively created distinctions between similar classes have been subjected to more stringent scrutiny than statutorily-mandated distinctions. See e.g., *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336 (1989).

³⁹ “Conditional parole” under 8 U.S.C. § 1226(a)(2)(B) is not parole under INA § 212(d)(5), as various unpublished Board of Immigration Appeals (BIA) decisions have noted. See, e.g., *In re Dielua Metelus*, A73 785 768, 2007 WL 4707379 (BIA Dec. 14, 2007) (unpublished); *In re: Eric Gudier Merida-Vasquez*, A098 917 909, 2008 WL 5477758 (Dec. 3, 2008) (“a release from custody under section 236(a) of the Act is not the type of “parole” that would make the respondent eligible for adjustment of status. As the Immigration Judge noted, the respondent has cited no authority establishing that release on bond under section 236(a)(2) of the Act is considered “parole” for adjustment of status purposes or section 212(d)(5) of the Act”); *In re: Arturo Ortega-Cervantes*, A79 783 189, 2005 WL 649116, (BIA Jan. 6, 2005). Rather, it is a form of release from custody.

⁴⁰ *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

⁴¹ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, arts. 2-9, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) [hereinafter, *Universal Declaration*]; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter, *ICCPR*].

⁴² Universal Declaration, *supra* note 41, at art. 9.

⁴³ ICCPR, *supra* note 41, at art. 9.

and mandates release when detention is not lawful. Article 16 of the 1951 Convention Relating to the Status of Refugees⁴⁴ calls for refugees to have free access to the courts – such access arguably includes the right to challenge one’s detention before an impartial arbiter. Moreover, the UNHCR has issued guidelines (“UNHCR Revised Guidelines”) governing the detention of asylum seekers.⁴⁵ The UNHCR Revised Guidelines provide an interpretation of Article 31 of the 1951 Convention, which governs the treatment of unlawfully present refugees.⁴⁶ As the UNHCR Revised Guidelines explain, consistent with Article 31 of the 1951 Convention, “detention should only be resorted to in cases of necessity. The detention of asylum seekers who come ‘directly’ in an irregular manner should, therefore, not be automatic, or unduly prolonged.”⁴⁷ The regulations proposed in this Petition would therefore be consistent with international law prohibiting arbitrary detention generally and the unnecessary, prolonged detention of asylum seekers specifically.⁴⁸

In sum, the proposed amendments find support in the immigration statute itself. The amendments seek to close a serious gap and rectify an anomaly in immigration law by providing the same judicial oversight of custody decisions that protects non-arriving asylum seekers. The regulations also help to cure potential constitutional deficiencies based upon unequal treatment of similarly situated asylum seekers and place our domestic position more in line with our commitments under international treaties.

⁴⁴ Convention Relating to the Status of Refugees art. 16, July 28, 1951, 189 U.N.T.S. 137, *incorporated by*, Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

⁴⁵ United Nations High Commissioner for Refugees, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, 1, (Feb. 1999) [hereinafter, *UNHCR Revised Guidelines*], available at <http://www.unhcr.org/au/pdfs/detentionguidelines.pdf>.

⁴⁶ Convention Relating to the Status of Refugees, *supra* note 44; Protocol Relating to the Status of Refugees, *supra* note 44.

⁴⁷ UNHCR Revised Guidelines, *supra* note 45, at 1, para. 3.

⁴⁸ *See also*, Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, 15 (2009)[hereinafter *Jailed Without Justice*], available at: <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>.

V. CONCLUSION

Petitioners request that the Attorney General initiate a rulemaking proceeding authorizing immigration judges to make custody determinations for arriving asylum seekers who have passed a credible fear interview. Amending the regulations addressed in this Petition would alleviate the need for the prolonged detention of asylum seekers, save government resources, comport with U.S. national security needs, and ensure compliance with domestic and international law and treaty obligations. Given that the Attorney General has the legal authority to define the power and set forth the procedures of immigration courts, the Petitioners request that the Attorney General amend the regulations in accordance with the proposed text set forth in Appendix A. If the Attorney General deems it necessary to publish the proposed regulation change in the Federal Register for comments, and/or to hold hearings regarding the proposed regulatory changes, please inform the undersigned of any such determinations or actions on this Petition.

March 15, 2010

Respectfully submitted,

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APPENDIX A

PROPOSED AMENDMENTS TO CURRENT REGULATIONS

The following are proposed amendments to current regulations implementing the above concerns. Any additions are underlined and redactions are indicated with a strikethrough.

TITLE 8 - - ALIENS AND NATIONALITY

CHAPTER V - - EXECUTIVE OFFICE OF IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE

PART 1003_EXECUTIVE OFFICE OF IMMIGRATION REVIEW - - Table of Contents

Subpart C_Immigration Court_Rules of Procedure

Section 1003.19 Custody/Bond

- (a) Custody and bond determinations made by the service pursuant to 8 CFR part 1236 may be reviewed by an Immigration Judge pursuant to 8 CFR part 1236.
- (b) Application for an initial bond redetermination by a respondent, or his or her attorney or representative, may be made orally, in writing, or, at the discretion of the Immigration Judge, by telephone.
- (c) Applications for the exercise of authority to review bond determinations shall be made to one of the following offices, in the designated order:
 - (1) If the respondent is detained, to the Immigration Court having jurisdiction over the place of detention;
 - (2) To the Immigration Court having administrative control over the case; or
 - (3) To the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court.
- (d) Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding. The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service.
- (e) After an initial bond redetermination, an alien's request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination.
- (f) The determination of an Immigration Judge with respect to custody status or bond redetermination shall be entered on the appropriate form at the time such decision is made and the parties shall be informed orally or in writing of the reasons for the decision. An appeal from

the determination by an Immigration Judge may be taken to the Board of Immigration Appeals pursuant to §1003.38.

(g) While any proceeding is pending before the Executive Office for Immigration Review, the Service shall immediately advise the Immigration Court having administrative control over the Record of Proceeding of a change in the respondent/applicant's custody location or of release from Service custody, or subsequent taking into Service custody, of a respondent/applicant. This notification shall be in writing and shall state the effective date of the change in custody location or status, and the respondent/applicant's current fixed street address, including zip code.

(h)(1)(i) While the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3) of Div. C of Pub. L. 104–208 remain in effect, an Immigration Judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

(A) Aliens in exclusion proceedings;

(B) Arriving aliens in removal proceedings, including persons paroled after arrival pursuant to section 212(d)(5) of the Act;

(C) Aliens described in section 237(a)(4) of the Act;

(D) Aliens subject to section 303(b)(3)(A) of Pub. L. 104–208 who are not “lawfully admitted” (as defined in §1236.1(c)(2) of this chapter); or

(E) Aliens designated in §1236.1(c) of this chapter as ineligible to be considered for release.

(ii) Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 1235 or 1236 of this chapter. In addition, with respect to paragraphs (h)(1)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an Immigration Judge that the alien is not properly included within any of those paragraphs.

(2)(i) Upon expiration of the Transition Period Custody Rules set forth in section 303(b)(3) of Div. C. of Pub. L. 104–208, an Immigration Judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

(A) Aliens in exclusion proceedings;

(B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act; with the exception of individuals who have been found to have a credible fear pursuant to 8 C.F.R. § 208.30;

(C) Aliens described in section 237(a)(4) of the Act;

(D) Aliens in removal proceedings subject to section 236(c)(1) of the Act (as in effect after expiration of the Transition Period Custody Rules); and

(E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Pub. L. 104–132).

(ii) Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 1235 or 1236 of this chapter. In addition, with respect to paragraphs (h)(2)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an Immigration Judge that the alien is not properly included within any of those paragraphs.

(iii) An arriving alien who has passed a credible fear interview shall benefit from a presumption that release is in the public interest, and an individual who has established his or her identity through credible evidence, including by the individual's credible testimony, shall benefit from a presumption that he or she is not a flight risk. Such an alien shall ordinarily be released promptly unless there are specific, articulable reasons to continue detention. The decision of an Immigration Judge to order an alien's release from custody without bond under INA § 236(a)(2)(B) shall not be interpreted to constitute the parole of that individual for purposes of any other purpose under the Act, including INA § 212(d)(5).

(3) Except as otherwise provided in paragraph (h)(1) of this section, an alien subject to section 303(b)(3)(A) of Div. C of Pub. L. 104–208 may apply to the Immigration Court, in a manner consistent with paragraphs (c)(1) through (c)(3) of this section, for a redetermination of custody conditions set by the Service. Such an alien must first demonstrate, by clear and convincing evidence, that release would not pose a danger to other persons or to property. If an alien meets this burden, the alien must further demonstrate, by clear and convincing evidence, that the alien is likely to appear for any scheduled proceeding or interview.

(4) *Unremovable aliens.* A determination of a district director (or other official designated by the Commissioner) regarding the exercise of authority under section 303(b)(3)(B)(ii) of Div. C. of Pub. L. 104–208 (concerning release of aliens who cannot be removed because the designated country of removal will not accept their return) is final, and shall not be subject to redetermination by an Immigration Judge.

(i) *Stay of custody order pending appeal by the government* — (1) *General discretionary stay authority.* The Board of Immigration Appeals (Board) has the authority to stay the order of an Immigration Judge redetermining the conditions of custody of an alien when the Department of Homeland Security appeals the custody decision or on its own motion. DHS is entitled to seek a discretionary stay (whether or not on an emergency basis) from the Board in connection with such an appeal at any time.

(2) *Automatic stay in certain cases.* In any case in which DHS has determined that an alien should not be released or has set a bond of \$10,000 or more, any order of the Immigration Judge authorizing release (on bond or otherwise) shall be stayed upon DHS's filing of a notice of intent to appeal the custody redetermination (Form EOIR–43) with the immigration court within one business day of the order, and, except as otherwise provided in 8 CFR 1003.6(c), shall remain in abeyance pending decision of the appeal by the Board. The decision whether or not to file Form EOIR–43 is subject to the discretion of the Secretary.

[57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995; 62 FR 10332, Mar. 6, 1997; 63 FR 27448, May 19, 1998; 66 FR 54911, Oct. 31, 2001; 70 FR 4753, Jan. 31, 2005; 71 FR 57884, Oct. 2, 2006]