No. 19-35565

IN THE

United States Court of Appeals for the Ninth Circuit

YOLANY PADILLA, ET AL.,
Plaintiffs-Appellees,

v.

IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 2:18-cv-00928-MJP
District Judge Marsha J. Pechman

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, PRETRIAL JUSTICE INSTITUTE, AND CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the *amici curiae* state that they are not-for-profit corporations that have no parent corporations and no publicly held corporation owns 10% or more of their stock.

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INTERESTS OF *AMICI CURIAE*[1]

The *amici curiae* are leading advocates on behalf of individuals who have been subjected to detention by the government.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, it has a nationwide membership of many thousands of direct members, and up to 40,000 members worldwide, including affiliates. The NACDL's mission is to ensure justice and due process for the accused and to promote the proper and fair administration of justice.

The Pretrial Justice Institute ("PJI") is a national organization working to advance safe, fair, and effective pretrial justice practices and policies that honor and protect all people. Since the 1970s, the PJI has worked to advance knowledge and practice in criminal justice through research, demonstration projects, and technical assistance, with a special focus on the fairness and efficacy of pretrial justice.

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae* or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief.

The Center for Legal and Evidence-Based Practices ("CLEBP") is a nonprofit corporation that has worked with jurisdictions across the country to improve the administration of their bail systems. The CLEBP's mission is to improve bail systems across the country by promoting rational, fair, and transparent legal and evidence-based pretrial practices to achieve safer and more equitable communities as well as cost-effective government.

Consistent with their respective missions, the *amici curiae* have devoted their resources to ensuring that all individuals deprived of liberty—including all of the noncitizens who are detained as part of the immigration process—receive the full protections of the law. The *amici curiae* thus share strong organizational interests in the outcome of this case and have the experience and expertise with pretrial detention regimes to offer unique perspectives on additional reasons the preliminary injunction should be affirmed.

SUMMARY OF ARGUMENT

This case involves whether individuals who seek asylum after entering the United States, and who have been found by the Department of Homeland Security ("DHS") to have a credible fear of persecution or torture in their home countries, may be incarcerated for weeks, months, or even years without a bond hearing. The district court ruled that the answer to that question is no and that these asylum seekers are protected by the Due Process Clause of the U.S. Constitution and

entitled to basic procedural safeguards, including a prompt bond hearing at which the government bears the burden of proof and a contemporaneous record of individualized findings is made—all of which are regularly provided by state and municipal courts to vastly more individuals than the class of asylum seekers protected by the preliminary injunction.

The district court's decision is consistent with well-established constitutional law that detention in the immigration context, in the absence of a criminal conviction, must "bear a *reasonable* relation" to valid government purposes and must be accompanied by "*adequate* procedural protections to ensure that the government's asserted justification . . . outweighs the individual's constitutionally protected interest" in liberty. *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (emphases added) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)) (alterations and internal quotation marks omitted).

As applied here, detention must be reasonably related to the government's interest to prevent flight from future asylum hearings and not outweighed by the asylum seekers' fundamental liberty interest. This necessarily gives rise to the right to an individualized bond hearing on flight risk, just as it does in the pretrial and civil commitment contexts. Anything less would allow the government to assume that every asylum seeker found within the United States poses a flight

risk—and that remedy fails constitutional muster as neither based on fact nor reasonably related to a legitimate interest.

The procedural protections afforded by the district court's preliminary injunction are also constitutionally required. Analogous protections—a prompt bond hearing at which the government bears the burden of proof and a contemporaneous record including particularized findings from a neutral factfinder—are guaranteed as a matter of course in comparable nonpunitive pretrial custody and civil commitment regimes.

Affording these basic procedural protections would not impose any undue operational difficulty on the federal government. The same are routinely applied by state and municipal governments across the country in jurisdictions that provide bond hearings for exponentially larger numbers of individuals before pretrial detention or civil commitment. And in those contexts, many states use *additional* administrative tools such as empirically based risk assessments and supervised release programs to increase release rates while ensuring future court appearances.

The district court's preliminary injunction should be affirmed.

ARGUMENT

A. Well-established constitutional law requires that individuals detained by the government receive an individualized bond hearing.

The United States Supreme Court has long held that "the Due Process Clause applies to *all 'persons'* within the United States, including aliens, whether

their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693 (emphasis added) (citing, *e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). "All" means all. All persons standing on U.S. soil, citizens and noncitizens alike, are "guaranteed due process protections." *United States v. Raya-Vaca*, 771 F.3d 1195, 1203 (9th Cir. 2014).

Due process protections take two forms: (1) "substantive due process," which protects individuals against government action that interferes with rights "implicit in the concept of ordered liberty," and (2) procedural due process, which ensures that any such interference that "survives substantive due process scrutiny" is "implemented in a fair manner." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted).

A central right protected by substantive due process is "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint." *Zadvydas*, 533 U.S. at 690. Infringing on that freedom therefore is permitted only when it "bear[s] a reasonable relation" to valid government purposes. *Hernandez*, 872 F.3d at 990 (quoting *Zadvydas*, 533 U.S. at 690).

There are only two potentially legitimate regulatory goals where, as here, the government seeks to detain individuals without convicting them of a crime: to protect the community against dangerous individuals and to ensure attendance at future proceedings. *See Zadvydas*, 533 U.S. at 690-91. The government does not

argue that categorical detention of asylum seekers who have entered the United States is required to protect the community. Nor could it, as these individuals have not even been charged with a crime.

Accordingly, detaining the asylum seekers at issue here for any reason other than ensuring attendance at future proceedings would violate substantive due process. *See id*. at 690; *Hernandez*, 872 F.3d at 990. And although the government seems to argue that the asylum seekers pose a categorical flight risk, that is demonstrably untrue. *See infra* Section D.1. The assumption that those affirmatively seeking asylum relief will fail to show up at their asylum hearings is also counterfactual. These are individuals who are seeking to use legal channels to make this country their home, and who have already cleared the first "credible fear" hurdle. In removal cases completed over the last nine years, nearly half (48%) of asylum seekers who were not detained at the time of the final decision in their case obtained permission to stay in the United States, and nearly one-third (30%) of asylum seekers who were initially detained but subsequently released obtained permission to stay in the United States. SER 124-25. Even the government admits that nearly one in five (17%) asylum seekers will be entitled to remain in the United States. Gov't Br. 52.

Procedural due process also requires the government to provide individuals it seeks to confine in noncriminal detention with bond hearings for individualized

determinations of flight risk. *See, e.g.*, *Salerno*, 481 U.S. at 746 (even when non-criminal detention is permissible under a substantive due process analysis, procedural due process demands that it "be implemented in a fair manner"). Both substantive and procedural due process therefore require an individualized bond hearing as ordered by the district court. *See, e.g.*, *id.* at 750-51 (due process permits pretrial detention of arrestees under the Bail Reform Act of 1984 in part because the statute demands "a full-blown adversary hearing" in which the government must "prove[] by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community"); *Kansas v. Hendricks*, 521 U.S. 346, 353-56 (1997) (civil commitment statute satisfied due process in part because it required a trial on future dangerousness); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008) (individuals "subjected to prolonged detention" pending judicial review of their removal orders are entitled to a bond hearing and "an individualized determination as to the necessity of [their] detention"). The alternative, categorical detention of asylum seekers based on nothing more than a presumption that *all* such individuals pose an unmanageable flight risk is an unconstitutional deprivation of their due process rights.

B. The procedural safeguards imposed by the district court for bond hearings are constitutionally required and routinely guaranteed by federal and state law in analogous contexts.

Given the critical liberty interests at stake, a bond hearing must also include basic procedural safeguards "to comport with due process." *Singh v. Holder*, 638 F.3d 1196, 1200 (9th Cir. 2011). As the district court correctly held, these safeguards must include at least a prompt hearing in which the government bears the burden of proof and an accurate contemporaneous record showing particularized determinations of individualized findings. *See* ER13-14. Similar protections are required by well-established precedent in analogous pretrial and civil commitment contexts, which "provide useful guidance in determining what process is due non-citizens in immigration detention." *Hernandez,* 872 F.3d at 993; *see also Zadvydas*, 533 U.S. at 690 (drawing on criminal pretrial and civil commitment case law in evaluating civil detention of noncitizens). And both federal and state jurisdictions implement these constitutional requirements by routinely guaranteeing similar or even more stringent procedures to individuals who have been detained without being convicted.

1. Hearings on the need for detention must be prompt.

A prompt hearing on the necessity of detention is crucial when a person is detained outside the ordinary post-trial context because *any* time needlessly spent in confinement constitutes a serious deprivation of individual liberty. *See, e.g.*,

Hernandez, 872 F.3d at 993 (procedures required to limit the "significant risk that [an] individual will be needlessly deprived of the fundamental right to liberty"). Federal and state laws routinely guarantee this protection by requiring prompt adjudication where the government asserts a need for pretrial detention or civil commitment.

For example, when an individual is confined after arrest, the federal Bail Reform Act requires an adversarial detention hearing to "be held *immediately* upon the person's first appearance before the judicial officer." 18 U.S.C. § 3142(f)(2)(B) (emphasis added). Even where a continuance is granted on good cause, it may not exceed three to five days. *Id*. State laws also require pretrial detention hearings to occur as soon as possible—again, within days. *See, e.g.*, Ariz. Rev. Stat. § 13-3961(E) (requiring a detention hearing within twenty-four hours of the defendant's initial appearance, with continuances not to exceed five days).[2] In addition, as recognized by the district court, "in the civil commitment

[2] *See also, e.g.*, D.C. Code § 23-1322(d)(1) (requiring a detention hearing at the first appearance, with continuances not to exceed five days); Fla. Stat. § 907.041(f) ("The pretrial detention hearing shall be held within 5 days of the filing by the state attorney of a complaint to seek pretrial detention."); La. Code Crim. Proc. art. 313B (upon prosecutor's motion "the judge or magistrate may order the temporary detention of a person in custody . . . , for a period of not more than five days, exclusive of weekends and legal holidays, pending the conducting of a contradictory bail hearing"); Me. Rev. Stat. tit. 15, § 1027 (court to issue a release order during initial appearance unless the prosecutor requests a specialized bail hearing, which must be heard within five days of the request); Mass. Gen. Law 276 § 58A(4) (detention hearing required at first appearance, or after a continuance

context, there is a long history of courts which have found that due process requires an expeditious hearing [on dangerousness], often defined as a period of no longer than seven days." ER 33-34 (collecting cases). Indeed, some "courts have suggested that the *maximum* [permissible] delay is 96-120 hours [after initial confinement], or even as limited a period as 48 hours." *State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 365 (Minn. 1980) (collecting cases); *see also* Treatment Advocacy Center, *Mental Health Commitment Laws: A Survey of the States* 14 (Feb. 2014), https://www.treatmentadvocacycenter.org/storage/documents/2014-state-survey-abridged.pdf (last visited Sept. 3, 2019) (most states allow emergency detention for evaluation "if there appears to be an imminent need to prevent physical harm to the person or others" only for "72 hours, while a few limit the period to 48 hours," and Virginia permits emergency detention only for four hours with a single two-hour extension). The district court's ruling that a

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not to exceed seven days); Ohio Rev. Code § 2937.222(A) (detention hearing not to be continued more than five days); Or. Rev. Stat. § 135.240(4)(b) ("If the defendant requests a release hearing, the court must hold the hearing within five days of the request."); S.C. Code § 22-5-510(B) ("A person charged with a bailable offense must have a bond hearing within twenty-four hours of his arrest[.]"); Wash. Rev. Code. § 10.21.060(2) (detention hearing to be held at first appearance with continuances not to exceed five days); *State v. Thompson*, 508 S.E.2d 277, 288 (N.C. 1998) (holding that a 48-hour delay amounted to a due process violation because "[t]he failure to provide defendant with a bond hearing before a judge at the first opportunity on Monday morning, and the continued detention of defendant well into the afternoon, was unnecessary, unreasonable, and thus constitutionally impermissible").

bond hearing must occur within seven days of a request was well supported in light of the time limitations imposed by analogous state and federal law.

2. The government must bear the burden of proof.

Due process also demands that the government bear the burden of proving that detention is necessary in absence of a criminal conviction. The law is unambiguous on this point in the criminal pretrial and civil commitment contexts. *See, e.g.*, *Salerno*, 481 U.S. at 750 (recognizing that the Bail Reform Act requires the government to "convince a neutral decisionmaker by clear and convincing evidence" that detention is necessary prior to trial); *Addington v. Texas*, 441 U.S. 418, 426 (1979) (holding that the government must prove need for involuntary commitment by clear and convincing evidence, and rejecting preponderance standard, based in part on near unanimity of law governing legal standard in commitment and "risk of increasing the number of individuals erroneously committed"); *People v. Stevens*, 761 P.2d 768, 774 (Colo. 1988) (holding that clear and convincing evidence is necessary "to justify the massive curtailment of liberty inherent in involuntary commitment"); *In the Interest of M.S.H.*, 466 N.W.2d 151, 152 (N.D. 1991) ("[O]ur law authorizes an involuntary commitment only if the petitioner proves by clear and convincing evidence that the respondent is a person requiring treatment[.]").

Not only do federal and state laws place the burden on the government to prove the need for nonpunitive detention, many require the government to meet a heightened "clear and convincing" standard of proof. *See, e.g.*, 18 U.S.C. § 3142(f); Ariz. Rev. Stat. § 13-3961(D); D.C. Code § 23-1322(b)(2); N.J. Stat. § 2A:162-16, 18; N.M. Const. art. II, § 13; Wis. Stat. § 969.035(6)(a); *Fry v. State*, 990 N.E.2d 429, 445-46 (Ind. 2013); *State v. Stradt*, 556 N.W.2d 149, 151 (Iowa 1996); *Mendoza v. Commonwealth*, 673 N.E.2d 22, 25 (Mass. 1996); *Brill v. Gurich*, 965 P.2d 404, 408 (Okla. Crim. App. 1998); *see also, e.g.*, General Order No. 18.8A, Circuit Court of Cook County (July 17, 2017).

The district court's requirement that the government bear the burden of proof at a detention hearing therefore aligns with procedural safeguards routinely guaranteed in other nonpunitive detention contexts.

3. An accurate contemporaneous record with particularized findings must be kept.

Finally, the district court's requirement that asylum seekers be provided with a contemporaneous record and particularized findings rests on solid ground. It is axiomatic that an accurate record is necessary to allow for effective appellate review. *See Cortez-Acosta v. I.N.S.*, 234 F.3d 476, 482 (9th Cir. 2000) ("[W]ithout a contemporaneous recording, we have no way to confirm the IJ's findings or to review his decision for factual or legal error."). This is precisely why the Court in *Singh* recognized that individuals detained during immigration proceedings have a

due process right to "a contemporaneous record of [bond] hearings and . . . in lieu of providing a transcript, the immigration court may record *Casas* hearings and make the audio recordings available for appeal upon request." 638 F.3d at 1208.

A contemporaneous record and specific findings again are required and guaranteed in both the pretrial and civil commitment contexts. *See, e.g.*, 18 U.S.C. § 3142(i)(1) (requiring a detention order issued under the Bail Reform Act to "include written findings of fact and a written statement of the reasons for the detention"); *Vitek v. Jones*, 445 U.S. 480, 495 (1980) (agreeing that a "written statement by the factfinder as to the evidence relied on and the reasons for transferring [an] inmate" to mental hospital commitment is a necessary minimum procedural safeguard); *Burns v. Ohio*, 360 U.S. 252 (1959) (state must furnish indigent criminal appellants with transcripts for use in seeking discretionary review); *Griffin v. Illinois,* 351 U.S. 12 (1956) (indigent criminal appellants must receive free transcripts to pursue as-of-right appeal); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314-15 (E.D. La. 2018) (in pretrial detention context, due process requires "consideration of alternative conditions of release, including findings on the record . . . explaining why an arrestee does not qualify for alternative conditions of release"); *Robinson v. St. Peter's Med. Ctr.*, 564 A.2d 140, 145 (N.J. Super. Ct. Law Div. 1989) ("An involuntary civil commitment is so obviously similar to a criminal penalty with respect to the rights at stake that the right to free

transcripts to civil litigants in such cases cannot be questioned."). There as here, such records ensure effective appellate review. *See, e.g.*, Alaska Stat. § 47.30.765 (right to appeal from an order of involuntary commitment); Minn. Stat. § 253B.23 (same); N.C. Gen Stat. § 122C-272 (same); Wash. Rev. Code § 10.21.040 (a person detained before trial on the basis of community danger "is entitled to expedited review of the detention order by the court of appeals under [special] writ procedures").

The protections required by the district court's preliminary injunction therefore are well-recognized as necessary procedural protections to prevent the needless incarceration of individuals who have not been convicted of any crime.

C. Vastly greater numbers of individuals have individualized bond hearings in state pretrial systems.

The government complains it will suffer "clear operational harms" if asylum seekers receive bond hearings with these protections, Gov't Br. at 53, and that these harms dominate the balance-of-equities factor under *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). But experience and evidence from the pretrial detention context shows such operational concerns to be unfounded. Many states and cities provide arrested individuals with the protections required by the district court, and many of those government entities deal with volumes of criminal defendants greatly exceeding the number of asylum seekers processed by the

DHS.[3] The district court thus correctly found that the balance of equities favors injunctive relief.

During Fiscal Year 2018, the U.S. Citizenship and Immigration Services ("USCIS") reported that it made positive credible fear determinations in 74,677 cases. U.S. Citizenship & Immigration Services, *Credible Fear Workload Report Summary FY 2018 Total Caseload*, https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_CFandRFstats09302018.pdf (last visited Sept. 3, 2019).[4] That same year, immigration courts completed 34,158 asylum cases with a credible fear claim, leaving the remainder unresolved within that fiscal year. 83 Fed. Reg. 55934, 55946 (Nov. 9, 2018).

By way of comparison, an average of 451,000 persons are held in pretrial detention in the United States on any given day, meaning that these jurisdictions must handle a far larger number of detention hearings (including both hearings that result in release and those that result in detention). Brian P. Schaefer & Tom Hughes, *Examining Judicial Pretrial Release Decisions: The Influence of Risk Assessment and Race*, 20 Criminology, Crim. Just., L. & Soc'y 48 (2019). In New

[3] The *amici curiae* do not endorse the adequacy of current pretrial services as described in this brief, but they submit that the government's stated concerns may be addressed without recourse to mandatory detention.

[4] Not all of these individuals are class members, however, as they may have been determined to have a positive credible fear *without* entering the United States (such as by presenting themselves at a port of entry).

York City alone, in 2017 the Police Department made 243,830 arrests that resulted in criminal court arraignments. New York City Criminal Justice Agency, *Annual Report 2017* 6 (2019), https://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=1725&doc_name=doc (last visited Sept. 3, 2019). New York City's pretrial services agency interviewed 179,665 of these arrestees to complete a risk assessment upon which the agency made a release recommendation to the criminal court, resulting in the release of nearly 140,000 individuals awaiting trial. *Id.* at 11-12.

Even jurisdictions that provide far more protective safeguards than those required by the district court's injunction are capable of handling individualized release determinations at similar or greater volumes than what the government would be required to handle here. *See, e.g.*, ER 195-97 (district court observing during oral argument that "just down the street" at the Seattle Municipal Court "bond hearings are happening at extraordinary rates"). For example, Kentucky and Washington, D.C., are two jurisdictions hailed as pioneers of pretrial reform because they provide strong presumptions of pretrial release, strict timeliness requirements and procedural protections, release risk assessments, and pretrial services. Harvard Law School, Criminal Justice and Policy Program, *Bail Reform: A Guide for State and Local Policymakers* 35 (Feb. 2019),

http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf (last visited Sept. 3, 2019).

In Washington, D.C., nearly 21,000 criminal cases were filed in 2017 and more than 19,600 (94%) of those charged were released before trial. Pretrial Services Agency for the District of Columbia, *FY 2017 Release Rates for Pretrial Defendants within Washington, D.C.* (Mar. 30, 2018), https://www.psa.gov/sites/default/files/2017%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf (last visited Sept. 3, 2019).

Washington, D.C.'s Bail Reform Act of 1992 establishes a presumption of unconditional pretrial release. D.C. Code § 23-1321(b). Criminal defendants are interviewed by pretrial services within 24 hours of arrest. D.C. Code § 23-1303(a). The Pretrial Services Agency uses the interview to prepare a report the judge must consider in determining whether a defendant must be released and upon what conditions. D.C. Code § 23-1303(g). Preventative detention is allowed only in specific circumstances. D.C. Code § 23-1322; Pretrial Services Agency for the District of Columbia, Court Support, https://www.psa.gov/?q=programs/court_support (last visited Sept. 3, 2019). Where circumstances warrant pretrial detention, a judge must hold a hearing to determine whether any conditions short of detention will ensure the defendant appears for subsequent court hearings or protects public safety. D.C. Code § 23-1322. The government has the burden of

proving that no conditions of release will reasonably ensure appearance and public safety. D.C. Code § 23-1322(b)(2).

In Kentucky, of the more than 153,000 people arrested and booked in jail between June 2009 and July 2010, 94% were released after only a single day in detention. Christopher T. Lowenkamp, *et al.*, Laura & John Arnold Foundation, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* 6, 9 (Nov. 2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf (last visited Sept. 3, 2019). Pretrial officers seek permission from each arrestee to conduct a pretrial interview. Ky. Ct. of Justice, *Interview Process and Release Alternatives*, https://kycourts.gov/courtprograms/pretrialservices/Pages/interviewrelease.aspx (last visited Sept. 3, 2019). Within 24 hours, the pretrial officer will conduct a risk assessment and make a release recommendation to a judge. *Id.* Defendants determined to be low-risk are automatically released, without requiring a bond hearing. Ky. Sup. Ct. Order 2015-24; Ky. Ct. of Justice, *supra*. Those not automatically released will receive a bond hearing. Ky. Ct. of Justice, *supra*. And Kentucky law presumes release upon an arrestee's own recognizance. Ky. Rev. Stat. § 431.520.

In sum, the experience of other jurisdictions with far fewer fiscal resources than the federal government demonstrates that there will be *no* "operational harm" to the federal government in complying with the safeguards imposed by the district

court—much less an operational harm severe enough to outweigh the harms suffered by asylum seekers deprived of their freedom without due process. If New York City and Kentucky can do it, so can U.S. Immigration and Customs Enforcement ("ICE").

D. Modern pretrial practices demonstrate that categorical detention of individuals seeking asylum is not necessary to ensure that they appear at their hearings.

Asylum seekers have uniquely strong incentives to appear at their hearings. The purpose of those hearings is for asylum seekers *to obtain legal status*, not to defend criminal charges and face the possible deprivation of their liberty. *See* 8 U.S.C. § 1158; 8 C.F.R. § 209.2. And unlike individuals detained before a criminal trial, immigrants in removal proceedings risk being deported to their home countries for missing even a single court hearing. *See* 8 U.S.C. § 1229a(b)(5). This risk is particularly acute for asylum seekers like Plaintiffs, who have established a credible fear of persecution or torture if returned to their home country. *See* ER 29. That such individuals are highly likely to appear for their hearings is supported not only by common sense but also by the available data. Even if the government's concern regarding failure-to-appear rates were based in fact (which it is not), state and federal courts have shown that the government can ensure high appearance rates by employing empirically derived risk assessment tools—methods far less restrictive than mandatory detention.

1. Asylum seekers are likely to appear for their court dates.

Between Fiscal Years 2008 and 2018, only 12.4% of cases with a credible fear claim were dismissed for failure to appear—a rate in line with that of criminal defendants who are released after receiving constitutionally acceptable pretrial services. The Executive Office for Immigration Review ("EOIR") reports that, between Fiscal Years 2008 and 2018, of the nearly 350,000 immigration cases that included a credible fear claim, immigration judges issued orders of removal in absentia for failure to appear only in around 44,000 cases (12.4%). EOIR, *Rates of Asylum Filings in Cases Originating with a Credible Fear Claim* (Nov. 2, 2018), https://www.justice.gov/eoir/page/file/1062971/download (last visited Sept. 3, 2019); EOIR, *In Absentia Removal Orders in Cases Originating with a Credible Fear Claim* (April 23, 2019), https://www.justice.gov/eoir/page/file/1116666/download (last visited Sept. 3, 2019). Similarly, in New York City, 14% of released criminal defendants failed to appear in 2016 and 15% failed to appear in 2017. *See* New York City Criminal Justice Agency, *supra*, at 36-37.

And when immigrants placed into removal proceedings are represented by attorneys, the appearance rate is 96% or higher. Am. Immigration Council, *Immigrants & Families Appear in Court: Setting the Record Straight* 2 (July 2019), http://americanimmigrationcouncil.org/sites/default/files/research/immigrants_and_families_appear_in_court_setting_the_record_straight.pdf (last

visited Sept. 3, 2019). Further, "a significant number of removal orders for failure to appear are later overturned by an immigration judge for lack of notice or 'extraordinary circumstances.'" *Id.* at 3. Detention is not the solution; the "focus should be on ensuring that immigrants who want to appear in immigration court have the opportunity to do so." *Id.* at 6.

Thus, after controlling for representation and lack of notice, immigrants in removal proceedings, including asylum seekers, have an appearance rate that is *higher* than most individuals charged with criminal offenses.

2. Risk assessment tools are available to guide the government in deciding which asylum seekers should be released pending immigration proceedings.

State and federal courts have successfully shown that the government may meet its interest in ensuring asylum seekers appear for their court dates with far less restrictive mechanisms than categorically detaining large classes of asylum seekers. For example, it is well-documented that asylum seekers are excellent candidates for supervised release. *See, e.g.*, Mark L. Noferi, *A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers*, Am. Immigration Council and Center for Migration Studies 1-5 (July 22, 2015), https://ssrn.com/abstract=2634713 (last visited Sept. 3, 2019). In addition, many jurisdictions have introduced risk-assessment tools to release more arrestees without increasing non-appearances.

"An empirically-derived pretrial risk assessment tool is one that has been demonstrated through an empirical research study to accurately sort defendants into categories showing their likelihood of having a successful pretrial release—that is, they make all their court appearances and are not arrested on new charges." Pretrial Justice Institute, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* 2 (May 2015), *available at* https://tinyurl.com/y42nce59 (last visited Sept. 3, 2019). These tools identify risk factors that may impede a defendant's pretrial success—that is, presenting a non-appearance or public safety risk—and then seek to predict a defendant's success based upon how the risk factors are weighted for the particular defendant. *Id.* at 2-4.

States including Virginia, Ohio, Kentucky, and Colorado have successfully used these tools, as has the federal court system. *Id.* at 4. A universal pretrial risk assessment tool also has been developed based on a database of more than 1.5 million cases in 300 jurisdictions across the United States. Laura & John Arnold Foundation, *Public Safety Assessment: Risk Factors and Formula* 2 (2016), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/PSA-Risk-Factors-and-Formula.pdf (last visited Sept. 3, 2019). These tools have been proven to successfully determine whether a defendant should be released on parole, on his or her own recognizance, or under supervision. Pretrial Justice Institute, *supra* at 3; New York City Criminal Justice Agency, *supra* at 23-24.

In some jurisdictions with pretrial risk assessments, failure-to-appear rates have been as low as 10%. Jessica Reichert & Alysson Gatens, *An Examination of Illinois and National Pretrial Practices, Detention, and Reform Efforts* (June 7, 2018), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7f61cf08-974e-a0b1-74de-79d95cf21250&forceDialog=0 (last visited Sept. 3, 2019) (Washington, D.C., had a 90% court appearance rate for those released).

The government is plainly capable of developing methods for determining which noncitizens should be retained and which should be released. The DHS can use these tools to meet its burden to demonstrate why an asylum seeker should not be released on parole or other conditions. Indeed, DHS itself has developed a Risk Classification Assessment for use in removal proceedings—although that assessment is deeply flawed. *See, e.g.*, Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 Geo. Immigr. L.J. 45, 47-48 (2014); Daniel Oberhaus, *ICE Modified Its 'Risk Assessment' Software So It Automatically Recommends Detention*, Vice (June 26, 2018), https://www.vice.com/en_us/article/evk3kw/ice-modified-its-risk-assessment-software-so-it-automatically-recommends-detention (last visited Sept. 3, 2019). Still, ICE's development and use of its flawed risk assessment tool establishes that there would be little increase in operational burden for ICE to use a superior, empirically based tool to provide

an individualized assessment of non-appearance risk in immigration cases after an individual establishes a credible fear of persecution or torture. Doing so would be in line with the due process protections afforded to all persons under the Constitution.

CONCLUSION

The *amici curiae* urge this Court to affirm the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,236 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

/s/ Erin K. Earl
Erin K. Earl

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 4, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Erin K. Earl
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