No. 19-35565

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, No. 2:18-cv-00928 (Pechman, J.)

BRIEF FOR AMICI CURIAE RETIRED IMMIGRATION JUDGES AND BOARD OF IMMIGRATION APPEALS MEMBERS IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF AMICI'S IDENTITIES AND INTEREST[1]

Amici curiae are former immigration judges and members of the Board of Immigration Appeals (BIA) who together have dedicated hundreds of years of service to administering the immigration laws of the United States, including by presiding over thousands of bond hearings. In view of their long service to the Nation, its citizens, and those who seek to immigrate here, amici are familiar with practices of immigration courts and proceedings, and with the tools that immigration courts require in order to decide noncitizens' cases on their merits and to reach a fair outcome based on those merits.

An appendix to this brief details each amicus's service to the immigration courts and/or the Board of Immigration Appeals.

INTRODUCTION

This case challenges the government's practice of denying bond hearings to noncitizens who have been determined to have credible fear of persecution or torture. *See* Appellants' Excerpts of Record (ER) 137-138 (Third Amended Complaint). That practice results in asylum seekers being unnecessarily detained

[1] Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

for long, indefinite periods of time. ER6 (Modified Injunction Order). On July 2, 2019, the district court entered a two-part modified preliminary injunction. In Part A of the preliminary injunction, the district court ordered the following relief for members of the Bond Hearing Class: (1) the government shall conduct a bond hearing within seven days of a request by an asylum seeker; (2) the government shall have the burden of demonstrating why the asylum seeker should not be released on bond, on parole, or on any other condition; (3) the government shall provide a recording or verbatim transcript of the bond hearing upon appeal; and (4) the government shall produce a written decision with particularized determinations of individualized findings at the conclusion of the bond hearing. ER2. In Part B of the preliminary injunction, the court held that the statutory prohibition pursuant to Immigration and Nationality Act (INA) § 235(b)(1)(B)(ii) against releasing on bond noncitizens awaiting a determination of their asylum claims violates the Due Process Clause of the U.S. Constitution, and that class members are entitled to bond hearings before a neutral decisionmaker. *Id.*

Amici offer, based on their collective hundreds of years of experience in the immigration courts and the BIA, their views as to why Parts A and B of the injunction promote the efficient functioning of the immigration court system and facilitate just resolution of cases by immigration judges. Amici first explain why it is more difficult for immigration judges to administer detained noncitizens' cases

than released noncitizens' cases. In particular, as amici explain below, detained noncitizens cannot adequately prepare their cases because it is difficult for them to obtain and confer with counsel, as well as to collect evidence relevant to their cases. Amici next explain why detaining noncitizens consumes significant resources that could potentially be reallocated to promote the effective and efficient operation of the immigration court system. Finally, amici explain how the modified injunction addresses these problems by preserving asylum seekers' longstanding right to a bond hearing and imposing limited, incremental procedural requirements that substantially improve the efficient and fair operation of the immigration court system.

ARGUMENT

I. UNNECESSARILY DETAINING NONCITIZENS MAKES CASES MORE DIFFICULT TO ADMINISTER

A. Immigration Courts Are Increasingly Overburdened

Immigration courts are notoriously overburdened. *See, e.g.*, *Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013). The burden is growing: "[b]y every measure, the number of deportations and removal proceedings has skyrocketed" in recent years.[2] As of June 30, 2019, there were 930,311 cases pending in U.S.

[2] *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings, New York Immigrant Representation Study Report, Part 1*, 33 Cardozo L. Rev. 357, 359 (2011).

immigration courts.[3] That number is more than double the number of cases that were pending at the end of fiscal year 2014.[4] This caseload is carried by a relatively small number of immigration judges: around 400.[5]

In our experience, immigration proceedings are complex. Although hearings are conducted in English, noncitizens often do not speak or understand English, necessitating translators.[6] Noncitizens are also typically unfamiliar with robust and fair judicial processes, such as those that enable them to offer live testimony and cross-examination of fact witnesses and expert witnesses (who, for example, may testify about conditions in noncitizens' home countries), depositions, and various other forms of evidence. *See, e.g.*, 8 C.F.R. §§ 1240.7, 1240.10(a)(4).[7] Thus, immigration judges are often required to extend the proceedings in order to facilitate a complete record. Removal proceedings also include legal arguments

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[3] Exec. Office for Immigration Review ("EOIR"), *Adjudication Statistics: Pending Cases* (2019).

[4] *Id.*

[5] EOIR, *Adjudication Statistics: Immigration Judge (IJ) Hiring* (2019) ("*Immigration Judge (IJ) Hiring*"). According to the EOIR, there were 430 immigration judges as of July 2019. However, that figure appears to include the Chief Judge, three deputies, and dozens of assistant chief immigration judges who do not hear cases.

[6] Lee, *Immigrants in Detention Centers Are Often Hundreds of Miles from Legal Help*, ProPublica (May 16, 2017), https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help.

[7] *See also Accessing Justice*, 33 Cardozo L. Rev. at 387.

that can turn on nuanced factual and legal determinations. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018) ("The INA defines 'aggravated felony' by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes.") (citations omitted); *Ayala-Villanueva v. Holder*, 572 F.3d 736, 740 (9th Cir. 2009) ("The administrative record contains various versions of two conflicting records of [Appellant's] birth[.]").[8] Noncitizens may request relief from removal, which can add further complexity to a case. *See, e.g.*, *Moncrieffe*, 569 U.S. at 187 ("Ordinarily, when a noncitizen is found to be deportable … he may ask the Attorney General for certain forms of discretionary relief from removal, like asylum … and cancellation of removal ...." (citing 8 U.S.C. §§ 1158, 1229b)). And, where a noncitizen desires counsel, the noncitizen's physical confinement, which makes it difficult for the noncitizen to communicate with attorneys or individuals who could help locate attorneys, often necessitates continuances to allow the noncitizen to obtain counsel.

[8] *See also* Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—a Two Year Review* 30 (2011) ("U.S. immigration law is a complex mix of laws that derive from the Immigration and Nationality Act (INA) and the implementing regulations detailed in the Code of Federal Regulations, and are also governed by a combination of decisions issued by the U.S. Supreme Court, 13 different Federal Circuit Courts, the Board of Immigration Appeals, and various memos issued by multiple federal agencies, including the Departments of State, Justice, and Homeland Security.").

B. Detained Noncitizens Cannot Adequately Prepare Their Cases

Detaining noncitizens contributes to the workload for immigration judges because (1) it is more difficult for detained noncitizens to obtain counsel; (2) it is more difficult for detained noncitizens to gather evidence in support of their cases; and (3) where a detained noncitizen is represented by counsel, it is more difficult for that noncitizen to communicate with his or her attorney.

1. Detained noncitizens have difficulty obtaining counsel

Unlike in criminal proceedings, there is no universal right to appointed counsel at the government's expense in removal proceedings. *See, e.g.*, 8 U.S.C. § 1362; 8 C.F.R. § 1240.10(a)(1); *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 756 (9th Cir. 2015). In general, 33 percent of noncitizens facing removal are unrepresented by counsel.[9] According to a 2015 University of Pennsylvania Law Review study, however, when considering only detained noncitizens, 86 percent of noncitizens facing removal are unrepresented by counsel.[10] Immigration judges benefit in at least three ways where noncitizens are represented by counsel: the attorney can guide the noncitizen through the removal process, the noncitizen will

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[9] EOIR, *Adjudication Statistics: Current Representation Rates* (2019).

[10] Eagly & Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 (2015) (considering cases between 2007 and 2012); *see also Accessing Justice*, 33 Cardozo L. Rev. at 367-368 ("[C]ustody status … strongly correlates with [noncitizens'] likelihood of obtaining counsel.").

present a more concise and straightforward case, and appellate decisions will provide better guidance to immigration judges.

First, where a noncitizen is represented by an attorney, the attorney, rather than the immigration judge, will take primary responsibility for guiding the noncitizen through the removal process. "[T]he complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important." *Ardestani v. INS*, 502 U.S. 129, 138 (1991). When a noncitizen is unrepresented by counsel, the immigration judge must guide the noncitizen through the removal process. Indeed, immigration judges have an affirmative obligation to assist with developing the record. *See, e.g.*, 8 C.F.R. § 1240.11(a)(2) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter[.]"); *Jacinto v. INS*, 208 F.3d 725, 734 (9th Cir. 2000) ("[I]mmigration judges are obligated to fully develop the record in those circumstances where applicants appear without counsel[.]"). Thus, as this Court has explained:

> Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.

Agyeman v. INS, 296 F.3d 871, 877 (9th Cir. 2002) (internal quotation marks omitted). Conducting removal proceedings—particularly for unrepresented

detainees—"puts substantial pressure on the judge to ensure that available relief is thoroughly explored and the record fully developed."[11] In addition, hearings become longer and may require continuances.

Second, when a noncitizen is unrepresented by counsel, the noncitizen's arguments are likely to be less concise and organized than they would be if prepared by counsel. *See, e.g.*, *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011) (recognizing that immigration law is a particularly complex area of law); *Ram v. Mukasey*, 529 F.3d 1238, 1242-1243 (9th Cir. 2008) (same); *Hernandez-Gil v. Gonzalez*, 476 F.3d 803, 807 (9th Cir. 2007) (noting that attorneys are particularly helpful to a noncitizen, "who often possesses the most minimal of educations and must frequently be heard not in the alien's own voice and native tongue, but rather through an interpreter"); *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) ("We have little doubt that the Baltazars, with their limited command of English and even less experience with the American legal system, would have benefitted from counsel[.]"). Attorneys are able to present legal and factual issues in a more coherent and organized manner than *pro se* noncitizens.[12]

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[11] Brennan, *A View from the Immigration Bench*, 78 Fordham L. Rev. 623, 626 (2009); *see also id.* ("However time-consuming, it is our duty to explain the law to pro se immigrants and to develop the record to ensure that any waiver of appeal or of a claim is knowing and intelligent.").

[12] Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 Conn. L. Rev. 1647, 1666-1667 (1997).

Indeed, detained noncitizens who secure legal counsel are nearly eleven times more likely to seek relief and twice as likely to win the relief sought.[13] Information that is important to a noncitizen may nonetheless be irrelevant to the immigration judge's inquiry. For example, a noncitizen may emphasize her desire to return to her family, even where that desire is not relevant to the legal analysis at hand. And, in some instances, attorneys will advise noncitizens to abandon meritless arguments. "A discussion with a lawyer might prompt the detainee to cut his losses and opt for voluntary departure, avoiding a pointless legal fight and the taxpayer-funded costs of detention."[14]

This conciseness and organization is particularly important when it comes to briefing, which helps make the issues and disputes clear to the immigration judge, who is tasked with analyzing those issues and reaching a fair outcome.[15] Indeed, unrepresented noncitizens often submit no briefing at all in BIA proceedings.[16] Legal and factual issues are difficult for unrepresented noncitizens to even ascertain, as detention facilities often do not provide resources such as up-to-date

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13 Eagly & Shafer, *Access to Counsel in Immigration Court* 2-3 (2016).

14 Lee, *supra* note 6.

15 *See* EOIR, *A Ten-Year Review of the BIA Pro Bono Project: 2002-2011* 10-11 (2014).

16 Bd. of Immigration Appeals, *The BIA Pro Bono Project Is Successful* 10 (2004).

legal libraries, computers, or photocopiers, making it difficult for detained noncitizens to prepare their cases.[17] The inability of immigration judges to effectively review the relevant issues prior to a hearing may lead to longer hearings and continuances.

Third, an unrepresented noncitizen who appeals an immigration judge's decision may deprive the appellate court of a concise and organized record on which to rule. It is more difficult for appellate judges to correctly decide cases and establish law without the benefit of informed briefing.[18]

At least three factors may contribute to noncitizens having particular difficulty obtaining counsel when they are detained. First, detained noncitizens cannot travel to locate or confer with counsel.[19] Second, because detainees are generally not permitted to work, they may have more difficulty paying for an attorney than a released noncitizen.[20] Third, detention centers are geographically

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[17] Org. of Am. States, Inter-Am. Comm'n on Human Rights, *Report on Immigration in the United States: Detention and Due Process* 117 (2010); Amnesty Int'l, *Jailed Without Justice: Immigration Detention in the USA* 31-32; S. Poverty Law Ctr. *et al.*, *Shadow Prisons: Immigrant Detention in the South* 10 (2016).

[18] Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 6-9 (2008) (authored by Chief Judge Katzmann of the U.S. Court of Appeals for the Second Circuit).

[19] Eagly & Shafer, 164 U. Pa. L. Rev. at 34-35.

[20] *Id.* at 35; Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 368 (2014).

distant from urban centers with pro bono legal organizations, large law firms, and law school clinical programs.[21] For example, the EOIR advises noncitizens detained at a detention center in Bakersfield, California to seek out pro bono legal service providers, the nearest of which are in Los Angeles, California—over 100 miles away from Bakersfield.[22]

2. Detained noncitizens have difficulty gathering evidence

Regardless of whether a detained noncitizen is represented by counsel, it is more difficult for a noncitizen to gather evidence in support of her case when she is being detained. *See, e.g.*, *Moncrieffe*, 569 U.S. at 201. Detained noncitizens are housed in prisons, jails, and federal facilities where they face significant restrictions on visitation, movement, and external communications.[23]

As to external communication, detainees are subject to phone, internet, and mail restrictions that make it difficult to obtain records necessary for prosecuting their cases. *Lyon v. U.S. ICE*, 300 F.R.D. 628, 632 (N.D. Cal. 2014) (noting

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[21] Human Rights First, *supra* note 8, at 31 (nearly 40 percent of ICE detention bed space is located over 60 miles from an urban center); Lee, *supra* note 6.

[22] EOIR, *List of Pro Bono Legal Service Providers* (July 2018), https://www.justice.gov/eoir/list-pro-bono-legal-service-providers ("*Pro Bono Legal Service Providers*"); *see also* Linthicum, *ICE Opens 400-Bed Immigrant Detention Center Near Bakersfield*, L.A. Times (Mar. 24, 2015), https://www.latimes.com/local/lanow/la-me-ln-ice-immigration-detention-mcfarland-20150323-story.html.

[23] Eagly & Shafer, 164 U. Pa. L. Rev. at 35; Amnesty Int'l, *supra* note 17, at 29-43; Linthicum, *supra* note 22.

allegations of restrictions on telephone calls for detained noncitizens, including that they "cannot complete calls to … offices that use 'voicemail trees, *i.e.*, automated systems that require selection of options to reach a live person'") (citation omitted).[24] Even obtaining key documents such as birth certificates can become extremely difficult, if not impossible. For example, some detention facilities have implemented "postcard-only" policies that prohibit sending or receiving mail in envelopes. *Prison Legal News v. Columbia Cnty.*, 942 F. Supp. 2d 1068, 1072, 1092 (D. Or. 2013) (permanently enjoining the postcard-only practice).[25] Such policies can prevent a detained noncitizen from receiving documents that are critical to her defense.

Given this limited access with the outside world, it is difficult for detained noncitizens to contact legal aid or other organizations that could represent them in immigration proceedings.[26] And even where a detained noncitizen has family or friends who could assist with obtaining counsel or gathering evidence, it is difficult for detained noncitizens to communicate with family and friends.

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[24] *See also* Amnesty Int'l, *supra* note 17, at 35-36.

[25] *See also* Sakala, *Return to Sender: Postcard-Only Mail Policies in Jail*, Prison Policy Initiative (Feb. 7, 2013), https://www.prisonpolicy.org/postcards/report.html.

[26] Human Rights First, *supra* note 8, at 31 (noting that nearly 40 percent of ICE detention facilities are located over 60 miles from an urban center); Lee, *supra* note 6; *Pro Bono Legal Service Providers*, *supra* note 22; *see also* Linthicum, *supra* note 22.

Legal arguments in immigration proceedings can turn on nuanced factual and legal issues. A lack of evidence not only puts the noncitizen at a substantial disadvantage, but an incomplete factual record makes an immigration judge's job more difficult and a fair outcome more difficult to achieve. And continuances may be necessary where a detained noncitizen is attempting to obtain a key piece of evidence. This is especially important in the particular legal predicament shared by plaintiffs—recently-arrived asylum seekers who passed their credible fear interviews. Many of these noncitizens will be affected by two recent precedential Attorney General decisions, *Matter of A-B-* and *Matter of L-E-A-*, which make it difficult for a detained, unrepresented noncitizen with extremely limited access to legal resources to win an asylum claim. Specifically, *Matter of A-B-* and *Matter of L-E-A-* set out that a person seeking asylum must establish that his fear is on account of his membership in a particular social group that is properly delineated, is defined by an immutable characteristic, is sufficiently particular and socially distinct, and is not improperly defined by the harm feared. As the fear in such cases is often from non-state actors, the noncitizen must further establish that the government is unwilling or unable to control the persecutors (as such terms are defined by case law) and that he cannot avoid persecution by relocating to another part of the country. *See Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). The factual showings demanded by these

new opinions only underscore the importance of a noncitizen's ability to marshal evidence to support his or her case.

3. Detained noncitizens face difficulties in consulting with attorneys

Even where a detained noncitizen is able to obtain counsel, her detention makes it difficult for her to communicate with her attorney. This hurdle to effective attorney-client communications may add even more complexity to the detained noncitizen's case—for example, because of requests for continuances or unclear factual records.

Detained noncitizens are often transferred from one detention facility to another without notification to their attorneys.[27] Thus, even determining where a detained noncitizen is located can be a difficult task for an attorney.[28] Upon locating a detained noncitizen, an attorney may be required to travel such a long distance to meet with the detained noncitizen that such in-person meetings become practically impossible. *Baires v. INS*, 856 F.2d 89, 93 n.6 (9th Cir. 1988). And,

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[27] Schriro, Immigrations and Customs Enforcement, *Immigration Detention Overview and Recommendations* 23-25 (2009); Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 Fordham L. Rev. 541, 556-558 (2009) ("DHS claims it sends out a notice within twenty-four hours of transfer, … but not a single immigration attorney interviewed for this article has ever received such a notice in the regular course of representation.").

[28] Markowitz, 78 Fordham L. Rev. at 556-558.

even when an attorney is able to make the long journey to a detention facility, facility rules prohibiting laptops and other electronics, a lengthy wait time for an attorney-client meeting room, and other barriers continue to inhibit effective attorney-client communications.[29] In some instances, attorneys make this journey only to be precluded from meeting with their clients.[30] Telephone calls are not a suitable alternative for these in-person meetings, as attorneys cannot call detained noncitizens directly, detained noncitizens are limited in the number of calls they can make, and such calls are often interrupted.[31] A detained noncitizen's counsel is therefore less equipped and less able to concisely and accurately present the noncitizen's case, making the immigration judge's job in reaching an appropriate, fair outcome more difficult. Extended proceedings and continuances are often necessary. And, just like where a noncitizen is unrepresented, where a noncitizen is represented by an attorney who cannot properly prepare, immigration judges must take a more active role in navigating the noncitizen through removal proceedings, the noncitizens' theories become more difficult to follow, and appellate decisions become less helpful.

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[29] Eagly & Shafer, 164 U. Pa. L. Rev. at 35.

[30] Kim, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They're Deported*, L.A. Times (Sept. 28, 2017), https://www.latimes.com/projects/la-na-access-to-counsel-deportation/.

[31] Org. of Am. States, *supra* note 17, at 110-113; Markowitz, 78 Fordham L. Rev. at 558.

II. UNNECESSARILY DETAINING NONCITIZENS CONSUMES LIMITED RESOURCES

As this Court has acknowledged, "[t]he costs to the public of immigration detention are staggering." *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (internal quotation marks omitted). The immigration system necessarily has limited resources, and to the extent money is made available by releasing noncitizens on bond, Congress could potentially reallocate that money through the budget process in a number of ways to help ease the burden on an overburdened immigration court system, including by hiring more immigration judges and other personnel;[32] expanding efforts to introduce noncitizens to court procedures;[33] and replacing outdated audio, video, and other electronics systems.[34] *See Hernandez*, 872 F.3d at 996 ("[R]educed detention costs can free up resources to more effectively process claims in Immigration Court.").

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[32] Slavin & Harbeck, Nat'l Ass'n of Immigration Judges, *A View from the Bench*, Fed. Lawyer 67, 70 (Oct./Nov. 2016) ("Clearly, the court needs more resources: more judges, more judicial law clerks, and more staff to deal with both the current backlog and the continuing increase in cases.").

[33] Am. Immigration Lawyers Ass'n, *Policy Brief: Facts About the State of Our Nation's Immigration Courts* 2 (2019) (discussing the EOIR's "Legal Orientation Program," which provides detained noncitizens with information about how to navigate their cases); Amnesty Int'l, *supra* note 17, at 33 (same); *Legal Orientation Program*, Dep't Justice, https://www.justice.gov/eoir/legal-orientation-program (visited Sept. 4, 2019) (same).

[34] Slavin & Harbeck, *supra* note 32, at 67-68; EOIR, *FY 2019 Budget Request at a Glance* 2 (2019).

The average daily cost of detaining a noncitizen ranges between $133 and $208.[35] Notwithstanding that high cost, the number of detainees in the immigration court system continues to increase. A total of 396,448 people were booked into ICE detention facilities in fiscal year 2018, which is a 22.5% increase from fiscal year 2017.[36] In comparison to the total number of noncitizens who were detained in 1994—about 81,000—these numbers, and their effects on the immigration court system, are staggering.[37] These high numbers affect immigration judges directly: as discussed above, there are only around 400 immigration judges tasked with managing this caseload.[38]

For fiscal year 2019, the Department of Homeland Security requested $2.8 billion to cover the cost of housing 52,000 noncitizens.[39] In comparison, for fiscal year 2019, ICE requested $184.4 million for its supervision of 82,000 (*i.e.*, 30,000

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35 U.S. Dep't of Homeland Sec., *Budget Overview: Fiscal Year 2018* 14 (2018); Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply*, Nat'l Immigr. F. (May 9, 2018), https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/; Eagly & Shafer, 164 U. Pa. L. Rev. at 60.

36 U.S. Immigration and Customs Enforcement, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report* 8 (2018).

37 Kalhan, *Rethinking Immigration Detention*, 110 Colum. L. Rev. Sidebar 42, 44-45 (2010).

38 *Immigration Judge (IJ) Hiring*, *supra* note 5.

39 U.S. Dep't of Homeland Sec., *Budget-in-Brief: Fiscal Year 2019*, at 4 (2018).

more) noncitizens in its "Alternatives to Detention" program, which monitors individuals who "may pose a flight risk, but who are not considered a threat to our communities."[40] ICE spends far less to monitor released individuals than on detaining individuals. *See Hernandez*, 872 F.3d at 996 (noting the high costs of detaining noncitizens and acknowledging that "[s]upervised release programs cost much less by comparison"). Immigration judges have an interest in these expenditures beyond desiring efficiency: Congress could potentially reallocate this money through the budget process to benefit the immigration court system in several ways, such as by hiring more immigration judges and other personnel, expanding efforts to familiarize noncitizens with court procedures, and replacing outdated electronics systems. And, more to the point, the inefficiencies of adjudicating cases involving detained noncitizens discussed above would be significantly ameliorated if detention were limited to those cases in which it is truly necessary.

Notwithstanding the high costs of detention, detention time can increase for a detained noncitizen in at least three scenarios. *First*, a noncitizen's detention can be exceptionally long where the noncitizen has a meritorious defense. *See, e.g.*, *Nadarajah v. Gonzalez*, 443 F.3d 1069, 1071 (9th Cir. 2006) ("[T]he government

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40 *Id.*

continues to detain Nadarajah, who has now been imprisoned for almost five years despite having prevailed at every administrative level of review[.]"); *see also Ayala-Villanueva*, 572 F.3d at 737 ("On three occasions, the Immigration Judge … terminated the removal proceedings, concluding that Ayala had presented substantial, credible evidence of his citizenship[.]"). Noncitizens who have sound defenses are more likely to pursue those defenses, which often involve detailed factual and legal analyses. This point is particularly concerning in light of the fact that, assuming a noncitizen has a meritorious defense, she should ultimately be released. Thus, detaining such a noncitizen, while particularly costly, serves no practical benefit.

Second, a noncitizen may appeal a removal decision to the BIA, where appeals often remain pending for six months or more.[41] And, if unsuccessful before the BIA, the noncitizen may petition a federal court of appeals for review, where the petition can remain pending for years. 8 U.S.C. § 1252(a)(5); *see also, e.g.*, *Moncrieffe*, 569 U.S. at 188-190. Throughout this appeal period, the noncitizen will spend even more time in detention.

Third, as explained above, counsel is central to a noncitizen adequately making her case to the immigration judge. *See supra* Part I.B; *see also Montes-*

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41 EOIR, *Certain Criminal Charge Completion Statistics* 4 (2016).

Lopez v. Holder, 694 F.3d 1085, 1089-1090 (9th Cir. 2012) (noncitizens have a right to reasonable time to locate counsel). Cases in which a detained noncitizen desires counsel often require continuances to allow the detained noncitizen to obtain counsel. These continuances can comprise over 50 percent of the total adjudication time for a case.[42] On average, where a detained noncitizen is able to find an attorney, it takes the detained noncitizen over a month to do so.[43]

While alternatives to detention reduce costs, they nonetheless facilitate enforcement of immigration laws, as they do not lead to any significant increase in flight.[44] Indeed, the rate of noncitizens who fail to appear after being released on bond is low—14 percent.[45] And noncitizens who are placed on supervision are especially likely to appear. For example, of noncitizens participating in one segment of ICE's Alternatives to Detention Program, over 95 percent appeared for

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42 Eagly & Shafer, 164 U. Pa. L. Rev. at 61.

43 *Id.* at 60.

44 *See, e.g.*, Noferi, *A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers* 1 (2015) ("If the U.S. government treats asylum seekers fairly and humanely—i.e., releases them following their apprehension … —evidence suggests that they will be likely to appear for proceedings.").

45 *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings*, TRAC Immigration (Sept. 14, 2016), https://trac.syr.edu/immigration/reports/438/; *see also id.* ("This is noteworthy since the cases immigration judges were reviewing were almost always those where the government had refused to release the individual.").

their removal proceedings.[46] Thus, there is minimal detriment to releasing noncitizens on bond where an immigration judge finds bond or supervised release to be appropriate.

III. THE INJUNCTION WILL IMPROVE THE FUNCTIONING OF THE IMMIGRATION COURT SYSTEM

The specific procedural requirements of the district court's injunction affirmatively improve the functioning of the immigration court system and so are consistent with the INA's goals of impartially, efficiently, and consistently administering the Nation's immigration laws. Holding a bond hearing within seven days of a request benefits the immigration court system by ensuring that noncitizens are able to adequately prepare their cases and by saving money that could be reallocated to the immigration court system. Placing the burden of proof on the government prevents noncitizens from being detained simply because they cannot articulate why they should be released, and takes into account the government's institutional advantages. Requiring a recording or transcript of the bond hearing upon appeal facilitates effective and efficient appeals.

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[46] U.S. Gov't Accountability Off., *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 30 (2014); *see also id.* at 31 (noting that data was unavailable for another segment of the program because "ICE … did not have sufficient resources to collect such data … , given other priorities").

A. Holding A Bond Hearing Within Seven Days Of A Request Benefits The Immigration Court System

1. Bond hearings benefit the immigration court system

As a general rule, bond hearings, which allow for the possibility of a noncitizen being released on bond if he or she does not present a flight risk or danger to the community, *Hernandez*, 872 F.3d at 983, will facilitate immigration judges administering complex cases—not to mention conserve resources. Specifically, a noncitizen released on bond will be able to obtain and communicate with counsel, and to begin collecting evidence. Thus, her case is more likely to be more fully, clearly, and concisely presented for the immigration judge. These benefits are amplified where the noncitizen has a meritorious defense, as she will be permitted to properly argue that defense, and will not be detained for a disproportionately long period of time. This is particularly true here, as all class members have already been screened by asylum officers or immigration judges, who determined that the detained individuals demonstrate a significant possibility of prevailing on the merits of their claims for protection. *See* 8 C.F.R. § 208.30(e)(2). Moreover, as explained above, there is minimal detriment to the immigration court system, as releasing noncitizens on bond does not lead to a significant increased risk of flight.

2. Holding bond hearings within seven days enhances these benefits

Immigration judges, who currently conduct bond hearings in a variety of contexts, are familiar with the procedure for a bond hearing, and are well-positioned to undertake a bond hearing within seven days of a request. In fiscal year 2015, for example, immigration judges adjudicated 50,654 bond hearings.[47] And immigration judges ordinarily held these hearings within 72 hours, as is customary in immigration court practice. In view of that practice, and in view of the fact that bond hearings are often relatively brief (each bond hearing lasts only minutes), the seven-day turnaround required by the district court's injunction is more than feasible.[48] A seven-day timeframe for bond hearings simply provides more structure to the calendaring system by telling an immigration judge when he or she should hold a bond hearing.

Indeed, the benefits to conducting bond hearings are achieved more quickly and readily when a bond hearing is conducted within seven days of a request. Prompt release of a noncitizen on bond makes it more likely that the noncitizen's case will be presented more fully, clearly, and concisely by ensuring that the noncitizen will promptly be able to obtain legal counsel and begin forming a legal

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47 *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings*, *supra* note 45.

48 Anello, 65 Hastings L.J. at 401.

strategy, and can begin collecting evidence. Continuances and extensions will become less frequent, and noncitizens will focus on only legally cognizable issues.

Additionally, the seven-day period will avoid the cost of detaining a noncitizen for longer than necessary where she will ultimately be granted bond. For example, assuming a noncitizen will ultimately be released on bond, if the bond hearing is held 17 days after a request instead of seven days after a request, the government will pay for an extra ten days of detention. And, as noted above, during that time, substantial burdens are imposed on already overburdened courts and detained noncitizens are hampered in consulting with counsel and presenting their cases.

B. Placing The Burden Of Proof On The Government Benefits The Immigration Court System

Placing the burden of proof on the government would yield at least two major benefits to the immigration court system. *First*, asylum seekers often present no flight risk or danger to the community but, because of lack of access to counsel and an inability to collect evidence, are unable to articulate why they do not. Notably, based on the experience of amici, noncitizens often have difficulty understanding the government's accusations against them at the bond hearing stage. In some instances, immigration judges must offer a high-level explanation of the accusations. Placing the burden of proof on the government would mitigate the problems described above (an increased burden on immigration judges and

added costs) by preventing detention of noncitizens simply because they lack the ability to explain why release would be the appropriate outcome. Instead, the government would lay out its positions more concretely, thus allowing noncitizens to more meaningfully respond.

Second, the bond hearings themselves would be more efficient if the government bore the burden of proof. The government has institutional advantages, such as familiarity with the relevant law. Moreover, it is less likely that a language barrier will inhibit discussions about relevant facts and law. Noncitizens often communicate with immigration judges through interpreters, limiting the amount of information that can be conveyed to and from an immigration judge and creating a risk of translation errors. *Jacinto*, 208 F.3d at 733 ("[A]liens often lack proficiency in English, the language in which the proceedings are conducted typically. Despite the presence of a translator, the language barrier presents the potential to affect the ability of an alien to communicate and the ability of the immigration judge to understand what is being stated.").[49] And, because bond hearings would be decided on their merits instead of a noncitizen's inability to articulate why she should be released on bond, issues

[49] *See also* Lee, *supra* note 6.

of bond will be decided more fairly, potentially leading to fewer reversals on appeal.

C. Requiring A Recording Or Transcript Upon Appeal Benefits The Immigration Court System

Providing noncitizens with a recording or transcript upon appeal allows them to more effectively and efficiently appeal any incorrect decisions. And, as explained above, correctly decided appellate decisions instruct immigration judges as to how they should apply statutes and regulations, whereas the inability to establish a clear record makes it less likely that such appeals meaningfully examine the relevant facts and law.[50]

Recordings and transcripts are particularly essential where a noncitizen was unrepresented at the bond hearing but subsequently obtained counsel. *See, e.g.*, *Baires*, 856 F.2d at 90 (noting that a noncitizen obtained counsel after his bond hearing). They are also essential where a noncitizen was represented at the time of the bond hearing, but her counsel was unable to attend. Because an unrepresented noncitizen may not have a complete understanding of the proceedings or the law applied at such proceedings, it will likely be difficult for the noncitizen to explain the immigration judge's reasoning to an attorney. A recording or transcript will give an attorney a firsthand account of the judge's reasoning.

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[50] Katzmann, *supra* note 18, at 6-9.

Preparing a recording or transcript requires minimal effort by immigration judges. In the experience of amici, many, if not most, immigration judges already record bond hearings, and immigration judges are able to record or transcribe other proceedings. *See, e.g.*, *Jacinto*, 208 F.3d at 729-732, 735 (quoting "the transcript of this matter" in determining whether an immigration judge adequately explained the relevant proceedings to a noncitizen); *Ram*, 529 F.3d at 1240 (quoting transcripts of hearings before an immigration judge); *Baltazar-Alcazar*, 386 F.3d at 942 ("At the outset of the hearing, Judge Martin played a recording of the earlier proceeding[.]."). Thus, immigration judges can use the same means to record or transcribe bond hearings. The only apparent burden is providing detained noncitizens with access to those recordings or transcripts. To the extent that additional costs result from preparing a recording or transcript, those costs would be more than offset by the money that is saved by releasing noncitizens who pose no flight risk or danger to the community.

CONCLUSION

For all of these reasons, the Court should affirm the district court's modified preliminary injunction.

Respectfully submitted,

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September 4, 2019

APPENDIX

Amici curiae are:

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2. The Honorable Sarah Burr, Assistant Chief Immigration Judge and Immigration Judge 1994-2012, New York.

3. The Honorable Teofilo Chapa, Immigration Judge 1995-2018, Miami, Florida.

4. The Honorable Jeffrey S. Chase, Immigration Judge 1995-2007, New York.

5. The Honorable George Chew, Immigration Judge 1995-2017, New York.

6. The Honorable Cecelia Espenoza, Board of Immigration Appeals Member 2000-2003.

7. The Honorable Noel Ferris, Immigration Judge 1994-2013, New York.

8. The Honorable James Fujimoto, Immigration Judge 1990-2019, Chicago, Illinois.

9. The Honorable Jennie Giambiastini, Immigration Judge 2002-2019, Chicago, Illinois.

10. The Honorable John Gossart, Immigration Judge 1982-2013, Baltimore, Maryland.

11. The Honorable Paul Grussendorf, Immigration Judge 1997-2004, Philadelphia, Pennsylvania and San Francisco, California.

12. The Honorable Miriam Hayward, Immigration Judge 1997-2018, San Francisco, California.

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14. The Honorable Carol King, Immigration Judge 1995-2017, San Francisco, California.

15. The Honorable Elizabeth Lamb, Immigration Judge 1995-2018, New York.

16. The Honorable Margaret McManus, Immigration Judge 1991-2018, New York.

17. The Honorable Charles Pazar, Immigration Judge 1998-2017, Memphis, Tennessee.

18. The Honorable George Proctor, Immigration Judge 2003-2008, Los Angeles and San Francisco, California.

19. The Honorable Laura Ramirez, Immigration Judge 1997-2018, San Francisco, California.

20. The Honorable John Richardson, Immigration Judge 1990-2018, Phoenix, Arizona.

21. The Honorable Lory D. Rosenberg, Board of Immigration Appeals Member 1995-2002.

22. The Honorable Susan Roy, Immigration Judge 2008-2010, Newark, New Jersey.

23. The Honorable Paul Schmidt, Immigration Judge 2003-2016, Arlington, Virginia; Board of Immigration Appeals Chairman and Member 1995-2003.

24. The Honorable Ilyce Shugall, Immigration Judge 2017-2019, San Francisco, California.

25. The Honorable Denise Slavin, Immigration Judge 1995-2019, Miami, Florida and Baltimore, Maryland.

26. The Honorable Andrea Hawkins Sloan, Immigration Judge 2010-2017, Portland, Oregon.

27. The Honorable Gustavo Villageliu, Immigration Judge 1990-1995, Miami, Florida; Board of Immigration Appeals 1995-2003.

28. The Honorable Polly Webber, Immigration Judge 1995-2016, San Francisco, California.

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I hereby certify that on this 4th day of September, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Alan Schoenfeld*
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