No. 16-56829

IN THE
United States Court of Appeals for the Ninth Circuit

XOCHITL HERNANDEZ, ET AL.,

Plaintiffs-Appellees,

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA NO. 5:16-CV-00620-JGB-KK
HON. JESUS G. BERNAL

BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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March 8, 2017

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INTEREST OF AMICUS CURIAE

The American Bar Association ("ABA") is one of the largest voluntary professional membership organizations and the leading organization of legal professionals in the United States.[1] Its more than 400,000 members come from all fifty states, the District of Columbia, and the United States territories, and include prosecutors, public defenders, and private defense counsel. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments. Members also include judges, legislators, law professors, law students, and nonlawyer associates in related fields.[2]

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to the filing of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division Council before filing.

Since its founding in 1878, the ABA has worked to protect the rights secured by the Constitution, in particular the rights under the Due Process Clauses and Equal Protection guarantees of the Fifth and Fourteenth Amendments. The ABA's extensive work in those areas is reflected in a range of formal policies regarding conditions of pretrial release in both the immigration and criminal contexts. The Supreme Court and other courts have frequently looked to these policies for guidance about the appropriate balance between individual rights and public safety. *See, e.g., Padilla v. Kentucky,* 130 S. Ct. 1473, 1482 (2010); *Strickland v. Washington,* 466 U.S. 668, 688 (1984); *Bearden v. Georgia,* 461 U.S. 660, 669 n.10 (1983); *United States v. Ford,* 830 F.2d 596, 599 (6th Cir. 1987); *Calvert v. State,* 342 S.W.3d 477, 488 (Tenn. 2011).

The ABA submits this brief to assist the Court with its examination of the process by which U.S. Immigration and Customs Enforcement ("ICE") officials and immigration judges impose conditions of release, particularly pretrial bonds, on noncitizens at the outset of removal proceedings. In certain cases, a pretrial bond may be necessary to minimize a noncitizen's risk of flight. But when bonds are imposed

without consideration of less restrictive conditions or the noncitizen's financial resources, they may inadvertently cause a noncitizen to be detained solely because of his or her inability to pay. That outcome violates bedrock constitutional protections.[3] Under our system of justice, an individual's right to liberty cannot depend solely on that person's ability to pay. The ABA's policies provide guidance on how the process of imposing conditions of pretrial release can better protect the constitutional rights of noncitizens while advancing the legitimate national security, justice, and economic interests of the United States.

QUESTION PRESENTED

Whether a process for setting pretrial bond in removal proceedings that fails to consider less restrictive conditions of release and the noncitizen's financial resources violates the Due Process Clause and Equal Protection guarantee of the Fifth Amendment.

[3] The plaintiffs have brought claims under the Fifth Amendment, the Eighth Amendment, and the Immigration and Nationality Act. In keeping with the ABA's expertise, this brief focuses on constitutional protections under the Fifth Amendment. But many of the principles identified here also support the plaintiffs' claims under the Eighth Amendment and the Immigration and Nationality Act.

SUMMARY OF ARGUMENT

The ABA has long encouraged immigration courts to decrease the imposition of financial conditions on pretrial release and to eliminate any bond system that does not account for a noncitizen's ability to pay. In place of arbitrarily fixed bonds, the ABA supports the use of individualized bond determinations, including the consideration of humane alternatives to detention that are the least restrictive means to ensuring appearance. This policy, which is consistent with ABA policies in the criminal justice context, serves both principled and practical objectives.

First, an arbitrary bond system—under which a noncitizen may be detained solely because of her inability to pay—discriminates against indigent parties and thereby offends bedrock constitutional principles that govern pretrial detention, particularly the guarantees of due process and equal protection in the Fifth and Fourteenth Amendments. The Supreme Court has held that pretrial detention deprives noncitizen respondents of their fundamental right to liberty. That deprivation may be permissible only if it furthers a legitimate law enforcement rationale—not if it punishes noncitizens for

their poverty. Constitutional principles therefore require that conditions of pretrial release, including bonds, be calibrated to account for the noncitizen's financial resources as well as his or her risk of flight.

In addition to ensuring that bond procedures are constitutionally sound, ABA policies are intended to promote the evenhanded and efficient administration of justice. Arbitrary detention based solely on wealth imposes substantial harms on the legal and financial interests of detained individuals and their families. Detainees often lose their jobs, and as a result may lose their homes and parental rights over U.S.-born children. In addition, detainees are substantially less capable of securing representation in removal proceedings, with the effect of dramatically decreasing their chances of a successful outcome. The collective impact of arbitrary bond determinations is an increase in the detained population and an increase in the total time noncitizens spend in detention—a result that overburdens a detention system that already costs this country nearly $2.5 billion per year. These personal and financial harms are even less justified in light of data suggesting that

alternatives to detention, such as supervised release, are extremely effective at ensuring appearances at removal proceedings.

For the reasons set forth herein, the ABA asks this Court to affirm the district court's injunction.

ARGUMENT

I. The ABA Opposes Pretrial Bond Requirements In Removal Proceedings Except Where Less Restrictive Conditions Of Release Are Inadequate And The Bond Accounts For The Noncitizen's Ability To Pay.

The ABA has long opposed the pretrial detention of any noncitizen in removal proceedings absent extraordinary circumstances.[4] Such circumstances occur where detention is necessary to prevent harm or to ensure the noncitizen's appearance; examples include cases where the noncitizen "(1) presents a threat to national security, (2) presents a threat to public safety, (3) presents a threat to another person or

[4] *See* ABA Report 107E, adopted Feb. 2006 (hereinafter "Report 107E"), http://tinyurl.com/jytos28. Only recommendations that are presented to and adopted by the ABA's House of Delegates ("HOD") become ABA policy. The HOD comprises 589 delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members, and the Attorney General of the United States, among others. *See* ABA House of Delegates, http://tinyurl.com/85kz595 (last visited Mar. 2, 2017). Policies adopted before 1988 are available from the ABA, and those dated after 1988 are available on the ABA website.

persons, or (4) presents a substantial flight risk."[5] Absent such a compelling ground for detention, the ABA supports the use—and, at minimum, the consideration—of "humane alternatives to detention that are the least restrictive necessary to ensure that non-citizens appear in immigration proceedings."[6] Those alternatives should include "supervised pre-hearing release and bond based on the individual's economic means and risk of flight."[7]

In many cases, a bond requirement is unjustified because less restrictive conditions of release—including release on recognizance and supervised released—will suffice to ensure the noncitizen's appearance. In those cases, the ABA opposes any type of bond. And in the rare case where a bond is necessary to ensure a noncitizen's appearance, it should be calibrated to account for the noncitizen's financial resources as well as his or her risk of flight. Otherwise, the bond could inadvertently, and indefensibly, impose detention based solely on the noncitizen's

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[5] Report 107E, *supra* note 4.

[6] *Id.*

[7] *Id.*; *see also* ABA Civil Immigration Detention Standards, 12A102 (hereinafter "Detention Standards"), adopted Aug. 2012, as amended in Aug. 2014 by Res. 111, at II.C, http://tinyurl.com/p73wopo.

inability to pay. Risks of harm or flight may justify detention in certain circumstances, but indigence alone cannot.

The ABA's policies regarding pretrial bonds in removal proceedings intentionally mirror its recommendations in the criminal context. The current Criminal Justice Standards, adopted by the ABA House of Delegates in 2007, were shaped by a comprehensive review of pretrial release practices, including the use of monetary conditions for release.[8] Having found that courts often impose such conditions without justification, the ABA now recommends that "[r]elease on financial conditions should be used only when no other conditions will ensure appearance."[9] Further, "[w]hen financial conditions are imposed, the court should first consider releasing the defendant on an unsecured bond" before contemplating money bail.[10] And in the rare case where bail may be appropriate, it "should be set at the lowest level necessary to ensure the defendant's appearance and with regard to a

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[8] *See* ABA Standards for Criminal Justice, Pretrial Release (3d ed. 2007).

[9] *Id.* Standard 10-1.4(c).

[10] *Id.*

defendant's financial ability to post bond."[11] In no circumstance should a "judicial officer … impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay."[12]

II. The ABA's Policies Ensure Fidelity To The Constitutional Principles That Govern Pretrial Detention In Both Removal And Criminal Proceedings.

The ABA's policies are designed to ensure fidelity to the constitutional principles that govern pretrial detention, particularly the guarantees of due process and equal protection in the Fifth and Fourteenth Amendments. Under Supreme Court precedent, those principles apply to both removal and criminal proceedings, and they prohibit the pretrial deprivation of liberty based solely on the inability to pay in either context. Accordingly, the ABA recommends the same approach to pretrial bonds for both noncitizen respondents and criminal defendants.

The Supreme Court has long held that depriving an individual of "conditional freedom simply because, through no fault of his own, he

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[11] *Id.*

[12] *Id.* Standards 10-1.4(e); 10-5.3(a).

cannot pay . . . would be contrary to the fundamental fairness required by" the Due Process Clause. *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). Consistent with that principle, the Court has rejected government policies and practices in a wide range of contexts that have the effect of "punishing a person for his poverty." *Id.* at 671 (revocation of probation for inability to pay fine); *see, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 447-48 (2011) (civil contempt for inability to pay child support); *Tate v. Short*, 401 U.S. 395, 398 (1971) (incarceration for inability to pay traffic fines); *Williams v. Illinois*, 399 U.S. 235, 240-241 (1970) (incarceration beyond statutory maximum due to inability to pay fine); *Smith v. Bennett*, 365 U.S. 708, 711 (1961) (inability to pay fee to file petition for writ of habeas corpus); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (inability to cover cost of transcript on appeal).

In keeping with that guidance, lower courts have concluded that when the appearance of an indigent defendant can be reasonably assured by an alternate form of release, "pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint." *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc); *see also Jones v. City of Clanton*, No. 2:15cv34–MHT, 2015 WL

5387219, at *2-3 (M.D. Ala. Sept. 14, 2015). As these cases clarify, imposing pretrial bonds without considering alternative conditions or the defendant's financial resources—such that the defendant may be detained solely because of his or her inability to pay—runs afoul of constitutional principles.

The same constitutional concerns arise in the immigration context. The Supreme Court has repeatedly emphasized that the procedures by which Congress implements immigration law must comply with the Due Process Clause, which "applies to all 'persons' within the United States, including aliens." *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). In particular, pretrial detention in connection with removal proceedings—which deprives a noncitizen of the fundamental right to physical liberty—must rest on constitutionally adequate grounds. *See id.* at 690-92. The ABA has thus concluded that detention is "subject to close constitutional scrutiny" even where, as here, it is "a procedural aspect of the deportation process."[13]

The ABA endorses a range of policies designed to ensure that immigration detention complies with the guarantees of due process and

[13] ABA Report 107C (hereinafter "Report 107C"), adopted Feb. 2006, http://tinyurl.com/zo3hmtu.

equal protection for noncitizens. Many of those policies are designed to ensure that the conditions of detention—including access to legal resources and medical treatment—preserve the constitutional rights of detainees.[14] But the ABA's recommended procedures for pretrial release are equally critical, as they ensure that detention is imposed to begin with only through constitutionally sound procedures.[15] As explained, detention based solely on the inability to pay fails to meet that standard.

III. Detention Based Solely On Inability To Pay Imposes Considerable Costs On Detainees And The Public Fisc With Negligible Benefits To Immigration Enforcement.

Substantial research supports the conclusion that arbitrary pretrial bond determinations adversely affect indigent detainees while also undermining the fairness, effectiveness, and credibility of the legal system. These concerns are particularly acute in light of recent data demonstrating that bond amounts are steadily increasing, with the

[14] *See* Report 107C, *supra* note 13; ABA, *Ensuring Fairness and Due Process in Immigration Proceedings* (2008).

[15] *See* Report 107E, *supra* note 4; Detention Standards, *supra* note 7, at II.C.

median bond amount in 2015 reaching $6,500.[16] Over the past twenty years, nearly one in five individuals who received a bond remained in detention at the conclusion of their removal case, presumably because they were unable to pay the bond.[17]

Uninformed bond decisions that incarcerate indigent detainees solely because of their inability to pay for their release not only impact individuals and their due process rights, but harm the U.S. legal system by undermining notions of fundamental fairness and equal protection under the law. Allowing wealth to be the sole determining factor of release from immigration detention makes the system unfair, arbitrary, and unconstitutional.

A. Uninformed Bond Determinations Inflict Substantial Harms On The Legal System And Detainees' Due Process Rights.

Immigration detainees face significant obstacles to asserting their legal rights, both in immigration court and in other legal proceedings. The biggest and most troubling hurdle is access to counsel. The ABA

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[16] TRAC Immigration, *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?* (Sept. 14, 2016), http://tinyurl.com/jjbyv64.

[17] *Id.*

has long encouraged regulations and practices that ensure detainees have access to competent counsel and legal resources and are free from conditions that unnecessarily limit communications with counsel or interrupt the attorney-client relationship.[18] Nevertheless, an overwhelming 86% of detainees lack counsel in immigration proceedings.[19] Over one million unrepresented noncitizens faced the possibility of removal between 2007 and 2017.[20]

As the ABA concluded in a 2010 study of removal proceedings, "the disparity in outcomes of immigration proceedings depending on whether noncitizens are unrepresented or represented is striking."[21] A

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[18] *See e.g.,* ABA Report 111B, adopted Feb. 2008 (hereinafter "Report 111B"), http://tinyurl.com/hvbblkw; ABA, Crim. J. Sec. Comm'n on Immigration, Report 101C (2009), http://tinyurl.com/zy753dx; ABA Report 115B, adopted Aug. 2002, http://tinyurl.com/joxw2x2.

[19] *See* Ingrid V. Eagly and Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 36 (2015) (analyzing government data on immigration cases from 2007 through 2012).

[20] *See* U.S. Dep't of Justice, Exec. Office for Immigration Review, *FY 2015 Statistical Year Book* at F1, fig. 10 (2016).

[21] ABA, Comm'n on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-3 (2010) [hereinafter *Reforming the Immigration Sys.*].

more recent study reported that detained noncitizens with counsel were able to remain in the United States in 21% of cases, as compared to a 2% rate for unrepresented noncitizens.[22] Another study that addressed only asylum adjudication outcomes concluded that "[r]epresented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel."[23] These results are not surprising; without a lawyer, *pro se* noncitizens "enter the system without any understanding of the process before them, much less of the grounds for relief that may be available to them."[24]

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[22] Eagly & Shafer, *supra* note 19, at 50 fig. 14; *see also* Peter L. Markowitz et al., Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability And Adequacy of Counsel in Removal Proceedings*, 33 Cardozo L. Rev. 357, 363-64 (2011) (from 2005 to 2011, non-detained noncitizens with lawyers had successful outcomes 74% of the time, while detained noncitizens without counsel prevailed 3% of the time).

[23] Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007); *see also Reforming the Immigration System*, *supra* note 21, at 5-9.

[24] *See* Appleseed, *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts* 29 (2009); *Reforming The Immigration System, supra* note 21, at 5-10.

Detainees are at a particular disadvantage in retaining counsel as many are held in remote locations far from legal services and have limited ability to seek or pay for representation. Indeed, almost 40% of ICE detention bed space is located more than 60 miles from an urban center, where the majority of legal resources are located.[25] A report on immigration reform by the ABA Commission on Immigration observed that "remote facilities . . . and the practice of transferring detainees from one facility to another—often more remote—location without notice stand in the way of retaining counsel for many detainees."[26]

In addition to making it difficult to obtain legal counsel, the circumstances of detention render effective litigation of removal proceedings difficult, if not impossible. As the Supreme Court has recognized, detention seriously impairs the exercise of a detainee's legal rights, including hindrance of the "ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S.

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[25] *See* Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two Year Review* 31 (2011).

[26] *Reforming The Immigration System, supra* note 21, at 5-9; *see also* Markowitz et al, *Accessing Justice, supra* note 22, at 369 (study of detainees in New York concluded that representation rates for detainees transferred out of state were "dismal").

514, 533 (1972). One major obstacle is the limited access to telephones in most detention facilities.[27] Phone calls are a crucial means of communication necessary for any attempt by detainees to gather evidence in support of their legal cases. For this reason, the ABA Immigration Commission's policy calls for detainees to have "[r]easonable and equitable access to telephones . . . at commercially competitive toll charges."[28] In practice, telephone calls are extremely limited and substantial per-minute fees render the calls prohibitively expensive.[29] One national survey of detention facilities found large

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[27] *See* Nat'l Immigrant Justice Ctr., *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court* 4 (2010) [hereinafter *Isolated in Detention*] (reporting widespread problems with phone access); *see also* U.S. Gov't Accountability Office, GAO-07-875*, Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance* 15-17 (2007) (discussing deficiencies with phone system).

[28] *See* Report 111B, *supra* note 18.

[29] *See, e.g.*, Ruben Loyo et al., N.Y.U. Sch. of Law, Immigrant Rights Clinic, *Locked Up But Not Forgotten: Opening Access to Family and Community in the Immigration Detention System* 23 (2010). The FCC voted in October 2015 to impose caps on predatory phone rates in detention centers, but the phone companies challenged the order and it was withdrawn. *See* Federal Communications Commission, *Consumer Guide: Inmate Telephone Service*, Aug. 10, 2016. It remains to be seen

numbers of facilities that prohibited private calls between lawyers and their detained clients, and in several cases, even leaving messages was impossible.[30]

Detention facilities are also often located far from a detainee's home, effectively isolating the detainee and making it difficult for attorneys, family, and potential witnesses to communicate with the detainee in person.[31] Many detainees also have limited English-language skills and educational backgrounds, further hindering their ability to communicate, conduct legal research, and gather records essential for their case. In 2015, less than 12% of immigration

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whether the FCC's revised caps, passed in August 2016, will survive any similar challenge.

[30] *Isolated in Detention, supra* note 27, at 4, app. 4-5. The Southern Poverty Law Center recently published a report on Stewart Detention Center in Georgia, where detainees reported they were refused the right to make calls to their attorneys from a confidential phone line, not permitted to accept scheduled calls from their attorneys, and indigent detainees were denied the right to call their attorneys for free. S. Poverty L. Ctr., *Shadow Prison Immigrant Detention in the South* (Nov. 21, 2016), http://tinyurl.com/zghzxnj.

[31] *See* Dora Schriro, U.S. Immigration & Customs Enf't, *Immigration Detention Overview and Recommendations* 23-24 (2009).

proceedings were completed in English.[32] Similarly, despite standards requiring access to legal resources, detention facilities often provide limited materials in languages other than English.[33] Thus, the realities of detention do not conform to the policies and practices proposed by the ABA, which call for appropriate access to legal materials, contact visits with family and friends, and provisions for qualified personnel to assist detainees who are illiterate or lack English proficiency.[34]

When detainees are unable to obtain effective legal representation, the result is an overall increase in the total time spent in detention and in the court system. A study of detainees from 2007 through 2012 showed that, among detainees who sought counsel, nearly 51% of all court adjudication time was the result of detainee requests

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[32] *See FY 2015 Statistical Year Book*, *supra* note 20, at E1, fig. 9.

[33] *See* Schriro, *supra* note 31, at 23; Org. of Am. States, Inter-American Comm'n. on Human Rights, *Report on Immigration in the United States: Detention and Due Process* 117 (2010); Nina Rabin, *Unseen Prisoners: Women in Immigration Detention Facilities in Arizona*, 23 Geo. Immigr. L.J. 695, 727-28 (2009) (finding multiple Arizona detention facilities fail to comply with detention standards providing for access to legal resources like law libraries).

[34] *See* Report 111B, *supra* note 18.

for additional time to find an attorney.[35] Unrepresented individuals were also far less likely to have custody hearings—44% of represented detainees obtained a hearing versus 18% of unrepresented detainees.[36] And, even where unrepresented individuals secured a hearing, they were substantially less likely to be released—44% versus 11%—further extending average detention times.[37]

The burdens of detentions, in turn, may cause noncitizens to abandon meritorious defenses to removal. For instance, in a study of asylum seekers, the U.S. Commission on International Religious Freedom reported that, of the asylum seekers who withdrew their asylum claims, a "substantial number reported that the conditions of their detention influenced their decision to withdraw their application

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[35] Eagly & Shafer, *supra* note 19, at 61, fig. 16; 34, fig. 8.

[36] *Id.* at 70-71, fig. 19.

[37] *Id.* This statistic runs counter to the Government's suggestion that detainees' due process rights are satisfied where they "could present any information they chose concerning their eligibility for release and the conditions on which they should be released." (Govt. Br. 46). The data suggests that, without representation, detainees are not able to provide an effective presentation in removal proceedings.

for admission."[38] Over a five-year period, detained credible fear claimants withdrew their asylum claims 13% of the time, compared to only 5% of released claimants.[39]

Collectively, these harms strike at the fair and evenhanded administration of justice. Rather than ensure that individuals are only deprived of their liberty because they pose a legitimate threat to the community or a flight risk, noncitizens are detained solely because of their inability to pay a bond. The harm then compounds itself where detained individuals are less likely to secure representation, and thereby far less likely to obtain a successful outcome in removal proceedings.

B. Uninformed Bond Determinations Impose Significant Costs On Detainees, Particularly Those That Are Indigent.

Detention based exclusively on the ability to pay a bond is particularly concerning in light of the well-documented physical, psychological, and economic harms associated with ICE detention. ABA

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[38] U.S. Comm'n On Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal, Volume I: Findings and Recommendations* 52 (Washington, DC, 2005), http://tinyurl.com/z95aozr.

[39] U.S. Comm'n On Int'l Religious Freedom, *Asylum Withdrawals By Custody Status By Fiscal Year Completed*, http://tinyurl.com/hadxcah.

policy calls for provision of "effective medical and dental care . . . includ[ing] both treatment and preventive services that are medically necessary, at no cost to the detainee." Nonetheless, subpar medical care and inadequate mental health services are rampant in ICE detention. Between October 2003 and November 2016, 166 individuals died in ICE custody.[40] A 2016 investigation into 18 recent deaths in ICE custody revealed subpar medical care and violations of detention standards in all but 2 instances.[41] Provision of psychiatric services is equally abysmal: a recent investigation into deaths in immigration detention centers operated by Corrections Corporation of America—the nation's largest for-profit prison company—concluded that over 20% of the deaths in those facilities were the result of suicides.[42]

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[40] ICE, *List of Deaths in ICE Custody*, updated Nov. 28, 2016, https://tinyurl.com/zuk5lyo.

[41] Human Rights Watch, *US: Deaths in Immigration Detention: Newly Released Records Suggest Dangerous Lapses in Medical Care* (2016), https://tinyurl.com/zncpff7.

[42] Alex Friedman, *32 Deaths at CCA-Operated Immigration Detention Facilities Include at Least 7 Suicides*, Prison Legal News (June 20, 2015), https://tinyurl.com/z2s4ty5.

Detention also imposes considerable economic burdens that can throw indigent individuals deeper into poverty. As the Supreme Court has observed, "[t]he time spent in jail awaiting trial . . . often means loss of a job; it disrupts family life; and it enforces idleness . . . . The time spent in jail is simply dead time . . . ." *Barker*, 407 U.S. at 532-33. The "dead time" of detention means substantial economic hardship on detainees and their families. Detainees often lose their jobs, and as a result, some lose their homes.[43] This hardship strikes a uniquely vulnerable population—in 2002, half of the U.S. foreign-born work force made less than double the minimum wage, and noncitizen women were substantially less likely to participate in the workforce, making men the sole breadwinner for the family.[44] That harm is then compounded for

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[43] *See* Ajay Chaudry et al., The Urban Inst., *Facing Our Future: Children in the Aftermath of Immigration Enforcement* 27 (2010) (noting families "generally lose[] a breadwinner" during immigration detention); Human Rights Watch, *Jailing Refugees: Arbitrary Detention of Refugees in the US Who Fail to Adjust to Permanent Resident Status* (2009) (noting that detained refugees "are unable to work to support their families"); Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention,* 45 Harv. C.R.-C.L.L. Rev. 601, 622 (2010) (noncitizen lost his home as a result of three-year long detention).

[44] *See* Randy Capps et al., The Urban Inst., *A Profile of the Low-Wage Immigrant Workforce* 5-6 (2003).

detainees that hire a lawyer. Indeed, this Court has observed that the "hardship from being unable to work . . . to pay for legal representation is beyond question[.]" *Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984). Even after detention, former detainees suffer ongoing economic detriment. One study revealed that, among those sampled, detainees suffered a 53% decrease in their weekly income, even 6 months after their detention.[45]

The children of detainees—many of whom are U.S. citizens[46]—are also subject to collateral harms as a result of a parent's detention. Noncitizen detainees often have minimal contact with their families and U.S. born children during detention. Between 1998 and 2010, detainees were transported an average of 370 miles to a detention facility, making

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[45] *See* Chaudry et al., *supra* note 43, at 28, tbl 3.1.

[46] A joint report by the Migration Policy Institute and Urban Institute recently estimated that parents of U.S. citizen children made up between one-fifth and one-quarter of the 3.7 million noncitizens deported between 2003 and 2013. Migration Pol'y Inst., *Health and Social Service Needs of U.S.-Citizen Children with Detained or Deported Immigrant Parents* (Sept. 2015), https://tinyurl.com/hxz7adq; *see also* Seth Freed Wessler, *Nearly 250K Deportations of Parents of U.S. Citizens in Just over Two Years*, Colorlines (Dec. 17, 2012, 9:45 AM), http://tinyurl.com/gnv7vye.

regular contact with their children and families virtually impossible.[47] For some parents, detention has resulted in their children being placed in foster care. In 2011, a national research study estimated that at least 5,100 children whose parents had been either detained or deported were living in foster care.[48] In these cases, detained parents are often unable to meet court mandates set by the child welfare system, including visits and parenting classes.[49] Nonetheless, the Adoption and Safe Families Act, passed by Congress in 1997, imposes stringent time requirements on states for either achieving family reunification or adoption after a child is placed in foster care.[50] Detained parents may therefore lose their parental rights as a result of their detention.[51]

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[47] Seth Freed Wessler, Applied Research Ctr., *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* 5 (2011); *see also* Loyo et al., *supra* note 29, at 1, 17.

[48] Wessler, Applied Research Ctr., *supra* note 47, at 4.

[49] Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 Conn. L. Rev. 99, 140 (2011).

[50] The Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. § 1305).

[51] Rabin, *Disappearing Parents*, *supra* note 49, at 109; *see also* Wessler, Applied Research Ctr., *supra* note 47, at 5; Sarah Rogerson, *Lack of Detained Parents' Access to the Family Justice System and the Unjust*

C. Uninformed Bond Determinations Impose Substantial Costs On The Public Fisc.

ABA policy advances fiscal responsibility by encouraging all bodies of judicial administration to "eliminate unnecessary correctional expenditures, enhance cost-effectiveness, and promote justice."[52] One critical reform the ABA has promoted is the reduction of unnecessary pretrial detention and the use of effective alternatives to detention.

The reason for these policies is simple: The costs of detention are staggering, and dramatically increased by the growing size of the detained population. In the past two decades, the average daily ICE detention population swelled from 7,475 in 1995 to over 41,000 in 2016.[53] In FY 2015 alone, a total of 367,774 individuals passed through

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Severance of the Parent-Child Relationship, 47 Family L.Q. 141, 141-72 (2013); Women's Refugee Comm'n, *Torn Apart by Immigration Enf't: Parental Rights and Immigration Detention 10* (2010); Wendy Cervantes & Yali Lincroft, *The Impact of Immigration Enforcement on Child Welfare* 6 (2010).

[52] *Cf.* ABA Crim. J. Sec., Report 107 (2002), http://tinyurl.com/cjvb72f.

[53] Jeh Charles Johnson, Secretary, Department of Homeland Security, Statement on Southwest Border Security (Nov. 10, 2016), https://tinyurl.com/jr87b96; *see also*, ACLU, *Shutting Down the Profiteers: Why and How the Dep't of Homeland Sec. Should Stop Using Private Prisons* 7 (Sept. 2016). Reportedly, the current administration aims to double detention capacity to 80,000 beds. Brian Bennett, *Not*

ICE custody.[54] Budgets have swelled accordingly. In FY 2016, DHS requested $2.407 billion to fund immigration detention, or more than $6.5 million per day.[55] This amounts to a daily cost of $158 per detainee.[56] Some data suggests that the numbers are even higher, estimating $164 per detainee per day, $298 per person per day for family detention, and totaling more than $2 billion a year.[57]

These numbers are particularly staggering when compared with the relatively modest costs of supervised release programs. One report suggests that alternatives to detention cost anywhere from 17 cents to

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Just 'Bad Hombres': Trump is Targeting up to 8 Million People for Deportation, L.A. Times, Feb. 4, 2017.

[54] TRAC Immigration, *New Data on 637 Detention Facilities Used by ICE in FY 2015* (Apr. 12, 2016), http://tinyurl.com/hdjzlgj.

[55] U.S. Dep't of Homeland Sec., *Budget-in-Brief: Fiscal Year 2016* 13 (2014); Nat'l Immigration Forum, The President's FY 2016 Budget Dep't of Homeland Sec. (Feb. 6, 2015), http://tinyurl.com/h4lmo3w.

[56] U.S. Gov't Accountability Office, *GAO-15-26*, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 9-12, 19 (Nov. 2014), http://tinyurl.com/jkfz3x4.

[57] Nat'l Immigration Forum, *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add up to Sensible Policies* (2013); *see also,* Nat'l Immigration Forum, *Detention Costs Still Don't Add Up to Good Policy* (2014), https://tinyurl.com/hv2kajk.

17 dollars a day per individual, and that restricting custodial detention to violent criminals would result in a savings of $4 million per day and $1.44 billion annually.[58] The GAO estimates that, in 2013, the average cost per participant in alternatives to detention was $10.55 per day.[59]

Detention also takes productive members of society and precludes them from contributing to the public coffers. Noncitizens pay property taxes, sales taxes, and many pay income taxes.[60] In 2010, households headed by unauthorized noncitizens contributed approximately $11.2 billion in taxes to state and local governments.[61] Detention therefore compounds financial harms by imposing substantial burdens on public

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[58] U.S. Dep't of Homeland Sec., *Congressional Budget Justification: FY 2012, U.S. Immigration and Customs Enforcement Salaries and Expenses: Alternatives to Detention* 43-45 (2012); *see also The Math of Immigration Detention, supra* note 57, at 11.

[59] GAO, *Alternatives to Detention*, *supra* note 56.

[60] *See* Tanya Golash-Boza, *Immigration Nation: Raids, Detentions, and Deportations in Post-9/11 America*, 8 Soc'ys Without Borders 313, 148 (2012); Immigration Pol'y Ctr., *Unauthorized Immigrants Pay Taxes, Too* 1 (2011) [hereinafter *Immigrants Pay Taxes*].

[61] *Immigrants Pay Taxes*, *supra* note 60, at 3 (considering personal income taxes, property taxes, and sales taxes). This study did not address the separate contributions of noncitizens authorized to be in the country.

funds while, at the same time, removing contributing taxpayers from the system.

D. Relative To Alternative Conditions Of Release, Uninformed Bond Determinations Offer Negligible Benefits To Immigration Enforcement.

Ultimately, ABA policy regarding immigration detention seeks to balance the constitutional rights and practical needs of noncitizen respondents with deterrence of flight and criminal conduct. As empirical data demonstrates, individualized conditions of pretrial release strike that balance by ensuring high rates of appearance and low rates of criminal wrongdoing, without gratuitously imposing the burdens of detention.

In FY 2015, 86% of individuals released from detention by an Immigration Judge attended their hearings.[62] This statistic has remained fairly static, even as the number of bond hearings have increased. A recent analysis of EOIR court records over the past 20 years showed an increasing number of detainees receiving bond

[62] TRAC Immigration, *What Happens When Individuals*, *supra* note 16.

hearings, and yet no corresponding increase in absconder rates.[63] The natural conclusion is that individualized bond hearings are working.

The effectiveness of individualized bond determination is heightened when paired with conditional supervision programs. The government's conditional supervision program, called ISAP II (Intensive Supervision Appearance Program), relies on the use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants.[64] A government-contracted evaluation of this program reported a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings.[65]

Statistics also demonstrate that detainees released on bond are no more likely to recidivate than the general population. At least as of May 2014, ICE reported a recidivism rate of less than 3% for the 36,007 individuals with criminal records who were released from ICE custody

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[63] *Id.*

[64] GAO, *Alternatives to Detention, supra* note 56, at 10-11.

[65] *Id.*

in FY2013.[66] Further, as data from the government's supervision programs also demonstrates, alternatives to detention are effective in preventing criminal activity by noncitizens released on bond. For instance, in 2011, less than 1% of participants in ISAP were removed from the program due to arrest by another law enforcement agency.[67]

Our nation's bond system reflects a balance between the need to ensure that defendants appear for proceedings and the recognition that we cannot and should not detain people who do not pose a risk to the community and can be otherwise compelled to attend their hearings. Setting bonds without considering noncitizens' ability to pay is an arbitrary procedure untethered from legitimate law enforcement rationales, particularly when alternatives to detention are proven effective at compelling attendance in immigration proceedings. The effect of non-individualized bond determinations is to detain the poor for their inability to pay. This unfairly imposes an additional burden on indigent noncitizens already saddled with substantial disadvantages,

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[66] Office of the Exec. Assoc. Dir. of Enf't & Removal Operations, U.S. Immigration & Customs Enf't, *Criminal Recidivist Report* 3 (2013).

[67] *Intensive Supervision Appearance Program II: Contract Year 2011 Annual Report* (BI Incorp. 2011).

and further imposes unnecessary and excessive costs on the United States.

* * * * *

In light of the foregoing constitutional and empirical considerations, the district court's preliminary injunction in this case imposes an essential procedural requirement on pretrial bond proceedings. Immigration judges must be granted considerable discretion in fashioning conditions of release. But that discretion cannot stretch to dismissing, out of hand, the legal relevance of a noncitizen's ability to pay when imposing a pretrial bond. Such an approach guarantees that some noncitizens will be detained solely because of their indigence, an outcome that is indefensible as a matter of constitutional doctrine and public policy.

The district court's injunction offers a narrowly tailored, purely procedural solution: It requires immigration judges to consider less restrictive conditions of release and a noncitizen's ability to pay before imposing a pretrial bond. That requirement simply makes explicit what the Constitution already compels, while preserving immigration judges'

broad discretion to decide how best to protect communities and ensure that noncitizens appear for subsequent proceedings.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's injunction.

Respectfully submitted,

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March 8, 2017

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I hereby 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 March 8, 2017.

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