No. 16-56829

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

XOCHITL HERNANDEZ ET AL.,
Plaintiff-Appellees,

v.

JEFFERSON SESSIONS 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

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1, the *amici curiae*, (1) the National Association of Criminal Defense Lawyers, and (2) the Center for Legal and Evidence-Based Practices, certify that neither entity has a parent corporation and that no publicly held corporation owns any of either entity's stock.

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STATEMENT OF INTEREST

This *amici curiae* brief is submitted on behalf of (1) the National Association of Criminal Defense Lawyers ("NACDL"), and (2) the Center for Legal and Evidence-Based Practices ("CLEBP"). The *amici* are leading advocates on behalf of individuals who have been subjected to detention by the government. Consistent with their respective missions, the *amici* have devoted their resources to ensuring that all individuals deprived of liberty—including the hundreds of thousands of non-citizens who are detained as part of the immigration process every year—receive the full protections of the law.

1. The NACDL is a nonprofit organization that represents public defenders and private criminal defense lawyers. Founded in 1958, the NACDL has a national membership of approximately 10,000 attorneys, in addition to almost 40,000 affiliate members, from all fifty states. The NACDL's mission is to ensure justice and due process for the accused, and to promote the proper and fair administration of justice.

2. The CLEBP is a non-profit 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.

The *amici* submit this brief pursuant to Federal Rule of Appellate Procedure 29(a) with the consent of all parties to this action. Pursuant to Rule 29(c)(5), the *amici* confirm that neither party nor a party's counsel has authored this brief, in whole or in part, or contributed money intended to fund the preparation or submission of this brief. No person or entity contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Court should affirm the district court's preliminary injunction for all the reasons stated in Plaintiff-Appellees' brief: the government's failure to consider a noncitizen's ability to pay money bail and alternative conditions of release during bond determinations violates both the Constitution and the Immigration and Nationality Act. The basic protections set forth in the preliminary injunction are consistent with those routinely afforded to criminal defendants in the pretrial system, which shares many of the same features as the immigration detention system. Lessons from the criminal pretrial context, learned after decades of rigorous study and analysis by academics and policy makers alike, provide an informed context useful for properly reviewing and affirming the preliminary injunction here.

Specifically, in the criminal pretrial system, experience has taught that (1) alternative conditions of release are as effective as (if not more so than) money bail in serving the government's interests in promoting return for court appearances and protecting public safety;

(2) money bail does not effectively advance the government's interests; and

(3) unnecessary detention—such as detention based on an individual's inability to pay money bail—carries serious adverse consequences for the defendants, their families, and their communities and wastes government resources.

As *amici* explain below, the preliminary injunction's modest procedural safeguards are entirely consistent with the best practices implemented in criminal pretrial systems around the country.

ARGUMENT

The district court's preliminary injunction sensibly provides noncitizens in the immigration system with basic protections that are routinely provided in criminal pretrial justice systems around the country. The *amici* thus support Appellees and urge the Court to affirm the preliminary injunction. As discussed herein, the Court should further affirm the preliminary injunction because it is supported by and consistent with best practices and lessons learned from long experience in the pretrial context.

I. The Safeguards Required by the District Court are Consistent with Best Practices in the Comparable Pretrial Justice System.

The district court's preliminary injunction—requiring Immigration and Customs Enforcement (ICE) and the Executive Office of Immigration Review (EOIR), in their bond setting practices, to consider a noncitizen's financial ability to pay and alternative conditions of release—provides basic protections that are consonant with those afforded to criminal defendants in the pretrial system. Providing these protections in the immigration context will bring the immigration detention system more in line with best practices developed through long experience in the criminal pretrial context.

Like immigration detention, pretrial detention in the criminal justice system is regulatory (not punitive) in nature and only permitted when it advances the government's interests in preventing danger to the community and flight pending

proceedings. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 747, 749 (1987).[1] In practice, however, the immigration system lags behind the criminal pretrial system in providing basic protections against unjustified government intrusions on individual liberty. For example, ICE is an outlier in detention rates, detaining 80% of arrestees pending immigration proceedings in 2013, nearly *double* the typical detention rates in any criminal pretrial system. Mark L. Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 Geo. Immigr. L.J. 45, 47-48 (2014). Critically here, the immigration system's principal reliance on money bail, without accounting for a noncitizen's financial condition, does not keep pace with best practices in the criminal context.

Driven by concerns over jail crowding and over detention, in addition to fairness and transparency in the criminal process, criminal pretrial systems across the country have increasingly moved away from a rote reliance on money bail. *See* John S. Goldkamp & Michael D. White, *Restoring accountability in pretrial release: the Philadelphia pretrial release supervision experiments*, 2 J. of Experimental Criminology 143, 144-45 (2006).

[1] Indeed, the Supreme Court, this Court, and the federal courts routinely rely on precedent from the criminal pretrial system in determining applicable due process standards in immigration proceedings. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) (citing *Salerno*, 481 U.S. at 746); *Rodriguez v. Robbins*, 804 F.3d 1060, 1074-76 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (same); *Haughton v. Crawford*, ---F. Supp. 3d---, No. 1:16-CV-634(LMB/IDD), 2016 WL 6436614, at *3 (E.D. Va. Oct. 28, 2016).

The federal pretrial system has long recognized that a defendant should not be detained solely because of his or her inability to pay a money bail. *See* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.") (added by the Comprehensive Crime Control Act of 1984, Chapter 1 (Bail Reform Act of 1984), Pub. L. No. 98-473, title II, § 203(a), 98 Stat. 1976 (Oct. 12, 1984)).[2] This requirement is well-grounded in due process and equal protection principles, as explained in Appellees' brief.

Consistent with these principles, increasing numbers of states have enacted legislation to emphasize release on recognizance or other alternative conditions of release (*i.e.* alternatives to money bail) and to reduce reliance on money bail in the pretrial system. *See* Amber Widgery, *Guidance for Setting Release Conditions*, Nat'l Conference of State Legislators (May 13, 2015) (collecting pretrial release practices around the country). Some states have also enacted express statutory provisions prohibiting unaffordable money bail, augmenting the overall movement away from reliance on money bail. *See, e.g.*, Kan. Stat. Ann. § 22-2801 ("all

[2] The United States has moreover consistently taken the position that any bail schedule that does not take into consideration an individual defendant's ability to pay is unconstitutional. *See* Brief for the United States as Amicus Curiae, *Walker v. City of Calhoun, GA*, CA No. 16-10521-HH (11th Cir. Aug. 18, 2016); Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, Dkt. No. 26 at 1 (M.D. Al. Feb. 13, 2015). *Amici* agree, and these long-standing principles should be properly applied in the immigration system.

persons, regardless of their financial status, shall not needlessly be detained pending their appearance . . . when detention serves neither the ends of justice nor the public interest"); Haw. Rev. Stat. § 804-9; Mass. Gen. Laws ch. 276, § 58A.[3]

As discussed below, experience from model jurisdictions, some of which have all but abolished money bail, demonstrate that properly validated evidence-based risk assessment tools can accurately identify higher-risk individuals, while pretrial flight risk can be adequately and cost-effectively managed through non-financial, alternative conditions of release.

Amici submit that the preliminary injunction's modest procedural safeguards are entirely consistent with these well-analyzed lessons and best practices from the pretrial justice system.

[3] Nearly all states require consideration of a defendant's financial resources to determine the availability and conditions of release. Alaska Stat. § 12.30.011; Ariz. Rev. Stat. § 13-3967; Ark. R. Crim. P. 9.2; Cal. Penal Code § 1270.1; Colo. Rev. Stat. § 16-4-103; Del. Code tit. 11, §§ 2105, 2107; Fla. Stat. § 907.041; 725 Ill. Comp. Stat. 5/110-5; Ind. Code § 35-33-8-4; Iowa Code § 811.2; Kan. Stat. Ann. § 22-2802; Ky. Rev. Stat. Ann. § 431.525; La. Code Crim. Proc. Ann. art. 316; Me. Rev. Stat. Ann. tit. 15, § 1026; Md. R CR Rule 4-216.1 (Eff. July 2017); MI Rules MCR 6.106; Minn. R. Crim. P. 6.02; Mo. Rev. Stat. § 544.455; Mont. Code Ann. § 46-9-109; Neb. Rev. Stat. § 29-901.01; Nev. Rev. Stat. § 178.498; N.M. R. Rule 5-401; N.Y. Crim. Proc. Law § 510.30; N.C. Gen. Stat. § 15A-534; N.D. R. Crim. P. 46; Ohio Crim. R. 46; Pa. R. Crim. P. 523-524; 12 R.I. Gen. Laws § 12-13-1.3; S.D. Codified Laws § 23A-43-4; Tenn. Code Ann. § 40-11-118; Tex. Code Crim. Proc. art. 17.15; Vt. Stat. Ann. tit. 13, § 7554; Va. Code Ann. § 19.2-121; Wa. St. Super. Ct. CR 3.2; W. Va. R. Code § 62-1C-3; Wis. Stat. § 969.01; Wyo. R. Crim. P. 46.1.

II. Experience From the Pretrial Justice System Teaches that Alternative Conditions of Release Can Better Address the Government's Interests in Civil Detention.

The criminal pretrial system has demonstrated that there are numerous proven alternatives to detention available at the government's disposal, even for higher-risk individuals. These alternatives are less intrusive than detention and are, in most, if not all cases, more effective than money bail in ensuring appearance in court. The district court thus rightly required ICE and EOIR to consider such alternatives when setting, re-determining, and/or reviewing the terms of any person's release from immigration detention.

Alternative, non-financial conditions of release can range from a simple promise to appear in court to heavy supervision, and often include a combination of options based on the risk level of a given defendant. The criminal system frequently uses the following types and categories of alternative release conditions:

A. Release on recognizance or unsecured appearance bonds;

B. Low-cost interventions such as reminder calls;

C. Electronic monitoring, and more intensive pretrial supervised release programs.

As shown in detail below, these categories of alternatives have proven, in most, if not all cases, more effective than money bail at managing pretrial flight

risk in the criminal context. Using similar practices in the immigration system would be consistent with established practices in the criminal system.

A. Release on recognizance or unsecured appearance bonds effectively secure the appearance of lower-risk defendants without relying on money bail.

For defendants who are deemed to be lower risk for pretrial flight and dangerousness, requiring a signed promise to return can be just as effective as money bail.

In the District of Columbia, which uses a flexible variety of alternative conditions of supervision and has all but eliminated money bail, nearly 90% of released defendants (representing all levels of pretrial risk) appear in court, compared to a national average of less than 80%. *Compare* Pretrial Servs. Agency for D.C., *Performance Measures* (data as of June 30, 2015) *with* Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Court* 8 fig. 5 (Bureau of Just. Stats., Nov. 2007).

The use of unsecured bonds, under which defendants are released pretrial without any up-front payment but agree to pay a set amount of money if they fail to show up for court, is equally effective as traditional money bail. A recent study in Colorado (which can be statistically extrapolated to the entire U.S. population with a small margin of error) demonstrated that lower- to moderate-risk defendants released on unsecured bonds appeared for their court dates at slightly *higher* rates

than those required to post traditional money bail. Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 11 (Pretrial Just. Inst. 2013).

In contrast, unnecessary detention or pretrial intervention harms lower-risk defendants and the public. In Kentucky, lower-risk defendants unnecessarily detained for even two or three days before release were more likely to fail to appear in court or recidivate. Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention* 10, 19 (Arnold Found. Nov. 2013) (hereinafter *Hidden Costs*). Similarly, in one study of defendants in the federal pretrial system, lower-risk defendants released with unnecessary supervision conditions were more likely to fail to appear or recidivate than defendants in the same risk level who did not have the same conditions. Marie VanNostrand & Geena Keebler, *Pretrial Risk Assessment in Federal Court*, Fed. Probation Vol. 73(2), 30-33 (2009). The potential downsides of over-supervision and unnecessary detention have led to increasing calls in the pretrial justice system to use release on recognizance or unsecured bond as the preferred means of managing lower-risk defendants. *See, e.g.*, American Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-1.4 (3d ed. 2007) (jurisdictions should promote release on recognizance or unsecured bond and use money bail only as a last resort).

Noncitizens protected by the district court's preliminary injunction include, by virtue of their qualification for release, substantial numbers of low-risk individuals. Any system that simplistically uses money bail as opposed to more sophisticated and proven alternatives runs a higher risk of unintentionally creating larger numbers of negative outcomes. In this sense, the preliminary injunction's basic protections for the immigration system are fully consistent with the record of experience from the criminal system.

B. Scalable low-cost interventions such as reminder calls effectively boost court appearance rates without relying on money bail.

Relatively minor, low-cost efforts to keep a defendant engaged by the criminal court system have also proved effective in boosting appearance rates, without relying on money bail. One low-cost alternative is the straightforward approach of providing simple-to-understand (for the layperson) information sheets with clearly stated requirements and expectations for release. Simplifying information sheets for defendants in pretrial release has improved the pretrial system's effectiveness, particularly with respect to unrepresented individuals. John Jay Coll. of Criminal Justice, *Pretrial Practice: Building a National Research Agenda for the Front End of the Criminal Justice System* 24-25 (2015) (hereinafter *Pretrial Practice*).

Other low-cost techniques, such as contacting peers and/or family members to assist in guiding defendants to courts, have also been effective in ensuring

appearances, as have small carrots and sticks for positive or negative pretrial behavior. *See id.*

Studies have demonstrated that simply reminding lower-risk defendants of court dates can materially reduce failures to appear. Standardized reminders, such as automated or live phone calls or text messages, have become widely implemented and have proven successful in improving appearance rates. *Id.* Coconino County, Arizona reduced its failures to appear by 12% after implementing a call reminder pilot program. Wendy F. White, Criminal Justice Coordinating Council et al., *Court Hearing Call Notification Project* 2 (2006). Jefferson County, Colorado used only live callers in its program, and reduced its failures to appear by 9% (a 43% reduction in the overall failure to appear rate). Timothy R. Schnacke et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders*, 48 Ct. Rev. 86, 89 (2010). In Nebraska, even postcard reminders of court dates sent through the mail yielded an overall improvement in appearance rates among misdemeanor defendants. Mitchel N. Herian & Brian H. Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, Nebraska Lawyer 11-13 (Sept. 2010).

These lessons underscore the effectiveness of low-cost, low burden alternatives to detaining indigent defendants pretrial. Compared to the over-detention engendered by money bail, and the consequent need to expend resources

on detention, low-cost alternatives to detention additionally have the obvious benefit of reducing the government's financial burden. This research thus demonstrates that scalable, low-cost alternatives can meet the government's interest in managing pretrial flight risk as effectively as money bail.

C. Supervised release and electronic monitoring effectively manage pretrial activities of even higher-risk defendants; no money bail is required.

Detention—much less detention on high money bail—is demonstrably unnecessary even in the cases of individuals assessed to pose a higher risk. Supervised release can be customized for the individual needs of higher-risk defendants to effectively address the government's concerns about danger or flight risk. Denver Pretrial Services, for example, utilizes conditions of release including court reminder calls, case management meetings, substance abuse testing, and electronic monitoring. Denver Dep't of Pub. Safety, *Denver Pretrial Services Program CY15 Annual Report* 5 (2015) (hereinafter *Denver Pretrial Services*).

A growing number of studies validate the effectiveness of flexible pretrial supervision programs in achieving the same purposes for which bail is intended, even as to higher-risk individuals. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1118, 1348, 1363 (2014); Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on*

Pretrial Outcomes 3, 13 (Arnold Found. Nov. 2013) (hereinafter *Impact of Supervision*).

First, pretrial supervision reduces failures to appear. *Pretrial Practice*, *supra*, at 16. Indeed, a study of supervised release in the federal pretrial system found that moderate and higher-risk defendants in supervision were more likely to appear in court. *Impact of Supervision*, *supra*, at 3, 13. Similarly, Virginia, which pioneered one of the first evidence-based risk assessment approaches to pretrial decision-making in the country, reported that in 2012, 96.3% of defendants released into alternative conditions of supervision appeared in court as scheduled. Kenneth Rose, *A "New Norm" for Pretrial Justice in the Commonwealth of Virginia* 3, 6 (Va. Dep't of Crim. Just. Servs. Dec. 2013). Second, supervising defendants during the pretrial period may decrease the occurrence of new criminal arrests after the conclusion of the criminal process. *Impact of Supervision*, *supra*, at 17 (tentative finding that "pretrial supervision of more than 180 days may also decrease the likelihood of [new criminal arrests].").

Even higher levels of pretrial risk can be effectively managed through tailored pretrial supervision and monitoring programs without resorting to money bail or unnecessary detention. For higher risk defendants, electronic monitoring, *i.e.* tracking defendants through a non-removable GPS signal, may still strike the necessary balance between protecting the public and ensuring court appearances,

while allowing less interruption in a defendant's pretrial life. Clifford T. Kennan, Pretrial Servs. Agency for D.C., *Organizational Assessment Fiscal Year 2013* 17 (2013). Compared to detention in jail, electronic monitoring is low cost and simple to administer. Wiseman, *supra*, at 1344 ("It costs at least four times as much to jail a defendant as a does to monitor him."). Further, electronic monitoring has the potential to narrow the gap between rich and poor defendants if used in place of imprisonment for failure to post bond. *Id*. at 1380.

In sum, the variety and success of alternative conditions of release demonstrate that detention and money bail should not be the principal means of managing pretrial risk. In fact, given the deleterious consequences that money bail resulting in unnecessary detention can have on defendants and their families, money bail should rarely be used in any detention system.[4]

III. Detention on Money Bail Can Undermine the Government's Interests in Civil Detention.

The district court's preliminary injunction is further justified because an

[4] *Amici* observe that ICE currently has an alternative release conditions program, the Intensive Supervision Appearance Program ("ISAP"), which involves supervision, technology monitoring (either electronic GPS tracking or phone reporting), periodic visits, and case management. Robert Koulish, *Immigration Detention in the Risk Classification Assessment Era*, 16-1 Conn. Pub. Int. L.J. 33-34 (2016). However, because of ICE and EOIR's reliance on money bail (even when individuals are unable to pay it), the ISAP program is underutilized despite demonstrably positive outcomes and cost-savings. *Id.*; *see also* Noferi, *supra*, at 88-89 (noting that while ICE detained nearly 441,000 individuals in 2013, only 41,000 noncitizens (or less than 10%) were supervised under ISAP in the same year, and more than half of those individuals began supervision in that year).

over-reliance on money bail, without consideration of ability to pay or alternative conditions of release, can actually *undermine* the stated goals of detention. Over-reliance on money bail necessarily results in the disproportionate detention of low-income and indigent defendants, who may not be able to meet even relatively small bail amounts. These individuals remain in custody due not to their flight risk or likelihood of reoffending—the only legitimate justifications for detention—but rather their inability to pay a financial condition of release. Such detention has nothing to do with objective risk factors, particularly undermines the purposes of civil detention with respect to lower- and moderate-risk defendants, and can carry serious adverse consequences.

A. Money bail does not improve appearance rates.

One of the stated purposes of money bail is to incentivize defendants to appear for their scheduled hearings rather than forfeit the money deposited. *See, e.g.*, *Stack v. Boyle*, 342 U.S. 1, 5 n.3 (1951). However, as discussed above, the existing evidence surrounding alternative conditions of release suggests that money bail is rarely necessary to ensure court appearances. Indeed, there is no reliable data demonstrating that money bail is actually an effective or necessary means to ensure appearance in court. *See* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. Rev. 837, 856-57 (2016) (citing Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and*

A Framework for American Pretrial Reform 16, 91-92 (2014)).[5]

At the same time, the effect of higher bail for low-income defendants is not enhanced incentive, but rather almost certain incarceration. Instead of managing flight risk during release, money bail usually results in greater detention. *See* Cohen & Reaves, *supra*, at 3 fig. 3 (showing direct relationship between the bail amount and likelihood of detention). Higher bail thus secures appearance in court not because of any increased incentive to appear, but rather because the defendant is held behind bars due to inability to pay a bond. *See* Wiseman, *supra*, at 1359.

Involuntary pretrial incarceration may also have unintended consequences for future interactions with the court. For lower-risk defendants in Kentucky, for example, longer periods of unnecessary pretrial detention were correlated with increased failure to appear for future hearings. *Hidden Costs*, *supra*, at 10-11. Whether or not a defendant is able to secure liberty by paying bail, the money bail system does not appear to be better or more effective at achieving its intended

[5] To the contrary, one researcher found "no evidence that money bail results in positive outcomes, such as an increase in defendants' rate of appearance at court." Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization* 23 (Aug. 18, 2016). Furthermore, studies relied upon by the for-profit bail industry are inconclusive at best, often based on improper uses of federal data, and do not compare effectiveness of any one type of pretrial release over that of others. Moreover, the studies ignore the fact that money has nothing to do with public safety (across the country, one can never forfeit the money on a bail bond for new crimes) and release (money bail has been shown to both deny and delay release). *See generally* Kristin Bechtel et al., *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research* (Pretrial Justice Inst. Nov 2012).

result of assuring appearance in court than the non-monetary conditions discussed above.

B. Money bail does not improve public safety.

Just as one of the lessons learned from the criminal pretrial system is that high money bail seems to fail in encouraging court appearance, the use of high bail and detention has likewise proven unsuccessful in protecting the community's safety. In addition to disrupting the lives of defendants through loss of employment, benefits, and social structure, pretrial incarceration of lower-risk, non-violent criminals is correlated with an increase in later criminal arrests. This effect can even be observed where detention lasts for only days. *See* Wiseman, *supra*, at 1354. Longer periods of detention enhance the correlation between detention and new criminal activity during the pretrial period. *Denver Pretrial Services*, *supra*, at 4 (citing *Hidden Costs*, *supra*); Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* 10-11 (Arnold Found. Nov. 2013) (hereinafter *Impact of Pretrial Detention*) (lower-risk defendants in Kentucky held in pretrial detention for longer periods of time more likely to engage in new criminal activity); Gupta, *supra*, at 22.

Further, incarceration of lower-risk defendants can disrupt healthy bonds such as employment, residential stability, prosocial networks, and positive community involvement that typically encourage lawful behavior. Disrupting those

bonds can increase the likelihood of recidivism. Anne Milgram et al., *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making*, 27 Fed. Sentencing Rep. 216, 217 (2015).

C. Detention of indigent individuals on unaffordable bail carries serious adverse consequences to those individuals and their families.

For more than fifty years, researchers have found that pretrial detention leads to worse case outcomes, particularly for indigent defendants. *See* Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641, 655 (1964) ("a causal relationship exists between detention and unfavorable disposition"); Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment*, Crim. Justice Pol. Rev. Vol. 25(1), 59, 60 (2014) (a "decision to detain a defendant pretrial may be, in effect, a decision to convict"); *Pretrial Practice*, *supra*, at 15. Faced with the threat of lengthy detention, criminal defendants may be influenced to sacrifice their due process rights. For those defendants who do not plead guilty, detention itself limits their access to counsel and their ability to gather the evidence needed for a defense. Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, University of Pennsylvania 5 (2016); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention* 22 (July 2016); *see also Barker v. Wingo*, 407 U.S. 514, 533 (1972).

Pretrial detention thus correlates with increased guilty pleas and verdicts, as well as lengthier prison sentences when convicted. *Impact of Pretrial Detention*, *supra*, at 4 ("Defendants who are detained for the entire pretrial period are much more [over 4%] likely to be sentenced to jail and prison. . . . Defendants who are detained for the entire pretrial period receive longer jail and prison sentences [an estimated 2.84 months longer]."); James C. Oleson et al., *The Sentencing Consequences of Federal Pretrial Supervision*, 63 Crime & Delinquency 313, 328 (2017). And the negative consequences of pretrial detention can be particularly acute for "low-risk, low-income defendants, especially those of color." *Pretrial Practice*, *supra*, at 15.

The potential for these severe consequences pertains equally to noncitizens detained in the immigration system due to their inability to pay bail. Noncitizens in removal proceedings generally have no guaranteed right to appointed counsel, and detention can interfere with a noncitizen's ability to find a lawyer. And, as one of the Plaintiffs in this case experienced, noncitizens can languish in immigration detention for *years*. *See also Rodriguez*, 804 F.3d at 1072 (among class of immigrant detainees who had all been in detention for at least six months, almost 50% remained in detention after twelve months, 20% remained in detention for more than eighteen months, and 10% for more than twenty-four months); *cf.* U.S. Dep't of Justice Office of the Inspector Gen., Rep. No. I-2013-001, *Management of*

Immigration Cases and Appeals by the Executive Office for Immigration Review 13-21 (Oct. 2012) (finding that EOIR underreports actual case processing times). Much in the same way that pretrial detention impairs the ability of criminal defendants to prepare their cases, noncitizens in detention may qualify for discretionary relief but find their ability to gather evidence in support of a meritorious claim hampered by the restrictive conditions of detention. Lower-risk noncitizens, many of whom would likely obtain relief from removal if given the chance to contact a lawyer, collect evidence, and prepare their petitions, are thus similarly disserved by unnecessary detention due to ICE's inflexible bond-setting practices.[6]

Finally, it is universally acknowledged in the criminal context that "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *see also Barker*, 407 U.S. at 532-33. Furthermore, pretrial detention disrupts healthy

[6] Numerous studies demonstrate the wide disparity in outcomes between immigrants with and without legal representation. *See, e.g.*, Ingrid Eagly et al., *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 2 (2015) (finding that 14% of detained immigrants secured representation and that represented detainees were 5.5 times more likely to obtain relief from removal). In California, from 2012-2015, 68% of detained noncitizens were unrepresented. Detained individuals who had counsel obtained successful case outcomes *more than five times as often* as did their unrepresented counterparts, while non-detained and represented immigrations succeeded approximately four times as often as those who lacked counsel. Cal. Coal. for Universal Representation, *California's Due Process Crisis: Access to Legal Counsel for Detained Immigrants* 4 (2016).

social bonds that encourage a defendant's return to court and other lawful behavior. Milgram, *supra*, at 217.

The same holds true for noncitizens in immigration detention. Studies have shown that the detention of a family member can have profound psychological and social effects on family members, particularly children. *See, e.g.*, Kalina Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families – A Report for the Inter-American Human Rights Court*, 84 Am. J. of Orthopsychiatry 496, 498, 500 (2013). If the detained family member is a wage-earner or caregiver, the potentially severe implications for family stability are obvious: loss of employment, income, and associated health benefits; loss of housing; inability to pay bills; and food insecurity. *Id.* at 501.

These negative consequences can be avoided—and noncitizens given a fair chance—by affirming the district court's preliminary injunction requiring ICE and EOIR to consider the individual's financial ability to pay and alternative conditions of release, and prohibiting the setting of money bail at an amount that results in detention.

IV. Experience From the Pretrial System Demonstrates that the Modest Safeguards Required by the District Court Will Not Undermine the Government's Interests in Immigration Detention.

Successful jurisdictions that have adopted evidence-based pretrial practices have all seen an increase in pretrial release while maintaining steady (and

sometimes improved) court appearance and public safety rates. The experience from three model jurisdictions demonstrates that correct application of a properly validated risk assessment tool, together with appropriate bail reforms such a reduced reliance on money bail and increased use of alternative conditions of release, can strike the right balance between pretrial liberty and meeting the government's legitimate interests in pretrial detention.[7] Moreover, policies that favor release over detention can result in substantial cost savings.[8] The district

[7] *Amici* do not endorse any particular risk assessment tool as perfect or exemplary. Indeed, many can be susceptible to the criticism that they unnecessarily conflate flight risk with dangerousness, where those factors should be assessed independently. *See* Gouldin, *supra*, at 842. This criticism is particularly acute in the immigration system, where a recent analysis of ICE's detention practices suggests that the vast majority of detentions are based on flight risk, and not dangerousness. Koulish, *supra*, at 19-23. Nevertheless, a properly validated risk assessment tool can better tailor pretrial detention and release decisions to individual risk and reduce unreasonable restrictions of liberty.

[8] The savings from using a pretrial release program can be substantial. The Pretrial Justice Institute has estimated the cost of detention at $50 or more per day. Pretrial Justice Inst., *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* 2 (May 2015). The U.S. Marshals Service reports its average daily cost of detaining a prisoner as $85.95. U.S. Marshals Serv., *Fact Sheet: Prisoner Operations* (2016). Detention for an entire pretrial period of approximately 280 days could cost between $14,000 and $24,000. By contrast, pretrial release supervision programs have shown costs of just $6 per day, with alternative-to-detention programs costing a similar amount. VanNostrand & Keebler, *supra*, at 50 Fig. 22. The total cost for non-detention pretrial programs in federal court amounted to between just $3,100 and $4,600, depending on intensity of supervision. *Id.* at 10. As discussed below, immigration detention is even more costly, costing an estimated $158 per day, compared to the approximately $10.55 per day for ICE's existing alternative to detention program, ISAP. U.S. Gov't

court's modest procedural safeguards are thus entirely consistent with the lessons and recommendations from these jurisdictions.

A. Model jurisdictions demonstrate that evidence-based pretrial practices are effective without relying on money bail.

Washington, D.C. has employed a pretrial services program since it was authorized by the U.S. Congress in 1967. The D.C. Pretrial Services Agency (PSA), which is a near-embodiment of the ABA standards discussed above, provides comprehensive services, including risk assessment and release recommendations, release monitoring, and drug testing programs. The use of money bail is now rare in Washington, D.C.—in 2008, 80% of defendants were released without financial bail, 15% were held without bail, and only 5% were released on a financial bail (usually set for technical or administrative reasons unrelated to public safety or flight risk). *The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth*, Pretrial Justice Inst. Case Studies Vol. 2(1), 2 (2009).

The PSA has been successful even without the frequent use of financial bail. In 2015, the latest year for which comprehensive data is available, the PSA supervised 18,000 defendants with approximately 4,000 monitored individuals on any given day. Pretrial Servs. Agency for D.C., *Congressional Budget Justification*

Accountability Office, Rep. No. GAO-15-26, *Alternatives to Detention* 18-19 (2014).

and Performance Budget Request Fiscal Year 2017 1, 28 (Feb. 2016). For all defendants that were released, the PSA reported an 89% arrest-free rate; that rate has remained almost constant for the 2011-2015 period. *Id.* at 23. For violent offenders who were released, the PSA reported an almost perfect arrest-free rate of 98%, with an appearance rate of 99% or above in the 2011-2015 period. *Id.* Overall, the total appearance rate for released defendants has been 88-89% in each year of the 2011-2015 period. *Id.*

Kentucky adopted HB 463 in 2011, which set forth significant pretrial justice reforms including an objective, validated tool to measure flight risk and risk to community safety. The reforms also established guidelines for permissible bail. Defendants identified as "low-risk" by the pretrial assessment tool are required to be released on recognizance or with only an unsecured bond. "Moderate-risk" defendants also receive release on recognizance or an unsecured bond, but may be referred to additional supervisory programs, such as monitored conditional release, GPS tracking, or mandatory drug testing. For "high-risk" defendants, the pretrial officer is directed to develop a risk mitigation strategy. Kentucky also sets maximum bail amounts for defendants who are not released on recognizance or with an unsecured bond.

The passage of these reforms in Kentucky caused an immediate increase in pretrial releases, from 65% of cases to 70%. Tara Boh Klute et al., *Report on*

Impact of House Bill 463 10 (2011). The rate of release without a secured bond rose from 51% to 66%. There was no attendant change in pretrial success rates. The appearance rate and public safety rate (percentage of defendants not arrested for committing another offense) for released defendants both held steady, going from 89% to 90% and 91% to 92%, respectively, in the first year after passage. *Id.* at 6. In the next four years passage, the appearance rate declined slightly, to 88%, but the public safety rate continued to increase, to 91% for 2011-12, and to 92% for 2013-14. Kentucky Pretrial Servs., *Pretrial Services Outcome Report* 6 (2015).

Colorado entered HB 13-1236 in May 2013. *See Denver Pretrial Services*, *supra*, at 9. The Colorado bill implemented the three recommendations of the Colorado Commission on Criminal and Juvenile Justice (CCJJ): (1) "Implement Evidence Based Decision Making Practices and Standardized Bail Release Decision Making Guidelines" (including the use of empirically developed risk assessment instruments); (2) "Discourage the Use of Financial Bond for Pretrial Detainees and Reduce the Use of Bonding Schedules"; and (3) "Expand and Improve Pretrial Approaches and Opportunities in Colorado." *Id.* The Colorado bill built upon the Colorado Pretrial Assessment Tool (CPAT), a tool developed by a collaboration of ten Colorado counties and that has been in use in Denver, Colorado, since 2012. *Id.* at 2. Pretrial success results from Denver demonstrate the approach's effectiveness.

Denver employs both the CPAT and the Ontario Domestic Assault Risk Assessment (ODARA) to categorize defendants into risk groups. *Id.* Overall, for all defendants released from custody between 2012 and 2015, the appearance rate varied between 82% (2015) and 89% (2012). *Id.* at 6. The public safety rate varied between 89% (2013) and 94% (2012). *Id.*[9]

B. Lessons from the pretrial system can be readily adopted into the immigration system.

ICE and EOIR have an existing infrastructure that, if properly validated and applied, can approximate for noncitizens the criminal pretrial system's levels of protection developed through decades of study and experience nationwide. Although the Department of Homeland Security has implemented a Risk Classification Assessment (RCA), it has not yet been properly validated for use with the immigrant detainee population and has been rightly criticized for being biased in favor of detention. Noferi, *supra*, at 76-81; Koulish, *supra*, at 16, 19-23.

[9] A growing number of jurisdictions, including several states and the federal system, use validated pretrial detention risk assessments. Some jurisdictions, such as the federal system, develop their own instruments, while a large number—29, including three entire states—have adopted the Arnold Foundation's Public Safety Assessment-Court tool, which is built upon data from more than 300 U.S. jurisdictions and does not consider factors, such as gender and race, that may be discriminatory. *See* Arnold Found., *Public Safety Assessment*, http://www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/ (last visited March 5, 2017); Timothy P. Cadigan et al., *The Re-Validaton of the Federal Pretrial Services Risk Assessment*, Fed. Probation Vol. 76(2), 3-8 (2012) (describing the validated federal risk assessment instrument).

Nevertheless, validation is an iterative process, and there can and should be greater emphasis placed on applying the lessons learned from the criminal pretrial system to improve the RCA.

Similarly, ICE's existing alternative conditions to release program, ISAP, is not in regular use but has demonstrated high success in ensuring appearance at court hearings. The Government Accountability Office reported that from 2011 through 2013, over 95% of ISAP program participants appeared at their scheduled final removal hearings. GAO-15-26, *supra*, at 30; *see also* Koulish, *supra*, at 34. The same GAO report observed that the average daily cost of the ISAP program is $10.55 per day, compared to the estimated $158 per day cost of detention. GAO-15-26, *supra*, at 19. The ISAP's effectiveness and cost savings demonstrate that the Government can manage the risks of release through more effective and less costly means than detention and money bail.[10]

[10] Consistent with the pretrial practices described above, other countries mandate consideration of alternatives to detention in their immigration systems. In Canada, alternatives must be adequately considered before a decision to detain. *Warssama v. Canada*, 2015 FC 1311, ¶¶ 34, 61 (2015). Similarly, the United Kingdom imposes a presumption of temporary admission or release that must be overcome in each individual case to justify detention. U.K. Home Office, *Enforcement Instructions and Guidance*, Chapter 55.1.1-55.1.2. Studies of alternative to detention programs implemented by non-governmental organizations around the globe have also demonstrated high appearance rates and suggested significant cost savings. *See* Alice Edwards, *Back to Basics*, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1 82-83, 85 (2011).

While ICE should improve and expand the availability of its existing tools for managing any risks posed by noncitizens in removal proceedings, its current tools demonstrate that it has the capacity to develop alternatives to money bail that are equally, if not more, effective at managing risk. The district court's preliminary injunction thus provides achievable minimum assurances against the unlawful detention of noncitizens based on their poverty alone. For these reasons, *amici* urge the Court to affirm the district court. Greater reforms can and should be implemented to raise the level of protections in the immigration system to take advantage of the lessons learned from the criminal pretrial justice system.

CONCLUSION

For the foregoing reasons, the *amici curiae* urge the Court to affirm the district court's preliminary injunction. ICE and EOIR, when setting, re-determining, and/or reviewing the terms of any person's release, (a) should be required to consider the person's financial ability to pay a bond; (b) should not set any bond at an amount greater than that needed to ensure the person's appearance; and (c) should consider whether the person may be released on alternative conditions of supervision, alone or in combination with a lower bond amount, that are sufficient to mitigate flight risk. These basic protections are consistent with those afforded to defendants in the criminal pretrial system, and may even reduce the government's financial burden. At a minimum, requiring consideration of a

person's individual circumstances will bring the immigration system in line with fundamental constitutional requirements and ensure that no person is detained solely because of his or her financial inability to pay. Poverty alone should not be the reason for detaining anyone, regardless of his or her immigration status.

Dated: March 8, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,899 words, according to the word count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: March 8, 2017

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CERTIFICATE OF SERVICE

9th Circuit Case Number(s): No. 16-56829

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.

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.

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