

No. 16-56829

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

XOCHITL HERNANDEZ, CESAR MATIAS, ET AL.,

Plaintiffs-Appellees,

v.

JEFFERSON SESSIONS, ET AL.,

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
No. CV 16-620-JGB

**BRIEF OF AMICI CURIAE UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW - IMMIGRANT RIGHTS CLINIC ET AL. IN SUPPORT
OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE**

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FRAP 26.1(a) CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a) and Fed. R. App. P. 29(c)(1), the undersigned counsel for amici curiae University of California, Irvine School of Law – Immigrant Rights Clinic, et al. states that the amici are all non-profit organizations, and no publicly held corporation owns 10% or more of their stock.

Dated: March 8, 2017

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IDENTITY AND INTERESTS OF AMICI¹

Amici curiae are 22 law clinics, legal service providers, community groups and immigrant rights organizations whose clients and members face prolonged detention due to an inability to pay bond amounts set by the government. All share a common interest in ensuring that the stories of detained individuals are considered in the resolution of this appeal. The experiences of individuals set forth in this brief reveal the distorting effect that the government's practices have on outcomes in the immigration system. They also make plain the profound impacts of the government's refusal to consider detainees' financial circumstances can have not only on detained individuals themselves, but on their families and communities.

Detailed statements of interest for each organization are appended following the conclusion of this brief.

¹ No party or party's counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief. No person, other than amici, their members, or counsel, contributed money intended to fund preparing or submitting this brief. Counsel for *amici* contacted both Defendants-Appellants and Plaintiff-Appellees and all parties consent to the filing of this brief (though the Government opposes *amici*'s position).

SUMMARY OF ARGUMENTS

On any given day, hundreds of individuals languish in immigration detention centers while they fight their removal cases for no reason other than because they are poor.² In those cases, the government has already determined that those individuals pose neither a danger to community nor a risk of flight sufficient to preclude release. The vast majority of noncitizens who are detained—a full 86 percent nationally—cannot afford an attorney and must navigate their removal proceedings without legal representation.³ The federal statutory scheme and Ninth Circuit precedents have attempted to reduce the risk of erroneous detention by imposing safeguards such as individualized bond hearings. However, the government’s refusal to require immigration officials to consider a detainee’s ability to pay when setting bond amounts has led to the extended imprisonment of individuals when confinement is neither necessary nor desirable. In the absence of an injunction, indigent noncitizens—particularly those who are unrepresented—will likely continue to remain confined, sometimes for years, at a cost of approximately \$158 per day.⁴

² See, e.g., ER102 (noting that the District Court of California, Central District determined, that as of October 2, 2015, there were at least 118 individuals who were still detained despite having a bond set).

³ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32, fig. 6 (2015) (analyzing removal cases from 2007 through 2012).

⁴ See SER160 (report from Government Accountability Office).

The government's policies and practices distort the proper functioning of the immigration system. First, immigration detention has punitive effects; thus, the refusal to consider a detainee's financial circumstances in custody determinations effectively punishes immigrants and their families because they are poor. Second, as the stories of detainees in this brief show, the government's practices put immigrants in the untenable position of having to choose between prolonged detention or voluntarily leaving the country, leading many vulnerable and desperate immigrants to give up their meritorious claims for relief.

Moreover, the impact of the government's policies and practices extend far beyond those felt by individual detainees. High bond amounts place a great deal of financial strain on families already struggling with the shock of detention and the potential deportation of a loved one, often the main breadwinner in the family. The current situation has created an opening for private bond companies to charge exorbitant fees and to profit from families who are determined to have a loved one back home for the duration of their removal proceedings. Ultimately, those harmed include many United States citizen children in mixed status households who are trapped in a cycle of poverty.

I. THE GOVERNMENT’S REFUSAL TO CONSIDER ABILITY TO PAY PUNISHES VULNERABLE IMMIGRANTS WHO ARE NEITHER A DANGER TO THE COMMUNITY NOR A FLIGHT RISK

As set forth in the Answering Brief of Plaintiffs-Appellees, immigrants who have had a bond set have been found by either Immigrations and Customs Enforcement (“ICE”) or an Immigration Judge (“IJ”) to not pose a danger to the community and to be likely to appear at future proceedings. Answering Br. of Pls-Appellees (“Pls.’ Br.”), Doc. 28, at 6. However, the government currently requires neither ICE nor IJs to consider detainees’ ability to pay when setting a bond amount. *Id.* at 7-8; *see In Re Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006) (granting immigration officials “broad discretion” in custody determinations and failing to include financial circumstances in list of factors that IJs may consider). Likewise, the BIA does not—and in many cases has refused to—consider detainees’ ability to pay when resolving appeals. Pls.’ Br. at 8. Even though ICE and IJs have the authority to impose conditions of release other than bond⁵, they are not required to consider whether such alternative conditions of supervision—alone or in combination with bond—might

⁵ *See Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060, 1087-88 (9th Cir. 2015) (internal citation and quotation marks omitted), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). IJs must consider alternatives to detention when deciding whether a person will be granted bond or not at *Rodriguez* bond hearings. *Id.*

be sufficient to allow a person who cannot afford a high bond amount to be released. Pls.' Br. at 7.

As a result of the government's policies and practices, ICE and IJs routinely set bond amounts that are inappropriately high. The risk of receiving bond amounts that are grossly out of reach for detainees is particularly great when an individual is unrepresented. Take, for example, the case of **Dania Morales**⁶, a 22-year-old who was brought to the United States as a child and was forced to miss her mother's funeral because she could not afford to pay the bond set by the IJ:

Dania spent almost a year and four months detained at the Adelanto Detention Center. At her first immigration bond hearing in October 2015, the IJ—ignoring her financial situation—set her bond at \$30,000. At that time, Dania did not have anyone to advocate on her behalf. She also could not afford to pay the bond as Dania had been the primary provider for her mother and sister before she was detained while working in a production line for a glasses manufacturer. Her mother could not help her with the bond amount due to a work injury, and her brother worked in construction and could barely afford his own expenses.

While Dania was detained, her mother was murdered. Upon learning this news, she asked ICE if she could attend the funeral but she never received a response. Around that time, Dania's bond was reduced to \$9,000, but her family still could not afford to pay it, especially given her mother's death. After one year of detention, Dania had another bond hearing. This time, she was represented by an attorney. At the bond hearing, Dania's attorney requested that the Court lower the bond to \$4,000—the amount Dania and her family could afford. The IJ denied the request and did not appear to consider Dania's ability to pay or alternative conditions of release.

⁶ The facts of Dania Morales's story are set forth in her Declaration (on file with counsel).

Had Dania been affluent, she would not have been separated from her family for 16 months in detention, or missed her mother's funeral. Dania had been arrested by ICE after she went to jail over an altercation with her ex-girlfriend. She spent less than a total of ninety days in jail—less than one fifth of the time she spent in immigration detention. Her detention at Adelanto was needless, as she had every incentive to stay out of trouble and appear at future hearings so she could continue fighting her case. Dania eventually won her merits case in early 2017.

Of course, the bond amount necessary to secure the appearance of a person who is indigent is different than the amount necessary to secure a wealthy person's appearance—but that does not seem to matter to the government. Another case in which an individual remains subject to unjustified detention is that of **Jude Francois**⁷, who has been imprisoned far away from his family for nearly three years:

Jude came to the country as a child under the Cuban-Haitian Entrant Program and has been a lawful permanent resident for over thirty years. His mother and siblings are all U.S. citizens or lawful permanent residents and his wife and three children are all U.S. citizens.

Jude was detained by immigration officials in September 2013 following a vehicle theft offense. He received a bond of \$10,000. Unfortunately, Jude's family had few resources, and to make matters worse, his wife and children were battling homelessness. Later, due to an incident that had triggered Jude's post-traumatic-stress-disorder from extreme childhood abuse, he was transferred to the Santa Ana Jail, where he spent time in administrative segregation. Jude was trapped alone in a cell, only able to exit for one hour a day. His family was unable to visit because they lived in Florida.

⁷ Jude Francois is a pseudonym that has been created to protect this detainee's identity. The facts of his story are set forth in the Declaration of Munmeeth K. Soni, Directing Attorney at Immigrant Defenders Law Center's Adult Representation Project (on file with counsel).

In 2016, following the preliminary injunction in this case (before it was stayed), Jude received another bond hearing. His counsel presented evidence of the family's financial circumstances, and the IJ reduced the bond significantly to \$3,000. While Jude and his family are still not quite able to pay this amount, it is within the realm of what they might be able to afford. The IJ's decision to eventually grant a bond of \$3,000 shows that the initial bond of \$10,000 was well beyond the family's ability to pay and senselessly high.

The unnecessary detention of immigrants by reason of their poverty is not without cost to the federal government. In FY2013, the average cost to detain one person per day—not including agency-wide overhead expenditures—was \$158. SER160. In contrast, the average daily cost of the government's alternative supervision program was a mere \$10.55 per day. *Id.* Put differently, taxpayers pay \$53,820 more per year to detain a noncitizen rather than to grant him or her supervised release. The annual cost to detain a noncitizen is more than three times the average annual Social Security benefit of \$16,176⁸ and more than four times the average annual expenditure per public-school student of \$12,296.⁹

A requirement that IJs consider ability to pay would likely lead to greater use of alternatives to detention, as illustrated by the case of **Victor Pianka**¹⁰, a lawful

⁸ Social Security Administration, *Fact Sheet* (2016), available at <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf>.

⁹ National Center for Education Statistics, *Fast Facts* (2016), available at <https://nces.ed.gov/fastfacts/display.asp?id=66> (noting expenditures per student for 2012-2013)

¹⁰ The facts of Victor Pianka's story are set forth in the Declaration of Laura St. John, Legal Director (Adult Program) at Florence Project (on file with counsel).

permanent resident from Poland who came to the United States as a refugee when he was two years old:

Victor has been detained since June 8, 2013, a period of approximately three years and nine months, which may extend for many more months if there is an appeal to the Ninth Circuit. He has resided most of his life in Phoenix, Arizona, and is currently detained at the Eloy Detention Center. He narrowly missed becoming a citizen through his mother when she naturalized just after his 18th birthday. He has no assets and no source of financial support.

Victor has been found incompetent to represent himself (a finding he disputes) and was appointed an attorney pursuant to *Franco-Gonzalez v. Holder*. In May 2015, the IJ set a bond in the amount of \$35,000 despite arguments and evidence that he did not have resources to pay a high bond. He has repeatedly requested supervised release in the alternative and is willing to accept electronic monitoring and other conditions of supervision, but his pleas have gone unheeded. The BIA recently remanded his bond case to ask the IJ to consider supervised release, which—in the words of the BIA—“if effectuated . . . could prove [] beneficial,” something the IJ has continued to refuse to do.

The harsh conditions of detention mean that confinement in an immigration detention facility often has punitive effects. *See Preap v. Johnson*, 831 F.3d 1193, 1195 (9th Cir. 2016) (describing conditions of immigration detention as “prison-like”). Take, for example, the case of **Fernanda**¹¹, who has been forced to endure verbal and physical harassment by both fellow detainees and detention guards:

Fernanda is a 37-year-old transgender woman who is currently detained in the Adelanto Detention Facility because she cannot afford to pay her bond of \$25,000. She fled Mexico 20 years ago because of homophobia

¹¹ Fernanda is a pseudonym that has been created to protect the detainee’s privacy. The facts of Fernanda’s story are set forth in the Declaration of Lisbeth Rivera from Las Crisantemas (on file with counsel).

and transphobia and has lived in United States since. In Mexico, her uncle began sexually abusing Fernanda when she was seven years old. Because of her gender identity, Fernanda was beaten by a group of young male classmates and older police officers who said they were trying to “cure” her.

In immigration detention, guards have harassed Fernanda and put her on lockdown after she suffered a panic attack. As a result of these incidents and the isolation of detention, she has experienced anxiety and depression. At Adelanto, she is being housed with males and is ostracized for her identity, reminding her of her childhood. In mid-January, she filed a complaint against a guard who had hit her.

For two years, **Claudette Hubbard**¹² also endured the punitive conditions of immigration detention:

Claudette is originally from Jamaica. She moved to the United States in 1973 as a permanent resident. In 2012, Claudette was transferred to ICE custody after serving time for a drug offense involving crack cocaine. She was sentenced at a time when the United States was waging a war on drugs with harsh mandatory minimums. In prison, Claudette took every class offered to her, earned a business degree, served as a mentor, and received clearance to work for the U.S. Army.

During her time in ICE detention, Claudette lost 27 pounds. At times, she could not eat or sleep due to the stress of possible deportation and was forced to begin taking medication. Claudette was granted a \$7,500 bond in her immigration case, which she initially could not pay. Eventually, after two years in detention, Claudette was able to reunite with her two children thanks to an online fundraising campaign that her daughter had organized. After appealing her case to the Ninth Circuit, Claudette eventually won a remand and her claim under the Convention Against Torture (“CAT”) remains pending before the BIA. If not for the funds her family raised, Claudette would have had to stay in

¹² The facts of Claudette Hubbard’s story are set forth in the Declaration of Holly S. Cooper, Co-Director of the UC Davis Immigration Law Clinic (on file with counsel).

detention for the duration of her removal proceedings, further jeopardizing her health.

Because immigration detention operates like punishment for the individuals who experience it, the refusal to consider detainees' financial circumstances acts effectively to punish vulnerable immigrants who cannot afford to pay their bond.

For the poorest detainees, such as named Plaintiff Cesar Matias, even seemingly small bond amounts are out of reach. This is the case for **Alex Diaz**¹³, an individual with serious mental disabilities who was found not competent to proceed without appointed counsel under *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010)¹⁴:

Alex came to the United States as a child. His father passed away when he was just eleven, and, shortly after, Alex began to show symptoms of serious psychiatric disabilities. In Alex's teens and early twenties, he acquired a criminal record, due to his peer group. Alex started using drugs to stop his hallucinations and was convicted twice for simple drug possession. In 2015, ICE arrested Alex and transferred him to immigration custody.

Alex has had a sporadic work history in manual labor and is dependent on his elderly mother, whose only source of income is limited and fixed social security payments. In July 2015, Alex received an initial bond of \$10,000. He could not afford it and therefore stayed in detention.

¹³ Alex Diaz is a pseudonym that has been created to protect his identity. The facts of Alex Diaz's story are set forth in the Declaration of Munmeeth K. Soni, Directing Attorney at Immigrant Defenders Law Center's Adult Representation Project (on file with counsel).

¹⁴ In *Franco-Gonzales*, the court found that under the Rehabilitation Act, immigrants with serious mental illnesses who are determined not competent to represent themselves must be provided a reasonable accommodation in the form of appointed counsel. *Id.* at 1051.

The IJ in his case later reduced the bond to \$6,000 in September 2015, noting Alex’s ability to pay the bond was irrelevant. The IJ again reduced the bond to \$3,000 in April 2016, an amount still exorbitant for his family. In December 2016, after the BIA remanded Alex’s removal case, Alex’s lawyer submitted a declaration from his mother explaining her limited finances and expenses. Alex also requested that the IJ order enrollment in the Intensive Supervision Appearance Program in lieu of, or in addition to, a lower bond. In January 2017, the IJ declined to lower the bond amount, concluding that—due to the Ninth Circuit stay of the *Hernandez v. Lynch* preliminary injunction—she no longer had to consider Alex’s ability to pay.

For over two years, Alex has been deprived of his liberty for no reason other than that he and his elderly mother are poor. His mental health remains precarious and he lacks the support he needs in detention.

The detainees whose stories are profiled above may have, in some cases, made regretful choices, but they do not deserve to be subject to prolonged detention simply because of their poverty. The government’s conduct violates the Constitution.

II. THE GOVERNMENT’S BOND PRACTICES FORCE IMMIGRANTS IN REMOVAL PROCEEDINGS TO MAKE AN IMPOSSIBLE CHOICE BETWEEN PROLONGING THEIR OWN DETENTION OR GIVING UP MERITORIOUS CLAIMS FOR RELIEF

The government’s current policies and practices have a coercive impact on detained immigrants who cannot afford to pay high bonds, disincentivizing them from pursuing meritorious claims for relief. Immigrants with stronger claims to remain in the United States need time to pursue such claims. But the current system forces those individuals to endure extended detention or to forsake their claims. The Ninth Circuit has recognized this painful conundrum, noting that “many detainees choose to give up meritorious claims and voluntarily leave the country instead of

enduring years of immigration detention awaiting a judicial finding of their lawful status.” *Rodriguez III*, 804 F.3d at 1072.

Immigrants in detention may be eligible for a variety of forms of relief from removal. For example, under the Immigration and Nationality Act (INA)¹⁵, those who fear persecution or torture upon return to their home countries may apply for protection-based relief, such as asylum, withholding of removal, or relief under the CAT.¹⁶ Victims of certain crimes or severe forms of trafficking may also apply for visas to remain in the United States.¹⁷

The story of **The Bernal Family**¹⁸ illustrates how the government’s bond practices can lead to arbitrary outcomes in the immigration system. There, family members escaping the same persecution had cases that took very different paths. For example, after receiving \$40,000 and \$45,000 bonds, two members of the family—unable to pay or endure the conditions of detention—forfeited their claims. Three other family members remained in detention and were ultimately granted asylum:

In March 2015, members of the Bernal family and their extended family, a total of 19 individuals, arrived at the port of entry in Nogales, Arizona seeking asylum.¹⁹ Back in Mexico, the family had been

¹⁵ 8 U.S.C. § 1101 *et seq.*

¹⁶ 8 U.S.C. § 1208 *et seq.*

¹⁷ 8 U.S.C. § 1101(A)(15)(U).

¹⁸ The facts of The Bernal Family story are set out in the Declaration of Laura St. John, Legal Director of the Florence Project (on file with counsel).

¹⁹ Asylum seekers who present themselves at the border are supposed to be screened for a fear of persecution. 8 U.S.C. § 1225(b)(1)(A) & (B); 8 C.F.R. § 208.30(d)-(g). During this time, they are detained pursuant to 8 U.S.C. §

abducted at gun point by members of a drug cartel and rescued several days later by Mexican police following a gun battle with the cartel. The family gave detailed information about themselves, their kidnappers, and their experiences to the police in Mexico City. Unfortunately, Mexican authorities did not keep their promise to keep their identities confidential. Soon, the names and photographs of some of the family members were printed in national news outlets across Mexico. Hearing that the cartel was actively searching for them, the family fled to the United States in fear for their lives.

Several members of the family were released on parole. Six members of Bernal family whose asylum claims were initially denied by the government were detained. At a bond hearing, the IJ determined that bond amounts of \$40,000 and \$45,000 were appropriate for the family. The IJ did not consider their ability to pay the bond amounts.

Two members of the Bernal family, Nancy and Linda²⁰, became anxious and desperate after they were unable to find funds to pay their bond amounts. They had already endured months of detention. They made the agonizing decision to withdraw their appeals before the BIA and were deported immediately. Since then, they have been living in hiding in Mexico, regularly having to relocate to escape danger.

By contrast, three members of the Bernal family, Delia, Victor, and Raul, decided to remain in detention while the BIA decided their appeals. Unable to pay their bonds of \$40,000 and \$45,000, they were detained for a total of almost one year. In January 2016, the BIA issued a reversal of the IJ's decision and granted asylum.

Had Nancy and Linda not been required to remain in detention because of their inability to pay bond, they would be safe with their family in the United States today. Instead, they continue to live on the run in Mexico, uncertain whether they will survive.

1225(b)(1)(B)(IV). If an individual passes the “credible fear” screening, she or he is then placed in removal proceedings pursuant to 8 U.S.C. § 1229a to pursue an asylum claim.

²⁰ Nancy and Linda are pseudonyms that have been created to protect their identity.

Even legal residents with strong ties and claims to remain in the United States have been forced to endure prolonged detention as a result of their inability to pay bond. **Daniel Casas**²¹, a twenty-year legal permanent resident had to choose to endure months in detention to apply for cancellation of removal, an application that was eventually granted by the IJ:

Daniel came to the United States at the age of 11 to work in the fields with his father. Before he was detained, Daniel helped to support his family, including his older brother who is paralyzed. But after a shoulder injury, he left his job of over a decade as a janitor. He began using marijuana for the injury, and after an incident where his adult nephew attempted to wrongfully kick him out of the apartment where they were living, Daniel was arrested for destroying property and possessing marijuana for personal use. Daniel was also arrested for drug possession after he was hit in the calf by a stray bullet while walking on the street and turned to drugs to self-medicate. He did not go to the hospital or the police because he feared it would lead to his deportation.

Fortunately, the IJ was willing to give Daniel a chance to remain in the United States and turn his life around. He was granted a form of relief available to legal permanent residents called cancellation of removal under INA § 240A(a). However, in order to pursue this relief, Daniel had to make the difficult decision to remain in detention—without access to a rehabilitation program. His bond was originally denied while *pro se* and, after he obtained representation, set at \$17,000. He could not afford to pay it. Daniel spent close to nine months in immigration detention as a result of his and his family's financial circumstances, almost three times the length of incarceration in all of his criminal cases combined.

²¹ Daniel Casas is a pseudonym that has been created to protect his identity. The facts of his story are set forth in the Declaration of Maria Lucia Chavez, Staff Attorney at the Northwest Immigration Rights Project (on file with counsel).

Given the coercive nature of detention, nine months could certainly be enough to discourage individuals from pursuing a meritorious claim for relief. The reality, however, is that many individuals pursuing relief must appeal the IJ's decision to the BIA or Ninth Circuit Court of Appeals and wait much longer for the appeal to be decided. *See, e.g., Rodriguez III*, 804 F.3d at 1072 (remarking that a petition for review of an order of removal from the BIA at the Ninth Circuit typically leads to an additional eleven months of confinement). This was the case for **Curtis Howard**²², a lawful permanent resident who was detained for over two and a half years while he litigated his case up to the Ninth Circuit because he was unable to pay bond, eventually winning relief under former INA § 212(c):

Curtis is a Chinese-Jamaican man who has children and grandchildren who are U.S. citizens. He worked as an electrician to support his family until he was sentenced to prison for a single drug offense in his 20s. While in prison, Curtis contracted a chronic illness, sustained neck injuries, and suffered serious vision loss. His wife also passed away during this time.

Following his release from prison, immigration officers arrested and detained Curtis. He received a \$2,000 bond, but even though the bond was low, he could not afford to pay. Incarceration had depleted his financial resources and his children had their own financial struggles to contend with. Even after a reduction to \$1,500, Curtis could not afford the bond.

Due to his indigency, Curtis spent more than two-and-a-half years in immigration detention in California and Washington State while he

²² Curtis Howard is a pseudonym that has been created to protect his identity. The facts of his story are set forth in the Declaration of Holly S. Cooper, Co-Director of the UC Davis Immigration Law Clinic (on file with counsel).

litigated his immigration case. Today, Curtis is back in Florida, where he now has a job, an apartment, and has begun the long process of rebuilding his relationship with his family.

Unnecessary, lengthy detention has an especially harsh impact on individuals who have fled persecution or experienced abuse. In a report published by Human Rights First titled *Life on Lockdown*, the authors describe the case of a transgender woman fleeing persecution in Honduras who was detained for six months in Texas until she was granted asylum because she could not afford to pay the \$12,000 bond set by the IJ.²³ Immigrants who have been tortured or otherwise isolated from others are especially vulnerable. *See, e.g.*, Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, at 53, 57 (2003) (noting, in a study of 70 asylum seekers, high levels of trauma such as torture (74%), imprisonment (67%) and kidnapping (36%) and finding that they experienced significant depression (86%), anxiety (77%) and PTSD (50%)). Given these figures, it is unsurprising that prolonged detention—which can exacerbate and re-initiate trauma—would lead to the forfeiture of meritorious claims.

²³ Olga Byrne et al., *Life on Lockdown: Increased Detention of Asylum Seekers*, HUMAN RIGHTS FIRST, 2 (July 2016).

Even individuals who have lived in the United States for some time who have experienced abuse, like **Elvia Davila**²⁴, struggle with the harsh conditions of detention as a result of not being able to afford bond:

Elvia is a mother of four who—before her arrest—had been supporting her children without any help from the father of her three youngest children, David²⁵. She had worked at a hotel, at a vegetable packing plant, and on a farm in Santa Maria, California. She is a member of the Mixtec indigenous group from one of Mexico’s poorest state. After a member of a local gang raped her, she reported the attack. She fled to the United States after receiving threats for reporting the attack. In the United States, she met David and started a family. Unfortunately, David abused her, leading to three reported incidents of domestic violence, two of which resulted in injuries to Elvia requiring stitches. During an extremely emotionally vulnerable time, she was unfortunately arrested and convicted for two incidents of DUI and transferred to ICE after serving short sentence.

The IJ found that Elvia was eligible for release on bond, but set bond at \$25,000. Because she had already been working tirelessly to make ends meet before her arrest, she did not have money to pay such a high bond. Elvia has filed an application for a U Visa, which is strong, and also has an application for asylum, withholding of removal and relief under CAT pending. Unfortunately, she has been unable to persuade the IJ to consider her ability to pay and lower her bond. She remains detained at the Adelanto Detention Facility.

The government’s practices undercut the statutory scheme by preventing detainees from pursuing the limited relief for which they are eligible.

²⁴ The facts of Elvia Davila’s story are set forth in the Declaration of Daniel Werner, a Certified Law Student at UC Irvine Immigrant Rights Clinic.

²⁵ David is a pseudonym that has been created to protect this detainee’s privacy.

III. THE IMPACTS OF THE GOVERNMENT'S BOND PRACTICES EXTEND FAR BEYOND THOSE FELT BY INDIVIDUAL DETAINEES AND PLACE FINANCIAL STRAIN ON FAMILIES STRUGGLING TO MAKE ENDS MEET

Many detainees are the breadwinners of their families. Thus, their detention has a drastic financial impact that emanates beyond the individual detainee. High bond amounts only add to the financial stress that families are struggling with. Indeed, the lowest bonds start at \$1,500—which is more than a month's rent for many families.²⁶ Often, families must choose between scraping money together to pay a bond or paying for necessities, such as rent, utilities, and food.

The tangible trauma of detention on entire families, exacerbated by the government's failure to consider ability to pay in setting bond amounts, is illustrated by the story of single father **Pedro and his seven children**²⁷, who saw their worst nightmare come true when ICE arrested Pedro:

Pedro's seven children—despite being U.S. citizens themselves—feared constantly that their undocumented father might be detained and deported. Then in 2015, immigration officials arrested their father at

²⁶ California Legislative Analyst's Office, *California's High Housing Costs: Causes and Consequences* (2015) 8, <http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> (noting the average monthly rent for a two-bedroom apartment in California is \$1,240); *see also* U.S. Dep't of Hous. and Urban Dev., *Fair Market Rent (FMR) FY 2016 and Income Limit (IL) FY 2016 Summary System*, https://www.huduser.gov/portal/datasets/fmr/fmr_il_history/select_Geography.odn (showing fair market rent value per county, e.g., the FMV in Spokane County Washington for a two bedroom apartment is \$789).

²⁷ The facts of Pedro's story are set forth in the Declaration of Sabrina Rivera, Staff Attorney of the Immigration Clinic at Western State College of Law (on file with counsel).

their home. The children witnessed the arrest. After Pedro's arrest, the children had to be separated.

At his bond hearing, Pedro raised his inability to pay a high bond with the IJ and explained that he supported all seven children by himself. The IJ nevertheless set a bond in the amount of \$5,000, which he could not pay. As a result, Pedro stayed in detention, and his children continue to suffer.

About a year into his detention, Pedro was released after a member of a local community organization paid for his bond. Now the family has been reunited, but Pedro's children have to be in counseling because of the trauma they experienced. Pedro is currently pursuing a U-visa, though he continues to struggle with depression.

Almost 18 million children in the United States have at least one immigrant parent and over 5 million children have an undocumented parent. Moreover, approximately 300,000 children with undocumented parents are born each year. These children are more likely to live in poverty and face lower levels of child cognitive development and emotional well-being due to the threat of parental deportation. For example, one study found that 75% of children with undocumented parents came from low-income families at or below 185% of the federal poverty level, compared to 51% of all children of immigrants and 40% of all U.S. children.²⁸ Further, children with undocumented parents are less likely to see socioeconomic

²⁸ *Children in U.S. Immigrant Families*, MIGRATION POLICY INST., <http://www.migrationpolicy.org/programs/data-hub/charts/children-immigrant-families>. (last visited Feb. 23, 2017); Robert Warren, *US-Born Children of Undocumented Residents: Numbers and Characteristics in 2013*, CENTER FOR MIGRATION STUDIES (Sept. 28, 2015), <http://cmsny.org/publications/warren-usbornchildren>.

progress over time—they continue to live in greater poverty throughout their adolescence and face lack of advancement into higher-paying jobs.²⁹ Moreover, studies have shown that “the chronic, toxic stress related to having unauthorized parents can lead to observable differences in child brain development” as well as the “psychological trauma” from experiencing parental deportations.³⁰

The story of **Carlos Barrera and his four children**³¹ offers another example of how other family members are forced to uproot their lives when a breadwinner is detained:

Having worked as a Certified Nursing Assistant (“CNA”) since 1991 until his arrest, Carlos was the only breadwinner of his wife and four children, two of whom are U.S. citizens. In 2014, he was arrested on a drug charge and was transferred to ICE custody after having served his time.

Carlos was detained for eight months until he received a \$30,000 bond. Carlos’s family had to pay a bond company, \$6,850 as a down payment and \$420 per month to rent an ankle bracelet plus the outstanding amount for the “loan” to cover the full bond amount.

To support their family through this drastic change, Carlos’s daughters had to change their lives drastically: his 25-year-old daughter moved back from Arizona to California to work and support the family, while his 21-year-old daughter decided not to attend community college and

²⁹ *Id.*

³⁰ Randy Capps, Michael Fix, & Jie Zong, *A Profile of U.S. Children with Unauthorized Immigrant Parents*, in MIGRATION POLICY INST. FACT SHEET, 6-7 (Jan. 2016).

³¹ The facts of Carlos’s story are set forth in the Declaration of Emi MacLean, Staff Attorney at National Day Laborer Organizing Network (NDLON) (on file with counsel).

instead obtained a CNA license so she could begin earning money as soon as possible.

As a result of his conviction and detention, Mr. Barrera lost the job that he had for 25 years and has not yet been able to find another one. His family lives month to month with no certainty about how to get out of the debt incurred during his detention—and the even deeper and growing debt caused by the high bond.

The failure to set bond amounts that bear a reasonable relationship to detainees' ability to pay and what is actually necessary to assure their appearance at future hearings has forced desperate families to seek out for-profit bond companies, only compounding the poverty many mixed status families already face. Because immigration authorities require detainees to post the full value of a bond in cash, *see* ER0123, this has created an opening for private bond companies to charge exorbitant fees to front the funds.

The exploitative practices of private bond companies are illustrated by the story of **Sean Gomez**³², who has had to deal with the financial fallout of contracting with Libre by Nexus, a company that requires immigrants to wear an ankle monitor and pay ongoing fees of \$420 a month for the entire duration of a case (in addition to initial fees), *none* of which go toward paying down the initial bond amount³³:

³² Sean Gomez is a pseudonym that has been created to protect this noncitizen's identity. The facts of his story are set forth in the Declaration of San Yu, Staff Attorney at Coalition to Abolish Slavery & Trafficking (on file with counsel).

³³ *See* Steve Fisher, "Getting Immigrants Out of Detention is Very Profitable," MOTHER JONES MAGAZINE (Sept/Oct 2016), *available at*

Sean came to the United States seeking asylum. Sean's assailants had kidnapped, tortured, and held him for ransom in his home country. They demanded \$3,000 dollars, which Sean's friends and family gathered, though not without some difficulty. Then, the kidnappers demanded more. Local police intervened, but he continued to receive threats. He decided he would not be safe if he stayed, and so he fled.

Sean received a \$12,000 bond upon reaching the United States. He could not afford to pay the bond, but he also could not bear the thought of being held against his will again. He turned to a bond company and, to date, has paid close to \$4,000 in fees, including for an ankle monitor—more than he and his family and friends paid his kidnappers. When potential employers see the ankle monitor, they assume Sean has criminal history. He has been laughed at on the street.

A similar fate has befallen **Ruben**³⁴, the sixth member of **The Bernal Family** described at *supra* Section II, who resorted to contracting with Libre by Nexus and paid fees totaling thousands of dollars while waiting for his case to be resolved:

Ruben had a bond hearing before a different IJ than the other members of the Bernal family and received a \$25,000 bond. This still far exceeded what he could afford, and so he contacted Libre by Nexus for help. Libre required him to wear an electronic monitor and pay an ongoing fee of \$420 a month.

The appeal of Ruben's asylum case is still pending before the BIA. It has been approximately 14 months since his release on bond, yet he has still not received a decision. The payments to Libre continue to pose a significant financial burden on Ruben and his family.

<http://www.motherjones.com/politics/2016/08/immigration-detainees-bond-ankle-monitors-libre>.

³⁴ The facts of Ruben Bernal's story are set forth in the Declaration of Laura St. John, Legal Director of the Florence Project (on file with counsel).

Noncitizens, like **Raul Novoa**³⁵, who resorted to ankle bracelet monitoring, are perceived to be criminals and often have trouble finding decent jobs. Raul works two jobs to pay his monthly payment of \$420 to his bond company and has paid over \$9,000 to the bond company since he was released in 2015.

When Raul was four years old, he came to the United States with his mother and his siblings to escape his violently abusive stepfather. In 1997, Raul became a legal permanent resident through Special Immigrant Juvenile Status. He graduated from high school and has since worked a series of jobs primarily in sales. Raul is the father of a teenage son that he supports financially.

Raul has been in removal proceedings since June 2012. The government is currently seeking to deport him based on a decade-old drug conviction. In 2015, after Raul had been detained for two and a half years, the IJ ordered his release on a \$15,000 bond. Raul has not only suffered physical harm of detention but continues to suffer the stigma of wearing an ankle bracelet and financial burden of monthly payment to the bond company.

Given how long it can take for some immigration cases to be resolved, families can very well end up paying fees that approach the original bond amount.³⁶ This is money that detainees will never get back, even if they win their cases and remain in the United States. This privatized rent-seeking perpetuates the cycle of poverty and undermines the rule of law.

³⁵ The facts of Raul Novoa's story are set forth in the Declaration of Joy Chen, a Certified Law Student at UC Irvine Immigrant Rights Clinic (on file with counsel).

³⁶ Fisher, "Getting Immigrants out of Detention is Very Profitable," *supra* note 37.

CONCLUSION

The government's bond practices harms the poorest noncitizens navigating the immigration system, and the impact is felt not only by immigrants themselves, but by their families and communities. Amici request that this Court affirm the decision of the District Court.

Dated: March 8, 2017

Respectfully submitted,

/s/ Peter R. Afrasiabi

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a) and 32(a)(7)(B), because this brief contains 6,632 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: March 8, 2017

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APPENDIX

Pursuant to Fed. R. App. P. 29(a)(4)(A) and 26.1, amici provide the following statement. All are nonprofit organizations with no parent corporations or publicly traded stock.

Asian Americans Advancing Justice - Los Angeles

Asian Americans Advancing Justice - Los Angeles (“Advancing Justice – LA”) is the nation’s largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders. Through direct services, impact litigation, policy advocacy, leadership development, and capacity building, Advancing Justice - LA focuses on the most vulnerable members of Asian American, Native Hawaiian, and Pacific Islander communities, including immigrant members of those communities. Asian Americans and Pacific Islanders (“AAPI”) have a strong interest in this case in light of their long and troubled experience with our immigration system. Much of modern immigration legal doctrine relies on cases concerning racist laws that were enacted over a century ago specifically to exclude AAPI immigrants. Today, segments of the AAPI community remain disproportionately represented in immigration detention and, in turn, bear a significant share of the physical and emotional harms that flow from it.

Brandeis Human Rights Advocacy Program (BHRAP)

The Brandeis Human Rights Advocacy Program and Professor Enid Trucios-Haynes conduct “Know Your Rights” presentations at the Kentucky ICE Detention Center. We have direct knowledge about the impact of detention on families and the individuals who are detained. A process examining the ability of individuals to pay for bonds would positively impact many in of the people detained by ICE in Kentucky.

Center for Gender & Refugee Studies

The Center for Gender & Refugee Studies (“CGRS”) at the University of California Hastings College of the Law works to protect the fundamental human rights of asylum seekers, with a particular focus on expanding protection for women, children, and LGBT individuals. CGRS has played a central role in the development of law and policy related to asylum seekers, including on detention and enforcement issues. Its areas of work include policy advocacy; litigation; scholarly research; and training and technical assistance for attorneys in thousands of asylum cases each year, including hundreds of cases of detained individuals. CGRS has represented asylum seekers in detention and has filed numerous amicus briefs in the federal courts on key issues of asylum and immigration law. CGRS has a longstanding interest in ensuring access to refugee protection via both the advancement of asylum

law in our courts and the vindication of asylum seekers' rights in our immigration system.

Coalition to Abolish Slavery & Trafficking (CAST)

The Coalition to Abolish Slavery & Trafficking (“CAST”) is one of the largest direct legal and social service providers for victims of human trafficking in the United States. CAST clients are vulnerable individuals who have been trafficked for labor or commercial sex. Their vulnerability to human trafficking and lack of community support systems often means trafficking victims who are detained cannot pay bond amounts and face prolonged detention. Their loss of freedom while being exploited by their traffickers is then continued when they must remain detained for lack of bond payment.

Columbia Law School Immigrants' Rights Clinic

The Columbia Law School Immigrants' Rights Clinic is a law clinic providing pro bono legal services to immigrants facing deportation. The Clinic collaborates with community and legal advocacy organizations on policy and litigation projects to advance immigrants' rights. The Clinic has represented immigrants detained at the South Texas Family Residential Center in Dilley, Texas and the Elizabeth Detention Center in Elizabeth, New Jersey in their bond hearings.

Community Legal Services in East Palo Alto

Community Legal Services in East Palo Alto (“CLSEPA”) is a non-profit organization that provides legal assistance to low income immigrants in and around East Palo Alto, California, where two-thirds of the population is Latino or Pacific Islander. The immigration team provides pro bono legal services to local residents in various types of immigration cases, including in detained and non-detained removal proceedings.

Cornell Law School’s Asylum and Convention Against Torture Appellate Clinic

Cornell Law School’s Asylum and Convention Against Torture Appellate Clinic represents individuals appealing to the Board of Immigration Appeals from denials of asylum, withholding under the Convention Against Torture, and similar forms of relief. Since 2003, clinic clients have included domestic violence victims, transgender individuals, child soldiers, political activists, and mentally challenged detainees. Almost all of these clients appeared pro se in their removal proceedings. Many of them, including one discussed in this brief, remained in detention because they could not pay an excessively high bond.

Council on American-Islamic Relations (CAIR)

The Council on American-Islamic Relations (“CAIR”) is the largest American Muslim civil liberties nonprofit organization in the nation. CAIR's mission is to enhance understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding. CAIR is a leading expert on issues of importance to the American Muslim community, including issues of civil and immigrants’ rights. The organization is headquartered in Washington, D.C. and has 30 chapters in 22 states across the nation.

Immigrant Defenders Law Center, Los Angeles

Immigrant Defenders Law Center (“ImmDef”) is an independent, non-profit law firm dedicated to advancing social justice for Southern California’s most marginalized immigrant and refugee communities through legal services, community empowerment, and advocacy for adults and children in federal immigration custody. Through its Children’s Representation Project and Adult Representation Project, ImmDef provides pro bono representation to over 600 immigrants in deportation proceedings. ImmDef represents adults immigrants with serious mental health conditions and who are detained at the Adelanto and Orange County detention facilities. Nearly all of ImmDef’s adult detained clients are subject to prolonged detention and cannot afford to post bond.

Las Crisantemas

Las Crisantemas is an organization centered on providing support to trans-women and black immigrants currently in detention centers. Since 2016, Las Crisantemas has increased their amount of visitations to queer/trans detained people in the Santa Ana Jail's detention pod. Through our weekly visitation, we are able to visit women and men who have fled their home countries after years of abuse and persecution, in order to help connect them to legal representation and post detention resources.

Loyola Immigrant Justice Clinic

The Loyola Immigrant Justice Clinic (LIJC) is a community-based collaboration of Loyola Law School, Loyola Marymount University, Homeboy Industries Inc., and Dolores Mission Church. LIJC's dual-pronged mission is to advance the rights of the indigent immigrant population in East Los Angeles through direct legal services, education, and community empowerment, while teaching law students effective immigrants' rights lawyering skills in a real world setting. LIJC focuses on providing representation to individuals who are unable to obtain immigration legal services elsewhere with an emphasis on immigrants with certain immigration and criminal complications who reside in the East Los Angeles area.

National Day Laborer Organizing Network (NDLON)

The National Day Laborer Organizing Network (NDLON) is a non-profit organization founded in 2001 whose mission is to improve the lives of immigrant day laborers in the United States through nationwide advocacy and organizing efforts in coordination with 49 member organizations in 19 states. To this end, NDLON supports the work of its member organizations to advance the rights of low-wage immigrant workers. NDLON challenges immigration enforcement efforts that threaten the lives and livelihoods of immigrant workers. Many NDLON members are immigrants who are directly affected by immigration enforcement, and they or their family members find themselves detained and in deportation proceedings, or at risk of being placed in deportation proceedings. NDLON members and their families, and people NDLON represents, have also been forced to make difficult decisions as a result of immigration bonds that are outside of the family's ability to pay. NDLON's main office and principal place of business is in Los Angeles, California.

New York Law School, Safe Passage Project Clinical Class

The Safe Passage Project clinical class at New York Law School is a law clinical course providing pro bono legal services to unaccompanied minors facing removal from the United States. The clinical class also partners with Safe Passage Project, the non-profit organization housed in New York Law School, to engage in

advocacy efforts supporting immigrant youth. At present, one of the youth represented through the Safe Passage Project clinical class was detained at the Adelanto Detention Center and in Orange County, California.

Northwest Immigrant Rights Project

Northwest Immigrant Rights Project (NWIRP) is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP focuses on direct representation to low-income immigrants who are placed in removal proceedings. A primary concentration of NWIRP's work is focused on representing detained individuals, many of whom are unable to afford the bond issued by the immigration court, and as a result remain detained throughout the removal process. Thus, NWIRP has a direct interest in the issues presented in this case.

Public Counsel

Public Counsel is based in Los Angeles, California and is the nation's largest pro bono law firm. Founded in 1970, Public Counsel's primary goals are to: (1) protect the legal rights of disadvantaged children; (2) represent immigrant victims of torture, persecution, domestic violence, trafficking, and other crimes; and (3) foster economic justice by providing underserved communities with access to quality legal representation. In support of these goals, Public Counsel represents indigent

immigrants from around the world, including many immigrants who remain in detention centers solely because of their inability to pay bond.

Rapid Response Network

We work with low income immigrant families in the Inland Empire and often those detained end up either unable to get out on bond because they can't afford it, or prey to unscrupulous bond companies who defraud them.

The Florence Immigrant and Refugee Rights Project

The Florence Immigrant and Refugee Rights Project (“Florence Project” or “Project”) is a Legal Orientation Program site of the Executive Office of Immigration Review. As such, the Florence Project provides orientation services to detained adult men and women as well as unaccompanied minors in removal proceedings. In 2016, over 17,000 detained children, men, and women facing removal charges observed a Florence Project presentation on immigration law and procedure. That same year, we provided individualized pro se support services including bond workshops to approximately 2,000 detained adult immigrants. Every year, the Florence Project also directly represents individuals before the Immigration Judge and Board of Immigration Appeals in addition to the aforementioned support to pro se respondents. All of the adult immigrants we assist are detained by ICE and in removal proceedings in remote locations in Florence and Eloy, Arizona. In any given year we see hundreds of individuals who languish in ICE detention because

they are unable to pay the unreasonably high bonds that are set in their cases. Many of these individuals have significant community ties and/or strong claims to relief. However, because Immigration Judges do not take into account the individuals' ability to pay when setting bond amounts, many people are faced with the untenable option of remaining detained for months and years to reach a final adjudication of their claims or giving up their valid claims for relief from removal in order to avoid prolonged detention. The Florence Project firmly believes that immigration bonds must be reasonably calculated to ensure an individual's presence in future hearings and not used as punishment or to ensure continued detention. This goal can only be reached by requiring Immigration Judges to take into consideration an individuals' realistic ability to pay the bond amount set.

University of California Davis School of Law Immigration Law Clinic

The University of California, Davis School of Law Immigration Law Clinic ("The Clinic") is an academic institution dedicated to advocating on behalf of detained immigrants who are placed in removal proceedings and to provide education and outreach on issues affecting detained individuals. The Clinic's clients were detained for years in immigration custody or continue to languish unnecessarily in prolonged immigration on detention.

University of California, Irvine School of Law Immigrant Rights Clinic

The University of California, Irvine School of Law – Immigrant Rights Clinic (“UCI IRC”) is a law clinic providing pro bono legal services to immigrants facing deportation. The Clinic also partners with community and legal advocacy organizations on policy and litigation projects to advance immigrants' rights and immigrant workers' rights. For several years, clinic students working under the supervision of faculty attorneys have represented immigrants detained at the Adelanto Detention Center and in Orange County, California facilities in their bond hearings. Many of these individuals were unrepresented in their removal proceedings and subject to prolonged detention.

University of Colorado Criminal/Immigration Defense Clinic

Law students at Colorado Law represent immigrants who have been detained by Immigration and Customs Enforcement at the GEO Detention Facility in Aurora, CO. We frequently argue on behalf of people who statutorily qualify for bond, have long-standing ties to the community, yet who cannot afford to pay the astronomically high bond amounts set by Immigration Judges in court. This situation is further exacerbated by the unwillingness of bail bondsman to act as sureties for immigrants, fearing that they will be deported and unable to repay them. We believe that a consideration of ability to pay, as one of several factors considered by both the DOJ

and the IJ in immigration court, is both fundamentally fair and necessary when a liberty interest is at stake.

University of Nevada, Las Vegas, Immigration Clinic

The UNLV Immigration Clinic represents respondents in removal hearings, many of who are detained. It is a common occurrence for our clinic to represent clients who would be eligible to request bond under applicable law, but who would likely be unable to pay the bonds that are likely to be set.

Western State College of Law Immigration Clinic

The Western State College of Law Immigration Clinic is a law school clinic that provides legal representation and advocacy to low-income noncitizens throughout Southern California in a range of immigration matters, including removal defense and bond hearings. The Clinic also engages in community education and policy advocacy to protect and promote the rights of immigrant communities.

CERTIFICATE OF SERVICE

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 this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Peter R. Afrasiabi

Peter R. Afrasiabi