No. 12-56734

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIMOTHY ROBBINS, et al.,
Respondents-Appellants,
v.

ALEJANDRO RODRIGUEZ, et al.,
Petitioners-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA
No. CV 07-3239-TJH (RNBx)

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE INTERNATIONAL LAW PROFESSORS AND HUMAN RIGHTS CLINICS AND CLINICIANS IN SUPPORT OF PETITIONERS-APPELLEES AND AFFIRMANCE OF THE DECISION BELOW

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Pursuant to Rule 29(b), Federal Rules of Appellate Procedure, undersigned counsel for Proposed *Amici Curiae* hereby move for leave to file the enclosed amicus brief in support of Petitioners-Appellees and urging affirmance of the order below. Counsel for Petitioners-Appellees have consented to the filing of this Amicus Curiae brief, while Counsel for the Government, Respondents-Appellants, have indicated they are taking no position on the filing of an amicus curiae brief.

INTEREST OF THE PROPOSED *AMICI CURIAE*

On appeal the Respondents-Appellants in this case seek reversal of a preliminary injunction order that requires them to comply with federal immigration statutes by providing bond hearings to the Petitioners-Appellees who have been subjected to prolonged immigration detention. The mandatory administrative detention of the Petitioners-Appellees pursuant to 8 U.S.C. §§ 1226(b) and 1225(d) without a bond hearing violates the international prohibition against arbitrary and prolonged detention proscribed by various international human rights agreements and customary international law. The proposed *Amici* are international law professors and human rights clinics and clinicians who are committed to respect for international human rights and have a deep interest in the domestic application of principles of international law. The issues raised in this appeal are within their areas of expertise.

Sarah H. Paoletti, counsel of record, is a Practice Associate Professor and

Director of the Transnational Legal Clinic at the University of Pennsylvania Law School. She was previously a Practitioner-in-Residence in the International Human Rights Clinic at the American University Washington College of Law. She is an expert in international law and migration, and also has significant experience in U.S. immigration law.

In addition, the following international law professors and human rights clinics and clinicians have joined the brief: Allard K. Lowenstein International Human Rights Clinic, Yale Law School; Thomas Antkowiak, *Associate Professor of Law*, Seattle University School of Law; David C. Baluarte, *Practitioner in Residence and Arbenz Fellow*, International Human Rights Law Clinic, American University, Washington College of Law; Caroline Bettinger-López, *Associate Professor of Clinical Legal Education and Director*, Human Rights Clinic, University of Miami School of Law; Arturo J. Carrillo, *Clinical Professor of Law*, George Washington University Law School, and *Director*, International Human Rights Clinic, George Washington University Law School, and *Co-coordinator*, Global Internet Freedom and Human Rights Project; Troy E. Elder, *Senior Schell Center Human Rights Fellow*, Allard K. Lowenstein International Human Rights Clinic, Yale Law School; Martin S. Flaherty, *Leitner Family Professor of International Human Rights Law*, Fordham University Law School, and *Founding Co-Director*, Leitner Center for International Law and Justice, Fordham University

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DESIRABILITY OF *AMICUS* BRIEF

In the interpretation and application of domestic immigration statutes, the United States Government must fulfill its international human rights obligations. It is well-established that as a State Party to the International Covenant on Civil and Political Rights ("ICCPR"), Oct. 5, 1977, 1966 U.S.T. 521, 999 U.N.T.S. 171, and a signatory of other international human rights instruments, the United States is bound by international obligations that protect against arbitrary and prolonged detention, including in the context of civil detention for immigration purposes.

In interpreting 8 U.S.C. §§ 1226(b) and 1225(d), this Court should consider the international human rights commitments of the United States. Under the *Charming Betsy* doctrine, *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), congressional legislation should not be construed as abrogating the international obligations of the United States without an affirmative indication of Congress' intent to do so. The statutory provisions at issue in this case do not provide such affirmative congressional intent to abrogate the international prohibition of arbitrary and prolonged detention.

In this brief, the proposed *Amici Curiae* explain the international obligations of the United States and the parameters of the international prohibition of arbitrary and prolonged detention. The proposed *Amici* argue that this Court should affirm the order directing the United States to provide Petitioners-Appellees with bond

hearings because international law guarantees all detained individuals the right to a hearing before a neutral decision maker in which the State is required to justify the lawfulness of detention. The preliminary injunction order granted by the court below will prevent the United States from violating its international human rights obligations.

The proposed *Amici* are international law professors and human rights clinics and clinicians with expertise in the area of international human rights law. They are therefore uniquely positioned to offer insight into the international human rights obligations of the United States. The perspective of the proposed *Amici* should therefore be valuable to the Court.

CONCLUSION

Undersigned counsel therefore respectfully move the Court for leave to file the enclosed *amicus* brief in support of the Petitioners-Appellees, urging affirmance of the order below.

Respectfully submitted,

s/Sarah H. Paoletti
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INTEREST OF AMICI CURIAE

Having sought leave of this Court for permission to file, *Amici Curiae*, international law professors and human rights clinics and clinicians, submit this brief in support of Petitioners out of respect for principles of international law and commitment to their application. They are recognized experts in the field, having practiced, researched, lectured, and published extensively in the areas of international human rights law. *See* Appendix A for a complete list of *Amici Curiae* and their academic titles and affiliation.

Pursuant to Rule 29(c)(5), Federal Rules of Appellate Procedure, *Amici Curiae* confirm that neither a 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 contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The United States' failure to ensure periodic review before a neutral decision maker whereby it justifies the detention of Petitioners violates the international prohibition against arbitrary and prolonged detention.

(1) U.S. courts recognize that the United States must comply with its obligations under international law, which prohibits arbitrary and prolonged detention, including detention of non-citizens for purposes of immigration control.

(a) Under international law, the detention of non-citizens in removal proceedings is arbitrary if not subject to individualized and periodic review by a neutral decision maker.

(b) Prolonged detention without ongoing review to determine whether detention continues to be justified is also arbitrary in violation of international law.

(c) Additional human rights instruments guarantee asylum seekers protections against administrative detention and require States to prove exceptional circumstances to justify their detention.

(2) International legal bodies emphasize that the administrative detention of non-citizens for immigration purposes should be a last resort.

As presented in this case, the detention of Petitioners pending their removal proceedings has not been subject to periodic review in which the United States has

justified the necessity of their continued detention to a neutral decision maker. Included among the above Petitioners are asylum seekers entitled to additional international law protections. Others, including those who are *prima facie* eligible for relief from deportation, have not been granted hearings of any kind to review their detention. Furthermore, Immigration and Customs Enforcement's ("ICE") parole process and the Government's process for determining mandatory detention do not involve periodic review of detention by a neutral decision maker, nor do they permit appeal. *See* Brief of Petitioners-Appellees at 4-16, Rodriguez v. Holder, No. 12-56734, (9th Cir. Nov. 16, 2012) (explaining the broad discretion of ICE officers to detain non-citizens with no judicial oversight of their decision under 8 U.S.C. Section 1226(c) and 8 U.S.C. 1225(b)).

ARGUMENT

I. THE UNITED STATES IS BOUND BY THE INTERNATIONAL PROHIBITION OF ARBITRARY AND PROLONGED DETENTION OF NON-CITIZENS SUBJECT TO CIVIL DETENTION.

The United States is obligated to adhere to the international norm against arbitrary and prolonged detention. The Universal Declaration of Human Rights ("UDHR") states that "no one shall be subjected to arbitrary arrest, detention, or exile." G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), Article 9 (Dec. 10, 1948). *See also Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2nd Cir. 1980) (stating that although the UDHR is not binding on States, "U.N. declarations are significant

because they specify . . . the obligations of member nations under the [U.N.] Charter."). The International Covenant on Civil and Political Rights, Oct. 5, 1977, 1966 U.S.T. 521, 999 U.N.T.S. 171, prohibits arbitrary detention in Article 9(1):

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 9(4) also provides that:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The U.N. Human Rights Committee ("HRC"), which interprets and enforces the ICCPR,[1] has stated that Article 9 is "applicable to all deprivations of liberty by arrest or detention, ***including in cases of immigration control***." Human Rights Committee, CCPR General Comment 8, ¶ 1 (1982) [hereinafter "General Comment No. 8"] (emphasis added). The HRC has emphasized that review of detention by a neutral decision maker is applicable to all individuals deprived of their liberty by arrest or detention, regardless of immigration status. *Id.*

As a State Party to the ICCPR, the United States is bound by the ICCPR's prohibition of arbitrary detention. ICCPR, art. 2. State Parties must guarantee

[1] *See* ICCPR, art. 28 (establishing the Human Rights Committee). *See also* ICCPR, Declarations of the United States of America (the United States ratified the ICCPR on June 8, 1992 with no reservations as to the competency of the HRC).

ICCPR rights to all people within their territory and under their jurisdiction regardless of citizenship status. *Id.* *See also* Human Rights Committee, CCPR General Comment 31 (2004) ("Covenant rights . . . must also be available to all individuals…such as asylum seekers, refugees, migrant workers. . . ").

The U.S. Government has affirmed its commitment to:

> . . . the protection and promotion of human rights and fundamental freedoms, [and to] fully . . . respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR . . .

Implementation of Human Rights Treaties, Executive Order No. 13107, 63 Fed. Reg. 68991 (Dec. 10, 1998).

While the ICCPR is a non-self-executing treaty for the United States, *see* Declarations of the United States of America regarding the ICCPR, its prohibition of arbitrary and prolonged detention is part of customary international law. "[A]greements that are not self-executing . . . , including the ICCPR, are appropriately considered evidence of the current state of customary international law." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 176 (2d Cir. 2009).

The prohibition of arbitrary and prolonged detention, as it applies to the Petitioners in the context of immigration control, has been included in numerous international and regional agreements, thus demonstrating the norm's widespread recognition and its incorporation into customary international law. In addition to the U.N. human rights treaties, regional treaties prohibit arbitrary arrest and

detention. Article 7 of the American Convention on Human Rights, which the United States has signed but not ratified, guarantees the freedom from arbitrary arrest or imprisonment. Organization of American States, American Convention on Human Rights, art. 7, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter "ACHR"]. The European Convention for the Protection of Human Rights and Fundamental Freedoms similarly protects the rights to liberty and security of person and to have proceedings before a neutral decision maker to determine the lawfulness of detention. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Sept. 3, 1953, E.T.S. No. 5, 213 U.N.T.S. 222 [hereinafter "European Convention"].

Self-executing treaties as well as some customary international norms are directly enforceable in U.S. courts. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice…"). U.S. courts have also recognized that non-self-executing treaties and customs not directly enforceable in U.S. courts are persuasive authority in interpreting domestic statutes. In considering whether the Petitioners are entitled to review before a neutral decision maker of their administrative detention, this Court should thus consider both the treaty provisions and customary international norms against arbitrary detention. *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (previously recognizing

the persuasive authority of the UDHR, a non-binding General Assembly resolution, in deciding whether a Mexican national's arrest and detention at the request of the Los Angeles Police Department were arbitrary).

The Supreme Court has held that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). U.S. courts use the *Charming Betsy* canon to resolve conflicts between international law and domestic statutes. The canon dictates that for a statute to supersede international law, Congress must provide affirmative indication of its intent to abrogate U.S. international obligations. *See Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (holding that a statute must show affirmative congressional intent to abrogate obligations under the ICCPR); *Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (recognizing that this Court must "generally construe Congressional legislation to avoid violating international law.").

The *Charming Betsy* canon is applicable to the ICCPR's prohibition of arbitrary and prolonged detention as a treaty provision and as customary international law. Therefore, a statute must show affirmative congressional intent to abrogate the U.S. obligation to protect against arbitrary and prolonged detention of non-citizens subject to removal proceedings in order for the international norm not to apply. This Court has previously applied the *Charming Betsy* canon to

construe the Immigration and Nationality Act as not authorizing indefinite administrative detention of a non-citizen subject to removal because "'a clear international prohibition' exists against prolonged and arbitrary detention." *Ma*, 257 F.3d at 1114-15. *See also Martinez*, 141 F.3d at 1384 (finding a definitive prohibition of arbitrary criminal arrest and detention under international law, with an emphasis on the UDHR and ICCPR). *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (recognizing that while the narrow facts of the case do not give rise to a violation of customary international law, the ICCPR's prohibition of arbitrary detention could be a binding customary norm).

II. THE UNITED STATES MUST GRANT PETITIONERS A HEARING BEFORE A NEUTRAL DECISION MAKER IN WHICH IT MUST JUSTIFY THE CONTINUED LAWFULNESS OF DETENTION.

A. Under international law, detention of non-citizens subject to removal is arbitrary if not reviewed in a hearing before a neutral decision maker.

International law guarantees procedural safeguards to protect against the arbitrary and prolonged detention of non-citizens. The ICCPR and other international legal instruments mandate access to proceedings before a neutral decision maker, such as a bonding hearing requested by the Petitioners here, to determine the lawfulness of detention. ICCPR, art. 9(4). Article 9 applies to all deprivations of liberty including for purposes of immigration control. General Comment No. 8, ¶ 1. *See also* Human Rights Commission, General Comment No. 15, ¶ 2, 9 (1986) ("[T]he rights of the Covenant must be guaranteed without

discrimination between citizens and aliens . . . [including] safeguards of the Covenant relating to deprivation of liberty . . . .").

The HRC has recently reaffirmed the right of a detained person to proceedings before a court "[to] decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful . . ." Human Rights Council, June 29, 2012, Doc. A/HRC/20/L.5, at 6(d) (June 29, 2012). This guarantee applies equally to administrative detention. *Id.* at 6(e).

In *Bakhtiyari v. Australia*, the HRC concluded that the absence of a judge's discretion in reviewing the justification of detention violates Article 9(4) of the ICCPR. U.N. Human Rights Committee, CCPR/C/79/D/1069/2002 (Oct. 29, 2003). In *Sham v. Australia*, the HRC further opined that review of the lawfulness of detention under Article 9(4) is not limited to "mere compliance" with domestic law. Human Rights Committee, CCPR/C/90/D/1255, ¶7.3 (July 20, 2007). Article 9(4) requires that when detention violates any provision of the ICCPR, courts must have the authority to order release of an individual, for example through a bond hearing as requested in this case. *Id.* Similarly, the mandatory detention of some Petitioners under 8 U.S.C. §§ 1226(c) and 1225(b) also violates Article 9(4) in failing to ensure periodic and substantive review of their detention and eliminating judicial discretion in issuing bond.

Similar procedural guarantees of judicial review of detention have been codified in regional human rights conventions. The ACHR[2] prohibits arbitrary detention and dictates that detained individuals "shall be brought promptly before a judge . . . [and] entitled to trial within a reasonable time or to be released . . . ." ACHR, art. 7(5). *See also* European Convention, art. 5(4) (entitling a detained person to proceedings to assess the lawfulness of his detention).

The Inter-American Court of Human Rights has expounded the necessity of individualized review of migrant detention:

> [T]hose migratory policies whose central focus is the mandatory detention of irregular migrants, without . . . an individualized evaluation, the possibility of using less restrictive measures of achieving the same ends, are arbitrary.

Velez Loor v. Panama, Inter-Am. Ct. H.R., (ser. C) No. 218, ¶ 171 (Dec. 10, 2010). *See also Case of SD v. Greece*, Eur. Ct. H.R., Case No. 53541/07 (2009) (holding that Article 5(4) of the European Convention was violated when an asylum seeker

[2] While the U.S. has not ratified the ACHR, the Inter-American Commission on Human Rights and the Inter-American Human Rights Court have affirmed the binding nature of the American Declaration on the Rights and Duties of Man, of which the United States is a signatory. *See* Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10 (July 14, 1989). The American Declaration on the Rights and Duties of Man provides that every individual detained has "the right to have the legality of his detention ascertained without delay by a court." Organization of American States, American Declaration on the Rights and Duties of Man, art. 25, May 2, 1948, 1144 U.N.T.S. 123, *reprinted* in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003).

was not permitted under Greek law to challenge the lawfulness of his detention); *Al-Nashif v. Bulgaria*, Eur. Ct. H.R., Case No. 50963/99 (2002) (holding that non-citizens subject to mandatory detention pending deportation proceedings without a hearing on their detention before on neutral decision maker violates Article 5(4)). The Inter-American Commission on Human Rights has also concluded that:

> [P]roceedings involving the detention, status or removal of aliens from a state's territory . . . have been found in this and other human rights systems to require individualized and careful assessment and to be subject to the same basic and non-derogable procedural protections applicable in proceedings of a criminal nature.

Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser/L/V/II.116, Doc. 5, Rev. 1, at ¶409 (Oct. 2002). Cursory custody review of detention of the Petitioners by ICE does not constitute such individualized and careful assessment by a neutral decision maker. *See* Brief of Petitioners-Appellees at 4-16 (describing the brief review conducted by ICE officers before detaining a non-citizen under 8 U.S.C. §§ 1226(c) and 1225(b)).

B. Detention of non-citizens subject to removal proceedings is arbitrary if prolonged beyond the period justified by the State.

Under international law, detention of non-citizens is arbitrary if prolonged beyond the period justified by the State at the time of detention. The HRC has found that the decision to detain an individual must be open to periodic review to allow the justification for the detention to be evaluated:

> [D]etention should not continue beyond the period for which the State can provide appropriate justification . . . there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.

A. v. Australia, U.N. Human Rights Committee, CCPR/C/59/D/560/1993 (Apr. 3, 1997) at ¶9.4. The failure to provide Petitioners with a hearing during which the State bears the burden of justifying continued detention based on specific criteria, such as flight risk and public danger, violates the prohibition on arbitrary detention.

The Working Group on Arbitrary Detention has stated that "a maximum period [for detention] should be set by law and the custody may in no case be unlimited or of excessive length." U.N. Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers, U.N. Doc. E/CN.4/2000/4/Annex 2 (1999). While international law does not fix a period for "prolonged detention", the failure of the United States to ensure periodic review during which it satisfies its burden of demonstrating the ongoing justification of Petitioners' detention, amounts to detention that is prolonged beyond the period justified by the State and is therefore arbitrary detention in violation of international law.

C. International law prohibits the arbitrary and prolonged detention of asylum seekers and mandates that the Government prove exceptional circumstances to justify their detention.

Additional international human rights instruments protect asylum seekers detained here under 8 U.S.C. § 1225(b) against administrative detention. As a signatory to The Protocol Relating to the Status of Refugees, the United States is required to apply articles 2-34 inclusive of the Convention relating to the Status of Refugees ("1951 Convention"). Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268, Art. 1. Article 31 of the 1951 Convention prohibits the punishment of refugees for illegal entry. Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 150. The 1951 Convention mandates that States refrain from limiting the movement of refugees beyond that which is necessary. *Id.*

Furthermore, the Executive Committee of the High Commissioner of Refugees' 1986 Conclusion on Detention of Refugees and Asylum-Seekers sets out the limited bases that justify detention of asylum seekers. U.N. High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers*, Oct. 13, 1986, No. 44 (XXXVII). Detention may be resorted to *only* to:

> verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.

The Executive Committee's conclusion pronounces the importance of "fair and expeditious procedures" in order to prevent the prolonged detention of asylum seekers in immigration proceedings. *Id.* The United Nations High Commissioner for Refugees' ("UNHCR") Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers address the particular procedural safeguards to which detained asylum seekers are entitled, including automatic and periodic review of their detention by a neutral judicial or administrative body. Guidelines No. 5 (Feb. 26, 1999), *available at* http://www.unhcr.org/refworld/docid/3c2b3f844.html [hereinafter "UNHCR Guidelines"]. Asylum seekers have the right to challenge the necessity of their detention in a review hearing and rebut any findings made. *Id.* The Petitioners seeking asylum have not been afforded the right to challenge their detention or received any hearing to consider their release pending their asylum claims. An ICE officer need only check a box in rejecting Petitioners' applications for release on parole under 8 C.F.R. § 212(d)(5)(A). The review process, which lacks a hearing by a neutral decision maker and opportunity to appeal is insufficient to meet the requirements for asylum seekers.

The UNHCR Guidelines clarified that asylum seekers should not be detained as a general policy and that "[t]here should be a presumption against detention" for asylum seekers. *Id.* at No. 2, 3. As has been urged vis-à-vis all administrative

detention of non-citizens by both the UN Special Rapporteur on the Human Rights of Migrants and the IACHR, asylum seekers should only be detained "after a full consideration of all possible alternatives…." *Id.* at No. 3. The United States has not affirmatively demonstrated that it has made a full consideration of alternatives to detention for the Petitioners seeking asylum. Moreover, detention of asylum seekers under 8 U.S.C. § 1225(b) may further exacerbate the mental and physical illness that many already suffer from as a result of trauma experienced in their home countries, raising additional human rights concerns.

III. INTERNATIONAL NORMS REQUIRE THAT ADMINISTRATIVE DETENTION FOR PURPOSES OF IMMIGRATION CONTROL BE A MEASURE OF LAST RESORT.

Independent experts on international human rights law and practice as well as the U.N. Special Rapporteur on the Human Rights of Migrants ("Special Rapporteur") and the IACHR urge that administrative detention of non-citizens should be a measure of last resort, as is set forth explicitly in regard to asylum seekers discussed above. In his 2010 Report, the Special Rapporteur condemned the indefinite length of immigration detention in some cases. Special Rapporteur on the Human Rights of Migrants, *Promotion and Protection of Human Rights: Human Rights Situations and Reports of Special Rapporteurs and Representatives*, ¶ 24, U.N. Doc. A/65/222 (3 Aug. 2010) [2010 Report]. The Special Rapporteur has stated, "detention of migrants must be prescribed by law and necessary,

reasonable and proportional to the objectives to be achieved." Special Rapporteur on the Human Rights of Migrants, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 9, U.N. Doc. A/HRC/20/24 (2 Apr. 2012). The Special Rapporteur has also said that "***the right to liberty and security of person…obliges States to consider in the first instance less intrusive alternatives*** to detention of migrants." *Id.*, ¶ 50 (emphasis added). *See also* Organization of American States, Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, ¶ 41-42, OEA/Ser. L/V/II, Doc 78/10 (30 Dec. 2010) (reiterating that detention of non-citizens should be a measure of last resort). This Court should consider that international norms strongly condemn the use of detention as regular tool in national immigration control.

CONCLUSION

The failure to ensure periodic review by a neutral decision maker of the Petitioners' ongoing detention in this case amounts to arbitrary and prolonged detention in violation of the United States' international legal obligations.

Respectfully Submitted,

November 21, 2012 s/Sarah H. Paoletti

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November 21, 2012

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