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Supreme Court of the United States

DAVID JENNINGS ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NINE RETIRED IMMIGRATION JUDGES AND BOARD OF IMMIGRATION APPEALS MEMBERS IN SUPPORT OF RESPONDENTS

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BRIEF FOR NINE RETIRED IMMIGRATION JUDGES AND BOARD OF IMMIGRATION APPEALS MEMBERS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted on behalf of the following retired immigration judges and Board of Immigration Appeals ("BIA") members: Hon. Sarah Burr, Hon. Joan V. Churchill, Hon. Bruce J. Einhorn, Hon. John F. Gossart, Jr., Hon. Eliza Klein, Hon. Nancy R. McCormack, Hon. Paul Nejelski, Hon. Lory D. Rosenberg, and Hon. Bruce W. Solow.[1]

INTEREST OF AMICI CURIAE

Amici curiae are former immigration judges and members of the BIA. Amici have an interest in this case based on their years of dedicated service administering the immigration laws of the United States. Amici believe that the Ninth Circuit's decision—requiring individualized bond hearings for immigrants subject to prolonged pre-final-order detention—is a correct interpretation of 8 U.S.C. §§ 1225(b) and 1226(a), (c). The decision acknowledges the legitimate purposes pre-final-order detention serves, including preventing flight and protecting communities. It furthers those purposes while mitigating the high costs, both human and financial, of unnecessarily and

[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

unreasonably detaining immigrants in the small percentage of cases where detention exceeds six months. In addition, the decision advances the overall administration of the immigration laws. Based on their experiences handling tens of thousands of cases, amici believe holding individualized bond hearings for immigrants subject to prolonged pre-final-order detention furthers the just and efficient enforcement of the immigration laws. Amici encourage the Court to affirm.

STATEMENT

Removal proceedings in immigration court can be complex, time-intensive affairs for the immigration judges who oversee them, a situation exacerbated when the immigrant is detained for prolonged periods during the process without access to a bond hearing. Moreover, it is those cases where an immigrant may have a meritorious defense to removal that are most likely to demand the most amount of time.

Removal proceedings begin in immigration court when the government files a charging document and serves it on an immigrant. 8 U.S.C. § 1229; 8 C.F.R. §§ 239.1, 1003.14. The notice specifies the basis for the proceedings and informs the immigrant when and where the proceedings will be held. 8 U.S.C. § 1229(a). An immigration judge presides over the proceedings. *Id.* § 1229a(a).

Removal proceedings can involve many of the procedures of a typical trial, including live witness testimony, a wide range of evidence, and legal and factual

arguments. 8 C.F.R. §§ 1240.7, 1240.10; *see generally* 8 C.F.R. part 1240. Yet immigrants often have no experience with such procedures. Immigrants therefore may be represented at any proceeding by counsel. § 1229a. But they generally must fund the representation themselves or find pro bono counsel; unlike in criminal proceedings, there is no universal right to appointed counsel at government expense. *Ibid.*; 8 C.F.R. § 1292.1. Perhaps as a result, the vast majority of detained immigrants—86% nationally—lack counsel in immigration proceedings. 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) (studying immigration cases from 2007 through 2012). For this class of immigrants, therefore, it will fall to the immigration judge to guide the immigrant through the sometimes complex and almost always unfamiliar process. In part for that reason, immigration judges routinely grant, and even encourage, requests by immigrants for continuances to allow time to find a lawyer. *See id.* at 61, fig. 16 (tracking the percentage of total case duration attributable to time spent searching for counsel, which can exceed 50% when an immigrant is detained); *see also* § 1229a(b)(4)(A) (guaranteeing an immigrant's right to seek counsel at no expense to the government).

Although many removal proceedings for detained immigrants are resolved quickly, immigrants who challenge their removal routinely are detained for prolonged periods while their cases are adjudicated. When contested, a proceeding before an immigration

judge must resolve two issues: (1) whether an immigrant is deportable or inadmissible as charged; and, if so, (2) whether the immigrant qualifies for any ground of relief from removal. Non-citizens may be eligible for various waivers or relief from removal, including cancellation of removal under 8 U.S.C. § 1229b, adjustment of status under 8 U.S.C. § 1154, asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), or a claim for protection under the Convention Against Torture, 8 C.F.R. §§ 208.16, 208.17. An immigration judge will not enter a final disposition without first resolving disputes over both the charge of deportability/inadmissibility and any available relief.

An immigration judge generally first sees an immigrant at a preliminary proceeding known as master calendar. *See, e.g.*, *In re Arguelles-Campos*, 22 I&N Dec. 811, 813-15 (BIA 1999). A typical morning or afternoon master calendar session may bring dozens of immigrants before a single immigration judge. The immigration judge will ask each immigrant to enter a plea to the charges against her and ask whether she will be seeking any form of relief. The judge will ensure that the immigrant has all of the necessary application forms for requesting relief, particularly for immigrants who do not have representation and may face language and other challenges. Through questioning of both the immigrant and attorney for the government, the judge will seek to estimate the time needed to resolve any disputed issues of deportability/inadmissibility and relief. Based on the responses, the parties' availability, and the many demands on the court's

own calendar, the judge will then schedule a hearing for a future date, reserving a block of time covering anywhere from a few hours to several days depending on the complexity of the issues. Additional hearings are always required if an immigrant disputes the charges or seeks relief.

An immigration judge may need to resolve many issues during the course of removal proceedings. As an initial matter, a judge needs to determine whether an immigrant is a United States citizen. Determining citizenship can be complex. Additionally, even in cases where there is no dispute over the underlying facts supporting removal, removability may nevertheless turn on complex legal issues, such as whether a conviction qualifies as an aggravated felony or a crime of moral turpitude. *See, e.g.*, *Lynch v. Dimaya*, No. 15-1498 (granting certiorari to consider whether the statutory provisions governing removal for a conviction of an aggravated felony are unconstitutionally vague). Resolving such issues can significantly lengthen the time to resolve the dispute, particularly when cases proceed through both administrative and federal court appeals. *See ibid.*

Moreover, disputes surrounding relief under the various provisions can involve their own complex legal issues and also may require fact-intensive review. Eligibility for relief may turn on thorny questions of statutory interpretation implicating both state and federal law. *See, e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *INS v. St. Cyr*, 533 U.S. 289, 292-93 (2001). Factual disputes can involve determining whether an

immigrant has proved a period of continuous residency, lack of certain criminal convictions, and "good moral character." § 1229b(a), (b). Similarly, refugees seeking asylum may be required to present evidence of past persecution or expert opinion about political or social conditions in their countries of origin supporting a well-founded fear of persecution. *Id.* §§ 1101(a)(42), 1158(b). To allow an immigrant the necessary time to gather and prepare this information, an immigration judge routinely will grant one or more continuances.

If an immigration judge determines that an order of removal is proper, an immigrant has thirty days to appeal to the BIA. 8 C.F.R. § 1240.53. Once again, immigrants who choose to press potentially meritorious defenses on appeal are likely to increase the amount of time needed to decide removal—an appeal to the BIA can take six months or longer from start to finish. Executive Office for Immigration Review, *Certain Criminal Charge Completion Statistics* 4 (Aug. 2016) (hereinafter "EOIR Data").[2] If an immigrant chooses not to appeal or the appeal is dismissed, the immigration judge will issue a final order of removal. 8 C.F.R. § 1241.1. A party may seek judicial review of a BIA decision by petition to the appropriate court of appeals. 8 U.S.C. § 1252(a)(5). Federal review can take years to complete. *E.g.*, *Moncrieffe*, 133 S. Ct. at 1683-84.

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[2] *Available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf.

Immigration judges work hard to manage these complex proceedings, often with limited resources. As of January 2016 there were 474,025 cases pending in United States immigration courts. Human Rights First, *The U.S. Immigration Court: A Ballooning Backlog that Requires Action* 2 (Mar. 15, 2016).[3] That is more than double the caseload from a decade ago. *Ibid.* Yet the number of immigration judges on the bench has only marginally increased in that same period, from 210 at the end of fiscal year 2007 to 256 at the end of fiscal year 2015. *Ibid.* As explained below, detaining immigrants for prolonged periods without bond proceedings only adds to the immigration judge's difficult task of fairly and efficiently deciding removal cases.

[3] *Available at* www.humanrightsfirst.org/sites/default/files/HRF-Court-Backlog-Brief.pdf.

SUMMARY OF THE ARGUMENT

I.A. Prolonged pre-final-order detention imposes significant costs on the immigration system. The class of immigrants in this case naturally focuses on the constitutional concerns raised by prolonged detention without a bond hearing. But pre-final-order detention also has significant practical effects on the administration of the immigration laws. Detention prevents many immigrants who are challenging removal from effectively presenting their cases because it reduces detainees' access to counsel and impairs their ability to gather relevant evidence in support of their cases. That, in turn, makes it more difficult for immigration judges accurately and fairly to render decisions. When removal is disputed, the outcome can turn on complex factual and legal issues, resolution of which demands a full record and clearly presented arguments. Those challenges do not end in immigration court but carry through to any appeal, because the BIA must evaluate trial determinations based on the underlying record.

B. Prolonged pre-final-order detention harms our immigration system precisely where it needs to be at its best—when an immigrant presents a potentially meritorious defense to removal. Although the vast majority of cases are resolved quickly, cases presenting potentially meritorious defenses are more likely to take time. But more time leads to prolonged detention when bail hearings are unavailable. And because detainees in prolonged detention are less able to obtain counsel and present their cases, prolonged detention without bail hearings deprives immigration judges of

help in those cases most likely to involve complex legal or factual issues.

C. Detaining immigrants for long periods of time increases costs on an already overburdened immigration system, consuming resources that might better be spent elsewhere. Yet alternatives such as supervised release using electronic monitoring cost a fraction of the price of housing detained immigrants for prolonged periods. Requiring bond hearings when pre-final-order detention exceeds six months will free up resources that can be used to resolve other challenges facing our immigration system.

II. The small subset of cases involving prolonged pre-final-order detention is well suited to bond hearings. Immigration judges are already familiar with administering bond hearings. They regularly conduct such hearings for immigrants charged with removal under other statutory provisions, including for people with criminal convictions and refugees who have recently crossed the border.

When a judge conducts a bond hearing for an immigrant who already has been detained for a lengthy period, the judge has even more information on which to base her judgment. She will be familiar with the immigrant's case and will have had an opportunity to assess the immigrant's credibility. And she can benefit from additional information gathered by the government during the detention.

Moreover, there is no reason to believe that requiring bond hearings would impose significant additional

administrative burdens on immigration judges. Such hearings would be required in only a small minority of cases. And the hearings can easily be streamlined at a judge's discretion.

ARGUMENT

I. PROLONGED PRE-FINAL-ORDER DETENTION IMPOSES SIGNIFICANT COSTS ON THE IMMIGRATION SYSTEM

Prolonged pre-final-order detention undermines the efficacy of removal proceedings in at least three ways. First, it increases the strain on immigration judges when immigrants are unable to obtain counsel or effectively present their cases due to prolonged detention. Second, it makes cases with potentially meritorious defenses to removal the hardest to administer. Third, it consumes vast resources housing immigrants, resources that could be spent hiring more judges and staff and improving courtrooms and technology for a beleaguered immigration system.

A. Prolonged Pre-Final-Order Detention Adds To Immigration Judges' Heavy Workload By Preventing Immigrants From Obtaining Counsel And Effectively Presenting Their Cases

Removal proceedings in which immigrants cannot effectively present their cases place significant burdens on the immigration judges conducting these proceedings and on the BIA members reviewing their decisions. Three factors contribute to the difficulties

immigration judges face when deciding the cases of immigrants who are detained for long time periods.

First, pre-final-order detention reduces immigrants' access to counsel. This Court long has recognized "that the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important." *Ardestani v. INS*, 502 U.S. 129, 138 (1991). Yet studies consistently show that detained immigrants have lower rates of legal representation than immigrants who are released pending removal proceedings. *See Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings: New York Immigrant Representation Study Report: Part 1*, 33 Cardozo L. Rev. 357, 367-73 (2011) (finding that "custody status (i.e., whether or not [individuals] are detained) strongly correlates with their likelihood of obtaining counsel"). For example, one nationwide study showed that only about one in seven detained immigrants is successful in obtaining representation; immigrants that are never detained are nearly five times more likely to have representation. Eagly, *supra*, at 31-32 (reporting that 14% of detained immigrants obtained representation, compared to 66% of those never detained); *see also* Lori A. Nessel & Farrin R. Anello, *Deportation Without Representation: The Access-to-Justice Crisis Facing New Jersey's Immigrant Families*, Seton Hall Ctr. For Social Justice (June 2016)

(reporting similar numbers from a case study in New Jersey).[4]

There are many reasons that detained immigrants are less able to obtain legal assistance. Detainees are less likely to have the resources to retain counsel because they are unable to work while detained. *See* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 368 (2014). Detainees also are less likely to obtain pro bono representation because most detention facilities are far from urban centers with public interest organizations, large private law firms, and law school clinical programs offering pro bono services. *Ibid.*

Second, even for the small minority of detained immigrants fortunate enough to obtain representation, pre-final-order detention still negatively affects that representation and thus increases the workload on immigration judges. Detention makes attorney-client communications more difficult. All in-person attorney-client meetings must occur at detention facilities. The significant distance between detention facilities and the urban centers where most immigration lawyers practice makes such meetings difficult. Dora Schriro, U.S. Immigration & Customs Enforcement, *Immigration Detention Overview and Recommendations* 23-24 (Oct. 2009).[5] And attorneys may be unable

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[4] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 2805525.

[5] *Available at* https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

to make lengthy telephone calls to detention centers without interruption by officials at the facility. *See* Inter-Am. Comm'n on Human Rights, *Report on Immigration in the United States: Detention and Due Process* 130-132 (Dec. 2010). When immigrants and their counsel are unable to communicate effectively, their cases may require more continuances or may be presented less clearly. And that spells more work for immigration judges.

Third, understanding the factual and legal basis for a pro se detainee's case presents an even greater challenge for the diligent immigration judge. Prolonged detention hobbles such detainees' attempts to clearly present issues to the immigration court. Detention facilities often have inadequate or outdated legal resources. *See id.* at 117; U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal* 186 (Feb. 2005) (finding that "in *none* of the facilities visited by the experts were all the legal materials listed in the DHS detention standards * * * present and up-to-date" (emphasis added)). Restricted communication with the outside world only exacerbates that problem. Inter-Am. Comm'n, *supra*, at 117. Detained immigrants without representation are also less able to gather evidence and otherwise develop the required factual support for their defenses.

Studies confirm the common-sense notion that cases involving represented immigrants are better argued and processed more efficiently both in the immigration courts and at the BIA. For example, while BIA

members consistently report that quality briefing facilitates effective legal review of removal proceedings, most unrepresented immigrants do not submit any brief at all in BIA proceedings. *See* Board of Immigration Appeals, *The BIA Pro Bono Project Is Successful* 10 (Oct. 2004).[6]

Conscientious immigration judges attempt to overcome the difficulties caused by prolonged pre-final-order detention by taking time to ensure that unrepresented detainees understand their rights. Judges also must work to develop a proper record for the BIA's review. As one immigration judge has written, conducting removal proceedings for pro se detainees "puts substantial pressure on the judge to ensure that available relief is thoroughly explored and the record fully developed." Noel Brennan, *A View from the Immigration Bench*, 78 Fordham L. Rev. 623, 626 (2009) ("However time-consuming, it is our duty to explain the law to pro se immigrants and to develop the record to ensure that any waiver of appeal or of a claim is knowing and intelligent."). To that end, immigration judges regularly grant continuances in cases to allow immigrants more time to gather necessary evidence and to ensure properly developed records. But the extra effort required of judges to manage cases involving pro se immigrants places additional strain on the already overburdened immigration courts.

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[6] *Available at* http://www.justice.gov/eoir/reports/BIAProBonoProjectEvaluation.pdf.

The extra effort for cases involving pro se immigrants is a result of more than simply the goodwill of immigration judges—conducting a fair hearing requires it. Fairness requires immigration judges to ensure that immigrants understand the procedures that will be used and the available avenues for relief. Indeed, regulations explicitly require the latter. 8 C.F.R. § 1240.11(a)(2) (judge must inform immigrant of "her apparent eligibility to apply" for relief). Fulfilling these requirements is harder when immigrants lack guidance from experienced counsel.

Despite immigration judges' best efforts, studies show significant disparities in outcomes based on representation and detention-status. *See Developments in the Law: Immigration Rights and Immigration Enforcement*, *Representation in Removal Proceedings*, 126 Harv. L. Rev. 1658 (2013). These disparities make clear that detention alone can, in some cases, determine the substantive outcome of removal proceedings—whether an immigrant ultimately is deported or allowed to remain in the United States.[7] And data bear that out: recent analysis shows immigrants released on bond were ultimately permitted to remain in the United States at a higher rate than the general population of immigrants in removal proceedings. Transactional Records Access Clearinghouse, *What Happens When*

[7] *Cf.* Brennan, *supra*, at 624 (noting that, even in represented cases, if "the attorney fails to create a complete record including submitting documents that are essential to the case, the immigrant may lose, no matter how authentic his claim for asylum may be or how dire the consequences of deportation").

Individuals Are Released On Bond In Immigration Court Proceedings? (Sept. 14, 2016) (hereinafter "TRAC Report").[8] For 2015, immigrants who were allowed to post bond and released from detention facilities overwhelmingly were permitted to remain in the United States, at a rate of two out of three. Only slightly more than half of immigrants, whether released on bond or detained, ultimately prevailed in overcoming a charge of removability. *Ibid.*[9]

B. Prolonged Pre-Final-Order Detention Makes Cases With Potentially Meritorious Defenses To Removal Among The Hardest To Administer

Immigration judges most benefit from well-presented cases in those cases raising challenging legal or factual issues. Yet these are the cases most likely to be poorly presented when immigrants are detained for prolonged periods without a bond hearing.

The vast majority of removal proceedings are resolved without prolonged pre-final-order detention. For example, recent data on immigrants detained under Section 1226(c) for specific charges show that immigrants spent on average less than eighty days in detention when there was no appeal to BIA. EOIR Data 2. Half of such immigrants spent twenty-nine days or less. *Ibid.* These removal proceedings may be

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[8] *Available at* http://trac.syr.edu/immigration/reports/438/.

[9] Fifty-four percent of immigration court cases completed in 2015 resulted in the charged immigrant being allowed to remain in the U.S. *Ibid.*

completed within a few weeks because in many cases removal is not challenged.

As a result, prolonged detention—defined in this case as detention for more than six months—will most frequently occur in the minority of cases where a respondent detainee presents some potentially meritorious defense against removal. For example, immigrants detained under Section 1226(c) for specific charges who appealed their case to the BIA spent an average of 313 days in pre-final-order detention based on recent data. *Id.* at 4. When no appeal was filed immigrants spent on average only seventy-eight days in detention. *Id.* at 2.

Those with potentially meritorious defenses to removal are also likely to present the best cases for release if afforded a bond hearing. Many forms of relief are available to only people with longstanding ties to the United States and minor criminal histories. *E.g.*, 8 U.S.C. § 1229b(a), (b). Immigrants with colorable claims to such relief are thus likely to have stronger community ties, which discourages flight. And they are likely to have less serious criminal convictions and, therefore, are less likely to pose a danger to the community.

Data from the class of immigrants in this case confirm this. The class's expert report shows class members prevailed in their cases five times more often than similarly situated non-class members. J.A. 122 (Table

35).[10] Yet those victories often came with significant detention time, which carries all the consequences discussed above, *supra* Section I.A. Class members who applied for some form of relief (rather than contesting only the underlying charges of removability) suffered on average a significantly increased detention time. For cases that proceeded all the way through appeal, applying for relief extended a class member's detention time an average of 112 days. J.A. 81 (Table 12).

Cases with potentially meritorious defenses to removal already challenge the immigration system by requiring careful legal analysis and thorough factual review. Detaining immigrants for prolonged periods without a bond hearing simply piles on to those challenges.

C. Prolonged Pre-Final-Order Detention Burdens An Already Overburdened Immigration System

Requiring immigrants to be detained for prolonged periods without bond hearings is costly. It eats up resources at a time when our immigration system struggles to deal with constrained budgets and exponentially increasing demand.

The number of immigrants subject to detention has grown markedly over the last twenty years. In 1994, approximately 81,000 non-citizens were detained over the course of the year. *See* Anil Kalhan,

[10] The report showed that 35% of class members won their cases, versus only 7% of detainees at the Mira Loma detention facility who won their cases for fiscal years 2010-2012. J.A. 122.

Rethinking Immigration Detention, 110 Colum. L. Rev. Sidebar 42, 44-45 (2010). By 2013, that number had risen to 440,557. U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2013* 5-6 (Sept. 2014).[11] The total cost of detention now exceeds $2.2 billion annually, roughly double the cost a decade ago. U.S. Dep't of Homeland Sec., *Budget-in-Brief: Fiscal Year 2017* 5 (2016).[12] Moreover, that amount is nearly *twenty* times the amount budgeted for the Alternatives to Detention Program, which places individuals who do not pose a danger to the community but may be a flight risk in various forms of non-detained, intensive supervision, such as electronic monitoring. *Ibid.* (budgeting $126 million for the program). Yet the Alternatives to Detention Program has nearly twice the daily capacity of immigration detention facilities. *Ibid.* (monitoring

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[11] *Available at* https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf. The Department's reports for fiscal years 2014 and 2015 do not report statistics on detention. A draft report for 2014 suggested a decline in total detentions to 425,478 immigrants. U.S. Immigration & Customs Enforcement, *Fiscal Year 2014 ICE Enforcement and Removal Operations Report—DRAFT*, at 9, *available at* https://assets.documentcloud.org/documents/1375456/ice-draft-report.pdf. And a Justice Department report on the use of restrictive housing reported total detentions of 307,310 immigrants during fiscal year 2015. U.S Dep't of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing*, at 88 (Jan. 2016), *available at* https://www.justice.gov/dag/file/815551/download.

[12] *Available at* https://www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf; *see also* Transactional Records Access Clearinghouse, *Immigration and Customs Enforcement (ICE) Budget Expenditures* (Feb. 2010), *available at* http://trac.syr.edu/immigration/reports/224/include/3.html (showing fiscal year 2006 budget of $1.16 billion for custody operations).

53,000 daily participants versus 31,000 detention beds).

There is no shortage of ways in which that money could be spent to ease the heavy load immigration judges and BIA members currently carry. Each immigration judge now faces an average caseload of 1,900 pending cases. Denise Noonan Slavin & Dorothy Harbeck, *A View from the Bench by the National Association of Immigration Judges*, Federal Lawyer 67, 67 (Oct./Nov. 2016).[13] Past hiring freezes and lower staff wages compared to some similar agencies have also reduced the numbers of available clerks and support staff. *Ibid.* Additionally, judges and staff must work with aging audio recording systems and video teleconferencing equipment. *Id.* at 67-68. Limiting long-term detention to cases warranted by flight risk and danger, as determined in an individualized bond hearing, would free up resources that could be redirected to address these problems.

II. INDIVIDUALIZED BOND HEARINGS MITIGATE THE SYSTEMIC PROBLEMS CAUSED BY PROLONGED PRE-FINAL-ORDER DETENTION

Cases in which an immigrant has been detained for six months or longer are particularly well suited for

[13] *Available at* http://www.fedbar.org/Publications/The-Federal-Lawyer/Features/A-View-from-the-Bench-by-the-National-Association-of-Immigration-Judges.aspx.

bond hearings. Providing bond hearings to immigrants in such cases is thus an appropriate response to the problems discussed in Section I, *supra*.

In a bond hearing the immigration judge assesses the danger and flight risk posed by each individual. Immigration judges routinely make such assessments during bond redetermination hearings in removal cases not subject to Sections 1225(b) and 1226(a), (c). *See* 8 C.F.R. § 1236.1. Judges also already conduct bond hearings for immigrants seeking asylum who may have entered the country only recently. § 1225(a)(1), (b)(1)(A)(iii); *Matter of X-K-*, 23 I&N Dec. 731, 734-35 (BIA 2005). In fact, immigration judges completed over 250,000 total bond hearings in 2012 and 2013. Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2013 Statistics Yearbook* A5 (Apr. 2014) (Table 2).[14] These hearings permit experienced judges to make an informed judgment about the risks of releasing a detainee based on employment history, length of residence in the community, family ties, previous record of nonappearance at court proceedings, previous criminal or immigration law history, and other factors. *See, e.g.*, *In re Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). Congress and the courts have long recognized these factors as appropriate indicia of flight risk and danger in pre-trial detention determinations. *See, e.g.*, *United States v. Gonzales Claudio*, 806 F.2d 334, 343 (2d Cir. 1986) (identifying "ties to the community" as "the starting point for assessing risk of flight");

[14] *Available at* http://www.justice.gov/eoir/statspub/fy13syb.pdf.

United States v. Friedman, 837 F.2d 48, 49-50 (2d Cir. 1988) (no flight risk based on finding that criminal defendant "is a life-long New York resident, that he has no prior criminal record, that he has no passport or known ability to evade surveillance, that he has worked gainfully in the New York area for twenty-five years prior to his arrest, and that he is married and has three children, all of whom live in the New York area.").

When an immigration judge conducts a bond hearing for an immigrant who already has been detained for six months, the judge likely can draw on an even greater depth of information to make her judgment. After six months, the judge will have been working with an immigrant for a considerable time and will be familiar with his or her case. She will have background information on the immigrant's claims. And she will be able to develop a sense of the immigrant's credibility. This is true regardless of whether the immigrant already has been living and working in the United States or is a refugee seeking asylum.

There is no reason to believe that granting individualized hearings would lead to arbitrary releases of detainees presenting serious flight risk or danger to the community. It would simply permit an immigration judge to review whether detention is necessary, without requiring that any particular detainee be released. Any order releasing a detained immigrant would be subject to multiple levels of review. First any ruling releasing a detainee would be subject to review by the BIA and could be stayed pending that review.

8 C.F.R. § 1003.1(b). Second, if the BIA authorizes release, DHS can request further review from the Attorney General. *Id.* § 1003.1(h). Any decision to release a detainee could also be made subject to appropriate conditions of release, which studies show can help dramatically minimize the risk of flight and danger. J.A. 564-65 (DHS witness testifying that program of supervised release achieved near-100% success in his region).

Indeed, bond hearings have already proven successful in other situations. One recent study showed that immigrants released on bond overwhelmingly appeared at subsequent court hearings—more than six out of every seven such immigrants appeared at subsequent hearings. TRAC Report. That appearance rate is higher than the rate for immigrants that enforcement officials themselves decide to release without a bond hearing. *See ibid.* (reporting a combined appearance rate for individuals released either on bond or by enforcement officials of 76.6%, compared to 86% for the subset released on bond). And when immigrants are released subject to additional supervision conditions, as the Ninth Circuit's decision requires immigration judges to consider, appearance rates can be as high as 99%. J.A. 564-65.

Requiring individualized bond hearings in cases of prolonged detention under Sections 1225(b) and 1226(a), (c) would not impose significant additional administrative burden on immigration judges. Under the Ninth Circuit's decision, these hearings would be required only in the small minority of cases in which

detainees are held for six months or more. In addition, bond hearings before immigration judges are subject to streamlined proceedings: bond determinations may be made orally, in writing, or, at the immigration judge's discretion, by telephone. *See* 8 C.F.R. § 1003.19.

For these reasons, individualized bond hearings conducted by immigration judges, and reviewed by the BIA, are an appropriate safeguard against the dangers of prolonged pre-final-order detention.

CONCLUSION

The Ninth Circuit's holding requiring individualized bond hearings for immigrants subject to prolonged detention under Sections 1225(b) and 1226(a), (c) should be affirmed.

Respectfully submitted,

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