No. 19-897

In the Supreme Court of the United States

TONY H. PHAM, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,
Petitioners,

v.

MARIA ANGELICA GUZMAN CHAVEZ, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF FORMER UNITED STATES IMMIGRATION JUDGES AND MEMBERS OF THE BOARD OF IMMIGRATION APPEALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DAVID G. KEYKO
Counsel of Record
ROBERT L. SILLS
MATTHEW F. PUTORTI
DARYL L. KLEIMAN
PATRICIA A. ROTHENBERG
ROLAND C. REIMERS
PILLSBURY WINTHROP SHAW PITTMAN LLP
31 West 52nd Street
New York, NY 10019
(212) 858-1379
david.keyko@pillsburylaw.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, former United States Immigration Judges and Members of the Board of Immigration Appeals ("BIA") who have collectively presided over thousands of immigration cases and appeals, submit this brief in support of Respondents. Because they have devoted their legal careers to the fair and efficient administration of immigration law, and many continue to work in the field, *amici* have a continuing interest in the operation of the immigration system. They are concerned because Petitioners' position is at odds with how immigration bond hearings actually work, will lead to inefficiency in the administration of cases, and will deprive immigration judges of the ability to exercise discretion on one of the very issues on which they are expert: whether a detained noncitizen in withholding-only proceedings should be released following an individualized bond hearing. Accordingly, *amici* submit this brief to provide the Court with the perspective of those who have sat on the bench: Petitioners' position would be neither administrable nor in the best interests of immigration courts and litigants.

Steven Abrams was an Immigration Judge from 1997 to 2013 in New York City, New York. Before his appointment to the bench, he held positions of Special Assistant U.S. Attorney for the Eastern District of New

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[1] All parties have consented to the filing of this brief. *See* Sup. Ct. R. 37.3(a). No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

York and Immigration and Naturalization Service ("INS") District Counsel in the New York District Office.

Terry A. Bain was an Immigration Judge in New York City, New York from 1994 to 2019.

Sarah M. Burr was an Immigration Judge in New York City, New York from 1994 to 2006. In 2006, she was appointed Assistant Chief Immigration Judge in New York for the Fishkill, Ulster, Bedford Hills, and New York City Immigration Courts, and served in that capacity until 2011, when she returned to the bench full-time until retiring in 2012.

Esmeralda Cabrera was an Immigration Judge from 1994 to 2005 in the New York City, New York, Newark and Elizabeth, New Jersey Immigration Courts. Prior to her appointment, Judge Cabrera served as INS District Counsel in New York City, New York, and as a Special Assistant U.S. Attorney with the U.S. Attorney's Office in Miami, Florida.

Teofilo Chapa was an Immigration Judge in Miami, Florida from 1995 to 2018.

Jeffrey S. Chase was an Immigration Judge in New York City, New York from 1995 to 2007, and an attorney advisor and senior legal advisor at the Executive Office for Immigration Review ("EOIR") of the BIA from 2007 to 2017.

George T. Chew, after serving as an INS trial attorney, was an Immigration Judge in New York City, New York from 1995 to 2017.

Joan V. Churchill was an Immigration Judge in Washington, DC and Arlington, Virginia from 1980 to 2005, and during that time she served five terms as a temporary Member of the BIA. She served as National President of the National Association of Women Judges from 2012 to 2013.

Bruce J. Einhorn was an Immigration Judge in Los Angeles, California from 1990 to 2007.

Cecelia M. Espenoza was a Member of the EOIR BIA from 2000 to 2003 and served in the Office of the General Counsel from 2003 to 2017, where she was Senior Associate General Counsel, Privacy Officer, Records Officer and Senior Freedom of Information Act Counsel.

Noel A. Ferris was an Immigration Judge in New York City, New York from 1994 to 2013 and an attorney advisor to the BIA from 2013 to 2016. Previously, she served as a Special Assistant U.S. Attorney in the Southern District of New York from 1985 to 1990 and as Chief of the Immigration Unit from 1987 to 1990.

James R. Fujimoto was an Immigration Judge in Chicago, Illinois from 1990 to 2019.

Gilbert Gembacz was an Immigration Judge in Los Angeles, California from 1996 to 2008. Judge Gembacz taught incoming immigration judges as part of their training at the National Judicial College for two years. He also served for six years on the Executive Committee of the National Association for Immigration Judges.

John F. Gossart, Jr. was an Immigration Judge in Baltimore, Maryland from 1982 to 2013, and is the former president of the National Association of Immigration Judges. From 1975 to 1982, he held various positions with the INS, including general attorney, naturalization attorney, trial attorney, and Deputy Assistant Commissioner for Naturalization. He is the co-author of the *National Immigration Court Practice Manual*, which is used by practitioners across the United States.

Paul Grussendorf was an Immigration Judge in Philadelphia, Pennsylvania and San Francisco, California from 1997 to 2004.

Miriam Hayward was an Immigration Judge in San Francisco, California from 1997 to 2018.

Charles M. Honeyman was an Immigration Judge in Philadelphia, Pennsylvania and New York City, New York from 1995 to 2020.

Rebecca Jamil was an Immigration Judge in San Francisco, California from 2016 to 2018, before which she served as Assistant Chief Counsel for U.S. Immigration and Customs Enforcement ("ICE") in San Francisco beginning in 2011.

William P. Joyce was an Immigration Judge in Boston, Massachusetts from 1996 to 2002, before which he served as legal counsel to the Chief Immigration Judge and as Associate General Counsel for enforcement for INS.

Carol King was an Immigration Judge in San Francisco, California from 1995 to 2017, and a

temporary Member of the EOIR BIA for six months in 2010 and 2011.

Elizabeth A. Lamb was an Immigration Judge in New York City, New York from 1995 to 2018.

Margaret McManus was an Immigration Judge in New York City, New York from 1991 to 2018.

Charles Pazar was an Immigration Judge in Memphis, Tennessee from 1998 to 2017, before which he was Senior Litigation Counsel in the Department of Justice Office of Immigration Litigation, and in the INS Office of General Counsel.

Laura Ramirez was an Immigration Judge in San Francisco, California from 1997 to 2018.

John W. Richardson was an Immigration Judge in Phoenix, Arizona from 1990 to 2018.

Lory D. Rosenberg was a Member of the EOIR BIA from 1995 to 2002. She is the author of *Immigration Law and Crimes*.

Susan G. Roy was an Immigration Judge in Newark, New Jersey from 2008 to 2010, before which she was an Assistant Chief Counsel, National Security Attorney, and Senior Attorney for the U.S. Department of Homeland Security ("DHS") Office of Chief Counsel in Newark. She is the past chair of the New Jersey State Bar Association Immigration Law Section. She serves on the Executive Committee of the New Jersey Chapter of the American Immigration Lawyers Association ("AILA") as Secretary, and is the New Jersey AILA Chapter Liaison to EOIR. She also served

on the AILA-National 2019 Convention Due Process Committee.

Paul W. Schmidt was an Immigration Judge in Arlington, Virginia from 2003 to 2016, before which he was Chairman of the EOIR BIA from 1995 to 2001, and a Member from 2001 to 2003. He was Deputy General Counsel of the INS from 1978 to 1987 and Acting General Counsel from 1979 to 1981 and again from 1986 to 1987. He was a founding member of the International Association of Refugee Law Judges, and presently is its Americas Vice President.

Ilyce Shugall was an Immigration Judge in San Francisco, California from 2017 to 2019.

Denise Slavin was an Immigration Judge in Baltimore, Maryland and Miami, Florida from 1995 to 2019.

Andrea Hawkins Sloan was an Immigration Judge in Portland, Oregon from 2010 to 2017.

Robert D. Vinikoor was an Immigration Judge in Chicago, Illinois from 1984 to 2017.

Polly Webber was an Immigration Judge in San Francisco, California from 1995 to 2016, with details in Tacoma, Washington; Port Isabel, Texas; Boise, Idaho; Houston, Texas; Atlanta, Georgia; Philadelphia, Pennsylvania; and Orlando, Florida Immigration Courts. She was National President of AILA from 1989 to 1990, and a National AILA Officer from 1985 to 1991.

Robert D. Weisel was an Immigration Judge in New York City, New York from 1989 to 2016. Judge Weisel was an Assistant Chief Immigration Judge, supervising court operations both in New York City and New Jersey. He was also in charge of the nationwide Immigration Court mentoring program for both Immigration Judges and Judicial Law Clerks and oversaw the New York City court's initiation of the first assigned counsel system within the Immigration Courts' nationwide Institutional Hearing Program.

SUMMARY OF ARGUMENT

This brief presents the view of former immigration judges ("IJs") and BIA members on an issue of vital importance to the functioning of our immigration system: whether to allow detained noncitizens in withholding-only cases to apply for release at individualized bond hearings. *Amici* believe that Respondents' position is the correct one because allowing such hearings provides substantial benefits: it makes withholding-only cases more administrable by streamlining dockets and the immigration court process; it preserves the statutory authority of IJs and leverages their practical expertise; and it helps ensure that Constitutional due process principles are upheld. Petitioners have offered no credible evidence that denying bond hearings would provide advantages outweighing these significant benefits.

This brief is divided into three parts. Section I provides an overview of how bond hearings work from the perspective of IJs. Section II explains why Petitioners' assertion that bond hearings in withholding-only proceedings lead to less streamlined

cases and impose an administrative burden on immigration courts is incorrect. Section III addresses how denial of bond hearings contributes to over-detention and exacerbates existing strains on the immigration detention system, particularly in light of the ongoing coronavirus pandemic.

ARGUMENT

I. Bond Hearings in Immigration Courts

Knowing the procedural structure of bond hearings and how IJs conduct those hearings is key to understanding why bond hearings during withholding-only proceedings under Section 1226 are administrable, in the interest of judicial economy, and consistent with the broad discretion granted to IJs.

A. General Principles of Removal

Immigration courts are the exclusive venue for proceedings to remove a noncitizen from the United States. 8 U.S.C. § 1229a(a)(1) and (3). The Department of Justice's EOIR operates sixty-seven immigration courts. The IJs who preside in these courts are appointed by the U.S. Attorney General. *See* 8 C.F.R. § 1003.10(a).

The Immigration and Nationality Act ("INA") vests DHS with the exclusive authority to commence removal proceedings. *See Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462, 465 (A.G. 2018). For over a century, this Court has recognized that removal is "among the severest of punishments" and has stressed the importance of protecting the due process rights of those who face removal. *See, e.g.*, *Fong Yue Ting v. U.S.*, 149

U.S. 698, 740-41 (1893) ("[Everyone] knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes [sic] most severe and cruel.").

B. Reinstatement of Removal and Withholding-Only Proceedings

Noncitizens removed from the United States pursuant to a removal order who subsequently return to the United States may have their removal reinstated.[2] If, however, they express to DHS a fear of return to their home country, then DHS must refer them to an asylum officer to determine whether they can articulate a "reasonable fear of persecution or torture," a higher standard than the "credible fear" required of first-time arrivals. 8 C.F.R. §§ 208.31, 241.8(e).

If an asylum officer concludes that a noncitizen has established a reasonable fear, the noncitizen is then referred to an IJ to apply for withholding of removal and protection under the United Nations Convention Against Torture ("CAT"). 8 C.F.R. § 208.31(e). Pending the IJ's decision, the noncitizen is held in

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[2] U.S. DEP'T OF JUSTICE ("DOJ"), WHAT TO DO IF YOU ARE IN EXPEDITED REMOVAL OR REINSTATEMENT OF REMOVAL, 7-11 (Oct. 2011), https://www.justice.gov/sites/default/files/eoir/legacy/2013/01/22/Expedited%20Removal%20-%20English%20%2817%29.pdf (last accessed Nov. 9, 2020).

federal custody,[3] which detention can last months,[4] unless he or she is released on bond. If an IJ grants withholding of removal, DHS cannot deport the noncitizen to the country where he or she faces persecution or torture, but can send the noncitizen to a third country. *See Lin v. U.S. Dep't of Just.*, 453 F.3d 99, 105 (2d Cir. 2006); 8 C.F.R. § 1208.16(f).

C. The Procedural Structure of Immigration Bond Hearings

Rather than remain in detention for the pendency of the immigration court proceedings, a noncitizen not subject to mandatory detention may be released on bond. *See* 8 U.S.C. § 1226(a); *Matter of Guerra*, 24 I. & N. Dec. 37, 37-38 (B.I.A. 2006), *abrogated on other grounds by Pensamiento v. McDonald*, 315 F. Supp. 3d 684 (D. Mass. 2018). To receive a bond hearing, a noncitizen generally must submit a request to the immigration court that has jurisdiction over the noncitizen's detention or the Office of the Chief Immigration Judge for designation of an immigration court to handle the request. 8 C.F.R. § 1003.19(c).[5]

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[3] *See* Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117, 118 (2016).

[4] *Id.* In 2013, ICE was estimated to have detained over 30,000 individuals for three months or longer, and over 10,000 individuals for six months or longer.

[5] *See* DOJ, IMMIGRATION COURT PRACTICE MANUAL, 133-34, (Nov. 3, 2020), https://www.justice.gov/eoir/page/file/1258536/download (last accessed Nov. 9, 2020) (detailing the application procedure for bond hearings).

After receiving a request for a bond hearing, the immigration court typically schedules the hearing for the earliest possible date. If, however, a noncitizen requests a bond hearing while he or she is already present for another type of hearing—for instance, a Master Calendar Hearing ("MCH") in a removal proceeding—the presiding IJ may take any of several courses of action: (i) "stop the other hearing and conduct a bond hearing on that date"; (ii) "complete the other hearing and conduct a bond hearing on that date"; (iii) "complete the other hearing and schedule a bond hearing for a later date"; or (iv) "stop the other hearing and schedule a bond hearing for a later date."[6]

Under ideal circumstances, a noncitizen will have requested a bond in advance of the MCH, which will allow the IJ, or the IJ's Court Administrator, to efficiently schedule both an MCH and a bond hearing for the same day.[7] Even where an individual has not requested a bond hearing in advance, an IJ may take up the issue of a bond *sua sponte*. Should the bond hearing become a contested matter, the IJ may order the parties to submit written materials in support of their respective positions.

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[6] *Id.* at 134.

[7] Generally, a bond hearing is a "non-record hearing." This means that if the bond hearing is held in connection with the MCH, after the MCH is completed, the IJ and parties may go off the record to conduct the bond hearing. At an IJ's discretion, however, bond hearings may be held on the record, and the record may be used if there is an appeal.

D. Evidentiary Considerations in Immigration Bond Hearings

Except when mandatory detention applies, whether a noncitizen will be released on bond and, if so, the amount of the bond, is at the IJ's discretion.[8] An IJ considers three broad factors when making a discretionary bond determination, namely whether the noncitizen (i) poses a danger to the community, (ii) is a threat to national security, and (iii) will likely appear for further immigration proceedings in light of the noncitizen's circumstances and ties to the United States. *See Matter of Patel*, 15 I. & N. Dec. 666 (B.I.A. 1976); *see also Matter of Siniauskas*, 27 I. & N. Dec. 207 (B.I.A. 2018). The noncitizen must submit evidence addressing all three factors; the government may also submit evidence and may clarify whether a bond has already been set and, if so, the amount of the bond and its justification for the bond amount. *See Matter of Urena*, 25 I. & N. Dec. 140, 141 (B.I.A. 2009).

When analyzing such a submission to determine the appropriateness and amount of a bond, an IJ may consider any "probative and specific" evidence, taking into account the facts and circumstances of the case, and considering the following factors: (i) whether the noncitizen has a fixed address in the United States; (ii) the noncitizen's length of residence in the United States; (iii) his or her family ties in the United States, and whether those connections may entitle the

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[8] *See* Am. Immigr. Council, *Seeking Release from Immigration Detention* (Sept. 13, 2019), https://www.americanimmigrationcouncil.org/research/release-immigration-detention (last accessed Nov. 9, 2020).

noncitizen to reside permanently in the United States in the future; (iv) the noncitizen's employment history; (v) his or her record of appearance in court; (vi) the noncitizen's criminal record, including how extensive and recent the criminal activity is, and the seriousness of the offenses; (vii) the noncitizen's history of immigration violations; (viii) his or her attempts to flee prosecution or otherwise escape from authorities; and (ix) how the noncitizen re-entered the United States. *See Matter of Guerra*, 24 I. & N. Dec. at 37, 40-41; *Matter of R-A-V-P-*, 27 I. & N. Dec. 803, 805 (B.I.A. 2020).

The IJ may give "greater weight to one factor over others, as long as the decision is reasonable." *See Matter of R-A-V-P-*, 27 I. & N. Dec. at 804-05. The IJ may also consider "the likelihood that relief from removal will be granted." *Id.* at 805 (*citing Matter of Andrade*, 19 I. & N. Dec. 488, 490 (B.I.A. 1987), for the proposition that a noncitizen "with a greater likelihood of being granted relief has a stronger motivation to appear for a hearing than one who has less potential to obtain relief").

Ordinarily, a noncitizen will receive one opportunity to present his or her case to an IJ for release pursuant to a bond. A request to reconsider the bond will be allowed only if "circumstances have changed materially since the prior bond determination." 8 C.F.R. § 1003.19(e).[9] Such reconsideration requests rarely result in a reversal of the IJ's decision. In addition, either party may appeal the IJ's bond decision to the

[9] *See also* DOJ, IMMIGRATION COURT PRACTICE MANUAL, *supra* note 5, at 134.

BIA, but the BIA is likewise generally reluctant to overturn a decision of the IJ. If the noncitizen appeals the bond determination, the IJ's bond decision remains in effect while the appeal is pending. If the government appeals, the IJ's bond decision likewise remains in effect while the appeal is pending unless the BIA issues an emergency stay or DHS stays the decision. *See* 8 C.F.R. §§ 1003.6(c), 1003.19(i).

E. Outcomes in Immigration Bond Hearings

Over the past two decades, the proportion of detained noncitizens who receive immigration bond hearings has risen from one in five to approximately one in two.[10] A majority of detainees who had bond hearings were granted release on bond between 2007 and 2012, but the bond grant rates have decreased marginally in subsequent years.[11] Although a greater percentage of bonds were granted for noncitizens represented by counsel than for unrepresented noncitizens, only fourteen percent of detained individuals had legal representation.[12]

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[10] *See* TRAC Immigr., *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?* (Sept. 14, 2016), https://trac.syr.edu/immigration/reports/438/ (last accessed Nov. 9, 2020).

[11] Emily Ryo, *Representing Immigrants: The Role of Lawyers in Immigration Bond Hearings* at 20 (USC Gould School of Law, Legal Studies Research Papers Series No. 18-11, 2018); *see also* TRAC Immigr., *Representation at Bond Hearings Rising but Outcomes Have Not Improved*, https://trac.syr.edu/immigration/reports/616/ (last accessed Nov. 9, 2020).

[12] Am. Immigr. Council, *Access to Counsel in Immigration Court* (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court (last accessed Nov. 9, 2020).

Significantly, few noncitizens absconded who posted bonds and were released. During fiscal year 2015, for example, just fourteen percent of all noncitizens failed to appear at their subsequent hearing[13]—a lower rate than those released on bond in non-immigration criminal proceedings, which was eighteen percent.[14] "Court records so far demonstrate that the practical result of the release of increasing numbers of individuals on bond has not resulted in any significant increase in those who abscond and fail to show up for their immigration hearings," and trends, "if anything, show declines."[15] Indeed, most noncitizens released on bond ultimately prevailed on their claims for immigration relief and were permitted to remain in the United States.[16]

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[13] *See* TRAC Immigr., *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, *supra* note 10.

[14] Will Dobbie, Jacob Goldin, & Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 214 (2018), https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20161503 (last accessed Nov. 9, 2020).

[15] *See* TRAC Immigr., *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, *supra* note 10.

[16] *Id.* (noting that, during the fiscal year 2015, "fully two out of every three (68%) won their case and were found not to be deportable").

II. Administrability of Bond Hearings and Proceedings When a Noncitizen Is Not Detained

Bond hearings in withholding of removal proceedings are not an administrative burden for IJs. IJs have substantial experience conducting bond hearings, and bond hearings in withholding of removal proceedings are no different than bond hearings in other contexts. Indeed, contrary to Petitioners' assertion, bond hearings in withholding of removal proceedings neither lead to a slowdown of cases that "thwart Congress' objectives" in enacting the immigration laws, nor impose an administrative burden on immigration courts. *See* Petitioners' Brief at 20, 34 (arguing Respondents' position is "patently unworkable" and would "fail to 'take appropriate account' of the 'serious administrative needs and concerns inherent in the necessarily extensive [DHS] efforts to enforce'" the immigration laws (quoting *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001)).

Not only do IJs routinely make bond determinations (and such determinations are therefore not an unusual or burdensome feature of the day-to-day work of IJs), but, as explained below, immigration court proceedings are fairer and more administrable when individuals seeking relief are not detained. A ruling allowing noncitizens in withholding-only proceedings to seek individualized bond determinations furthers judicial economy.

A. Bond Hearings Are Routine and Streamlined

Petitioners' argument that individualized bond hearings make withholding-only cases less administrable is based on a misunderstanding of the routine role bond hearings play in immigration court proceedings, and is without merit. Further, Petitioners fail to recognize that noncitizens seeking withholding of removal are often subject to a lengthy hearing process, and if either party files an appeal or cases are remanded by the BIA or the Article III courts, it may take four to five months to resolve them.[17] Thus, the more "streamlined procedures adopted by DHS under Section 1231(a)" as applied to Respondents are actually not streamlined at all. Petitioners' Brief at 20.

Individualized bond hearings are a well-established statutory feature of immigration court proceedings, and IJs are experienced and adept at exercising their statutory discretion over bond determinations. IJs have flexibility to calendar individualized bond hearings so that they do not interrupt or delay the administration of any other part of the proceeding. Indeed, bond hearings usually take little time and, as noted, often are held concurrently with the MCH—thus, the IJ, noncitizen, and DHS prosecutor are already in the court and prepared to discuss the

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[17] *See* U.S. GOV'T ACCOUNTABILITY OFF. ("GAO"), IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES (June 2017), https://www.gao.gov/assets/690/685022.pdf (describing the growing backlog in immigration courts and finding that cases can drag on for years before a decision is reached) (last accessed Nov. 9, 2020).

merits of the underlying claim for relief and the considerations for granting bond. The idea that it is more "streamlined" to detain an applicant for months to avoid what is typically a routinely scheduled, short hearing cannot withstand scrutiny. To the contrary, bond hearings contribute to efficient adjudication of hearings on the merits of noncitizens' claims for immigration relief because when noncitizens are safely released on bond they are in a better position to develop their applications for relief and present a more complete and organized narrative to the IJ.

Further, most IJs have a steady flow of asylum cases on their dockets, giving them a well-developed understanding of the bond risks in withholding-only cases; noncitizens seeking release on bond often face similar circumstances. Thus, IJs are familiar with the relevant factors and the types of evidence that are typically presented during a bond hearing. Additionally, when dealing with a bond request from withholding of removal applicants, IJs will have the entire record, including the past record of deportation, before them. Because of this, IJs can reach reasoned and accurate bond decisions efficiently. In practice, this means bond hearings are, contrary to Petitioners' contention, not a roadblock. There is therefore no basis for Petitioners' contention that bond hearings "complicate procedure" in the immigration courts; in fact, they are a routine part of an IJ's regular docket.

B. Noncitizens Who Are Not Detained Are More Likely to Have Counsel and Access to Evidence, Which Streamlines the Proceedings

Cases in which the noncitizen is not detained are far more administrable than those in which the noncitizen remains in custody primarily because, historically, non-detained noncitizens are between two and four times more likely to be represented by counsel.[18] When represented by counsel, noncitizens are better prepared to navigate the withholding-only proceedings process, leading to better developed and organized cases.[19] Represented noncitizens are also much more likely to be prepared for their scheduled appearances, resulting in their cases being handled more efficiently and requiring fewer continuances and judicial resources. By contrast, noncitizens who are not represented by legal counsel can be (understandably) unprepared for their hearings, leading to delays in the administration of their cases, and additional cost and burden on the immigration courts and an IJ's individual docket.

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[18] *See* TRAC Immigr., *Who Is Represented in Immigration Court?* (2017), https://trac.syr.edu/immigration/reports/485/ (last accessed Nov. 9, 2020); Am. Immigr. Council, *Access to Counsel in Immigration Court*, *supra* note 12.

[19] *See* Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 66 (2015), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review (last accessed Nov. 9, 2020); Am. Immigr. Council, *Access to Counsel in Immigration Court*, *supra* note 12.

Non-detained noncitizens represented by counsel are also much more likely to be able to timely gather the evidence they need to fully present their cases, evidence that can be difficult or impossible to obtain while detained. For example, noncitizens often require records from foreign governments to fully present their cases. Determining exactly which forms and signatures are required, where the request needs to be made, or what level of detail needs to be included in the request often requires significant research and follow-up. Failure to follow the requisite bureaucratic procedure precisely will regularly result in an automatic denial of the records request. The process is more difficult where the foreign government is excessively bureaucratic, inefficient, or corrupt, which is true of many of the countries from which noncitizens in withholding-only proceedings are fleeing persecution or torture. As a result, detained noncitizens often do not present a complete record, which typically results in multiple requests for adjournments and continuances while the noncitizens struggle to assemble the evidence necessary to present their cases.

Similarly, noncitizens in custody are less likely to have access to adequate legal resources, resulting in them having an incomplete understanding of the immigration court process and being poorly positioned to prepare their cases and navigate the immigration court system. This problem is compounded when, as is often the case, the detained noncitizen has no or limited English language proficiency, and without assistance of counsel is unaware of the full nature of the proceedings; the IJ is thus required to spend

significant time explaining the proceedings through a translator, which further delays the process.

Counsel can assist in obtaining the necessary evidence and explaining the process in advance to their clients. From an IJ's perspective, therefore, it is far easier and more efficient to allow noncitizens to be released on bond where appropriate because, in those cases, the noncitizens are more likely to be represented and adequately prepared—neither of which is likely to happen if Petitioners' position is adopted.

C. Evidence and Logic Confirm That Noncitizens Who Are Not Detained Will Still Appear in Immigration Court

Petitioners contend that individualized bond hearings "hinder removal"; that noncitizens have "strong incentives to abscond in order to avoid execution of the removal order"; and that mandatory detention "ensur[es] that such aliens do not abscond to avoid removal." Petitioners' Brief at 20. Studies, practice, and common sense, however, show the opposite is true.

Petitioners ignore that obtaining the relief that the noncitizens seek requires the noncitizens to appear at every scheduled immigration hearing. Thus, noncitizens have a strong interest in diligently pursuing their cases to their legal conclusions. Between 2008 and 2018, ninety-five percent of all noncitizens, including those in detention, who filed applications for immigration relief came to all of their

court hearings.[20] Similarly, noncitizens, including those in detention, seeking immigration relief who obtained lawyers appeared for every scheduled immigration court hearing ninety-six percent of the time.[21] These numbers empirically validate the conclusion that those who have sought immigration relief, including withholding of removal, have a strong incentive to engage with the immigration court system and not to abscond—and that the vast majority of noncitizens seeking relief appear at all their immigration court hearings.

The small percentage of individuals seeking relief who do not appear for court hearings typically do not have nefarious reasons. Often, noncitizens who are not represented by counsel erroneously believe that when they attend mandatory check-in appointments with ICE, they are appearing at court hearings, and then miss their actual court dates.[22] Those seeking relief thus are sometimes unaware of when and where to report for their hearing. *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 442-43 (B.I.A. 2018). A failure to appear might also result from something as simple as a failure to notify the court of a change of address or difficulty interpreting court notices (particularly for those who do not speak English).[23] More often, those

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[20] Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, 168 U. PENN. L. REV. 816, 826, 865 (2020).

[21] *Id.* at 826.

[22] *Id.* at 861.

[23] *Id.* at 861-62.

who fail to appear do so by mistake, rather than intentionally evading the immigration court's reach.

Regardless, missing a hearing overwhelmingly results in an order of the noncitizens' removal from the United States—the very fate they are trying to avoid.[24] IJs must order removal *in absentia* if a noncitizen who has received a valid notice to appear and has been properly notified misses even one scheduled court hearing at which the government establishes that the noncitizen is subject to removal. *See* 8 U.S.C. § 1229a(b)(5)(a). An *in absentia* order of removal entered in the case of such a failure to appear then renders the noncitizen both inadmissible to the United States and barred from most forms of immigration relief for a substantial period of years. 8 U.S.C. §§ 1182(a)(6)(B), 1229a(b)(7).

Petitioners claim that individuals in withholding of removal proceedings are incentivized not to return for future hearings because of their "willingness to disregard the immigration laws and a prior removal order by entering the country illegally after a prior removal." Petitioners' Brief at 20-21. But by Petitioners' logic, no individuals in detention will ever be eligible for bond hearings because each has, in the government's view, demonstrated "a willingness to disregard the immigration laws." *Id.* at 20. Petitioners themselves acknowledge that, by statute, one of the determinations IJs must make when evaluating

[24] Courts have infrequently found that *in absentia* removal is not warranted where notice of the missed hearing was defective, but such a standard is high, and more often, deficiencies in notice are not a basis on which to reverse a removal order.

whether to release an individual on bond is whether "'the alien is likely to appear for any scheduled proceeding.'" *See* Petitioners' Brief at 34a (quoting 8 C.F.R. § 236.1(c)(3)). Congress has granted IJs statutory discretion to make that determination for a reason—because it is not pointless. Thus, a noncitizen's prior "willingness to disregard the immigration laws" cannot plausibly be the basis for the categorical denial of release pursuant to bonds for all noncitizens in withholding-only proceedings.

Just as Petitioners overstate the risk of individuals absconding, so too do they ask for an over-expansive remedy to address that risk. As Petitioners acknowledge, Section 1226(a) allows the imposition of bond conditions to reduce risk of flight. *See* Petitioners' Brief at 21. During a bond hearing, for example, DHS may propose one of its Alternatives to Detention ("ATD"), a group of programs that include, for example, supervised release or technology monitoring. *See* 8 U.S.C. § 1231(a); 8 C.F.R. §§ 241.4, 241.5, 241.13, 241.14; 8 C.F.R. § 1236.1(d)(1).[25] These alternatives have not only effectively ensured that individuals appear at their immigration hearings (a fact DHS has implicitly acknowledged by continuing to request more funding to increase ATD capacity), but can also be

[25] ICE, DETENTION MANAGEMENT (Oct. 13, 2020), https://www.ice.gov/detention-management#tab2 (last accessed Nov. 9, 2020); *see also* Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141 (2017) (discussing conditions of supervised release, such as regular check-ins and relinquishment of travel documents, electronic monitoring, and community based alternatives to detention, and noting the high rate of effectiveness of each alternative).

dramatically less expensive than detention.[26] *See Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (citing statistics that ATD programs resulted in high attendance rates).

D. Safeguards Are Already in Place to Ensure That Releasing a Noncitizen on Bond Will Not Harm the Public

Allowing noncitizens in withholding-only cases to be released from incarceration by posting a bond does not threaten public health or safety. No evidence exists that any significant number of individuals in withholding-only cases who have been released has proven to be dangerous. In fact, individuals who come to the United States fleeing persecution or torture in their home countries are more likely than not to be the subjects of violence and persecution—not the perpetrators. For those cases where evidence exists to suggest that a noncitizen in a withholding-only case might pose such a material threat, IJs are required to consider that evidence and evaluate that risk as part of their routine assessment of the three factors affecting all discretionary bond determinations. Therefore, the same statutory framework that Petitioners themselves acknowledge governs an IJ's determination of when to grant a discretionary bond, *see* Petitioners' Brief at 34a (quoting 8 C.F.R. § 236.1(c)(3)), also ensures that IJs

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[26] GAO, REPORT TO CONGRESSIONAL COMMITTEES: ALTERNATIVES TO DETENTION, 18 (Nov. 2014), https://www.gao.gov/assets/670/666911.pdf ("[O]ur analyses showed that the average daily cost of the ATD program ($10.55) was significantly less than the average daily cost of detention ($158) in fiscal year 2013.") (last accessed Nov. 9, 2020).

are not releasing potentially dangerous noncitizens in withholding-only proceedings.

E. It Is Easier to Ensure Due Process Is Afforded to Noncitizens When They Are Not Detained

Petitioners' position would make withholding-only proceedings less administrable by making it more difficult for IJs to ensure that due process is provided in such cases. *See Castro-Cortez v. I.N.S.*, 239 F.3d 1037, 1047-50 (9th Cir. 2001) (citing *Yamataya v. Fisher*, 189 U.S. 86 (1903)), *abrogated on other grounds by Fernandez-Vargas v. Gonzalez*, 548 U.S. 30, 36 & n.5 (2006) ("[T]here is no dispute that aliens subject to orders of reinstatement enjoy Fifth Amendment protection."); *see also Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 867 (8th Cir. 2002) (acknowledging that noncitizens in reinstatement of removal cases have due process rights), *overruled on other grounds*, *Gonzalez v. Chertoff*, 454 F.3d 813, 818 n.4 (8th Cir. 2006).[27]

Due process concerns in withholding-only cases include, but are not limited to, lack of: a full and fair hearing; a meaningful opportunity to present and rebut evidence (which may include cross-examining witnesses); ability to develop an adequate administrative record; access to counsel; and notice of the right to seek review. To effectively adjudicate withholding-only cases, IJs must be conscious of these

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[27] *See also* Am. Immigr. Council, *Reinstatement of Removal Practice Advisory* (May 23, 2019) https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf (summarizing due process concerns in reinstatement of removal cases and collecting cases) (last accessed Nov. 9, 2020).

due process concerns and conduct proceedings consistent with litigants' due process rights. *See U.S. v. Mendoza-Lopez*, 481 U.S. 828 (1987); *Lattab v. Ashcroft*, 384 F.3d 8, 21 n.6 (1st Cir. 2004); *U.S. v. Charleswell*, 456 F.3d 347, 356-57 (3d Cir. 2006); *Bejjani v. I.N.S.*, 271 F.3d 670, 687 (6th Cir. 2001); *Castro-Cortez v. I.N.S.*, 239 F.3d at 1047-50 (finding that denying noncitizens a meaningful opportunity to introduce evidence fails to "comport[] with fundamental notions of due process").

Affording a noncitizen due process is more difficult when a noncitizen is detained because detained noncitizens are much less likely to be represented by counsel, which increases the risk that the noncitizen will be deprived of his or her due process rights. Moreover, adjudicating unrepresented detained noncitizens' cases significantly increases the workload of the IJ. To ensure that an unrepresented noncitizen is afforded due process, an IJ must, for example, repeatedly and fully explain the process and the detained noncitizen's rights and responsibilities. This can be time consuming and is, of course, compounded by the fact that most cases involve the use of interpreters, which more than doubles the time required.

The current administrative climate heightens these due process concerns. IJs have been threatened with disciplinary action if they do not meet strict quotas and deadlines for the completion of cases, including cases in

which noncitizens remain in detention.[28] This overriding pressure to "clear" cases off the immigration court docket (which is designed, at least in part, to alleviate the costs of detaining a large number of noncitizens for extended periods of time), makes it more difficult for IJs to afford detained noncitizens adequate due process. As a result, these cases are more likely to result in due process violations and remands requiring re-hearings, consuming judicial and administrative resources (to say nothing of potentially violating the Constitutional rights of the detained individual).

F. The Small Number of Withholding-Only Cases Means Bond Hearings Will Not Have a Material Impact on Court Administration

Withholding-only cases comprise only about one percent of the total cases in the immigration courts and, on average, on any individual IJ's docket.[29] Therefore, even if all of Petitioners' arguments about the burdensome effects of allowing individualized bond hearings in withholding-only cases were well-founded (which they are not), the actual administrative burden

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[28] *See* DOJ, IMMIGRATION JUDGE PERFORMANCE METRICS MEMO (Mar. 30, 2018), https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics (last accessed Nov. 9, 2020); EOIR, PERFORMANCE PLAN (Oct. 1, 2018), http://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf (last accessed Nov. 9, 2020).

[29] *See* EOIR, STATISTICS YEARBOOK FISCAL YEAR 2018, https://www.justice.gov/eoir/file/1198896/download (reporting approximately one percent of total immigration court cases were withholding-only) (last accessed Nov. 9, 2020).

caused by permitting bond hearings in these cases would be negligible and strongly outweighed by the real, practical benefits of allowing the approximately 8,000 noncitizens in pending withholding-only cases to apply for bond.

In short, Petitioners' position, if accepted, would complicate withholding-only cases and make them less administrable. In contrast, allowing noncitizens in withholding-only cases to apply for release at individualized bond hearings would make these cases more administrable and help ensure fair hearings. Petitioners have offered no credible evidence that there are any advantages of denying bond hearings that would outweigh these substantial benefits.

III. The Problems of Over-Detention

A. Denial of Bond Hearings Will Lead to Over-Detention of Those Who Pose No Flight Risk and Who Are Not a Risk to Public Safety

Petitioners seek to remove detention decision-making from IJs and give it solely to ICE. As Petitioners acknowledge, ICE will conduct a review of whether a noncitizen should be detained at the outset of detention, considering "[f]avorable factors" (*e.g.*, "close relatives residing here lawfully") and unfavorable factors (*e.g.*, the likelihood that "the alien is a significant flight risk" or would "[e]ngage in future criminal activity"). *See, e.g.*, 8 C.F.R. § 241.4(f), Petitioners' Brief at 35. Leaving this decision to ICE alone, however, not only contravenes longstanding practice, but also inappropriately vests bond decisions

with an agency charged with enforcement, not adjudicatory responsibility.[30] Pursuant to statute, applicants must establish before an IJ by clear and convincing evidence that they are not a danger or flight risk. 8 C.F.R. § 1236.1(c). This high burden, imposed by law, together with a lack of evidence that it is not being enforced by IJs, belies any concern that IJs are being overly permissive in granting bond or release.

B. Petitioners' Interpretation Will Further Strain the Immigration Detention System Already Imperiled by COVID-19

The government is responsible for protecting noncitizens' health and safety while detained. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (a "prison official's deliberate indifference to an inmate's serious medical needs is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment"). As a matter of due process, immigrants held in detention are entitled to "safe conditions of confinement," and the government is obligated "to provide reasonable safety for all residents and personnel within the institution." *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

The COVID-19 pandemic poses an immediate threat to the safety of detained persons, as well as those

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[30] Further, ICE is subject to "outside influences which encourage a determination of detention." Jeremy Pepper, *Pay Up or Else: Immigration Bond and How a Small Procedural Change Could Liberate Immigrant Detainees*, 60 B.C. L. REV. 951, 972 (2019); *see also* Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 183-84 (2016).

working in detention facilities.[31] By August 30, 2020, 5,355 detained individuals and 45 ICE employees (not including third-party contractors) who work at detention centers had tested positive for the coronavirus.[32] On July 13, 2020, executives from private prison companies testifying before Congress stated that nearly 1,000 of their employees had tested positive for the coronavirus.[33] This is likely to be an undercount of cases because detention centers have been refraining from testing all persons they know have been exposed to someone who has become ill.[34]

Since late March, dozens of federal lawsuits have been filed seeking, among other relief, individualized bond hearings on the grounds that detainment poses an unreasonable risk for contracting the coronavirus and violates the Fifth Amendment and other due process rights.[35] Those in detention centers cannot socially distance and are not being provided with adequate personal protective equipment; those who test

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[31] Am. Immigr. Lawyers Ass'n, *Deaths at Adult Detention Centers* (last updated Sept. 26, 2020), https://www.aila.org/ICEdeaths (documenting deaths in ICE detention since the start of the COVID-19 pandemic) (last accessed Nov. 9, 2020).

[32] Jorge Loweree, Aaron Reichlin-Melnick, & Walter A. Ewing, *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*, at 34, https://www.americanimmigrationcouncil.org/sites/default/files/research/the_impact_of_covid-19_on_noncitizens_and_across_the_us_immigration_system.pdf (last accessed Nov. 9, 2020).

[33] *Id.*

[34] *Id.* at 34-35.

[35] *Id.* at 35.

positive are often not being held in quarantine, but are actually continuing to be transported between detention facilities. *See, e.g., Yanes v. Martin*, No. 20-CV-00216, slip op. at 7-13 (D.R.I. June 2, 2020) ("The number of detainees currently held there is 578 requiring some inmates to occupy cells with at least one other—a situation that makes 'social distancing' impossible"; "social distancing [is] impossible during all meals"; "detainees are required to stand in line to receive meals, a process which also makes social distancing impossible"; "Staff are mingled throughout the institution; there appears to be no attempt to limit the number of different staff with whom detainees come into contact"); *Barerra v. Wolf*, No. 20-CV-1241, slip op. at 3-5 (S.D. Tex. Sept. 21, 2020) ("Plaintiffs are not given hand sanitizer, or facial tissue, and there are often soap shortages"; "Plaintiffs, including those who are ill with COVID-19, clean the dormitories and bathrooms and are often not given gloves to do so"; "Detainees who have tested positive are also transferred across various housing units during their COVID-19 recovery").

Based on these grave safety concerns, a number of federal courts have granted bond hearings for individual and class petitioners. *See, e.g., Barerra*, 20-CV-1241, at 20 (granting individualized bond hearings to eight petitioners in light of COVID-19 pandemic); *Yanes*, 20-CV-00216, at 14-15 (granting individualized bond hearings to class of petitioners); *Roman v. Wolf*, No. 20-CV-00768, slip op. at 2 (W.D. Ca. June 17, 2020) (same); *Savino v. Hodgson*, No. 20-CV-10617, slip op. at 2 (D. Mass. Apr. 8, 2020) (same).

Petitioners' interpretation of the statute will only exacerbate the dire situation faced by detention centers from the COVID-19 pandemic. While at the beginning of the pandemic ICE promised to focus its enforcement efforts on public safety risks and individuals subject to mandatory detention on criminal grounds, the agency seems to have since shifted course.[36] Petitioners' position here likewise runs counter to the goal of releasing those who need not be in detention to reduce the overall number of detained persons and prevent the spread of COVID-19. That detained persons are seeking emergency habeas relief from the federal courts in such great numbers evidences the fact that there is even greater need now to allow for individualized bond hearings for those seeking immigration relief, including in withholding-only proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Fourth Circuit should be affirmed.

[36] Loweree, Reichlin-Melnick, & Ewing, *supra* note 32.

Respectfully submitted.

DAVID G. KEYKO
Counsel of Record
ROBERT L. SILLS
MATTHEW F. PUTORTI
DARYL L. KLEIMAN
PATRICIA A. ROTHENBERG
ROLAND C. REIMERS
PILLSBURY WINTHROP SHAW PITTMAN LLP
31 West 52nd Street
New York, NY 10019
(212) 858-1379
david.keyko@pillsburylaw.com

Counsel for Amici Curiae