

Nos. 20-322, 19-896

In The
Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, et al.,
Petitioners,

v.

ESTEBAN ALEMAN GONZALEZ, et al.,
Respondents.

TAE D. JOHNSON, ACTING DIRECTOR OF U.S.
IMMIGRATION AND CUSTOMS ENFORCEMENT, et al.,
Petitioners,

v.

ANTONIO ARTEAGA-MARTINEZ,
Respondent.

**On Writs Of Certiorari To The
United States Courts Of Appeals
For The Ninth And Third Circuits**

**BRIEF OF AMICI CURIAE
ASIAN AMERICANS ADVANCING JUSTICE—
ASIAN LAW CAUCUS, ET AL.
IN SUPPORT OF RESPONDENTS**

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STATEMENT OF INTEREST

Amici curiae are forty-four legal service providers, immigrant rights organizations, law clinics, and other community-based organizations concerned about the adequacy of due process safeguards for detained noncitizens.¹ Likewise, *amici curiae* have clients and membership who have suffered the serious physical and mental health consequences of prolonged detention. Many of these clients are pursuing claims for relief, so that they may remain in the United States with their loved ones and their communities and safe from the dangers they would face if deported.

We have a profound interest in ensuring that the voices of our members and clients are included in the resolution of the legal issues in this case. Their stories demonstrate the horrific and irreparable harm of prolonged detention, the gross inadequacy of the post-order custody review (“POCR”) process, and the need for continued access to individualized assessments of flight risk and danger to the community before a neutral adjudicator for noncitizens detained under 8 U.S.C. § 1231.

The names of each organization are appended after the conclusion of this brief.



¹ *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioners and respondents have consented to the filing of this brief pursuant to Rule 37.3(a).

SUMMARY OF ARGUMENT

Individuals with final orders of removal have significant due process interests, and their detention causes them to experience serious and irreparable harm. Many noncitizens detained under 8 U.S.C. § 1231 are pursuing a variety of bona fide claims for legal relief—claims that are all the more difficult to pursue from the confines of detention, posing serious due process problems. These noncitizens suffer greatly from the experience of immigration detention, which subjects them to violence and mistreatment, has grave consequences for their physical and mental health, and tears their families apart.

Immigration and Customs Enforcement (“ICE”)’s post-order custody review (“POCR”) process, which is nominally intended to provide noncitizens detained under 8 U.S.C. § 1231 with a procedural avenue to seek release, does not comply with due process. Noncitizens in prolonged detention are regularly denied release based on little or no reasoning. ICE’s POCR regulations do not truly guarantee the right of detained noncitizens to counsel or to provide evidence. Moreover, the POCR process is not designed to provide an opportunity to seek release for those noncitizens who are pursuing their legal right to seek relief from deportation.

Consequently, bond hearings in front of a neutral arbiter which compel the government to defend its continued detention of noncitizens are vitally important. Through bond hearings like those available

under *Guerrero-Sanchez v. Warden, York Cnty. Prison*, 905 F.3d 208 (3d Cir. 2018) and *Aleman Gonzalez v. Barr*, 955 F.3d 762 (9th Cir. 2020), noncitizens have an opportunity to better pursue their claims for relief, reunite with their families, and be free from the inhumane conditions of immigration detention.

◆

ARGUMENT

I. Individuals with Final Orders of Removal Have Significant Due Process Interests, and Their Detention Causes Them to Experience Serious and Irreparable Harm.

Noncitizens with final orders of removal are regularly detained for prolonged periods despite pursuing bona fide legal claims. These include applications for withholding of removal,² relief under the Convention Against Torture,³ motions to reopen immigration proceedings,⁴ and claims for other forms of relief. While noncitizens, many of whom are survivors of torture, pursue these claims, detention inflicts severe harm on their bodies, minds, and families.

² See 8 U.S.C. § 1231(b)(3)(B).

³ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (“CAT”); see also 8 C.F.R. § 208.8.

⁴ See 8 U.S.C. § 1229a(c)(7), 8 C.F.R. § 1003.23.

A. Noncitizens detained under 8 U.S.C. § 1231 have valid claims for relief from removal, including fear-based claims.

“As a torture survivor I have a strong claim for immigration relief. . . . For these reasons I request that a bond be granted.”

—**Fernando Trujillo Sanchez**⁵

Many noncitizens who pursue valid claims for relief after receiving final orders of removal are subjected to prolonged detention. When ICE reinstates these individuals’ removal orders, and when, after an interview, ICE finds that they have a reasonable fear of returning to their country of origin, it places them into withholding-only removal proceedings, where they can seek withholding of removal and protection under the Convention Against Torture. While noncitizens pursue these and other forms of relief—a process which is usually lengthy—ICE often continues to detain them, without regard to their due process rights to present their valid claims.

For example, **Fernando Trujillo Sanchez**⁶ was detained for nearly a year and a half before he was released through an *Aleman Gonzalez* bond hearing and subsequently granted relief under the Convention Against Torture. Mr. Trujillo Sanchez, who had a prior

⁵ “Fernando Trujillo Sanchez” is a pseudonym to protect Mr. Trujillo Sanchez’s identity. The facts of his case are detailed in a declaration by his attorney. *See* Decl. of Heliodoro Moreno, Esq. (on file with counsel).

⁶ *See id.*

removal order, reentered the United States after a cartel and local police in Mexico brutally beat him and slit his throat. Despite the persecution he had faced after his previous removal, and the strength of his claim for protection, Mr. Trujillo Sanchez was subjected to prolonged detention while he pursued his claim for relief. While detained, Mr. Trujillo Sanchez, who had a history of past trauma, was afflicted with symptoms of post-traumatic stress disorder.

Juan Pedro Hernandez⁷ endured six months of detention while pursuing a withholding of removal claim due to his fear of persecution in Honduras, his country of origin, which an immigration judge ultimately granted. While detained he was sexually assaulted by a contractor employed by ICE. Mr. Hernandez reported the assault to the police, was interviewed by prosecutors, and filed an application for a U visa, a special visa for victims of crime,⁸ based on his cooperation. He was only able to secure release from ICE custody through an *Aleman Gonzalez* bond hearing.

Seventeen months after Mr. Hernandez's release, an immigration judge granted him withholding of removal based on the extreme harm he and his family experienced during his prior removal to Honduras. Mr. Hernandez had faced death threats against him and

⁷ "Juan Pedro Hernandez" is a pseudonym to protect Mr. Hernandez's identity. The facts of his case are detailed in a declaration by his attorney. See Decl. of Elizabeth Davis, Esq. (on file with counsel).

⁸ See 8 U.S.C. § 1101(a)(15)(U).

his family members, an invasion of his mother's home, forced relocation of him and his immediate family, and the murder of his uncle and two cousins by the MS-13 gang. This harm stemmed from the gang's belief that Mr. Hernandez had cooperated with law enforcement as an informant against their organization. Despite the strength of his fears that deportation would subject him this extreme harm again, Mr. Hernandez was kept detained for six months. To this day, Mr. Hernandez experiences post-traumatic stress disorder and depression because of the assault.

Amlorn Siratana⁹ was arrested by ICE and separated from his family for seven months while he pursued a motion to reopen his removal proceedings based on the decision of the Board of Immigration Appeals ("BIA") in *Matter of Abdelghany*, 26 I. & N. Dec. 254, 265 (BIA 2014) (limiting retroactive application of repeal of 212(c) relief). Ultimately, after a court vacated the criminal conviction that led to his order of removal, Mr. Siratana's removal proceedings were reopened and terminated.

Mr. Siratana entered the United States as a refugee when fleeing the Cambodian genocide at the age of nine and became a lawful permanent resident. Mr. Siratana was ordered removed in 1998 for a prior criminal conviction but was released on an order of

⁹ The facts of Mr. Siratana's case are detailed in a declaration by his attorney. See Decl. of Melanie Kim, Esq. (on file with counsel).

supervision¹⁰ because Cambodia did not agree to his repatriation. After ICE released Mr. Siratana, he returned to his community, began working as an auto mechanic, met his U.S.-citizen wife, and lived peacefully with his wife and children until August of 2018, when ICE abruptly arrested him again.

Mr. Siratana was so despondent while separated from his family in detention that he considered giving up his case and accepting deportation to Cambodia, a country where he “did not know anyone and does not know how [he] would survive.”¹¹ Mr. Siratana’s parents immigrated to Cambodia from Laos and Thailand; he is not ethnically Cambodian and cannot speak Khmer. Mr. Siratana suffered in detention for seven months before being released on bond through an *Aleman Gonzalez* hearing.

Other stories contained below highlight additional forms of relief that individuals detained under 8 U.S.C. § 1231 are statutorily eligible to pursue. **Seedy Drammah**,¹² for instance, is eligible for cancellation of removal under this Court’s recent decision in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), due to defects in the original charging document in his case.

¹⁰ ICE may issue an order of supervision after the removal period ends; these orders generally require a noncitizen to report regularly to ICE and abide by stated conditions. *See* 8 U.S.C. § 1231(a)(3).

¹¹ *See* Decl. of Melanie Kim, Esq., *supra* note 9.

¹² The facts of Mr. Drammah’s case are detailed in a declaration by his attorney. *See* Decl. of Sarah Gillman, Esq. (on file with counsel).

Amadou Barry¹³ filed a motion to reopen his political asylum case based on the ineffective assistance of prior counsel. Nonetheless, these people were held in detention until they were able to obtain the hearings currently available under *Guerrero-Sanchez* and *Aleman Gonzalez*. These hearings are often the only hope for release and freedom from arbitrary and prolonged detention—freedom which allows noncitizens to better pursue their meritorious claims for relief.

B. Prolonged detention causes serious and irreparable harm to noncitizens and their families, warranting robust procedural protections.

“I desperately wish to be released from detention while this [COVID-19] outbreak is happening so that I can feel safe. I do not receive adequate medical attention while in detention as it is.”

—**Maria Perez Santos**¹⁴

Immigration detention in the United States is penal in character, punitive in form, and inhumane in practice.¹⁵ Detention dehumanizes, and it impedes the

¹³ “Amadou Barry” is a pseudonym to protect Mr. Barry’s identity. The facts of his case are detailed in a declaration by his attorney. *See* Decl. of Jessica Rofé, Esq. (on file with counsel).

¹⁴ “Maria Perez Santos” is a pseudonym to protect Ms. Perez’s identity. The facts of her case are detailed in a declaration by her attorney. *See* Decl. of Priscilla Merida, Esq. (on file with counsel).

¹⁵ *See, e.g.,* HUMAN RTS. WATCH, ET AL., CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 63–64 (2018), <https://www.hrw.org/report/2018/05/22/code-red>.

ability of noncitizens to vindicate their rights. The harmful effects of immigration detention include serious physical and mental health consequences; traumatic experiences of assault, harassment, and punitive solitary confinement; and family separation that upends the lives of citizens and noncitizens alike.

Noncitizens' physical health conditions often go untreated while in ICE detention, exacerbating their conditions and resulting in needless suffering. The ongoing COVID-19 pandemic has made things even worse for detained noncitizens, as the virus has spread widely among cramped detainee populations.

Maria Perez Santos¹⁶ is an Indigenous woman from Mexico who contracted COVID-19 while she was detained and pursuing her claim for withholding of removal. In January 2020, while dropping off her child at school, Ms. Perez was arrested by ICE and placed into detention. Ms. Perez was especially vulnerable in detention because of her preexisting health conditions, which include a history of gestational diabetes and chronic stomach pain, which a doctor informed her was probably due to ulcers or gallbladder problems.

[hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf) (“The US detention system regularly detains individuals with serious medical and mental health conditions, sometimes for prolonged periods of time, in facilities ill-equipped to provide appropriate care, without sufficient consideration of the impact of detention on these individuals’ health, leading to sometimes fatal consequences.”).

¹⁶ See Decl. of Priscilla Merida, Esq., *supra* note 14.

Throughout her detention, and despite the onset of the COVID-19 pandemic, ICE did not provide Ms. Perez with adequate medical care. Her serious chronic stomach pain was treated only with Pepto-Bismol. In April 2020, Ms. Perez contracted COVID-19, and began to experience symptoms including diarrhea, headaches, body chills, and night sweats. Even then, Ms. Perez remained detained, without access to hand sanitizer, gloves, or the ability to maintain physical distance from other detainees.

Ms. Perez was only released when she was able to secure a bond hearing under *Aleman Gonzalez*. She continues to pursue her withholding of removal claim, which is based on abuse she experienced in Mexico following her prior removal; Ms. Perez was deported to Mexico after her husband, whom she was forced to marry at age fifteen, brought her to the United States. In total, Ms. Perez was detained and separated from her four children for six months. At the time of her detention, her youngest daughter was only eight years old.

Noncitizens in prolonged detention also suffer serious consequences for their mental health.¹⁷ For **Amadou Barry**,¹⁸ an asylum seeker from a West African country, detention brought back the terror he faced when the government of his country of origin tortured

¹⁷ See José Olivares, *ICE Review of Immigrant's Suicide Finds Falsified Documents, Neglect, and Improper Confinement*, THE INTERCEPT (Oct. 23, 2021, 6:00 AM), <https://theintercept.com/2021/10/23/ice-review-neglect-stewart-suicide-corecivic/>.

¹⁸ See Decl. of Jessica Rofé, Esq., *supra* note 13.

him for his political activism. Following his detention, a psychiatrist diagnosed him with major depressive disorder and anxious distress, noting that “[t]he unexpected twists and turns with no clear purpose or reason have led this current detention to awaken memories of when he was tortured.” **Juan Pedro Hernandez**,¹⁹ who was sexually assaulted by an ICE contractor while detained, experiences post-traumatic stress disorder and depression as a result of the assault. Mr. Hernandez is forced to relive the assault in his mind, has nightmares about the experience, and consequently suffers from insomnia. He has also involuntarily lost weight and lost interest in things he used to love, like sports and cooking. **Fernando Trujillo Sanchez**,²⁰ whose throat had been slit by persecutors, was retraumatized by being confined in dangerous conditions of detention. He suffered symptoms of post-traumatic stress disorder, including panic attacks, migraines, flashbacks, and nightmares.

The harmful consequences of immigration detention also include serious incidents of harassment and punitive solitary confinement. Consider the story of **Anton Garcia Diaz**,²¹ a transgender man from Honduras. Mr. Garcia Diaz has lived in the United States since 2014. In Honduras, Mr. Garcia Diaz experienced

¹⁹ See Decl. of Elizabeth Davis, Esq., *supra* note 7.

²⁰ See Decl. of Heliodoro Moreno, Esq., *supra* note 5.

²¹ The details of Mr. Garcia Diaz’s case are described in the decision of the District Court granting his habeas petition. *Diaz v. Acuff*, 507 F. Supp. 3d 991 (S.D. Ill. 2020). See also Decl. of Keren Zwick, Esq. (on file with counsel).

physical and sexual violence related to his gender nonconformity. Fleeing his abusers in Honduras, Mr. Garcia Diaz came to the United States and moved in with family members.

In 2019, ICE arrested and detained Mr. Garcia Diaz, and placed him in withholding-only proceedings because he had a removal order originating from a prior entry to the United States in 2008. Mr. Garcia Diaz sought withholding and protection under the Convention Against Torture based on his membership in the LGBTQI community in Honduras.

During his detention, which lasted more than one year, Mr. Garcia Diaz was denied access to gender-affirming medical care. He was initially detained alongside women, where he was repeatedly harassed and taunted. He was periodically held in solitary confinement due to abuse from other detained individuals and guards that stemmed from his gender identity. At one point, he was detained with men, not as recognition of his gender identity, but because of the chaotic state of the jail amid the COVID-19 pandemic.

Mr. Garcia Diaz's attorneys ultimately secured his release through a writ of habeas corpus, but not until he had been detained for over a year. Mr. Garcia Diaz's immigration case was recently remanded by the United States Court of Appeals for the Seventh Circuit to the BIA for reconsideration of the case in light of his

gender identity²²—after an appeal that Mr. Garcia Diaz may well have chosen to waive had he been forced to remain in detention throughout the process.

In addition to harming those who are detained, the sudden arrest and prolonged detention of noncitizens often has acute ramifications for their families and children, many of whom are United States citizens. For instance, **Amadou Barry**²³ was detained and separated from his family for half a year until he was released through a *Guerrero-Sanchez* bond hearing. When ICE arrested Mr. Barry, it did so at his home and in front of his children. His eldest daughter was suffering from a debilitating viral infection in her heart, for which she had been recently hospitalized and was receiving specialized medical care. In the years prior, his family had relied on his sole income as an Uber driver to make ends meet. While he was detained, his wife had to enroll in the Supplemental Nutrition Assistance Program (SNAP) to put food on the table for their children.

While detained, ICE shuffled Mr. Barry across the country to multiple ICE detention facilities, frequently without any notice to him, his family, or his counsel. This experience was particularly traumatic for Mr. Barry, as a survivor of past imprisonment and torture in his country of origin, and devastating for his family.

²² See Order Granting Unopposed Motion to Remand, *Garcia-Diaz v. Garland*, No. 21-1340 (7th Cir. Oct. 20, 2021), ECF No. 16.

²³ See Decl. of Jessica Rofé, Esq., *supra* note 13.

After six months of detention, Mr. Barry was released through a *Guerrero-Sanchez* bond hearing. He continues to pursue his motion to reopen his case due to the grossly ineffective assistance of prior counsel; his case is ongoing and was recently remanded to the immigration judge due to her improper reliance on a nonexistent transcript.

Consider also the story of **Floriciel Liborio Ramos**,²⁴ an Indigenous woman from Mexico. Ms. Liborio Ramos has lived in the United States for more than twenty years and has three children, all of whom are U.S. citizens. Her youngest daughter has been diagnosed with autism. As a single mother, Ms. Liborio Ramos worked two full-time jobs while caring for her children, including making sure her daughter received necessary special education and therapy.

In March 2017, ICE detained Ms. Liborio Ramos as she was leaving an IHOP restaurant after eating breakfast with her children. Ms. Liborio Ramos, who had received a prior removal order at the border in 2003, expressed a fear of returning to Mexico, where members of the Zetas gang had threatened to kill her and did, in fact, kill members of her family based on their Indigenous identity. She was then placed in withholding-only proceedings.

During the year that ICE detained their mother, Ms. Liborio Ramos's children moved frequently, from

²⁴ The facts of Ms. Liborio Ramos's case are detailed in a declaration by her attorney. *See* Decl. of Jehan Laner Romero, Esq. (on file with counsel).

the home of one family friend to another. Her youngest daughter regressed considerably in school while her mother was detained. ICE did not release Ms. Liborio Ramos until ordered to do so, following a successful habeas petition, in March 2018. Her withholding-only case is still ongoing, and her children continue to attend therapy, due in part to the lingering effects of the separation from their mother.

These stories demonstrate some of the grave incidents of violence and other harms many noncitizens experience while detained. Being detained makes individuals physically and mentally ill. Detained noncitizens also often face harassment and forcible isolation. The separation of families, which often include U.S.-citizen children, also results in the prolonged absence of parents, spouses, and loved ones, often leaving non-detained relatives struggling to make ends meet.

II. ICE’s Post-Order Custody Review (“POCR”) Procedure Does Not Comply with Due Process.

“I have already been imprisoned here for nine months. . . . All this time I have not had a lawyer since immigration has made me wait. It is a lot of time waiting and they have not resolved anything.”

—**Laura Ramirez**²⁵

²⁵ “Laura Ramirez” is a pseudonym to protect Ms. Ramirez’s identity. The facts of her case are detailed in a declaration by her attorney. See Decl. of Nancy Morawetz, Esq. (on file with counsel).

Given the severity and the frequency of the harms experienced by noncitizens in detention, it follows that a strong procedural system is essential to protecting the rights and the safety of noncitizens detained by ICE. Specifically, this requires an individualized hearing, with the evidentiary burden placed on the government, not the detained individual.

The government, in its brief, argues that the Department of Homeland Security (“DHS”)’s regulations that govern the post-order custody review (“POCR”) process, 8 C.F.R. § 241.4 and 8 C.F.R. § 241.13, constitute sufficient process. *See* Pet’r’s Br. at 40 (“DHS has [] granted noncitizens procedural protections that are not specified in the statutory text.”) The government concentrates on the DHS regulations governing the POCR process, noting, for instance, that “[t]he noncitizen may submit evidence, use an attorney or other representative, and, if appropriate, seek a government-provided translator.” Pet’r’s Br. at 5 (citing 8 C.F.R. § 241.4(h)(2) and (i)(3)). The government also highlights that, “[d]uring the initial three-month custody review, the field office has the discretion to hold ‘a personal or telephonic interview’ with the noncitizen.” *Id.* at 45 (citing 8 C.F.R. § 241.4(h)(1)).

For detained noncitizens, the reality is far bleaker. ICE frequently makes POCR decisions before noncitizens have had time to submit evidence in their favor. ICE’s regulations, moreover, do not guarantee access to counsel or a personal interview. The process actually afforded to individuals in immigration detention is grossly insufficient. Only a guarantee of an

individualized hearing before a neutral adjudicator, with the burden placed on the government to provide evidence, can provide the level of procedural protection that the government purports to embrace.

Consider the story of **Oumar Yaide**,²⁶ which demonstrates how the POGR process is designed to punish those who pursue lawful claims for relief. When ICE denied Mr. Yaide release, it offered no reason beyond the mere possibility that his motion to reopen his case—which was ultimately granted—could be denied by the BIA. The reasons ICE proffered for keeping Mr. Yaide detained are emblematic of a system that is not designed to provide for the release of individuals who are pursuing legitimate claims, the adjudication of which can be protracted.

Mr. Yaide was born in Chad; he arrived in the United States seeking asylum based on his membership in the Gorane ethnic group and imputed anti-government political opinions. An immigration judge and the BIA denied his application for asylum. In August 2019, after ICE arrested Mr. Yaide at his home and detained him, Mr. Yaide filed a motion to reopen his case. Chad had criminalized all same-sex relations since his original case was heard, and Mr. Yaide, as a gay man, sought protection from persecution based on his sexual orientation.

²⁶ The facts of Mr. Yaide's case are detailed in a declaration by his attorney. *See* Decl. of Sean Lai McMahon, Esq. (on file with counsel).

The POCR process failed Mr. Yaide, as it fails so many detained noncitizens. After Mr. Yaide's arrest, his attorney submitted a release request, asking ICE to release him due to the strength of his motion to reopen, as well as the lack of any criminal history or evidence of flight risk. The deportation officer denied the request over the phone, but did not provide a written decision, even when requested to do so. In late November 2019, Mr. Yaide's attorney calculated that the 90-day post-order custody review was due to occur, and submitted more evidence, although ICE would not confirm the date of the review. Mr. Yaide's attorney never received a copy of any POCR decision; it is unclear whether ICE reviewed any of Mr. Yaide's supporting evidence or even conducted his 90-day POCR review.

In March 2020, ICE finally issued a written denial of release, in response to another request from Mr. Yaide's attorney. In the denial, ICE noted that Mr. Yaide's motion to reopen was pending before the BIA, and stated, "[i]f your request is ultimately unsuccessful, your removal is reasonably foreseeable in that ICE is able to effectuate removal to Chad." No other rationale was provided for denying him release. ICE treated the mere possibility that Mr. Yaide's motion to reopen could be denied as sufficient reason to ignore the strength of the motion, the time it would take to adjudicate it, and, indeed, any facts that supported Mr. Yaide's release. As Mr. Yaide's attorney describes in his declaration, "the lack of transparency, confusion, and seeming refusal to exercise individual discretion

demonstrated in Mr. Yaide’s case is common” throughout the immigration detention system.²⁷

In some cases, ICE issues POCR denials and continues to detain even those noncitizens who have been *granted* relief, where the government is appealing the grant. For instance, **Oscar Rodriguez Medina**²⁸ was granted withholding of removal in June 2021, based on the persecution he would face as a gay man and political activist if deported to Honduras. Nevertheless, ICE continues to detain him, despite the grant of withholding. Every time Mr. Rodriguez Medina has had a POCR review, ICE has denied his release, apparently on the ground of a sole criminal charge for which he received a deferred disposition.

Indeed, the POCR process often results in summary denials, with boilerplate²⁹ or unsupported reasons for denying release. Consider the case of **Kon**

²⁷ *See id.* Mr. Yaide was ultimately released, in April 2020, after a determination that his diabetes placed him at risk of complications if he contracted COVID-19. The Board of Immigration Appeals granted Mr. Yaide’s motion to reopen on June 24, 2020.

²⁸ “Oscar Rodriguez Medina” is a pseudonym to protect Mr. Rodriguez Medina’s identity. The facts of his case are detailed in a declaration by his legal representative. *See* Decl. of Ian Austin Rose (on file with counsel).

²⁹ For instance, when Juan Pedro Hernandez received a POCR denial, it read in part, “[t]his decision has been made based on a review of your file and/or your personal interview and consideration of any information you submitted to ICE’s reviewing officials.” *See* Decl. of Elizabeth Davis, Esq., *supra* note 7.

Kuac,³⁰ a young man whom ICE has detained for more than two years. Mr. Kuac was born in Sudan and came to the United States in 1999 as the child of a family of refugees, fleeing war and government repression. Mr. Kuac has been diagnosed with post-traumatic stress disorder and depression and several other health issues, including hyperlipidemia.

At no point during Mr. Kuac's two-year-long detention has ICE had to defend its decision to continue detention at a bond hearing before a neutral arbiter. The POCR regulations, moreover, have allowed ICE to deny Mr. Kuac release without even having clarity on which country it intends to remove him to. After his 90-day POCR review, Mr. Kuac was told he would not be released, because ICE was working on his removal to Sudan, his country of birth. But in fact, Mr. Kuac had lost Sudanese citizenship upon the independence of South Sudan in 2011. By the time of the 180-day review, ICE had changed tactics, and denied release again, claiming they had obtained a travel document from the government of South Sudan, a country that did not exist when Mr. Kuac was born. Because Mr. Kuac has a fear of being deported to South Sudan, he has since sought to reopen his immigration case and obtained a stay of removal from the BIA, remaining detained all the while. In October 2021, Mr. Kuac's attorneys filed a habeas petition seeking his release, or, at minimum, a bond hearing before an immigration

³⁰ The details of Mr. Kuac's case are described in a declaration by his legal representative. See Decl. of Ian Austin Rose, *supra* note 28.

judge, which remains pending. Mr. Kuac is still detained as of the filing of this brief.

Consider also the story of **Ricardo Smith**,³¹ which illustrates how ICE's failure to provide written denials impedes noncitizens' ability to seek their release. Mr. Smith is currently detained and has a pending motion to reopen his immigration case. When his attorney submitted evidence for his 90-day POCR review, his ICE deportation officer called her and orally informed her that he would deny release. In their conversation, he referred incorrectly to Mr. Smith's criminal convictions, demonstrating that the officer was not even fully familiar with Mr. Smith's case.

More than seven weeks later, Mr. Smith's attorney has still yet to receive a written POCR decision despite repeated requests; until she receives the written decision, she will be unable to escalate the case for review. Mr. Smith, who remains detained, is a primary caregiver for his younger brother, who has cerebral palsy, and his two minor daughters. There is no evidence that ICE considered any of those facts in denying Mr. Smith's custody review.

ICE officers even make decisions before providing detained noncitizens with the opportunity to provide evidence in support of their release, thereby precluding themselves from considering all the facts in each case.

³¹ "Ricardo Smith" is a pseudonym to protect Mr. Smith's identity. The facts of his case are detailed in a declaration by his attorney. *See* Decl. of Brittany Castle, Esq. (on file with counsel).

Patrick Campbell's³² attorney reached out to ICE in advance of his scheduled 90-day custody review to enter her appearance and inform the officer that she would provide additional evidence, including evidence of Mr. Campbell's complex medical needs. ICE responded and said they had already denied release. The denial of release came before Mr. Campbell's attorney had the opportunity to submit any evidence.

Similarly, **Floriciel Liborio Ramos**³³ was denied release before her attorney had an opportunity to submit evidence. Ms. Liborio Ramos was informed on June 19, 2017, that her 90-day POCR review had already been denied, despite having been told that the review would be conducted on June 23. Her attorney never received a written denial of release.

ICE's POCR process also fails detained noncitizens who have accepted a final order of removal, but whom the government is unable to remove for some other reason, such as geopolitical conditions or the unavailability of a valid travel document. Despite the regulations' promise to provide release if there is "no significant likelihood of removal," 8 C.F.R. § 241.13(d)(1), these noncitizens often remain detained, sometimes for extreme lengths of time, until some other avenue—such as a bond hearing—facilitates their release.

³² "Patrick Campbell" is a pseudonym to protect Mr. Campbell's identity. The facts of his case are detailed in a declaration by his attorney. *See id.*

³³ *See* Decl. of Jehan Laner Romero, Esq., *supra* note 24.

Consider, for instance, the stories of **Laura Ramirez**³⁴ and **Miguel Antonio Lopez-Cacerez**,³⁵ which illustrate how POCR does not even provide due process to noncitizens whose prolonged detention is due to the government's inability to obtain proper travel documents. Ms. Ramirez was born in Nicaragua but left that country for Guatemala as a child. She entered the United States in 2002 and raised two children on Long Island, in New York state. After she received a single conviction for drug possession, ICE detained Ms. Ramirez in March 2018.

After more than four months in detention, with no movement in her case, Ms. Ramirez asked to be deported. The judge then ordered her removed to either Nicaragua or Guatemala. But neither country had any proof of Ms. Ramirez's citizenship, leaving ICE unable to deport her. ICE nevertheless refused to release her from detention at her 90-day post-order custody review. The deportation officer issued Ms. Ramirez, who suffers from dementia and is illiterate, a written denial.

In February 2019, Ms. Ramirez's attorneys submitted evidence for her 180-day custody review, which ICE never acknowledged. Ms. Ramirez was not released until her attorney was able to secure a bond hearing under *Guerrero-Sanchez*, in March 2019. At

³⁴ See Decl. of Nancy Morawetz, Esq., *supra* note 25.

³⁵ The details of Mr. Lopez's case are described in the decision of the District Court granting his habeas petition. *Lopez-Cacerez v. McAleenan*, No. 19-cv-1952-AJB-AGS, 2020 WL 3058096 (S.D. Cal. June 9, 2020). See also Decl. of Katherine Hurrelbrink, Esq. (on file with counsel).

Ms. Ramirez’s bond hearing, the immigration judge immediately noticed that Ms. Ramirez had serious cognitive limitations and ordered Ms. Ramirez released on bond of \$500 that same day. But before she was able to obtain a hearing before a neutral arbiter, where the government was forced to defend her detention, Ms. Ramirez spent a year detained—during which the POCR process offered her essentially no process at all.

Miguel Antonio Lopez-Cacerez³⁶ grew up on the streets in Honduras and has no memory of his parents. He left Honduras for Mexico around age nine with no identification documents. He has not returned to Honduras since, except for when he was deported there by U.S. officials—leaving Honduras for Mexico shortly thereafter.

Mr. Lopez reentered the United States in 2018, after his wife was murdered by members of a drug cartel. He was apprehended, charged with a misdemeanor criminal immigration offense, and transferred to ICE custody. Mr. Lopez did not contest his deportation. The Honduran government, however, refused to accept him because he, as an orphan with no known family or identity documents, lacked proof of Honduran citizenship.

Mr. Lopez spent over fifteen months in ICE detention: more than five times the length of his seventy-seven-day criminal sentence for illegal entry. ICE conducted two POCR reviews, both times deciding to

³⁶ *See id.*

continue to detain Mr. Lopez due to purported flight risk concerns. He remained detained until his attorneys filed a habeas petition and the government was required to defend Mr. Lopez's detention at a bond hearing. The immigration judge granted Mr. Lopez bond, and he has since been released from detention.

As these stories illustrate, the POCR process does not protect the grave due process interests at stake for noncitizens in prolonged detention. ICE can deny release even before a noncitizen has an opportunity to present any evidence or seek the assistance of counsel. ICE often fails to issue written decisions that explain the reason for a denial of release, even for those noncitizens who are represented by counsel. When written denials are provided, they are little more than form letters. Even individuals whom the government knows it cannot remove are unable to secure release through POCR. Perhaps most troublingly, ICE officers habitually deny release simply because detained noncitizens are pursuing claims for relief that could hypothetically fail. As officers charged with executing removal, they are ill-suited to evaluate the due process interests of those they detain.

III. Bond Hearings Like Those Required Under *Guerrero-Sanchez* and *Aleman Gonzalez* Are a Necessary Due Process Protection for Individuals Detained Under 8 U.S.C. § 1231.

Bond hearings after six months, where the government is required to justify why it is continuing to

deprive noncitizens of their liberty, have been instrumental in protecting the serious due process interests at stake for detained individuals with final orders of removal. Only a bond hearing in front of an immigration judge provides them any meaningful review of their prolonged detention and a chance at being released.

A. In the Third and Ninth Circuits, *Guerrero-Sanchez* and *Aleman Gonzalez* bond hearings have been a crucial due process safeguard to protect noncitizens' liberty.

“If you are reading this, I have tried to express in words how I feel and what has happened to my family but it is hard. I find myself crying when I think about [the day I was detained] and the time I was away from my children. I smile when I think about being reunited with them when the bond was set for \$2,000.”

—**Seedy Drammah**³⁷

Fernando Trujillo Sanchez,³⁸ **Juan Pedro Hernandez**³⁹, and **Amlorn Siratana**,⁴⁰ whose stories were discussed in Section I.A, *supra*, only saw an end to their inhumane detentions through access to *Aleman Gonzalez* bond hearings. Mr. Trujillo Sanchez

³⁷ See Decl. of Sarah Gillman, Esq., *supra* note 12.

³⁸ See Decl. of Heliodoro Moreno, Esq., *supra* note 5.

³⁹ See Decl. of Elizabeth Davis, Esq., *supra* note 7.

⁴⁰ See Decl. of Melanie Kim, Esq., *supra* note 9.

was released on an *Aleman Gonzalez* bond in April of 2021. Following his release, he is now able to focus on caring for his mother. He was also able to prepare for his individual hearing outside of detention, and, several months later, was granted CAT relief. Had he not had access to an *Aleman Gonzalez* hearing, Mr. Trujillo Sanchez would have continued to languish in detention under inhumane conditions while his proceedings were ongoing.

Mr. Hernandez's⁴¹ release has enabled him to seek rehabilitative treatment for a prior workplace injury and care for his infant daughter. It also allowed his wife to undergo heart surgery that she was unable to during his detention. His release has given him the chance to heal and better manage his PTSD and depression, which he suffers from due to the trauma he experienced while detained in ICE custody, including his sexual assault at the hands of an ICE contractor. Were it not for his release through an *Aleman Gonzalez* bond hearing, he would have been forced to continue to suffer in detention. Seventeen months after his release, an immigration judge granted him withholding of removal.

Because of his release on bond, **Amlorn Siratana**⁴² was able to meet regularly with his legal representative, gather all relevant documents, and ultimately secure the vacatur of his decades-old conviction that had precipitated his removal case. This resulted in his

⁴¹ See Decl. of Elizabeth Davis, Esq., *supra* note 7.

⁴² See Decl. of Melanie Kim, Esq., *supra* note 9.

removal proceedings being reopened and terminated due to the changed circumstances. Mr. Siratana would not have been able to advance his case so rigorously and pursue other avenues of relief were it not for his *Aleman Gonzalez* hearing and subsequent release from detention.

After his release, Mr. Siratana was also able to resume managing the health of his twelve-year-old son, who has suffered from thalassemia, a rare blood disorder requiring frequent blood transfusions and emergency care, since infancy. He takes him to the hospital for appointments on a regular basis and takes him in for blood transfusions as needed. Mr. Siratana is now retired and spends his days caring for his son and providing childcare for some of his grandchildren. He was able to relieve his wife, who, while he was detained, was forced to work overnight shifts as a nurse and care for their children and grandchildren during the day. Following his release through an *Aleman Gonzalez* bond hearing, Mr. Siratana has recovered his status as a lawful permanent resident and is able to care for his family without the looming threat of deportation.

Access to a *Guerrero-Sanchez* hearing protected **Seedy Drammah**⁴³ from prolonged detention and reunited him with his family. In April of 2019, Mr. Drammah was detained by ICE at a routine check-in pursuant to the order of supervision he had been on for twelve years. In his own words, “my family and I

⁴³ See Decl. of Sarah Gillman, Esq., *supra* note 12.

experienced the worst event of our lives [that day] . . . I was in shock . . . I was really terrified and just could not stop thinking about my children and how scared they must be that I was not home—I was always home at night.”⁴⁴

While he was detained, Mr. Drammah’s family faced extreme hardship. For example, one of his daughters has medical conditions that could not be adequately attended to and worsened during her father’s detention, since he was her primary caregiver. Mr. Drammah’s *Guerrero-Sanchez* bond hearing is all that allowed for an end to his prolonged detention and reunification with his family. In fact, at the bond hearing, the government’s attorney stipulated to bond of \$2,000.

Since his release, Mr. Drammah has been able to better access legal representation in his pending immigration case. Mr. Drammah has moved to reopen his case pursuant to this Court’s recent decision in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), so that he can pursue cancellation of removal based on the extreme harm his United States-citizen children would face if he were deported to the Gambia. While he awaits the review of his pending motion to reopen his case, he is able to stay where he belongs—at home, supporting his family and community.

⁴⁴ *See id.*

Likewise, a *Guerrero-Sanchez* bond hearing was critical to ending **Mohammad Shahzad**'s⁴⁵ prolonged detention and reuniting him with his family. Mr. Shahzad was detained from December 2020 to July 2021, while pursuing a motion to reopen his case based on ineffective assistance of counsel and newly developed persecution claims. These claims stem from death threats he and his family received due to his cooperation with the U.S. government against Pakistani nationals who operate a criminal enterprise.

In the seven months Mr. Shahzad was detained, ICE transferred him to at least four different detention centers in Louisiana, Arizona, New Jersey, and Pennsylvania, in the midst of the COVID-19 pandemic. Mr. Shahzad's time in detention exacerbated his medical issues, which include high blood pressure, type 2 diabetes, high cholesterol, anxiety, and heart problems. Moreover, Mr. Shahzad had inconsistent access to his required medications, was especially vulnerable to contracting COVID-19, and had not been vaccinated during any of these transfers.

While his appeal and motion to reopen are still pending before the BIA, upon his release on bond, Mr. Shahzad was able to reunite with his wife, his two stepdaughters, and his four grandchildren. He has returned to being the primary provider of his household. His health significantly deteriorated while he was

⁴⁵ The details of Mr. Shahzad's case are described in a declaration by his attorney. *See* Decl. of Medha Venugopal, Esq. (on file with counsel).

detained, but since his release he has been able to obtain proper and consistent access to medication, helping him stabilize his medical condition. Without the opportunity to have a *Guerrero-Sanchez* hearing, Mr. Shahzad would still be in prolonged detention. At the bond hearing, the government did not submit any evidence whatsoever. Ultimately, the *Guerrero-Sanchez* hearing was his only hope for release from ICE detention, which caused severe harm to Mr. Shahzad’s health.

B. Noncitizens face an untenable deprivation of liberty in circuits that lack the procedural due process safeguard of bond hearings before a neutral arbiter.

“When you try to seek legal support, most of the time the lawyers that you try to reach won’t take your case because they don’t have time, also you don’t speak English, and you don’t know the immigration laws.”

—**A.S., a formerly detained immigrant**⁴⁶

The absence of procedural due process safeguards, such the hearings available under *Guerrero-Sanchez* and *Aleman Gonzalez*, virtually guarantees that there will be cases of extremely prolonged detention. In circuits without these safeguards, there is no

⁴⁶ TULANE UNIV. L. SCH. IMMIGRANT RTS. CLINIC, NO END IN SIGHT: PROLONGED AND PUNITIVE DETENTION OF IMMIGRANTS IN LOUISIANA 31 (2021) [hereinafter NO END IN SIGHT], <https://law.tulane.edu/content/no-end-sight-prolonged-and-punitive-immigration-detention-louisiana>.

administrative mechanism to ensure accountability for ongoing detention. The only recourse, aside from the inadequate POCHR process, is to file an individual habeas petition in federal court challenging one's continued detention.

Habeas proceedings, however, are often complicated to navigate, especially for detained noncitizens filing petitions without the assistance of counsel. Courts routinely dismiss many noncitizens' cases due to technical errors, such as failing to include a filing fee and improperly completing forms. At best, habeas petitions are a lengthy process insufficient to protect the serious liberty interests at stake.

Consider a recent study conducted by the Tulane University Law School Immigrant Rights Clinic, which examined the 499 immigrant habeas cases filed between January 1, 2010 to July 31, 2020 within the Western District of Louisiana. The report found that "eighty-five percent of petitioners had no lawyer to help them file, leading to technical errors in many cases, such as difficulties with the fee, fee waiver process, or address requirements."⁴⁷ Because habeas petitions are difficult for pro se litigants to navigate, the Court dismissed twenty percent of resolved habeases solely because of procedural errors like failing to include a filing fee and improperly completing forms.⁴⁸

⁴⁷ *Id.* at 29–31.

⁴⁸ *Id.* at 17.

Moreover, for many noncitizens outside of the Third and Ninth Circuits, their detention is prolonged long before they manage to file a habeas petition. The Tulane report also found that, in the Western District of Louisiana, “immigrants [in the district] had been detained for nearly one year and one month, on average, at the time they filed their habeas petitions.⁴⁹ Even after filing, petitioners faced court delays, including extensions granted to the government to respond to the filing. In a substantial number of cases, the government eventually released the individual when it was finally held to account. For those whose cases were not dismissed, the average total time in post-final order detention before a bond hearing or release was 559 days, or a year and a half.⁵⁰

In short, individual habeas petitions are at best a slow and cumbersome avenue of relief for noncitizens facing prolonged detention. *See, e.g., Bah v. Cangemi*, 489 F. Supp. 2d 905 (D. Minn. 2007) (ordering petitioner released after thirty months of detention, including twenty-one months post-final order while

⁴⁹ *Id.* at 8; *see also* N.Y.U. IMMIGRANT RTS. CLINIC, ET AL., THE WRIT OF HABEAS CORPUS: HOW A UNITED STATES DISTRICT COURT CIRCUMVENTS OVERSIGHT OF UNLAWFUL DETENTION 10 (2016), https://www.prisonlegalnews.org/media/publications/Writ_of_Habeas_Corpus_-_How_a_United_States_District_Court_Circumvents_Oversight_of_Unlawful_Detention_NYU_Law_FFF_2016.pdf (“In the Northern District of Alabama, 89% of detainees who filed habeas petitions were detained for over 250 days after their removal order and some were detained as long as 1,122 days.”).

⁵⁰ NO END IN SIGHT, *supra* note 46, at 16–20.

pursuing an ultimately successful motion to reopen); *C.-P. v. Barr*, No. 20-cv-1698-JRT-TNL, 2020 WL 9600020 (D. Minn. Nov. 23, 2020) (following *Guerrero-Sanchez* and ordering a bond hearing after fourteen months for post-final order petitioner pursuing withholding of removal); *Matos v. Barr*, 509 F. Supp. 3d 3 (W.D.N.Y. 2020) (granting a pro se petitioner a bond hearing after being detained for twelve months post-final order of removal). Without the protections provided by the Third and Ninth Circuits' rulings on 8 U.S.C. § 1231, ICE is not held accountable for its prolonged detention of noncitizens, even as the length of that detention stretches from months to years.

◆

CONCLUSION

The stories of the community members and clients described in this brief demonstrate the harms of prolonged detention, the inadequacies of ICE's existing POCR process, and the serious need for robust procedural due process safeguards for noncitizens detained under 8 U.S.C. § 1231. *Amici* respectfully urge this Court to uphold the requirements set by the Third

and Ninth Circuits in *Guerrero-Sanchez* and *Aleman Gonzalez*.

Respectfully submitted,

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