Nos. 13-56706, 13-56755

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALEJANDRO RODRIGUEZ, ET AL.,
Petitioners-Appellees,

v.

TIMOTHY ROBBINS, ET AL.,
Respondents-Appellants.

On Appeal from the United States District Court for the Central District of California, No. 2:07-cv-03239 (Hatter, J.)

BRIEF OF AMICI CURIAE RETIRED IMMIGRATION JUDGES AND BOARD OF IMMIGRATION APPEALS MEMBERS IN SUPPORT OF PETITIONERS-APPELLEES

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STATEMENT OF AMICI'S IDENTITY AND INTEREST[1]

Amici curiae are former immigration judges and members of the Board of Immigration Appeals who together have dedicated over 350 years of service to administering the immigration laws of the United States, including by presiding over numerous bond hearings. Amici possess an acute interest in the Court's construction of the Fifth Amendment's Due Process Clause and its prohibition on arbitrary imprisonment, as well as in the continued efficient administration of the immigration laws.

Amici are the following former immigration judges and members of the Board of Immigration Appeals:

- Hon. Steven Abrams
- Hon. Sarah M. Burr
- Hon. Jeffrey S. Chase
- Hon. George T. Chew
- Hon. Joan V. Churchill
- Hon. Bruce J. Einhorn
- Hon. Cecelia M. Espenoza

[1] All parties consent to the filing of this brief. Amici state that no party or party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amici or their counsel contributed money intended to fund preparing or submitting this brief.

- Hon. Noel Ferris
- Hon. John F. Gossart, Jr.
- Hon. William P. Joyce
- Hon. Edward Kandler
- Hon. Carol King
- Hon. Margaret McManus
- Hon. Charles Pazar
- Hon. Lory D. Rosenberg
- Hon. Susan Roy
- Hon. Paul W. Schmidt
- Hon. William Van Wyke
- Hon. Gustavo D. Villageliu
- Hon. Polly A. Webber.

INTRODUCTION

Temporary deprivations of immigrants' physical liberty "may sometimes be justified by concerns about public safety or flight risk" but must "always be constrained [by] the requirements of due process." *Hernandez v. Sessions*, 872 F.3d 976, 981 (9th Cir. 2017). Petitioners in this case naturally focus on the constitutional concerns raised by prolonged detention in the absence of a bond hearing. But lengthy pretrial detention of immigrants in removal proceedings also has a profoundly negative impact on the administration of the nation's immigration laws. Such detention renders already complicated and challenging administrative proceedings even more so by limiting immigrants' access to counsel and impairing even counseled immigrants' presentation of their cases. At the same time, such detention requires a large expenditure of resources that could instead be devoted to other urgent needs of the immigration system. Amici respectfully submit that providing a bond hearing where pretrial detention of an immigrant in removal proceedings exceeds six months, as Petitioners urge, is not only consistent with the requirements of due process but also a straightforward and effective means of addressing these issues.

BACKGROUND

Removal proceedings are often lengthy and complicated. They may involve many features of a typical trial, including fact and expert witness testimony, a

variety of different forms of evidence, and legal argument. 8 C.F.R. §§ 1240.7, 1240.10; *see generally* 8 C.F.R. Part 1240. They accordingly impose very substantial burdens on thinly resourced immigration courts, especially when litigants are uncounseled and/or detained.

To determine removability, an immigration court may be required to resolve complex factual issues. *See, e.g.*, *Ayala-Villanueva v. Holder*, 572 F.3d 736, 740 (9th Cir. 2009). Even where the underlying facts are undisputed, removability may turn on difficult legal questions, such as whether an immigrant's prior conviction qualifies as an aggravated felony or a crime of moral turpitude. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210-1211 (2018). Eligibility for relief from removal may present further thorny issues, including questions of federal and state statutory interpretation, *see, e.g.*, *Moncrieffe v. Holder*, 569 U.S. 184, 190-191 (2013); *INS v. St. Cyr*, 533 U.S. 289, 292-293 (2001), and complicated factual determinations concerning, *e.g.*, an immigrant's "good moral character." 8 U.S.C. § 1229b(a), (b)(1)B). Evidence and expert opinion may be required concerning past persecution or conditions in an immigrant's country of origin. *Id.* §§ 1101(a)(42), 1158(b). Immigration judges routinely grant one or more continuances to allow immigrants the necessary time to gather and prepare this information.

When an immigration court determines that removal is proper, appeal is available to the BIA, but may require six months or longer to complete.[2] An immigrant who loses her appeal may seek judicial review of the BIA's decision by petition to a federal court of appeals, but such review may take years. *See* 8 U.S.C. § 1252(a)(5); *see also, e.g.*, *Moncrieffe*, 569 U.S. at 188-190.

Immigration judges strive to manage a high volume of such complex proceedings with limited resources. As of May 2018, approximately 714,000 cases were pending in U.S. immigration courts, more than triple the caseload of a decade ago.[3] Yet the number of immigration judges has not kept pace and today is only about 350—a relatively modest increase from the 210 immigration judges serving at the end of fiscal year 2007.[4] New EOIR guidance requires judges to complete 700 cases annually, exceeding the national average of 678 cases per judge per year between 2013 and 2018, without allocating additional resources to help accomplish

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[2] *See* Executive Office for Immigration Review ("EOIR"), *Certain Criminal Charge Completion Statistics* 4 (Aug. 2016), https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf.

[3] *See* Transactional Records Access Clearinghouse ("TRAC"), *Immigration Court Backlog Tool*, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited July 26, 2018).

[4] *See* EOIR, *Fact Sheet* (Dec. 2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download; Human Rights First, *The U.S. Immigration Court: A Ballooning Backlog that Requires Action* 2 (Mar. 15, 2016), http://www.humanrightsfirst.org/sites/default/files/HRF-Court-Backlog-Brief.pdf.

this goal.[5] While the quotas purport to address the backlog of immigration cases, there is reason to doubt that they are achievable in the absence of additional resources—or aids to efficiency such as Petitioners seek here.

Finally, because immigrants in removal proceedings ordinarily must fund their own legal representation or obtain pro bono assistance, many lack counsel and require guidance and assistance from the court. Detained immigrants are especially unlikely to be represented. One study of cases between 2007 and 2012 found that 86 percent of detained immigrants lacked counsel.[6]

ARGUMENT

I. LENGTHY PRETRIAL DETENTION HAS A PROFOUNDLY NEGATIVE IMPACT ON THE IMMIGRATION SYSTEM

Amici submit that lengthy pretrial detention undermines the efficacy of removal proceedings in at least two ways. *First*, it increases the burden on immigration courts by limiting immigrants' ability to obtain counsel and present their cases. *Second*, it consumes vast resources that could instead be devoted to

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[5] *See* Meckler, *New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportation: Rules were laid out in a message sent Friday to immigration judges*, Wall St. J., Apr. 2, 2018, https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158; Email from James McHenry, Director, EOIR, to Immigration Judges, AILA Doc. No. 18040301 (Mar. 30, 2018), https://aila.org/infonet/eoir-memo-immigration-judge-performance-metrics.

[6] Eagly & Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 & fig. 6 (2015).

increasing the number of immigration judges, improving court facilities and systems, and meeting other critical needs of the beleaguered immigration system.

A. Lengthy Pretrial Detention Limits Immigrants' Ability To Present Their Cases

Lengthy pretrial detention compromises immigrants' ability to present their cases in several respects: (1) it reduces access to counsel; (2) for counseled immigrants, it impedes attorney-client communication; and (3) for uncounseled immigrants, it dramatically complicates the task of preparing and presenting factual evidence and legal argument. In turn, each of these effects increases the burdens on immigration courts and the BIA as they strive to ensure that each person in removal proceedings receives a fair hearing.

First, detention limits access to counsel. "In the context of immigration detention, … 'due process requires adequate procedural protections to ensure that the government's asserted justification for [] confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" *Hernandez*, 872 F.3d at 990 (quoting *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011)). It is well-settled that "the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important." *Ardestani v. INS*, 502 U.S. 129, 138 (1991). In part for that reason, immigration judges frequently grant continuances to permit immigrants in removal proceedings to obtain counsel, an exercise that can

significantly increase case duration.[7] Yet even with such accommodations, a recent study found that only about 14 percent of detained immigrants were ultimately able to obtain legal representation, compared to about 66 percent of immigrants who were never detained.[8] There are many reasons why detained immigrants are less able to obtain counsel. Detainees are less likely to be able to pay for legal representation because they cannot work while detained.[9] Detainees also are less likely to obtain pro bono legal services because most detention facilities are far from urban centers with public interest organizations, large law

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[7] Eagly & Shafer, *supra* note 6, at 61 & fig. 16 (finding that the time spent searching for counsel can exceed 50% of the total duration of a case when the immigrant is detained).

[8] *Id*. at 31-32; *see also* California Coalition for Universal Representation, *California's Due Process Crisis: Access to Legal Counsel for Detained Immigra*nts 7 tbl 1 (June 2016) (32 percent of detained California immigrants had counsel compared to 73 percent of non-detained immigrants), https://www.nilc.org/wp-content/uploads/2016/06/access-to-counsel-Calif-coalition-report-2016-06.pdf; Nessel & Anello, *Deportation Without Representation: The Access-to-Justice Crisis Facing New Jersey's Immigrant Families* 14, Seton Hall Ctr. for Social Justice (2016) (33 percent of detained New Jersey immigrants had counsel compared with 79 percent of non-detained immigrants), https://www.immigrationresearch-info.org/report/seton-hall-university-school-law/deportation-without-representation-access-justice-crisis-fac; *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings—New York Immigrant Representation Study Report: Part 1*, 33 Cardozo L. Rev. 357, 367-368 (2011) ("[C]ustody status … strongly correlates with [immigrants'] likelihood of obtaining counsel.").

[9] *See* Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 368 (2014).

firms, and law school clinical programs offering such services.[10] For example, immigrants detained in California's Mesa Verde Detention Facility are more than 100 miles from the nearest government-listed legal aid provider in Los Angeles.[11] For an immigrant detained at the San Luis Regional Detention Center in Arizona, the nearest government-listed legal aid office is a Catholic Charities office about 100 miles away in El Centro, California. If that office is unable to provide representation, the next best options are in San Diego, 195 miles away; Phoenix, 205 miles away; Florence, 225 miles away; or Tucson, 255 miles away.[12]

Second, for the minority of detained immigrants who do obtain legal representation, prolonged detention complicates attorney-client communication. Although in-person attorney-client consultation must occur at a detention facility, as noted, the distance between detention facilities and the urban centers where

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[10] *See id.* at 368; *see also* Lee, *Immigrants in Detention Centers Are Often Hundreds of Miles from Legal Help*, ProPublica (May 16, 2017, 4:00 PM), https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help.

[11] *See* EOIR, *List of Pro Bono Legal Service Providers* (July 2018), https://www.justice.gov/eoir/list-pro-bono-legal-service-providers; *see also* Linthicum, *ICE opens 400-bed immigrant detention center near Bakersfield*, L.A. Times, Mar. 24, 2015, http://www.latimes.com/local/lanow/la-me-ln-ice-immigration-detention-mcfarland-20150323-story.html.

[12] *See* EOIR, *List of Pro Bono Legal Service Providers* (July 2018), https://www.justice.gov/eoir/list-pro-bono-legal-service-providers.

most immigration lawyers practice may preclude such meetings.[13] Even telephone communication may be difficult, with attorneys unable to call clients directly or without interruption.[14] When immigrants and counsel are unable to communicate effectively, cases may be presented less clearly or be more likely to require numerous continuances. That inevitably spells more work for immigration courts.

Third, lengthy detention presents significant obstacles to the majority of detained immigrants who lack access to counsel and must proceed pro se. Competent briefing helps focus and advance immigration proceedings.[15] Nevertheless, many pro se litigants in immigration court lack adequate legal resources, such as a well-equipped law library.[16] For example, an investigation of six detention centers reported that "legal materials available in the law libraries [were] very outdated; … country condition reports vital for asylum applications

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[13] *See* Kim, *Immigrants held in remote ICE facilities struggle to find legal aid before they're deported*, L.A. Times, Sept. 28, 2017, http://latimes.com/projects/la-na-access-to-counsel-deportation/.

[14] *See* Inter-Am. Comm'n on Human Rights, *Report on Immigration in the United States: Detention and Due Process* 110-113 (Dec. 30, 2010), https://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf.

[15] *See* BIA, *A Ten-Year Review of the BIA Pro Bono Project: 2002-2011*, at 10-11 (Feb. 2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/27/BIA_PBP_Eval_2012-2-20-14-FINAL.pdf.

[16] *See* Inter-Am. Comm'n, *supra* note 14, at 117.

were several years old; and … few of the materials [were] available in Spanish."[17] As importantly, detention poses a formidable obstacle to immigrants' efforts to gather documentary evidence, identify and prepare witness testimony, and obtain expert opinions in support of their defenses and claims for relief.

Each of the effects just described increases the burdens on immigration courts and the BIA, which must provide a fair hearing to every immigrant in removal proceedings. Immigration courts must "fully develop the record" in cases where immigrants represent themselves, *Jacinto v. INS*, 208 F.3d 725, 734 (9th Cir. 2000), and "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts," *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (internal quotation marks omitted), as well as ensure that immigrants understand all available avenues for relief, *see* 8 C.F.R. § 1240.11(a)(2). As one immigration judge has written, conducting removal proceedings for pro se detainees thus "puts substantial pressure on the judge to ensure that available relief is thoroughly explored and the record fully developed."[18] And despite immigration

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[17] *See* Southern Poverty Law Center, *Shadow Prisons: Immigrant Detention in the South* 10 (Nov. 2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf.

[18] Brennan, *A View from the Immigration Bench*, 78 Fordham L. Rev. 623, 626 (2009); *see also id.* ("However time-consuming, it is our duty to explain the law to pro se immigrants and to develop the record to ensure that any waiver of appeal or of a claim is knowing and intelligent.").

judges' best efforts, detention produces significant disparities in outcomes, such that immigrants released on bond are significantly more likely to be permitted to remain in the United States.[19]

B. Lengthy Pretrial Detention Consumes Vast Resources

Apart from its detrimental effect on immigrants' ability to present their cases in immigration court and at the BIA, lengthy detention is costly, consuming vast resources at a time when the nation's immigration system struggles to cope with constrained budgets and exponentially increasing demands.

As this Court has observed, "[t]he costs to the public of immigration detention are staggering." *Hernandez*, 872 F.3d at 996 (quotation marks omitted). The number of immigrants subject to detention has grown rapidly in recent years, ballooning from about 80,000 in 1994 to more than 350,000 in 2016.[20] The current average daily cost of detaining each adult immigrant is between $133 and $208.[21]

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[19] *See Developments in the Law: Immigration Rights and Immigration Enforcement, Representation in Removal Proceedings*, 126 Harv. L. Rev. 1658, 1662 (2013); TRAC, *What Happens When Individuals Are Released On Bond In Immigration Court Proceedings?* (Sept. 14, 2016) (hereinafter "TRAC Report"), http://trac.syr.edu/immigration/reports/438/.

[20] *See* Kalhan, *Rethinking Immigration Detention*, 110 Colum. L. Rev. Sidebar 42, 44-45 (2010); U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2016*, at 8 (Dec. 2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf.

[21] *See* U.S. Immigration and Customs Enforcement, *Budget Overview: Fiscal Year 2018*, at 14 (2018), https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf; Benenson, *The Math of Immigration Detention,*

Thus, the overall cost of detention is massive: about $2.8 billion annually, a figure that has increased by more than $1.1 billion in the last decade alone.[22] That is more than *fifteen times* the approximately $180 million budgeted for the Alternatives to Detention program, which places individuals who do not pose a danger to the community but may be a flight risk under various forms of non-detained, intensive supervision, such as electronic monitoring, and has almost twice the daily capacity of the nation's immigration detention facilities.[23] *See Hernandez*, 872 F.3d at 996 ("Supervised release programs cost much less by comparison [to detention.]").

Further, as this Court has explained, "reduced detention costs can free up resources to more effectively process claims in Immigration Court." *Hernandez*, 872 F.3d at 996. There is no shortage of ways in which funds presently allocated to cover costly pretrial detention could instead be used to ease the heavy load currently borne by immigration courts and the BIA. Funds freed up by a

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2018 Update: Costs Continue to Multiply, Nat'l Immigration Forum (May 9, 2018), https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/.

[22] U.S. Dep't of Homeland Sec., *Budget-in-Brief: Fiscal Year 2019*, at 4 (2018), https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf; TRAC, *Immigration and Customs Enforcement (ICE) Budget Expenditures* (Feb. 2010), http://trac.syr.edu/immigration/reports/224/include/3.html (showing fiscal year 2008 budget of $1.647 billion for custody operations).

[23] *See* U.S. Dep't of Homeland Sec., *supra* note 22, at p. 4.

diminished reliance on lengthy detention could be devoted to hiring more immigration judges.[24] Programs like the Legal Orientation Program, which introduces immigrants to court procedures, easing judges' role as educators and guides, could be expanded.[25] Or additional resources could be used to replace and update aging audio recording systems, video teleconferencing equipment, or data storage and retrieval systems.[26]

II. INDIVIDUALIZED BOND HEARINGS MITIGATE THE SYSTEMIC PROBLEMS CAUSED BY LENGTHY PRETRIAL DETENTION

Providing bond hearings to immigrants subject to at least six months of detention is a sensible, effective means of addressing the problems just described. Immigration courts are well-equipped to conduct such hearings, and there is no basis to believe that requiring such hearings endangers communities or drives down appearance rates.

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[24] *See, e.g.*, Slavin & Harbeck, *A View from the Bench by the National Association of Immigration Judges* 67, The Federal Lawyer (Oct./Nov. 2016), http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2016/October November/Features/A-View-from-the-Bench-by-the-National-Association-of-Immigration-Judges.aspx?FT=.pdf.

[25] *See* DOJ, *Legal Orientation Program*, https://www.justice.gov/eoir/legal-orientation-program.

[26] *See* Slavin, *supra* note 24, at 67-68.

Immigration judges conducted more than 61,000 bond hearings in 2016.[27] Immigration judges routinely analyze whether individual immigrants present any danger or flight risk during bond redetermination hearings in removal cases not subject to Sections 1225(b) and 1226(a), (c), *see* 8 C.F.R. § 1236.1, as well as conducting bond hearings for recent entrants to the United States who seek asylum, *see* 8 U.S.C. § 1225(a)(1), (b)(1)(A)(iii); *In re X-K-*, 23 I&N Dec. 731, 734-735 (BIA 2005). Immigration judges are accordingly well accustomed to making informed judgments concerning accepted indicators of an immigrant's potential danger and flight risk such as employment history, length of residence in the community, family ties, history of nonappearance, and criminal history. *See, e.g.*, *In re Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). In cases involving immigrants who have been detained for at least six months, immigration judges often will be able to draw on existing familiarity with these and other relevant facts.

There is no reason to suspect that requiring individualized bond hearings leads to the release of detainees presenting serious flight risk or danger to the community. Instead, such a requirement simply permits immigration judges to make particularized determinations about those issues. In addition, any order releasing a detained immigrant is subject to multiple levels of review. Any such

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[27] EOIR, *FY 2016 Statistics Yearbook* A6 (Mar. 2017) (Table 2A), https://www.justice.gov/eoir/page/file/fysb16/download.

ruling is subject to review by the BIA and can be stayed pending that review. 8 C.F.R. § 1003.1(b). In any case in which BIA authorizes release, DHS can seek further review by the Attorney General. *Id.* § 1003.1(h). And any decision to release a detainee can also be made subject to appropriate conditions designed to further safeguard against flight or danger to the community. *See* SER180-181 (DHS witness testifying to success of supervised release program).

Concerning flight risk in particular, the evidence indicates that requiring bond hearings does not increase the rate at which immigrants in removal proceedings fail to appear. To the contrary, the record in this case indicates that when immigrants are released on bond subject to protective conditions, subsequent appearance rates are as high as 99 percent. SER180-181. And one recent study indicates that immigrants released on bond are more likely to appear than are those released at enforcement authorities' discretion.[28]

Moreover, any increase in immigration courts' administrative burdens resulting from a requirement for bond hearings is small (because in most cases detention does not extend beyond six months) and offset by the efficiencies and savings described above. This is particularly so in light of streamlined procedures

[28] *See* TRAC Report, *supra* note 19 (reporting a combined appearance rate for individuals released either on bond or by enforcement officials of 76.6 percent, compared to 86 percent for the subset released on bond).

permitting bond determinations to be made orally, in writing, or, at the judge's discretion, by telephone. *See* 8 C.F.R. § 1003.19.

Finally, bond hearings reduce the disproportionate impact of prolonged detention on immigrants with meritorious defenses to removal. Because potentially meritorious cases often present challenging legal and factual issues, there is substantial overlap between the subset of immigrants who are eligible for relief and the subset who experience lengthy pretrial detention. *See, e.g.*, ER721-722 (Table 35) (class members (*i.e.*, those detained at least six months) are five times more likely than non-class members to obtain relief). Thus, immigrants with the strongest cases against removal are detained the longest, require the greatest expenditure of government resources, and are at greatest risk of abandoning their cases. Bond hearings help ameliorate these perverse effects.

CONCLUSION

For all of these reasons, amici respectfully submit that this Court should affirm the district court's grant of a permanent injunction requiring that individualized bond determinations be made with respect to immigrants in removal proceedings who are detained for six months or more.

Respectfully submitted,

/s/ David Lesser

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July 27, 2018

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Signature of Attorney or Unrepresented Litigant [/s/ David Lesser] Date [Jul 27, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ David Lesser
DAVID LESSER