19-3220-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSE CELAN PADILLA RAUDALES,
Petitioner-Appellee,

v.

THOMAS DECKER, in his official capacity as Field Office Director, New York City Field Office, United States Immigration & Customs Enforcement, CHAD F. WOLF, in his official capacity as Acting United States Secretary of Homeland Security, WILLIAM P. BARR, in his official capacity as Attorney General, United States Department of Justice,
Respondents-Appellants.

On Appeal from the United States District Court for the Southern District of New York, No. 19-cv-1934
Before the Honorable Paul G. Gardephe

BRIEF FOR FORMER IMMIGRATION JUDGES AND FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTIUTIONAL PROVISIONS

STATUTORY PROVISIONS

REGULATIONS AND ADMINISTRATIVE MATERIALS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae have served as Immigration Judges and as members of the Board of Immigration Appeals ("BIA").[2] *Amici* are invested in the resolution of this case because they have dedicated their careers to improving the fairness and efficiency of the U.S. immigration system. Through their centuries-long collective experience, *amici* have adjudicated hundreds—if not thousands—of immigration detention hearings. *Amici* have substantial knowledge of immigration detention issues, including the practical impact of the burden of proof in such hearings.

INTRODUCTION AND ARGUMENT SUMMARY

Under the Fifth Amendment, "[n]o person" shall "be deprived of … liberty … without due process of law[.]" U.S. Const. amend. V. The "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). This liberty is so fundamental that the law tolerates its restraint only in limited circumstances.

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[1] A*mici* have filed substantially similar briefs in other cases involving burden of proof issues in proceedings under 8 U.S.C. § 1226(a). Here, no party or party's counsel authored this brief in whole or in part, nor contributed money to preparing or submitting this brief. Only *amici* or their counsel contributed money to prepare or submit this brief. The parties have consented to the filing of this brief.

[2] A complete list of *amici* is included in this brief's addendum.

Such restraint violates the Due Process Clause "unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690. Yet, federal law provides far greater protections to criminal defendants than it does to noncitizens in civil proceedings—even though the distinctions between criminal and non-criminal proceedings mean very little to a person sitting behind bars.

Accordingly, noncitizens already face significant hurdles in detention proceedings brought under 8 U.S.C. § 1226(a). At issue in this appeal is whether another, even higher and more fundamental, barrier to due process can be erected in this Circuit: do noncitizens bear the burden of justifying their freedom from detention? For noncitizens, the answer to this question is no mere technicality—it can mean the difference between freedom and confinement. This burden's allocation, therefore, "reflects the value society places on individual liberty." *Addington v. Texas*, 441 U.S. 418, 425 (1979).

Given their collective experience in adjudicating immigration bond hearings, *amici* are particularly well-suited to address the monumental question in this case. To that end, *amici* wish to share the following observations for this Court's benefit:

First, noncitizens already enjoy fewer procedural protections than criminal defendants. We contrast the procedural rules for detaining criminal defendants and noncitizens to underscore the challenges that noncitizens face in immigration bond hearings, and to highlight the need for a presumption against detention as one of the last remaining bulwarks to protect noncitizens' liberty.

Second, detention of noncitizens consumes the government's already-limited administrative and judicial resources. *Amici* highlight the staggering costs that are associated with immigration detention, as well as the strain on immigration courts resulting from the unnecessary detention of noncitizens.

Third, contrary to the government's position, placing the burden of proof on the government would not generate fiscal or administrative hardship. *Amici* advance that position with confidence because the government previously shouldered that exact burden over a fifteen-year period. Several of the *amici* served as Immigration Judges within that period and found that this older system did not cause additional costs or administrative hurdles.

Fourth, in *amici*'s experience, detaining noncitizens actually ***increases*** the burden on the immigration court system. While in detention, noncitizens face significant challenges in adequately preparing their cases. Further, the Executive Branch now utilizes "performance metrics" to encourage Immigration Judges to accelerate the fact-finding process in detention proceedings. With less time for

individualized fact-finding, noncitizens will have even less opportunity to marshal the facts needed to satisfy the burden to avoid detention. Reallocating the burden of proof in immigration bond hearings, therefore, would reduce costs.

Fifth, and finally, *amici* offer alternatives to noncitizen detention that would inject much-needed resources to the immigration court system. The government's aversion to such alternatives rest on a single statistic suggesting that the vast majority of noncitizens abscond upon release on bond. That statistic, however, is misleading and inconsistent with other available data, and bears little resemblance to the reality that *amici* encountered in years of adjudicating immigration cases.

Together, these observations should lead this Court to conclude that due process requires the government to make some sort of individualized showing before it may place noncitizens under lock and key.

ARGUMENT

I. COMPARED TO CRIMINAL DEFENDANTS FACING DETENTION, NONCITIZENS HAVE ONLY LIMITED PROCEDURAL PROTECTIONS

Federal law extends far more protections to criminal defendants than to noncitizens. The existing inequities in procedural safeguards between criminal defendants and noncitizens abound, without forcing noncitizens to bear the burden of justifying their freedom from detention.

A. No Limitations on Government's Ability to Detain

In federal criminal prosecutions, for example, a presumption in favor of detention applies only to relatively few defendants. Specifically, there exists a rebuttable presumption for detaining a criminal defendant only if the case involves crimes of violence (for which the sentence is life imprisonment or death), certain serious drug offenses, or cases involving certain repeat offenders. *See* 18 U.S.C. § 3142(f). But the government's ability to detain noncitizens under 8 U.S.C. § 1226(a) is not subject to those limitations. Noncitizens, in some circumstances, may be detained without any criminal convictions at all.[3]

B. Very Limited Right to Judicial Review

Moreover, in criminal cases, the government's decision to detain defendants prior to trial is subject to judicial review. *See, e.g., United States v. Briggs*, 697 F.3d 98, 101 (2d. Cir. 2012). By contrast, pretrial detention of a noncitizen under 8 U.S.C. § 1226(a) is almost entirely unreviewable. *See* 8 U.S.C. § 1226(e) (precluding noncitizens from challenging the Attorney General's "discretionary judgment" concerning detention or release); *see also Darko v. Sessions*, 342 F. Supp. 3d 429, 433 (S.D.N.Y. 2018).

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[3] For instance, arriving noncitizens who are not clearly entitled to be admitted and noncitizens subject to expedited removal are among those detained for prolonged periods of time. *See* INA § 235(b)(2)(A); INA § 235(b)(1)(A)(i); 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 235.3(b)(2)(iii).

C. No Right to A Court-Appointed Attorney

Criminal defendants also enjoy the right to government-appointed counsel during detention proceedings. 18 U.S.C. § 3142(f). By contrast, noncitizens facing government detention ***may*** have counsel present, but "only at their own expense." 8 U.S.C. § 1362; *Matter of Gutierrez*, 16 I. & N. Dec. 226, 228-229 (BIA 1977) (holding that the government will not appoint counsel regardless of the circumstances). And worse, noncitizens in removal proceedings have no Sixth Amendment right to counsel since deportation hearings are civil proceedings. *See Saleh v. DOJ*, 962 F.2d 234, 241 (2d Cir. 1992) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)). Thus, legal representation remains out of reach for the majority of detained noncitizens because they often cannot afford an attorney.[4]

Unsurprisingly, the vast majority of noncitizen detainees—nearly 83%—are unrepresented in immigration proceedings.[5] The adverse outcomes are equally predictable. As the American Bar Association noted, "the disparity in outcomes of immigration proceedings depending on whether noncitizens are unrepresented or

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[4] Urbina & Rentz, *Immigrant Detainees and the Right to Counsel*, N.Y. Times (Mar. 30, 2013), https://www.nytimes.com/2013/03/31/sunday-review/immigrant-detainees-and-the-right-to-counsel.html.

[5] *Building an Immigration System Worthy of American Values*, Hearing Before the Sen. Comm. on the Judiciary, 113 Cong. 112 (2013) (testimony of the American Immigration Lawyers Association), https://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg81774.pdf.

represented is striking."[6] Noncitizens who secure legal counsel are nearly ***eleven*** times more likely to seek relief and ***twice*** as likely to win the relief sought.[7] The Varick Street immigration court in New York bears witness to those disparate outcomes. Since the implementation of a pro bono counsel program in that court, noncitizens are now ***eleven*** times more likely to win than before the program began.[8] A study group formed by this Court found that only three percent of detained immigrants in New York Immigration Courts who lacked representation avoided deportation, compared to eighteen percent who had counsel.[9] Given the importance of legal counsel and "[h]ow the attorney performs can be fateful," this is a disturbing gap in protecting noncitizens' right to due process.[10]

D. No Consideration for Noncitizens' Financial Circumstances

The law also turns a blind eye to noncitizens' financial circumstances in bond hearings. In criminal cases, for example, federal courts must consider a

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6 American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-3 (2010).

7 Eagly & Shafer, *Access to Counsel in Immigration Court* 2-3 (2016).

8 Sidahmed, '*It's Like an Automatic Deportation if You Don't Have a Lawyer'*, N.Y. Times (Aug. 13, 2019).

9 Study Group on Immigrant Representation, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings, New York Immigrant Representation Study* 19 (2011).

10 Brennan, *A View from the Immigration Bench*, 78 Fordham L. Rev. 623, 624-625 (2009).

criminal defendant's assets and net worth before setting the conditions of release. *See* 18 U.S.C. § 3142(c)(1)(B)(xii). By contrast, under BIA procedures, Immigration Judges are not obligated to consider a noncitizen's ability to pay for bail. *Abdi v. Nielsen*, 287 F. Supp. 3d 327 (W.D.N.Y. 2018).[11] In *amici*'s view, the failure to consider a noncitizen's finances in setting bond further illustrates the lack of procedural protection and threat to due process that already exist in the current system.[12]

E. No Sixth Amendment Right to a Speedy Trial

Moreover, unlike in criminal cases, noncitizen detainees do not enjoy the right to a speedy trial protected by the Sixth Amendment and the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161 *et seq.* Indeed, this Court has observed that "civil immigration detention does not normally trigger the Act's thirty-day arrest-to-indictment time limit." *United States v. Guevara-Umana*, 538 F.3d 139, 141-142 (2d Cir. 2008). As a result, some noncitizens have languished in detention for years while awaiting the conclusion of their immigration proceedings.[13] *See, e.g.*,

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[11] *See also In re Manuel Balbuena Rivera A.K.A. Manuel Rivera-Balbuena*, 2010 WL 691275, at *1 (BIA Feb. 16, 2010); *In re Castillo-Cajura*, 2009 WL 3063742, at *1 (BIA Sept. 10, 2009); *In re Mario Sandoval-Gomez*, 2008 WL 5477710, at *1 (BIA Dec. 15, 2008).

[12] *See, e.g., Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017).

[13] *See, e.g.,* Transactions Records Access Clearinghouse ("TRAC") Immigration, *Profiling Who ICE Detains – Few Committed Any Crime* (Oct. 9, 2018), https://trac.syr.edu/immigration/reports/530 (noting that two individuals

Casas-Castrillon v. Department of Homeland Sec., 535 F.3d 942, 944 (9th Cir. 2008). It is axiomatic that justice delayed is justice denied.

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Noncitizens facing detention already have far fewer procedural safeguards than criminal defendants. Worse, while the length of a criminal defendant's sentence is keyed to the length of time necessary to "protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C), noncitizens who are removed due to criminal convictions are almost always detained by immigration officials ***after*** they have served their sentence. *See* 8 U.S.C. § 1226(c)(1) (allowing the Attorney General to detain noncitizens even "when the alien is released"); *Nielsen v. Preap*, 139 S. Ct. 954 (2019) (holding that immigrants with past criminal records can be detained even after they have completed their prison terms). In other words, noncitizens continue to face detention ***after*** they have been deemed no longer dangerous.[14] In a key sense, therefore, the purported public interest in detaining noncitizens under 8 U.S.C. § 1226(a) is often questionable.

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have been held for more than ten years and 1,932 individuals for more than a year); *see also* Castillo, *With or Without Criminal Records, Some Immigrants Spend Many Years in Detention*, L.A. Times (Nov. 12, 2018), https://www.latimes.com/local/ lanow/la-me-immigrant-detainees-20181112-story.html (describing an asylum seeker who spent almost ***ten years*** in immigration detention).

[14] Notably, the Department of Homeland Security has observed a recidivism rate of less than 3% for the 36,007 noncitizens with criminal records that were released from ICE custody in 2013. *See* Hearing Before the House Comm. on

In sum, noncitizens subject to immigration detention proceedings are subject to the Attorney General's broad detention powers, with no Sixth Amendment right to an attorney or to a speedy trial, and with no consideration of their financial ability to even pay the potential bond amount. Given the dearth of procedural safeguards in place, the fundamental rights afforded by the Fifth Amendment require that a presumption against noncitizen detention should again serve as the floor for due process—the bare, irreducible minimum necessary to protect against the arbitrary deprivations of noncitizens' liberty.

II. UNNECESSARILY DETAINING NONCITIZENS CONSUMES ALREADY-LIMITED GOVERNMENT RESOURCES

A. Costs of Immigration Detention are Staggering

Immigration and Customs Enforcement ("ICE") "operates the largest detention system in the country."[15] For fiscal year 2020, the Department of Homeland Security requested $2.7 billion to cover the cost of 54,000 detention beds.[16] The average daily cost of detaining a noncitizen is between $130 and

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Oversight and Gov't Reform, 114 Cong. 2, 6 (2015) (statement of Chairman Chaffetz).

[15] Schriro, Immigrations and Customs Enforcement, *Immigration Detention Overview and Recommendations* 6 (2009).

[16] U.S. Dep't of Homeland Sec., *Budget-in-Brief: Fiscal Year 2020*, at 3 (2019).

$208;[17] the federal government spent $8.43 million per day on immigrant detention in fiscal year 2018.[18] Meanwhile, the number of detainees in the immigration court system has been rising: 510,854 individuals were detained in ICE facilities in fiscal year 2019, reflecting a 29% increase from fiscal year 2018.[19] Considering that the total number of noncitizens detained in 1994 was about 81,000, these numbers–and their effects on the immigration court system–are alarming.

The costs of immigration detention are exacerbated by frequent increases in detention time for noncitizens in at least three scenarios. ***First,*** a noncitizen's detention can be exceptionally long where the noncitizen has a meritorious defense. Noncitizens who have sound defenses are more likely to pursue those defenses, which often involve detailed factual and legal analyses that protract the proceedings. And where a meritorious defense exists, it would be unjust to have detained the noncitizen in the first place.

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17 U.S. Dep't of Homeland Sec., *Budget Overview: Fiscal Year 2020*, at 6 (2019); *Cf.* Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply*, Nat'l Immigr. F. (May 9, 2018), https://immigration forum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/.

18 Benenson, *supra* note 17.

19 U.S. Immigration and Customs Enforcement, *Fiscal Year 2019 ICE Enforcement and Removal Operations Report* 5 (2019).

Second, a noncitizen may appeal a removal decision to the BIA, where appeals often remain pending for six months or more.[20] If this appeal is unsuccessful, the noncitizen may then petition a federal court of appeals for review, which takes additional years. *See* 8 U.S.C. § 1252(a)(5).

Third, as explained above, hurdles in representation by counsel lead to prolonged time in detention. Since legal assistance is critical to an adequate presentation of merits, Immigration Judges often allow noncitizens reasonable time to locate counsel. However, limited access to communication and other challenges imposed by detention make it particularly complex for a nondefendant to find an attorney. These continuances can comprise over 50 percent of the total adjudication time for a case.[21]

B. Immigration Courts are Increasingly Overburdened

Immigration courts are notoriously "overburdened." *Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013). What this Court has recognized as an "enormous backlog in immigration proceedings"[22] has consistently grown: pending cases more than doubled from fiscal years 2006 through 2015, primarily due to a declining rate

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[20] Executive Office for Immigration Review ("EOIR"), *Certain Criminal Charge Completion Statistics* 4 (2016).

[21] Eagly & Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 61 (2015)

[22] *Lora v. Shanahan*, 804 F.3d 601, 605 (2d Cir. 2015).

of completion each year.[23] In October 2019, there were 987,274 cases waiting in U.S. immigration courts.[24] Yet this immense task is imposed on a remarkably small number of Immigration Judges: 442.[25]

The complexity of immigration proceedings heightens the concern. Noncitizen defendants often do not speak or understand English, requiring translators during hearings. This limits the amount of information that can be conveyed to and from an Immigration Judge and creates a risk of translation errors. Moreover, noncitizens are rarely equipped with knowledge of judicial processes in America, including critical steps like cross-examination of fact witnesses and experts.

In sum, as Chief Judge Robert A. Katzmann of this Court has noted, "the challenges for any judge, however conscientious, to dispose of all these cases with due care are overwhelming."[26] Chief Judge Walker's testimony before the Senate Judiciary Committee in 2006 is even truer now: "[i]mmigration judges simply

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23 U.S. Government Accountability Office, *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, June 2017.

24 EOIR, *Adjudication Statistics: Pending Cases* (as of Oct. 2019).

25 As of Oct. 2019. EOIR, *Adjudication Statistics: Immigration Judge (IJ) Hiring* (Oct. 2019). Moreover, this figure appears to include dozens of assistant chief immigration judges who do not hear cases.

26 Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Georgetown J. Legal Ethics 3, 7 (2008).

cannot be expected to make thorough and competent findings of fact and conclusions of law under these circumstances."[27]

III. REALLOCATING THE BURDEN OF PROOF WOULD NOT GENERATE ANY FISCAL OR ADMINISTRATIVE COSTS

The due process inquiry at the heart of this case turns partly on whether the proposed reallocation of the burden of proof in detention hearings would generate any "fiscal and administrative burdens." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The empirical record shows that shifting the burden to the government would not create such harms. Indeed, for more than a decade, that is precisely how the immigration detention system functioned.

Fifty years ago, the Board of Immigration Appeals ("BIA") stated that "[i]n our system of ordered liberty, the freedom of the individual is considered precious. No deportable alien should be deprived of his liberty pending execution of the deportation order unless there are compelling reasons and every effort should be made to keep the period of any necessary detention to a minimum." *Matter of Kwun*, 13 I. & N. Dec. 457, 464 (BIA 1969). Nearly a decade later, the BIA established a formal presumption against detention. *Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976). There, the BIA held that "[a]n alien generally is not and

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[27] *Immigration Litigation Reduction*, Hearing Before the S. Comm. on the Judiciary, 109 Cong. 6 (2006) (statement of Chief Judge John M. Walker, Jr., Second Circuit Court of Appeals), https://www.govinfo.gov/content/pkg/CHRG-109shrg28339/pdf/CHRG-109shrg28339.pdf

should not be detained or required to post bond except on a finding that he is a threat to the national security … or that he is a poor bail risk." *Id.* That approach held for two decades.

It was not until 1999 that the BIA established a presumption in the opposite direction—that noncitizens should ***not*** be released in 1226(a) proceedings. *See, e.g.*, *Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999). Between 1976 and 1999, the government bore the burden in thousands upon thousands of immigration bond hearings. *Amici*, who served as Immigration Judges during that period, identified no administrative or fiscal difficulties resulting from that burden allocation.

"[A]ll else again being equal," as this Court has advised, "courts should avoid requiring a party to shoulder the more difficult task of proving a negative." *National Communications Ass'n Inc. v. AT&T Corp.*, 238 F.3d 124, 131 (2d Cir. 2001). Doing so fits the "general rule" that "the party that asserts the affirmative of an issue has the burden of proving the facts essential to its claim." *Id.* (citing *Auburndale State Bank v. Dairy Farm Leasing Corp.*, 890 F.2d 888, 893 (7th Cir. 1989)). And consistent with established Due Process precedent, the government should bear the burden to justify noncitizen detention by clear and convincing evidence. *See* Pet'r Br. (Dkt. No. 100) at 35-40. Requiring noncitizens to prove a negative—that they are not a danger to the community and not a flight risk—goes

against this fundamental precept while providing no administrative or fiscal cost savings to the system.

Critically, the government's brief does not argue that a return to the prior regime would generate any fiscal or administrative burdens. And that should come as no surprise—those burdens simply do not exist. *See, e.g.*, *Brito v. Barr*, 2019 WL 6333093, at *7 (D. Mass. Nov. 27, 2019). If anything, and as shown below, a presumption against noncitizen detention would actually ***lower*** the administrative burdens on Immigration Judges.

IV. UNNECESSARILY DETAINING NONCITIZENS INCREASES THE BURDEN ON THE IMMIGRATION COURT SYSTEM

A. Detained Noncitizens Cannot Adequately Prepare their Cases

1. Detained noncitizens have difficulty obtaining or consulting with counsel

As noted above, the vast majority of noncitizens facing removal lack counsel because the Sixth Amendment does not attach to immigration proceedings. Detention is an additional, unmistakable barrier to obtaining counsel: 86 percent of detained noncitizens facing removal are unrepresented by counsel,[28] compared to

[28] Eagly & Shafer, *supra* note 21, at 32 (considering cases between 2007 and 2012); *see also* Markowitz et al., *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).

33 percent of noncitizens facing removal generally.[29] A study commissioned by this Court found that only 40 percent of detained immigrants had counsel in New York City, 22 percent in Newark, and 19 percent in all locations outside of New York.[30] This is partly because many noncitizens are held in remote detention centers[31] and lack access to legal services and pro bono organizations, making it "difficult and expensive" for attorneys to reach them. *Baires v. INS*, 856 F.2d 89, 93 n.6 (9th Cir. 1988) (describing a detention facility in Florence, Arizona). Detained immigrants also cannot travel to meet with lawyers. Moreover, as noncitizen detainees are barred from working, they are unable to pay for an attorney.

Even where a detained noncitizen manages to obtain counsel, detention complicates their attorney-client communications. Detained noncitizens are often transferred from one detention facility to another without notification to their

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29 EOIR, *Adjudication Statistics: Current Representation Rates* (2019).

30 Study Group on Immigrant Representation, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings, New York Immigrant Representation Study* 4 (2011).

31 Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—a Two Year Review* 31 (2011) (noting that nearly 40 percent of ICE detention facilities are located over 60 miles from an urban center).

attorneys.[32] Furthermore, the attorney may have to travel such a long distance that in-person meetings become practically impossible.

At the detention facility, rules prohibiting laptops and other electronics, a lengthy wait time for an attorney-client meeting room, and other barriers continue to inhibit effective attorney-client communications.[33] Attorneys may even be barred from meeting with their clients.[34] Telephones do not offer a suitable alternative to in-person client meetings, since attorneys cannot call detained noncitizens directly, and detained noncitizens are limited in the number of calls they can make, and such calls are often interrupted.[35] A detained noncitizen's counsel is therefore less able to concisely and accurately present the noncitizen's case to an Immigration Judge.

In *amici*'s experience, these obstacles to obtaining counsel are taxing on the Immigration Judge's ability to reach an efficient and fair resolution to the case.

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[32] Schriro, Immigrations and Customs Enforcement, *Immigration Detention Overview and Recommendations* 23-25 (2009); Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 Fordham L. Rev. 541, 556-558 (2009).

[33] Eagly & Shafer, *supra* note 21, at 35.

[34] Kim, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They're Deported*, L.A. Times (Sept. 28, 2017), https://www.latimes.com/projects/la-na-access-to-counsel-deportation/.

[35] *See* Organization of Am. States, Inter-Am. Comm'n on Human Rights, *Report on Immigration in the United States: Detention and Due Process* 110-113 (2010); *see also* Markowitz, *supra* note 32, at 558.

That is particularly true because an Immigration Judge, "unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record." *Yang v. McElroy*, 277 F.3d 158, 723 (2d Cir. 2002) (citing 8 U.S.C. § 1229a(b)(1). As with unrepresented noncitizens, counsel for noncitizens who are not properly prepared for the hearings force Immigration Judges to take a more active role in navigating the removal proceedings. Their attorneys may also present incomplete facts and legal theories, impeding a complete record. All of this is likely to generate confusion, mistakes, and ultimately, additional resource-consuming litigation.

If the obstacles to obtaining counsel posed by detention are removed, the likelihood of representation will increase. *Amici* believe that this will bring significant relief to the overburdened immigration courts. As the Supreme Court has noted, "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). Immigration law is notoriously complex. Immigration Judges, like Article III judges, rely on the "crucible of adversarial testing" to "yield insights (or reveal pitfalls)" that they could not "muster guided only by [their] own lights." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1232-1233 (2018) (Gorsuch, J., concurring) (citation omitted).

In amici's experience, immigration courts gain significant benefits when noncitizens are represented by counsel: the attorney can guide the noncitizen through the removal process, the noncitizen will present a more concise and straightforward case, and appellate decisions will provide better guidance to Immigration Judges.

First, the Immigration Judge is released from the responsibility of guiding the noncitizen through the removal process if an attorney is present. Conducting proceedings for unrepresented noncitizens "puts substantial pressure on the judge to ensure that available relief is thoroughly explored and the record fully developed."[36]

Indeed, as this Court has previously noted:

> Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.

Singh v. BIA, 77 F. App'x 54, 55 (2d Cir. 2003) (citing *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (omitting internal quotation marks)). Counsel frees the Immigration Judge from this burden—at least in large part. Shifting the burden of proof would also require the government to lay out its positions more concretely,

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[36] Brennan, *supra* note 10, at 626.

allowing even unrepresented noncitizens to more meaningfully respond with less guidance from Immigration Judges.

Second, noncitizens represented by counsel present their cases in a manner that facilitates efficient and thorough review. Attorneys can also convince noncitizens to abandon meritless arguments or appeals. An unrepresented noncitizen often lacks judgement as to what information is pertinent to an Immigration Judge's inquiry. Discussions with counsel may even "prompt the detainee to cut his losses and opt for voluntary departure, avoiding a pointless legal fight and the taxpayer-funded costs of detention."[37]

With counsel, noncitizens present legal and factual issues in a far more coherent and organized manner than *pro se* noncitizens. This advantage is particularly important in briefing, where the Immigration Judge seeks a clear understanding of any disputes in fact or law.[38] Unrepresented noncitizens often fail to submit a briefing in BIA proceedings altogether.[39] The resulting inability of

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[37] Lee, *Immigrants in Detention Centers Are Often Hundreds of Miles from Legal Help*, ProPublica (May 16, 2017), https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help.

[38] *See* EOIR, *A Ten-Year Review of the BIA Pro Bono Project: 2002-2011* (2014), at 10-11.

[39] Board of Immigration Appeals, *The BIA Pro Bono Project Is Successful* 10 (2004) ("Most often, pro se case appeals by detained aliens failed to filed a brief before the Board"), https://www.justice.gov/sites/default/files/eoir/legacy/2005/02/01/BIAProBonoProjectEvaluation.pdf.

Immigration Judges to effectively review the relevant issues prior to a hearing leads to unnecessary delays.

Third, the absence of counsel may deprive the appellate court of an adequate record upon which to rule. It is more difficult for appellate judges to correctly decide cases without the benefit of an informed briefing.[40] Yet, noncitizens without counsel have difficulty in both obtaining and expressing the facts and arguments to develop an informed briefing. The government by contrast has institutional advantages, such as familiarity with the relevant law, which make it easier for the government to provide Immigration Judges with the information needed to properly adjudicate a case. Placing the burden of proof on the government encourages the government to use these advantages to develop the factual record, improving the likelihood of Immigration Judges to reach a fair conclusion efficiently.

2. Detained noncitizens face challenges in gathering evidence

Even with legal representation, it is far more difficult for a noncitizen to gather evidence while detained. *See Moncrieffe*, 569 U.S. at 201 (noting that noncitizens are often subject to mandatory detention, "where they have little ability to collect evidence."). The government's contention that "the alien … is in the

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40 *See* Katzmann, *supra* note 26, at 6.

best position to provide evidence"[41] is flatly inconsistent with *amici*'s experience. Noncitizens detained in prisons, jails, and federal facilities face significant limits on visitation, movement, and external communications.[42] Phone, internet, and mail restrictions, as well as limitations on retention and access to personal documents, also hinder efforts to obtain records necessary to prepare their cases.

Moreover, unlike in criminal proceedings, the government can conduct removal proceedings in a state other than where a noncitizen was apprehended. Noncitizens are routinely placed in detention centers far from their home state.[43] Therefore, even if a detained noncitizen has family or friends willing to assist with obtaining counsel or gathering evidence, communicating with those helpful sources is strained further by geographic distance.

In sum, the current presumption in favor of noncitizen detention actually ***increases*** administrative burdens. The current presumption makes it more likely that noncitizens will remain detained throughout immigration proceedings, which in turn makes it harder for noncitizens to obtain counsel and develop the factual

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41 Gov't Br. at 30.

42 Eagly & Shafer, *supra* note 21, at 35; Amnesty Int'l, *Jailed without Justice: Immigration Detention in the USA* (2011), at 34-35; Southern Poverty Law Center et al., *Shadow Prisons: Immigrant Detention in the South* (2016), at 19.

43 *See* Bernstein, *For Those Deported, Court Rulings Come Too Late*, N.Y. Times (July 20, 2010), https://www.nytimes.com/2010/07/21/nyregion/21deport.html

record. Consequently, shifting the burden of proof to the government would reduce the fiscal and administrative burdens currently borne by immigration courts, while ensuring that only those noncitizens who truly pose a risk of flight or a danger to the community are properly detained.

B. The Executive Branch's "Performance Metrics" for Immigration Judges Further Truncate the Fact-Finding Process

The government claims that "[t]he existing procedures governing bond hearings … are flexible, permitting an immigration judge to consider a wide range of factors[.]"[44] The problem, however, is not whether an Immigration Judge may consider a wide range of factors but whether a noncitizen is able to provide the court with necessary information to properly weigh those factors. As noted above, the lack of procedural safeguards coupled with the current burden allocation circumvents noncitizens' ability to do so.

Worse, in 2018, the Department of Justice announced new "performance metrics" that pressure Immigration Judges to resolve their cases with greater haste.[45] Now, an Immigration Judge's performance is deemed "unsatisfactory" or "in need of improvement" if the judge completes fewer than 700 cases per year, or

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44 Gov't Br. at 29.

45 James McHenry, Dir., Exec. Office for Immigration Review, Memo. to All EOIR Judges Regarding Immigration Judge Performance Metrics (Mar. 30, 2018), https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics.

completes fewer than 90% of its custody cases on the same day (unless the government does not produce the alien on the hearing date). These quotas discourage intensive fact-finding, further hurting a noncitizen' ability to meet the burden of proof to avoid detention.

These "performance metrics" are relevant to the due process inquiry here because there is a key practical link between the robustness of the fact-finding process and the underlying burden of proof. In any proceeding where "there is a dispute about the facts of some earlier event, the fact-finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact-finder can acquire is a belief of what ***probably*** happened." *See In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

To be clear, *amici* are confident that Immigration Judges will always strive to reach the right result—regardless of the time constraints they face. But these metrics serve only to entrench the significant practical effects of a backdrop presumption on the outcome of immigration proceedings. Requiring noncitizens to continue to bear the burden of proof in the face of such metrics runs contrary to the basic principles of fairness and due process.

V. DETENTION ALTERNATIVES WOULD NOT INCREASE RISK OF ABSCONDMENT AND WOULD REDUCE ADMINISTRATIVE AND FISCAL COSTS

A. The Government's Brief Rests on the Unfounded Insinuation that Noncitizens Abscond if Released on Bond

The government's position rests largely on a single "report by the Department of Justice Inspector General," which supposedly "shows that when aliens are released from custody, nearly 90 percent abscond and are not removed[.]"[46] This statistic is misleading, inconsistent with other available data, and out of step with our collective experience as Immigration Judges.

The 90 percent statistic also appears to be limited only to noncitizens facing ***final*** orders of removal—a very a narrow slice of the universe of noncitizens detained under 8 U.S.C. § 1226(a). In *amici*'s experience, many noncitizens believe that their arguments are meritorious and are often eager to appear in court and prove their entitlement to relief. Those who do so successfully will avoid final orders of removal, so the government's numbers reflect upon, at most, those noncitizens with unsuccessful cases.

Moreover, a measure of the number of noncitizens who "abscond" can often be misleading. In our experience, many noncitizens fail to appear simply due to scheduling mistakes, or because they lacked notice of the hearing itself. *Amici*'s experience teaches that when a noncitizen failed to appear at an initial hearing, it

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[46] Gov't Br. at 11 (citing 62 Fed. Reg. 10,312, 10,323 (Mar. 6, 1997)).

often sufficed to re-set the hearing for a later date; when given another opportunity, many noncitizens would subsequently appear. Thus, the government is wrong to assume that a noncitizen's failure to appear is automatically an act of abscondment.

Indeed, in *amici*'s experience, noncitizens released on bond almost always appear in court as required. And the existing research studying this very topic confirms *amici*'s experience. For example, one study observed that "86 percent of individuals that were released from detention turned up for their court hearing when it was finally held."[47] Similarly, another concluded that noncitizens who were released from detention had high attendance rates, finding that "86% of family detainees attended all their court hearings" during the fifteen-year study.[48] This rate was even higher among family members applying for asylum: ***96 percent*** of asylum applicants had attended every one of their immigration court hearings during this time period.[49] Noncitizens enrolled in Alternatives to Detention (ATD) programs also have shown high rates of court appearances. From fiscal years 2011 to 2013, for example, over ***99 percent*** of participants in the ATD program's "full-

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47 TRAC Immigration, *What Happens When Individuals Are Released On Bond In Immigration Court Proceedings?* (Sept. 14, 2016), http://tinyurl.com/jjbyv64. TRAC is a data gathering, research, and distribution organization at Syracuse University.

48 Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Calif. L. Rev. 785, 848 (2018).

49 *Id.*

service" component appeared at their scheduled court hearings, and ***95 percent*** of those participants appeared during final removal hearings.[50]

Thus, in light of the empirical record and in *amici*'s collective experience, the government's concerns that noncitizens released on bond will abscond are grossly misleading and simply unfounded.

B. Supervised Release Programs Offer a Practical Alternative and Inject Needed Resources into the Immigration Courts

The government can spend far fewer resources if it adopts supervised release programs in place of detention. For example, less than one-tenth of the budget needed to maintain 54,000 detention beds is necessary to monitor 120,000 average daily participants in ICE's ATD program.[51] This program supervises individuals in immigration proceedings through a combination of home visits, office visits, alert response, court tracking, and/or technology (such as electronic ankle bracelets).[52]

Importantly, alternative methods to detention facilitate effective enforcement of immigration laws. Studies have shown that they do not lead to any significant

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50 U.S. Government Accountability Office ("GAO"), *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 30 (2014).

51 *See* U.S. Dep't of Homeland Sec., *Budget-in-Brief: Fiscal Year 2020*, at 3-4 (2019) ($2.7 billion for 54,000 detention beds requested, compared to $209.9 million for the ATD program).

52 *Id*. at 4.

increase in flight.[53] In fact, the rate of noncitizens who fail to appear after being released on bond is only 14 percent.[54] Noncitizens who are placed on supervision are particularly likely to appear: over 95 percent of noncitizens participating in one segment of ICE's ATD programs appeared for their removal proceedings.[55] Thus, there is minimal detriment to releasing noncitizens on bond where an Immigration Judge deems bond or supervised release to be appropriate.

Given the government's already-limited resources, releasing noncitizens on bond would allow desperately needed funds to help the overburdened immigration court system. Immigration Judges foresee benefits of these additional funds beyond heightened efficiency. In *amici*'s view, there exists an urgent need for more Immigration Judges and other personnel.[56] Additional funds can be used to expand efforts to educate noncitizens about immigration court procedures,[57] and to

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53 *See, e.g.*, Noferi, *A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers* 1 (2015).

54 TRAC Immigration, *supra* note 47; *see also id.* ("This is noteworthy since the cases immigration judges were reviewing were almost always those where the government had refused to release the individual.").

55 GAO, *supra* note 50; *see also id.* at 31.

56 Slavin & Harbeck, *A View from the Bench by the National Association of Immigration Judges*, Fed. Lawyer 67, 70 (Oct./Nov. 2016).

57 American Immigration Lawyers Association, *Policy Brief: Facts About the State of Our Nation's Immigration Courts* 2 (2019); Amnesty Int'l, *supra* note 42, at 33 (same); DOJ, *Legal Orientation Program* (same), https://www.justice.gov/eoir/legal-orientation-program.

replace outdated audio, video and other electronics systems to support efficient court proceedings.[58] Limiting detention to when it is truly needed would help alleviate the glaring inefficiencies noted above in adjudicating detained noncitizens' cases. The first step to fixing the overburdened immigration system is to reallocate the burden of proof onto the government to justify noncitizen detentions.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that this Court should affirm the District Court's judgment below.

June 3, 2020

Respectfully submitted.

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[58] *See* Slavin & Harbeck, *supra* note 56, at 67-68; EOIR, *FY 2019 Budget Request at a Glance* 2 (2019).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 6,474 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Souvik Saha
SOUVIK SAHA

June 3, 2020

ADDENDUM

The Honorable Steven Abrams served as an Immigration Judge from 1997 to 2013 at the New York, Varick Street, and Queens Wackenhut Immigration Courts in New York City. Prior to his appointment to the bench, he worked as a Special U.S. Attorney in the Eastern District of New York, and before that as District Counsel, Special Counsel for criminal litigation, and general attorney for the former INS. Judge Abrams also previously worked as assistant counsel for the State of New York Commission of Investigation, as assistant counsel for the New York State Department of Social Services Medicaid Fraud and Abuse Unit, and for the Queens County District Attorney's Office, serving first as an assistant district attorney, then as senior assistant in the Homicide Bureau.

The Honorable Sarah M. Burr served as a U.S. Immigration Judge in New York from 1994 and was appointed as Assistant Chief Immigration Judge in charge of the New York, Fishkill, Ulster, Bedford Hills and Varick Street immigration courts in 2006. She served in this capacity until January 2011, when she returned to the bench full-time until she retired in 2012. Prior to her appointment, she worked as a staff attorney for the Criminal Defense Division of the Legal Aid Society in its trial and appeals bureaus and also as the supervising attorney in its immigration unit. She currently serves on the Board of Directors of the Immigrant Justice Corps.

The Honorable Esmeralda Cabrera served as an Immigration Judge from 1994 until 2005 in the New York, Newark, and Elizabeth, NJ Immigration Courts.

The Honorable Jeffrey S. Chase served as an Immigration Judge in New York City from 1995 to 2007 and was an attorney advisor and senior legal advisor at the Board of Immigration Appeals from 2007 to 2017. He is presently in private practice as an independent consultant on immigration law and is of counsel to the law firm of DiRaimondo & Masi in New York City. Prior to his appointment, he was a sole practitioner and volunteer staff attorney at Human Rights First. He also was the recipient of the American Immigration Lawyers Association's annual pro bono award in 1994 and chaired AILA's Asylum Reform Task Force.

The Honorable George T. Chew served as an Immigration Judge in New York from 1995 to 2017. Previously, he served as a trial attorney at the INS.

The Honorable Joan V. Churchill served as an Immigration Judge from 1980-2005 in Washington DC/Arlington VA, including 5 terms as a Temporary Member of the Board of Immigration Appeals. From 2012-2013 she served as the National President of the National Association of Women Judges.

The Honorable Bruce J. Einhorn served as a United States Immigration Judge in Los Angeles from 1990 to 2007. He now serves as an Adjunct Professor of Law at Pepperdine University School of Law in Malibu, California, and a Visiting Professor of International, Immigration, and Refugee Law at the

University of Oxford, England. He is also a contributing op-ed columnist at D.C.-based The Hill newspaper. He is a member of the Bars of DC, NY, PA, and the Supreme Court of the United States.

The Honorable Cecelia M. Espenoza served as a Member of the Executive Office for Immigration Review (EOIR) Board of Immigration Appeals from 2000-2003, and in the Office of the General Counsel from 2003-2017 where she served as Senior Associate General Counsel, Privacy Officer, Records Officer and Senior FOIA Counsel. She is presently in private practice as an independent consultant on immigration law, and served as a member of the World Bank's Access to Information Appeals Board. Prior to her EOIR appointments, she was a law professor at St. Mary's University (1997-2000) and the University of Denver College of Law (1990-1997) where she taught Immigration Law and Crimes and supervised students in the Immigration and Criminal Law Clinics. She has published several articles on Immigration Law. She is a graduate of the University of Utah and the University of Utah S.J. Quinney College of Law. She was recognized as the University of Utah Law School's Alumna of the Year in 2014 and received the Outstanding Service Award from the Colorado Chapter of the American Immigration Lawyers Association in 1997 and the Distinguished Lawyer in Public Service Award from the Utah State Bar in 1989-1990.

The Honorable Noel Ferris served as an Immigration Judge in New York from 1994 to 2013 and an attorney advisor to the Board from 2013 to 2016, until her retirement. 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.

The Honorable James R. Fujimoto served as an Immigration Judge in Chicago from 1990 until 2019.

The Honorable Gilbert T. Gembacz served as an Immigration Judge in Los Angeles from 1996 to 2008.

The Honorable Jennie L. Giambastiani served as an Immigration Judge in Chicago from 2002 until 2019.

The Honorable John F. Gossart, Jr. served as a U.S. Immigration Judge from 1982 until his retirement in 2013 and is the former president of the National Association of Immigration Judges. At the time of his retirement, he was the third most senior immigration judge in the United States. Judge Gossart was awarded the Attorney General Medal by then Attorney General Eric Holder. From 1975 to 1982, he served in various positions with the former Immigration Naturalization Service, including as general attorney, naturalization attorney, trial attorney, and deputy assistant commissioner for naturalization. He is also the co-author of the National Immigration Court Practice Manual, which is used by all practitioners

throughout the United States in immigration court proceedings. From 1997 to 2016, Judge Gossart was an adjunct professor of law at the University of Baltimore School of Law teaching immigration law, and more recently was an adjunct professor of law at the University of Maryland School of Law also teaching immigration law. He has been a faculty member of the National Judicial College, and has guest lectured at numerous law schools, the Judicial Institute of Maryland and the former Maryland Institute for the Continuing Education of Lawyers. He is also a past board member of the Immigration Law Section of the Federal Bar Association. Judge Gossart served in the United States Army from 1967 to 1969 and is a veteran of the Vietnam War.

The Honorable Paul Grussendorf served as Supervisory Asylum Officer and as an Immigration Judge in Philadelphia, San Francisco and Texas, and has over thirty years of experience in asylum and refugee protection. He has worked as a Protection Officer for the UN Refugee Agency and as a Refugee Officer for the United States Citizenship and Immigration Services. He has also served as an Associate Professor of Clinic Law at George Washington University Law School's Immigration Clinic.

The Honorable Miriam Hayward is a retired Immigration Judge. She served on the San Francisco Immigration Court from 1997 until 2018.

The Honorable Charles Honeyman served as an Immigration Judge in New York City from 1995 to 2001, and in Philadelphia from 2001 to 2020. Judge Honeyman received a Bachelor of Arts degree from Roanoke College in 1971, a Master of Arts degree from Pennsylvania State University in 1975, a Masters of Public Policy degree from the University of Michigan in 1977, and a Juris Doctorate from the University of Baltimore in 1981. From 1981 to 1995, he practiced immigration law at various law firms in Baltimore and Philadelphia. He was also an adjunct professor at Villanova University Law School in 1988 and 1989.

The Honorable Rebecca Jamil was appointed as an Immigration Judge by Attorney General Loretta Lynch in February 2016 and heard cases at the San Francisco Immigration Court until July 2018. From 2011 to February 2016, Judge Jamil served as assistant chief counsel for U.S. Immigration and Customs Enforcement in San Francisco. From 2006 to 2011, she served as staff attorney in the Research Unit, Ninth Circuit Court of Appeals, in San Francisco, focusing exclusively on immigration cases. Judge Jamil earned a Bachelor of Arts degree in 1998 from Stanford University and a Juris Doctor in 2006 from the University of Washington Law School. Judge Jamil is a member of the Washington State Bar and is currently in private practice in San Francisco.

The Honorable Carol King served as an Immigration Judge from 1995 to 2017 in San Francisco and was a temporary Board member for six months between 2010 and 2011. She previously practiced immigration law for ten years, both with the Law Offices of Marc Van Der Hout and in her own private practice. She also taught immigration law for five years at Golden Gate University School of Law and is currently on the faculty of the Stanford University Law School Trial Advocacy Program. Judge King now works as a Removal Defense Strategist, advising attorneys and assisting with research and writing related to complex removal defense issues.

The Honorable Elizabeth A. Lamb was appointed as an Immigration Judge in September 1995. She received a Bachelor of Arts degree from the College of Mt. St. Vincent in 1968, and a Juris Doctorate in 1975 from St. John's University. From 1983 to 1995, she was in private practice in New York. Judge Lamb also served as an adjunct professor at Manhattan Community College from 1990 to 1992. From 1987 to 1995, Judge Lamb served as an attorney for the Archdiocese of New York as an immigration consultant. From 1980 to 1983, she worked as senior equal employment attorney for the St. Regis Paper Company in West Mark, New York. From 1978 to 1980, Judge Lamb served as a lawyer for the New York State Division of Criminal Justice Services in New York. She retired in January of 2018 and is a member of the New York Bar.

The Honorable Donn Livingston was an Immigration Judge from 1995 to 2018. He has served at the Queens Wackenhut Immigration Court, New York Immigration Court, and Denver Immigration Court. He received a Bachelor of Arts degree in 1971 from the University of Colorado at Boulder, and a Juris Doctorate from New York Law School in 1978. From 1993 to 1995, Judge Livingston served as a general attorney for the former Immigration and Naturalization Service in New York. From 1983 to 1993, he was a partner with the firm Massaro and Livingston, also in New York.

The Honorable Charles Pazar was born in the Bronx, New York, and grew up in suburban New Jersey. He earned a B.A., *magna cum laude*, from Boston University and a J.D. from Rutgers University School of Law in Newark, New Jersey. Judge Pazar served in the Drug Enforcement Administration Office of Chief Counsel and the Immigration and Naturalization Service Office of General Counsel. He was a Senior Litigation Counsel in the Office of Immigration Litigation (OIL) immediately preceding his appointment as an Immigration Judge in 1998. He served as an Immigration Judge in Memphis, Tennessee, from 1998 until his retirement in 2017. During his tenure as an Immigration Judge, he was a panelist in conferences sponsored by the Memphis Bar Association, the Tennessee Bar Association, the Immigration Law Section of the Federal Bar Association (FBA), the University of Mississippi, and the Arkansas Association of Criminal

Defense Attorneys. The FBA has recognized him for his efforts to encourage pro bono representation. The graduating students at the University of Memphis Cecil C. Humphreys School of Law voted him as graduation speaker in the May 2017 commencement. Judge Pazar serves as an adjunct professor of law at the University of Memphis. He has also served as an adjunct at the University of Mississippi School of Law. Since retirement, he has continued to teach at the University of Memphis. He has spoken at houses of worship in Memphis and at the Bench Bar Conference of the Memphis Bar Association, and the Immigration Law Section of the Federal Bar Association. In addition to speaking, he has written articles for the Memphis Bar Journal, Tennessee Bar Journal and The Green Card (FBA Immigration Law Section journal), advocating for increased pro bono participation by attorneys in the Immigration Courts.

The Honorable Laura Ramirez has been a member of the California Bar since 1985. She was appointed an Immigration Judge in San Francisco in 1997, where she served until her retirement from the bench on December 31, 2018.

The Honorable John W. Richardson served as an Immigration Judge in Phoenix, Arizona from 1990 until 2018. From 1968 to 1990, he served in the United States Army, Judge Advocate General's Corps, as a trial attorney, trial judge, regional defense counsel, legislative counsel to the Secretary of the Army and director, Senate Affairs for the Secretary of Defense.

The Honorable Lory D. Rosenberg served on the Board of Immigration Appeals from 1995 to 2002. She then served as Director of the Defending Immigrants Partnership of the National Legal Aid & Defender Association from 2002 until 2004. Prior to her appointment, she worked with the American Immigration Law Foundation from 1991 to 1995. She was also adjunct Immigration Professor at AU Washington College of Law from 1997 to 2004. She is the founder of IDEAS Consulting and Coaching, LLC, a consulting service for immigration lawyers, and is the author of Immigration Law and Crimes. She currently works as Senior Advisor for the Immigrant Defenders Law Group.

The Honorable Susan Roy started her legal career as a Staff Attorney at the Board of Immigration Appeals, a position she received through the Attorney General Honors Program. She served as Assistant Chief Counsel, National Security Attorney and Senior Attorney for the DHS Office of Chief Counsel in Newark, NJ, and then became an Immigration Judge, also in Newark, from 2008 until 2010. Sue has been in private practice 5 years and presently heads her own law firm. She is the Chair-Elect of the NJSBA Immigration Law Section, and serves on the Executive Committee of the NJ-AILA Chapter as Secretary. She also serves on the AILA-National 2019 Convention Due Process Committee. She is a past recipient of the NJ Governor's Jefferson Award for volunteerism, and the NJ Federal Bar Association Pro Bono Service Award. Sue is the NJ AILA Chapter

Liaison to EOIR, is the Vice Chair of the Immigration Law Section of the NJ State Bar Association and in 2016 was awarded the Outstanding Prop Bono Attorney of the Year by the NJ Chapter of the Federal Bar Association.

The Honorable Paul W. Schmidt served as an Immigration Judge from 2003 to 2016 in Arlington, VA. He previously served as Chairman of the Board of Immigration Appeals from 1995 to 2001 and as a Board Member from 2001 to 2003. He authored the landmark decision *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1995), extending asylum protection to victims of female genital mutilation. He served as Deputy General Counsel of the former INS from 1978 to 1987, serving as Acting General Counsel from 1986-1987 and 1979-1981. He was the managing partner of the Washington, DC office of Fragomen, DelRey & Bernsen from 1993 to 1995 and practiced business immigration law with the Washington, DC office of Jones, Day, Reavis and Pogue from 1987 to 1992, where he was a partner from 1990 to 1992. He served as an adjunct professor of law at George Mason University School of Law in 1989 and at Georgetown University Law Center from 2012 to 2014 and 2017 to present. He was a founding member of the International Association of Refugee Law Judges (IARLJ), which he presently serves as Americas Vice President. He also serves on the Advisory Board of AYUDA and assists the National Immigrant Justice Center/Heartland Alliance on various projects; and speaks, writes and lectures at various forums throughout the

country on immigration law topics. He also created the immigration law blog immigrationcourtside.com.

The Honorable Ilyce S. Shugall served as an Immigration Judge from 2017 until 2019 in the San Francisco Immigration Court. From April 2012 to August 2017, she was the Directing Attorney of the Immigration Program at Community Legal Services in East Palo Alto. She was in private practice at Van Der Hout, LLP, a boutique immigration firm, from October 2001 to March 2012 where she was an associate and then partner. She was a legal fellow at ProBAR in Harlingen, Texas from September 1999 to September 2001.

The Honorable Denise Slavin served as an Immigration Judge from 1995 until 2019 in the Miami, Krome Processing Center, and Baltimore Immigration Courts.

The Honorable Andrea Hawkins Sloan was appointed an Immigration Judge in 2010 following a career in administrative law. She served on the bench of the Portland Immigration Court until 2017.

The Honorable Polly A. Webber served as an Immigration Judge from 1995 to 2016 in San Francisco, with details in Tacoma, Port Isabel, Boise, Houston, Atlanta, Philadelphia, and Orlando Immigration Courts. Previously, she practiced immigration law from 1980 to 1995 in her own firm in San Jose, California. She served as National President of the American Immigration

Lawyers Association from 1989 to 1990 and was a national AILA officer from 1985 to 1991. She also taught Immigration and Nationality Law for five years at Santa Clara University School of Law. She has spoken at seminars and has published extensively in this field and is a graduate of Hastings College of the Law (University of California), J.D., and the University of California, Berkeley, A.B., Abstract Mathematics.

The Honorable William Van Wyke served as an Immigration Judge from 1995 until 2015 in New York City and York, PA.