No. 16-56829

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

XOCHITL HERNANDEZ ET AL.,
Plaintiffs-Appellees,

v.

JEFFERSON SESSIONS, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California, No. 5:16-cv-00620 (Bernal, J.)

BRIEF OF AMICI CURIAE NINE RETIRED IMMIGRATION JUDGES AND BOARD OF IMMIGRATION APPEALS MEMBERS IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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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 have dedicated over 150 years of public service to administering the immigration laws of the United States, including the adjudication of custody hearings for noncitizens subject to removal proceedings. Amici accordingly have an acute interest in the Court's construction of the constitutional provisions, Immigration and Nationality Act provisions, and regulations applicable to adjudication of noncitizen removal. In particular, amici, having presided over thousands of custody hearings, are concerned with noncitizen bond determinations that promote efficient and just outcomes for immigrants and for our nation's immigration enforcement system.

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

- The Honorable Sarah Burr
- The Honorable Joan Churchill
- The Honorable Gilbert Gembacz
- The Honorable John Gossart

[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.

- The Honorable Carol King
- The Honorable Eliza Klein
- The Honorable Pedro Miranda
- The Honorable Lory D. Rosenberg
- The Honorable Gustavo Villageliu

INTRODUCTION

The unnecessary detention of noncitizens in removal proceedings burdens already overstretched immigration judges and generates significant costs for the immigration system. Often, detention is either mandated by federal statute or warranted to protect public safety and ensure noncitizens do not evade removal. But detention that results from a noncitizen's inability to pay bond set by Immigration and Customs Enforcement ("ICE") or an immigration judge serves no purpose other than to strain judicial and enforcement resources.

The district court's preliminary injunction—which requires that ICE officials, immigration judges, and the Board of Immigration Appeals (1) consider a noncitizen's financial ability to pay a bond; (2) not set bond higher than is needed to ensure appearance; and (3) consider alternative conditions of release—addresses systemic problems in the immigration system by reducing the number of unnecessary detentions that result solely from noncitizens' economic disadvantages. Existing bond determination procedures can accommodate these modest changes with no harm to the Government's interests and minimal additional judicial factfinding.

Amici—who among them have over 150 years of experience and expertise in immigration law—agree that the district court correctly concluded Plaintiffs-Appellees are likely to succeed on the merits. We submit this brief, however, to

address the Government's claim that the preliminary injunction will be difficult for immigration officials to administer. Our collective decades of experience as immigration judges refute the Government's assertion. Having presided over hundreds—if not thousands—of custody determinations, we see no prospect of the district court's order unduly burdening the Government. In fact, it will have the benefit of reducing unnecessary detentions, which, as detailed below, will improve the immigration system in a number of respects. Accordingly, the order of the district court should be affirmed.

ARGUMENT

I. THE REQUIREMENTS OF THE PRELIMINARY INJUNCTION ARE STRAIGHTFORWARD TO ADMINISTER AND WILL BENEFIT THE PUBLIC

Based on decades of collective experience presiding over noncitizen custody hearings, amici believe that, contrary to the Government's contention, the preliminary injunction will not harm the public interest. First, the considerations required by the preliminary injunction fit well within the existing bond determination process, and immigration judges are well-equipped to administer them efficiently. Second, the district court's order does not strip ICE or immigration judges of their discretion to determine if someone poses a flight risk or is a danger to the community, nor does it compel any particular outcome. Third, the order will not lead to lower appearance rates in removal proceedings. Indeed,

the Government's concerns regarding the injunction's burdens are either overstated or mischaracterize its actual requirements.

A. The Preliminary Injunction Fits Within Existing Bond Procedures And Is Straightforward To Implement

The preliminary injunction will not disrupt the current bond determination process. Under Section 236(a) of the Immigration and Nationality Act, a noncitizen whom the U.S. Government seeks to remove from the United States is subject to arrest and detention pending a removal determination. 8 U.S.C. § 1226(a). Initially, an ICE officer makes a custody decision as to whether to detain or release a noncitizen. 8 C.F.R. § 1236.1(d)(1). If the ICE officer denies release, or if the ICE officer grants release but imposes conditions with which the noncitizen disagrees, the noncitizen may seek review of that decision before an immigration judge at a bond hearing.

At both the individual custody determination before ICE and the bond hearing before an immigration judge, the noncitizen bears the burden of "demonstrat[ing] to the satisfaction of the [immigration judge] that such release would not pose a danger to property or persons, and that [he] is likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8); *see also Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006). If an immigration judge determines that the noncitizen does not pose a danger and is not a flight risk that warrants detention,

she may release the detainee on bond, recognizance, or some other condition of release. *Guerra*, 24 I. & N. Dec. at 38.

Immigration judges possess significant discretion in determining whether a noncitizen should be released and the terms of release, including the amount of any bond. *See Guerra id.* at 40. An immigration judge may consider a range of evidence, some of which is objective, and some of which requires the immigration judge to evaluate the credibility of the noncitizen and other witnesses. Typically, the judge will consider one or more of the following factors:

> (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States.

Id. Some immigration judges also consider other factors, such as the noncitizen's ability to pay. These factors all relate to the immigration judge's core inquiry in a bond hearing—namely, whether the noncitizen poses a danger to the community or is a flight risk, and, if not, the conditions of release that will best ensure the noncitizen will appear at future proceedings.

The preliminary injunction entered by the district court changes this bond determination process only by requiring that ICE officials and immigration judges consider a noncitizen's ability to pay, not set bond higher than necessary to ensure appearance, and consider alternatives to detention. Notwithstanding the Government's arguments to the contrary, these requirements do not fundamentally alter the bond determination process. They do not require immigration judges to conduct a new or different hearing in order to consider a detainee's ability to pay, and they certainly do not require a "mini trial," as the Government's opening brief suggests (at 44). Rather, they require immigration judges to consider ability to pay and alternative means of ensuring appearance as part of the *existing* bond hearings that immigration judges already conduct. These considerations are not overly complicated or complex. Indeed, many of us considered ability to pay and alternative conditions of release when we were immigration judges presiding over bond hearings, and these considerations never added more than a few minutes of extra time to learn more about the financial resources to which a noncitizen had access.

Further, immigration judges have the expertise needed to consider these factors and, as the Government's opening brief acknowledges (at 22), many immigration judges already do so. But even for those who do not, the injunction will not require them to gain a new skill set or engage in an inquiry for which they

are unequipped. Instead, when determining a noncitizen's ability to pay and considering alternative means to detention, an immigration judge will need to consider the evidence before her, test the credibility of the noncitizen's testimony, and reach an informed, calculated decision—the precise functions that she already performs. Moreover, the immigration system already considers a noncitizen's ability to pay in certain contexts, such as when determining whether to grant a fee waiver. *See* 8 C.F.R. § 103.7(c). These types of considerations are in no way foreign to the immigration system.

B. The Preliminary Injunction Preserves Immigration Judges' Discretion

The preliminary injunction does not strip immigration judges of their discretion to deny release in appropriate cases, or to set appropriate conditions in those cases where detention is not needed. The Government's suggestions to the contrary—and its declaration (at 33) that the injunction "dramatically alters the status quo"—are misplaced.

The preliminary injunction identifies a set of considerations which immigration judges must take into account, but it does not dictate any specific outcome, nor does it significantly alter the bond determination calculus. In situations where a noncitizen poses a danger to the community or is a flight risk that warrants detention, the preliminary injunction will have no impact on the

outcome whatsoever; that noncitizen will remain detained. And the burden will remain on the noncitizen to demonstrate he is not a danger to the community or a flight risk, and is thus a worthy candidate for bond and/or an alternative to detention. Further, in evaluating whether a noncitizen should receive bond, an immigration judge will remain free to consider any number of factors in reaching a fair, individualized bond determination. Nothing about the preliminary injunction upsets that discretion.

C. The Preliminary Injunction Will Not Lead to Lower Appearance Rates in Removal Proceedings

The preliminary injunction—and resulting reduction in unnecessary detentions—will also not harm the public interest by contributing to lower appearance rates at removal proceedings.

The Government contends (at 37) that the rate of noncitizens' failure to appear at hearings "has only worsened over time, … [which] shows that the implementation of the district court's injunction would actually … increase the number of aliens who fail to show up for immigration court." In support of this contention, the Government cites data from the Executive Office for Immigration Review ("EOIR") that it contends show that "41 percent of aliens released on conditions fail to show up for their Immigration Court hearings." *Id.*

But these data are misleading in two respects. First, they consider a noncitizen's initial appearance when calculating "in absentia" rates. *See* Transactional Records Access Clearinghouse (TRAC) Immigration, *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?* (Sept. 14, 2016) at n.7. The data thus fail to account for those noncitizens who may miss an initial appearance (for any number of reasons, such as failing to receive notice of a court date) but who later appear. Second, the EOIR data also do not include noncitizens whose cases are terminated for administrative reasons. *Id.* Adjusting for these two shortcomings shows that the overall "in absentia" rate for 2015 was actually 23 percent, not 41 percent. *Id.* at 5 & n.7. And, in fact, these more accurate data show that the "in absentia" rate has been steadily falling, not increasing, contrary to the Government's claims. *Id.* Moreover, with respect to those immigrants who are released on bond by an immigration judge at a bond hearing, as opposed to by an ICE official, the "in absentia" rate is even lower. In 2015, it was 14 percent, meaning that 86 percent of those released by immigration judges appeared in their removal proceedings. *Id.* This is consistent with our experiences, in which noncitizens who are released on bond generally appear at future hearings.

Further, the appearance rate of noncitizens who were released and participated in ICE's Alternatives to Detention program is even higher. This

program, which provides a range of services, including home visits, monitoring, and case management, has proven successful at enhancing appearance rates in removal proceedings; from 2011, to 2013, more than 95 percent of participants appeared at their final scheduled removal hearing. U.S. Gov't Accountability Off., GAO-15-26, Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness 30 (2014).

As these data and our experiences make clear, a reduction in unnecessary detention does not result in lower appearance rates.

II. BY REDUCING UNNECESSARY DETENTION, THE PRELIMINARY INJUNCTION WILL MAKE IT EASIER FOR IMMIGRATION JUDGES TO EFFICIENTLY AND FAIRLY ADMINISTER REMOVAL PROCEEDINGS

Amici further urge the Court to uphold the preliminary injunction because of the benefit that will flow to immigration adjudications from a reduction in the number of noncitizens detained solely because they are unable to pay bond. Releasing such noncitizens from detention will significantly improve immigration judges' ability to resolve removal cases quickly and fairly, by ensuring noncitizens are able to clearly present their entitlement to relief through enhanced access to counsel and evidence.

A. The District Court's Order Will Increase the Number of Immigrants Able to Secure Counsel, Which Will Aid Immigration Judges in Processing Claims

In removal proceedings, immigration judges must make a determination about an immigrant's removability and any claims to relief therefrom. *See* 8 U.S.C. § 1229a. As with judges and juries in federal court, immigration judges are aided in this task by an adversarial presentation of the facts and law, which is especially crucial in the fast-paced and difficult to manage dockets of immigration court. Moreover, amici presided over many cases in which one party could not communicate in English, much less formulate her defense meaningfully. Immigration judges are accustomed to adjudicating cases fairly and efficiently under tremendous pressure, but a truly adversarial proceeding—with both sides represented by counsel—aids them in sifting valid from meritless claims.

Yet detained immigrants, including those in the plaintiff class, are significantly less likely than those released to be represented by counsel.[2] In fact, 86 percent of detained respondents in removal proceedings are uncounseled, compared to only 34 percent of non-detained respondents. Eagly & Shafer, *A*

[2] Immigrants are entitled to be represented by counsel at their own expense in removal proceedings, 8 U.S.C. § 1362; *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 756 (9th Cir. 2015), and EOIR regulations require that immigration judges inform respondents of their right to counsel and to provide them with a list of pro bono legal service providers, *see* 8 C.F.R. § 1240.10(a)(1)-(2).

National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev. 1, 32 (2015). This is hardly surprising; "[c]onfinement makes it more difficult to retain or meet with legal counsel." *Rodriguez v. Robbins*, 804 F.3d 1060, 1073 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). The problem is exacerbated for immigrants held in remote detention centers that are "difficult and expensive" for attorneys to reach. *Baires v. INS*, 856 F.2d 89, 93 n.6 (9th Cir. 1988) (describing the detention facility in Florence, Arizona). Further, detainees are typically unable to work, making it difficult for them to pay for private counsel.

The inability of detainees to obtain counsel leads to significant negative consequences. This Court has long recognized the particular importance of counsel in proceedings under immigration law, a field that has rightly been termed "a labyrinth that only a lawyer could navigate." *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011). "It is difficult to imagine a layman more lacking in skill or more in need of the guiding hand of counsel, than an alien who often possesses the most minimal of educations and must frequently be heard not in the alien's own voice and native tongue, but rather through an interpreter." *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 807 (9th Cir. 2007).

Not only is counsel key to immigrants' ability to secure relief from removal; it is also vital to immigration judges' factfinding and interpretation of relevant

statutes and regulations. *See, e.g.*, *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948-949 (9th Cir. 2004) (overturning removal order where counsel could have presented legal argument supporting suspension of deportation and adduced relevant evidence that non-attorneys were unequipped to demonstrate). Counsel presents the evidence in a coherent manner for the judge and focuses her attention on key issues of statutory interpretation necessary to resolution of the action. *See* Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 Conn. L. Rev. 1647, 1666–67 (1997).[3] When an immigration judge has questions, only an attorney is able to respond with "any idea of their legal significance." *Ram v. Mukasey*, 529 F.3d 1238, 1243 (9th Cir. 2008) (internal quotation marks omitted). Attorneys—who possess greater knowledge of the law than laypersons and are bound by ethical constraints against making frivolous submissions to tribunals—also save overburdened immigration judges time by reducing the number of meritless arguments against removal that many *pro se* detainees file. Finally, as Chief Judge Katzmann of the U.S. Court of Appeals for the Second Circuit has observed, representation by counsel before an immigration judge can improve outcomes on appeal by generating a better record

[3] Indeed, the Department of Justice itself recognizes the need for attorneys to elucidate thorny factual and legal issues by mandating assignment of trial attorneys to all contested removal proceedings. 8 C.F.R. §§ 1240.2(a); 1240.10(d).

and preserving issues for appellate review. *See* Katzmann, *Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 6-9 (2008) ("Often times, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured adequate representation at the outset, the outcome might have been different."). For all these reasons, representation conserves immigration judges' resources and makes a just result more likely.

A recent study bears out the importance of lawyers in removal cases: In 95 percent of cases in which an immigrant achieved relief from removal, and 72 percent of cases that ended in termination of removal proceedings, the respondent was represented by counsel. Eagly, *A National Study of Access to Counsel*, 164 U. Pa. L. Rev. at 22, fig. 4. Noncitizens are up to eight times more likely to obtain relief when represented by counsel in removal proceedings. *Id.* at 57. Among asylum seekers, arguably the most vulnerable population subject to removal, applicants represented by legal counsel were granted asylum at a rate 3.1 (affirmative) and 1.8 (defensive) times higher than unrepresented applicants. U.S. Gov't Accountability Off., GAO-17-72, Asylum Variation Exists in Outcomes of Applications Across Immigration Courts and Judges at 31, 33 (Nov. 2016).

In practice, therefore, because most detainees do not obtain counsel, and because counsel is often decisive in the ability to obtain relief, detention itself

often determines the outcome of removal proceedings. Without the district court's preliminary injunction, many cases will continue to proceed without the benefit of counsel, which not only makes it less likely the noncitizen can obtain relief, but also makes the immigration judge's job that much harder.

B. The District Court's Order Will Enhance Immigrants' Access to Evidence That Supports Their Claims

Many of the obstacles detainees face in obtaining counsel also make it difficult to gather evidence necessary to defend against removal. *See* 8 C.F.R. § 1240.10(a)(4) (entitling a respondent in removal proceedings to present evidence on her own behalf and to cross-examine Government witnesses). These difficulties are intensified for impoverished detainees unable to pay a substantial bond, who cannot afford to hire people outside the detention facility to assist in preparing their case. The physical remoteness of many detention centers also makes it difficult for detainees to communicate with friends and family members who could provide evidence of their entitlement to relief from removal. *See* Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Det. Sys.—A Two-Year Review* 31 (2011) (noting that nearly 40 percent of ICE detention bed space is located more than 60 miles from an urban center). Even relatives who are able to travel to these sites are limited to thirty-minute visits with detainees. García Hernández, *Immigration Detention As Punishment*, 61 UCLA L. Rev. 1346, 1384 (2014).

To add to the difficulty, detainees are subject to transfer without notice. Under the applicable ICE directive, detainees transferred to a new facility cannot be informed of the impending transfer until immediately beforehand, denying them opportunity to contact their attorney or family members critical to building their case. U.S. Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, at 457 (Dec. 2011). Certainly, this practice may be justified by security considerations, but its impact on those detained because they cannot afford bond is to further erode their ability to defend against removal.

Together, these impediments to detained immigrants' ability to develop their cases mean that members of the class are denied the ability to demonstrate to immigration judges the merits of their cases purely as a result of their penury. The preliminary injunction, by requiring the Government take steps to ensure that immigrants are not detained solely due to their inability to pay bond, alleviates this harm without imposing undue costs on the immigration system.

III. BY REDUCING UNNECESSARY DETENTIONS OF IMPOVERISHED IMMIGRANTS, THE PRELIMINARY INJUNCTION WILL CONSERVE IMMIGRATION SYSTEM RESOURCES

Detention creates financial and other resource burdens on the immigration system. Reducing unnecessary detention via a bond—set at an amount that corresponds to the immigrant's ability to pay—saves the Government the costs it

would otherwise incur. Moreover, these reduced costs to the government can free up resources to enable immigration judges to process claims more effectively.

In 2016, ICE held 352,882 immigrants in civil detention. Department of Homeland Security Office of Immigration Statistics, Annual Flow Report at 3, December 2016. This represented an increase of 100,000 detainees over just a decade prior. Department of Homeland Security Office of Immigration Statistics, Immigration Enforcement Actions: 2006, at 1, May 2008. ICE spends $158 per day on each detainee and over $2 billion annually on immigration detention. U.S. Gov't Accountability Off., GAO-15-26, Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness, at 19 (Nov. 2014). When a detainee is released, the Government no longer incurs these costs.

The Government bears additional costs because immigrants' time in detention before removal proceedings is often prolonged by a (typically unsuccessful) search for counsel. In recognition of the centrality of counsel to achieving a fair and accurate disposition, *see supra* Part II, and a noncitizen's right to reasonable time to locate counsel, *see Montes-Lopez v. Holder*, 694 F.3d 1085, 1089-1090 (9th Cir. 2012), immigration judges routinely grant continuances to allow detainees time to obtain counsel. This is a time-intensive process, given detainees' limited access to the outside world and, often, a language barrier that

renders it more difficult to locate and communicate with prospective attorneys without access to translators or community resources outside the detention center. *See, e.g.*, *Biwot v. Gonzales*, 403 F.3d 1094, 1099 (9th Cir. 2005) (recognizing that, for a detained immigrant, a two-day continuance "was essentially meaningless in terms of the practical ability to engage an attorney"). The average detainee consequently spends thirty-three days seeking an attorney, Eagly, *A National Study of Access to Counsel*, 164 U. Pa. L. Rev. at 60, which merely serves to lengthen the immigrant's detention and consume additional Government resources.

Moreover, because detained noncitizens' removal proceedings are fast-tracked, *see* Eagly, *Remote Adjudication in Immigration*, 109 N.W. U. L. Rev. 933, 975 (2015), immigration judges may have more difficultly adjudicating those cases, not only because they do not have the necessary time to sort through complicated issues, but also because detainees may be forced to proceed with their cases before they are prepared to do so. Released detainees, in contrast, can be transferred to the nondetained docket and need not take priority over judges' time. Thus, by reducing unnecessary detention, the preliminary injunction will help alleviate a burden on the immigration system and will lead to better, more informed adjudication.

CONCLUSION

The district court's preliminary injunction helps immigration judges ensure the integrity of their adjudications and achieve just outcomes, while helping the Government conserve precious resources. For all of these reasons, this Court should affirm the district court's grant of a preliminary injunction.

Respectfully submitted,

/s/ Alan E. Schoenfeld

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Signature of Attorney or Unrepresented Litigant [/s/Alan E. Schoenfeld] Date [March 8, 2017]

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2017, 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/ Alan E. Schoenfeld
ALAN E. SCHOENFELD