Nos. 13-56706 & 13-56755

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIMOTHY ROBBINS, *et al.*,
Respondents-Appellants/Cross-Appellees,

v.

ALEJANDRO RODRIGUEZ, *et al.*,
Petitioners-Appellees/Cross-Appellants,

On Appeal from the United States District Court
for the Central District of California
No. CV 07-3239-TJH (RNB)

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW IN SUPPORT OF PETITIONERS' PRINCIPAL AND RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the *amici curiae*, (1) the National Association of Criminal Defense Lawyers, and (2) the Judge David L. Bazelon Center for Mental Health Law, certify that neither entity has a parent corporation and that no publicly held corporation owns more than ten percent of either entity's stock.

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STATEMENT OF INTEREST

This *amici curiae* brief is submitted on behalf of (1) the National Association of Criminal Defense Lawyers (the "NACDL"), and (2) the Judge David L. Bazelon Center for Mental Health Law (the "Bazelon Center").

1. The NACDL is a nonprofit organization that represents public defenders and private criminal defense lawyers. Founded in 1958, the NACDL has a national membership of approximately 10,000 attorneys, in addition to almost 40,000 affiliate members, from all fifty states. The NACDL's mission is to ensure justice and due process for the accused, and to promote the proper and fair administration of justice.

2. The Bazelon Center, founded in 1972 as the Mental Health Law Project, is a national nonprofit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, training and education, the Bazelon Center works to advance the rights and dignity of individuals with mental disabilities in all aspects of life.

The *amici* submit this brief pursuant to Federal Rule of Appellate Procedure 29(a) with the consent of all parties to this action. Pursuant to Rule 29(c)(5), the *amici* confirm that neither a party nor a party's counsel has authored this brief, in

whole or in part, or contributed money intended to fund the preparation or submission of this brief. No person or entity contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The *amici curiae* are nonprofit organizations that advocate on behalf of criminal defendants and individuals with mental disabilities in criminal pretrial and civil commitment contexts. The *amici* submit that the immigration system is an outlier among these comparable detention regimes because it fails to provide constitutionally mandated procedural safeguards required under common principles of due process. Petitioners, a class of detained noncitizens, seek to rectify this anomaly and bring the procedural protections of the immigration detention system in line with those provided in the pretrial justice and civil commitment regimes. To that end, the Court should adopt Petitioners' requested procedural safeguards for detained noncitizens, including: (1) providing detainees with an automatic bond hearing; (2) requiring the government to justify detention by clear and convincing evidence; (3) requiring consideration of alternatives to detention; (4) providing adequate written notice of the hearing to allow for a meaningful opposition to detention; (5) providing periodic detention hearings; and (6) requiring consideration of the length of detention.

ARGUMENT

This case is about defining the statutory and due process rights of noncitizens during periods of prolonged detention by the government under the Immigration and Nationality Act ("INA"). The Petitioners-Appellees/Cross-Appellants ("Petitioners") argue that noncitizens detained for a prolonged period during the pendency of removal proceedings have a right to an automatic bond hearing subject to meaningful procedural safeguards. In contrast, the Respondents-Appellants/Cross-Appellees (the "Government"), argue that noncitizens have no such uniform rights beyond the custody review procedures currently provided. The *amici curiae* submit this brief in support of Petitioners' position.

The *amici* are the NACDL and the Bazelon Center, nonprofit organizations that represent criminal defendants and individuals with mental disabilities in criminal pretrial and civil commitment proceedings at the national and state level. Based on their substantial experience advocating on behalf of individuals in these comparable detention settings, the *amici* submit that the procedural protections mandated in the pretrial and civil commitment contexts constitute minimum safeguards limiting the Government's ability to detain individuals for prolonged periods, and that these protections should be applied equally to noncitizens in immigration proceedings, based on common principles of due process.

The prolonged detention of noncitizens in removal proceedings is substantially similar to the detention of individuals in the pretrial and civil commitment contexts, in which courts and legislatures have repeatedly considered and mandated significant procedural safeguards. Indeed, the Supreme Court, this Court, and the federal courts in general routinely rely on precedent from these comparable systems in determining applicable due process standards in immigration proceedings. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (relying on pretrial justice and civil commitment case law in evaluating civil detention of noncitizens); *Singh v. Holder*, 638 F.3d 1196, 1203-04 (9th Cir. 2011) (relying on civil commitment cases to determine rights of noncitizens). In each of these contexts, it is the Government's ability to restrain an individual's liberty for prolonged periods that triggers due process concerns and corresponding procedural protections. Accordingly, the due process safeguards applicable in the pretrial and civil commitment contexts should apply equally to the thousands of individuals subject to prolonged immigration detention each year, often for years-long periods, at great expense to taxpayers, with sparse procedural protections.

Without endorsing the adequacy or sufficiency of the procedures that have long been provided in these other detention regimes, the *amici* submit that Petitioners' requests in this case are consistent with basic procedural protections provided to detainees in these comparable systems. If the Government's

interpretation of the INA and the requirements of due process is accepted, the immigration system would be an outlier, providing substantially fewer protections against prolonged detention than the criminal pretrial and civil commitment systems. In particular, the Government opposes the following procedural safeguards, which are standard components in the suite of rights afforded detainees in those systems:

1. **Automatic Hearings:** The Government's position that class members must affirmatively request bond hearings—if they are provided at all—runs contrary to established practice in the pretrial detention and civil commitment contexts. In federal and state pretrial justice systems, defendants, presumed to be innocent, are automatically entitled to a prompt custody decision by a judicial officer at the outset of an individual's confinement, and may only be detained after a full detention hearing reveals a danger to the community or likelihood of flight. (*See infra* § I.A.) Likewise, in the civil commitment system, an individual detained based on a purported mental illness and dangerousness is entitled to a prompt hearing, without request, before a judicial officer to determine if there is sufficient justification for commitment. (*See infra* § II.A.)

2. **Heightened Burden of Proof:** The Government's position that it should not bear the heightened burden of proving, by clear and convincing evidence, that detention is justified is inconsistent with the general rule in pretrial

and civil commitment proceedings. At pretrial detention hearings under most federal and state laws, the government must prove by clear and convincing evidence that the defendant poses a danger to the community. (*See infra* § I.B.) In civil commitment hearings, the government must prove by clear and convincing evidence that the individual meets the substantive requirements for commitment to justify so serious a deprivation of liberty. (*See infra* § II.B.)

3. **Consideration of Alternatives:** The Government disputes that alternatives to detention should be considered at a bond hearing. This position is contrary to accepted standards in other detention regimes. It is a near universal statutory requirement in federal and state pretrial detention proceedings that the judicial officer consider alternatives to detention and narrow conditions to release. (*See infra* § I.C.) In the civil commitment context, courts have held that due process requires the government to consider less restrictive alternatives to detention. (*See infra* § II.C.)

4. **Adequate Notice:** The Government rejects Petitioners' proposal that written notice should be provided by the Government sufficiently in advance of the hearing to enable the noncitizen to prepare a defense. In contrast, pretrial defendants are generally afforded notice of the evidence the government intends to present at the hearing to justify detention to allow for a meaningful defense. (*See infra* § I.D.) Likewise, individuals facing civil commitment have a right to notice

of hearings, which includes details regarding not just the date, time, and place of the hearing but also the basis for detention and the substance of the evidence to be submitted. (*See infra* § II.D.)

5. **Subsequent Bond Hearings:** The Government denies the right of noncitizens to bond hearings every six months for individuals who continue to be detained to limit the possibility of unnecessarily prolonged detention. In the pretrial justice system, defendants are afforded the right to hearings after an initial detention decision to determine whether continued detention is justified under due process. (*See infra* § I.E.) In the civil commitment context, due process requires that individuals be granted periodic judicial review of their involuntary commitments because detention cannot continue for longer than necessary to achieve the purpose for which an individual was committed. (*See infra* § II.E.)

6. **Consideration of the Length of Detention:** Finally, the Government contends that, unlike in the pretrial context, a judicial officer in immigration proceedings should not consider the length of an individual's detention at the bond hearing. In contrast, courts in pretrial proceedings expressly consider this factor in evaluating the necessity of detention, and have held that detention for a period of six months may raise due process concerns. (*See infra* § I.F.)[1]

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[1] In addition to these six safeguards, Petitioners also request that the Court hold that immigration courts must consider, at a detention hearing, whether an individual is significantly likely to be removed upon the conclusion of proceedings

The *amici* respectfully submit that adopting these procedural protections requested by Petitioners would help bring the immigration system in line with comparable detention regimes.[2]

I. The Pretrial Justice System Provides Procedural Safeguards Comparable to Those Requested by Petitioners.

Unlike the limited procedures that the Government seeks to apply to prolonged immigration detainees, the criminal justice system provides substantial procedural safeguards to prevent unnecessary and prolonged detention of defendants prior to trial. As originally conceived, the law "unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail" set at an amount to provide adequate assurance the defendant would stand for trial. *See Stack v. Boyle*, 342 U.S. 1, 4 (1951). "This traditional right to freedom before

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because, *e.g.*, the noncitizen is stateless or is likely eligible for mandatory relief from removal. This protection is *sui generis* to the immigration context and is thus without a natural analog in the pretrial detention and civil commitment systems.

[2] Many of the procedural protections that Petitioners request are also provided for in the juvenile detention system, another civil detention regime. For example, accused juvenile delinquents are entitled to a hearing that "measure[s] up to the essentials of due process and fair treatment." *In re Gault*, 387 U.S. 1, 30-31 (1967). Juveniles also must be provided ample written notice of the details of hearings. *Id*. at 33 ("Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'"). Additionally, juvenile courts are ordinarily prohibited from detaining a minor without first determining that alternatives less restrictive than incarceration would not suffice. 2 Thomas A. Jacobs, *Children & the Law: Rights and Obligations* § 8:41 (2014) (collecting cases).

conviction . . . serves to prevent the infliction of punishment prior to conviction." *Id.*; *accord United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985) (citations omitted) ("[F]ederal law has traditionally provided that a person arrested for a non-capital offense shall be admitted to bail. Only in rare circumstances should release be denied.").

This right to release pending trial is rooted in the Due Process Clause of the Constitution, which forbids governments from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amends. V, XIV. As the Supreme Court has recognized, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. The government violates these rights unless the detention is reasonably related to its purpose and ordered in a proceeding with "adequate procedural protections." *Id.*

Today, those "adequate procedural protections" are embodied in the Bail Reform Act of 1984 (the "Bail Act"), 18 U.S.C. § 3141 *et seq.*, which governs the detention of federal defendants pending pretrial proceedings. *See* 18 U.S.C. § 3141(a); Fed. R. Crim. P. 46(a). The crux of the law is the requirement that "[i]n a full-blown adversary hearing, the Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can

reasonably assure the safety of the community or any person," in order to justify detention before trial. *United States v. Salerno*, 481 U.S. 739, 750 (1987) (affirming the constitutionality of the Bail Act based on the "extensive safeguards" provided to defendants). Thus, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 755. "Only in rare cases should release be denied," and any "[d]oubts regarding the propriety of release are to be resolved in favor of defendants." *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990).

Likewise, state pretrial detention laws, embodied in most states' constitutions and statutes, provide defendants with a presumption in favor of release in most circumstances. *See generally* National Conference of State Legislatures, *Pretrial Release Eligibility*, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx (citing forty-eight states which provide a presumption for pretrial release through their constitutions or statutes); *State v. Wassillie*, 606 P.2d 1279, 1281-82 (Alaska 1980) ("Provisions establishing bail as a matter of constitutional right are contained in the constitutions of most, and perhaps all, American states."); *State v. Flowers*, 330 A.2d 146, 147 (Del. 1974) (accord).

The protections afforded by these federal and state pretrial detention schemes are consistent with the procedural safeguards requested by Petitioners,

and include: (1) granting detainees the right to an automatic custody determination; (2) requiring the government to establish the need for detention by clear and convincing evidence; (3) mandating that the judicial officer consider alternatives to detention; (4) providing notice to the detainee to allow for a meaningful defense; (5) allowing subsequent hearings to challenge prolonged detentions; and (6) considering the length of the detainee's detention.

A. The Pretrial Justice System Requires a Prompt and Automatic Custody Determination.

The Bail Act requires an automatic and prompt determination that the defendant be released or detained pending trial. *See* 18 U.S.C. § 3142(a); *United States v. Fidler*, 419 F.3d 1026, 1028 (9th Cir. 2005). In making this determination, the Bail Act, as the default, "mandates the release of a person pending trial unless the court 'finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.'" *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008) (citing 18 U.S.C. § 3142(e)).

Under this scheme, detention is only allowed after a detention hearing, and a detention hearing is only allowed when the defendant falls into a discrete category justifying detention. *See* 18 U.S.C. § 3142(e)-(f); *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988); *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988);

United States v. Terrones, 712 F. Supp. 786, 788 (S.D. Cal. 1989). In particular, the Bail Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes," including crimes of violence with a maximum term of ten years or more, offenses for which the sentence is life imprisonment or death, serious drug offenses, crimes involving minor victims, or certain repeat offenders. *Salerno*, 481 U.S. at 747 (citing 18 U.S.C. § 3142(f)). Alternatively, the government must show that the defendant is a "serious risk" to flee or to obstruct justice or threaten, injure, or intimidate witnesses or jurors. 18 U.S.C. § 3142(f)(2). If a detention hearing is necessary, it must be held "immediately upon the person's first appearance before the judicial officer" absent good cause. 18 U.S.C. § 3142(f); *accord United States v. Molinaro*, 876 F.2d 1432, 1433 (9th Cir. 1989).

In line with the Reform Act, numerous states have expressly codified the right to a detention hearing at the outset of detention to ensure a prompt review of the purported justification for detention. *See, e.g.*, Alaska Stat. §§ 12.30.006, 12.30.011; Ariz. Rev. Stat. §§ 13-3961, 13-3967; Cal. Penal Code § 1270.1; Colo. Rev. Stat. § 16-4-101; Mont. Code Ann. § 46-9-109(1); D.C. Code § 23-1322(b); Fla. Stat. § 907.041(f); Haw. Rev. Stat. § 804-3(d); 725 Ill. Comp. Stat. 5/110-6.1; Iowa Code § 811.1A; La. Code Crim. Proc. Ann. arts. 330, 330.1; Mass. Gen. Laws ch. 276, § 58A; Me. Rev. Stat. Ann. tit. 15, §§ 1026-27; Mo. Rev. Stat.

§ 544.455; N.C. Gen. Stat. § 15A-534; Ohio Rev. Code Ann. § 2937.222; Or. Rev. Stat. § 135.240; R.I. Gen. Laws § 12-13-1.1; S.C. Code Ann. § 22-5-510; Utah Code Ann. § 77-20-1; Wash. Rev. Code § 10.21.040.

In short, the common strand in federal and state pretrial regimes is the recognition that detention is a limited exception to the general rule of release, which must be specifically justified in each particular case—before a judicial officer at an initial bail hearing. *See United States v. Honeyman*, 470 F.2d 473, 474 (9th Cir. 1972) ("The whole spirit of the [Bail Act] is that a defendant facing trial should be released, rather than detained, unless there are strong reasons for not releasing him.").

B. The Government Must Prove by Clear and Convincing Evidence that the Detainee Poses a Danger.

To justify detention at a bond hearing under the Bail Act, the burden of proof is on the Government to show by "clear and convincing evidence" that detention is necessary because "no condition or combination of conditions will reasonably assure the safety of any other person and the community."[3] 18 U.S.C. § 3142(f); *accord Hir*, 517 F.3d at 1086.

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[3] Although the Bail Act does not expressly provide the standard of proof required when the government seeks detention based on flight risk, federal courts have held that the government must make this showing by an alternative "clear preponderance of the evidence" standard. *Motamedi*, 767 F.2d at 1406. In contrast, other jurisdictions statutorily require the application of the "clear and

Numerous state legislatures have also expressly adopted this foundational requirement and statutorily require authorities to prove the need for detention based on dangerousness by "clear and convincing evidence." *See, e.g.*, Ariz. Rev. Stat. § 13-3961(d); D.C. Code § 23-1322(b); Ind. Code § 35-33-8-3.2; La. Code Crim. Proc. Ann. arts. 330, 330.1; Mass. Gen. Laws ch. 276, § 58A; N.H. Rev. Stat. Ann. § 597:2; Ohio Rev. Code Ann. § 2937.222; Utah Code Ann. § 77-20-1; Vt. Stat. Ann. tit. 13, § 7553a; Wash. Rev. Code § 10.21.040.

Even without explicit statutory guidance, state courts routinely impose heightened proof requirements on the state, equivalent to the federal "clear and convincing evidence" standard, to demonstrate the purported basis for detention. *See, e.g.*, *Simpson v. Owens*, 85 P.3d 478, 488 n.17 (Ariz. Ct. App. 2004) ("plain and clear"); *Brill v. Gurich*, 965 P.2d 404, 408 (Okla. Crim. App. 1998) ("clear and convincing"); *Trammell v. State*, 221 So. 2d 390, 390 (Ala. 1969) ("clear and strong"); *Hanley v. State*, 451 P.2d 852, 857 (Nev. 1969) ("considerably greater than that required to establish . . . probable cause"); *In re Application of Haynes*, 619 P.2d 632, 636 (Or. 1980) ("clear and convincing"). Courts reason that "the State is in a position superior to that of the accused to produce evidence during a hearing because it already will have presented evidence in the process of charging

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convincing evidence" standards to detention hearings based on either dangerousness or flight risk. *See, e.g.*, D.C. Code § 23-1322(b); La. Code Crim. Proc. Ann. arts. 330, 330.1; Utah Code Ann. § 77-20-1; Vt. Stat. Ann. tit. 13, § 7553a.

the person." *Simpson*, 85 P.3d at 487 (citing *People v. Purcell*, 778 N.E.2d 695, 700 (Ill. 2002)). Because detention is only justified as an exception to the general rule of allowing release on bail, "placing the burden on the accused is, in effect, forcing him to prove a negative." *Id.* For this reason, the burden—rightly heavy—is squarely placed on federal and state authorities.

C. The Judicial Officer Must Consider Alternatives to Pretrial Detention.

In determining whether to detain a defendant, federal and state judicial officers must consider alternatives that are less restrictive than detention.

Under the Bail Act, the officer must consider release conditions, which constitute the "least restrictive . . . condition, or combination of conditions" required to "reasonably" prevent flight or assure the safety of the community. 18 U.S.C. § 3142(c)(1); *see also Motamedi*, 767 F.2d at 1405. This statutory requirement to consider alternatives to detention is mandatory, *see United States v. Infelise*, 934 F.2d 103, 105 (7th Cir. 1991), and a non-comprehensive list of alternatives to detention include: remaining in the custody of a designated person, reporting to law enforcement, complying with a curfew, returning to custody after work or school, and allowing electronic monitoring. *See* 18 U.S.C. § 3142(c). The appropriateness of the alternatives depends on the individual characteristics of the

defendant, including any family ties and responsibilities. *See id.* § 3142(g)(3); *United States v. Malloy*, 11 F. Supp. 2d 583, 585 (D.N.J. 1998).

In accordance with the Bail Act, it is a near-universal statutory requirement under state pretrial detention regimes that alternatives to detention or conditions to release be considered in connection with any detention decision. *See, e.g.*, Alaska Stat. § 12.30.011(b); Ariz. Rev. Stat. § 13-3961(d); Cal. Penal Code § 1270; Conn. Gen. Stat. § 54-63b; Fla. Stat. § 907.041; Haw. Rev. Stat. § 804-3(d); Mont. Code Ann. § 46-9-106(2); D.C. Code § 23-1322(b); 725 Ill. Comp. Stat. 5/110-5, 5/110-6.1; Ind. Code § 35-33-8-3.2; Iowa Code § 811.2; Kan. Stat. Ann. § 22-2802; Ky. Stat. Ann. § 431.520; Ky. R. Crim. P. 4.12; Me. Rev. Stat. Ann. tit. 15, § 1026; Mass. Gen. Laws ch. 276, § 58A; Mich. Comp. Laws § 765.6b; Minn. R. Crim. P. 6.02; Mo. Rev. Stat. § 544.455; N.D. R. Crim. P. 46; Neb. Rev. Stat. § 29-901; N.H. Rev. Stat. Ann. § 597:2; N.Y. Crim. Proc. Law § 510.30; N.C. Gen. Stat. § 15A-534; Ohio Rev. Code Ann. § 2937.222; Or. Rev. Stat. § 135.245; 42 Pa. Cons. Stat. § 5701; R.I. Gen. Laws § 12-13-1.3; S.C. Code Ann. §17-15-10; S.D. Codified Laws § § 23A-43-3; Tenn. Code Ann. § 40-11-116; Vt. Stat. Ann. tit. 13, § 7554; Wash. Rev. Code § 10.21.040; Wis. Stat. § 969.01.

D. The Detainee Is Afforded Notice of the Government's Basis for Detention.

Federal and state pretrial detention laws include significant notice provisions intended to make any detention hearing meaningful and to allow the proper presentation of a defense to detention.

Specifically, a defendant has the right to "notice of any reasons advanced by the government in opposition to bail release and a reasonable opportunity to respond." *United States v. Abuhamra*, 389 F.3d 309, 328 (2d Cir. 2004); *accord United States v. Accetturo*, 783 F.2d 382, 390-91 (3d Cir. 1986); *United States v. Wind*, 527 F.2d 672, 675 (6th Cir. 1975); *United States v. Eischeid*, 315 F. Supp. 2d 1033, 1035 (D. Ariz. 2003); *In re West*, 227 Cal. App. 3d 1509, 1517 (1991) (unpublished) ("to satisfy concerns of fundamental fairness, the defendant must receive a written summary of the evidence against him, to the extent such can be provided without jeopardy to public safety or the safety of witnesses"). Numerous states also statutorily require notice of hearings to defendants to allow a meaningful defense to detention. *See, e.g.*, Cal. Penal Code § 1270.1(b) (requiring written notice of hearing and "an opportunity to be heard on the matter"); Colo. Rev. Stat. § 16-4-101 (requiring "reasonable notice" of hearing); Or. Rev. Stat. § 135.245 (providing notice of the release hearing). Pretrial detention laws thus provide procedures to ensure meaningful opportunities for defendants to contest detention.

E. A Detainee Is Allowed Subsequent Opportunities to Contest Continued Detention.

Even if a defendant is initially deemed to be properly subject to detention, he or she must be afforded subsequent opportunities to petition for release on due process grounds. *See United States v. Gelfuso*, 838 F.2d 358 (9th Cir. 1988); *Accetturo*, 783 F.2d at 388 ("a determination under the Bail Reform Act that detention is necessary is without prejudice to a defendant petitioning for release at a subsequent time on due process grounds"); *United States v. Ailemen*, 165 F.R.D. 571, 589 (N.D. Cal. 1996) (granting motion for pretrial release on due process grounds); *United States v. Orena*, 986 F.2d 628, 630 (2d Cir. 1993); *United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989); *see also State v. Fernando A.*, 981 A.2d 427, 432 (Conn. 2009). Courts widely recognize this constitutional right to ensure that detention decisions are not merely justified at the time of the bond hearing, but remain justified during the term of the detention.

F. The Court Must Consider the Length of Past and Likely Future Detention in Justifying Continued Detention.

In determining whether continued detention is justified under due process, courts expressly consider the length of past detention, and the likely period of future detention. *See Gelfuso*, 838 F.2d at 359; *Orena*, 986 F.2d at 630; *Accetturo*, 783 F.2d at 388; *Ailemen*, 165 F.R.D. at 581; *United States v. Millan*, 4 F.3d 1038, 1043 (2d Cir. 1993); *Hare*, 873 F.2d at 801 (holding that a court "must

consider . . . the length of the detention that has in fact occurred or may occur in the future"). For instance, in *Hare*, the Fifth Circuit reversed a detention decision, which failed to consider the length of detention, namely, the pretrial detention of the individual for four months. 873 F.2d at 801. Other courts have found that similar periods of prolonged detention may raise significant due process concerns. *See, e.g.*, *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) (four months); *United States v. LoFranco*, 620 F. Supp. 1324, 1326 (N.D.N.Y. 1985) (six months); *United States v. Hall*, 651 F. Supp. 13, 16 (N.D.N.Y. 1985) (six months).

In line with their duties and obligations under due process, state courts similarly consider the period of detention in conducting due process inquiries. *See, e.g.*, *Kleinbart v. United States*, 604 A.2d 861, 872 n.18 (D.C. 1992) ("In considering continued pretrial detention or release, the trial court should weigh the due process implications of the length of time appellant has already been detained."); *People ex rel. Kuby v. Agro*, 111 A.D.3d 516, 517 (N.Y. App. Div. 2013) (considering length of pretrial detention and extent government bears responsibility for duration). The right for detainees to request reexamination of their detentions, including especially the length of their detention, ensures

minimum due process safeguards against indefinite or unnecessarily prolonged detention.[4]

II. The Civil Commitment System Provides Procedural Safeguards Comparable to Those Requested by Petitioners.

As in the pretrial justice system, courts have held that many of the procedural safeguards Petitioners are seeking in the immigration context are constitutionally required under civil commitment law.

Federal and state civil commitment law provides the substantive and procedural framework for involuntarily committing individuals with mental illness to undergo treatment in hospitals or other settings. Substantial procedural protections exist in this context because—like detentions of defendants in pretrial contexts and immigration detainees in removal proceedings—"commitment to a mental hospital produces 'a massive curtailment of liberty,' and in consequence 'requires due process protection.'" *Doe v. Gallinot*, 657 F.2d 1017, 1021 (9th Cir. 1981) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)); *accord Jones v.*

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[4] Notably, the practical maximum length of pretrial detention is "limited by the stringent time limitations of the Speedy Trial Act," which requires that trials occur within seventy days of indictment to limit the possibility of prolonged detentions prior to trial barring special circumstances. *See Salerno*, 481 U.S. at 747; 18 U.S.C. § 3161(c)(1). States also carefully circumscribe the length of pretrial detentions to avoid due process concerns in the first place. *See, e.g., Mack v. United States*, 637 A.2d 430, 434 (D.C. 1994). The absence of any such comparable requirement in the immigration context makes the importance of periodic review of prolonged detention even greater.

Blanas, 393 F.3d 918, 932 (9th Cir. 2004); *Project Release v. Prevost*, 722 F.2d 960, 971 (2d Cir. 1983) (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring) ("there can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law").

Specifically, courts have held that involuntary civil commitment requires (1) that the government provide mandatory hearings, (2) that the government prove by clear and convincing evidence that commitment is warranted, (3) that the government provide notice to the individual of the details of the commitment proceedings, (4) that the government consider less restrictive alternatives to commitment, and (5) that committed individuals be granted periodic judicial review to determine if the basis for their confinement still exists.

A. Automatic Hearings Before an Independent Tribunal Are Required to Justify Commitment.

This Court has held that "minimum requirements of due process" include providing individualized hearings to determine whether commitment is warranted. *Gallinot*, 657 F.2d at 1024; *accord Bailey v. Pataki*, 708 F.3d 391, 393 (2d. Cir. 2013) ("[T]he constitutional principle that, absent some emergency or other exigent circumstance, an individual cannot be involuntarily committed to a

psychiatric institution without notice and a predeprivation hearing [is] firmly established."); *see also* 1-2 Michael L. Perlin, Mental Disability Law: Civil and Criminal § 2C-4 (2d ed. 2013) (hereinafter "Perlin") ("There is no longer any serious question as to the constitutional requirement of some kind of a judicial hearing prior to an order of involuntary civil commitment.").

Individual commitment hearings must be provided automatically and not merely upon request. *See Gallinot*, 657 F.2d at 1023-24. Any contrary rule would place an inappropriate burden on individuals to protect themselves from continued commitment. *See id.* Because it is the state that "must ultimately justify depriving a person of a protected liberty interest by determining that good cause exists for the deprivation," it must affirmatively provide a hearing in each case. *Id*. at 1023 (quoting *Suzuki v. Yuen*, 617 F.2d 173, 176-78 (9th Cir. 1980)).

Consistent with this requirement of due process, many states have codified the requirement for automatic hearings before individuals can be involuntarily committed. *See*, *e.g.*, Colo. Rev. Stat. § 27-65-109(2); Fla. Stat. § 394.467(6)(a); 405 Ill. Comp. Stat. 5/3-706; Mass. Gen. Laws ch. 123, § 7(c); Mich. Comp. Laws § 330.1453(1); Minn. Stat. § 253B.08(1)(a); Ohio Rev. Code Ann. § 5122.15(A); Tex. Health & Safety Code Ann. § 574.035(a); Va. Code Ann. § 37.2-814(A); Wis. Stat. § 51.20(2)(b).

B. Involuntary Commitment Must Be Justified by Clear and Convincing Evidence.

In all cases, due process requires authorities to present "clear and convincing evidence" before an individual can be civilly committed. *Addington v. Texas*, 441 U.S. 418, 419-20, 433 (1979). The Supreme Court reached this conclusion in *Addington* after determining that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id*. at 425 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972)). Because the risk to an individual facing possibly erroneous confinement is substantially greater than the risk to society of applying a lower standard of proof, the Court held that a preponderance of the evidence standard provided insufficient protection. *Id*. at 427. The Court recognized that an "individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id*.

In accordance with *Addington*, state statutes and state courts require the government to prove the necessity of commitment by clear and convincing evidence to satisfy due process. *See, e.g.*, Ala. Code § 22-52-10.1; Ariz. Rev. Stat. § 36-540; Fla. Stat. § 394.467(1); Minn. Stat. § 253B.09; Ohio Rev. Code Ann. § 5122.15(B); Tex. Health & Safety Code Ann. § 574.035(a); *In re G.M.*, 186 P.3d 229, 233 (Mont. 2008) ("As a result, clear and convincing evidence is the standard of proof in a civil commitment proceeding."); *Shivaee v. Commonwealth*, 613

S.E.2d 570, 578 (Va. 2005) ("[The Supreme Court] clearly stated that the 'clear and convincing' evidentiary standard is the minimum standard that may be used in a civil commitment proceeding.").

C. Less-Restrictive Alternatives to Civil Commitment Must Be Considered.

It is a basic concept in American law that although a "governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Courts have thus held that due process requires that the government not civilly commit an individual against her will unless it is determined that less restrictive alternatives to detention are insufficient. *See Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969) ("the principle of the least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment, which entails an extraordinary deprivation of liberty"); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1127 (D. Haw. 1976), *rev'd on other grounds*, 617 F.2d 173 (9th Cir. 1980) (holding that a civil commitment law did not meet the requirements of due process because it did not mandate a consideration of less restrictive alternatives); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1096 (E.D. Wis. 1972), *vacated on other grounds* (requiring consideration of

"(1) what alternatives are available; (2) what alternatives were investigated; and (3) why the investigated alternatives were not deemed suitable"). Less restrictive alternatives include, for example, placement in the custody of a friend or relative and day treatment in a hospital. *See Lessard*, 349 F. Supp. at 1095.

Consistent with federal law, state legislatures have mandated consideration of less restrictive alternatives. A majority of states have passed statutes expressly requiring courts to consider alternatives to hospitalization in civil commitment proceedings. *See* Perlin § 2C-5; *see, e.g.*, Ala. Code § 22-52-10.1; Ariz. Rev. Stat. § 36-540; Fla. Stat. § 394.467(1)(b); Ga. Code Ann. § 37-3-161; 405 Ill. Comp. Stat. 5/3-811; Minn. Stat. § 253B.09; N.M. Stat. Ann. § 43-1-3(D); Ohio Rev. Code Ann. § 5122.15(E); Wash. Rev. Code § 71.05.320(1)-(2); *see also Breen v. Carlsbad Mun. Sch.*, 138 N.M. 331, 340 (2005) ("New Mexico was one of the first states to define the 'least drastic means principle,' or 'least restrictive alternative concept,' for purposes of involuntary civil commitment."); *In re Joan K.*, 273 P.3d 594, 601 (Alaska 2012) ("An important principle of civil commitment in Alaska is to treat persons 'in the least restrictive alternative environment consistent with their treatment needs.'"); *Reese v. United States*, 614 A.2d 506, 510 (D.C. 1992) ("[T]he courts in this jurisdiction have emphasized the importance of an explicit finding that an involuntarily civilly committed mental patient is receiving the least restrictive treatment alternative available.").

D. Individuals Facing Civil Commitment Have the Right to Notice of Hearings.

Due process requires that individuals subject to civil detention proceedings receive written notice of hearings. The government must provide notice to the detainee of more than merely the date, time, and place of the hearing, but also of "the basis for his detention . . . the standard upon which he may be detained, the names of examining physicians and all other persons who may testify in favor of his continued detention, and the substance of their proposed testimony." *See Lessard*, 349 F. Supp. at 1092; *accord United States v. Baker*, 807 F.2d 1315, 1323 (6th Cir. 1986) ("Notice is required to provide an individual with a *meaningful* opportunity to challenge the government's evidence; an individual who has not been notified of the government's intention to commit the person indefinitely or of the grounds relied on by the government, simply has not been afforded an opportunity to present his own witnesses and to challenge adequately the government's evidence.") (emphasis in original); *Stamus v. Leonhardt*, 414 F. Supp. 439, 446-47 (S.D. Iowa 1976); *Bell v. Wayne Cnty. Gen. Hosp.*, 384 F. Supp. 1085, 1092 (E.D. Mich. 1974).

This standard arises from the basic requirements of due process, which mandate notice "reasonably calculated to inform the respondent in an involuntary commitment proceeding of the nature and purpose of the hearing" and "that the notice be given sufficiently in advance of the proceedings to provide a reasonable

opportunity to prepare." *French v. Blackburn*, 428 F. Supp. 1351, 1356-57 (M.D.N.C. 1977); *accord Suzuki*, 411 F. Supp. at 1127; *Doremus v. Farrell*, 407 F. Supp. 509, 515 (D. Neb. 1975). Many states in turn have codified this basic notice requirement. *See* Perlin § 2C-4.7; *see, e.g.*, Colo. Rev. Stat. § 27-65-109(2); 405 Ill. Comp. Stat. 5/3-706; Mass. Gen. Laws ch. 123, § 7; Mich. Comp. Laws § 330.1453; Minn. Stat. § 253B.08(2); Va. Code Ann. § 37.2-814(D), (F); Wis. Stat. § 51.20(2)(b).

E. Committed Individuals Must Be Provided Periodic Judicial Review, and Confinement Cannot Continue for Longer than Necessary to Achieve the Purpose of the Commitment.

The Supreme Court has held that even if an individual's original commitment was founded on a constitutionally adequate basis, confinement cannot continue after the basis for the confinement no longer exists. *See O'Connor*, 422 U.S. at 574-75 ("Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed"); *Jackson*, 406 U.S. at 738 (a person committed based on incapacity to stand trial for a criminal offense "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."); *Jones*, 393 F.3d at 931 ("[D]ue process requires that the nature and duration of

commitment bear some reasonable relation to the purpose for which the individual is committed."); *see also Clark v. Cohen*, 794 F.2d 79, 86 (3d Cir. 1986) (citations omitted) ("[D]ue process require[s] periodic reviews of [an individual's] continuing need for institutionalization. Periodic reviews are required because if the basis for a commitment ceases to exist, continued confinement violates the substantive liberty interest in freedom from unnecessary restraint.").

Consistent with federal law, the Supreme Courts of Connecticut and New Jersey held in two foundational cases that due process requires periodic judicial review for civilly committed individuals. *See Fasulo v. Arafeh*, 378 A.2d 553, 558 (Conn. 1977) ("[P]laintiffs have been denied their due process rights . . . by the state's failure to provide them with periodic judicial review of their commitments in the form of state-initiated recommitment hearings, replete with the safeguards of the initial commitment hearings, at which the state bears the burden of proving the necessity for their continued confinement."); *State v. Fields*, 390 A.2d 574, 580 (N.J. 1978) (holding that individuals indefinitely committed to mental institutions following a criminal acquittal by reason of mental disability are entitled to periodic review hearings at which the state bears the burden of justifying continued detention).

States have consistently followed this due process requirement, with state statutes or judicial decisions eliminating indefinite institutionalizations without

periodic review. *See* Perlin § 2C-6.5c ("Since *Fasulo* and *Fields*, there has come the 'virtual demise' of indeterminate involuntary institutionalization, with over forty states providing a durational limit on commitment."); *see, e.g.*, Fla. Stat. § 394.467(7); Minn. Stat. § 253B.03(5); Wis. Stat. § 980.07(1); *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994) (stating that due process requires that civil commitment be accompanied by periodic review).

CONCLUSION

The *amici curiae* support Petitioners' request that the Court affirm the right of noncitizens in removal proceedings to (1) an automatic bond hearing, (2) where the Government must show by clear and convincing evidence that detention is justified and (3) that no alternatives to detention are sufficient to address its concerns, while providing minimal procedural safeguards including (4) adequate notice in plain language; (5) consideration of the length of past and likely future detention; and (6) periodic judicial review of detention decisions. Without these minimum procedural safeguards, the immigration system would provide fewer comparable safeguards against prolonged detention of individuals than analogous detention regimes, including the pretrial justice system and the civil commitment system, and violate established minimum standards of due process.

Dated: September 29, 2014

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 6,730 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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