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June 9, 2017

VIA ECF

Hon. Ronnie Abrams
United States District Court
Southern District of New York
40 Foley Square, Room 2203
New York, NY 10007

Re: *Celestin v. Decker,* Case No. 17-CV-2419 (RA)
Letter motion seeking leave to file proposed *amici curiae brief*

Dear Judge Abrams:

We recently learned of this Court's order in the above-referenced case, seeking supplemental briefing on "whether during a *Lora* hearing, an Immigration Judge is required to consider a detainee's ability to pay or alternatives to detention when setting bail." ECF Docket No. 17 (filed Jun. 6, 2017). We respectfully write to seek the Court's permission to file a brief of *amici curiae* on this question, in support of the Petitioner. The proposed brief is included with this submission. Counsel for Petitioner in this case consents to our request to seek leave to file our proposed brief; counsel for Respondents takes no position on our request.

"District courts have broad discretion to permit or deny the appearance of amici curiae in a given case." *United States v. Ahmed*, 788 F. Supp. 196, 198 n.1 (S.D.N.Y. 1992), *aff'd* 980 F.2d 161 (2d Cir. 1992). "An amicus brief should normally be allowed when ... the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Andersen v. Leavitt*, No. 03-cv-6115, 2007 U.S. Dist. LEXIS 59108, *6 (E.D.N.Y. Aug. 13, 2007) (internal quotations omitted). Leave to file an amicus brief is particularly appropriate "in cases involving matters of public interest." *Id.*

Amici curiae include the Brooklyn Defender Services, Immigrant Rights Clinic of Washington Square Legal Services, Inc. (at New York University Law School), Kathryn O. Greenberg Immigration Justice Clinic (at Cardozo Law School) and Legal Aid Society-New York. As legal service providers who routinely represent detained immigrants, we are uniquely positioned to offer our expertise on this exceptionally important legal issue. We each have been counsel or *amici* in several important immigration detention cases, including *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), which provided for constitutionally adequate bond hearings for

many who were subject to prolonged detention. Our longstanding fight for bond hearings is not meaningful, however, if the bonds are arbitrarily set at levels inaccessible to indigent detainees. The issue identified by this Court is thus relevant to thousands of New Yorkers who are detained and who depend on Immigration Judges to follow statutory and constitutional requirements when setting their bond.

The proposed *amici* are as follows:

Brooklyn Defender Services ("BDS") is a public defender organization that represents more than 30,000 people every year who cannot afford an attorney in criminal, family, civil and immigration proceedings. BDS has represented immigrants in removal proceedings since 2009, and since 2013, has represented detained immigrants through the New York Immigrant Family Unity Project, New York's first-in-the-nation appointed counsel program for detained New Yorkers facing removal who cannot afford an attorney. BDS represents Alexander Lora, the petitioner in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), in his removal proceedings, and represented him before the federal district court and circuit court. BDS has represented dozens of clients in "Lora" hearings, including clients with strong defenses to removal who were nevertheless granted bonds so high they were unable to pay them.

The Immigrant Rights Clinic ("IRC") of Washington Square Legal Services is a clinical law program at New York University School of Law. IRC routinely represents detained immigrants in removal proceedings. IRC has a longstanding interest in defending the rights of detained immigrants, and has served as counsel of record for petitioners and amici in several cases before federal district courts within the Southern District of New York, the U.S. Court of Appeals for the Second Circuit, and the U.S. Supreme Court. It is co-counsel with BDS for the petitioner in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015).

The Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law is a non-profit clinic dedicated to providing quality legal representation for indigent immigrants facing deportation and advocacy work to support immigrant communities. Clinic students have won relief for many individuals facing deportation, and their work has helped change laws and policies affecting immigrants in New York and nationally.

The Legal Aid Society is the oldest and largest program in the nation providing direct legal services to low-income families and individuals. Founded in 1876, the Legal Aid Society has a long-standing proven track record of providing targeted services to meet the essential legal needs for the most vulnerable New Yorkers in all five boroughs of the City. The Society's legal program operates three major practices — Civil, Criminal and Juvenile Rights — and receives volunteer help from law firms, corporate law departments and expert consultants that is coordinated by the Society's Pro Bono program. With its annual caseload of more than 300,000 legal matters, the Legal Aid Society takes on more cases for more clients than any other legal services organization in the United States, and it brings a depth and breadth of perspective that is unmatched in the legal profession. The Legal Aid Society's unique value is an ability to go beyond any one case to create more equitable outcomes for individuals and broader, more powerful systemic change for society as a whole. In addition to the annual caseload of 300,000 individual cases and legal matters, the Society's law reform representation for clients benefits

some 2 million low-income families and individuals in New York City and the landmark rulings in many of these cases have a Statewide and national impact. The Civil Practice maintains an Immigration Law Unit ("ILU") which has a comprehensive and interdisciplinary practice, including expertise in representing immigrants at the intersection of criminal and immigration law. The ILU has also represented and served as amicus on behalf of immigrants seeking release from prolonged and mandatory detention in habeas and other federal court proceedings.

For the foregoing reasons, we respectfully request the Court's permission to file the proposed brief of *amici curiae.*

Respectfully submitted,

/s/Alina Das
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RENALDO CELESTIN,
Petitioner,
v.

THOMAS DECKER, in his official capacity as Field Office Director of the Immigration and Customs Enforcement ("ICE") New York City Field Office; DIANEMCCONNELL, in her official capacity as Assistant Field Office Director for the ICE New York City Field Office; U.S. DEPARTMENT OF HOMELAND SECURITY ("DHS"); JOHN F. KELLY, in his official capacity as Secretary ofDHS; JEFFERSON BEAUREGARD SESSIONS III, in his official capacity as the Attorney General of the United States; ERIC TAYLOR, in his official capacity as Director of Hudson County Correctional Facility,
Respondents

Case No.: 17-CV-2419 (RA)

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER'S SUPPLEMENTAL BRIEF

BRIEF OF *AMICI CURIAE* BROOKLYN DEFENDER SERVICES, IMMIGRANT RIGHTS CLINIC OF WASHINGTON SQUARE LEGAL SERVICES, KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC, AND THE LEGAL AID SOCIETY IN SUPPORT OF PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

PRELIMINARY STATEMENT **1**

STATEMENT OF INTEREST **2**

ARGUMENT **5**

I. The Statute Requires Consideration of Ability to Pay and Alternatives Conditions of Release When Setting Bond. 5

A. The Statute Requires an Immigration Judge to Consider Ability to Pay Bond When Setting Bond. 5

B. The Statute Requires an Immigration Judge to Consider Alternatives Conditions of Release When Setting Bond. 9

II. The Constitution Requires Consideration of Ability to Pay and Alternative Conditions of Release When Setting Bond. 10

A. The Due Process Clause Requires Immigration Judges to Consider Ability to Pay and Alternative Conditions of Release When Setting Bond. 10

1. Procedural Due Process Requires This Analysis. 11

2. Substantive Due Process Requires This Analysis. 14

B. The Excessive Bail Clause Requires Immigration Judges to Consider Ability to Pay and Alternative Conditions of Release When Setting Bond. 16

C. The Equal Protection Clause Requires Immigration Judges to Consider Ability to Pay and Alternative Conditions of Release When Conducting Bond Hearings. 18

III. An Immigration Judge's Consideration of Ability to Pay and Alternative Conditions of Release Must Be Meaningful. 20

CONCLUSION **22**

TABLE OF AUTHORITIES

Cases

Abreu v. Callahan, 971 F. Supp. 799 (S.D.N.Y. 1997) 19

Bearden v. Georgia, 461 U.S. 660 (1983) ..... passim

Browning-Ferris Indus. of VT, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 16

Burger v. Gonzales, 498 F.3d 131 (2d Cir. 2007) 14

Carlson v. Landon, 342 U.S. 524 (1952) 9, 16

Clark v. Martinez, 543 U.S. 371 (2005) 7

Cruz-Miguel v. Holder, 650 F.3d 189 (2d Cir. 2011) 9

Demore v. Kim, 538 U.S. 510 (2003) 15

Ferreras v. Ashcroft, 160 F.Supp.2d 617 (S.D.N.Y. 2001) 12

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 12

Hernandez v. Lynch, No. 61-CV-0620 (JGB), 2016 WL 7116611 (C.D. Cal. Nov. 10, 2016) ..... passim

Hernandez v. Sessions, No. 16-56829 (9th Cir. Dec. 13, 2016) 8

I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) 9

Islam v. Gonzales, 469 F.3d 53 (2d Cir. 2006) 20

Jones v. City of Clanton, 15-cv-34-MHT, 2015 WL 5387219 (Sep. 14, 2015) (M.D. Ala.).. 16, 22

Lora v. Shanahan, 804 F. 3d 601 (2d Cir. 2015) ..... passim

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 16

Mathews v. Eldridge, 424 U.S. 319 (1976) 11, 12, 13

Matter of Aguilar-Aquino, 24 I & N Dec. 747 (2009) 9

Paroutian v. United States, 471 F.2d 289 (2d Cir. 1970) 15, 19

Pierce v. City of Velda City, MO, No. 4:15-cv-00570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015) (Dkt. 16) 20

Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978) (en banc) 8, 10, 15, 20

Qun Yang v. McElroy, 277 F.3d 158 (2d Cir.2002) 21

Rhem v. Malcom, 507 F.2d 333 (2d Cir. 1974) 15

Rivera v. Holder, 307 F.R.D. 539 (W.D. Wash. 2015) 9

Rodriguez v. Providence Cmty. Corr., Inc., No. 3:15-cv-01048, 2015 WL 9239821 (M.D. Tenn. Dec. 17, 2015) 20

Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015) 1, 5, 10

Rone v. Shanahan, 15-cv-9063, 2016 WL 1047393 (S.D.N.Y. Mar. 13, 2016) 14

Smith v. Bennett, 365 U.S. at 708 (1961) 19

St. John v. McElroy, 917 F. Supp. 243 (S.D.N.Y. 1996) 14

Tate v. Short, 401 U.S. 395 (1971) 1, 18, 19

Thompson v. Moss Point, MS, No. 1:15-cv-00182-LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 16, 2015) (Dkt. 18) 20

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 7

Turner v. Rogers, 564 U.S. 431 (2011) 11

United States v. Arzberger, 592 F.Supp.2d 590 (S.D.N.Y. 2008) 17, 18

United States v. Gaines, 449 F.2d 143 (2d Cir. 1971) 18, 19

United States v. Karper, 847 F.Supp.2d 350 (N.D.N.Y. 2011) 17

United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969) 17

United States v. Leisure, 710 F.2d 422 (8th Cir. 1983) 17

United States v. Polouizzi, 697 F.Supp.2d 381 (E.D.N.Y. 2010) 17

United States v. Salerno, 481 U.S. 739, 754 (1987) 2, 12, 16, 17

Varden v. City of Clanton, No. 2:15-cv-00034 (M.D. Al. Feb. 13, 2015) 20

Walker v. City of Calhoun, GA, No. 4:15–CV–0170–HLM, 2016 WL 361612(N.D. Ga. Jan. 28, 2016) 20

Williams v. Illinois, 399 U.S. 235 (1970) 1, 18

Zadvydas v. Davis, 533 U.S. 678 (2001) ..... passim

Statutes & Regulations

8 C.F.R. § 1236.1(c)(8) 6

8 C.F.R. § 1236.1(d) 9

8 U.S.C. § 1226(a) 1, 5, 6, 9

8 U.S.C. § 1226(a)(1) 6, 7

8 U.S.C. § 1226(a)(2) 5, 9

8 U.S.C.§ 1226(c) 1, 5, 6

18 U.S.C. § 3142(c)(2) 21

18 U.S.C. § 3142(g) 22

18 U.S.C. § 3142(g)(3)(A) 22

13 V.S.A § 7554(b) 22

Conn. Gen. Stat. Ann. § 54-64a 22

N.Y. Crim. Pro. L. § 510.30 22

Other Authorities

Alternatives to Detention: Improved Data Collection and Analysis Needed to Better Assess Program Effectiveness ("GAO Report"), GAO-15-26 (Nov. 2014)..... 14, 18

American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010), http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/..... 21

Brief for United States as Amicus Curiae Supporting Plaintiff-Appellee, *Walker v. City of Calhoun*, appeal docketed, No. 16-10521 (11th Cir. Aug. 18, 2016)..... 20

United States Department of Justice, Civil Rights Division Office for Access to Justice, Dear Colleague Letter (March 14, 2016)..... 20

PRELIMINARY STATEMENT

The Supreme Court has long held that a court cannot "imprison. . . a person solely because he lacks funds." *See Bearden v. Georgia*, 461 U.S. 660, 674 (1983); *see also Williams v. Illinois*, 399 U.S. 235, 241 (1970); *Tate v. Short*, 401 U.S. 395, 398-99 (1971). This Court has asked the parties for supplementary briefing on the question of whether an Immigration Judge must consider ability to pay and alternatives conditions of release. As explained below, both the Immigration and Nationality Act ("INA") and the U.S. Constitution require Immigration Judges to consider these factors. To hold otherwise would be to accept the untenable position that an immigrant detainee may remain incarcerated solely because he or she is indigent.

First, the statute requires this inquiry. The relevant provision in the INA governing release on bond—whether in the context of *Lora/Rodriguez* prolonged detention bond hearings or discretionary bond hearings—is 8 U.S.C. § 1226(a). *See* 8 U.S.C. § 1226(a); *see also Rodriguez v. Robbins*, 804 F.3d 1060, 1082 (9th Cir. 2015) (recognizing that after six months of detention under §§ 1225(b) or 1226(c), Immigration Judges must hold bond hearings under § 1226(a)), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016); *Lora v. Shanahan*, 804 F. 3d 601, 616 (2d Cir. 2015) (applying *Rodriguez* to require bond hearings within six months of detention under § 1226(c)). The text, context and structure of 8 U.S.C. § 1226(a) contemplate that once an Immigration Judge has determined that a noncitizen may be released on some conditions,[1] any such order setting terms for a noncitizen's "release" must fully and adequately consider that noncitizen's ability to pay and suitability for alternative release conditions. This

[1] In the context of *Lora* and *Rodriguez* bond hearings, the government bears the burden of establishing by clear and convincing evidence that an individual poses such a flight risk or danger to society that she may not be released on bond from detention. *Lora*, 804 F.3d at 616; *Rodriguez*, 804 F.3d at 1074. If the government fails to meet its burden, the individual must be admitted to bond and an Immigration Judge must consider what bond amount or alternative conditions of release would be necessary to secure the individual's reappearance.

reading of the statute is not only supported by its text, structure, and purpose, but also by other tools of statutory construction, including the canon that any ambiguity in the statute must be construed to avoid serious constitutional problems. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The statute, therefore, can and must be construed to require basic procedures to avoid the serious constitutional concerns that would otherwise be presented. Those procedures include a requirement that immigration officials meaningfully consider ability to pay when setting bond—such that immigration officials set bond at no greater amount than necessary to ensure that person's appearance—as well as release on alternative conditions of supervision.

Second, at least three clauses within the U.S. Constitution require an inquiry into ability to pay and alternative conditions of release. A bond system that ignores an individual's ability to pay and alternative conditions of release violates the Fifth Amendment's due process and equal protection guarantees, and the Eighth Amendment's prohibition against excessive bail. This is because such a bond system results in detention based on poverty alone, without any reasonable relationship to the government's legitimate purposes, and impermissibly discriminates against individuals based on their lack of financial resources. Without an inquiry into one's financial circumstances, Immigration Judges cannot possibly ensure that bond is set "by a court at a sum designed to ensure that goal, and no more." *United States v. Salerno*, 481 U.S. 739, 754 (1987).

STATEMENT OF INTEREST

Amici curiae are organizations with a long history of defending the rights of detained, indigent immigrants and have in interest in the proper application of the law to release determinations in Immigration Court. *Amici curiae* include the following:

Brooklyn Defender Services ("BDS") is a public defender organization that represents more than 30,000 people every year who cannot afford an attorney in criminal, family, civil and

immigration proceedings. BDS has represented immigrants in removal proceedings since 2009, and since 2013, has represented detained immigrants through the New York Immigrant Family Unity Project, New York's first-in-the-nation appointed counsel program for detained New Yorkers facing removal who cannot afford an attorney. BDS represents Alexander Lora, the petitioner in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), in his removal proceedings, and represented him before the federal district court and circuit court. BDS has represented dozens of clients in "Lora" hearings, including clients with strong defenses to removal who were nevertheless granted bonds so high they were unable to pay them.

The **Immigrant Rights Clinic ("IRC") of Washington Square Legal Services** is a clinical law program at New York University School of Law. IRC routinely represents detained immigrants in removal proceedings. IRC has a longstanding interest in defending the rights of detained immigrants, and has served as counsel of record for petitioners and *amici* in several cases before federal district courts within the Southern District of New York, the U.S. Court of Appeals for the Second Circuit, and the U.S. Supreme Court. It is co-counsel with BDS for the petitioner in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015).

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needs for the most vulnerable New Yorkers in all five boroughs of the City. The Society's legal program operates three major practices—Civil, Criminal and Juvenile Rights—and receives volunteer help from law firms, corporate law departments and expert consultants that is coordinated by the Society's Pro Bono program. With its annual caseload of more than 300,000 legal matters, the Legal Aid Society takes on more cases for more clients than any other legal services organization in the United States, and it brings a depth and breadth of perspective that is unmatched in the legal profession. The Legal Aid Society's unique value is an ability to go beyond any one case to create more equitable outcomes for individuals and broader, more powerful systemic change for society as a whole. In addition to the annual caseload of 300,000 individual cases and legal matters, the Society's law reform representation for clients benefits some 2 million low-income families and individuals in New York City and the landmark rulings in many of these cases have a Statewide and national impact. The Civil Practice maintains an Immigration Law Unit ("ILU") which has a comprehensive and interdisciplinary practice, including expertise in representing immigrants at the intersection of criminal and immigration law. The ILU has also represented and served as amicus on behalf of immigrants seeking release from prolonged and mandatory detention in habeas and other federal court proceedings.

Amici curiae support the arguments of Petitioner in this case, and submit this brief to highlight the statutory and constitutional underpinnings of the requirement that Immigration Judges meaningfully consider ability to pay and alternative conditions of release when setting bond.

ARGUMENT

I. The Statute Requires Consideration of Ability to Pay and Alternatives Conditions of Release When Setting Bond.

Immigration Judges must meaningfully consider ability to pay a bond or alternative conditions of release when setting bond under 8 U.S.C. § 1226(a). Section 1226(a) governs bond hearings, including those conducted pursuant to *Lora* and *Rodriguez*. *See Rodriguez*, 804 F.3d at 1082 (recognizing that after six months of detention under §§ 1225(b) or 1226(c), Immigration Judges must hold bond hearings under § 1226(a)); *Lora*, 804 F. 3d at 616 (applying *Rodriguez* to require bond hearings within six months of detention under § 1226(c)). As explained below, two aspects of statute indicate that decisions to set bond must consider ability to pay and alternative conditions of release. First, § 1226(a)(2) contemplates the setting of bond or conditional parole as part of a decision "to release" a noncitizen on those conditions; the failure to consider ability to pay renders release an impossibility for the poor. Second, § 1226(a)(2) specifies that the government has the authority "to release" noncitizens on "conditional parole," a term that has encompassed alternative conditions of release short of financial conditions. Taken together, these provisions demonstrate that the INA itself requires consideration ability to pay and alternative conditions of release when Immigration Judges conduct bond hearings.

A. The Statute Requires an Immigration Judge to Consider Ability to Pay Bond When Setting Bond.

The Immigration and Nationality Act provides the government with the authority to detain or release noncitizens, subject to specified exceptions, who are facing removal proceedings before an Immigration Judge. The statute provides, in relevant part:

> (a) [A]n alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. . . pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—

> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
> (B) conditional parole . . .

8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(c)(8).

The text of the statute indicates that the purpose of setting bond or conditional parole is to facilitate the noncitizen's "release" at an amount reasonably calculated to secure their future appearances, not to facilitate the noncitizen's continued detention. Ensuring this "release" compels an inquiry into detainee's ability to pay the set bond amount. Interpreting the statute to exclude this inquiry would defeat its purpose, raise serious constitutional concerns, as described *infra* Point II, and render 8 § 1226(a)(2) meaningless for thousands of indigent noncitizens. It would also be inconsistent with the DOJ's views on bail in other federal contexts.

The Second Circuit has recognized the plain meaning of "released" in a related section of § 1226, § 1226(c)(1).[2] In this context, "released" means "not incarcerated, not imprisoned, not detained. . . i.e., not in physical custody." *Lora*, 804 F.3d 601, 610 (2d Cir. 2015). "Release" operates similarly in § 1226(a)(2). The term is contrasted with the Attorney General's authority to "detain" an immigrant, described in the preceding § 1226(a)(1). The statute then lists conditions for that release in § 1226(a)(2)(A)-(B): namely bond and conditional parole. Thus, Congress authorized bond and conditional parole in a "release" provision separately enumerated from the provision authorizing detention. Interpreting § 1226(a)(2) to permit detention without consideration of an indigent detainee's financial means frustrates the statutory mandate to pursue actual "release." By contrast, releasing a detainee on a bond that accounts for his or her poverty,

[2] 8 U.S.C.§ 1226(c) governs mandatory detention of immigrants pending removal proceedings, and authorizes the Attorney General to take into custody any immigrant who is inadmissible or deportable for certain offenses not relevant here "when the alien is released."

or on conditional parole as an alternative to bond, would carry out the statue's command to release the detainee on appropriate conditions.

An interpretation of the statute that does not require a meaningful inquiry into a detainee's ability to pay bond would render Congress's distinction between the authority to "continue to detain the arrested alien" and the authority to "release the alien on—(A) bond . . . or (B) conditional parole" meaningless for indigent noncitizens, who would remain detained under either prong. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (recognizing the Court's duty to give effect to every word and clause in a statute and avoid nullifying words, phrases or provisions). 8 U.S.C. § 1226(a)(1) and § 1226(a)(2) together show that the Attorney General may either detain or release an immigrant at her discretion. However, if § 1226(a)(2) were read to omit an inquiry into the immigrant's ability to pay any bond set, it would allow the Attorney General to "continue to detain" an immigrant in every case where the immigrant could not afford to pay bond. Such a reading would collapse the difference between § 1226(a)(1) and § 1226(a)(2).

Nonetheless, to the extent the Court finds § 1226(a) ambiguous despite the text and statutory context, it must also apply the constitutional avoidance canon to ensure that 8 § 1226(a)(1) is not applied in a manner that raises constitutional concerns. Under this canon, courts must "choos[e] between competing plausible interpretations of a statutory text, resting on a reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

The Supreme Court and Second Circuit have repeatedly applied the constitutional avoidance canon to ensure a constitutional interpretation of immigration detention laws. *See Zadvydas*, 533 U.S. at 701 (recognizing that prolonged detention of immigrants under § 1231(a)

raised significant constitutional concerns and construing the statute to include a rebuttable presumption of release after 6 months) (internal quotation marks omitted). *See also Lora*, 804 F.3d at 616 (holding to avoid constitutional concerns that immigrants detained pursuant to § 1226(c)(1) "must be admitted to bail" unless the government proves that the immigrant "poses a risk of flight or a danger"). Courts have also applied the canon to construe criminal bail statutes to require consideration of ability to pay and alternatives to incarceration in order to avoid constitutional concerns. *See Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (construing state bail statute to require consideration of ability to pay and alternatives to money bail because of due process and equal protection concerns). Here, an interpretation of the statute that does not require an inquiry into the immigrant's ability to pay bond or suitability for release on alternative conditions would raise serious constitutional doubts under the Due Process, Excessive Bail, and Equal Protection clauses. *See* Point II, *infra*. As a federal district court recently held in the immigration bond context, these concerns would be avoided if this Court construes the statute to require an inquiry into a detainee's ability to pay bond. *See Hernandez v. Lynch*, No. 61-CV-0620 (JGB), 2016 WL 7116611, at *21-30 (C.D. Cal. Nov. 10, 2016) (granting preliminary injunction requiring Immigration Judges to consider a detainee's ability to pay and suitability for alternative conditions of release in bond hearings because failure to do so is likely unconstitutional, and the statute itself must be construed under the constitutional avoidance doctrine to require that immigration officials consider such factors), *appeal docketed sub nom. Hernandez v. Sessions*, No. 16-56829 (9th Cir. Dec. 13, 2016).

Finally, even if the statute were ambiguous and constitutional avoidance did not apply, any lingering ambiguities in the statute should nonetheless be construed in favor of the detainee, thus requiring an inquiry into ability to pay. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449

(1987) (acknowledging "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien").

B. The Statute Requires an Immigration Judge to Consider Alternatives Conditions of Release When Setting Bond.

The text, statutory structure, and purpose of 8 U.S.C. § 1226(a)(2) similarly compel a meaningful inquiry into the suitability of alternatives to bond. The plain text of § 1226(a)(2)(B) authorizes the Attorney General to release an immigrant on "conditional parole."[3] Conditional parole includes nonmonetary conditions of release, such as release on recognizance. *See Cruz-Miguel v. Holder*, 650 F.3d 189, 191 (2d Cir. 2011) ("On the same day each petitioner was taken into DHS custody, he was released therefrom on 'his own recognizance' pursuant to 8 U.S.C. § 1226[(a)(2)]. . . . All parties appear to agree that petitioners were released on 'conditional parole.'"). In addition, the government construes its authority to release noncitizens on conditions of supervision, such as electronic monitoring. *See Matter of Aguilar-Aquino*, 24 I & N Dec. 747 (2009). IJs thus violate the plain language of 8 U.S.C. § 1226(a)(2) if they fail to consider a detainee's eligibility for alternatives to bond. *See Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015) (holding that the plain language of 8 U.S.C. § 1226(a) requires IJs to "consider conditions for release beyond a monetary bond," such as conditional parole, and ordering IJs in Washington to do so under 8 U.S.C. § 1226(a)).

Failing to consider conditional parole would also violate § 1226(a)'s implementing regulations and decades of practice. *See* 8 C.F.R. § 1236.1(d). Courts have recognized DHS's authority to detain or release noncitizens on bond or recognizance for decades. *See, e.g.*, *Carlson v. Landon*, 342 U.S. 524, 538 n.1 (1952) (acknowledging most immigrants could receive

[3] § 1226(a)(2)(A) also authorizes conditions in combination with a cash bond, enabling the Attorney General to impose other conditions of release to ensure reappearance without a prohibitively high cash bond.

"modest bonds or personal recognizances" under the Internal Security Act).

To the extent the statute is in any way ambiguous, the canon of constitutional avoidance also compels consideration of conditional parole to ensure that individuals are not impermissibly detained based solely on their lack of financial resources. *See Zadvydas*, 533 U.S. at 699; Point I.A, *supra* (discussing the canon); Point II, *infra* (discussing the constitutional concerns with detaining noncitizens without consideration of ability to pay and alternatives to bond). Courts have held in the pre-trial criminal bail context that the Fifth and Fourteenth Amendments require courts to find that there are no alternative forms of release, such as a lower bond and/or non-monetary conditions of supervision, that would be sufficient to mitigate flight risk and danger before continuing an individual's detention. *See Pugh*, 572 F.2d at 1058 (upholding Florida criminal bail scheme against a constitutional challenge by construing it to require consideration of alternatives to money bond). These concerns may be avoided if the statute is construed to require alternative conditions of release. *See Hernandez*, 2016 WL 7116611, at *21-30; *see also Rodriguez*, 804 F.3d at1087 (affirming permanent injunction requiring that immigration judges "consider the use of alternatives to detention in making bond determinations" (internal quotation marks omitted)).

II. The Constitution Requires Consideration of Ability to Pay and Alternative Conditions of Release When Setting Bond.

A. The Due Process Clause Requires Immigration Judges to Consider Ability to Pay and Alternative Conditions of Release When Setting Bond.

"Freedom from imprisonment…lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690; *Lora*, 804 F.3d at 606. The Supreme Court has long recognized that "imprisoning a defendant solely because of his lack of financial resources" violates the Due Process Clause. *Bearden*, 461 U.S. at 674 (holding that a court could not revoke

probation and jail a defendant who was too poor to comply with probation conditions). *See also Turner v. Rogers*, 564 U.S. 431, 445 (2011) (prohibiting the government from finding a defendant in civil contempt for failure to pay child support without an indigence determination). Here too, due process requires consideration of ability to pay and alternative conditions of release. First, a failure to consider ability to pay and alternative conditions of release would violate a detainee's procedural due process rights because it deprives him or her of adequate procedures to ensure that he or she does not remain in detention solely because of poverty. Second, it would violate his or her substantive due process rights because his or her continued detention without consideration of ability to pay bond and alternative conditions of release would no longer bears a reasonable relationship to the purposes of the detention statute.

1. Procedural Due Process Requires This Analysis.

Courts have long held that due process requires adequate procedures and specific findings as to an individual's ability to pay bond and suitability for alternative conditions of release, to avoid incarceration based on poverty. *See Bearden*, 461 U.S. at 666-67 ("[T]he issue… requires a careful inquiry into such factors as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose. . . .") (internal citation omitted); *see also Turner*, 564 U.S. at 445 (requiring procedures such as a written indigence form, cross-examination and an express finding about indigence in a civil contempt hearing); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (internal citations omitted). An immigration bond hearing that failed to consider ability to pay or alternative conditions of release would fail the test for evaluating the constitutionality of

procedural safeguards. *See Mathews*, 424 U.S. at 335; *see also Ferreras v. Ashcroft*, 160 F.Supp.2d 617, 630 (S.D.N.Y. 2001) ("The *Mathews* test requires the Court to balance: i) the private interest that the government action affects; ii) the risk that the procedures used will result in erroneous deprivation of that interest and the extent to which that risk could be minimized by additional safeguards; and iii) the government's interest in maintaining current procedures."). Indeed, it is on this basis that the federal district court in *Hernandez* granted a preliminary injunction last year that immigration judges must be required to consider ability to pay and alternative conditions of release. *See Hernandez*, 2016 WL 7116611, at *25-26 (finding that Immigration Judges' failure to consider ability to pay bond and conditional parole in bond hearings violated *Mathews* because of immigrants' strong liberty interest and the risk of erroneous deprivation when ability to pay is not considered).

First, an immigrant's interest in release from detention "lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (describing freedom from detention as "elemental").

Second, the immigration court's failure to consider an individual's ability to pay or the viability of conditional parole created a significant risk of erroneous deprivation of liberty. For indigent immigrant detainees like the Petitioner, release is entirely contingent on ability to pay the bond set by the Immigration Judge. Their financial situations are inextricably related to the bond amount appropriate to ensure appearance at future proceedings: the same bond amount will better incentivize reappearance for indigent individuals than more affluent individuals. Too high, and the bond amount is the equivalent of mandatory detention. Thus, an inquiry into the detainee's financial situation is necessary to ensure that immigration bonds are set no higher than necessary to ensure release. *Salerno*, 481 U.S. at 754. Such an inquiry is required to prevent the

erroneous incarceration of an individual solely because he or she cannot pay the price of his or her freedom. *See Bearden*, 461 U.S. at 674.

These unconstitutional outcomes would constitute an unacceptable "erroneous deprivation of [liberty]" simply because of the Immigration Judge's failure to consider an individual's ability to pay bond and the suitability of alternative conditions. *Mathews*, 424 U.S. at 335. Requiring Immigration Judges to consider a detainee's ability to pay bond and suitability for conditional parole is a simple "additional. . . procedural safeguard" to protect the due process rights of detainees. *Id*. The cost to the government of this additional safeguard is minimal: it is simply a necessary component of existing bond hearings.

Third, the government's asserted interests in preventing flight and promoting public safety would not be diminished by requiring consideration of an immigrant detainee's financial situation or eligibility alternative release conditions. Indeed, by setting bond, an Immigration Judge by definition has found that the immigrant poses no danger to the community, and is not so significant of a flight risk that bond is not appropriate. Once those threshold findings are made, however, an Immigration Judge must then set bond or conditions of release that adequately incentivize the individual's reappearance in court without subjecting him or her to detention based solely on indigence. Moreover, the government has a strong interest in an accurate, individualized assessment of release conditions that will adequately ensure reappearance without subjecting individuals to detention based solely on their indigence. Such procedures ensure both that the government's detention policies comply with the Constitution and avoid the significant financial cost of detaining individuals solely because of their inability to pay bond.[4]

[4] Alternatives to detention are much less expensive than keeping an indigent immigrant

Second Circuit and federal district courts regularly scrutinize procedurally deficient immigration hearings. *See, e.g.*, *Burger v. Gonzales*, 498 F.3d 131, 136 (2d Cir. 2007) (vacating BIA's reversal of an asylum decision because the BIA took administrative notice of facts relating to petitioner's fear of persecution without considering petitioner's evidence rebutting these facts); *see also St. John v. McElroy*, 917 F. Supp. 243, 248 (S.D.N.Y. 1996) (finding that the INS's failure to consider factors bearing directly on petitioner's bail application "thwart[ed] the individualized determination that due process requires"); *Rone v. Shanahan*, 15-cv-9063, 2016 WL 1047393, at *8 (S.D.N.Y. Mar. 13, 2016) (remanding for a procedurally adequate *Lora* hearing when government had not been asked to meet their evidentiary burden).

To fail to consider ability to pay and alternative conditions of release, once a respondent has been deemed not to pose a danger or flight risk and thus must be admitted to bond, violates procedural due process rights because the detainee's interest in his or her freedom is so fundamental; because the lack of adequate procedures create a significant risk that the detainee is being erroneously detained based solely on poverty, and not because he or she poses a danger or significant flight risk; and because the alternative procedural safeguards to protect liberty would not undermine the government's interests.

2. Substantive Due Process Requires This Analysis.

When the government has failed to establish that an immigrant poses a flight or risk or danger yet he or she is confined in immigration detention because the Immigration Judge did not consider his or her ability to pay the set bond amount or alternative conditions of release, this

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needlessly in jail. For example, according to the Government's own data, the average cost of detention per day in FY 2013, not including agency overhead, was $158, compared to $10.55 for electronic monitoring. *See* U.S. Gov't Accountability Off., *Alternatives to Detention: Improved Data Collection and Analysis Needed to Better Assess Program Effectiveness* ("GAO Report"), GAO-15-26 at 18 (Nov. 2014). Release without conditions, of course, comes at no additional cost.

raises serious substantive due process concerns. The government must provide a "sufficiently strong special justification" for this severe deprivation of individual liberty to be permissible—that is, preventing flight or danger to the community. *Zadvydas*, 533 U.S. at 690; *see also Demore v. Kim*, 538 U.S. 510, 528 (2003). As described in Point II.A.1, *supra*, a grant of some bond means by definition that an Immigration Judge concluded that a detainee presented no danger to public safety and no sufficient level of flight risk that required detention, i.e., the denial of all bond. Thus, only poverty explains why an indigent detainee, neither a danger nor a sufficiently high flight risk, remains in detention. The Supreme Court and Second Circuit have found this outcome impermissible. *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660 (1987) (holding that the government cannot imprison an individual solely because he lacks the ability to pay fines despite good-faith efforts); *see also Paroutian v. United States*, 471 F.2d 289, 290 (2d Cir. 1970) (holding that unless a pretrial detainee received time served for his detention after being unable to post bail, he would be deprived of due process); *Rhem v. Malcom*, 507 F.2d 333, 336 (2d Cir. 1974) ("The demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial.").

Following these principles, courts nationwide—and the DOJ itself—have recognized that imprisoning indigent people because they cannot post bond results in punishment that bears no reasonable relation to state interests, in violation of due process. Statement of Interest, *Walker*, No. 16-10521-HH at 18 (explaining that bail set without considering ability to pay results in illegal prolonged detention when individuals are held not because they are dangerous or a flight risk, but are held solely due to their inability to pay the bail amount); *Pugh*, 572 F.2d at 1058 (holding unconstitutional a bail statute unless it required consideration of alternatives to money

bail); *Jones v. City of Clanton*, 15-cv-34-MHT, 2015 WL 5387219, at *19 (Sep. 14, 2015) (M.D. Ala.). The Supreme Court has also found due process violations based on similar grounds in civil contexts where significant liberty interests are at stake. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (invaliding a Mississippi statute demanding excessive record preparation fees following the reasoning of *Bearden*).

When a person's ability to pay or suitability for alternative conditions of release is ignored, despite the determination that he or she does not pose a flight risk or danger, his or her continued detention on a high bond no longer bears any reasonable relation to its statutory purpose, as required by the Due Process Clause. It instead is based solely on his poverty.

B. The Excessive Bail Clause Requires Immigration Judges to Consider Ability to Pay and Alternative Conditions of Release When Setting Bond.

The Eighth Amendment's Excessive Bail clause, U.S. Const. amend. VIII, states plainly that "Excessive bail shall not be required . . . ." As the Supreme Court has explained, the Excessive Bail Clause applies to immigration proceedings. *See Browning-Ferris Indus. of VT, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263 n.3 (1989) (explaining that the "potential for governmental abuse which the Bail Clause guards against" is implicated "in a civil deportation proceeding"); *see also Carlson*, 342 U.S. at 539-40, 557 (rejecting the "contention" that the Eighth Amendment applies only to criminal proceedings and recognizing that it can be applied to civil immigration detention).

The Excessive Bail Clause prohibits the imposition of bail conditions that are "excessive in light of the valid interests the state seeks to protect by offering bail." *See Salerno*, 481 U.S. at 754. Thus, if a high bond has been set without consideration of an immigrant's ability to pay or the suitability of alternative conditions of release, as is the case here, then the bond amount is

arbitrary and violates the Eighth Amendment. *See United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."); *see also United States v. Arzberger*, 592 F.Supp.2d 590, 605-06 (S.D.N.Y. 2008) ("[S]etting cash bail at a level that the defendants could not meet was to deprive the defendants of their liberty" and is excessive when the conditions are not "necessary to satisfy legitimate governmental purposes".).

Under this standard, bail is found to be unconstitutionally "excessive" where a lower amount or alternative conditions would prevent danger or mitigate flight risk. *See United States v. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983) (ordering release on lower amounts and alternative conditions of supervision when "the evidence. . . indicated that appellants would appear at their trial"); *see also United States v. Polouizzi*, 697 F.Supp.2d 381, 390 (E.D.N.Y. 2010) (finding bail conditions are "unconstitutionally excessive if they impose restraints that are more than necessary to achieve the government's interest"); *see also United States v. Karper*, 847 F.Supp.2d 350, 363 (N.D.N.Y. 2011). When bail is set to prevent danger to the community or flight risk, as here, the Eighth Amendment requires that "bail must be set by a court at a sum designed to ensure that goal, and no more." *Salerno*, 481 U.S. at 754.

Without a full judicial inquiry into an immigrant detainee's ability to pay or alternative conditions of release, a high bond set is necessarily arbitrary and bears no rational relationship to the government's interests. *Hernandez*, 2016 WL 7116611, at *27-28 (granting preliminary injunction in immigration bond class action and holding that petitioners were likely to succeed on the merits on their excessive bail claim). An immigrant's inability to pay the bond set is particularly salient where, as here, an Immigration Judge has found that the individual poses no danger or a sufficient enough flight risk to require continued detention. While the government

has an interest in ensuring the immigrant detainee's appearance in court, any bond set to do so must be informed by an individualized assessment of his financial circumstances. *See Arzberger*, 592 F.Supp.2d at 606 ([W]hether the Government's 'response'. . . is necessary or excessive cannot be determined without an individualized determination."). Moreover, the calculus must account for the suitability of alternatives, which are plentiful in the immigration context, where the government routinely uses electronic monitoring, in-person or telephonic reporting, and case management services to secure appearance for individuals not in physical detention.[5] Without this individualized determination of ability to pay or alternative conditions of release, an immigration official has no way of knowing what constitutes "excessive" bond for a particular individual. The Eighth Amendment, therefore, requires immigration officials to consider ability to pay, as well as alternative conditions of release, to ensure that the bond set is not "excessive" relative to its purpose. *See id*. at 605 (finding that "if the Excessive Bail Clause has any meaning, it must preclude bail conditions that are (1) more onerous than necessary to satisfy legitimate governmental purposes and (2) result in deprivation of the defendant's liberty.").

C. The Equal Protection Clause Requires Immigration Judges to Consider Ability to Pay and Alternative Conditions of Release When Conducting Bond Hearings.

The Supreme Court, Second Circuit, the Department of Justice itself, and numerous district courts across the country have agreed that continued incarceration due to one's inability to make bond payments violates the Equal Protection Clause. *See United States v. Gaines*, 449 F.2d 143 (2d Cir. 1971) (relying on the Supreme Court's line of cases in *Tate* and *Williams* to declare that defendant's incarceration due to his inability to pay his bond was impermissible

[5] Data collected by ICE's Alternatives to Detention contractor for 2011 through 2013 showed that over 99 percent of participants appeared at their scheduled court hearings. *See* GAO Report at 30.

discrimination); *see also Paroutian v. United States*, 471 F.2d 289 (2d Cir. 1971). In *Gaines*, the defendant was first released pending sentencing, then subsequently arrested on state charges and held on bail he could not pay, delaying his federal prison sentence. 449 F.2d at 144. Finding that this "resulted in his having to serve a sentence that a richer man would not have had to serve" in violation of Due Process and Equal Protection, the court gave him time served credit on this federal sentence. *Id*.

An Immigration Judge's setting of bond without an adequate inquiry into ability to pay or alternative conditions violates the Equal Protection guarantee of the Fifth Amendment where it renders indigent detainee incapable of securing release solely because of their financial means. U.S. Const. Amend. V. *See also Bearden*, 461 U.S. at 672-73 (holding that a court cannot impose jail time for failure to pay a fine and make restitution without an inquiry into ability to pay and whether nonpayment was willful); *Tate*, 401 U.S. at 398-99 (holding that petitioner could not be imprisoned for his inability to pay a fine); *Smith v. Bennett*, 365 U.S. at 708 (1961) (striking down a filing fee requirement for habeas corpus petitions). These cases show that, when there is a significant liberty interest at stake such as a detainee's freedom, courts must apply heightened scrutiny. *See Abreu v. Callahan*, 971 F. Supp. 799, 814 (S.D.N.Y. 1997) (finding that a "liberty interest would warrant heightened scrutiny"). However, even under rational basis review, the government's detention would violate equal protection. *Hernandez*, 2016 WL 7116611, at *27-28 (granting preliminary injunction in immigration bond class action and holding that petitioners were likely to succeed on the merits on their equal protection claim).

The Department of Justice, the agency that oversees the Executive Office for Immigration Review in which Immigration Judges are employees, has taken the position in past cases that "[i]ncarcerating individuals solely because of their inability to pay for their release,

whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause . . . ." Statement of Interest of the United States at 1, *Varden v. City of Clanton*, No. 2:15-cv-00034 (M.D. Al. Feb. 13, 2015); *see also* Brief for United States as Amicus Curiae Supporting Plaintiff-Appellee at 19, *Walker v. City of Calhoun*, appeal docketed, No. 16-10521 (11th Cir. Aug. 18, 2016) ("[I]mprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible") (quoting *Pugh*, 572 F.2d at 1056); United States Department of Justice, Civil Rights Division Office for Access to Justice, Dear Colleague Letter at 7 (March 14, 2016) (The "equal protection principles of the Amendment prohibit 'punishing a person for his poverty.") (quoting *Bearden*, 461 U.S. at 671). Many district courts across the country have followed suit and invalidated practices that keep indigent people incarcerated based on their inability to pay their set bond. [6] Thus, requiring Immigration Judges to consider ability to pay and alternative conditions of release would comport with equal protection requirements for bail law in other contexts.

III. An Immigration Judge's Consideration of Ability to Pay and Alternative Conditions of Release Must Be Meaningful.

Immigration Judges have a duty to make an adequate and meaningful inquiry into ability to pay and alternative conditions as part of the bond hearing. *See Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006) ("Unlike an Article III judge, an IJ is not merely the fact finder and adjudicator, but also has an obligation to establish and develop the record"); *Qun Yang v.*

[6] *See, e.g.*, *Walker v. City of Calhoun, GA*, No. 4:15–CV–0170–HLM, 2016 WL 361612, at *10-11, 14 (N.D. Ga. Jan. 28, 2016) (granting class-wide preliminary injunction); *Pierce v. City of Velda City, MO*, No. 4:15-cv-00570-HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015) (Dkt. 16) (issuing declaratory judgment); *Thompson v. Moss Point, MS*, No. 1:15-cv-00182-LG-RHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 16, 2015) (Dkt. 18) (same); *see also Rodriguez v. Providence Cmty. Corr., Inc.*, No. 3:15-cv-01048, 2015 WL 9239821, at *1, 6-7 (M.D. Tenn. Dec. 17, 2015) (holding that detaining probationers on money bail without an inquiry into their ability to pay was unconstitutional and granting class-wide preliminary injunction).

McElroy, 277 F.3d 158, 162 (2d Cir.2002) (same). To do so, Immigration Judges must fully consider ability to pay bond and suitability for alternative conditions of release, developing the factual record where necessary and drawing inferences—where necessary—in favor of release. Failure to do so results in arbitrarily high bond amounts and ensures that a similarly situated but more affluent noncitizen would be released, while indigent detainees remain in prolonged imprisonment. A meaningful standard is particularly important in light of the nature of removal proceedings, where there is no recognized statutory right to government-appointed counsel, immigrants may be detained in facilities far from their homes, and the majority of immigrant detainees are pro se. *See* American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-10 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.

Moreover, requiring a meaningful inquiry into financial considerations that favors release over continued detention would comport with other contexts. For example, federal law on pretrial detention specifies that the federal judiciary must "not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2). To ensure this outcome, § 3142 requires federal judges to consider defendant's "financial resources" when "determining whether there are conditions of release that will reasonably assure [reappearance and public safety]." § 3142(g); § 3142(g)(3)(A). States similarly have enacted laws to require judges to undertake meaningful inquiries to ensure that people are not incarcerated because they are poor.[7]

[7] The states within the Second Circuit require these considerations. *See* N.Y. Crim. Pro. L. § 510.30 (requiring that courts consider the defendant's financial resources when setting bond); *see also* 13 V.S.A § 7554(b) (ordering that the defendant "shall be ordered released on personal

By contrast, any standard operating as a presumption of wealth would turn the Constitutional bases for this inquiry on their head. Since "justice that is blind to poverty and indiscriminately forces defendants to pay for their liberty is not justice at all," this Court should hold that Immigration Judges must be required to engage in a meaningful inquiry into immigrant detainees' ability to pay and alternative conditions of release when conducting bond hearings. *Jones*, 2015 WL 5387219 at *3.

CONCLUSION

For the foregoing reasons, this Court should hold that Immigration Judges are statutorily and constitutionally required to engage in a meaningful inquiry into a detained individual's ability to pay and alternative conditions of release when setting bond.

Dated: June 9, 2017
New York, New York

Respectfully submitted,

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recognizance or upon the execution of an unsecured appearance bond. . . unless the judicial officer determines that such a release will not reasonably assure the appearance of the person as required" and directing the judicial officer to "take into account. . . financial resources" when determining conditions of release); *see also* Conn. Gen. Stat. Ann. § 54-64a (stating that "Excessive bail shall not be exacted for bailable offenses").

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RENALDO CELESTIN,
Petitioner,
v.

THOMAS DECKER, in his official capacity as Field Office Director of the Immigration and Customs Enforcement ("ICE") New York City Field Office; DIANEMCCONNELL, in her official capacity as Assistant Field Office Director for the ICE New York City Field Office; U.S. DEPARTMENT OF HOMELAND SECURITY ("DHS"); JOHN F. KELLY, in his official capacity as Secretary ofDHS; JEFFERSON BEAUREGARD SESSIONS III, in his official capacity as the Attorney General of the United States; ERIC TAYLOR, in his official capacity as Director of Hudson County Correctional Facility,
Respondents.,

Respondents

Case No.: 17-CV-2419 (RA)

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Alina Das of Washington Square Legal Services, Inc., a member of this Court in good standing, respectfully enters her appearance as counsel for *Amici Curiae*: the Brooklyn Defender Services, Immigrant Rights Clinic of Washington Square Legal Services, Inc., Kathryn O. Greenberg Immigration Justice Clinic, and the Legal Aid Society, in the above-entitled action and requests that all notices given or required to be given and all papers served in this case be given to and served upon the following:

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