No. 22-489

IN THE
United States Court Of Appeals
FOR THE SECOND CIRCUIT

JOHN DOE,
Petitioner-Appellee,

– against –

THOMAS DECKER, in his official capacity as Director of the New York Field Office of U.S. Immigration and Customs Enforcement, ALEJANDRO MAYORKAS, in his official capacity as Secretary, U.S. Department of Homeland Security, and MERRICK GARLAND, in his official capacity as Attorney General of the United States,
Respondents-Appellants.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF LEGAL SERVICES PROVIDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE

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INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

Amici are nonprofit legal services organizations that represent noncitizens in removal proceedings before immigration judges and the Board of Immigration Appeals ("BIA"), in habeas proceedings in federal district and circuit courts, and on petitions for review in this Court and other courts of appeals. We respectfully submit this brief to assist the Court in understanding the experiences and interests of litigants protected under the forbearance agreement between this Court and U.S. Immigration and Customs Enforcement ("ICE").[1]

As we discuss below, ICE frequently detains individuals protected by forbearance stays for many months or years while their petitions for review and accompanying stay motions pend before this Court. In *amici's* experience, the government, litigants, and this Court treat the forbearance policy as a formalized process, and a forbearance stay functionally operates as a formal stay of removal. *Amici* therefore respectfully submit that the detention of an individual with a

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[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4), *amici* certify that no *amicus curiae* is a corporation, no party's counsel authored any part of the brief, and no person or entity contributed money to prepare or file this brief other than *amici*. Individual statements of interest for each *amicus curiae* are provided at Appendix A.

The parties have consented to the filing of this brief, which *amici* therefore file under Federal Rule of Appellate Procedure 29(a)(2), without a motion for leave of the Court.

forbearance stay is best understood as falling under 8 U.S.C. § 1226, rather than § 1231 as the government contends.

Amici also challenge the government's conclusory assertion that individuals with forbearance stays would not be able to seek individualized bond hearings if their detention were to fall under § 1231. The limited procedural protections provided by ICE while our clients await judicial review frequently violate our clients' due process rights. *Amici* request that this Court decline the government's invitation to characterize § 1231 as precluding a claim to constitutional entitlement to individualized review by a neutral adjudicator.

ARGUMENT

I. Noncitizens Experience Substantial Hardships While Detained, Even When Removal Is Stayed Under the Forbearance Policy

When Mr. Doe woke up on the 326th day of his immigration detention, little in his daily life had changed. While the BIA dismissed his appeal that day, Mr. Doe remained in jail as he had the 325 days prior, separated from his family, still forced to wear a jumpsuit. He continued to be subject to strip searches, and his movement, communication, and visitation remained severely restricted. Joint Appendix ("JA") 15, 67; *see also Velasco Lopez v. Decker*, 978 F.3d 842, 851–52 (2d Cir. 2020) (describing deprivations of immigration detention, including no access to employment, the internet, family or friends outside of visiting hours, and "limited access to the telephone"); *Charles v. Orange Cty.*, 925 F.3d 73, 78 n.3 (2d Cir. 2019) ("[C]ivil

immigration detainees are housed in conditions similar to those experienced by detainees awaiting trial on criminal charges."); *Mendez Ramirez v. Decker*, No. 19-cv-11012 (GHW)(KHP), 2020 WL 9815209, at *3 (S.D.N.Y. Mar. 4, 2020), *report and recommendation rejected*, No. 1:19-cv-11012 (GHW), 2020 WL 1674011 (S.D.N.Y. Apr. 3, 2020) (describing conditions at a local county jail, where individuals held in immigration detention are subject to strip searches and have limited contact with family).

Because ICE viewed its detention authority over Mr. Doe as switching that day to 8 U.S.C. § 1231, he became eligible for "post-order custody reviews" by ICE officials, the first of which would occur ninety days after the BIA's denial of Mr. Doe's administrative appeal. In *amici*'s experience, this custody review process is opaque and almost always results in a summary denial. *See infra* at 12-15. Were it not for the district court's November 3 and 19, 2021 orders, Mr. Doe never would have received his bond hearing. At that bond hearing, the immigration judge, acting as a neutral arbiter, determined Mr. Doe's release was warranted under a $5,000 bond and certain monitoring and reporting requirements. *See* JA-89. But for that bond hearing, Me. Doe would likely have remained detained for the last year while litigating his petition for review under a forbearance stay.

A. Noncitizens Are Often Detained for Prolonged Periods While Their Removal Is Stayed Under the Forbearance Policy

Whether under § 1231 or § 1226, "[w]hen the Government incarcerates individuals it cannot show to be a poor bail risk for prolonged periods of time . . . it separates families and removes from the community breadwinners, caregivers, parents, siblings and employees." *Velasco Lopez*, 978 F.3d at 855. The following stories show that ICE routinely detains individuals protected from removal by forbearance stays for months or even years while their petitions for review are pending in this Court.

For example, **Aldwin Brathwaite,**[2] who came to the United States from Trinidad in 1979 as a lawful permanent resident ("LPR"), spent over 29 months in immigration detention, 17 of those under forbearance. In October 2018, ICE placed Mr. Brathwaite in removal proceedings and detained him three months later. Mr. Brathwaite sought termination of his removal proceedings on the ground that his recent state criminal convictions, which were on appeal and therefore non-final, did not constitute "convictions" rendering him removable under the Immigration and Nationality Act. An immigration judge ("IJ") rejected this argument and ordered Mr. Brathwaite removed. Mr. Brathwaite appealed to the BIA, which dismissed his appeal.

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[2] *Brathwaite v. Garland*, 3 F.4th 542 (2d Cir. 2021). The facts of his case are supplemented by a declaration by his attorney. *See* Decl. of John Peng, Esq., of Prisoners' Legal Services of New York (on file with counsel).

At the time of the BIA's decision, Mr. Brathwaite had been incarcerated for a full year in an immigration detention center. Mr. Brathwaite challenged the BIA's decision through a petition for review ("PFR") with this Court and filed a motion for a stay of removal, triggering the forbearance policy. Nearly seventeen months later, this Court granted Mr. Braithwaite's PFR, determining that Mr. Brathwaite did not have a final conviction for immigration purposes, and therefore was not removable at all. Shortly thereafter, Mr. Braithwaite was released from detention and returned to his children and grandchildren in New York, and today continues to work to support his family and comply with all conditions of release. His remanded case remains pending at the BIA.

Anthony Baptiste,[3] another longtime LPR, also experienced prolonged detention while challenging his removal order. ICE detained Mr. Baptiste for over two years while he litigated his case before the immigration court and the BIA, and for another 20 months under a forbearance stay while his petition for review was pending before this Court.

ICE detained Mr. Baptiste in April 2017, and Mr. Baptiste litigated his case for over two years before the immigration court and the BIA. In July 2019, the BIA dismissed his appeal and issued a final order of removal against Mr. Baptiste. Mr.

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[3] *Baptiste v. Garland*, 19-2238 (2d Cir.).

Baptiste petitioned for review and moved for a stay of removal later that month. The government opposed the stay motion and moved to dismiss in August 2019, arguing that the Second Circuit lacked jurisdiction over the petition. The case did not progress to full briefing while the motion to dismiss was pending. *See* 2d Cir. Local Rule 31.2(a)(3).

In July 2020 – nearly a year after Mr. Baptiste filed his stay motion – the Second Circuit denied the government's motion to dismiss. The Second Circuit did not formally adjudicate the stay motion. Instead, the Court stated: "Other than the inadequate argument in the motion to dismiss that we lack jurisdiction, Respondent does not oppose the stay motion on the merits. Accordingly, the parties are reminded that the forbearance policy remains in place." *See Baptiste v. Garland*, 19-2238 (2d Cir.), ECF No. 68.

The parties fully briefed the appeal, and the stay motion remained pending.[4] In February 2022, Mr. Baptiste and the government entered a joint stipulation to remand the case to the agency to consider the effect of an intervening state court order, which vacated the sole remaining criminal conviction underlying his removal order. The

[4] Mr. Baptiste was eventually released in March 2021, twenty months after he filed his petition for review.

Second Circuit so-ordered the stipulation and remand, and denied the stay motion as moot.

Mr. Brathwaite's and Mr. Baptiste's cases are not unique for the lengths of time they spent protected by forbearance stays and in detention as they pursued substantial arguments at the circuit. Numerous individuals spend many months or years under forbearance pending resolution of their petitions for review. And many of these individuals remain detained for much of this time without receiving a bond hearing to determine whether this detention is necessary. *See*, *e.g.*, *Hernandez Aguilar v. Barr*, 20-1851 (2d Cir.) (protected by a forbearance stay for over eight months); *Ranchinskiy v. Barr*, 19-1441 (2d Cir.) (protected by a forbearance stay for over a year); *Rodriguez Sanchez v. Garland*, 19-2678 (2d Cir.) (protected by a forbearance stay for one year and eleven months); *Argueta Anariba v. Sessions*, 15-3296 (2d Cir.) (protected by a forbearance stay for over eight months).[5]

[5] Each of the petitioners in the cases cited in this paragraph filed a petition for a writ of habeas corpus challenging their prolonged detention. These individuals likely would have remained detained without a bond hearing during the entire duration of these lengthy forbearance stays, but for the intervention of the district courts that granted habeas relief. *See Hernandez Aguilar v. Decker*, 482 F. Supp. 3d 139 (S.D.N.Y. 2020); *Ranchinskiy v. Barr*, 422 F. Supp. 3d 789 (W.D.N.Y. 2019); *Rodriguez Sanchez v. Decker*, 431 F. Supp. 3d 310 (S.D.N.Y. 2019); *Argueta Anariba v. Shanahan*, 190 F. Supp. 3d 344 (S.D.N.Y. 2016).

B. The Forbearance Policy Has the Formality of a Court-Ordered Stay

As district courts in this circuit have overwhelmingly agreed, "the forbearance agreement amounts to a 'court order[ed] stay of the removal of the [noncitizen].'" *Vides v. Wolf*, No. 6:20-cv-06293 (EAW), 2020 WL 3969368, at *6 (W.D.N.Y. July 14, 2020) (quoting *Sankara v. Whitaker*, No. 18-cv-1066, 2019 WL 266462, at *4 (W.D.N.Y. Jan. 18, 2019)). In *amici*'s experience, this Court treats the forbearance policy as a formalized procedure that operates like a court-ordered stay.

For example, **H.L.P.**[6] is a young Guatemalan man who sought asylum based on his fear of persecution because of his perceived sexual identity. ICE arrested H.L.P. in May 2018, and he remained detained under § 1226(a) throughout his proceedings, following a bond hearing in which the IJ misstated the applicable standard, and denied bond.[7] He lost his asylum case before the IJ, and the BIA ordered him removed on September 11, 2019.

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[6] *H.L.P. v. Barr*, 19-3053 (2d Cir.). Initials are used to protect H.L.P.'s identity. H.L.P. filed a motion in this Court to be referred to by his initials, but this motion was not adjudicated due to the remand of the case back to the agency. Additional facts are drawn from his petition for a writ of habeas corpus. Petition, *H.L. v Searls*, No. 21-cv-0143 (W.D.N.Y. Jan. 25, 2021), ECF No. 1 (on file with counsel).

[7] At the bond hearing, the IJ asserted that H.L.P. had to demonstrate "by clear and convincing evidence" that he was neither a danger nor a flight risk. The agency requires only that the noncitizen bear the burden by a preponderance of the evidence

H.L.P. petitioned for review and filed an emergency motion for stay of removal on the afternoon of September 24, 2019. An ICE officer failed to forward a removal cancellation notice to the relevant individuals within the agency, however, and the following morning, ICE deported H.L.P. to Guatemala. *See H.L.P. v. Barr*, 19-3053, ECF No. 30, at 2-3. After the Department of Justice learned that H.L.P. had been deported, it immediately wrote to the Second Circuit and represented that ICE would facilitate H.L.P.'s return to the United States. *See* ECF No. 16, at 1. His return did not immediately transpire, and on October 2, 2019, the Second Circuit ordered the government to show cause why H.L.P. was removed despite the filing of a motion for a stay of removal. *See* Order, ECF No. 25. That this Court would order such action undermines the government's characterization of a forbearance stay as a mere "informal agreement" that does not operate in the same manner as a court-ordered stay. Brief for Respondents-Appellants ("Gov't Br.") at 3.

ICE then returned H.L.P. to the United States and re-detained him. This Court did not rule on H.L.P.'s stay motion, and he remained subject to the forbearance policy. In February 2021, the government agreed that his consolidated petition for review should be remanded to the BIA to reconsider H.L.P.'s asylum claim.

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standard. In contrast, this Court's precedent requires that the government bear the burden by clear and convincing evidence for individuals who have experienced prolonged detention under § 1226(a). *Velasco Lopez*, 978 F.3d at 855.

Altogether, H.L.P. was covered by a forbearance stay for over one year and four months, the majority of which he spent in detention.

There are other indicators of the formality of a forbearance stay. In his appellee brief, Mr. Doe points out that the government cannot unilaterally terminate a stay under the forbearance policy without prior notice to the Court. Brief for Petitioner-Appellee at 10-11. Likewise, petitioners who have found detention so unbearable that they would rather be deported than remain incarcerated cannot themselves lift the forbearance policy unilaterally. As with seeking rescission of any other court order, these individuals must file a motion to lift a forbearance stay. Specifically, the petitioners must move the Court to withdraw their stay motion, and the Court must rule on it, before ICE can deport them.

Take, for example, the story of **Maria Cared Millan-Hernandez**, who ICE detained after a racially-motivated traffic stop in July 2017.[8] Although an IJ granted her a monetary bond, she was unable to pay it and remained detained throughout her immigration court proceedings. An IJ ordered Ms. Millan-Hernandez's removal, and then, after almost a year of detention, the BIA upheld the order in June 2018. She filed a PFR and stay motion with the Second Circuit in July 2018. The government opposed the stay, but honored the forbearance agreement. On October 8, 2018 – still

[8] *Millan-Hernandez v. Barr*, 965 F.3d 140 (2d Cir. 2020).

detained under carceral conditions – Ms. Millan-Hernandez filed a motion with this Court to withdraw her pending motion for a stay of removal, which the Court granted on October 10, 2018.[9] Twelve days later, ICE deported her to Mexico.[10] On July 13, 2020, this Court issued a precedential decision granting her petition for review and remanding the case to the agency. Had Ms. Millan-Hernandez not moved this Court to withdraw her stay motion, she would likely have remained in detention for months or years while her appeal was pending.

Indeed, Ms. Millan-Hernandez is not the only individual who could no longer suffer under conditions of prolonged detention and made the weighty, life-altering decision to move this Court to withdraw a stay motion so as to no longer be subject to the forbearance policy. *See, e.g., Matute v. Garland*, 22-6171, ECF Nos. 17, 18 (2d Cir.) (respectively, petitioner's motion to withdraw pending motion for stay of removal, and this Court's motion order granting motion to withdraw); *Moise v. Garland*, 21-6617, ECF Nos. 37, 38 (2d Cir.) (same); *Marquez v. Garland*, 18-3363, ECF Nos. 91, 94 (2d Cir.) (same).

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[9] *Millan-Hernandez v. Barr*, 18-2107, ECF Nos. 39, 42 (2d Cir.).

[10] *See* DHS Motion to Dismiss, filed on December 23, 2020 in remanded removal proceedings (on file with counsel).

This Court's own adherence and its insistence that the parties adhere to the forbearance policy underscores the formality of the forbearance stay. Like any other court-ordered stay, a forbearance stay operates as an "essential tool[] in meeting the government's constitutional obligation to provide procedural due process for immigrants facing removal." *Hechavarria v. Sessions*, 891 F.3d 49, 54 (2d Cir. 2018), as amended (May 22, 2018). It is not plausible to read § 1231 – which directs the removal of noncitizens during a 90-day period and excludes individuals whose removals are stayed pending judicial review – as applying to noncitizens whose removals are stayed pursuant to this formalized agreement between ICE and this Court.

II. Whether Under Section 1226 or Section 1231, Individuals Subject to Prolonged Detention Are Constitutionally Entitled to a Bond Hearing

The government suggests that if individuals with forbearance stays are detained under 8 U.S.C. § 1231, then they are not constitutionally entitled to any process beyond the post-order custody review procedures set forth in § 1231 and accompanying regulations. *See* Gov't Br. at 21. However, the limited administrative review procedures under this "POCR" process are inadequate to protect the due process rights of detained individuals under the forbearance policy, who frequently pose neither a danger nor a flight risk, have already been detained for lengthy periods, and face months or years of continued detention while their petitions are adjudicated and any remanded proceedings are completed. *See, e.g., Velasco Lopez*, 978 F.3d at 853

(explaining that "'as the period of . . . confinement grows,' so do the required procedural protections") (quoting *Zadvydas*, 533 U.S. at 701); *Falodun v. Session*, No. 6:18-cv-06133-MAT, 2019 WL 6522855, at *11 (W.D.N.Y. Dec. 4, 2019) (reviewing post-order custody review process as applied to one habeas petitioner and finding that "the Court cannot agree that these cursory, unreviewable custody determinations are constitutionally adequate given the protected liberty interest at stake and the length of detention to date").

A. The Review Procedures for Individuals Under Section 1231 Are Inadequate

If followed (which it is often not), the POCR process begins with an initial custody determination within 90 days of detention under § 1231. At that point, a local ICE official or their designee conducts a "records review" to determine whether release is appropriate. 8 C.F.R. §§ 241.4(c)(1), (h)(1), (h)(5). If an individual is detained beyond the initial 90-day period, a second administrative review of the individual's detention occurs within 180 days of incarceration. *Id.* §§ 241.4(c)(2), (k)(2)(ii), (k)(2)(iv). The authority to conduct the 180-day review is transferred from the local ICE official to a particular unit of ICE headquarters, the Headquarters Post-Order Detention Unit ("HQPDU"). *See id.* §§ 241.4 (c)(2), (i).

The 180-day review begins with a records review, and if release is not authorized, a panel of three ICE deportation officers is supposed to interview the detained individual. *Id.* §§ 241.4(i)(1)-(3). The panel asks a series of questions and

records the individual's answers, and then prepares a recommendation on whether the individual should remain in custody, which is then passed to the ultimate decisionmaker – an officer at ICE's Washington, D.C. headquarters – who does not directly interview or hear from the detained person or their representative. *Id.* §§ 241.4(c)(2), (i)(4)-(6).

Although an attorney or representative is ostensibly permitted to attend the interview, *id.* §§ 241.4(d)(3), (i)(3)(ii), and an individual may submit evidence on their behalf, *id.* § 241.4(i)(3)(ii), there are no provisions authorizing presentation of argument, calling of witnesses, or viewing or confronting the government's evidence. *See generally id.* § 241.4(i)(3) (describing the interview process). All parties involved in the review, from the interviewers to the ultimate decisionmaker, are ICE officials. *See* §§ 241.4(i)(1), (c)(3). The burden is on the individual noncitizen to demonstrate that they are neither a danger nor a flight risk. *Id.* § 241.4(d)(1). There is no right to appeal the agency's determination. *Id.* § 241.4(d). The ultimate decision to release is discretionary even if an individual establishes that his or her release does not pose a danger to the community or a significant flight risk. *Id.* § 241.4(d)(1) (explaining that the agency "may release" or "may also . . . continue [] custody . . . " of such individuals).

If ICE decides to deny release after the 180-day review, officials must conduct another records review and interview within approximately a year and annually

thereafter. *See id.* § 241.4(k)(2)(iii). The noncitizen may receive a review earlier if they can show circumstances materially changed since the last review. *Id.* [11]

B. For Individuals Under Forbearance, Detention Under Section 1231 Raises Grave Due Process Concerns

These POCR regulations, even if applied correctly, fail to provide a constitutionally adequate process to protect against arbitrary and prolonged detention. **First**, the existing process does not provide individuals with a hearing with the attendant evidentiary procedures. The first 90-day review – which would have been scheduled over a year into detention for all individuals mentioned in this brief – is document-based only, which critically deprives the decisionmaker the ability to assess credibility and veracity. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision.").

While an individual can submit evidence on their own behalf, that evidence is not even at issue in the 180-day interview, and there is no requirement that the panel

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[11] As noted by courts – and in *amici*'s own experience – ICE has often failed to follow even the scant review process under the regulations. *See D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 394 (W.D.N.Y. 2009) (noting that ICE had "ignored the [POCR] regulations it promulgated"). Interviews for the 180-day review often never take place, and when they do, attorneys are often not able to attend or are not permitted to speak. Peng Decl. ¶ 14. When rendered, decisions often fail to provide adequate reasoning for denial. *See, e.g., Falodun*, 2019 WL 6522855, at *11; ("These *pro forma* custody reviews are not even in compliance with the applicable regulations . . . .").

review or consider the evidence. *See generally* 8 C.F.R. § 241.4(i). Nor does an individual have the opportunity to call witnesses, view ICE's evidence against them, or engage with such evidence in any way. *Id.* This is particularly problematic where ICE has information-sharing agreements with a variety of law enforcement organizations, *see Velasco Lopez*, 978 F.3d at 853, and may possess information that a detained individual is not aware of and cannot rebut.

A hearing with the ability to present and review evidence and witnesses in the presence of the ultimate decisionmaker is essential where the criteria for release involve specific, fact-based issues such as whether the detained individual will "pose a threat to the community following release" or will "pose a significant flight risk." 8 C.F.R. § 241.4(e). The fact that a noncitizen "is not permitted to present evidence to [an] official orally, or to confront or cross-examine adverse witnesses . . . [is] fatal to the constitutional adequacy of the procedures." *Goldberg*, 397 U.S at 268; *accord Cinapian v. Holder*, 567 F.3d 1067, 1074 (9th Cir. 2009) (collecting due process precedents that "acknowledge[e] the importance of the right to confront evidence and cross examine witnesses" in other immigration-related proceedings).

Second, the POCR regulations do not involve a neutral adjudicator. ICE officers are the only parties involved at every step of an individual's custody review. 8 C.F.R. §§ 241.4(i)(1), (i)(3)(i), (i)(5)-(6). ICE is the enforcement and prosecutorial arm of the Department of Homeland Security ("DHS") and the jailing authority for

immigration detainees. Indeed, ICE measures the success of the agency on arresting and deporting as many noncitizens as possible. *See* U.S. Immigration and Customs Enf't, *ICE Annual Report, Fiscal Year 2021*, 1 (2022) *available at* https://www.ice.gov/doclib/eoy/iceAnnualReportFY2021.pdf. ICE officials' interest in the result of these custody proceedings disqualify them as neutral adjudicators. *See Guerrero-Sanchez v. Warden York Cnty. Prison*, 905 F.3d 208, 227 (3d Cir. 2018) (emphasizing the custody review is conducted by "DHS employees who are not ostensibly neutral decision makers such as immigration judges"), *abrogated on statutory grounds by Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827 (2022). As the Supreme Court has noted, "[a]n interrogation by one's captor . . . hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker." *Hamdi*, 542 U.S. at 537 (plurality opinion) (emphasis added).

Third, the regulations place on the detained individual the burden to demonstrate that they pose neither a danger nor a flight risk. *See* 8 C.F.R. § 241.4(d)(1); *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (criticizing 8 C.F.R. § 241.4's burden allocation). The Second Circuit has held that this burden allocation is unconstitutional where detention under 8 U.S.C. § 1226(a) becomes prolonged, *Velasco Lopez*, 978 F.3d at 853, 855-57. Courts in this Circuit have held the same for those detained under 8 U.S.C. § 1226(c). *See, e.g.*, *Concepcion v. Barr*, 514 F. Supp. 3d 555, 565-66 (W.D.N.Y. 2021) ("The vast majority of courts in this Circuit to have

considered this issue . . . have found that due process requires that an individual such as Petitioner is entitled to a bond hearing where the government must demonstrate dangerousness or flight risk by clear and convincing evidence.").

Fourth, the regulations do not permit an appeal of ICE's decision, meaning that there is no forum to challenge errors produced in the course of the decision-making process. 8 C.F.R. § 241.4(d). The bar on appellate review is particularly problematic given the liberty interests at stake. *Zadvydas*, 533 U.S. at 692 ("[T]he Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights." (citation omitted)).

When applied to individuals who face prolonged detention while protected from removal by forbearance stays, the POCR process falls far short of what is required under due process. Indeed, the "Constitution demands greater procedural protections even for property." *Id.* (discussing 8 C.F.R. § 241.4)*; see also Diouf v. Napolitano*, 634 F.3d 1081, 1091 (3d Cir. 2011) ("The regulations do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge."); *Guerrero-Sanchez*, 905 F.3d at 227 ("The DHS regulations . . . themselves raise serious constitutional concerns." (citation omitted)).

Detained individuals seeking to vindicate their rights to judicial review in this Court experience lengthy and profound deprivations of liberty, at great cost to themselves and their communities. For example, Mr. Brathwaite, an LPR who had been in the United States for almost four decades at the time he was detained, was separated from his children, grandchildren, and community for over two years without the government ever having to demonstrate that his detention was necessary. H.L.P. was detained during the initial wave of Covid-19, where he was unable to protect himself against the virus because of the facility's inadequate pandemic protocols, which made him "anxious, stressed, and scared."[12] Whenever he had possible Covid symptoms, he was put in solitary confinement while awaiting test results, sometimes for over ten days at a time. Apart from the terror of experiencing a pandemic trapped in a jail with no ability to protect himself from the exposure to other detained individuals and guards, in the winter of 2020 H.L.P. began to receive physical threats from another detained individual. The man later attacked him, punching him repeatedly in the head even after he had fallen to the floor. H.L.P. suffered a broken nose, a broken tooth, and a concussion, for which he did not receive proper medical attention for weeks.

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[12] Facts are taken from H.L.P.'s petition for a writ of habeas corpus. *See* Petition, *H.L. v. Searls*, No. 21-cv-00143 (W.D.N.Y. Jan. 25, 2021), ECF No. 1, at 7-8.

Numerous individuals, like Mr. Doe, also suffer psychologically from prolonged detention. *See* JA-16. Mr. Baptiste, who had come to the United States from Trinidad in 1978 at the age of 17, spent over three years in detention altogether, which took a major toll on his mental health, leading him to feel like he was "growing despondent and giving up hope."[13]

During this prolonged incarceration, every one of the individuals mentioned herein experienced a deprivation of "the most significant liberty interest there is – the interest in being free from imprisonment," which was "on any calculus, substantial." *Velasco Lopez*, 978 F.3d at 851. This deprivation that results in "ruptures in the fabric of communal life [and] impact[s] society in intangible ways" requires more than cursory reviews done by ICE officials. *Hernandez-Lara v. Lyons*, 10 F.4th 19, 33 (1st Cir. 2021). Whether considered under *Mathews*[14] or any other applicable due process framework, the Constitution demands that individuals like Mr. Doe receive a bond hearing in front of a neutral adjudicator where the government bears the burden of proof by clear and convincing evidence. *See Guerrero-Sanchez*, 905 F.3d at 225-26 (applying *Mathews* to conclude that bond hearings with these heightened safeguards are constitutionally necessary once detention under § 1231(a)(6) surpasses six months,

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[13] *Baptiste v. Garland*, 19-2238 (2d Cir. Sept. 1, 2020), ECF No. 77, at 16.

[14] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

after construing unreviewed detention under § 1231 as time-limited); *see also Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015) (citing constitutional reasonableness concerns, construing § 1226(c) to require bond hearings for individuals detained under § 1226(c), and noting that prolonged detention "has real-life consequences for immigrants and their families"), *cert. granted, judgment vacated*, 138 S. Ct. 1260 (2018).

* * * *

Mr. Doe sat in a county jail for more than eleven months without the government ever having to justify his detention. In the government's view, Mr. Doe should never have received a bond hearing, as the BIA's affirmance of his removal order "render[ed] his habeas petition moot." *See* Gov. Br. at 16. However, this conclusory statement fails to recognize that the prolonged nature of detention requires the government to demonstrate to a neutral adjudicator that detention 'bears a reasonable relation to the purpose for which the individual was committed." *Zadvydas*, 533 U.S. at 690 (brackets omitted). And in Mr. Doe's case, a neutral adjudicator determined that it did not.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully ask this Court to affirm the district court decision and hold that the detention of individuals under the forbearance policy is governed by 8 U.S.C. § 1226. If the Court determines that § 1231 applies, however, it should reject the government's conclusory assertion that

individuals detained under § 1231 with forbearance stays are not entitled to bond hearings, and should remand to the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) and Local Rules 29.1(c) and 32.1(a)(4), because the brief contains 5038 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Garamond.

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APPENDIX A:

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 30,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents nondetained immigrants in removal proceedings. The Bronx Defenders' representation extends to affirmative immigration applications, motions to reopen, appeals and motions before the BIA, petitions for review, and federal petitions for writs of habeas corpus challenging unlawful immigration detention.

The Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law ("IJC") is a law clinic that represents individuals facing deportation, as well as community-based organizations, in both public policy and litigation efforts. IJC has a long-established interest in fighting for the rights of immigrants pursuing their ability to remain in the U.S., including representing people who face detention without bond pending removal proceedings.

The Legal Aid Society is the nation's oldest and largest not-for-profit provider of legal services to low-income clients. Legal Aid's Immigration Law Unit (the "ILU") is a recognized leader in the delivery of free, comprehensive and high-caliber legal services to low-income immigrants in New York City and surrounding counties. Part of the ILU's work consists of representing detained individuals in removal proceedings before immigration judges, on appeals to the BIA and the United States Court of Appeals for the Second Circuit, and in habeas proceedings in the Southern District of New York.

Make the Road New York ("MRNY") is a nonprofit, membership-based community organization that integrates adult and youth education, legal and survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY has over 200 staff, over 24,000 members, and five offices spread throughout New York City, Long Island, and Westchester. MRNY is at the forefront of numerous initiatives to analyze, develop, and improve civil and human rights for immigration communities, including issues related to detention and deportation of immigrant community members. Its attorneys and accredited representatives regularly represent both detained and nondetained clients in the greater New York City area in immigration matters.

Prisoners' Legal Services of New York ("PLS") is a nonprofit organization that has provided civil legal services for over forty-five years to indigent individuals

incarcerated in New York State. As part of the New York Immigrant Family Unity Project, PLS provides free legal representation to noncitizens incarcerated in New York State prisons facing immigration removal proceedings within the Institutional Hearing Program, in addition to noncitizens held in immigration detention in Albany, Batavia, and Plattsburgh, New York. PLS also provides representation in habeas corpus proceedings to detained immigrants in the U.S. District Courts for the Southern and Western Districts of New York and on petitions for review and civil appeals before the U.S. Court of Appeals for the Second Circuit. PLS has a strong interest in protecting the due process rights of incarcerated and detained persons and minimizing the harmful effects of prolonged detention.

UnLocal, Inc. is an immigration legal services and community education non-profit based in New York City. UnLocal represents immigrant New Yorkers in their immigration matters, and conducts presentations on immigration law, know your rights trainings, and legal consultations at community-based spaces including schools, workplaces, places of worship and other immigrant-serving organizations. UnLocal clients and the membership of many of UnLocal's community-based partners include individuals who have faced detention without bond during the pendency of their removal proceedings.