PRACTICE ADVISORY
(Current as of February 2015)

Department of Homeland Security Files Brief to the Board of Immigration Appeals Acknowledging that Immigration Judges May Grant Release on Conditional Parole Under INA § 236(a) as an Alternative to Release on a Monetary Bond

Immigration and Nationality Act ("INA") § 236(a), 8 U.S.C. § 1226(a), expressly authorizes the Attorney General to release a noncitizen from detention pending her removal case on a "bond of at least $1,500 . . . *or* conditional parole." However, in recent years, Immigration Judges ("IJ") nationwide have refused to hear requests for conditional parole—otherwise known as release on recognizance—on the grounds that they lack authority under the statute and regulations to grant release without a minimum $1,500 bond. The result is that many individuals remain in detention even where non-monetary conditions of release would be sufficient to ensure their appearance at future proceedings, solely because they are unable to pay a bond.

In October 2014, the ACLU Immigrants' Rights Project, ACLU of Washington, and Northwest Immigrant Rights Project filed *Rivera v. Holder*, a class action lawsuit on behalf of detainees in the Western District of Washington challenging the immigration courts' policy of refusing to hear requests for conditional parole.

After *Rivera* was filed, the government certified a case—*In re V-G*—to the Board of Immigration Appeals ("BIA"), asking that the BIA clarify this issue nationwide in a precedential decision. On January 21, 2015, the Department of Homeland Security ("DHS") filed its brief with the BIA. There, DHS concedes that

> [t]he Immigration Judge [has] authority under section INA § 236(a) to release a respondent on her own recognizance and pursuant to conditional parole, as opposed to settling a monetary bond with a minimum amount of $1,500. No authority precludes an Immigration Judge from releasing a respondent on conditional parole under INA § 236(a)(2)(B), if the circumstances warrant release without a monetary bond.

In re V-G, DHS Br. at 3 (BIA filed Jan. 21, 2015); *see also id*. at 6-11 (discussing how this authority is confirmed by the plain language of the statute and regulations; the statutory history; and BIA case law).

At present, it is unclear whether the BIA will use this case to issue a precedential decision or dismiss the case as moot. In the meantime, we encourage attorneys to attach DHS' brief to any requests to IJ for release on conditional parole. A redacted copy of DHS' brief is attached. Also attached is a letter brief setting forth arguments that attorneys can raise regarding the IJ's authority to grant release on conditional parole.

For more information on the status of the litigation, please contact **Sophia Yapalater** at **syapalater@aclu.org**. We would also appreciate updates on how local ICE counsel and IJs respond to the brief and the outcome of requests for conditional parole.

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Office of the Chief Clerk

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December 22, 2014

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Re: A[redacted]
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Dear Counsel:

The Board requests supplemental briefing for the subject case. Both parties are granted until **January 21, 2015**, to submit their supplemental brief to the Board of Immigration Appeals. The briefs or extension request must be RECEIVED at the Board on or before this date. **Please note: The supplemental brief is limited to 30 double-spaced pages.** Two copies of this letter have been sent to you. Please attach one copy of this letter to the front of your brief when you mail or deliver it to the Board, and keep one for your records. Please address the following:

The Board requests supplemental briefing from the parties to address:

1) whether the Immigration Judge is authorized to grant conditional parole and can release the alien without any monetary bond on his or her own recognizance during a custody redetermination hearing;

2) given that the alien in this case has posted the full bond and been released, should the Board adjudicate the merits of the bond appeal or dismiss the appeal as moot? What impact, if any, do the procedures set forth in 8 C.F.R. § § 1236.1(d)(1), (2), and (3), which relate to the District Director's authority to ameliorate the terms and conditions of release, have on this question?

A fee is not required for the filing of a brief. Your brief must be RECEIVED at the Office of the Board of Immigration Appeals within the prescribed time limits. It is NOT sufficient simply to mail the brief and assume your brief will arrive on time. We strongly urge the use of an overnight courier service to ensure the timely filing of your brief. If you have any questions about how to file something at the Board, you should review the Board's Practice Manual at www.justice.gov/eoir.

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals--including correspondence, forms, briefs, motions, and other documents. If you are the Respondent or Applicant, the "Opposing Party" is the Chief Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

Filing Address:

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Sincerely,

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:

[redacted]

In bond proceedings

File No.: A[redacted]

DEPARTMENT OF HOMELAND SECURITY
SUPPLEMENTAL BRIEF ON APPEAL

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INTRODUCTION

The U.S. Department of Homeland Security (Department or DHS), U.S. Immigration and Customs Enforcement (ICE) hereby submits this brief on the November 20, 2014, bond decision by the Immigration Judge redetermining the respondent's bond from the "no bond" determination of ICE to a bond of $2,000. The matter is currently pending before the Board of Immigration Appeals (BIA or Board) on certification by the Immigration Judge. On December 22, 2014, the Board requested supplemental briefing from the parties to address whether an Immigration Judge has authority to grant conditional parole and release an alien on recognizance; whether, given that the respondent has posted bond and been released, the Board should adjudicate the merits of the bond appeal or dismiss the appeal as moot; and what impact, if any, the procedures set forth in 8 C.F.R. §§ 1236.1 (d)(l), (2), and (3) (2014), which relate to the District Director's authority to ameliorate the terms and conditions of release, have on the previous question.

In the instant matter, the respondent, who is detained under section 236(a) of the Immigation and Nationality Act (Act or INA), requested that the Immigration Judge release her on conditional parole. The Immigration Judge asked the respondent what conditions she would like the Immigration Judge to set; the respondent was unable to suggest any conditions. The Immigration Judge found, without making explicit findings on whether the respondent posed a danger to the community or was a flight risk, that setting a monetary bond was appropriate in light of the respondent's misrepresentations to immigration officers as to her identity and nationality, and because she declined the Immigration Judge's offer of the earliest available hearing date for her hearing on the merits of her relief claim. In light of the facts and procedural posture of this case, the Immigration Judge set a bond in the amount of $2,000, and the

respondent reserved appeal. The respondent was released from the custody of the Department of Homeland Security Immigration and Customs Enforcement (Department or DHS) on November 25, 2014 after posting the required bond. In the Bond Memorandum, the Immigration Judge requested certification to the Board on the issue of whether the Immigration Judge has authority to release an alien on his or her recognizance under 8 C.F.R. § 1240.1(a)(2), and the Board subsequently requested supplemental briefing.

For the reasons explained in detail below, the Department asks the Board to affirm the Immigration Judge's bond decision on its merits, even though Immigration Judges have authority to release aliens held under INA § 236(a) from custody on recognizance. The Department further provides a suggested framework for when the Board should dismiss certain other bond appeals as moot pursuant to *Matter of Valles-Perez*, 21 I&N Dec. 769, 773 (BIA 1997) and *Matter of Luis-Rodriguez*, 22 I&N Dec. 747, 753 (BIA 1999).

ISSUES PRESENTED

- Whether an Immigration Judge has authority to release an alien held under INA § 236(a) from custody on conditional parole without monetary bond on his or her own recognizance?

- If an alien has appealed the amount of bond, but has since posted the full bond and been released, should the Board adjudicate the merits of the bond appeal as a prudential matter, or is it required to dismiss the appeal as moot?

- Do the procedures set forth in 8 C.F.R. §§ 1236.1(d)(l), (2), and (3), relating to the Department's authority to ameliorate the terms and conditions of release, serve to limit the Board's authority in deciding bond appeals?

- In finding that the respondent warranted a monetary bond rather than release on conditional parole based on her recent entry to the United States, her limited family ties, her false statements to immigration officers including an alias and claiming that she was a native of Mexico rather than Guatemala, and the respondent's refusal of the earliest possible hearing date for her merits hearing, did the Immigration Judge establish a reasonable foundation for the respondent's $2,000 bond?

STANDARD OF REVIEW

Whether certain bond appeals may be dismissed as moot as a prudential matter is an issue within the Board's administrative discretion. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The factual findings that serve as the predicate for the bond are subject to the "clearly erroneous" standard. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). "A fact finding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the fact finder." Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,899 (Aug. 26, 2002) (Supplementary Information) (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)). Whether the Immigration Judge properly found that the respondent warranted a monetary bond rather than release on conditional parole based on her recent entry to the United States, her limited family ties, and her false statements to immigration officers including an alias and claiming that she was a native of Mexico rather than Guatemala, is a factual matter subject to *de novo* review.

SUMMARY OF THE ARGUMENT

The respondent was detained under section 236(a) of the Act. The Immigration Judge had authority under section INA § 236(a) to release a respondent on her own recognizance and pursuant to conditional parole, as opposed to setting a monetary bond with a minimum amount of $1,500. No authority precludes an Immigration Judge from releasing a respondent on conditional parole under INA § 236(a)(2)(B), if the circumstances warrant release without a monetary bond.

Many circumstances resulting in an alien's release from Department custody will remove all practical significance from the alien's bond appeal, such as that addressed by the Board in *Matter of Valles-Perez*, 21 I&N Dec. at 773, in which the Board held that a grant of bond in a second bond redetermination hearing rendered the bond appeal of the first bond redetermination hearing moot. However, this respondent's appeal from the Immigration Judge's November 20, 2014 grant of bond in the amount of $2,000 is not such a circumstance, because the respondent retains a financial interest in the outcome of the bond appeal even though she has been released, and particularly since the merits of her removal case may not be decided in the immediate future. The Immigration Judge's decision nevertheless should be affirmed on its merits, since she provided a reasonable basis for her decision that the respondent's recent arrival to the United States, minimal ties, and misrepresentations to immigration officers regarding her identity, warranted payment of monetary bond. Moreover, the Immigration Judge set a bond higher than the $1,500 bond floor, which supports the conclusion that this respondent is not a proper candidate for release on recognizance pursuant to conditional parole.

The Immigration Judge appropriately found that release on conditional parole was not warranted in the instant case due to the facts and posture of the case. Although the Immigration Judge did not expressly deem the respondent a flight risk in the Bond Memorandum, the circumstances of the respondent's case demonstrate that she poses some flight risk and has a diminished likelihood to appear at future hearings. The respondent's recent entry to the United States, her limited family ties, her misrepresentation to immigration officers of her identity and nationality, and her refusal of an immediately available hearing date for the relief phase of her proceedings were all appropriate factors for the Immigration Judge to consider in setting an appropriate monetary bond in the broad exercise of the Immigration Judge's discretion. I.J. at 3-

4. Accordingly, the Immigration Judge properly set bond in the amount of $2,000, rather than either the minimum $1,500 bond or release on recognizance. *Id.*

STATEMENT OF FACTS

The respondent is a [redacted] year-old native and citizen of the Guatemala. Bond Exh. 1 (I-213 Record of Deportable/Inadmissible Alien). On June 25, 2014, the respondent was encountered by a U.S. Customs and Border Protection (CBP) Border Patrol Agent in the District of Arizona, within one hundred air miles of the United States' border with Mexico. *Id.* The Border Patrol Agent determined that the respondent had entered the United States within fourteen days prior to the encounter. *Id.* The respondent represented to the Border Patrol Agent that she was a Mexican citizen, and she was transported to the Douglas, Arizona Port of Entry. *Id.* A representative of the Mexican Consulate interviewed the respondent and determined that she was actually a citizen of Guatemala. *Id.* The respondent admitted her true nationality and that she had initially provided a false name to CBP. *Id.*

On July 11, 2014, the respondent represented to a Border Patrol Agent that she had a fear of returning to Guatemala. CBP referred her to the U.S. Citizenship and Immigration Services Asylum Office for a reasonable fear determination. On July 16, 2014, because the Asylum Office could not obtain a Mam language interpreter, a timely reasonable fear determination could not be made, so the Asylum Office proceeded as though a positive reasonable fear determination had been made and issued a Notice to Appear to the respondent.

Per the respondent's request, a bond redetermination hearing was held by the Tacoma Immigration Court on November 20, 2014. I.J. at 1. The Department had initially set the conditions of the respondent's release at "no bond." *Id.* The respondent, through counsel, requested release on recognizance, pursuant to conditional parole. *Id.* The Immigration Judge requested that

respondent's counsel articulate what conditions she was requesting on parole to assure the respondent's appearance at future immigration court hearings. Counsel was unable to identify any specific requested conditions. *Id.* at 4. The Immigration Judge also offered to advance the individual merits hearing to the following day, November 21, 2014, in order to accommodate the respondent, but the respondent's counsel turned down the offered merits hearing date. *Id.* After considering that the respondent was a recent entrant to the United States, had made false statements about her name and country of citizenship to CBP, and that she did not have any family in the United States, the Immigration Judge found that a $2,000 bond was appropriate. *Id.* The respondent reserved appeal, while the Department waived appeal. The respondent posted her $2,000 bond on November 25, 2014, and was released from custody. On December 10, 2014, the Immigration Judge certified this case to the Board on the issue of whether an Immigration Judge has authority to release an alien under INA § 236(a) on recognizance pursuant to conditional parole without requiring the posting of a monetary bond. *Id.* at 1.

ARGUMENT

I. INA § 236(A)(2)(B) PROVIDES IMMIGRATION JUDGES WITH AUTHORITY TO RELEASE ALIENS ON CONDITIONAL PAROLE IF CIRCUMSTANCES WARRANT RELEASE WITHOUT PAYMENT OF A MONETARY BOND.

An Immigration Judge has authority under INA § 236(a)(2) to release a respondent on her own recognizance under conditional parole, without a minimum bond of $1,500. No authority precludes an Immigration Judge from releasing a respondent on conditional parole under INA § 236(a)(2)(B), if the circumstances warrant release without bond. The Board arguably disposed of this question in *Matter of Castillo-Padilla*, 25 I&N Dec. 257, 259 (BIA 2010), when it held that an alien released from custody following payment of a $12,000 bond had not been afforded "conditional parole" under section 236(a)(2)(B) of the Act, nor had he been "paroled" into the

United States for humanitarian or other purposes as that term is used in section 212(d)(5) such as might make him eligible for adjustment of status. Distinguishing the multiple conditions that aliens paroled into the United States under section 212(d)(5) face, the Board observed that release under section 236(a)(2)(B)'s conditional parole "does not place any such restrictions on an alien… The alien is merely released from detention 'pending a decision on whether the alien is to be removed from the United States.' Section 236(a) of the Act.") *Matter of Castillo-Padilla, id.*

Under INA § 236(a), the Attorney General or the Secretary of Homeland Security can (1) detain an alien, (2) release on bond of at least $1,500, or (3) release on conditional parole, pending the completion of proceedings. The term "conditional parole," used in INA § 236(a)(2)(B), is not defined in the Act; however, it is a concept that has existed in practice since at least 1950. Prior to 1950, section 20 of the Immigration Act of 1917 gave the Attorney General discretion to release an alien on no less than $500 bond during proceedings, conditioned on the alien being produced for hearings. Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 890-91 (1917).

Section 23(a) of the Internal Security Act of 1950 added a provision for release of a deportable alien from immigration custody without bond and termed it "conditional parole." *United States ex rel. Lee Ah Youw v. Shaughnessy,* 102 F. Supp. 799, 800-01 (S.D.N.Y. 1952), citing Act of September 23, 1950, c. 1024, Title I sec. 23, 64 Stat. 1010, 8 U.S.C. § 156(a). In 1952, the phrase was adopted into the custody provisions of the Immigration and Nationality Act at former INA § 242(a), the predecessor to INA § 236(a). Act of June 27, 1952, Ch. 477, 66 Stat. 163, 208 (Immigration and Nationality Act or McCarran-Walter Act). "Conditional parole" referred to the release of a deportable alien from immigration custody without bail. *See*

Rubenstein v. Brownell, 206 F.2d 449, 455 (D.C. Cir. 1953) ("Section 242(a) authorizes the Attorney General to keep an alien in custody, release him on bond, or release him on conditional parole."). Thus, under former INA § 242(a), a deportable alien could be released on "conditional parole" pending a final determination on deportability. The three options with regard to custody during the pendency of proceedings in former INA § 242(a) are very similar to the current pre-final order custody provisions of INA § 236(a).[1]

Prior to detention mandates enacted in 1996 and codified in INA § 236, there existed a longstanding presumption of bond eligibility for non-criminal aliens. *See Matter of Patel*, 15 I&N Dec. 666, 666 (1976) ("[a]n alien generally ... should not be detained or required to post bond except on a finding that he is a threat to the national security ... or that he is a poor bail risk.") (citing cases omitted) (superseded by statute with regard to criminal aliens, as stated in *Matter of Valdez-Valdez*, 21 I&N Dec. 703, 703-04 (BIA 1997)). The Supreme Court acknowledged this practice of releasing noncriminal aliens from immigration custody without bond or on their own recognizance. *Carlson v. Landon*, 342 U.S. 524, 533 n.31 (1952) (noting that the Government's custody status list, pending on the date of the enactment of the Internal Security Act, September 23, 1950, indicated that "the modest bonds or personal recognizances of the far larger part of the aliens remained unchanged after the bond amendment to the Immigration Act."); *Demore v. Kim*, 538 U.S. 510, 557 n.12 (2003) ("The INS releases many noncriminal aliens on bond or on conditional parole under § [236(a)(2)] pending removal proceedings").

Since 1996, an applicant for bond redetermination is presumed to be ineligible for bond unless she can demonstrate that her release from custody "would not pose a danger to property or persons, and that [she] is likely to appear for any future proceedings." See 8 C.F.R. §§

[1] The 1996 amendment to INA § 236(a) increased the minimum bond amount from $500 to $1500.

1236.1(c)(8). This regulation reversed the longstanding presumption of bond eligibility for non-criminal aliens recognized by the Board in *Matter of Patel, supra; see* 62 Fed. Reg. 10312, 10313 (Mar. 6, 1997). Thus in redetermining custody under INA § 236(a), the burden is on the alien to establish that she does not present a danger to others, a threat to national security, or a flight risk. *Matter of Guerra*, 24 I&N Dec. 37, 39-40 (BIA 2006).

The regulations further clarify that Immigration Judges have authority to "detain the alien in custody, release the alien, and determine the amount of bond, *if any*, under which the respondent may be released." 8 C.F.R. § 1236.1(d) (emphasis added). While INA § 236(a)(2)(A) requires release on a bond not lower than $1,500, INA § 236(a)(2)(B) permits release on conditional parole; thus, INA § 236 is internally consistent, and the statute and regulations are harmonious. In interpreting statutory language, if the intent of Congress is clear, the Board "must give effect to the unambiguously expressed intent of Congress." *Matter of Nolasco-Tofino*, 22 I&N Dec. 632, 636 (BIA 1999) (quoting *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Congressional intent is determined from the language of the statute, "the specific context in which that language is used, and the broader context of the statute as a whole." *Matter of Castillo-Padilla*, 25 I&N Dec. at 260 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). A reading of the plain language of INA § 236(a)(2)(A) and (B) together clearly shows that an Immigration Judge can release an alien without bond or with bond. If releasing an alien with the imposition of a monetary bond, the Immigration Judge must set the monetary bond at a minimum of $1,500 under the plain language of INA § 236(a).

The 1952 enactment of the INA also included the addition of the word "parole" to a separate section of the Act – § 212(d)(5) – which provided for the discretionary parole of

excludable aliens. The term "parole" codified in INA § 212(d)(5) referred to a procedure to allow excludable aliens into the United States and which the legacy Immigration and Naturalization Service (INS) had utilized for many years prior to the codification of the term in INA § 212(d)(5) in 1952. *Matter of R-*, 3 I&N Dec. 45, 46 (BIA 1947) ("Parole is an administrative device of long standing."). Prior to the 1952 Act, the enlargement of inadmissible aliens into the United States on parole had been "fashioned out of necessity and without statutory sanction." *Matter of Conceiro*, 14 I&N Dec. 278, 279-80 (BIA 1973). Under the 1952 regime, deportable aliens were not eligible for § 212(d)(5) parole. *See Matter of K-H-C-*, 6 I&N Dec. 295, 298 (BIA 1954) ("The authority to continue to detain aliens in, or release them from custody, provided by [INA § 242] relates solely to an alien apprehended in deportation proceedings. . . . Since this authority relates solely to aliens apprehended in deportation proceedings, it has no application to an alien detained in an exclusion proceeding. Provision for the release of an excluded alien is found in section 212(d)(5)."). Therefore, while lexically similar, the terms "conditional parole" and "parole" referred to two wholly distinct concepts applicable to separate classes of aliens.[2] *See Matter of Castillo-Padilla*, 25 I&N Dec. at 260 (relying on plain language of INA § 236(a)(2)(B) and § 212(d)(5)).

"Conditional parole" under INA § 236(a)(2) is separate and distinct from "parole" under INA § 212(d)(5)(A). *Matter of Castillo-Padilla*, 25 I&N Dec. at 260. Parole under INA § 212(d)(5)(A) is a discretionary authority exclusively held by DHS, to be exercised on a case-by-case basis and restricted to circumstances where urgent humanitarian reasons justify the parole or where a significant public benefit will result from the parole. *Id.* at 261. By contrast, a release on conditional parole under INA § 236(a)(2)(B) may be justified by factors that would not be

[2] In 1996, the enactment of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) expanded the class of aliens eligible for parole under § 212(d)(5), but did not eliminate the distinction between "conditional parole" under INA § 236 and "parole" under section 212.

adequate for parole under section 212(d)(5)(A). *Id.*; *see also Matter of Guerra*, 24 I&N Dec. at 40 ("An Immigration Judge has broad discretion in deciding the factors that he or she may consider in custody redeterminations."). For example, a release under INA § 236(a)(2)(B) could be predicated on no more than a determination that the alien does not present a danger to persons or property, is not a threat to national security, and does not pose a flight risk. *See Matter of Guerra, supra*; *Matter of Adeniji*, 22 I&N Dec. 1102, 1111-13 (BIA 1999). A release on conditional parole under INA § 236(a)(2) need not be for humanitarian reasons or for a significant public benefit.

Although sections 212(d)(5)(A) and 236(a)(2) both provide detained aliens a means of securing temporary release from the physical custody of immigration officials, these provisions are separate and distinct, and the legal status of an applicant released under INA § 236(a)(2) is not identical to that of an applicant paroled under INA § 212(d)(5)(A).

Thus both the historical development of the detention statutes and the plain language of section 236(a)(2) of the Act establish that Immigration Judges have authority to either release a detained alien on a monetary bond or, if conditions warrant, to release an alien on conditional parole without requiring the posting of a bond.

II. PRUDENTIAL CONSIDERATIONS WARRANT DISMISSAL OF BOND APPEALS WHERE THERE IS NO ISSUE LEFT FOR THE BOARD TO DECIDE, RESULTING IN AN APPEAL THAT HAS NO PRACTICAL SIGNIFICANCE.

As an administrative tribunal, the Board is not subject to the case-or-controversy requirement of Article III, and therefore its jurisdiction is not governed by the constitutional "mootness doctrine" jurisprudence. *Matter of Luis-Rodriguez*, 22 I&N Dec. 747, 753 (BIA 1999); *see also Matter of Garcia-Garcia,* 25 I&N Dec. 93, 94 (BIA 2009) (same). Nevertheless, the concept of mootness still has a place in Board decision-making as a prudential consideration.

[redacted]

"[W]here a controversy has become so attenuated or where a change in the law or an action by one of the parties has deprived an appeal or motion of practical significance, considerations of prudence may warrant dismissal of an appeal or denial of a motion as moot." *Luis-Rodriguez, id.*, citing *Valles.*

"Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). "[F]ederal courts may not 'give opinions upon moot questions or abstract propositions.'" *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). "This means that, throughout the litigation, the [petitioner] 'must have suffered, or be threatened with, an actual injury traceable to the [respondent] and likely to be redressed by a favorable judicial decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)); *see also Murphy v. Hunt* ("Hunt"), 455 U.S. 478, 481 (1982) (per curiam) ("In general, a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.") (citations and internal quotation marks omitted). For cases in Article III courts, mootness is a threshold jurisdictional issue. *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 537 (1978); *North Carolina v. Rice*, 404 U.S. 244, 246, (1971) (per curiam); *United States v. Strong*, 489 F.3d 1055, 1059 (9th Cir. 2007), *cert. denied*, 552 U.S. 1188 (2008). Although the Board is not limited on jurisdictional grounds from considering any pending bond appeal, prudential considerations warrant dismissal of appeals as moot under certain circumstances as a matter of discretion.

A. Where an Alien has been Lawfully Removed Pursuant to a Final Order of Removal, or has been Released from Department Custody without Paying a Bond, the Board Should Dismiss the Bond Appeal as Moot in the Exercise of its Discretion.

1. Lawful Removal Pursuant to a Final Order of Removal Renders a Bond Appeal Moot Because Overturning the Immigration Judge's Bond Decision Would Have No Practical Significance for the Alien.

The Board addresses bond appeals and appeals from the merits of removal cases separately. *Matter of Chirinos*, 16 I&N Dec. 276 (BIA 1977) (holding that bond hearings shall be held separate and apart from deportation hearings); 8 C.F.R. § 1003.19(d). The Board should find, as a prudential matter and in the exercise of its discretion, that an alien's removal from the United States pursuant to the execution of a final order of removal warrants dismissal of an alien's bond appeal, because the challenged bond order has no legal significance since the alien is no longer in Department custody. *See, e.g. Ferry v. Gonzales*, 457 F.3d 1117, 1132 (10th Cir. 2006) (alien's challenge to legality of his immigration detention mooted by his administrative removal from the United States), citing *Soliman v. United States*, 296 F.3d 1237, 1243 (11th Cir. 2002); *Ortez v. Chandler*, 845 F.2d 573, 575 (5th Cir. 1988).

Challenges to immigration detention through habeas petitions filed by aliens who were subsequently removed require a showing of "collateral consequences" as a result of that removal before federal courts will find they have continuing jurisdiction. *Abdala v. INS*, 488 F.3d 1061, 1063 (9th Cir. 2007), *cert. denied*, 552 U.S. 1267, 128 S.Ct. 1671, 170 L.Ed.2d 371 (2008). "For a habeas petition to continue to present a live controversy after the petitioner's release or deportation, however, there must be some remaining 'collateral consequence' that may be redressed by success on the petition." *Id.* at 1064; *see also Handa v. Clark*, 401 F.3d 1129, 1132 (9th Cir. 2005) ("[B]ecause Handa's petition for a writ of habeas corpus was filed before his

physical removal and because there are collateral consequences as a result of that removal, jurisdiction remains." (footnote omitted)); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1049 (9th Cir. 2004) ("Although the INS has removed [petitioner] to Portugal, and he is therefore no longer in custody, we continue to have jurisdiction because he filed his habeas petition before his removal and 'continues to suffer actual collateral consequences of his removal.'").

Similar prudential considerations apply in the interplay between immigration removal proceedings and bond appeals. But unlike a habeas petition in federal court, which seeks release or to address conditions of custody, there are no collateral consequences to an Immigration Judge's bond order that would survive the alien's removal from the United States following a final order. Any collateral consequence that might attach to an alien's removal occurs as a result of the removal itself, not as a result of the Immigration Judge's denial of bond. *See, e.g., Abdala*, 488 F.3 at 1065 (alien's challenge to length of immigration detention mooted by deportation; no collateral consequences or controversy left for court to decide because alien's deportation "cur[ed] ... complaints about the length of his INS detention"); *compare Zegarra-Gomez v. INS*, 314 F.3d 1124, 1125-27 (9th Cir. 2003) (challenge to denial of section 212(c) waiver resulted in collateral consequence that survived after alien's deportation, because alien's inadmissibility due to conviction would bar return); *Matter of Luis-Rodriguez*, 22 I&N Dec. at 752 (alien's departure to Cuba pursuant to stipulation with deportation proceedings still pending did not moot government's appeal).

A challenge based on collateral consequences to the removal itself remains viable despite the alien's physical removal, so the alien is not without remedies. An alien who has been removed from the United States may be entitled to continue to challenge his removal through a petition for review despite their physical removal from the United States. *See Coyt v. Holder*,

593 F.3d 902, 907 (9th Cir. 2010) (physical removal of petitioner by United States does not preclude petitioner from pursuing motion to reopen); *Nken v. Holder*, 556 U.S. 418, 424 (2009) (noting that Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–612, lifted prior ban on adjudication of petition for review once alien has been deported).

There is simply no practical reason for the Board to adjudicate the merits of a bond appeal once an alien has been removed from the United States pursuant to a final order. As a prudential matter the Board should dismiss such bond appeals as moot.

2. Release from Custody on Recognizance While an Alien's Bond Appeal is Pending Moots the Appeal Because the Alien Already Obtained the Relief Sought.

The same reasoning applies to bond appeals filed by aliens who were subsequently released from Department custody on their own recognizance. "[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and ... the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *Burnett v. Lampert*, 432 F.3d 996, 999 (9th Cir. 2005). Similarly, an alien appealing an Immigration Judge's bond order challenges the legality of that bond order and seeks release from Department custody, either by eliminating the requirement of paying a bond or by reducing the bond amount. If release from custody has already occurred because the Department reconsidered its position on bond, the bond appeal is moot, because the alien is no longer in custody and retains no financial interest in the outcome since he has not paid a bond to be released. *See Picrin-Peron v. Rison*, 930 F.2d 773, 776 (9th Cir. 1991) (alien's release from custody is same relief sought in habeas, so "there is no further relief [the court] can provide."); *Sayyah v. Farquharson*, 382 F.3d 20, 22 n. 1 (1st Cir. 2004) (claim of indefinite detention

mooted by release from custody); *Riley v. INS*, 310 F.3d 1253, 1257 (10th Cir. 2002) ("Appellant's release from detention moots his challenge to the legality of his extended detention.").

As with aliens already removed following final orders, there is no reason for the Board to adjudicate the merits of a bond appeal if the Department has exercised its authority to release the alien on recognizance. Similarly, the Board need not entertain on the merits an appeal from an alien following the Immigration Judge's decision to release that alien on recognizance under INA § 236(a)(2)(B) (providing for release on "conditional parole") when the Immigration Judge has neither required any minimal bond under INA § 236(a)(2)(A) nor placed other restrictions on release, because there would be no conditions for the Board to ameliorate. *See Matter of Castillo-Padilla*, 25 I&N Dec. at 259 ("In contrast, section 236(a) does not place any such restrictions on an alien who is released on conditional parole. The alien is merely released from detention 'pending a decision on whether the alien is to be removed from the United States.' Section 236(a) of the Act.") As a prudential matter the Board should dismiss such bond appeals as moot.

3. An Alien's Release from Custody after a Second Bond Hearing Likewise Moots an Appeal Pending from an Immigration Judge's First Bond Hearing.

Unlike appeals from the merits of removal cases, in which the Immigration Judge loses jurisdiction once an appeal is filed with the Board, aliens may file successive motions for bond redetermination without regard to a pending appeal of a previous bond order. The regulations allow for successive bond requests if the alien can establish a material change in the alien's circumstances since the prior bond redetermination, and as long as a final order of removal has not been entered. 8 C.F.R. §§ 1003.19(e), 1236.1(d)(3)(i); *Matter of Valles-Perez*, 21 I&N Dec.

at 772. Should the second bond redetermination hearing result in the alien's release from custody, with or without payment of a bond, any appeal pending from the first bond redetermination hearing should be deemed moot. *Id.* at 773. Should the alien wish to challenge the conditions set by the Immigration Judge at the second bond hearing, the proper avenue would be a second bond appeal.

B. The Board Need Not Dismiss as Moot Bond Appeals in Which an Alien or the Alien's Obligor has Paid an Immigration Bond and the Alien has Been Released, Since the Appeal Has Practical Significance.

In contrast, an alien's release from Department custody following payment of a cash bond or a surety bond paid through a bail bondsman does not necessarily "deprive [the] appeal ... of practical significance." *Luis-Rodriguez*, 22 I&N Dec. at 753. Aliens, or their obligor(s), who have paid an immigration bond are required to either pay cash or to locate and pay an agent (immigration bond company) to post the bond. If the alien or the alien's obligor pays a cash bond, funds are held by the Department, the beneficiary of the bond, until after an alien's removal proceedings have been completed, preventing the alien or the alien's obligor from using these funds for other purposes. If an alien secures his immigration bond through an agent, that agent may charge a non-refundable fee, in addition to interest or an annual premium. In either scenario, an alien's successful challenge to the amount of bond ordered by an Immigration Judge could result in a re-negotiation of the bond amount paid, freeing up funds for the alien or the alien's obligor to use for other purposes.

The Department does not ask the Board to dismiss the instant bond appeal as moot, because the respondent retains a financial interest in the outcome of the bond appeal even though

she has been released from custody and given that the merits of her removal case may not be decided in the near future.[3]

III. THE PROCEDURES SET FORTH IN 8 C.F.R. §§ 1236.1(D)(1), (2), AND (3) RELATING TO THE DEPARTMENT'S AUTHORITY TO AMELIORATE THE TERMS AND CONDITIONS OF RELEASE DO NOT LIMIT THE BOARD'S AUTHORITY TO DECIDE BOND APPEALS.

A. Applicable Regulations Grant the Board Broad Jurisdiction over Bond Appeals.

An Immigration Judge's authority to conduct a bond hearing is governed by statute, regulation, the binding authority of this Board's published decisions and those of the Attorney General, and the published authority of the geographically relevant Circuit Court of Appeals. In the context of custody proceedings, an Immigration Judge's authority to redetermine conditions of custody is set forth in INA § 236 and 8 C.F.R. § 1236.1(d). Generally speaking, an Immigration Judge only has authority to issue a bond when a Notice to Appear has been filed with the Immigration Court. *Matter of A-W-*, 25 I&N Dec. 46-47 (BIA 2009).

The Board's authority to set bond conditions on appeal from an Immigration Judge's order derives from the Immigration Judge's underlying authority to redetermine conditions of custody, and is governed by the various regulations addressing custody and bond determinations. *Matter of Adeniji*, 22 I&N Dec. at 1105, citing to 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), and 1236.1(d)(3)(i). As part of its general appellate role, the Board also has independent authority to assess the record and make its own bond determination under current law. *Matter of Adeniji*, 22 I&N Dec. at 1106, citing to *Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994).

[3] As of the date of this brief, the respondent's removal case remains on the non-detained calendar but does not have a future hearing date set.

B. 8 C.F.R. § 1236.1(d) More Specifically Defines the Board's Appellate Jurisdiction in Bond Proceedings, but Does Not Otherwise Limit it.

The regulation at issue provides several paths for an alien to challenge the Department's initial bond determination made under INA § 236(a) depending on the timing and circumstances. An alien may ask an Immigration Judge to redetermine the Department's custody decision at any time prior to an administratively final order of removal. 8 C.F.R. § 1236.1(d)(l). If the alien has been released from Department custody, the Immigration Judge may consider a request to ameliorate the terms of release if the request is filed within seven days after release. *Id.* If an alien has been released from Department custody and seven days have passed, the alien may ask the Department to review the conditions of its initial bond determination. 8 C.F.R. § 1236.1(d)(2). Finally, an alien may appeal the Immigration Judge's or the Department's decision to the Board. 8 C.F.R. § 1236.1(d)(3).[4]

The Board has addressed this regulation in several published cases, holding that an Immigration Judge lacks jurisdiction to consider an alien's request for amelioration of terms of release following release from Department custody if the alien fails to make the request within 7

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[4] 8 C.F.R. § 1236.1(d) states in relevant part:
(d) Appeals from custody decisions—(1) Application to immigration judge. After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 1240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in §1003.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.
(2) Application to the district director. After expiration of the 7-day period in paragraph (d)(1) of this section, the respondent may request review by the district director of the conditions of his or her release.
(3) Appeal to the Board of Immigration Appeals. An appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals in the following circumstances:
(i) In accordance with §1003.38 of this chapter, the alien or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.
(ii) The alien, within 10 days, may appeal from the district director's decision under paragraph (d)(2)(i) of this section.

days of release as required by 8 C.F.R. § 1236.1(d)(1); *Matter of Aguilar-Aquino*, 24 I&N Dec. 747, 753 (BIA 2009); but that where such a request for amelioration of bond conditions is timely made, the Immigration Judge had jurisdiction to consider an alien's request to have the Department's electronic monitoring bracelet removed. *Matter of Garcia-Garcia*, 25 I&N Dec. at 95-96.

Nothing in the language of this regulation or the Board decisions discussing it limits the Board's authority to decide bond appeals as a prudential matter. Other regulations cross-reference § 1236.1(d); *see* 8 C.F.R. § 1003.1(b)(7) governing the Board's general appellate jurisdiction; but are less specific in scope and do not provide additional guidance.

In practical terms, if an Immigration Judge ameliorates the Department's bond conditions following an alien's release from custody under this regulation, the request had to have been made within seven days of release. 8 C.F.R. § 1236.1(d)(1). If the alien subsequently files an appeal and the relief sought by the alien through the appeal was obtained instead by the Immigration Judge's amelioration of bond conditions, the Board could appropriately dismiss such appeal as moot. However, as a practical matter this scenario is unlikely unless the alien filed the appeal before seeking amelioration of the Department's bond conditions from the Immigration Judge. The same logic would apply if amelioration was instead granted by the Department after seven days had passed since the alien's release. That is, if the same relief sought at the Immigration Judge bond hearing was granted instead by the Department under section 1236.1(d)(2), then the Board should find the bond appeal moot as a prudential matter.

Conversely, if the basis for the bond appeal of the initial Immigration Judge bond order was different from the post-release amelioration granted by either the Immigration Judge or the Department, the bond appeal would not necessarily be moot.

Guerra, 24 I&N Dec. at 40.

The respondent was a recent entrant to the United States when she was encountered by CBP near the United States' border with Mexico on June 25, 2014. The respondent initially claimed she was a citizen of Mexico. CBP only learned that the respondent is actually a citizen of Guatemala after the she was interviewed by an official from the Mexican Consulate who determined that she was a citizen of Guatemala. The respondent also misrepresented her name to CBP. She lacks any family ties in the United States. She has no work history in the United States, but no criminal or prior immigration history. Due to the respondent's recent immigration history, including her deception at the border concerning her country of citizenship, and her non-existent family ties, the Immigration Judge appropriately determined that setting a monetary bond rather than releasing the respondent on conditional parole was appropriate in this matter. The Immigration Judge properly determined that bond in the amount of $2,000 was appropriate in light of the facts of the respondent's case.

Given the respondent's admissions that she lied to immigration officers about her identity and nationality, the Immigration Judge's resulting bond order of $2,000 was eminently reasonable. As the Immigration Judge observed, the Board allows judges to deny bond as a matter of discretion even if an alien has established that she is not a danger to the community or a flight risk. I.J. at 3, citing *Matter of Guerra*, 24 I&N Dec. at 39; *Matter of D-J-*, 23 I&N Dec. at 575-76. As such, the Immigration Judge's decision to require payment of a modest monetary bond based on the respondent's admissions to lying to immigration officers, and her declining the earliest available hearing date, was reasonable. Moreover, the respondent was able to post the bond and has been released from custody.

CERTIFICATE OF SERVICE

Case Control Name: [redacted]

File No.: A[redacted]

I hereby certify and declare under penalty of perjury that, on January 20, 2015, I caused to be served the attached documents:

DEPARTMENT OF HOMELAND SECURITY
SUPPLEMENTAL BRIEF ON APPEAL

☒ by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process and causing the same to be mailed by first class mail to the person at the address set forth below;

☐ by causing to be personally delivered a true copy thereof to the person at the address set forth below;

☐ by electronic filing, in accordance with applicable regulations, to the person at the address set forth below;

☐ by FEDERAL EXPRESS to the person at the address set forth below;

☐ by telefaxing with acknowledgment of receipt to the person at the address set forth below:

Elizabeth Benki, Esq.
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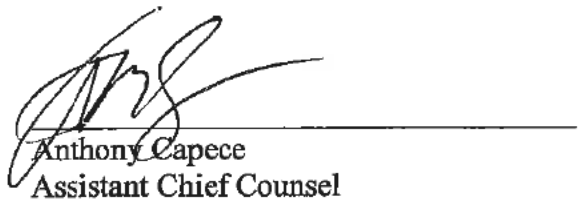

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AMERICAN CIVIL LIBERTIES UNION FOUNDATION of MARYLAND

May 19, 2014

The Honorable Elizabeth A. Kessler
United States Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge
Baltimore, Maryland

Re: Matter of [redacted], A # [redacted] – Amicus Letter In Support of Mr. [redacted]s Motion for Custody Redetermination

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EXECUTIVE DIRECTOR

Dear Judge Kessler,

The Immigrants' Rights Project of the American Civil Liberties Union (ACLU) and the American Civil Liberties Union of Maryland (ACLU-MD) respectfully submit this amicus letter in support of Mr. [redacted]'s motion for custody redetermination. We respectfully urge this court to order Mr. [redacted] released on his own recognizance or on conditions of supervision. The Immigration Court has clear authority to grant Mr. [redacted]'s release without monetary bond under Section 236(a) of the Immigration and Nationality Act ("INA") and 8 C.F.R. § 1236.1(d), and considerations of fairness and sound public policy strongly favor release on recognizance or conditions in this case. The current bond of $15,000 is excessive under the Eighth Amendment, going far beyond what is necessary to ensure Mr. [redacted]'s appearance for his removal proceedings and being unwarranted given the absence of legitimate concerns about his dangerousness or flight risk.

I. Interests of Proposed *Amici Curiae*

The ACLU is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The Immigrants' Rights Project of the ACLU (IRP) has been at the forefront of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants. IRP has developed substantial expertise in the proper scope of detention authority under the INA, as well as a longstanding interest in enforcing constitutional and statutory constraints on that authority. IRP has litigated numerous key cases in the area of administrative detention of noncitizens.

The ACLU of Maryland is an affiliate of the ACLU. Like the ACLU, it has been an active participant in the debate over the constitutionality of prolonged and mandatory detention and is engaged in numerous policy, legislative, and litigation initiatives to protect and uphold the constitutional rights of immigrants in Maryland across a variety of immigration enforcement matters.

We jointly submit this letter to the Court in order to highlight statutory and constitutional arguments favoring release of Mr. [redacted] on his own recognizance or, in the alternative, on conditions of supervision.

II. Immigration Judges Have Authority to Grant Release on Conditions Other Than Monetary Bond, Including Release on Supervision or Recognizance

The Immigration Court has clear authority to grant Respondents' release on recognizance or conditions without the posting of money bond under Immigration and Nationality Act ("INA") § 236(a) and 8 C.F.R. § 1236.1(d). Although the Board of Immigration Appeals has yet to definitely establish this proposition, *Amici* respectfully submit that the plain language of the statute and regulation compel this result. By authorizing release on "conditional parole," Congress empowered the Attorney General to grant release on recognizance or conditions of supervision as an alternative to money bond; as agents of the Attorney General, Immigration Judges are specifically authorized to do so. Moreover, release on "conditional parole" must include release on recognizance. In addition to being required under the plain text of the statute, these conclusions are further supported by implementing regulations, agency practice and case law, and public policy considerations.

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A. The Plain Text of INA § 236(a) Clearly Authorizes the Attorney General to Grant Release on Conditional Parole as an Alternative to Release on Money Bond, And A Contrary Conclusion Would Defeat The Purposes of the Statute.

INA § 236(a) provides in pertinent part that, pending a decision on removal,

> 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*;

Id. (emphasis added). The plain language of INA § 236(a) thus clearly authorizes the Attorney General to grant release on "conditional parole" as an alternative to release on money bond. In accordance with this plain language—and as decades of usage confirm—release on conditions, including release on recognizance, are authorized as "conditional parole" within the meaning of INA § 236(a).

"Parole" is undisputedly a form of "release,"—as acknowledged in the statutory text of § 236(a)(2) itself. *See id*. (authorizing "release . . . on" "conditional parole"). The meaning of the term "parole" moreover, also entails a form of release. Dictionaries define "parole" as the "conditional release" of a

prisoner. *Merriam-Webster's Collegiate Dictionary* 902 (11th ed. 2005); Black's Law Dictionary 1227 (9th ed. 2009); *see also Muscarello v. United States*, 524 U.S. 125, 128 (1998) (relying on dictionaries to interpret statutory terms). Moreover, a release on conditions is clearly "conditional," as that term is defined as "subject to, implying, or dependent upon a condition." *See Merriam-Webster's Collegiate Dictionary* -- (11th ed. 2005). As explained in Part C, *infra*, these conditions may include forms of supervision as well as release on recognizance.

Reading the statute to bar release on conditions other than monetary bond would violate basic principles of statutory construction. As the Supreme Court has explained, courts "are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) (citation omitted). A construction that somehow barred Immigration Judges from ordering release on conditional parole would not only be contrary to the plain text, but also render INA § 236(a)(2)(B) mere surplusage. *See Marx v. General Revenue Corp*., 133 S.Ct. 1166, 1178 (2013) (noting that "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme").

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Even if the term "conditional parole" INA § 236(a) were ambiguous with respect to release on conditions—which it is not—barring such release would be "arbitrary and capricious" and would defeat the purposes of the statute. While agencies are afforded deference in interpreting the statutes they administer, *see Chevron U.S.A. Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984), their interpretations must be based on "reasoned decisionmaking" and "a consideration of the relevant factors." *Judulang v. Holder*, 132 S.Ct. 476, 483-84 (2011) (internal citations omitted).

The purpose of immigration detention pending removal is to protect the community from danger and to guard against flight risk. *See Zadvydas v.* Davis, 533 U.S. 678, 690 (2001); *see also Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231 (3rd Cir. 2011) (holding that detention must be tethered to the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community."); *Matter of Patel*, 15 I&N Dec. 666 (BIA 1979) (noting that "[a]n alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk" (citation omitted)); *accord Matter of Andrade*, 19 I&N Dec. 488, 489 (BIA 1987). Conditioning any release from detention on a minimum bond is not tied to these dual purposes. Rather, the ability to afford a $1500 bond is "a matter irrelevant" to whether the noncitizen is a danger to the community or a flight risk. *Judulang*, 132 S.Ct. at 484. As in other detention contexts, immigration courts must be allowed to exercise their conditional parole authority so as to prevent "poverty [from] be[ing] an absolute obstacle [to] release." *Leslie v. Holder*, 865 F.Supp.2d 627, 641 (M.D.Pa 2012).

B. Immigration Judges, like DHS Officers, Are Authorized to Release Individuals on Conditional Parole.

Immigration Judges, exercising the authority delegated jointly to them and to DHS Officers by the Attorney General under INA §236(a), are authorized to release individuals on conditional parole. It would be incongruous for the statute

to authorize DHS to order release on recognizance but not the immigration courts, given that the *Attorney General* is expressly designated in the statute. Not surprisingly then, the regulations governing custody redetermination hearings clearly vest Immigration Judges with the authority to grant release without imposing a money bond. The implementing regulation, 8 C.F.R. § 1236.1(d), provides:

> After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 1240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, *release* the alien, and determine the amount of bond, *if any*, under which the respondent may be released . . . .

Id. (emphasis added). Thus, the regulation specifically empowers the Immigration Judge to review and "ameliorat[e] . . . the conditions under which [a respondent] may be released" prior to the entry of any final removal order. Reading the regulation as a whole, it is clear that these release "conditions" refer back to DHS's authority at 8 C.F.R. § 1236.1(c)(8) to "release" a respondent "under the conditions at section 236(a)(2) . . . of the Act"—namely, a minimum $1,500 bond *or* conditional parole. The Immigration Judge may "ameliorat[e]" these release conditions by determining whether to "to detain the alien in custody, *release* the alien, and determine the amount of bond, *if any*, under which the respondent may be released." *Id*. § 1236.1(d)(1)(emphasis added). The phrase "if any" in § 1236.1(d)(1) clearly contemplates circumstances under which the Immigration Judge orders release *without* setting a monetary bond—such a grant of release on conditions of supervision, or the condition of recognizance.

Finally, the authority to of Immigration Judges to release on "conditional parole" has been repeatedly acknowledged by the Attorney General and the BIA. *See Matter of D-J*, 23 I&N Dec. 572*,* 582 (AG 2003) (noting that "section 236(a) affords aliens to whom it applies the opportunity to seek discretionary relief (bond *or conditional parole*) in a hearing before an Immigration Judge") (emphasis added); *In re Joseph*, 22 I&N Dec. 799, 800, 809 (BIA 1999) (upholding the Immigration Judge's order releasing alien on his own recognizance after determining that immigrant was properly considered for release under INA § 236(a)). Moreover, empowering Immigration Judges to order release on conditions is consistent with both the overall purpose of the detention statute and the "broad discretion" that INA § 236(a) vests in the Attorney General to decide whether to detain or release a noncitizen in removal proceedings. *Matter of D-J*, 23 I&N Dec. at 575; *accord In re Guerra*, 24 I&N Dec. 37, 39 (BIA 2006).[1]

[1] Although *D-J* and *Guerra* refer specifically to the Attorney General's broad discretion to order "release on bond," they do not limit the Immigration Judge's authority under INA § 236(a) to

C. Immigration Judges' Authority To Order Release On Conditional Parole Includes Authority to Order Release on Recognizance.

Release on recognizance entails a release on conditions, and is thus encompassed within the term "conditional parole." The conditions of recognizance include, at minimum, the requirement that the respondent appear for removal proceedings. *See* Black's Law Dictionary 1386 (9th ed. 2009) (defining recognizance as "[a] bond or obligation, made in court, by which a person promises to perform some act or observe some condition, such as to appear when called, to pay a debt, or to keep the peace").

Accordingly, implementing regulations for INA § 236(a) construe "conditional parole" to refer to release on recognizance. *See* 8 C.F.R. § 287.3 (directing DHS to determine promptly whether noncitizens subject to a warrantless arrest "will be continued in custody or released on bond *or recognizance*" (emphasis added)); *id*. § 1236.3(b) (providing for the release of "[j]uveniles for whom bond has been posted, for whom parole has been authorized, *or who have been ordered released on recognizance*" (emphasis added)); *see also* Memorandum from Gus P. Coldbella, DHS Office of General Counsel, Clarification of the Relation Between Release Under Section 236 and Parole Under Section 212(d)(5) of the Immigration and Nationality Act (Sept. 28, 2007) ("Coldebella Memo"), at 3 n.3 (defining "parole" in INA 236(a)(2) as "the release of a deportable alien from [Immigration and Naturalization Service ("INS")] custody without bail").

This inclusion of release on recognizance as an essential form of "conditional parole" is confirmed by longstanding DHS practice as well. DHS routinely exercises its authority to grant "conditional parole" under INA § 236(a) by releasing noncitizens on their own recognizance in making its initial custody determination. INS Form 1-220A, "Order of Release on Recognizance," which DHS presently uses for initial custody determinations, states that "[i]n accordance with Section 236 of the [INA] . . . you are being released on your own recognizance provided you comply with the conditions," and requires, among other things, that the noncitizen "report for any interview or hearing as directed by the Immigration and Naturalization Service or the Executive Office for Immigration Review." As explained in Part I.B, *supra*, this same authority of release on recognizance must be shared by Immigration Judges as well.

Indeed, both the BIA and several federal courts of appeal have acknowledged that the INA authorizes release on recognizance as a form of "conditional parole." *See Matter of Aguilar-Aquino*, 24 I&N Dec. 747, 748 (BIA 2009) (noting that alien released by DHS under INA § 236(a) had been "released on his own recognizance"); *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1115 (9th Cir. 2007) (noting that "[i]t is apparent that the INS used the phrase 'release on recognizance' as another name for 'conditional parole' under [INA § 236(a)]);

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release on monetary bond, nor could they consistently with the plain text of the statute. As noted above, *D-J* makes clear that INA § 236(a) grants noncitizens the "opportunity to seek . . . conditional parole . . . in a hearing before an Immigration Judge." *See D-J*, 23 I&N Dec. at 582.

accord Cruz-Miguel v. Holder, 650 F.3d 189, 192 (2d Cir. 2011); *Delgado-Sobalvarro v. Attorney General of U.S.*, 625 F.3d 782, 784 (3rd Cir. 2010).

D. Public Policy And Fundamental Fairness Weigh Strongly in Favor of Permitting Immigration Judges to Order Release on Conditions Other Than Monetary Bond.

Finally, public policy concerns and principles of fundamental fairness weigh strongly in favor of permitting Immigration Judges to order release on conditions other than monetary bond. By definition, a detention regime that requires individuals to post a minimum $1,500 has a disparate impact on indigent and low-income respondents, who become vulnerable to unnecessary detention based merely on lack of economic resources.[2] Such costs are particularly unjustifiable given the availability of effective alternatives to detention ("ATDs") to ensure appearance for court and, if necessary, removal.

Detention undisputedly imposes tremendous costs on individuals. When respondents are detained for even short periods of time, they are deprived of liberty, risk losing their only means of support, face significant barriers to maintaining contact with their families, and are prevented from preparing an effective defense in their removal proceedings. *See Barker v. Wingo*, 407 U.S. 514, 532-533 (1972) ("The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness . . . Imposing those consequences on anyone who has not yet been convicted is serious."). In addition, detention imposes significant hardships on family members, many of whom may be U.S. citizens. [3]

Detention also diminishes low-income and immigrant detainees' ability to procure legal representation, resulting in tremendous obstacles to asserting their rights in immigration proceedings. These detainees are at a distinct disadvantage when it comes to accessing counsel, as many are held in locations with limited legal services and have little ability to contact or pay for representation; the facilities themselves, moreover, often lack legal resources.[4] An estimated 84% of

[2] A recent study of government data on immigration bond determinations in New York City from 2005 to 2010 determined that 55% of individuals who receive bond are unable to pay it. New York University School of Law Immigrants' Rights Clinic, Immigrant Defense Project, & Families for Freedom, *Insecure Communities: New Data on Immigrant Detention and Deportation Practices in New York City* 11 (July 2012). More than 20% of detained New Yorkers who have bond set, but are unable to pay it, have U.S. citizen children. *Id*. at 11.

[3] *See* Ajay Chaudry et al., The Urban Inst., *Facing Our Future: Children in the Aftermath of Immigration Enforcement* 27 (2010) (noting families "generally lose[] a breadwinner" during immigration detention); Human Rights Watch, *Jailing Refugees: Arbitrary Detention of Refugees in the U.S. Who Fail to Adjust to Permanent Resident Status* 36 (2009) (noting that the detention of refugees "results in loss of jobs").

[4] *See* Dora Schriro, ICE, *Immigration Detention Overview and Recommendations* (2009); IACHR, *Report on Immigration in the United States: Detention and Due Process* 117 (2010); Nina Rabin, Univ. of Ariz., *Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona* 33 (2009) (finding multiple Arizona detention facilities fail to comply with detention standards providing for access to legal resources like law libraries).

immigration detainees do not have lawyers.[5] Moreover, as EOIR has long recognized, this lack of counsel harms the government as well, hindering the efficient processing of removal cases. Office of Inspector General, *Management of Immigration Cases and Appeals by EOIR* 31, 33 (2012)("a lack of representation can significantly delay proceedings because of the extra time needed to provide explanations to, and solicit information from, the aliens").

The consequences of making bond a condition of release on indigent respondents are even more unjustifiable given that a money bond is often unnecessary to prevent flight. As the criminal justice system has long recognized, numerous alternatives to detention that do not involve money bond—such as telephonic and in-person reporting, curfews, home visits, and electronic monitoring—can ensure appearance at court hearings, and for removal if ordered. ICE's own Alternatives to Detention ("ATD") program has been very successful in ensuring that immigrants appear for removal proceedings. BI Incorporated, the company with which ICE contracts for its Intensive Supervision and Appearance Program II ("ISAP II"), has reported 99% attendance rates at immigration court hearings.[6]

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III. [redacted]

[redacted]

[5] ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-8 (2010).

[6] *See* ISAP II 2011 Annual Report (in 2011, ICE referred 35,380 participants to ISAP II; the "full service" option produced a 99.4% attendance rate at all Immigration Judge hearings and a 96.0% attendance rate at the final court decision); ISAP II 2010 Annual Report (in 2010, ICE referred 25,778 participants to ISAP II; the "full service" option had a 99% attendance rate at all Immigration Judge hearings and a 94% attendance rate at the final court decision).

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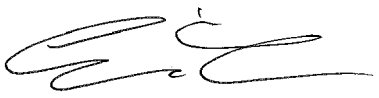
[redacted]

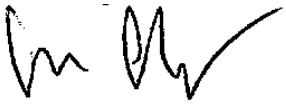
IV. Conclusion

[redacted]

For the foregoing reasons, we respectfully urge this court to exercise its authority under INA § 236(a)(2)(b) and 8 C.F.R. § 1236.1(d) and to order Mr. [redacted] released on his own recognizance or on conditions of supervision as an alternative to monetary bond.

Respectfully Submitted,





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