No. 20-1787

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JULIO CESAR ORTEGA CAMPOVERDE,
Appellant,

v.

WARDEN YORK COUNTY PRISON, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
No. 4:20-CV-00332

BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES IN SUPPORT OF APPELLANT JULIO CESAR ORTEGA CAMPOVERDE

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FRAP 29(a)(4)(A) CORPORATE DISCLOSURE STATEMENT

None of the parties involved in this action are corporations with a parent corporation, or corporations owned by publicly held corporations.

IDENTITY AND INTERESTS OF AMICI CURIAE

This brief is submitted on behalf of proposed amici curiae the National Association of Criminal Defense Lawyers (NACDL) and the Center for Legal and Evidence-Based Practices ("CLEBP"). Amici are leading experts on criminal pretrial detention. Amici have devoted their resources to ensuring that all people deprived of liberty by the government receive the full protection of the law.

The National Association of Criminal Defense Lawyers is a nonprofit voluntary professional bar organization that works on behalf of criminal defense lawyers to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members in 28 countries, and 90 state, provincial, and local affiliate organizations, totaling up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, providing amicus assistance in cases that present issues of systemic importance, as this case does.

CLEBP is a non-profit corporation that has worked with jurisdictions across the country to improve the administration of their bail systems. CLEBP's mission is to advance the administration of justice by promoting rational, fair, and transparent

legal and evidence-based pretrial practices to achieve safer and more equitable communities as well as cost-effective government.

Amici submit this brief as authorized by Fed. R. App. P. 29. Pursuant to Fed. R. App. P. 29(a)(2), amici have contacted counsel for the parties. Appellant consents to, and the government has no objection to, the filing of this brief.

FRAP 29(a)(4)(E) STATEMENT

Pursuant to Rule 29(a)(4)(E), amici confirm that neither party nor a party's counsel has authored this brief, in whole or in part, or contributed money intended to fund the preparation or submission of this brief. No person contributed money that was intended to fund preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with Mr. Ortega Campoverde that the Equal Protection Clause, the Due Process Clause, and the Immigration and Nationality Act require immigration judges in bond hearings to consider an immigrant detainee's ability to pay and alternative conditions of release. *See Hernandez v. Sessions*, 872 F.3d 976, 993 (9th Cir. 2017) ("when the government determines what bond to set without considering a detainee's financial circumstances, or the availability of alternative conditions of release, there is a significant risk that the individual will be needlessly deprived of the fundamental right to liberty."). Amici submit this brief to share evidence from the criminal pretrial system. The experiences of pretrial jurisdictions across the country demonstrate that nonmonetary alternatives to detention successfully address concerns that a defendant poses a risk of danger or flight without overburdening individual liberty.

Jurisdictions have increasingly rejected the use of money bail in criminal pretrial custody determinations. In its place, many have embraced nonmonetary alternatives to detention. The evidence from these jurisdictions offers two lessons that bear directly on Mr. Ortega Campoverde's claims. First, the evidence demonstrates that money bail does not protect public safety or prevent flight. Second, nonmonetary conditions of release can successfully mitigate the risk of pretrial flight or rearrest. Amici urge the Court to apply these lessons when

considering whether, as Mr. Ortega Campoverde claims, the immigration judge violated his due process, equal protection, and statutory rights. *See* Brief for Appellant at 32-41, *Campoverde v. Warden York Cnty. Prison, et al.,* No. 20-1787 (3rd Cir.) (filed July 10, 2020), Dkt. 22-1.

This Court, other federal courts, and the Supreme Court have all drawn from pretrial detention cases when considering due process and other claims challenging immigration detention. *See*, *e.g.*, *Zadvydas v. Davis,* 533 U.S. 678, 690-91 (2001) (citing *United States v. Salerno*, 481 U.S. 739, 746 (1987)); *E.D. v. Sharkey*, 928 F.3d 299, 306 (3rd Cir. 2019) ("[t]his Circuit has longed [sic] viewed the legal rights of an immigration detainee to be analogous to those of a pretrial detainee."); *Padilla v. ICE*, 953 F.3d 1134, 1143 (9th Cir. 2020). Immigration detention and criminal pretrial detention are civil detention schemes that share many common features. In both systems, the government imposes detention in prison-like conditions. *See German Santos v. Warden Pike Cnty. Corr. Facility*, No. 19-2663 2020 WL 3722955, at *7 (3rd Cir. July 7, 2020) (finding that conditions of confinement of an immigrant detainee held in a county corrections facility were indistinguishable from criminal punishment). But detention is not intended to punish. Rather, in both systems, detention is imposed to prevent flight and protect public safety pending proceedings. *See Zadvydas,* 533 U.S. at 690-91 (citing *Salerno,* 481 U.S. at 747). As it has in other immigration detention challenges, this

Court should consider the pretrial detention context when deciding Mr. Ortega Campoverde's case.

The lessons from the pretrial context are clear. Jurisdictions from across the country, including in this Circuit, have recognized that when release from criminal detention is conditioned on money bond, wealth—not a defendant's risk of flight or dangerousness—determines who is released and who is detained. Defendants with resources can secure their release by posting bond, while low-income defendants languish in jail because they cannot. The injustice and irrationality of such a system has driven reform of pretrial systems nationally.

The common thread linking reforms across the country is a shift away from a rote reliance on money bail, and toward a system in which conditions of release address the factors underlying a defendant's risk of rearrest or failure to appear in court. Evidence from the pretrial system shows that these conditions are as effective, and often more effective, at preventing flight and protecting public safety as money bail.

Amici urge the Court to consider lessons from the pretrial context to hold that the immigration court violated Mr. Ortega Campoverde's rights when it failed to consider either his ability to pay his money bail or alternatives to detention.

ARGUMENT

I. Many Pretrial Systems Across the Country No Longer Rely on Money Bail.

Empirically-validated evidence from criminal pretrial systems demonstrates that money bail, especially without consideration of a defendant's ability to pay, is irrational and unnecessary to protecting public safety and preventing flight. The Court should consider the lessons that the pretrial system teaches when evaluating Mr. Ortega Campoverde's claims.

a. A Large and Increasing Number of Pretrial Jurisdictions Recognize That Wealth-Based Detention Is Irrational and Unjust.

The federal pretrial system has long recognized that a defendant should not be detained solely because of his or her inability to pay a money bail. *See* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.") (added by the Comprehensive Crime Control Act of 1984, Chapter 1 (Bail Reform Act of 1984), Pub L. No 98-473, Title II §203(a), 98 Stat. 1976 (Oct. 12, 1984)). This prohibition on wealth-based detention is grounded in due process and equal protection principles, and the corresponding tenet that restrictions on liberty are justified only when they are necessary to meet the state's interest in preventing flight and protecting public safety. *See* Unif. Law Comm'n, *Draft Uniform Pretrial Release and Detention Act: Prefatory Note* 1 (2020) (noting that under Supreme Court precedent, pretrial

detention must be a limited exception that is used only when no less restrictive measures suffice).

As a growing number of states and localities across the country have recognized, when release from pretrial detention is conditioned on payment of bond, wealth—and not an assessment of danger or flight risk—determines who is detained. *See* Ctr. for Access to Justice, *Misdemeanor Bail Reform and Litigation: An Overview* 1-10 (Ga. St. U. Coll. L. 2017) (describing state and local litigation and legislative reform efforts aimed at limiting the use of money bond). Under money bail systems, defendants with resources, regardless of whether they pose a risk to public safety or flight, can secure release by posting bond, while many low-income defendants remain incarcerated solely because they cannot satisfy the financial condition of their release. *See*, *e.g.*, Emily Leslie and Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments,* 60 J. of L. & Econ 529, 530 (2017) ("of the 38 percent of felony defendants who are detained, nine of 10 failed to post bond" and "[o]f those held on bail,…44 percent have bail set at less than $1,000") (citing Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, Technical Report No. NCJ 234777 (Bureau of Justice Stats. 2013) and Mary T. Phillips, *Decade of Bail Research in New York City* (N.Y.C. Crim. Justice Agency

2012)). Wealth-based incarceration inflicts a severe deprivation of liberty but is unrelated to protecting public safety or preventing flight.

b. Jurisdictions Across the Country Have Reformed Their Pretrial Practices to Limit or Eliminate the Use of Money Bail.

As jurisdictions recognize the irrationality and unlawfulness of money bail as a condition of release, they are adopting widespread changes. In the last six years, every state legislature, including in New Jersey and Delaware, has enacted legislation addressing their criminal pretrial law and polices. Nat'l Conf. of State Legislatures, *Trends in Pretrial Release: State Legislation Update* 1 (2018) (hereinafter *Nat'l Conf. of State Leg.*). *See*, *e.g.*, 11 Del. C. § 2101 (2019-2020); N.J.S.A § 2A:162-15 (2020).

Though reforms vary, a common thread is an effort to prevent unnecessary detention by embracing two empirically-validated practices: (1) limiting the use of money bail as a condition of pretrial release, and (2) utilizing nonmonetary alternatives to detention. Ctr. for Access to Justice, *supra*, at 1-10. While some states have expressly prohibited money bail that the defendant cannot afford, others have enacted policies requiring a prompt bail review hearing when a defendant remains detained because of an inability to pay. *See*, *e.g.*, N.M. Const. art. II § 13 (2018) ("[a] person who is not detainable on grounds of dangerousness nor a flight risk… shall not be detained solely because of financial inability to post a money or property bond"); Kan. Stat. Ann. § 22-2801 (2020) ("all persons,

regardless of their financial status, shall not needlessly be detained pending their appearance . . . when detention serves neither the ends of justice nor the public interest"); Haw. Rev. Stat. § 804-9 (2019) ("the amount of bail … shall be set in a reasonable amount based upon all available information, including… the defendant's financial ability to pay"); MD R. 4-216.1(e)(1)(d)(1)(B) (2020) ("[a] judicial officer may not impose a special condition of release with financial terms in form or amount that results in the pretrial detention of the defendant solely because the defendant is financially incapable of meeting that condition"); Ariz. R. Crim. Proc. 7.3(b)(2) (2020) ("the court . . . must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the defendant is unable to pay the imposed monetary condition."). *See also Nat'l Conf. of State Leg.*, *supra*, at 2 (noting that in 2017, four states enacted laws requiring prompt bail hearing if a defendant remained incarcerated because of an inability to afford the bail amount).

In jurisdictions that continue to rely on money bail, indigent detainees have successfully challenged the imposition of bail without consideration of their ability to pay. *See, e.g.*, *ODonnell v. Harris County*, 251 F. Supp.3d 1052 (S.D. Tex. 2017), *aff'd as modified*, 892 F.3d 147 (5th Cir. 2018); *Daves v. Dallas County*, 341 F. Supp.3d 688 (N.D. Tex. 2018), *appeal pending,* No. 18-11368 (5th Cir. Oct.

23, 2018); *Shultz v. Alabama*, 330 F. Supp.3d 1344, 1365 (N.D. Ala. 2018), *appeal pending sub nom. Hester v. Gentry*, No. 18-13894 (11th Cir. Sept. 13, 2018).

c. Experience Shows That, Even Without Money Bail, Defendants Continue to Appear for Court and Avoid Rearrest.

Jurisdictions that have rejected money bail in pretrial criminal matters have seen no increase in the rates of flight or pretrial arrest for a new offense. This is validated by studies from jurisdictions around the country, including from within this Circuit.

A recent study of Philadelphia's "No-Cash-Bail" policy, for instance, found that for low-risk defendants, eliminating monetary bail did not reduce appearance rates or increase rates of pretrial rearrest. Aurelie Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors* 30 (2020). Under the policy, Philadelphia's district attorney announced that his office would not request money bail in nearly two-thirds of all cases filed in the city, including for misdemeanors and some nonviolent felonies. *Id*. at 3. Though the policy did not meaningfully reduce rates of pretrial detention, it sharply increased the percentage of defendants released without monetary conditions or supervision. *Id*. Comparing the rates of rearrest between defendants released on recognizance and similarly-situated defendants released on monetary bail with supervision, researchers analyzing Philadelphia's policy found that reduced reliance on money bail did not impact public safety. *Id.* at 26. Researchers also found that money bail made no

meaningful difference in appearance rates: even without it, the vast majority of defendants continued to appear in court. *Id.*at 27.

Similarly, in 2017, New Jersey enacted sweeping criminal justice reforms that essentially eliminated the use of money as a condition of pretrial release. *See* N.J. Judiciary, *Report to the Governor and the Legislature* 7 (2018) (hereinafter *NJ Report to the Governor*) (noting that in 2018, only 102 defendants were ordered to post money bail out of a total 44,383 eligible defendants). As a result of the reforms, the number of defendants released after arrest without initial pretrial detention jumped from 54 percent in 2014 to 71 percent in 2017. *Id.* at 11. Despite the dramatic increase in the number of defendants being released without going to jail and having to post bail, New Jersey experienced almost no change in the rates of appearance or pretrial rearrest. *Id.* at 12-15.

The experiences of Philadelphia and New Jersey are echoed in jurisdictions around the country. *See*, *e.g.*, Pretrial Justice Inst., *Outcomes from the Smart Pretrial Initiative* 5 (2017) (noting that Denver, Colorado maintained high public safety rates after implementing reforms that resulted in a nine-fold increase in the number of felony defendants released on personal recognizance); Pretrial Servs. Agency for D.C., *PSA's Risk Assessment Ensures Fair Administration of Pretrial Justice in the District of Columbia* 1 (2019) (hereinafter *PSA Risk Assessment*) (reporting that the District of Columbia releases over 90 percent of arrestees

without using a financial bond, approximately 87 percent of whom remain arrest free and 90 percent of whom make all scheduled court appearances); Cindy Redcross et al., *Evaluation of Pretrial Justice System Reforms That Use The Public Safety Assessment* 14, 27-29 (MDRC 2019) (reporting that Mecklenburg, North Carolina increased the number of defendants released on recognizance by more than 20 percent without experiencing a corresponding increase in the rates of pretrial flight or arrest); Cnty. Of Santa Clara Bail and Release Work Group, *Final Consensus Report on Optimal Justice* 32 (2016) (noting that Santa Clara County achieved a failure to appear rate of less than 5 percent for defendants released on recognizance or supervision).

Simply put, there is no reliable data demonstrating that money bail improves appearance rates or public safety. *See* Lauryn P. Gouldin, *Disentangling Flight Risk From Dangerousness,* 2016 BYU L. Rev. 837, 856-57 (2016) (citing Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and A Framework for American Pretrial Reform* 16, 91-92 (Nat'l Inst. Corr. 2014)). As one researcher has explained, there is "no evidence that money bail results in positive outcomes, such as increase in defendants' rate of appearance at court." Arpit Gupta et at., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. Legal Stud. 471, 475 (2016).

Courts considering challenges to money bail in the criminal pretrial context have relied on the body of empirically-validated evidence from around the country and found that unaffordable money bail is unrelated to preventing flight and protecting public safety. *See*, *e.g.*, *ODonnell*, 251 F. Supp. 3d at 1131 ("[t]he reliable credible evidence in the record from other jurisdictions shows that release on secured financial conditions does not assure better rates of appearance or law-abiding."); *Shultz,* 330 F. Supp. 3d at 1363 (recognizing that "[e]mpirical studies demonstrate that there is no statistically significant difference between the rates at which criminal defendants released on secured and unsecured bail are charged with new crimes."). This Court should do the same, and hold that the immigration court erred when it set a monetary condition of release for Mr. Ortega Campoverde without considering his ability to pay.

d. Money Bail is Not Only Ineffective, But It Disproportionately and Unfairly Impacts Minority Defendants.

Because of the correlation between wealth and race, the use of money bail "disproportionately harms Black and Latinx defendants." Colin Doyle et al., *Bail Reform A Guide for State and Local Policymakers* 7 (Harv. L. Sch. 2019). "[M]inority defendants fail to make bail at higher rates than their white counterparts and are consequently detained more often." Leslie & Pope, *supra*, at 531.

Racial bias within the bail-setting system intensifies this problem. Black and Latinx individuals are more likely to be charged with crimes in the first place, more likely than white defendants to be detained pretrial, and more likely to be assigned money bail as a condition of release. *Id.* at 550. *See also* Will Dobbie & Crystal Yang, *Proposals for Improving the U.S. Pretrial System* 15-16 (Hamilton Proj. 2019) ("there is evidence that among felony defendants …black defendants are 9 percentage points more likely to be detained pretrial compared to otherwise similar white defendants, and that black defendants are charged higher bail amounts than whites."); David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q. J. Econ. 1885, 1886 (2018) ("in our data, black defendants are 3.6 percentage points more likely to be assigned monetary bail"). When courts assign bail, they give Black and Latinx defendants bail amounts that are twice as high as those set for their white counterparts. Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial,* PRISON POLICY INITIATIVE (Oct. 9, 2019).

Criminal pretrial detention, including detention for failure to pay bond, carries serious adverse consequences that poor and minority defendants disproportionately endure. Studies overwhelmingly show that pretrial detention, even for a few days, can have a destabilizing and detrimental impact on people accused of crimes. *See* Doyle et al., *supra*, at 8 (documenting the attendant harms of pretrial detention). *See also* Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and*

Lasting Effects of Pretrial Detention 2 (Vera Inst. Justice 2019) (describing the growing body of research demonstrating that even limited pretrial detention can negatively impact defendants' lives and case outcomes). Individuals who are incarcerated solely because they cannot afford to post bail risk losing their jobs, their homes, and custody of their children. Doyle et al., *supra*, at 8. Even years later, people who were detained pretrial suffer from lower rates of employment and lower average income than people who were released pretrial. Will Dobbie, et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201, 227 (2018).

Fifty years of empirically-validated research in criminal pretrial detention also demonstrates that people who cannot afford to post bail suffer worse case outcomes, even when controlling for criminal histories and charges. *See* Leslie & Pope, *supra*, at 529 ("[w]e find that being detained increases the probability of conviction by 13 percentage points for felony defendants."); Megan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment*, 25 Crim. Justice Pol. Rev. 59, 69 (2014) (a "decision to detain a defendant pretrial may be, in effect, a decision to convict"); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641, 655 (1964) ("a causal relationship exists between detention and unfavorable disposition"). Defendants who are detained during the pretrial period are more likely to be convicted and

experience harsher sentences than non-detained defendants. *See* Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. Econ. & Org. 511, 513 (2016) (finding that pretrial detention leads to a 42 percent increase in sentence length); Leslie & Pope, *supra*, at 529, 546 (finding that pretrial detention increases the likelihood of conviction and "the minimum sentence length for felony defendants by over 150 days."); Dobbie et al., *The Effects of Pretrial Detention*, *supra*, at 225 (finding that "initially released defendants are significantly less likely to be found guilty of an offense, to plead guilty to a charge, and to be incarcerated following case disposition.").

Researchers attribute the disparate case outcomes to the different bargaining positions that detained and non-detained defendants find themselves in. *See* Dobbie et al., *The Effects of Pretrial Detention*, *supra*, at 234. A defendant who is incarcerated pretrial "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 533 (1972). The challenge of mounting a defense, combined with the toll of incarceration, incentivizes individuals to plead guilty simply to get out of jail, regardless of the merits of their case. Leslie & Pope, *supra*, at 530.

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Evidence from around the country demonstrates that money bond is both ineffective in addressing danger and flight risk, and harmful to defendants' lives and case outcomes.

II. The Criminal Pretrial System Teaches that Immigration Judges Can Successfully Manage Concerns About the Risk of Flight or Danger with Nonmonetary Conditions of Release.

The criminal pretrial system demonstrates that nonmonetary alternatives to detention, which range from a simple promise to appear in court to more significant supervision, can effectively address an immigration judge's concerns about danger or flight risk. The criminal system frequently uses the following types and categories of alternative release conditions, often in combination with one another:

a. Release on recognizance or unsecured appearance bonds;

b. Low cost interventions such as reminder calls; and

c. Electronic monitoring and intensive pretrial supervised release programs.

Data from jurisdictions that have reformed their criminal pretrial practices show that alternatives to detention offer a more effective and tailored approach than money bail for managing risk of flight or danger, even for individuals who pose a higher risk. The Court should draw from the experience of the pretrial system and hold that the immigration judge here erred in failing to consider alternatives to Mr. Ortega Campoverde's immigration detention.

a. Experience From the Criminal Pretrial System Demonstrates That Supervised Release Can Effectively Mitigate the Risk of Flight or Danger Even for High Risk Defendants.

Research from the criminal system validates the effectiveness of flexible pretrial supervision programs in achieving the same purpose for which bail is intended. For example, a study of the newly reformed pretrial system in Orange County, California found that defendants subject to supervised release were 43 percent less likely to fail to appear than similarly-situated defendants released on cash bond. Matt Barno et al., *Exploring Alternatives to Cash Bail: An Evaluation of Orange County's Pretrial Assessment and Release Supervision (PARS) Program*, 45 Am. J. Crim. Justice 363, 373 (2019). Similar results were observed in Santa Clara County, California, which increased the number of defendants released on nonmonetary conditions while maintaining high rates of appearance and public safety. *See* Doyle et al., *supra*, at 62. Between 2013 and 2016, Santa Clara County reported that 95 percent of defendants released on their own recognizance or under supervision appeared for their hearings, and 99 percent avoided rearrests. *Id.* at 62-63.

These results mirror the experiences of the federal pretrial system and jurisdictions like New York City; Yakima County, Washington; New Jersey; and Washington D.C., each of which has successfully employed alternatives to detention to mitigate the risk of flight or re-offense, even for moderate and high-

risk defendants. *See* Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* 3, 13 (Arnold Found. 2013) (noting that in the federal pretrial system, supervision increased appearance rates for moderate and high risk defendants, independent of money bail); Aubrey Fox & Steven Koppel, *Pretrial Release Without Money: New York City, 1987- 2018* 6, 9 (N.Y.C. Crim. Justice Agency 2019) (noting that the use of money bail decreased by 25 percent as the court-appearance rate remained high); Claire M. B. Brooker, *Yakima County, Washington Pretrial Justice System Improvements: Pre- and Post-Implementation Analysis* 16 (Pretrial Justice Inst. 2017) (reporting that reforms resulted in a 20 percent increase in the number of defendants released subject to nonmonetary conditions but no statistically significant change in public safety or court appearances); *NJ Report to the Governor*, *supra*, at 12-15 (New Jersey dramatically reduced the number of defendants subject to pretrial detention but saw no change in rates of failure to appear or rearrests); Pretrial Servs. Agency for D.C., *Congressional Budget Justification and Performance Budget Request Fiscal Year 2019* 27 (2018) (hereinafter *Congressional Budget Justification*) (reporting that in 2017, 90 percent of defendants were released on nonmonetary conditions, 86 percent remained arrest free, and 88 percent made all scheduled court appearances).

b. Low-Cost, Tailored Alternatives Are Effective in Ensuring that Pretrial Detainees Appear for their Proceedings.

Criminal pretrial systems that have rejected money bail have turned to low-cost pretrial interventions that are designed to address the actual reasons criminal defendants fail to appear for hearings. An individual's failure to appear is rarely motivated by a willful intent to abscond. More often, it is the result of factors that create barriers to compliance, such as the inability to miss work, lack of childcare, or lack of reliable transportation. *See* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 729-730 (2018) (enumerating a host of reasons that defendants fail to appear and distinguishing between those who actively shirk their obligations and those who inadvertently miss their hearings). Pretrial systems that address these factors enable individuals to appear for criminal proceedings, with far better results than money bail.

If failure to appear is not a conscious choice, then incentivizing compliance, as money bail is designed to do, will not achieve the desired result. *See*, *e.g.*, Brice Cooke et al., *Using Behavioral Science to Improve Criminal Justice Outcomes* 2 (U. Chi. Urban Lab 2018) (arguing that deterrence-based policies are only effective if people consciously weigh the costs and benefits before choosing a particular course of action); Ouss & Stevenson, *supra*, at 28-29 (arguing that inattention is one explanation for failures to appear, and cannot be improved with incentives). Rather, to meaningfully prevent failure to appear, pretrial interventions must

reduce barriers to attendance. *See* Cooke et al.*, supra*, at 2 (finding that behavioral interventions significantly reduced rates of failure to appear in New York City).

Experience from the pretrial system illustrates the effectiveness of low-cost interventions designed to address the actual causes of failure to appear. Examples include telephonic and text message reminders of upcoming court dates, making information about future hearings more accessible to defendants, and engaging broader community networks. For example, researchers in New York City found that redesigning the city's summons to more prominently display the next hearing date and the consequences of failing to appear reduced the rates of failure to appear by 13 percent. *Id.* at 15.

Studies have also demonstrated that reminding defendants of upcoming court dates can materially reduce failures to appear. *See* Pretrial Justice Ctr. for Courts, *Use of Court Date Reminder Notices to Improve Court Appearance Rates* 1 (2017) (hereinafter *Use of Court Date Reminder*) (providing data from numerous jurisdictions which successfully adopted court date reminder systems to improve appearance rates). Researchers in New York City observed a 25 percent decrease in failures to appear when they paired the redesigned summons with text message reminders that contained information about the date, time, and location of the defendant's next hearing. Cooke et al., *supra*, at 15. States like Arizona, Kentucky, and Nebraska as well as localities like Coconino County, Arizona, Philadelphia,

Pennsylvania, and King County, Washington, have all also adopted court date reminder programs and experienced reduced rates of failure to appear. *Use of Court Date Reminder*, *supra*, at 2-4. Research from these jurisdictions suggest that "phone-call reminders can increase appearance rates by as much as 42% and mail reminders can increase appearance rates by as much as 33%." Megan Stevenson & Sandra Mayson, *Pretrial Detention and Bail* in Reforming Criminal Justice 21, 33 (Erik Luna ed., 2017).

Empirical evidence from the criminal pretrial context demonstrates that pretrial interventions designed to address the barriers that actually prevent defendants from attending court proceedings are more effective than money bail at ensuring their appearance.

c. Model Jurisdictions Demonstrate That Alternatives to Detention Can Supplant the Use of Money Bail.

By embracing empirically-validated nonmonetary alternatives to detention, jurisdictions like New Jersey and Washington D.C. have effectively eliminated the use of money bail in their pretrial criminal systems.[1]

[1] Many jurisdictions, including model jurisdictions discussed below, employ pretrial risk assessment tools before setting conditions of release in order to assess the likelihood that a defendant will be rearrested or abscond during the pretrial period. Amici contend that risk assessment tools can exacerbate racial and social disparities and thus should never be the sole determinants of detention or significantly restrictive release conditions.

In 2017, **New Jersey** enacted comprehensive criminal justice reform legislation that aims to balance an individual's right to liberty with the State's responsibility for ensuring public safety. *NJ Report to the Governor*, *supra*, at 1. Under the reforms, judicial officers classify defendants based on their risk of pretrial arrest and flight. *Id.* at 3. Low risk defendants are released into the community subject to pretrial monitoring. *Id.* Such monitoring may include telephonic or in person check-ins with pretrial services or, in some cases, electronic monitoring. *Id.* at 32. Money bail is rarely set as a condition of release and in 2018, less than 1 percent of defendants were required to post a cash bail. *Id.* at 7.

Since enacting the reform measures, New Jersey has significantly increased the number of defendants released pretrial, including the number of defendants released without conditions. In 2018, 93.5 percent of defendants were released pretrial and nearly 70 percent were released without first being detained. *Id.* at 8. Even with the rising rates of pretrial release and the limited use of money bail, New Jersey did not experience a material change in the rates of pretrial arrest or flight. *Id.* at 15. Before and after the reforms, the appearance rate has remained steadily above 89 percent, and the rate of new criminal activity rose by only two percent. *Id*. at 13-14. Researchers attribute this marginal increase to difficulties collecting and comparing data sets from before and after the reforms were enacted,

and argue that they do not reflect a meaningful change in rates of pretrial arrest. *Id*. at 13.

Washington, D.C. has employed a pretrial service program since it was authorized by the U.S. Congress in 1967. The D.C. Pretrial Service Agency (PSA) provides comprehensive services, including risk assessment and release recommendations, release monitoring, and drug testing programs. *Congressional Budget Justification*, *supra*, at 1. The guiding principle of the PSA is a D.C. bail statute that emphasizes the use of the least restrictive release conditions for pretrial defendants and a prohibition on wealth-based detention. *Id*. To successfully achieve its purpose, the PSA evaluates the likelihood a defendant will appear at his or her next hearing without a new arrest and sets conditions relative to the individual's risk. *Id.* at 19. Defendants who pose higher risk of pretrial arrest or failure to appear are subject to more restrictive conditions of release, while low-risk defendants are released without conditions or with only minimal supervision. *Id.* at 19-22. Money bail is rare and in 2019, over 90 percent of arrestees in D.C. were released without using a financial condition. *PSA Risk Assessment*, *supra*, at 1.

The PSA has been successful even without the use of money bail. Each year, the PSA is responsible for over 17,000 defendants, and on any given day the PSA supervises an average of 4,780 defendants. *Congressional Budget Justification*,

supra, at 1. In 2017, the last year for which comprehensive data is available, the PSA reported an 86 percent arrest-free rate among all released defendants. *Id.* at 27. When the sample was reduced to defendants accused of violent crimes, the PSA reported a 99 percent arrest-free rate. *Id.* The PSA reported similarly low rates of rearrests between 2013 and 2016. *Id.* In addition to mitigating the risk of rearrest, the PSA successfully utilizes nonmonetary conditions of release to ensure defendants appear for future court dates. Indeed, in 2017, 88 percent of defendants made all scheduled court appearances. *Id*. at 27.

Evidence from these model jurisdictions illustrates the availability and utility of alternatives to monetary bail for mitigating concerns about the risk of flight and danger to the community.

III. The Immigration System Lags Far Behind the Pretrial System by Imposing Detention Without Connection to an Individual's Ability to Pay Bond.

Despite the mountain of evidence disproving the utility of money bail, the immigration system has steadily increased its use of detention and money bail. In Fiscal Year 2019, Immigrations and Customs Enforcement (ICE) reported that on any given day, approximately 50,000 people were in ICE custody. U.S. ICE, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report* 5 (2019). This is a 20 percent increase from the previous fiscal year and is nearly double the number of people who were in

immigration custody in 2015. *Id.*; Katharina Bucholz, *Number of Immigrant Detainees Rises Quickly*, STATISTA (Jan. 3, 2020).

As the detained population has grown, immigration judges have increased their reliance on money bond. In Fiscal Year 2018, the median bond amount set by immigration judges across the country was $7,500, a 50 percent increase from five years earlier. *Three-Fold Difference in Immigration Bond Amounts By Court Location*, TRAC IMMIGRATION (July 2, 2018). Of the immigrants granted bond, nearly 40 percent had bond set at $10,000 or more. *Id.* Only one percent of immigrants were released from custody without a financial condition. *Id.*

The immigration system's reliance on money bail, as in Mr. Ortega Campoverde's case, is irrational and ignores evidence-based best practices.

a. Immigration Detention Based on an Inability to Pay Harms Detainees and Undermines Public Safety.

The unnecessary detention of indigent individuals like Mr. Ortega Campoverde increases the likelihood that they will lose their cases. Immigration detention impedes access to counsel, which impairs case outcomes unrelated to the merits. A comprehensive study of immigration court proceedings found that access to counsel is a determinative factor of success in removal proceedings, but detained immigrants are far less likely than their non-detained counterparts to secure representation. Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32, 49 (2015). In fact, only 14

percent of detained noncitizens have counsel, compared with 66 percent of those who are not detained. *Id.* at 32. Among noncitizens who are detained, those with counsel are ten-and-a-half times more likely than those without to win their cases. *Id.* at 49.

In addition to harming case outcomes, the immigration system's over-reliance on money bail—without considering ability to pay or alternative conditions of release—may undermine the stated goals of detention. Studies have shown that defendants who were subject to pretrial detention were more likely to reoffend than defendants who were released during the pretrial period. *See* Dobbie et al., *The Effects of Pretrial Detention*, *supra*, at 227 (finding that that though pretrial detention prevented criminal activity while the defendant's case was pending, it increased the likelihood of arrest on new charges after adjudication); Leslie & Pope, *supra*, at 550 (finding that "individuals who are detained pretrial are more likely to be rearrested after their cases are resolved."). Researchers suggest that harsh prison conditions, negative peer effects, and the economic impact of pretrial detention, including job loss and reduced earnings, contribute to the increased rates of rearrest among defendants subject to pretrial detention. Dobbie et al., *The Effects of Pretrial Detention, supra,* at 234-35.

Whether in the pretrial or immigration context, detention is associated with negative case outcomes and long-term harm to the detainee.

b. Immigration Judges Should Use Alternatives to Detention Similar to Those in the Criminal Pretrial Context.

When considering Mr. Ortega Campoverde's case, the immigration court should have considered a number of low-cost alternatives to detention similar to those available in the criminal pretrial context, including release on recognizance and phone or in-person supervision. *See* Am. Immig. Council, *Seeking Release from Immigration Detention* 2 (2019) (describing that at a bond redetermination hearing the immigration judge determines whether the noncitizen is eligible for release and if so, whether to release them on recognizance, bond, or other conditions). *See also* Audrey Singer, Cong. Research Serv. R 45804, *Immigration: Alternative to Detention (ATD) Programs* 5 (2019) (describing ICE's supervision program).

Before setting conditions of release, immigration judges consider a number of factors, including a noncitizen's community ties and arrest history, in order to assess whether the noncitizen poses a flight risk or is a danger to the community. *See Matter of Guerra*, 24 I. & N. Dec 37, 40 (B.I.A. 2006) ("Immigration Judges may look to a number of factors in determining whether an alien merits release from bond, as well as the amount of bond that is appropriate."). Experience from the criminal pretrial system demonstrates that immigration judges can mitigate concerns about risks of flight or arrest by employing nonmonetary conditions of release. Research about the use of such alternatives in the immigration context has

found that they work to address flight risk. The Government Accountability Office (GAO) found, for example, that immigrants subject to supervised release had appearance rates of more than 90 percent. Audrey Singer, *supra*, at 9.

Particularly given the proven effectiveness of alternatives to detention, the Court should require the immigration judge to consider such alternatives in Mr. Ortega Campoverde's case.

CONCLUSION

Consistent with modern, empirically-validated practices in the pretrial context, the Court should reverse the district court and find that the immigration judge erred in failing to consider Mr. Ortega Campoverde's ability to pay bail and in refusing to consider alternatives to detention.

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Respectfully submitted,

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COMBINED CERTIFICATIONS

1. Pursuant to Third Circuit Local Appellate Rule 28.3(d), the undersigned certifies that the attorney signing this brief is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.
2. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), the undersigned certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5), because this brief contains 6,327 words, excluding the parts of the brief exempted by the Federal Rules of Appellate Procedure.
3. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010, and is set in 14-point Times New Roman type.
4. Pursuant to Third Circuit Local Appellate Rule 31.1(c), the undersigned certifies that this brief as provided to the Court in electronic form includes the same text as the paper copies of the brief filed with the Court. The undersigned further certifies that this brief has been checked for viruses prior to electronic submission and that no virus was detected. The virus detection program utilized was ESET Endpoint Antivirus.

5. Pursuant to Third Circuit Local Appellate Rule 31.1(a), the undersigned certifies that an original and six copies of the foregoing brief will be submitted to the Court within five days of this filing by Federal Express.
6. Pursuant to Third Circuit Local Appellate Rule 31.1(a), the undersigned certifies that a copy of the foregoing brief was served upon all counsel of record via the Court's ECF system on July 17, 2020.

Dated: July 17, 2020

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