No. 15-1204

IN THE

Supreme Court of the United States

DAVID JENNINGS, ET AL.,
Petitioners,

v.

ALEJANDRO RODRIGUEZ, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for The Ninth Circuit

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS FIRST AND INTERNATIONAL LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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Human Rights First is a non-governmental organization established in 1978 that works to ensure U.S. leadership on human rights globally and compliance domestically with this country's human rights commitments. Human Rights First operates one of the largest programs for *pro bono* legal representation of refugees, working in partnership with volunteer lawyers at leading law firms to provide legal representation without charge to thousands of indigent asylum applicants, including some detained in immigration detention facilities across the United States. Human Rights First has conducted research, issued reports and provided recommendations to the United States Government regarding compliance with its legal obligations under international law with respect to its use of immigration detention.

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[1] The parties have consented in writing to the participation of *amici*. Their written consents have been filed with the Clerk of the Court. No party in this case authored this brief in whole or in part, or made any monetary contribution to its preparation and submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This *amicus* brief addresses the obligation of U.S. courts to construe federal statutes, including the Immigration and Nationality Act (INA), in a manner consistent with the nation's obligations under binding treaties and customary international law. This has been an established canon of statutory construction since *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Applying that canon here, this Court should avoid an interpretation of the INA that allows for prolonged detention without an individualized determination by a court, independent of the detaining authorities and capable of ordering release, that detention is reasonable, necessary and proportionate under the facts of the particular case.

Pursuant to treaties, such as the International Covenant on Civil and Political Rights ("ICCPR"), and customary international law, the United States must protect individuals' right to liberty. It may not detain any person arbitrarily and must provide certain safeguards to ensure that arbitrary detention does not occur. These protections apply to asylum seekers and other individuals held in U.S. immigration detention. In particular, the United States must provide for review by a court of each individual's detention and the detention should be subject to periodic review as it continues. The Government must show the reviewing court that the particular individual's detention is reasonable, necessary and proportionate in the circumstances of the individual's case, and the detention must be subject to periodic reevaluation in which the Government must demonstrate that detention remains reasonable, necessary and proportionate as it becomes more prolonged.

The Government's interpretation of the INA cannot be squared with the United States' treaty obligations and the requirements of customary international law. According to the Government, the INA authorizes the prolonged detention of non-citizens while denying them access to an individualized immigration court custody hearing. The Government's interpretation, in short, would deny to large groups of asylum seekers and other non-citizens the rights and safeguards that the United States is obligated to provide under the ICCPR, other international treaties and customary international law.

These considerations provide further reason why this Court should reject the Government's construction of the INA and should affirm the Court of Appeals' decision.

I. The INA Should Be Interpreted Consistently with U.S. Treaty Obligations and Customary International Human Rights Law

Since the earliest days of the republic, this Court has recognized that domestic statutes must be read in light of this nation's binding obligations under international law. *See*, *e.g.*, *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801). "It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804),] that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (internal quotation marks and citation omitted); *accord F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 178 n.35 (1993);

Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) [hereinafter Restatement (Third)]. Under these precedents, the INA should be interpreted so as not to conflict with the Government's obligations under international law.

The United States is bound by two sources of international law: (1) treaties to which the United States is a party, and (2) norms and practices that are so widespread as to become customary international law. Restatement (Third) § 102. Under *Charming Betsy* and its progeny, this Court must consider both of these sources when interpreting statutes that implicate the Government's obligations under international law. *See Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884) (interpreting a statute so as not to violate terms of treaty); *Charming Betsy*, 2 Cranch at 118 (interpreting a statute so as not to violate "the law of nations").

The Government's practice of detaining non-citizens under §§ 1225(b) and 1226(c) of the INA for potentially prolonged duration without access to immigration court review is at odds with the ICCPR, a multilateral treaty that the United States has ratified without relevant reservation. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; 138 Cong. Rec. 8070-71 (1992). As discussed below, Article 9(1) of the ICCPR prohibits "arbitrary arrest or detention." In addition, Article 9(4) of the ICCPR provides that anyone deprived of liberty by arrest or detention "shall be entitled to take proceedings before a court." Pursuant to executive order, it is the Government's "policy and practice . . . fully to respect and implement its obligations under the international

human rights treaties to which it is a party, including the ICCPR." *Implementation of Human Rights Treaties*, Executive Order No. 13107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).[2]

Other international instruments guarantee non-citizens rights that are similar to and complement those in ICCPR Article 9. The American Declaration of the Rights and Duties of Man ("American Declaration") provides in Article XXV that "[e]very individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court."[3] And the United Nations

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[2] Although, as this Court has acknowledged, the ICCPR is "not self-executing," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004), *i.e.*, it is not directly enforceable in a private right of action in domestic courts absent enabling legislation, Restatement (Third) § 111(4) cmt. c, it nonetheless "bind[s] the United States as a matter of international law," *Sosa*, 542 U.S. at 735; *see* Restatement (Third) § 111 cmt. h. Accordingly, it is a source of binding obligations when construing a federal statute. *See Chew Heong*, 112 U.S. at 548-50; *Ma v. Ashcroft*, 257 F.3d 1095, 1114-115 (9th Cir. 2001) (construing 8 U.S.C. § 1231(a)(6) as requiring a reasonable time limitation on immigration detentions to avoid conflict with ICCPR); Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 Fordham Int'l L.J. 243, 280-21 (2013) ("Regardless of their direct domestic effect, the United States is bound by the treaties that underlie the international human rights standards relating to immigration detention and thus has an international obligation to comply with those standards.").

[3] *See* art. XXV, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. LV/I. 4 Rev. (1965) [hereinafter American Declaration] (prohibiting arbitrary deprivations of liberty and requiring review of detentions "without delay by a court"). Although the American Declaration is not a binding treaty, it is a source of legal obligation for every member of the Organization of American States (OAS), and the United States is a member of

Convention Relating to the Status of Refugees ("Refugee Convention") provides that the United States "shall not impose penalties" on arriving refugees "on account of their illegal entry or presence" in the country or restrict "the movements of such refugees" unless such restriction is "necessary." *See* United Nations Convention Relating to the Status of Refugees art. 31, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]. Articles 2 through 34 of the Refugee Convention became binding on the United States through our accession to the United Nations Protocol Relating to the Status of Refugees ("Refugee Protocol"). *See* United Nations Protocol Relating to the Status of Refugees art. 1 ¶ 1, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The Refugee Convention and Protocol are discussed in detail in the *amicus* brief of the United Nations High Commissioner for Refugees ("UNHCR").

The rights secured by Article 9 of the ICCPR and similar treaties are also fundamental rights under customary international law. Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) §§ 102(2), 701(b). Evidence of its content includes "the customs and usages of civilized nations," "the works of jurists and commentators," *The Paquete Habana*, 175 U.S. 677, 700 (1900), and international agreements

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the OAS. *See* Gilman, *supra* note 2, at 282 ("Through its membership in the OAS and ratification of the legally binding OAS Charter, the United States accepted binding obligations to protect the human rights set forth in the American Declaration. While the United States questions the exact nature of its obligations, . . . the government acknowledges that the American Declaration does serve as a source of obligation.").

that "are intended for adherence by states generally and are in fact widely accepted," Restatement (Third) § 102(3). Commentators and courts alike have described the requirement of court review and the prohibition against arbitrary detention as binding international norms. *See id.* § 702(e) cmt. h; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 172-73 (2d ed. 2005); *see also, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 240 n.3 (2d Cir. 1995) (policy of prolonged arbitrary detention is a violation of international law); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."); Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* (2011). Indeed, these requirements are part of every major international human rights agreement.[4]

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[4] *See, e.g.,* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 16(4), (8), *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003) [hereinafter Convention on Migrants' Rights]; Convention on the Rights of the Child art. 37, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Convention on Children's Rights]; African (Banjul) Charter on Human and Peoples' Rights art. 6, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter]; American Convention on Human Rights art. 7(6), Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(4), Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter European Convention]; G.A. Res. 43/173, annex, Body of Principles for the Protection of All

This Court should avoid an interpretation of the INA that would violate the Government's treaty obligations and its obligations under customary international law.

II. U.S. Treaty Obligations Require Individualized and Periodic Assessment of Whether Detention is Arbitrary

U.S. treaty and customary international law obligations prohibit states from subjecting any person to arbitrary detention. Consistent with that prohibition, states may detain a person only after establishing, on a case-by-case basis, that detention is reasonable, necessary and proportionate under the particular individual's circumstances. The related requirements relating to court review of immigration detention are outlined in Section III below. Where detention is initially upheld, the Government must ensure that detention does not become arbitrary over time. To avoid that possibility, the detention must be subject to periodic review to ensure that it remains reasonable, necessary and proportionate. The Government's position runs counter to these obligations.

A. The Government Must Provide for an Individualized Determination That a Non-Citizen's Detention Is Reasonable, Necessary and Proportionate

Article 9(1) of the ICCPR provides that every person "has the right to liberty" and "[n]o one shall be

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Persons Under Any Form of Detention or Imprisonment, at Principle 11 (Dec. 9, 1988); G.A. Res. 217 A (III), Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration].

subjected to *arbitrary* arrest or detention." ICCPR art. 9(1) (emphasis added). The American Declaration similarly provides, in Articles I and XXV, that all persons have the right to liberty and that unlawful or arbitrary detention is prohibited. American Declaration arts. I, XXV. The prohibition against arbitrary detention "is recognized in all major international and regional instruments for the promotion and protection of human rights,"[5] and it has been "widely enshrined in national constitutions and legislation." U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/22/44, ¶¶ 42, 43 (Dec. 24, 2012) [hereinafter 2012 Arbitrary Detention Report]. The "widespread ratification of international treaty law on arbitrary deprivation of liberty, as well as the widespread translation of the prohibition into national laws, constitute a near universal State practice evidencing the customary nature" of the prohibition. *Id.* ¶ 43.

This prohibition against arbitrary detention is applicable to state practices relating to immigration. As the U.N. Human Rights Committee, which supervises and monitors the implementation of ICCPR obligations, has explained, Article 9(1) of the ICCPR applies to all deprivations of liberty, including those related to immigration control. U.N. Human Rights Comm., General Comment No. 35: Article 9 (Liberty and Security of Person), U.N. Doc. CCPR/C/GC/35, ¶¶ 3, 12, 18 (Dec. 16, 2014) [hereinafter HRC General Comment No. 35]. The rights espoused in the ICCPR "must be guaranteed

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[5] *E.g.*, African Charter art. 6; American Convention art. 7(3); European Convention art. 5; Universal Declaration art. 9.

without discrimination between citizens and aliens." U.N. Human Rights Comm., General Comment No. 15: The Position of Aliens Under the Covenant, ¶ 2 (Sept. 30, 1986) [hereinafter HRC General Comment No. 15]; *accord* U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, ¶ 10 (May 26, 2004) [hereinafter HRC General Comment No. 31] (stating that Covenant rights must be available "to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons"). Parties to the ICCPR, such as the United States, must also ensure "in their legislation and in practice" that immigrants are not denied their right to be free from arbitrary detention. *See* HRC General Comment No. 15, ¶ 4.

Detention is arbitrary if it is not "reasonable, necessary and proportionate in the light of the circumstances." HRC General Comment No. 35, ¶ 18. In order to ensure that these requirements are met, the decision to detain a person "must consider relevant factors case by case." *Id.*; *see also A v. Australia*, Communication No. 560/1993, U.N. Human Rights Comm., ¶ 9.2, 9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997); François Crépeau (Special Rapporteur on the Human Rights of Migrants), Rep. of the Special Rapporteur on the Human Rights of Migrants, ¶ 53, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) [hereinafter Rapporteur's 2012 Report] ("States must take full account of individual circumstances" when considering whether to detain an immigrant or employ an alternative to detention). That decision must also take into account "all the circumstances" that bear on the

reasonableness, necessity and proportionality of detention. *Van Alphen v. Netherlands*, Communication No. 305/1988, U.N. Human Rights Comm., ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (July 23, 1990); *see also* HRC General Comment No. 35, ¶ 18.

The "necessity" principle allows states to resort to detention "only as a last available measure." U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1999/63, ¶ 78 (Dec. 18, 1998) [hereinafter 1998 Arbitrary Detention Report]. It also requires states to "take into account less invasive means of achieving the same ends" before resorting to detention. HRC General Comment No. 35, ¶ 18; *accord C. v. Australia*, Communication No. 900/1999, U.N. Human Rights Comm., ¶ 8.2, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2002). A determination that detention is necessary to protect the public or prevent flight requires "case by case" consideration of "less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions."[6] HRC General Comment No. 35,

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[6] As various international legal authorities and experts have explained, nations have numerous alternatives to detention that they can use to manage migration in ways that are consistent with international legal obligations. S*ee* Rapporteur's 2012 Report, ¶ 48 ("Research has found that over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and assistance. The alternatives have also proved to be considerably less expensive than detention . . . ."); U.N. High Comm'r for Refugees, *Detention Guidelines*, at Annex A (2012) [hereinafter UNHCR Detention Guidelines] (outlining various alternatives to detention); U.S. Conference of Catholic Bishops et al., *Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System* 28-

¶ 18. A "mandatory rule for a broad category" of individuals is impermissible. *Id.*; *accord A v. Australia*, ¶ 9.2 (noting that necessity must be determined in light of "all the circumstances of the case").

The Refugee Convention, as discussed in the U.N. High Commissioner for Refugee's *amicus* brief, provides that contracting states shall not impose restrictions on the movements of refugees "other than those which are necessary."[7] Refugee Convention art. 31(2); UNHCR Detention Guidelines, ¶¶ 21-30 (detailing, in the context of the detention of asylum

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29 (2015) (outlining use of alternatives to detention in the United States and their effectiveness in securing appearance for hearings and compliance with immigration appointments); Int'l Det. Coal., *There Are Alternatives* (2015) (outlining examples of alternatives used in the United States and many other countries and their effectiveness).

[7] As noted above, the United States has acceded to the Refugee Protocol, which provides that parties "undertake to apply articles 2 to 34 inclusive of the [Refugee] Convention to refugees." Refugee Protocol art. 1. Article 31's protections apply not only to asylum seekers who have come directly from territories where their life or freedom was threatened, but also to those who transited through other countries where they were unable to find effective protection. *See* UNHCR Detention Guidelines, ¶ 4; Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection* ¶ 103 (2001). The United States is also a member of the Executive Committee of UNHCR. In 1998, the UNHCR Executive Committee issued a formal conclusion deploring that countries detain asylum seekers "on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to . . . fair procedures for timely review of their detention status." Conclusions Adopted by the Executive Committee on International Protection of Refugees, No. 85 ¶ dd, U.N. GAOR, 49th Sess., Supp. No. 12A, U.N. Doc. A/53/12/Add.1 (1998).

seekers, the purposes for which initial detention may be "necessary" in an individual case)[8]; James C. Hathaway, *The Rights of Refugees Under International Law* 421-23 (2005) (Article 31(2)'s prohibition of "other than minimalist detention" to verify identity and circumstances of arrival enjoins states "from detaining refugees on the basis of general rules that authorize prolonged detention as a response to unauthorized entry"). The Convention also prohibits the use of detention as a penalty or sanction for illegal entry or presence in a country. *See* UNHCR Detention Guidelines, ¶¶ 11, 32 (discussing Article 31(1)'s prohibition on the use of detention to penalize asylum seekers); Goodwin-Gill, *supra* note 7, ¶¶ 108, 111 ("penalties" include "imprisonment, and other restrictions on freedom of movement"; penalizing those viewed as illegal entrants without regard to the circumstances of flight in each individual case amounts to a breach of state's obligation).

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[8] The UNHCR Detention Guidelines are issued in conjunction with Article 35 of the Refugee Convention, and "reflect the state of international law relating to detention – on immigration related grounds – of asylum-seekers and other persons seeking international protection." UNHCR Detention Guidelines, ¶ 4. This Court and others have found other UNHCR guidance helpful in interpreting international legal obligations. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987) (finding interpretative guidance in the "UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status" provides "significant guidance"); *Ins v. Aguirre-Aguirre*, 526 U.S. 415, 427-28 (1999) (declining to follow Handbook but recognizing it as a "useful interpretive aid"); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (relying on UNHCR's Guidelines to find that women may constitute a particular social group).

The "proportionality" principle requires states to balance the potential need for detention against the effect that detention will have on each particular detainee. As the UNHCR has explained, proportionality "requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights." UNHCR Detention Guidelines, ¶ 34. The principle also requires the state to balance the need for detention against the effect that detention will have on an individual detainee. *See* HRC General Comment No. 35, ¶ 18 (the individualized assessment should "take into account the effect of the detention on [an immigrant's] physical or mental health"). As detention becomes prolonged and a detainee's right to liberty is increasingly burdened, a heightened showing is needed to justify detention. *See* UNHCR Detention Guidelines, ¶ 44 ("The length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary.")

Assessing reasonableness, necessity and proportionality requires an individualized assessment of the unique circumstances concerning each non-citizen detainee. *See Velez Loor v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171 (Nov. 23, 2010); Inter-Am. Comm'n H.R., Rep. on Terrorism and Human Rights, OEA/Ser/L/V/II.116, doc. 5, rev. 1 corr., ¶ 409 (Oct. 22, 2002). For that reason, the Human Rights Committee has repeatedly found that a non-citizen's detention was arbitrary under Article 9(1) of the ICCPR where the state failed to justify the detention in light of the detainee's

particular circumstances. In *Kwok Yin Fong v. Australia*, for example, the Human Rights Committee concluded that Australia had violated Article 9(1) of the ICCPR where it put forward only "general reasons" to justify the prolonged detention of a non-citizen and failed to justify the detention based on "grounds particular to her case." *Fong v. Australia*, Communication No. 1442/2005, U.N. Human Rights Comm., ¶ 9.3, U.N. Doc. CCPR/C/97/D/1442/2005 (Nov. 23, 2009). Similarly, the Committee has found a violation of Article 9(1) where the state tried to justify an asylum seeker's prolonged detention on the ground that its "general experience" was that "asylum seekers abscond if not retained in custody." *Shafiq v. Australia*, Communication No. 1324/2004, U.N. Human Rights Comm., ¶ 7.3, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006).

The Government's interpretation of the INA is at odds with the United States' obligation to assess on a case-by-case basis whether an individual non-citizen's detention is reasonable, necessary and proportionate.[9]

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[9] The government contends that the only mechanism available to arriving asylum seekers to secure release from detention is through DHS's parole authority. Pet'rs Br. at 18. Various reports indicate that U.S. Immigration and Customs Enforcement's (ICE) detention and parole decisions for "arriving asylum seekers" have in many cases been inconsistent, arbitrary, and/or not actually based on assessments of the particular individual's circumstances, finding for instance that: ICE parole decisions for "arriving asylum seekers" often fail to actually involve assessments of the necessity of detention in each particular individual's case; ICE officers often fail to parole asylum seekers who meet the criteria detailed in ICE's own parole directive applicable to "arriving asylum seekers"; and these problems have worsened in recent years. *See* Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* 1-3, 13-

19 (2016) [hereinafter "HRF Report"] (describing failures to follow and inconsistencies in applying asylum parole policies now and in the past); Human Rights First, *Detention of Asylum Seekers in Georgia* (2016) [hereinafter "Georgia Report"] (describing near moratorium on parole for asylum seekers held in detention facilities located in Georgia); 1 U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal* 60-62 (2005) (finding, based on statistical analysis of government data, that asylum parole guidelines for "arriving" asylum seekers were "not being consistently applied" and that asylum seekers in some parts of the country were routinely released while asylum seekers in other parts of the country were rarely paroled).

As these reports indicate, in many cases parole decisions are not actually based on an individualized assessment, but instead on factors such as the availability of bed space in detention facilities, local ICE detention policies, and/or a desire to deter other asylum seekers from seeking asylum in the United States. *See* Georgia Report at 1, 4; HRF Report at 2-3, 14-17, 22-24, 30-31; *see also* U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection* 47-48 (2016) (parole bond rates reported based on availability of detention beds).

In July 2016, Human Rights First reported that arriving asylum seekers are denied parole and continue to be held in detention in some cases based on the fact that they initially arrived at a U.S. port of entry; in other cases officers have denied parole based on unexplained assertions that asylum seekers constitute a "flight risk" even when they have presented evidence of family or other community ties, or based on purported failures to sufficiently establish identity even when they have submitted considerable documentation establishing their identities. *See* HRF Report at 2-3, 13-19, 20-22. ICE acts in effect as "judge and jailer" in the absence of immigration court custody hearings, which the Government asserts are blocked by regulation. *See* 8 C.F.R. § 1003.19(h)(2)(i)(B); *see also* HRF Report at 23; Inter-Am. Comm'n H.R., Rep. on Immigration in the United States: Detention and Due Process, ¶ 137, OEA/Ser.L/V/II Doc. 78/10 (Dec. 30 2010) [hereinafter "Inter-American Commission 2010 Report"]. Such deficiencies, coupled with the lack of access to immigration court custody hearings, lead to the detention of

B. Periodic Review Is Necessary to Ensure That Detention Does Not Become Arbitrary Over Time

The prohibition against arbitrary detention also requires that any detention decision be subject to periodic review. This is necessary because considerations of reasonableness, necessity and proportionality may change over time as detention becomes increasingly prolonged. As the Human Rights Committee has said, "every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention can be assessed." *A v. Australia*, ¶ 9.4; *accord Neptune v. Haiti*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 108 (May 6, 2008) (states "must periodically assess whether the reasons and purposes that justified the deprivation of liberty remain, whether the preventive measure is still absolutely necessary to achieve these purposes, and whether it is proportionate"); HRC General Comment No. 35, ¶ 18 (stating that the determination that detention is justified as reasonable, necessary and proportionate "must be subject to periodic re-evaluation and judicial review"); Office of the U.N. High Comm'r on Human Rights, Recommended Principles and Guidelines on Human Rights at International Borders, U.N. Doc. A/69/CRP. 1, at 19 (July 23, 2014) (states should "periodically review the necessity and proportionality of continued detention").

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many asylum seekers for prolonged periods of time that are not reasonable, necessary or proportionate. *See* HRF Report at 2, 23-24.

Periodic review is necessary to prevent arbitrary detention since "detention should not continue beyond the period for which the State can provide appropriate justification." *A v. Australia*, ¶ 9.4; *accord* HRC General Comment No. 35, ¶ 12 ("[T]he decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention."); Rapporteur's 2012 Report, ¶ 21. Without periodic review, states would be unable to meet their obligation to ensure that "detention does not last longer than absolutely necessary." *See* HRC General Comment No. 35, ¶ 15.

The UN Human Rights Committee has specifically expressed concern that the United States' use of mandatory detention that results in non-citizens being detained "for prolonged periods of time without regard to the individual case" raises concerns under Article 9 of the ICCPR. U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4, ¶ 15 (Apr. 23, 2014).

The Government carries the burden of providing "appropriate justification" for continued detention and ensuring that detention does not last longer than necessary. *See A v. Australia*, ¶ 9.4. As the U.N. Working Group on Arbitrary Detention has explained, government authorities "shall establish" that "detention is justified in accordance with the principles of necessity, reasonableness and proportionality." U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/30/37, ¶ 83 (July 6, 2015); *accord* UNHCR Detention Guidelines, ¶ 47(v)

("The burden of proof to establish the lawfulness of the detention rests on the authorities in question.").

The Government's interpretation of the INA disregards the United States' obligation under the ICCPR to provide for periodic review of detention to ensure that it remains reasonable, necessary and proportionate under the particular circumstances applicable to each non-citizen detainee.

III. The United States Has an Obligation Under the ICCPR and International Law to Provide Court Review of All Detentions

Under international law, the Government is required to provide all asylum seekers and other non-citizens with court review of the propriety of their detention. ICCPR Article 9(4) provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

This "important guarantee" applies "to all persons deprived of liberty," including those in immigration detention. HRC General Comment No. 35, ¶¶ 4, 40; *accord* HRC General Comment No. 31, ¶ 10 (stating that Covenant rights must be available "to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons"); HRC General Comment No. 15, ¶ 2 (stating that the rights espoused in the ICCPR "must be guaranteed without discrimination between citizens and aliens"). Similarly, the American

Declaration provides in Article XXV that "[e]very individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court." American Declaration art. XXV; *see also* American Convention art. 7 ("Anyone who is deprived of his liberty shall be entitled to recourse to a competent court."); Inter-Am. Comm'n H.R. Res. 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, at Principle III(1) (Mar. 13, 2008).[10]

The right of detainees to court review of their detention is binding on the United States both through the ICCPR and also under widely-recognized norms of customary international law. *See* U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, U.N. Doc. WGAD/CRP.1/2015, ¶ 19 (May 4, 2015) [hereinafter May 2015 Arbitrary Detention Report][11]; *id.* ¶ 19 n.35

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[10] *See also* Convention on Migrants' Rights art. 16(8); Convention on Children's Rights art. 37(d); African Charter art. 7; European Convention art. 5(4).

[11] The Working Group on Arbitrary Detention, established by the former Commission of Human Rights, is charged by the U.N. Human Rights Council with, *inter alia*, investigating deprivations of liberty imposed inconsistently with international standards. U.N. Human Rights Comm., Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, U.N. Doc. E/CN.4/1992/20 (Jan. 21, 1992). The May 2015 Arbitrary Detention Report is the result of the Human Rights Council's request that the Working Group draft principles and guidelines related to the rights of detainees "with the aim of assisting Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty in compliance with international human rights law." U.N. Human Rights Council Res. 20/16, U.N. Doc. A/HRC/RES/20/16, ¶ 10 (July 17, 2012). The basic principles and guidelines set out in the May 2015 Arbitrary Detention Report thus represent a distillation of "international

("The right to bring such proceedings before a court is well enshrined in treaty law and customary international law."). This is a "self-standing human right, the absence of which constitutes a human rights violation." *Id.* ¶ 2.

The review proceedings guaranteed by the ICCPR and customary international law must be conducted by a court that is independent of the detaining authority. *See id.* ¶ 69 (the reviewing court "must be a different body from the one that ordered the detention"); UNHCR Detention Guidelines, ¶ 47(iii) ("[T]he reviewing body must be independent of the initial detention authority, and possess the power to order release or to vary any conditions of release."). Article 9(4) of the ICCPR requires proceedings before "a court." ICCPR art. 9(4). The U.N. Human Rights Committee has explained that Article 9(4) "envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control." *Torres v. Finland*, Communication No. 291/1988, U.N. Human Rights Comm., ¶ 7.2, U.N. Doc. CCPR/C/38/D/291/1988 (Apr. 2, 1990) [hereinafter *Torres v. Finland*]; *accord* G.A. Res. 43/173, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Dec. 9, 1988) (defining "judicial or other authority" as a court "whose status and tenure should afford the strongest possible

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standards and recognized good practice" regarding the right to take court proceedings to challenge detentions. May 2015 Arbitrary Detention Report, ¶ 7.

guarantees of competence, impartiality and independence").[12]

Moreover, the reviewing court must have the authority to order release. *See A v. Australia*, ¶ 9.5 (stating that court review under ICCPR art. 9(4) "must include the possibility of ordering release"); May 2015 Arbitrary Detention Report, ¶ 27 (court must "bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is found to be arbitrary or unlawful").

ICCPR Article 9(4) and customary international law also require that court review of detention occur "without delay." *See* ICCPR art. 9(4); May 2015 Arbitrary Detention Report, ¶ 80 ("[N]o substantial waiting period shall exist before a detainee can bring

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[12] The Government contends that U.S. immigration courts are blocked by regulation from holding custody hearings for so-called "arriving" asylum seekers, and that their only mechanism for securing release is for the detaining authority to decide to release them on parole, leaving ICE effectively as "judge and jailer." Pet'rs Br. at 18. U.S. immigration courts are part of the Department of Justice, *see* 8 C.F.R. § 1003.10(a) (immigration judges appointed by Attorney General and serve within DOJ's Executive Office for Immigration Review), which is a separate agency from the detaining authority (ICE is a part of the Department of Homeland Security). In those categories of cases in which immigration courts are currently permitted to conduct custody hearings, they do have the authority to order release from detention, though that authority has at times been limited. While U.S. immigration courts do not fall within the judicial branch of the U.S. government, given the current U.S. system, and the fact that the immigration courts already provide custody hearings to many detained immigrants, access to immigration court custody hearings should at a bare minimum be available to all immigration detainees.

a first challenge to the arbitrariness and lawfulness of detention.");[13] *see also Torres v. Finland*, ¶ 7.2 (finding detention of immigrant in violation of ICCPR Article 9(4) where "no challenge could have been made until the second week of detention"); *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 134 (Sept. 7, 2004) (delay of 21 days before petitioner obtained a ruling on lawfulness of detention was "clearly an excessive time" in violation of American Convention Article 7(6)).

Court review of detention must also be provided periodically or regularly, as detention extends in time and becomes more prolonged. *See* HRC General Comment No. 35, ¶ 18 (detention "must be subject to periodic re-evaluation and judicial review"); *id.* ¶ 15 (referencing need for "regular review by a court or other tribunal" of administrative detentions); May 2015 Arbitrary Detention Report, ¶ 61 (non-nationals should have access to "regular periodic reviews of their detention to ensure it remains necessary, proportional, lawful and non-arbitrary"); *id.* ¶ 82 (individual entitled to take proceedings to a court again "after an appropriate period of time has passed, depending on the nature of the relevant circumstances"); *id.* ¶ 104(b) (court is empowered to "consider whether the detention remains justified, or whether release is warranted in light of all the changing circumstances of the detained individual's

[13] *See also* Convention on Migrants' Rights art. 16(8) (requiring court review "without delay"); American Convention art. 7(6) (requiring court review "without delay"); European Convention art. 5(4) (guaranteeing right to have lawfulness of detention "decided speedily by a court").

case"); UNHCR Detention Guidelines, ¶ 47(iv) ("[F]ollowing the initial review of detention, regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place."); *see also Neptune v. Haiti*, ¶ 108 (judges "must periodically assess whether the reasons and purposes that justified the deprivation of liberty remain").

The system the Government advocates—in which immigrants are detained for prolonged periods on the decision of USCBP and ICE officers without even an immigration court custody hearing—is at odds with these requirements.[14] The U.N. Special Rapporteur on the human rights of migrants stated in 2008 that the U.S. Government "should ensure that the decision to detain a non-citizen is promptly assessed by an independent court," and that "immigration detainees are given the chance to have their custody reviewed in a hearing before an immigration judge." Jorge Bustamante (Special Rapporteur on the Human Rights of Migrants), Rep. of the Special Rapporteur on the Human Rights of Migrants, ¶¶ 122, 123, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008). The Inter-American Commission on Human Rights, in its 2010

[14] Paradoxically, while the Government in this case argues that those who present themselves to U.S. officers at a formal point of entry should be deprived of court review, there is no dispute that those who avoid a formal port of entry and cross the border have access to immigration court custody hearings under *In re X-K-,* 23 I & N Dec. 731 (B.I.A. May 4, 2005). While the availability of a custody hearing may have no impact on an individual's decisions regarding approach to the U.S. border, the provision of access to court review would, if anything, encourage individuals to report to formal U.S. entry points rather than avoiding them and crossing the border elsewhere.

report on the U.S. immigration detention system, recommended that U.S. detention determinations be conducted on a case-by-case basis, subject to judicial review, and that immigrants be permitted to appeal detention decisions to an immigration court. Inter-American Commission 2010 Report, ¶¶ 429, 431. In its preliminary findings from its 2016 visit to the United States, the U.N. Working Group on Arbitrary Detention stated that "[i]ndividualised review should comply with procedural requirements of international law, including: the requirement that the State bear the burden of proof to demonstrate that it has a legitimate interest in detention, the provision of automatic and periodic bond hearings, and the requirement that immigration judges consider the accrued length of detention in deciding whether to release an individual." U.N. Working Grp. on Arbitrary Det., Preliminary Findings from Its Visit to the United States of America (Oct. 24, 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E.

The Government argues that the only avenue for challenging immigration detentions should be habeas corpus review. Pet'rs Br. 46-50. While Article 9(4) clearly requires access to habeas corpus, the theoretical existence of habeas, as it operates in the U.S. system, does not suffice in and of itself to meet the requirements of U.S. obligations under international law. Access to, and the scope of, habeas is limited in the United States and wait times for resolution of such petitions are lengthy. As such, habeas petitions in the U.S. system are not an avenue for prompt review of the necessity, proportionality and reasonableness of detention. Moreover, legal representation rates are exceedingly low for

immigration detainees, and pro bono legal representation for indigent immigration detainees is scarce. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1 (2015) (Study found after collecting data from over 1.2 million deportation cases decided between 2007 and 2012 that 14% of detained immigrants were able to secure representation and only 2% of immigrants obtained *pro bono* representation). Habeas review is also often subject to administrative exhaustion requirements that pose additional obstacles to court access.

Thus, while a petition for habeas review is one way for a detainee to challenge his detention before an independent court within the U.S. judiciary, the United States must provide more process for asylum seekers and immigrants in order to meet its treaty commitments and the obligations of applicable international law. Indeed, the Government's position, that asylum seekers and immigrants who have been held in immigration detention by the United States for six months, and often longer, should be denied access to immigration court custody hearings, would conflict with U.S. human rights commitments.

CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Appeals' decision in this case.

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