IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1784

AARON HOPE*, et al.*,

Petitioners-Appellees,
v.

CLAIR DOLL, Warden of the York County Correctional Facility, *et al.*,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
1:20-cv-00562

UNOPPOSED BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT UNDER FRAP 26.1

I, Kristin Macleod-Ball, attorney for amicus curiae, certify that the American Immigration Council is a non-profit organization that does not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

DATED: May 11, 2020 *s/ Kristin Macleod-Ball*

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I. INTRODUCTION AND STATEMENT OF AMICUS CURIAE[1]

Amicus curiae the American Immigration Council (the Council) proffers this brief in support of Petitioners-Appellees (Petitioners). The district court in this case acknowledged that Petitioners, individuals in immigration detention facing heightened risk of death and serious illness due to COVID-19, were likely to succeed on their claims and merited release from detention pursuant to a temporary restraining order. Respondents-Appellants (Respondents) now argue that the alleged risks of releasing Petitioners necessarily outweigh the harm that they are likely to face by remaining detained and subject to heightened risk of COVID-19. But the practices of Respondent U.S. Immigration and Customs Enforcement (ICE) itself suggest the contrary. In support of Petitioners' arguments, this brief provides examples in which ICE itself has found that the release of individuals facing serious medical risks due to immigration detention is both lawful and necessary even though those individuals are detained under 8 U.S.C. § 1226(c).

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amicus curiae, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E). Petitioners-Appellees and Respondents-Appellants, through counsel, consent to the filing of this brief.

administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of immigrants in the United States. The Council has a substantial interest in ensuring that individuals are not prevented from seeking release from immigration detention.

II. ICE HAS LONG ACKNOWLEDGED ITS OWN AUTHORITY TO RELEASE INDIVIDUALS DETAINED PURSUANT TO 8 U.S.C. § 1226(c)

Under 8 U.S.C. § 1226(c), individuals with certain criminal convictions must be "taken[n] into custody" during their removal proceedings. However, ICE has long had a practice of permitting release of individuals subject to § 1226(c) detention in the types of extreme cases at issue here. As one former official has explained, "[e]ven individuals held under [§ 1226(c)] were released pursuant to ICE's guidelines and policies, particularly where the nature of their illness could impose substantial health care costs or the humanitarian equities mitigating against detention were particularly compelling." Declaration of Andrew Lorenzen-Strait ¶11, *Coreas v. Bounds*, No. 8:20-cv-00780-TDC, 2020 WL 2201850 (D. Md. Apr. 30, 2020), ECF No. 2-5.[2] Special factors that could merit release include

[2] The Court can take judicial notice of this publicly filed court record. *See, e.g., Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2011) (noting that courts may "take judicial notice of undisputed matters of public record, including documents on file in federal or state courts") (internal citations omitted); *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) (noting that a court may take judicial notice of "matters of public record").

"individuals who did not yet have a serious physical illness, but were vulnerable to medical harm," like individuals who currently are at heightened risk of death or serious illness due to COVID-19. *Id*. ¶¶7-8. Historically, U.S. Department of Homeland Security (DHS) memos expressly provided for such releases. *Id*. ¶¶12-13 (discussing DHS and ICE memos expressly laying out policy for release of individuals with special vulnerabilities, including serious medical concerns). Although the current administration has rescinded those particular memos, ICE continues to release individuals on these grounds, consistent with the requirements of the Constitution.

Additionally, ICE has specifically developed tools to ensure individuals released in these circumstances are monitored and appear in immigration court for removal proceedings. *Id*. ¶15 (describing the "use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting," leading to 99% attendance rate at immigration court hearings, according to a government-contracted study); *see also* Supplemental Declaration of Dr. Dora Schriro ¶¶41-43, *Thakker v. Doll*, No. 1:20-cv-00480-JEJ (M.D. Pa. May 4, 2020), ECF No. 102-20 (noting that "[a]lternatives to detention are both effective and inexpensive because they are tailored to an individual depending on their levels of need and risk in the community" and "maximize medically vulnerable and low-risk people's ability to remain healthy in

the community while protecting public safety and the integrity of court proceedings and other legal requirements"); *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (noting "the empirically demonstrated effectiveness" of non-monetary alternatives to detention that "meet[] the government's interest in ensuring future appearances"). These safeguards address ICE's concern that it not release individuals who may be a flight or public safety risk. *See* Rep. Br. at 35-37.

III. ICE VOLUNTARILY RELEASES INDIVIDUALS SUBJECT TO 8 U.S.C. § 1226(c) FROM DETENTION[3]

As the district court explained, individuals like Petitioners face irreparable harm if forced to remain in detention during the COVID-19 outbreak, due the heightened risk of death or serious injury they face and Respondents' inadequate preparation and safety precautions in detention centers. *See* Appellants' App. at 6-9. In their appeal, Respondents suggest that, for individuals detained subject to 8 U.S.C. § 1226(c), the alleged risks of release necessarily outweigh these serious harms. But in practice, ICE regularly releases individuals with serious health conditions who are subject to §1226(c). ICE's release of such individuals is both lawful and appropriate. Below are several examples of this practice.

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[3] All accounts described below use pseudonyms and are drawn from correspondence between counsel for amicus and counsel or former counsel for the individual involved. Information regarding the accounts is on file with counsel for amicus.

John Doe

In April 2020, ICE released John Doe, a twenty-one-year-old lawful permanent resident who came to the United States at age six. Remaining in detention put him at serious risk because he suffers from asthma, as well as severe psychiatric disorders including Bipolar Disorder, Major Depressive Disorder, and a major neurocognitive disorder. He was hospitalized in the past for an attempted suicide and continues to suffer from suicidal ideation.

Mr. Doe is in removal proceedings, where he is pursuing cancellation of emoval under 8 U.S.C. § 1229b(a) as a long-term lawful permanent resident. However, because of prior convictions for robbery in the third degree, possession of stolen property and misdemeanor assault, he remained in detention during these proceedings subject to § 1226(c).

But ICE ultimately determined that Mr. Doe could and should be released from custody. In April 2020, a nonprofit immigration attorney sought his release from detention because he is particularly vulnerable to infection from COVID-19 and noting his severe risk of suicide. After ICE initially failed to respond to her request, the attorney contacted the local Assistant U.S. Attorney to advise that she would be filing a habeas petition on his behalf. Thereafter, ICE released Mr. Doe with monitoring conditions, including an ankle monitor. He has complied with these conditions since his release.

John Roe

In May 2020, ICE released John Roe, a fifty-six-year-old Nigerian with renal failure who is married to a U.S. citizen and the brother of a lawful permanent resident. He was diagnosed with renal failure after arriving in the United States, on a tourist visa, in 2012. He immediately began receiving life-saving dialysis treatment.

Following a conviction for a federal drug trafficking offense, Mr. Roe served the remainder of his twenty-four month sentence entirely in a Federal Bureau of Prisons hospital—where he received regular dialysis treatment—because he was too ill to be housed in prison. Subsequently, upon transfer to immigration custody, ICE detained Mr. Roe pursuant to § 1226(c). However, it failed to provide him necessary medical care and safe detention conditions even aside from the risk of COVID-19. ICE made no arrangements for Mr. Roe to receive dialysis treatments for the first week. Consequently, his legs swelled, and he became very ill. Only then did ICE take him to the hospital for dialysis treatment.

The facility where ICE detained Mr. Roe is a small county jail with fewer than 180 detained noncitizens at most times. Despite the relatively small size of this facility, fourteen noncitizens were confirmed to have contracted COVID-19 there as of May 8, 2020. A nonprofit immigration attorney contacted ICE and the local Assistant U.S. Attorney on Mr. Roe's behalf and requested his release from

detention because he was particularly vulnerable to a coronavirus infection. ICE released Mr. Roe the following day subject to the condition that he continue with his dialysis treatments.

John Moe

In April 2020, ICE released John Moe, a 36-year-old man who has lived in the United States since he was a young teenager with his U.S. citizen and lawful permanent resident parents and family members. When he was in his twenties, Mr. Moe suffered serious injuries in a car accident. He sustained a traumatic brain injury (TBI) which family members reported made him seem like a different person. He also suffered physical injuries that damaged his lungs and limit his mobility.

Mr. Moe is in removal proceedings. He is seeking several forms of relief from removal, including a U visa, which may be provided to people who were victims of certain crimes and helped law enforcement with the investigation or prosecution of those crimes. *See* 8 U.S.C. § 1101(a)(15)(U). His case is currently on appeal with the Board of Immigration Appeals (BIA). During this lengthy process, ICE has detained Mr. Moe pursuant to § 1226(c) due to two convictions for second degree assault that occurred after his accident and resulting TBI. After the outbreak of COVID-19, a nonprofit attorney sought humanitarian parole for Mr. Moe because of his serious medical problems. As a result of his TBI and

related neurological and psychiatric disabilities, Mr. Moe is unable to follow guidance while in immigration detention that could help to protect him from COVID-19. He was released pursuant to a grant of humanitarian parole, with an ankle monitor and regular telephone check-ins with ICE.

John Poe

In May 2020, ICE released John Poe, who has lived in the United States for nearly twenty years and for virtually all that time has maintained Temporary Protected Status (TPS) pursuant to 8 U.S.C. § 1254a(a). He lives with his wife and three children, has held stable jobs, and consistently paid taxes. He has lived in the same city for almost his entire time in the United States and in the same home for over seven years. He has diabetes, hypertension, and high cholesterol (hyperlipidemia), and thus is vulnerable to severe COVID-19.

While in removal proceedings, Mr. Poe is actively pursuing a range of immigration relief, including a U visa and asylum, as well as post-conviction relef for a criminal conviction. But because of that conviction for domestic assault—a charge to which he plead guilty without being advised of the immigration consequences—he is detained pursuant to § 1226(c).

In April 2020, Mr. Poe's immigration attorney made an initial request for release on bond pursuant to 8 C.F.R. § 236.1(c)(8). ICE denied the request on the grounds that Mr. Poe is subject to mandatory detention under § 1226(c). Several

days later, his attorney sought a custody redetermination under *Fraihat v. ICE*, No. EDCV 19-1546 JGB (SHKx), 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020) (preliminary injunction order directing ICE to review medically vulnerable detainees for release), and asked for humanitarian parole under 8 U.S.C. § 1182(d)(5). In early May 2020, ICE agreed to release Mr. Poe subject to an order of recognizance and GPS monitoring.

John Soe

ICE released John Soe, who was held pursuant to § 1226(c), in March 2020, after confirmed cases of COVID-19 were found at the detention facility where he was being held. Mr. Soe, who has significant family ties in the United States, including a U.S. citizen wife and children, has a single, non-violent aggravated felony conviction. His underlying medical conditions place him at higher risk of severe illness if infected with COVID-19. ICE granted him release subject to telephonic monitoring, an ankle monitor, and in-person check-ins.

IV. CONCLUSION

Currently, individuals like Petitioners face risks to their lives, health, and safety due to the ongoing COVID-19 outbreak. Through its practice of releasing individuals subject to § 1226(c) who have serious medical conditions, ICE acknowledges that it has the authority—and that it is appropriate— to do so. Amicus urges this Court to affirm the district court's decision to order the release

of the petitioners in this case.

Respectfully submitted,

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Dated: May 11, 2020

CERTIFCATIONS

1. I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and 29(a)(5), because it contains 2067 words, excluding the parts of the parts exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2016, is proportionately spaced, and has a typeface of 14 point.

2. Pursuant to 3d Cir. L.A.R. 31.1(c), I certify that the PDF version of this brief has been scanned by Malwarebytes antivirus software and no virus has been detected.

3. Pursuant to 3d Cir. L.A.R. 28.3(d), I certify that I am a member of the bar of this Court.

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CERTIFCATE OF SERVICE

I hereby certify that on May 11, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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