No. 20-16389

IN THE

United States Court of Appeals for the Ninth Circuit

PASCUAL HILARIO PANKIM,

Petitioner-Appellant,

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ETC.,

Respondents-Appellees.

On Appeal of a Decision of the District Court for the Northern District of California No. 20-cv-02941-JSC

BRIEF OF IMMIGRANT LEGAL DEFENSE, ASIAN AMERICANS ADVANCING JUSTICE – ASIAN LAW CAUCUS, COMMUNITY LEGAL SERVICES IN EAST PALO ALTO, IMMIGRANT DEFENDERS LAW CENTER, THE NATIONAL IMMIGRANT JUSTICE CENTER, NORTHWEST IMMIGRANT RIGHTS PROJECT, PUBLIC COUNSEL, AND THE FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that that none of the Amici Curiae have a parent corporation or shares or securities that are publicly traded.

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STATEMENT OF AMICI CURIAE'S IDENTITY AND INTEREST[1]

Asian Americans Advancing Justice - Asian Law Caucus ("Advancing Justice - ALC"), founded in 1972, is the nation's first legal and civil rights organization serving low-income Asian Pacific Islander communities. Advancing Justice - ALC employs a broad strategy which integrates the provision of legal services, educational programs, community organizing initiatives and advocacy. Advancing Justice - ALC provides legal representation to detained immigrants in bond proceedings and in federal habeas litigation. Procedural protections in bond proceedings are of particular concern to Southeast Asian and Pacific Islander communities who are disproportionately impacted by detention and deportation due to contacts with law enforcement.

Community Legal Services in East Palo Alto (CLSEPA), based in East Palo Alto, California, CLSEPA has a large removal defense program that provides representation to hundreds of individuals facing removal before the Immigration Courts, including individuals who are detained. Many of CLSEPA's clients have had contact with the criminal justice system. CLSEPA represents detained individuals in bond hearings and habeas petitions. CLSEPA's work includes direct

[1] Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

representation, provision of *pro se* services, training to support community members in navigating the legal system and exercising their rights, and advocacy to bring about fair and inclusive treatment of immigrants and their families.

Immigrant Defenders Law Center (ImmDef) is dedicated to advancing social justice for Southern California's most marginalized immigrant and refugee communities through legal services, community empowerment, and advocacy for adults and children in federal immigration custody. ImmDef represents approximately 1,400 noncitizens annually in their removal proceedings, many of whom are in detention. An immigration judge in our clients' bond proceedings will often find that DHS has met its burden of proof based on an unreliable and incomplete RAP sheet and/or unproven allegations contained in a police report. As a result, many of ImmDef's clients are routinely denied release from custody. Based on ImmDef's experience, immigration courts require guidance from this Court on how to evaluate the criteria of dangerousness for purposes of awarding bond and should not solely rely on police reports and/or RAP sheets.

Immigrant Legal Defense (ILD) is a nonprofit organization based in Oakland, California, dedicated to providing immigration legal services to marginalized immigrant communities. ILD represents individuals detained in California and throughout the U.S. in their bond and removal proceedings as well as in habeas

litigation. ILD sees individuals regularly denied bond due to unfounded assessments of dangerousness based on uncorroborated police reports and RAP sheets. ILD advocates for firm due process protections for its clients in light of the deprivation of their liberty.

The National Immigrant Justice Center (NIJC), a program of the Heartland Alliance, provides legal representation to low-income immigrants, refugees, and asylum seekers across the country, including detained individuals in their removal and bond proceedings. Because of its national scope, NIJC understands the importance of requiring the government to meet its burden in bond proceedings and believes this case could provide a meaningful opportunity to create more substantive parameters for what the government can and cannot do to meet its burden.

Northwest Immigrant Rights Project (NWIRP) is a nonprofit legal organization dedicated to the defense and advancement of noncitizens' legal rights. NWIRP provides direct representation to low-income immigrants placed in removal proceedings, including bond proceedings. NWIRP also provides presentations and individual consultations to noncitizens in removal proceedings, including bond hearings, who are unrepresented during the proceedings.

Public Counsel, based in Los Angeles, California, represents indigent immigrants from around the world in their claims for immigration relief. Public Counsel has

provided legal services to thousands of immigrants detained by the Department of Homeland Security, including through legal orientations, pro se assistance, direct representation, and impact litigation. Public Counsel is committed to advancing transparency, equality, and justice in our nation's immigration system.

The Florence Immigrant & Refugee Rights Project ("Florence Project") provides free legal and social services to immigrant men, women, and children detained in immigration custody in Arizona. In 2019, approximately 10,000 detained people facing removal charges received a Florence Project orientation on immigration law and procedure. In any given year the Florence Project sees hundreds of individuals who come into immigration custody following interactions with the criminal justice system. In many cases, the Immigration Court relies entirely on hearsay evidence contained in arrest reports to deny bond based on danger where the underlying criminal matter remains either unresolved or even was dismissed entirely. The Florence Project believes that reliance on unsubstantiated police reports undermines the fundamental fairness of bond proceedings.

INTRODUCTION

This Court should take the instant case as occasion to issue a precedential decision recognizing and codifying what several of its district courts have already concluded that due process demands. Amici respectfully ask the Court to hold that in a proceeding such as this one where the government bears the burden of proof by clear and convincing evidence, an uncorroborated police report or RAP sheet[2] cannot, by itself, form the sole basis for an immigration judge's ("IJ") denial of bond based on a determination of dangerousness.

I. Reliance on Uncorroborated Police Reports and RAP Sheets Makes a Mockery of This Court's Mandate that Findings of Dangerousness be Supported by Clear and Convincing Evidence.

This case exemplifies the common and troubling practice of IJs denying bond based on information in police reports. The IJ found Mr. Pankim to be a danger to the community based principally on a police report describing his arrest on allegations of domestic violence.[3] *Pankim v. Barr*, No. 20-cv-02941, 2020 WL 2542022, at *3 (N.D. Cal. May 19, 2020). The allegations in the arrest report were

[2] A "RAP sheet" ("record of arrests and prosecutions") is a report listing all of a person's interactions with the criminal justice system, including arrests that did not lead to prosecutions and prosecutions that did not lead to convictions. *See Singh v. Holder*, 638 F.3d 1196, 1201, 1209–10 (9th Cir. 2011); *Francis v. Gonzales*, 442 F.3d 131, 142–43 (2d Cir. 2006).

[3] The IJ also admitted into the record a RAP sheet showing the resulting charges, even though those charges had been dropped by the time of the hearing. In addition, the information in the RAP sheet was erroneous, as it was not up to date and contained inaccurate information regarding the charges. *See* Petitioner's Opening Brief, p. 34, fn. 9.

not only uncorroborated by any other evidence but also directly contradicted by sworn testimony from the supposed victim; the prosecutor declined to pursue charges based on those allegations; and no court ever determined that those allegations were supported by probable cause. *Id*. at *9. Yet the IJ nevertheless concluded that the police report allegations were sufficient to meet the exacting standard of "clear and convincing evidence" that this Court requires to justify continued prolonged detention in cases such as these. *See Aleman Gonzalez v. Barr*, 955 F.3d 762, 765–66 (9th Cir. 2020) (holding that immigrants detained for longer than six months are entitled to bond hearing at which government must justify continued detention by clear and convincing evidence); *Singh v. Holder,* 638 F.3d 1196, 1203–04 (9th Cir. 2011) (same). As a result, Mr. Pankim was denied bond. *Id*. at *29.

Reliance on uncorroborated police reports and RAP sheets leads to even more troubling consequences and due process violations when the detained person faces ongoing criminal proceedings, a scenario that occurs frequently. The criminal court may have released an individual on bond or on his or her own recognizance, reflecting that court's determination that the individual does ***not*** pose a danger to the community or a flight risk. But shortly thereafter, that individual is detained by Immigration and Customs Enforcement under circumstances that prevent him or her

from appearing at hearings in the criminal case, with the result that the criminal proceedings are indefinitely prolonged.

At the bond hearing, the IJ asks about the pending criminal prosecution shown on the RAP sheet with details alleged in a police report. The detained person exercises the right to remain silent and does not testify as to the circumstances that led to the arrest and prosecution, having been advised by criminal defense counsel not to risk self-incrimination. The government concedes it has nothing more than a "vacuum of information" on which to base its fear that releasing the detained person will endanger the community. *See* Verified Petition for Writ of Habeas Corpus, *Corral v. Sessions,* N.D. Cal. Case No. 3:17-cv-03987-MEJ, Dkt. # 1-1, at 18–19 (July 14, 2017) ("My concern is danger in the vacuum of information that we currently have regarding his pending criminal charges … I mean, it's a pretty – pretty serious charge."). Yet in all too many cases, this "vacuum of information" is enough for the IJ to deny bond, further prolonging the detention of those who have already been locked up for six months or more. Such decisions make a mockery of the high standard of "clear and convincing evidence" that this Court has held the government must satisfy in order to justify continued prolonged detention.

II. A Precedential Holding is Warranted Because the Problems with Uncorroborated Police Reports and RAP Sheets Extend Beyond the Particular Circumstances of This Case.

This Court has already held that the Fifth Amendment's guarantee of constitutional due process mandates a clear and convincing standard of proof for a determination of dangerousness in prolonged detention cases. *Aleman*, 955 F.3d at 765–66; *Singh*, 683 F.3d at 1203. It should now hold that reliance on uncorroborated information in police reports and RAP sheets, by itself, is insufficient as a matter of law to meet this constitutional mandate. A precedential holding to this effect is necessary because the constitutional due process concerns posed by reliance on uncorroborated police reports and RAP sheets extend far beyond the particular circumstances of this case.

IJs frequently deny bond and return individuals to detention after accepting uncorroborated allegations in police reports or entries on RAP sheets as "clear and convincing" proof of their danger to the community. And in the great majority of those cases, the IJ's determination of dangerousness will not receive meaningful judicial review. Many cases become moot when detained persons are released before a court can adjudicate their challenges.[4] In still more cases, uncounseled individuals never challenge the police report allegations at all. Accordingly, this case has implications far beyond Mr. Pankim's particular circumstances and presents this Court with a long-overdue opportunity to clarify the meaning of the clear-and-

[4] *See, e.g., Corral v. Sessions,* N.D. Cal. Case No. 3:17-cv-03987-MEJ, Dkt. #32 (Dec. 19, 2017); *Domingo-Jimenez v. Lynch*, N.D. Cal. Case No. 3:16-cv-05431-WHA, Dkt. #29 (Jan. 19, 2017) (habeas petitions dismissed as moot).

convincing evidence standard as it applies to the usage of police reports and RAP sheets.

Amici respectfully propose that this Court adopt the simple and categorical rule that police reports and RAP sheets, absent other corroboration, cannot form the sole basis for a determination of dangerousness in cases where the government has the burden to justify continued detention by clear and convincing evidence.

III. This Court's Precedent Places the Burden on the Government to Justify Continued Prolonged Detention by Clear and Convincing Evidence.

Section 1231(a) of Title 8 of the United States Code, the provision under which Mr. Pankim has been detained, authorizes "the detention of aliens who have already been ordered removed from the country." 8 U.S.C. § 1231(a).[5] Many individuals remain detained pursuant to 8 U.S.C. § 1231 as they pursue defenses to removal that would allow them to remain in the United States. It is not uncommon for such individuals to remain in detention for years on end.[6]

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[5] Because this Court applies the same clear and convincing evidence standard in cases of prolonged detention under §§ 1231(a) and 1226(a), Amici's proposed rule against sole reliance on uncorroborated police reports and RAP sheets is equally applicable to detention under both provisions. *See Aleman*, 955 F.3d at 765–66 (§ 1231(a)); *Singh*, 638 F.3d at 1203–04 (§ 1226(a)).

[6] Mr. Pankim was in ICE detention from August 2019 until June 2020. ER 28, 221–25; *see, e.g.*, *Singh*, 638 F.3d at 1203 (petitioner was detained "nearly four years"); *Reyes v. Wolf*, No. 2:19-cv-02086, 2020 WL 2308075, at *1 (D. Nev. May 8, 2020) (nearly two and a half years); *Jimenez v. Wolf*, No. 19-cv-07996, 2020 WL 1082648, at *6 (N.D. Cal. March 6, 2020) ("almost one and a half years"); *Obregon v. Sessions*, No. 17-cv-01643, 2017 WL 1407889, at *7 (N.D. Cal. Apr. 20, 2017) (nearly fourteen months); *Ramos v. Sessions*, 293 F. Supp. 3d 1021, 1024 (N.D. Cal. 2018) (one year); *Vargas v. Wolf*, No. 2:19-cv-02135, 2020 WL 1929842, at *10 (D. Nev. April 21, 2020) (eleven months).

In *Zadvydas v. Davis*, the Supreme Court held that detentions pursuant to 8 U.S.C. § 1231 extending for longer than six months are no longer "presumptively reasonable" and due process requires that the government provide justification for their continuation. 533 U.S. 678, 701 (2001). This Court's *Aleman* and *Singh* decisions give effect to the mandate of due process by holding that individuals detained longer than six months are entitled to a bond hearing at which the government must prove by clear and convincing evidence that danger to the community and/or flight risk justifies continued detention. *Aleman*, 955 F.3d at 765–66 (detentions under § 1231(a)); *Singh*, 638 F.3d at 1203–04 (detentions under § 1226(a)). As this Court explained in *Singh*: "Because it is improper to ask the individual to 'share equally with society the risk of error when the possible injury to the individual' — deprivation of liberty — is so significant, a clear and convincing evidence standard of proof provides the appropriate level of procedural protection." 638 F.3d at 1203–04 (quoting *Addington v. Texas,* 441 U.S. 418, 427 (1979)).

IJs may consider a variety of factors, including but not limited to evidence of criminal activity, in deciding whether an immigrant is a danger to the community for purposes of a bond determination. *See Singh*, 638 F.3d at 1206; *In re Guerra,* 20 I & N Dec. 37, 40 (BIA 2006). Nonetheless, the decision must comport with due process. *See id.* at 1203. The IJ cannot have "relied upon proof that—as a matter of law—could not establish" that an individual was a danger to the community.

Romero Salas v. Barr, No. 20-cv-0073, 2020 WL 919135, at *4 (S.D. Cal. Feb. 26, 2020) (quoting *Nguti v. Sessions*, No. 16-cv-6703, 2017 WL 5891328, at *2 (W.D.N.Y Nov. 29, 2017)). Thus, while an IJ has wide discretion in determining how much credence and weight, if any, to give to the allegations in a police report or RAP sheet, due process places limits upon that discretion.

IV. The Clear and Convincing Evidence Standard is a High Bar That is Meant to Protect Individuals' Due Process Rights.

The clear and convincing evidence standard reflects the Supreme Court's teaching that "due process places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake . . . are both particularly important and more substantial than the mere loss of money.'" *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982)). In particular, the clear and convincing standard is appropriate for civil proceedings that may result in a person's involuntary detention or confinement. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418, 425 (1979) (requiring clear and convincing evidence for involuntary mental health commitment).

This Court has concluded that because the deprivation of liberty resulting from prolonged immigration detention is "so significant, a clear and convincing evidence standard of proof provides the appropriate level of procedural protection." *Singh*, 638 F.3d at 1204 (quoting *Addington*, 441 U.S. at 427). Thus, the clear and convincing standard requires that the evidence must establish "an abiding conviction

that the truth of [the] factual contentions at issue is highly probable." *Mondaca-Vega v. Lynch*, 808 F.3d 413, 422 (9th Cir. 2015) (en banc) (internal quotation marks omitted) (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)); *see Tijani v. Willis*, 430 F.3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring) (explaining that the primary function of a standard of proof is to properly "allocate the risk of an erroneous decision among litigants based upon the competing rights and interests involved").

"Adopting a standard of proof is more than an empty semantic exercise." *Addington*, 441 U.S. at 425 (internal quotations and citations omitted). And "[i]n cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty." *Id.* (cleaned up). Therefore, in order to protect the "substantial liberty interests at stake" at bond determination hearings in prolonged detention cases, *Singh*, 638 F.3d at 1200, this Court must give meaning to the "clear and convincing" standard as it applies to the consideration of police reports and RAP sheets in order to ensure that society can have confidence the correct result has been reached. *See Colorado*, 467 U.S. at 315–16 ("The function of any standard of proof is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.").

V. Police Reports and RAP Sheets cannot by themselves add up to the clear and convincing evidence of dangerousness required to justify denial of bond.

A. Even under the relaxed evidentiary rules in immigration proceedings, the clear and convincing standard requires that a finding of dangerousness must be "highly probable" and based on reliable evidence.

Establishing dangerousness by clear and convincing evidence "is a high burden and must be demonstrated in fact, not 'in theory.'" *Obregon*, 2017 WL 1407889, at *7 (*quoting United States v. Patriarca*, 948 F.2d 789, 792 (1st Cir. 1991)). Especially under this exacting standard, due process constrains the otherwise relaxed evidentiary rules that govern the conduct of immigration hearings. Although "the Federal Rules of Evidence do not apply strictly in immigration removal proceedings," *Singh*, 638 F.3d at 1209–10, the IJ's decision must nevertheless be based on evidence that is both ***reliable*** and ***highly probative***. *See United States v. Int'l Broth. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am. AFL-CIO*, 978 F.2d 68, 72 (2d Cir. 1992) ("Hearsay evidence may constitute substantial evidence in an administrative hearing so long as it is reliable.") (citing *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *cf. Colorado*, 467 U.S. at 316 (clear and convincing standard requires "highly probable" conviction that the truth has been established).

Although IJs are given broad discretion as to what evidence they may consider, the clear and convincing evidence standard nevertheless requires that the

sum total of that evidence must be sufficiently reliable and probative so that society can have "confidence . . . in the correctness of [their] factual conclusions." *See Colorado*, 467 U.S. at 315. Therefore, if the clear and convincing evidence standard is to be more than an "empty semantic exercise," *Addington*, 441 U.S. at 425, the uncorroborated and often unreliable information found in police reports and RAP sheets cannot suffice to leave the factfinder with the "unabiding conviction that the truth of its factual contentions is highly probable." *Colorado*, 467 U.S. at 316.

B. Police reports and RAP sheets are inherently unreliable and thus cannot form the sole basis for a determination of dangerousness.[7]

1. The Circuit Courts have repeatedly questioned the reliability of police reports and RAP sheets.

For decades, the Courts of Appeals have repeatedly cast doubt on the reliability of uncorroborated police reports and cautioned against reliance on them in immigration proceedings. In *Sierra-Reyes v. INS*, the Fifth Circuit held that an IJ erred in finding the petitioner removable based on police reports of two arrests that never led to prosecutions because the prosecutor determined there was insufficient evidence to proceed. *See* 585 F.2d 762, 764 n.3 (5th Cir. 1978) (stating that "[w]e are quite concerned about the consideration of and reliance on these police reports by the immigration judge," because such reports in the absence of subsequent

[7] The unreliability of police reports is discussed in more detail in the contemporaneously filed amicus brief of the University of California, Davis Immigration Law Clinic.

prosecution "were not probative of anything and should not have been considered as 'adverse factors'"). In *Avila-Ramirez v. Holder*, the Seventh Circuit held that the Board of Immigration Appeals committed reversible error when it upheld an IJ's decision to remove an individual based on nothing more than uncorroborated police reports. 764 F.3d 717, 724–25 (7th Cir. 2014).[8] And in this Circuit, Judge Kleinfeld has concluded that "something as potentially inaccurate as a police report cannot be 'clear and convincing' evidence" for purposes of an immigration removal proceeding. *Olivas-Motta v. Holder*, 746 F.3d 907, 919 (9th Cir. 2013) (Kleinfeld, J., concurring).

RAP sheets fare no better. The Second Circuit has concluded that "they will usually fail to rise to the level of clear and convincing evidence. RAP sheets lack the necessary information to describe the full record of conviction and do not necessarily emanate from a neutral reliable source." *See Francis v. Gonzales*, 442 F.3d 131, 143 (2d Cir. 2006) (concluding that foreign RAP sheet did not meet standard of "clear, unequivocal, and convincing" evidence required to establish that permanent resident had been convicted of a deportable crime because it "lack[ed] the essential protections that an abstract of conviction contains"); *id.* ("In identifying

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[8] In *Avila-Ramirez*, the Seventh Circuit noted that the BIA had disregarded its own precedential decision in *In re Catalina Arreguin De Rodriguez,* which stated that arrest reports should be given "little weight" in the absence of "a conviction or corroborating evidence of the allegations contained therein." 21 I. & N. Dec. 38, 42 (BIA 1995); *see Avila-Ramirez*, 764 F.3d at 724–25.

reliable evidence, there are good reasons to prefer records emanating from neutral courts and magistrates instead of from agencies whose jobs are to seek to detect and prosecute crimes.”).

The Circuit Courts have also questioned the reliability of police reports in non-immigration contexts, such as criminal bond determinations and revocation proceedings, which involve similar considerations of danger to the community and flight risk. *See, e.g.*, *United States v. Padilla*, 793 F. App’x 749, 757 (10th Cir. 2019) (“[P]olice reports are not inherently reliable . . . While we do not dispute that *some* police reports contain sufficient indicia of reliability to support the probable accuracy of the information that they contain, the district court was obliged to specifically determine that the . . . police report contained such indicia before relying on that report.”); *United States v. Jordan*, 742 F.3d 276, 280 (7th Cir. 2014) (holding that police reports are not presumed to be reliable for purposes of supervised release revocation proceedings).

Furthermore, a police report is only “demonstrably reliable evidence of the fact that an arrest was made.” *United States v. Johnson*, 710 F.3d 784, 789 (8th Cir. 2013). “[T]hey are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true.” *Id.* For all of these reasons, uncorroborated allegations in a police report should not be sufficient by themselves to establish by

clear and convincing evidence that an individual is a danger to the community and must remain in detention.

2. There is a growing consensus among district courts in this Circuit that police reports and RAP sheets alone cannot constitute clear and convincing evidence of dangerousness.

There is a growing consensus among district courts in this Circuit that uncorroborated police reports and RAP sheets cannot meet the high burden of establishing dangerousness by clear and convincing evidence that is required for immigration bond proceedings in prolonged detention cases. In *Reyes*, the IJ found the petitioner dangerous based solely on an arrest report and a criminal indictment, the latter of which included several dismissed charges. 2020 WL 2308075, at *10. The district court rejected that conclusion, holding that "the untested criminal allegations needed corroboration by other evidence along with a corresponding assessment of probative value and weight." *Id.*; *see also Jimenez*, 2020 WL 1082648, at *4 (holding conviction documents and arrest report insufficient to show by clear and convincing evidence that petitioner was dangerous); *Vargas*, 2020 WL 1929842, at *9 (holding it was error to find dangerousness when the IJ "relied solely on the pending criminal charge").

3. District courts have found uncorroborated arrest reports to be insufficient evidence of dangerousness even in cases where the agency placed the burden of proof on the petitioner.

Furthermore, this Circuit's district courts have found uncorroborated arrest reports and RAP sheets to be insufficient evidence of dangerousness even when applying a more lenient standard of proof in bond hearings for individuals detained for periods shorter than six months. In such cases, the agency's position is that the burden is on the ***petitioner***, not the government, to show to the satisfaction of the IJ that he or she is not a danger to the community.[9] Yet even under that government-friendly standard, district courts have concluded that police reports and RAP sheets are not sufficiently "probative and specific" to satisfy the demands of due process. *See, e.g.*, *Ortega-Rangel v. Sessions*, 313 F. Supp. 3d 993, 1004–05 (N.D. Cal. 2018). In *Ortega-Rangel*, the IJ concluded that the petitioner was a danger to the community solely because she had been arrested for selling drugs, even though she was never charged in court for that offense, let alone convicted. *Id.* at 997 ("[N]o court or grand jury had determined that there [was] probable cause to believe that she in fact had done so."). *Id.* The district court granted Ortega-Rangel's habeas petition because the mere fact of her arrest was not "probative and specific," and as such the IJ's sole reliance on that information to deny bond violated due process. *Id.* at 1004–05.

[9] *See Guerra,* 20 I & N Dec. at 40; *In re Adeniji*, 21 I. & N. Dec. 1102, 1113 (BIA 1999).

Likewise, in *Kharis v. Sessions* – another case decided under the more lenient standard – the district court held that an IJ may only rely on pending criminal charges if the evidence supporting the charge is "probative and specific." No. 18-cv-04800-JST, 2018 WL 5809432, at *7–*8 (N.D. Cal. Nov. 6, 2018) (finding that Interpol "Red Notice" of pending foreign criminal charges was not sufficiently "probative and specific" evidence of dangerousness).

If due process does not allow an uncorroborated police report or RAP sheet to form the sole basis for a finding of dangerousness even in short-term detention cases when the agency's position is that the burden is on the petitioner, then the conclusion is all the more inescapable that under the stringent standard of clear and convincing evidence required in prolonged-detention cases such as this one, police reports and RAP sheets cannot form the sole basis for a dangerousness finding.

4. Even the BIA regularly finds that police reports and RAP sheets are unreliable.

Administrative decisions from the Board of Immigration Appeals also cast doubt on whether uncorroborated police reports and RAP sheets can satisfy the government's burden in bond hearings. The BIA instructs IJs to consider the "'probativeness' of alleged criminal activity and independent corroborating evidence, particularly where criminal charges are dismissed." *See Reyes*, 2020 WL 2308075 at *7 n.12. The BIA has often reversed IJs' determinations of dangerousness when they are based solely on uncorroborated police reports and RAP

sheets. *See, e.g., Arreguin De Rodriguez,* 21 I. & N. Dec. at 44 (stating that uncorroborated arrest reports should be given "little weight"); *Reyes*, 2020 WL 2308075 at *7 n.12 (citing additional BIA decisions).

VI. Dangerousness determinations relying only on uncorroborated police reports and RAP sheets lead to unconstitutional and unjust results.

In many cases, reliance on uncorroborated police reports and RAP sheets as the sole basis for a dangerousness finding leads to additional consequences for detained persons that are both unconstitutional and unjust.

A. When a criminal court has released the individual on bail or on recognizance, it has already made a determination of non-dangerousness based on the same evidence that the IJ now uses to find dangerousness.

That an uncorroborated police report or RAP sheet should not form the sole basis of a dangerousness determination is particularly apparent when the criminal court has released the individual on bond or on recognizance prior to her detention by ICE. In those cases, the IJ's dangerousness finding flies in the face of a prior court finding – based on the same evidence – that the individual is ***not*** dangerous. In *Ortega-Rangel*, the petitioner was released on her own recognizance because the criminal court found that she was neither a flight risk nor a danger to the community. *See* 313 F. Supp. 3d at 997. Despite that finding, the IJ relied solely on her arrest and pending charges to find, under the same facts available to the criminal court, that she was a danger to the community. *See id*. at 998–99.

In *Obregon*, the criminal court had released the petitioner to continue outpatient alcohol rehabilitation treatment shortly before ICE detained her. 2017 WL 1407889, at *7. The district court pointed to that bond determination as grounds for expressing skepticism that the clear and convincing standard for dangerousness had been met. *Id.* at *8 ("It is worth considering, as well, that the criminal courts clearly believed that petitioner was entitled to bail *before* she was detained fourteen months ago. As I indicated during oral argument, it is extremely doubtful that any Magistrate Judge on this court would have remanded her to custody based on this record."). *See also Vargas*, 2020 WL 1929842, at *1 (criminal court had released immigrant on her own recognizance prior to ICE detention); *Corral*, N.D. Cal. Case No. 3:17-cv-03987-MEJ, Dkt. #1, at 1 (same).

B. IJs' reliance on dropped charges to establish dangerousness cannot satisfy the clear and convincing standard.

Immigration judges' reliance on dropped charges to establish dangerousness – as in this case, *see Hilario Pankim*, 2020 WL 2542022, at *2 – is an even more egregious violation of due process, because in those cases a prosecutor or grand jury has already determined that there was ***not*** sufficient evidence to prove that the individual committed the crime. In *Reyes*, the IJ found that the petitioner was dangerous because she had been charged with several serious felonies. 2020 WL 2308075, at *10. But by the time of the bond hearing, the felony charges had been dismissed and the petitioner stood convicted only for misdemeanor battery. *Id.* The

district court concluded that the dismissed charges and associated arrest reports were not sufficiently "probative and specific" evidence of criminal activity to meet the requirement of clear and convincing evidence for proving dangerousness. *Id*.

Amici do not argue that the IJ is or should be bound by a criminal court's prior findings on a bond determination, or by a prosecutor's prior decision not to pursue charges. However, when an IJ reaches the opposite conclusion and finds dangerousness based on the same record and without the benefit of any additional evidence, that decision cannot reasonably inspire the "confidence . . . in the correctness of [its] factual conclusions" that society requires under the clear and convincing evidence standard. *See Colorado*, 467 U.S. at 315.

C. Detained persons with pending criminal charges are unconstitutionally forced to choose between their due process liberty interest and their right against self-incrimination.

Detained persons who face pending criminal charges (or whose charges have been dismissed without prejudice to their being refiled at a later date) are put in the impossible dilemma of being forced to choose between their due process liberty interest and their constitutional right against self-incrimination when deciding whether or not to testify at the bond hearing in order to rebut the derogatory allegations in their police reports and RAP sheets. In such circumstances, the Supreme Court has found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377,

394 (1968). An individual may wish to testify at her bond hearing in order to explain the circumstances behind an arrest, but cannot because her criminal defense attorney has advised her to remain silent. *See, e.g.*, *Corral*, N.D. Cal. Case No. 3:17-cv-03987-MEJ, Dkt. #1, at 1–2 (individual's attorney advised him not to testify about events leading up to his arrest in order to preserve his Fifth Amendment rights); *Domingo-Jimenez*, N.D. Cal. Case No. 3:16-cv-05431-WHA, Dkt. #1, at 1 (same).

No person should be required "to forfeit one constitutionally protected right as the price for exercising another." *Lefkowitz v. Cunningham*, 431 U.S. 801, 807–08 (1977); *see Simmons*, 390 U.S. at 394. But that is exactly what happens when detained persons with pending criminal charges are confronted at the immigration bond hearing with uncorroborated police reports and RAP sheets. As a result, the individual's inability to respond to the derogatory allegations in those documents renders them an even more unreliable and insufficient basis for supporting a clear and convincing finding of dangerousness.

D. Detained persons often face a Kafkaesque Catch-22 in which continued ICE detention prevents them from resolving the pending criminal charges that are the sole basis for their detention.

When individuals held in ICE detention are facing pending criminal charges, the very circumstances of detention can delay the resolution of those charges – especially when, as is often the case, ICE prevents or refuses to facilitate their attendance at criminal court hearings. *See, e.g.*, *Velasco-Lopez v. Decker*, 978 F.3d

842, 847 (2d Cir. 2000) (ICE refused to produce detained person for criminal court appearances on four separate occasions, thus delaying resolution of criminal charges which were ultimately dropped); *Corral*, N.D. Cal. Case No. 3:17-cv-03987-MEJ, Dkt. #1, at 8–9 (detained person missed four hearings in criminal case because ICE refused to transport him); *Domingo-Jimenez*, N.D. Cal. Case No. 3:16-cv-05431-WHA, Dkt. #1, at 1 (detained person missed three criminal hearings because ICE refused to transport him).

And when the individuals' pending criminal charges are the sole basis for the finding of dangerousness that authorizes their detention, the indefinite delays resulting from that detention create a Kafkaesque Catch-22 in which the individuals are effectively prevented from resolving the charges that form the basis for their continued detention. The petitioner in *Ortega-Rangel* was detained by ICE two days before the scheduled preliminary hearing in her criminal case, with the result that by the time of the district court's decision more than three months later, there still had not been any state-court review of the probable cause supporting the charges against her. *See* 313 F. Supp. 3d at 997, 1002. That lack of a probable-cause determination, along with the absence of any other corroborating evidence, led the district court to determine that the IJ's finding of dangerousness based solely on the pending charges violated her due process rights. *Id*. at 1002. Due process cannot be satisfied under any evidentiary standard – clear and convincing or otherwise – when the ICE

detention itself prevents the detained person from resolving the pending criminal charges that form the basis for the dangerousness finding and continued detention.

VII. This Court should hold that reliance on uncorroborated police reports and RAP sheets is insufficient by itself to support a determination of dangerousness under the clear and convincing evidence standard.

As the cases discussed above make clear, the constitutional due process concerns resulting from reliance on uncorroborated police reports and RAP sheets as the sole basis for denying bond based on purported dangerousness extend far beyond the particular circumstances of this case. When IJs base their determinations solely on a RAP sheet entry supported by a "vacuum of information," or when they choose to credit uncorroborated allegations in an arrest report in spite of a prosecutor's determination that the evidence did not support prosecution or a criminal court's determination that the individual could be released on bond without endangering the community, such decisions make a mockery of the exacting standard of clear and convincing evidence that this Court has held due process requires in prolonged-detention cases. *See Aleman*, 955 F.3d at 755–56; *Singh*, 683 F.3d at 1203–04.

Still worse due process violations result when detained persons with pending criminal charges are prevented from testifying to controvert police report allegations for fear of incriminating themselves, or when the very circumstances of their detention prevent resolution of the same criminal charges that are the sole

justification for their continued detention. In such cases, society is left with even less confidence that the inherently unreliable evidence of police reports and RAP sheets can enable the factfinder to reach the correct conclusion. *See Colorado*, 467 U.S. at 315.

For all of these reasons, this Court should give force to its prior holdings in *Aleman* and *Singh*, and make clear that the constitutional mandate for clear and convincing evidence is more than just an "empty semantic exercise," *see Addington*, 441 U.S. at 425, when applied to the use of uncorroborated police reports and RAP sheets in bond determinations. To that end, Amici respectfully propose that this Court adopt the simple and categorical rule that police reports and RAP sheets, absent other corroboration, cannot form the sole basis for a determination of dangerousness in cases where the government has the burden to justify continued detention by clear and convincing evidence.

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Respectfully submitted,

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RULE 32(A) CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it is an amicus brief containing 6,268 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it appears in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: November 23, 2020

/s/ Nareeneh Sohbatian

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 23, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 23, 2020

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