Dale L. Wilcox
D.C. Bar No. 1029412
Michael M. Hethmon
DC Bar No. 1019386
Immigration Reform Law Institute, Inc.
25 Massachusetts Ave. NW, Suite 335
Washington, D.C. 20001
(202) 232-5590

Attorneys for Amicus Curiae Federation for American Immigration Reform

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

Amicus Invitation No. 16-06-21 Commitment to Mental Health Facility	Case No.: Redacted

REQUEST TO APPEAR AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF OF THE FEDERATION FOR AMERICAN IMMIGRATION REFORM

I. INTEREST OF AMICUS CURIAE

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request by the Board of Immigration Appeals (BIA) on June 21, 2016 for supplemental briefing in this matter. FAIR is a nonprofit, public-interest, membership organization of concerned Americans who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. The Board has solicited *amicus* briefs from FAIR for more than twenty years. *See, e.g.*, *In-re-Q-M-T-*, 21 I. & N. Dec. 639 (BIA 1996) (citing Timothy J. Cooney, Esquire, Washington, D.C., amicus curiae for FAIR and noting "The Board acknowledges with appreciation the brief submitted by amicus curiae.").

II. QUESTIONS PRESENTED

This supplemental brief addresses the following issues for the BIA's consideration in the instant case, as requested:

- Is a respondent who has been committed to a mental health treatment facility "detained ... in custody" or "released" within the meaning of 8 C.F.R. § 1236.1(d)(1)? Does this depend on the nature of the commitment arrangement? If so, what terms must be imposed as part of the commitment arrangement to ensure that it equates to detention?

- Is commitment to a mental health facility appropriate where a respondent has a mental health condition that causes him or her to be a danger if at liberty in the United States? If so, what terms must be imposed as part of the commitment arrangement to reasonably assure the safety of the community?

- Is commitment to a mental health facility appropriate where a respondent has a mental health condition that causes him or her to pose a risk of flight such that no bond could reasonably assure his or her presence? If so, what terms must be imposed as part of the commitment arrangement to reasonably assure the respondent's presence at future proceedings?

III. STATEMENT OF FACTS

The only factual information provided in the Amicus Invitation is that it concerns a "respondent who has been committed to a mental health facility."[1]

IV. SUMMARY OF THE ARGUMENT

Amicus Invitation 16-06-21 does not specify which of the various INA provisions under which the "detention ... in custody" or "release" of a respondent "committed to a mental health treatment facility" should be analyzed by amicus FAIR, but appears to concern a respondent who has made a custody redetermination request pursuant to 8 C.F.R. § 1236.1(d)(1), making the Board's briefing interest in a proceeding in the "pre-order" stage. Custody redetermination requests under 8 C.F.R. § 1231.1(d)(1) are not available to aliens in pre-inspection, removal period, or post-removal period detention.

For 8 C.F.R. § 1231.1(d)(1) review purposes, the Board has determined that "detained in custody" and "release from custody" refer to physical detention of an alien under the jurisdiction of an Immigration Judge or District Director, and not to detention by a state or other federal agency, or alternative terms of release from immigration custody.

An alien committed to a mental health facility must be under the jurisdiction and custody of U.S. Department of Homeland Security ("DHS") before the agency may consider a custody determination request under § 1231.1(d)(1). DHS has a duty to screen aliens in detention facilities it operates or controls for mental incompetency or disorders, to provide treatment where medically indicated, and to inform the immigration judge of such indicia so that appropriate safeguards can be identified. However it is unclear whether DHS or Executive Office for

[1] IRLI made repeated requests for additional information to Respondent's counsel, Kira Gagarin Esq., but no response was ever received.

Immigration Review ("EOIR") have authority to civilly commit dangerous aliens to mental health facilities, which could conflict with Supreme Court due process protections for all persons in civil commitment proceedings. Detention of aliens whose mental disorder presents a danger to the community is mandatory, but remains subject to the same due process temporal constraints that protect other immigration detainees. The fact that a removable alien has been civilly committed in a non-agency proceeding or is subject to a final order of removal on mental disorder grounds would generally appear to preclude a bond redetermination request on the basis of flight risk.

V. TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

VI. ARGUMENT

A. Custody redetermination requests under 8 C.F.R. § 1231.1(d)(1) are not available to aliens in pre-inspection, removal period, or post-removal period detention.

The only factual information provided in the Amicus Invitation is that it concerns a "respondent who has been committed to a mental health facility." Title 8 of the Code of Federal Regulations defines "respondent" as an alien who has been "named in a Notice to Appear ["NTA"] issued in accordance with section 239(a) of the Act." 8 C.F.R. § 1001.1(r). An NTA is a written notice that has been served on the alien to commence a removal proceeding. INA § 239(a)(1). For §1236.1(d)(1) purposes, the term "respondent" would necessarily exclude an alien for whom the agency has granted deferred action, either by declining to issue an NTA or by administratively closing a case after the commencement of proceedings.

"Mental health facility" is not defined in any title of the United States Code or the Code of Federal Regulations, but in the criminal incompetency context is a facility suitable for

hospitalized treatment of a mental disease or defect.[2] "Commitment" is not defined in DHS immigration regulations, but DHS Transportation Security Administration regulations defines "commitment to a mental facility" as

> An applicant [for a hazardous materials endorsement on a commercial drivers license] is committed to a mental health facility if he or she is formally committed to a mental health facility by a court, board, commission, or other lawful authority, including involuntary commitment and commitment for lacking mental capacity, mental illness, and drug use. This does not include commitment to a mental health facility for observation or voluntary admission to a mental health facility.

49 C.F.R. § 1572.109(c).

Different INA provisions authorizing detention of aliens apply to different stages in the removal process. Applicability of these statutes also depends upon the ground for removability, which must be stated in each respondent's NTA and reviewed at the time of each respondent's initial custody determination.

Amicus Invitation 16-06-21 does not specify which of the various INA provisions under which the "detention ... in custody" or "release" of a respondent "committed to a mental health treatment facility" should be analyzed by amicus FAIR. But as the Amicus Invitation refers only to a respondent who impliedly has made a custody redetermination request pursuant to 8 C.F.R. § 1236.1(d)(1), it appears that the Board's briefing interest concerns a removal proceeding in the "pre-order" stage. Congress has given DHS broad discretion to decide whether to take an alien

---

[2] During a federal criminal prosecution or incarceration following conviction, if the court "finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense," the court must "*commit* the defendant to the *custody* of the Attorney General. The Attorney General shall *hospitalize* the defendant for treatment in *a suitable facility*...." 18 U.S.C. § 4241(a), (d).

who is the pre-order stage of the removal process into custody. *Castañeda v. Souza*, 810 F.3d 15, 19-20 (1st Cir. 2015). Specifically, INA § 236(a) provides:

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General . . . may continue to detain the arrested alien . . . and . . . may release the alien on . . . bond . . . .

INA § 236 also authorizes DHS, upon issuance of an immigration arrest warrant, to arrest and detain any alien "pending a decision on whether the alien is to be removed from the United States." The agency in general has discretion to either release the arrested alien: (1) on bond, (2) conditional parole, or (3) continue to detain the alien during removal proceedings. INA § 236(a). INA § 235(b) authorizes detention of "applicants for admission," including under certain circumstances, parolees and returning lawful permanent residents ("LPRs"). *See* INA § 101(a)(13). "[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted," an applicant for admission "shall be detained" for removal proceedings. INA § 235(b)(2)(A). However, applicants for admission detained prior to or after failing an INA § 235 inspection would not appear to qualify for a redetermination of custody under 8 C.F.R. § 1236.1(d)(1) until the NTA required to commence removal proceedings has been filed by U.S. Immigration and Customs Enforcement ("ICE") with an immigration court and an initial custody hearing has been held.

Regulations governing the exercise of the agency's INA § 236 release power authorize immigration judges (subject to review by the BIA and ultimately the Attorney General) to make individualized initial bond determinations "provided that the alien must demonstrate to the

satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8).

The regulation in question, "Appeals from custody decisions," by its plain language only applies to aliens who have previously undergone "an initial custody determination by the district director, including the setting of bond," but prior to issuance of a final order of removal. 8 C.F.R. §1231.1(d).[3] Paragraph 1231.1(d)(1) authorizes "a request," by "a respondent" for "amelioration of the conditions under which [the respondent] may be released." The request must also comply with the requirements of 8 C.F.R. §1003.19. In particular, the request must be written and show "that the alien's circumstances have changed materially since the prior bond determination." 8 C.F.R. § 1003.19(e). Prior to judicial review, an appeal from a denial of a custody redetermination request must first be taken to the BIA, "pursuant to section 1003.38." 8 C.F.R. §1003.19(f). Redetermination requests thus require a showing by the alien, subject to review by the BIA, of changed circumstances as to dangerousness and flight risk, 8 C.F.R. §§ 1236.1(d)(1), (d)(3).

INA § 236 also mandates that the agency detain certain respondents—those charged as removable for having committed various criminal offenses, or upon conviction for certain offenses received a sentence of more than one year, or engaged in terrorist activity—"upon release, without regard to whether the alien is released on parole, supervised release, or probation, or whether the alien may be arrested or imprisoned again for the same offense." INA § 236(c)(1). Aliens subject to mandatory detention under §236(c)(1) may only be released by the agency if the agency decides that the alien is cooperating in certain enforcement activities *and*

[3] Physical confinement during removal proceedings but prior to issuance of a final order of removal is called "pre-order detention."

"will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled hearing." INA § 236(c)(2).

The detention of aliens who are subject to a final order of removal is governed by 8 C.F.R. part 241. 8 C.F.R. § 1241.2. Once "an order under 8 C.F.R. part 1240 becomes final," an alien is in post-order detention status and no longer eligible to request amelioration under § 1231.1(d)(1). During the "removal period," after issuance of a final order of removal but prior to actual removal, *see* INA § 241(a)(1)(A), the agency must detain certain aliens who are removable on national security or terrorism grounds. INA § 241(a)(2). All inadmissible aliens, as well as aliens who are deportable as nonimmigrant status or entry condition violators, criminals, public security risks with final removal orders, or who have "been determined to be a risk to the community or unlikely to comply with the order of removal" may be detained "beyond the removal period." INA § 241(a)(6). Detention of aliens in the removal period and beyond is regulated by 8 C.F.R. §§ 241.13 ("Determination of whether there is a significant likelihood of removing a detained alien in the reasonably foreseeable future") and 241.14 ("Continued detention of removable aliens on account of special circumstances").

A custody determination by a district director described in paragraph (d)(1) thus refers only to a determination as to pre-order immigration detention, as distinguished from criminal custody under federal or state criminal law. *See Castañeda*, 810 F.3d at 20 (construing the phrase "when released" in INA § 236(c)(1) (Detention of Criminal Aliens; Custody); *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001) (same). The language of § 236(c)(1) makes clear that immigration custody is not only legally distinct from criminal custody, but that criminal custody is also a more expansive status than incarceration or confinement. Unlike the scope of the term as used in the Appeals from Custody Decisions regulation, criminal custody can include

alternatives to incarceration such as home detention and electronic monitoring. *See Hensley v. Municipal Ct.*, 441 U.S. 345, 348-49 (1973). However, for immigration detention and removal purposes, the Board has classified such alternatives as "terms of release." *See In Re Kotliar*, 24 I. & N. Dec. 124, 125 (BIA 2007).

B. Custody for 8 C.F.R. § 1231.1(d)(1) review purposes means physical detention of an alien under the jurisdiction of an Immigration Judge or District Director.

The terms "detained," "custody," and "released" as used in 8 C.F.R. § 1231.1(d)(1) have been construed by the BIA. *See Matter of Aguilar-Aquino*, 24 I. & N. Dec. 747 (BIA 2009). In *Aguilar-Aquino*, the Board recognized that

> both a person who has been released on parole and one who remains incarcerated can be considered to be in "custody." On the other hand, the term "detain" generally refers to actual physical restraint or confinement within a given space.... Therefore, although a person who is in custody is not necessarily in detention, one who is in detention is necessarily in custody. With this understanding we find that the term "custody" as it is used in 8 C.F.R. §1236.1(d)(1) refers to actual physical restraint or confinement within a given space.

Id. at 752. Looking at the legislative history of INA § 236(a) and its pre-IIRIRA predecessors, the Board has found that in section 236, "Congress used the terms 'custody' and 'detain' interchangeably and did not intend for them to be afforded different meanings." *Id.* at 752-53. However, the Board further found that

> Congress did not intend the term "custody" in section 236 of the Act to be afforded the broad interpretation employed in the Federal habeas corpus statute, where it is interpreted expansively to ensure that no person's imprisonment or detention is illegal.... In this regard, we note that a writ of habeas corpus may only be granted to a person who is in "custody." As it is used in 8 C.F.R. § 1236.1(d)(1), however, "custody refers to whether the Immigration Judge or the district director has jurisdiction for purposes of review of the DHS's initial custody determination.

Id. at 752.

The Board also clarified that "released from custody within the meaning of 8 C.F.R. § 1236.1(d)(1)" meant release "from actual physical detention." *Id.* at 753. Conditions placed on the respondent's release, including the home confinement and electronic monitoring device programs, "constituted 'terms of release' and were not 'custody' within the meaning of section 236(a) of the Act and 8 C.F.R. § 1236.1(d)(1)." *Id.*

These considerations indicate that the two bare facts provided in the Amicus Invitation—that a "respondent" has been "committed to a mental health facility" are not by themselves sufficient to qualify an alien as "detained" or "in custody" for 8 C.F.R. § 1231.1(d)(1) review purposes—*i.e.*, for amelioration of custody conditions—if (1) the alien is detained by DHS during a pre-inspection period, a removal period, or in post-removal period detention, or (2) the terms of commitment do not require mandatory physical detention. Further inquiry as to the nature of the commitment arrangement is thus required.

C. An alien committed to a mental health facility must be under the jurisdiction and custody of DHS before the agency may consider a custody determination request under § 1231.1(d)(1).

To determine whether an Immigration Judge or District Director has jurisdiction over an alien request for amelioration of detention conditions pursuant to 8 C.F.R. § 1231.1(d)(1), the threshold question is whether the agency or persons who authorized the commitment of the respondent, or who are the respondent's custodian while committed to the mental health facility, are state actors, or federal actors other than DHS. If jurisdiction is lacking, neither the agency nor an immigration judge can be the custodian of an alien committed to a mental health facility. Significantly, if neither DHS nor EOIR has jurisdiction due to lack of custody over the alien, neither would be subject to a habeas challenge for a violation of the statutory or constitutional limits on mandatory or indefinite immigration detention imposed by 8 U.S.C. § 1231. *See, e.g.*,

Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 483-848 (1999); *Mederos v. Murphy*, 762 F. Supp. 2d 209, 215 (D. Mass. 2010); *In re Civil Commitment of Richards*, 738 N.W.2d 397, 399-400 (Minn. Ct. App. 2007).

Aliens confined in mental institutions or hospitals are, like citizens, generally committed involuntarily under state law, for the protection of the individual and the public. *See Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (States may legitimately take measures to restrict the freedom of the dangerously mentally ill, in order to protect the community from harm.). In the case where commitment is based on danger to the public, confinement is authorized only so long as both the mental illness and dangerousness persist, with confinement subject to continued review. *See, e.g., Jones v. United States*, 463 U.S. 354, 368 (1983).

If commitment was by a state court, or the custodian is a state agency, habeas corpus challenges to confinement based on a state court order must be brought under 28 U.S.C. § 2254, not 28 U.S.C. § 2241. Such aliens may be in physical detention within the meaning of INA § 236. But if the alien has been confined by a state court under a civil commitment order, neither DHS nor the immigration courts have custody, and thus jurisdiction, over the detained alien, making the alien ineligible to request a change of custody conditions under 8 C.F.R. § 1231.1(d)(1). A habeas writ on behalf of a person in custody pursuant to the judgment of a state court also cannot be granted until the applicant has first exhausted the remedies available in those state courts. *Felker v. Turpin*, 518 U.S. 651, 662 (1996). By contrast, a complaint alleging unlawful detention where a DHS official is the custodian must be filed as a habeas corpus challenge under section 2241.

For aliens who have been charged with or convicted of a federal crime, the Insanity Defense Reform Act, 18 U.S.C. §§ 4241-4247, authorizes civil commitment of individuals who

have been determined by a federal court to be both mentally ill and dangerous. 18 U.S.C. §§ 4241(d), 4246. In both the state and federal criminal contexts, a finding of not guilty by reason of insanity is a sufficient ground for civil commitment, as it establishes both criminal conduct and mental illness. *Jones v. United States*, 463 U.S. at 366. However, a judicial determination of legal incompetency in a criminal trial in federal court can have no wider application outside of those criminal proceedings. *See O.K. v. Bush,* 344 F. Supp. 2d 44, 54 (D.D.C. 2004) (*citing U.S. v. Clark*, 617 F.2d 180, 184 n.5 (9th Cir. 1980)); *U.S. v. Copley*, 935 F.2d 669, 671 (4th Cir. 1991).[4]

Significantly, an alien committed in a federal criminal proceeding has been committed to a mental health facility by a federal agency other than DHS. The question of the identity of the "immediate custodian" for removable aliens is unsettled, with some circuits holding that only the warden or superintendent of the facility is the proper respondent, while others also include ICE executive officials. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (declining to apply immediate custodian rule in immigration context and noting circuit split); *Kholyyavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006) (warden of state jail was custodian and ICE Field Director dismissed); *Day Tho Hy v. Gillen*, 58 F. Supp. 2d 122, 124-25 (D. Mass 2008) (warden of state facility was proper party and ICE regional director dismissed). Only in federal circuits which recognize an ICE District Director as an immediate custodian for § 2241 habeas challenges would that Director appear to have jurisdiction to consider a § 1236.1(d)(1) request.

[4] EOIR Immigration Judge Benchbook, although extensively reviewing "Mental Health Issues in the Criminal Context," acknowledges that "much of this law is rooted in constitutional precepts that do not apply to civil immigration proceedings." *See* § C.2, available at www.justice.gov/eoir/immigration-judge-benchbook-mental-health-issues (last viewed on July 7, 2016).

D. DHS or EOIR authority to civilly commit dangerous aliens to mental health facilities is unclear.

By statute, the immigration judge is responsible both for making determinations of: (1) mental incompetency to participate in removal proceedings, with appropriate safeguards for incompetent aliens in removal proceedings, *see* INA § 240(b)(3), and, (2) if charged in the NTA, removability on the ground that a respondent has a dangerous mental disorder, *see* INA §§ 212(a)(1)(A)(iii), 237(a)(10).

If it is "impractical by reason of an alien's mental incompetency for the alien to be present at the proceeding, the [immigration judge] shall prescribe safeguards to protect the rights and privileges of the alien." INA § 240(b)(3). The test for determining whether an alien is competent to participate in immigration proceedings is "whether the alien has a rational and factual understanding of the nature and object of the proceedings, can consult with his or her representative, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." *Matter of M-J-K*, 26 I. & N. Dec. 773, 775 (BIA 2016) (citing *Matter of M-A-M-*, 25 I. & N. Dec. 474, 478-79, 480 (BIA 2011)). While the application of safeguards is mandatory, immigration judges "have discretion to determine which safeguards are appropriate under the circumstances of a particular case." *Id.* (citing *Matter of J-S-S-*, 26 I. & N. Dec. 679, 682 (BIA 2015)).

Neither DHS nor the alien's representative has the burden of proof in a competency determination, but both parties have a duty to provide indicia of incompetency to the immigration judge, who makes the determination using a preponderance of the evidence standard. *Matter of J-S-S-*, 26 I. & N. Dec. at 683. The INA presumes that a removal proceeding against an incompetent alien is fair if the IJ has prescribed safeguards, in particular if

the alien is represented by counsel. *Matter of M-A-M-*, 25 I. & N. Dec. at 477; 8 C.F.R. § 1003.25(a).

DHS regulations impose an affirmative obligation on the agency to provide immigration courts with *relevant materials in the agency's possession* that would inform the immigration court about a respondent's mental competency. 8 C.F.R. § 1240.2(a) ("[DHS] counsel shall present on behalf of the government evidence material to the issues of deportability or inadmissibility and *any other issues that may require disposition* by the immigration judge."); *Matter of M-A-M-*, 25 I. & N. Dec. at 480. Such relevant materials would include records of ICE Health Services Corps (IHSC) detainee mental health screenings (*e.g.* Form IHSC-883, IHSC Mental Health Review), prior reports or evaluations of mental disorders or behaviors indicating incompetency, or records indicating that an NTA was served at a mental health institution, or to a representative or relative who informed DHS prior to filing of the NTA of indicia of incompetency.

By DHS policy, ICE is only responsible for screening and treatment of mental illness or incompetency for aliens when they are: (1) unrepresented and (2) in ICE custody. *See* ICE Director John Morton, Memorandum: *Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions* (Apr. 22, 2013). Specifically, DHS has a self-imposed duty to screen aliens detained by ICE in facilities housing "ERO detainees" for indications of mental illness. *See* ICE Performance-Based National Detention Standards (PBNDS), Detention Standard 4.3.1 (Medical Care), https://www.ice.gov/doclib/detention-standards/2011/medical_care.pdf (last viewed July 7, 2016). The ICE Medical Care PBNDS mandate initial and ongoing mental health screening, assessment, and treatment of detainees in

"the following types of facilities housing ERO [ICE Enforcement and Removal Operations division] detainees: [1] Service Processing Centers (SPCs), [2] Contract Detention Facilities (CDFs), and [3] State or local government facilities used by ERO through Intergovernmental Service Agreements (IGSAs) to hold detainees for more than 72 hours." PBNDS 4.3.1 (Medical Care) (2013).

Detainees in these three types of facilities must be provided a comprehensive mental health screening and assessment: The facility shall have a mental health staffing component on call to respond to the needs of the detainee population 24 hours a day, seven days a week. PBNDS 4.3.1 ¶ 2. Each detainee shall receive a mental health intake screening within twelve hours upon arrival at each detention facility. *Id.* at ¶ 14. Each detainee shall further receive a comprehensive mental health assessment by a qualified, licensed health care professional, no later than 14 days after entering into ICE custody or arrival at facility. *Id.* at ¶ 15. The assessment shall classify each detainee on the basis of medical and mental health needs. Detainees shall be referred for evaluation, diagnosis, treatment and stabilization as medically indicated. *Id.* at ¶ 16. Although these screenings are not meant to determine "competency" for due process purposes in a removal proceeding, currently, ICE records the results of detainee screenings on Form IHSC-883. *See Matter of M-J-K*, 26 I&N Dec. at 774. DHS may refer detainees for mental health evaluation and diagnosis "as medically indicated," *Id.* at ¶ 16, and must disclose such indicia of possible incompetency per 8 C.F.R § 1240.2(a).

Civil commitment of an incompetent alien to a mental health facility is thus not a power expressly granted to immigration judges by statute or regulation. Although the Board has recognized the wide discretion afforded immigration judges in making individualized determinations of appropriate safeguards for a mentally incompetent respondent, *see, e.g., Matter*

of M-J-K, 26 I. & N. at 775-76, it has never construed the safeguards statute to include a civil commitment power. FAIR believes this omission is reasonable, given the due process concerns that could arise from an order of commitment issued by an agency that skirts the parameters set for state civil commitments under the *Jones* and *Hendricks* line of Supreme Court precedent.

Similarly, the INA contains no express civil commitment authority for aliens with mental disorders or illness by an ICE District Director or other official responsible for detention operations. As discussed above, ICE Detention Standards, although non-regulatory, provide for mental health screening and treatment of detainees in specified ICE-operated and contract detention facilities, and such treatment could include long-term hospitalization or referrals for outside treatment by DHSIHC personnel. PBNDS 4.3.1. But this mandate for provision of mental health-related care to immigration detainees derives from the Fourteenth Amendment right to due process, under a "deliberate indifference" standard, applicable to all pretrial detainees in federal facilities. *See Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (deliberate indifference standard); *Brown v. Plata*, 131 S. Ct. 1910 (2011) (applying standard to substandard mental health care in state prisons); *Newbrough v. Piedmont Regional Jail Auth.*, 822 F. Supp. 2d 558 (E.D. Va. 2011) (applying standard to immigration detainee).

E. Detention of aliens whose mental disorder presents a danger to the community is mandatory, but subject to the same due process temporal constraints as other immigration detainees.

An IJ may only set a release bond if he or she first determines that the alien does not present a danger to the community. *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006). Dangerous aliens have no constitutional right to be at liberty in the United States pending the completion of proceedings to remove them from the country, and are thus properly detained without bond. *Carlson v. Landon*, 342 U.S. 524, 537-42, (1952) (potentially dangerous resident

aliens may be detained without bail during pendency of deportation proceedings). A respondent's claim that his violent act was a result of his mental illness does not lessen the danger that his actions pose to others. *See Matter of G-G-S-*, 26 I. & N. Dec. 339, 346 (BIA 2014) (once an offense is determined to be particularly serious, no separate determination of danger to the community is required).

Regulations implementing IIRIRA have added, as a requirement for ordinary bond determinations under INA § 236(a), that the alien must demonstrate that "release would not pose a danger to property or persons," even though section 236(a) does not expressly include that requirement. *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (BIA 1999). In the custody reconsideration proceeding that is the subject of this Amicus Invitation, the detained alien—not the agency—bears the burden of proving that his release would not pose a danger to property or persons. 8 C.F.R. § 1236.1(c)(8); *cf.* INA § 240(c)(1)(B).

Section 236(a) custody redetermination requests differ from post-removal period detention reviews, where DHS has initiated removal proceedings and then held a petitioner for more than six months. There, an alien is clearly detained by ICE for § 2241 habeas act purposes. *INS v. St. Cyr*, 533 U.S. 289, 306-07 (2001). Federal courts have granted habeas petitions seeking review of such detention conditions, including a bond re-determination where DHS bears the burden of showing dangerousness. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 682 (2001); *Clark v. Martinez*, 543 U.S. 371, 385 (2005); *Thai v. Ashcroft*, 366 F.3d 790, 792-93 (9th Cir. 2004); *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2007).

Aliens held in a DHS-controlled facility in indefinite custody are not thereby "committed to a mental health facility," even if they are being provided mental health treatment for disorders that present a danger to the community. If the alien has been found to be mentally incompetent

to participate in removal proceedings, he or she should be provided with the safeguard of appointed counsel. If there is "no significant likelihood that the alien will be removed in the reasonably foreseeable future, DHS must meet a three-part regulatory test to extend detention for a six-month period. First, 'the alien must have previously committed one or more crimes of violence, as defined in 18 U.S.C. § 16. Second, a physician designated by the IHSC must have reported that "due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future." Third, an immigration judge, following a reasonable cause hearing, must have determined that it is unreasonable to conclude that any "conditions of release" could "be expected to ensure the safety of the public." *See* 8 U.S.C. §§ 241.14(f)(1), (g)(3), and (h),

For all other respondents committed to a mental health facility as a detainee under ICE jurisdiction, FAIR believes that public safety, flight risk, and due process detention limits can best be addressed if the alien is charged in an NTA with removability based on certification of a mental disorder, or behavior associated with the disorder, that may pose or has posed a threat to the property, safety, or welfare of the alien or others, or having a "history of behavior associated with the disorder … which behavior is likely to recur or lead to other harmful behavior..." INA § 212(a)(1)(A)(iii)(inadmissibility), INA § 237(a)(10)(deportability). The burden of proof to establish the existence of a mental illness triggering removal under these two provisions rests with a medical officer or board, which must certify the alien to have the requisite mental illness to the immigration judge, who in turn must rely on the certification. INA § 240(c)(1)(B).[5]

[5] Routinely including a charge of inadmissibility on mental disorder grounds in the NTA for unadmitted aliens confined in mental health institutions is a practical safeguard that would improve the likelihood that service on all required parties was proper and complete under 8 C.F.R. § 103.8(c)(2), and the immigration court is notified at the earliest possible moment of relevant mental health concerns, in accordance with 8 C.F.R. § 1240.2(a).

Implementing regulations are found at 42 C.F.R. §§ 34.2-34.4.[6] In FAIR's view, a removal proceeding against an alien charged with a threatening mental disorder or related history of behavior provides the constitutionally requisite hearing and related procedural protections, in particular opportunity for the alien's appointed counsel to adequately represent the alien's interests, including challenges to the medical officer's findings.

F. Civil commitment or a final order of removal on mental disorder grounds would preclude a bond redetermination request on the basis of flight risk.

The setting of a release bond is solely designed to ensure an alien's presence at proceedings. It is improper to grant bond redetermination where an alien presents a danger to the community. *Matter of Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009). Only after an alien demonstrates that he does not pose a danger to the community should an immigration judge continue to a determination regarding the extent of flight risk posed by the alien. *Id.* Given the bare facts in the Amicus Invitation, FAIR is unable to envision a scenario where a removable alien has been civilly committed to a mental health facility but is not a danger to the community, which is the sole circumstance where the risk of flight determination would be relevant. For an alien in ICE custody who has been transferred to such a facility for treatment, the situs of detention is irrelevant to whether the alien poses a flight risk if released pursuant to a bond redetermination hearing.

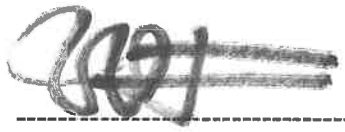
VII. CONCLUSION

Given the unclear authority of immigration judges and ICE district directors to civilly commit mentally incompetent or dangerously disordered aliens to mental health facilities, FAIR

[6] Essentially, if a designated medical examiner finds that the alien has a "Class A" condition, including harmful mental behaviors caused by drug addiction or alcoholism, or has a history of the condition that is likely to reoccur, the alien is inadmissible.

concludes that a more consistent use of charges in NTAs of removability due to dangerous mental disorders or behavior would, in the mental health context, best balance and insure the interests in public safety, due process protections of detained aliens, and likelihood of the appearance of removable aliens at immigration proceedings.

Respectfully submitted,



Dale L. Wilcox
Michael M. Hethmon
Immigration Reform Law Institute, Inc.
25 Massachusetts Ave, NW, Suite 335
Washington, DC 20001
Phone: 202-232-5590
Fax: 202-464-3590
Email: litigation@irli.org

Attorneys for Amicus Curiae Federation for American Immigration Reform