STEPHEN W MANNING
JESSICA BOELL
JENNIFER ROTMAN
for the AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
PO BOX 40103
Portland OR 97240

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Attorneys for Amicus Curiae

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

In the Matter of **Hilario Antonio GARCIA GARCIA,** Respondent In Bond Proceedings	File No. A088-889-863

BRIEF OF AMICUS CURIAE, AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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Introduction

Asserted in *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009), and in the case arising here, the Department of Homeland Security posits a regulatory interpretation that divests Immigration Judges of one of their most basic adjudicatory roles: reviewing terms of release from custody. Under DHS's view, the power to determine the terms of release is reserved only to them without interference, oversight, or review by an Immigration Judge. The regulation DHS cites for this power, 8 C.F.R. § 1236.1(d)(1), plainly does not provide for it. *Matter of Toscano-Rivas*, 14 I&N Dec. 523 (BIA, A.G. 1973).[1]

Nevertheless, DHS has acted here and elsewhere to expand its concept of power to restrict the personal lives of non-citizens in a way that would have been unimaginable just a short time ago. With changes in technology that permit electronic monitoring via radio frequency and global position satellite monitoring, and new managerial units singularly responsible for using this technology, DHS has

[1] The question was asserted but not decided in *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009). The question is directly raised here, but again, it is not clear that the Board must answer it. The Immigration Judge did not actually ameliorate any term of release for the respondents. In this sense, DHS was the prevailing party below and does not have any claim to put forth on appeal. Nevertheless, the issue is of significant importance to AILA to proffer this brief.

aggressively rolled out several initiatives under the rubric of "alternatives to detention". *See* Immigration & Customs Enforcement, *Alternatives to Detention Fact Sheet* (March 16, 2009) available at: <<http://www.ice.gov/pi/news/factsheets/080115alternativestodetention.htm>> (last visited May 31, 2009) ("ATD Fact Sheet").

In this brief, AILA writes to explain the critical role Immigration Judges have in reviewing conditions imposed on a non-citizen when released from detention. First, Immigration Judges have the power to modify *any* term of release including, but not limited to, physical or telephonic reporting requirements, electronic monitoring, home confinement, hours of curfew, or presentation of documents. This is so because the regulation authorizes it, statutory interpretation compels it, and Constitutional principles require it. Second, in the absence of a regulation or formal law-making guidance on alternatives to detention initiatives, Immigration Judges have a special duty to police DHS's adherence to the faithful application of the release criteria so that individuals who do not pose a flight risk are not burdened by unnecessary restraints.

Statement of Interest of Amicus Curiae

The American Immigration Lawyers Association ("AILA") is a national association with more than 10,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS") and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

Argument

I. Immigration Judges May Modify Any Term of Release.

Sometime in 2002, DHS organized managerial units to coordinate terms of release nationwide.[2] *See* ATD *Fact Sheet*.

[2] As explained in more detail below, the record as it comes to the Board is sparse in details about the "Alternative to Detention" initiative launched by DHS. The information asserted herein is based on AILA's understanding of the ATD

Called the "Alternatives to Detention Unit", there are several publicly announced initiatives, such as the Electronic Monitoring Program (EMP), the Intensive Supervision Program (ISAP), and the Enhanced Supervision/Reporting program (ESR).[3] *Id.; see also* ICE *About Programs, Alternatives to Detention*, available at <<http://www.ice.gov/partners/dro/detalts.htm>> (last visited May 31, 2009). Presently operating in 12 cities, the ISAP initiative "uses a variety of effective strategies such as electronic monitoring via radio frequency (RF) and global position satellite (GPS), unannounced home visits, and telephonic reporting requirements." *See* ATD Fact Sheet. The non-citizen is required "to comply with a variety of activities, including local office visits, employment verification, curfews and travel document information collection." *Id.*

The power to impose terms for release long pre-dated these managerial units. Quintessentially, the detention,

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initiatives from public information and information supplied by AILA's members. There is a certain ad hoc quality to the initiatives and their actual operation at the field level that is not explained in this record. The Board has been cautious in such situations before, *Matter of Sanchez-Avila*, 21 I&N Dec. 444 (BIA 1996), and additional proceedings might be appropriate here for supplemental information.

[3] DHS materials refer to the initiative as the "Intense Supervision and Appearance Program" and the "Intensive Supervision and Appearance Program."

bond, parole, and supervision provisions of § 236 were designed primarily to make sure that the alien who is the subject of the removal proceedings will be made available for hearing when required, and for removal if ultimately found to be removable. *Matter of Toscano-Rivas*, 14 I&N Dec. 523, 527 (A.G. 1973).

Thirty years ago, in *Matter of Toscano-Rivas*, a unanimous en banc Board and the Attorney General (reviewing the matter by certification) held that immigration judges are authorized to modify the non-monetary terms of release.[4] The arguments DHS makes today opposing Immigration Judge review echo, nearly word for word, the arguments considered and rejected in *Matter of Toscano-Rivas*. For example, here DHS asserts that the regulations "establish a division of responsibilities" between [DHS] and the [Immigration Judges]". The former-INS made an identical argument. *Id.* at 525 ("The District Director takes the position that the special inquiry officer had no authority to delete the

[4] In *Matter of Toscano-Rivas*, the Board and the Attorney General were confronted with two different questions: one, the question of Immigration Judge power to modify non-monetary conditions of release and, two, whether un-related conditions of release such as an unauthorized employment rider were enforceable. The Board and the Attorney General were unanimous in their agreement on the first question. The decision refers to "special inquiry officers" who are today known as "immigration judges." We use the term "immigration judge" for readability, as it makes no analytical difference.

condition relating to unauthorized employment because the District Director has the exclusive right to impose conditions of bonds other than the actual amount of the bond."). Here, DHS asserts that Immigration Judges "are not, however, expressly authorized to alter or terminate pre-existing orders of supervision that were issued to an alien by ICE as a term of conditional parole." Again, a similar argument was made in *Matter of Toscano-Rivas*. *Id.* ("The District Director would have us interpret the absence of any reference to conditions of bond in 8 CFR 242.2(b) to mean that the special inquiry officer is without any power to review a determination as to non-monetary conditions of a bond made by the District Director.")

Matter of Toscano-Rivas rejected these arguments. Analyzing the regulatory predecessor to § 1236.1(d), *Matter of Toscano-Rivas* observed that the plain language of the regulation provides that an Immigration Judge can modify the terms of release. *Id.* at 525-26 ("We refer to the portion that states the District Director shall advise a respondent 'whether he may apply to a special inquiry officer pursuant to paragraph (b) of this section for release or modification of the conditions of release ...'"). Accordingly, *Matter of Toscano-Rivas* held that Immigration Judges "in fact have the power to review and

modify the conditions of a bond imposed by the District Director." *Id.*

The holding in *Matter of Toscano*-Rivas is dispositive here. The regulation at § 1236.1(d)(1) contains three clauses. It provides Immigration Judges with regulatory power over individuals who are in custody (clauses 1 and 2) and individuals who have been released from custody (clause 3). There are several notable features about the third clause. First, it is a plain statement of the power of an Immigration Judge that, using his or her expertise in fact-finding and the adversarial hearing system, he or she may ameliorate the terms of release. Second, its applicability to every term of release is clear in the language "ameliorate the *terms* of release", which is plural and broad (emphasis added). Third, there is no limitation expressed in the clause. It does not constrain the Immigration Judge's power to redetermine only the amount of bond. In fact, it speaks to an immigration judge's power, not DHS's power.

It is worth remarking what is not at issue here: the power of an Immigration Judge to impose conditions such as enhanced supervision, special reporting, electronic monitoring equipment or other similar conditions in the first instance. The power under review here is limited to

the third clause of § 1236.1(d). The other clauses in the regulation grant related but distinct powers to an Immigration Judge. For example, clauses 1 and 2 authorize an Immigration Judge to set *any* amount of bond, including an amount higher than the District Director's bond. *Matter of Spiliopoulos*, 16 I&N Dec 561, 562 (BIA 1978) (authorizing IJ to increase bond amount under predecessor regulation because of language permitting IJ to determine the "amount thereof" a bond). Unlike the other clauses, the third clause limits an Immigration Judge's task to amelioration of the terms of release. Consequently, an Immigration Judge could not add terms that would increase a restraint of liberty.

II. In the absence of regulations, Immigration Judges have a critical role in reviewing terms of release under any DHS alternative to detention initiative.

Immigrant detention is the fastest-growing, least examined type of incarceration in America. *See* Nina Bernstein, *City of Immigrants Fills Jail Cells With Its Own*, N.Y. Times, Dec. 27, 2008 at A1. Nearly half a million individuals will be detained in the growing maze of the immigrant detention system in the United States this year. *Id.* The system is plagued with cruelties. The Department of Homeland Security is not widely seen as having ably managed the immigrant detention system. Deaths

are not infrequent. *See* Nina Bernstein, *Few Details on Immigrants Who Died In Custody*, N.Y. Times, May 5, 2008 at A1. There are systemic complaints of physical abuse, sexual abuse, and overcrowding. *See* American Civil Liberties Union of Massachusetts, *Detention and Deportation in the Age of ICE* (2008) (available at <<http://www.aclum.org/ ice/ documents/aclu_ice_detention_report.pdf>>. DHS's use of quick transfers, without notice, among distant and disparate facilities, is a tactic that has earned the unsettling euphemism of "disappearing". *Id*.

One solution for the dysfunction that besets DHS's detention system is, of course, to detain fewer people by conscientious implementation of *true* alternatives to detention. *See* American Immigration Lawyers Association, *Alternatives to Detention* (Position Paper series) (July 3, 2008) (available at <<http://www.aila.org/content/ default.aspx?docid=25874>>). Congress has encouraged the creation of true alternative to detention programs for non-citizens "who are not mandatory detainees, but are deemed unlikely to appear at their immigration hearings." *Report accompanying the Department of Homeland Security Appropriations Bill, 2008*, H.R. Rep. No. 110-181 at 42 (June 8, 2007).

Since the creation of their detention alternative managerial units, DHS has furiously expanded the use of its ISAP and ESR initiatives based largely on the perceived successes of the initiatives.[5] In operation across the country, these initiatives and other innovative concepts hold promise to alleviate the harsh impacts of detention and bring order to the disorder of DHS's detention grid. Regrettably, there are no regulations or publicly available formal guidance bearing the weight of law to guide DHS's decision making.

And, thus, we come to the pernicious aspect of the DHS initiatives. The essence of a *true* alternative to detention initiative, indeed, is that by increasing supervision, a "high-risk" individual is turned into a "low-risk" individual, and thus the need for detention is avoided. AILA is critical of DHS's present alternatives to detention

[5] It is not cynical to point out that the widely touted statistics that ISAP-managed individuals have a 93% appearance rate is not all that surprising. *See Report Accompanying Department of Homeland Security Appropriations Bill, 2008,* H.R. Rep. 110-181 at 42 (June 8, 2007). After all, DHS apparently only enrolls individuals that are *not* flight risks. These are individuals who would have already shown up in the pre-ISAP era. A better allocation of our scarce public resources and, frankly, a more honest initiative would have focused on those individuals who have no local family and community ties; prior arrests, convictions, or failures to appearances at hearings – i.e. high flight-risks – and subjected them to the enhanced supervision.

initiatives for several reasons. Most importantly, "all of DHS's alternatives to detention programs rely heavily on electronic monitoring devices which seriously restrict an individual's freedom of movement— thereby converting the program into an alternative form of custody rather than an alternative to detention." *See* AILA Position Paper, *supra.* DHS has adopted a blanket approach to its initiatives, imposing onerous conditions on individuals who are not flight risks at all. *Id.* ("DHS currently only permits individuals to participate in alternative programs if the individual has already demonstrated that they are not a flight risk or danger to the community[.]"*Id.; In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security*, Human Rights First, at 41 (2004) (available at << http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf>>).

This blanket approach has several problems. First, it is unlawful. DHS holds no general police power to detain. *INS v Chadha*, 462 US 919, 953 n.16 (1983) (executive's administration of laws "cannot reach beyond the limits of the statute that created it..."). Its power to detain must derive from a statutory grant of authority and § 236(a) provides DHS with its sole authority to detain. Section 236(a) clearly does not authorize the detention of every

non-citizen. *Cf.* § 236(a) ("may" detain) *with* § 236(c) (mandatory detention). Under § 236(a), only individuals who pose a flight risk or who are dangers to the community should be detained.[6] Individuals who are not flight risks or dangers to the community should not be detained and their liberty should not be restrained with unnecessary conditions. These individuals should be released from detention on their own recognizance, if appropriate, under the governing Board standard. *See, e.g., Matter of Patel*, 15 I&N Dec. 666 (BIA 1976) (describing release from custody standard); *Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974) (same); *Matter of Guerra*, 24 I&N Dec. 37 (2006) (same).[7] Immigration Judges, accordingly, have a special duty to insure that low-risk individuals are freed from unnecessary restraints. *I.N.S. v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 196 (1991) (access to

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[6] DHS cannot compel any individual to participate in a program such as ISAP or ESR absent an authorized arrest because without an arrest, logically, there can be no release.

[7] AILA is aware of situations in which an individual is enrolled in an ISAP or ESR long after the release decision is made. For purposes of § 1236.1(d)(1)'s terms of release clause, the timing of enrollment is not relevant. An individual may seek review of any condition within seven days of its imposition. *Matter of Reczynski*, 15 I&N Dec. 598, 599-600 (1976) ("An alien under a bond condition can adequately protect his rights by making a prompt request for a redetermination...shortly after the condition is imposed[.]")

administrative review necessary to insure individualized determinations of release conditions).

Second, the use of conditions such as those involved in ISAP or ESR "should be specifically governed by a published regulation of the Service." *Matter of Toscano-Rivas*, 14 I&N Dec. at 553 (Attorney General authoring). A regulation would decrease "the potential problem . . . of undue utilization of such a condition." *Id.* at 557. A regulation should outline "[s]uch standards [that] would provide guidance to Service personnel involved in day-to-day implementation and would be a safeguard against abuse of discretion." *Id.* Importantly, the "standards set forth in a regulation might be of use in affording a basis for decision making in the event of administrative or judicial review." *Id.*

Conclusion

There are many reasons to encourage true alternatives to immigrant detention. "The creation of robust alternatives to detention programs that focus on case management through partnerships with community organizations rather than the use of restrictive electronic monitoring should help to reduce the numbers of individuals in detention and ensure that individuals with strong ties to the community are not needlessly separated from their

families." *See* AILA Position paper, *supra*. The efforts of DHS to date fall short of the promise these programs hold. Importantly here, their initiatives are unlawfully implemented. The Board should hold that Immigration Judges play a critical role in supervising the terms of release so that each individual retains his or her liberty to the greatest extent possible under law.[8]

Respectfully submitted,
for the AMERICAN IMMIGRATION
LAWYERS ASSOCIATION

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STEPHEN W MANNING
June 1, 2009

CERTIFICATE OF SERVICE

I, STEPHEN W MANNING, hereby certify that I served a copy of Brief of Amicus Curiae by first class mail on June 2, 2009 to:

Office of Chief Counsel
U.S. DEPARTMENT OF HOMELAND SECURITY
120 Montgomery Street Suite 200
San Francisco CA 94104

Francisco Ugarte
SAN FRANCISCO IMMIGRANT &
LEGAL EDUCATION NETWORK
938 Valencia Street
San Francisco CA 94110

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STEPHEN W MANNING

[8] AILA takes no position on whether Mr. Garcia-Garcia should be granted relief or amelioration of the terms of his release.