DETAINED

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE OF IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

FALLS CHURCH, VIRGINIA

In the Matter of:	)	Case No: A029-923-675
Armando CERDA REYES,	)	
Respondent.	)	In Bond Proceedings.

BRIEF OF

THE CAROLINAS CHAPTER OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION,

CATHOLIC CHARITIES OF THE ARCHDIOCESE OF NEWARK,

DOLORES STREET COMMUNITY SERVICES,

NORTHWEST IMMIGRANT RIGHTS PROJECT, AND

THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD

AS AMICI CURAIE IN SUPPORT OF RESPONDENT

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8. Copy of Declaration of Cynthia Aziz, (original attached to Respondent's Brief on Certification in the case of *In re K. Cruz-Lopez*, A200-577-344).

9. Certification decision of Immigration Judge Barry J. Pettinato in Charlotte, North Carolina, dated March 10, 2010 in In re Mauricio Munoz Guerrero, A087-948-595.

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I. INTRODUCTION AND STATEMENT OF AMICI[1]

Amici Curiae are organizations with members or staff who represent respondents in bond proceedings before immigration judges (IJ) and who have a direct interest in ensuring that respondents have access to prompt bond hearings. Amici proffer this brief to urge the Board to interpret the regulation at 8 C.F.R. § 1003.19(c) to allow immigration judges to conduct bond hearings without the respondent present provided that: (1) at the time a bond request was filed with the immigration court, respondent was physically within the court's assigned geographic area; and (2) respondent consents to waiving presence at the hearing.[2]

The interpretation of this regulation is of national importance. At issue is the authority of immigration judges to conduct bond hearings expeditiously when the respondent properly requested a hearing, the immigration court scheduled the hearing, and the U.S. Immigration and Customs Enforcement (ICE) subsequently transfers the respondent outside the court's assigned geographical area. In this case, which arose in Charlotte, North Carolina, the immigration judge erroneously concluded that Respondent's transfer from South Carolina to Georgia eliminated her authority to conduct the hearing. However, the same issue has occurred in Elizabeth, New

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[1] Detailed statements of interest for amici are appended to this brief.

[2] The regulation provides:

> (c) Applications for the exercise of authority to review bond determinations shall be made to one of the following offices, in the designated order:
>
> (1) If the respondent is detained, to the Immigration Court having jurisdiction over the place of detention;
>
> (2) To the Immigration Court having administrative control over the case; or
>
> (3) To the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court.

8 C.F.R. § 1003.19(c) (emphasis added).

Jersey, San Francisco, California, Louisville, Kentucky and Memphis, Tennessee. The instant appeal, and others, including those certified by immigration judges, show that judges, attorneys, and respondents seek the Board's guidance and resolution of this issue.[3] Accordingly, Amici ask the Board to issue a precedential decision interpreting 8 C.F.R. § 1003.19(c) as governing only the venue for filing an initial bond application, and jurisdiction over an IJ's authority to conduct a bond hearing.

The plain language of the regulation, legislative history, Supreme Court precedent, Board precedent, and due process compel interpreting § 1003.19(c) as a venue regulation, i.e., it governs only the designated order of locations for filing a bond application. The regulation is *not* jurisdictional because it does not address nor prevent an IJ from conducting a properly requested and pre-scheduled bond hearing when respondent waives presence at the hearing.

First, the plain language of the regulation states only that it provides a "designated order" for where to make "[a]pplications for the exercise of authority to review bond determinations." 8 C.F.R. § 1003.19(c). Thus, it only governs where to "make" (i.e., file) a bond request; it simply does not speak to whether an immigration judge may engage in the "exercise of authority" once the application is properly filed. Rather, § 236 of the Immigration and Nationality Act (INA)

[3] The Board granted the National Immigration Project et al. leave to appear as amicus curiae in three other appeals raising this same issue; In re Mauricio Munoz Guerrero, A087-948-595 (certified by Immigration Judge Barry J. Pettinato in Charlotte, North Carolina by decision on March 10, 2010), Exhibit 9; In re K. Cruz-Lopez, A200-577-344 (appeal from a decision of Immigration Judge V. Stewart Couch in Charlotte, North Carolina dated May 12, 2011), Exhibit 10; In re Cesar Certuche-Duran, A 200-766-700 (certified by Immigration Judge Mirlande Tadal in Elizabeth, New Jersey on September 19, 2013), Exhibit 11. The immigration courts resolved the merits of Mr. Munoz Guerro's and Mr. Cruz-Lopez's cases before the Board adjudicated the bond appeals (thereby rending those appeals moot) and the Board decided Mr. Certuche-Duran's appeal on other grounds a day before the Third Circuit Court of Appeal granted his petition for review.

and the regulations at 8 C.F.R. § 1236.1(c)(10), (11) govern an immigration judge's actual "jurisdiction" over bond proceedings.

Second, the regulation's legislative history evidences that its purpose is to notify the public, including detainees, where to file an application for a bond hearing to "maximize the prompt availability of Immigration Judges for respondents applying for custody/bond redeterminations." 52 Fed. Reg. 2931, 2936 (Jan. 29, 1987). This purpose is served by interpreting the regulation as governing the venue of a bond application, not jurisdiction to conduct a bond proceeding.

Third, this interpretation is consistent with Supreme Court precedent distinguishing between jurisdictional rules, which govern a tribunal's adjudicatory capacity, and those which are merely claim-processing rules. *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67 (2009); *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011). Application of the legal analysis in those cases demonstrates that § 1003.19(c) is a claim processing rule because it "promote[s] the orderly progress of litigation" by designating where to file a bond application. *Henderson*, 131 S. Ct. at 1203. It does not govern an IJ's adjudicatory capacity to conduct bond proceedings.

Fourth, classifying the regulation as procedural comports with more than three decades of Board of Immigration Appeals precedent. *Matter of Chirinos*, 16 I&N Dec. 276 (BIA 1977); *Matter of Valles-Perez*, 21 I&N Dec. 769 (BIA 1997). In *Matter of Chirinos*, this Board held that the parties' ability "to place the facts *as promptly as possible* before an impartial arbiter" is the primary consideration in a bond redetermination proceeding. 16 I&N Dec. at 277 (emphasis in the original). By interpreting 8 C.F.R. § 1003.19(c) as procedural, immigration judges may

timely conduct previously scheduled bond hearings instead of forcing respondents to file new bond hearing requests each time ICE transfers them to a new location.

Fifth, the Board must interpret the regulation as procedural to safeguard respondents' due process rights to prompt bond hearings, access to counsel and procedural fairness. As this case and the accompanying attorney declarations demonstrate, interpreting the regulation as cutting off IJ jurisdiction delays a person's bond hearing by days, weeks, and even months, interferes with counsel's ability to communicate and represent respondents, and gives ICE the ability to manipulate the location of bond proceedings. Interpreting the regulation to govern venue would avoid these due process concerns by expediting bond hearings, improving access to counsel, and vesting immigration judges with control over the location of bond proceedings.

II. ISSUE PRESENTED

Whether the regulation at 8 C.F.R. § 1003.19(c), relating to designated locations for making an application for a bond redetermination, divests an immigration judge of jurisdiction to conduct a bond redetermination hearing where the application was properly filed in accordance with 8 C.F.R. § 1003.19(c), but the detainee is physically absent from the courtroom.[4]

III. ARGUMENT

THE BOARD SHOULD INTERPRET 8 C.F.R. § 1003.19(c) AS A PROCEDURAL CLAIM PROCESSING RULE, NOT A JURISDICTIONAL RULE.

A. Under Its Plain Language, The Regulation Addresses Only the Order of Filing Locations for Bond Hearing Requests.

In reviewing a regulation, a court "must first task is to determine whether the regulation itself is unambiguous; if so, its plain language controls." *Ohio Valley Envtl. Coalition v. Aracoma Coal Co*., 556 F.3d 177, 193 (4th Cir. 2009) (citations omitted). The regulation at issue

[4] The reason why a respondent is absent from the hearing is not relevant to the issue. In this case, neither Respondent nor Amici challenge DHS's authority to transfer respondents.

here, 8 C.F.R. § 1003.19(c), plainly states that it governs "[a]pplications for the exercise of authority to review bond determinations" and then designates the order of three locations for filing such applications. *Id.* If the respondent is detained at the time of making the bond application, he must "make" (file) the application "to the Immigration Court having jurisdiction over the place of detention." 8 C.F.R. § 1003.19(c)(1). If the respondent is not detained, he should make the application "[t]o the Immigration Court having administrative control over the case." 8 C.F.R. § 1003.19(c)(2). If this is not possible, the respondent then may make a bond application "[t]o the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court." 8 C.F.R. § 1003.19(c)(3).

Thus, the words of the regulation only address the order of locations (venue) for "ma[king]" (filing) a bond application. The regulation says nothing about the location for consideration of the bond application, nor does it speak to which immigration court has "jurisdiction," i.e., adjudicatory capacity to conduct the bond hearing. This makes perfect sense because an IJ's jurisdiction to conduct a bond hearing is governed by INA § 236 and the implementing regulations at 8 C.F.R § 1236.

While subsection (c)(1) of the regulation contemplates filing a bond application with the immigration court "having jurisdiction over the place of detention," under the regulation's plain language, this condition has been met once the bond application is "made" (filed) with the court presiding over the place of detention. Subsection (c)(1) does not change the fact that § 1003.19(c) governs where applications are made, not where they are adjudicated.

Moreover, use of the clause "having jurisdiction over" to describe the respondent's physical location *at the time the bond application is made*, is distinct from, and does not speak to, an IJ's jurisdiction *at the time of the actual bond hearing*. *See Union Pacific R.R. v.*

Brotherhood of Locomotive Engineers, 558 U.S. 67, 81 (2009) ("Recognizing that the word 'jurisdiction' has been used by courts, including this Court, to convey 'many, too many, meanings,' . . ., we have cautioned, in recent decisions, against profligate use of the term. Not all mandatory "prescriptions, however emphatic, are . . . properly typed jurisdictional'. . . .") (internal citations and quotation marks omitted). Similarly here, the "prescription" in subsection (c)(1) of 8 C.F.R. § 1003.19 is not "properly typed jurisdictional." *Id.*[5]

B. The Legislative History of 8 C.F.R. § 1003.19(c) Establishes That It Was Re-promulgated to Serve The Procedural Purpose of Notifying Respondents Where to File Bond Hearing Requests.

The Executive Office for Immigration Review (EOIR) re-promulgated 8 C.F.R. § 1003.19(c) in 1987 along with various other "procedural changes," "for the purpose of assisting in the expeditious, fair, and proper resolution of issues arising in [deportation, exclusion, bond, and rescission proceedings] by providing the parties involved with clear, useful, and readily accessible procedural guidelines." 52 Fed. Reg. 2931, 2936 (Jan. 29, 1987). *See also id.* ("New sections 8 CFR 3.14 through 3.38 cover the 25 rules of procedure which will be applicable (except where specifically stated to the contrary) to all proceedings before Immigration Judges").

The preamble to 8 C.F.R. § 1003.19(c) (then located at 8 C.F.R. § 3.18 (1987)) provided that the regulations were meant "to maximize the prompt availability of Immigration Judges for respondents applying for custody/bond redeterminations while at the same time causing an

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[5] Additionally, as evidenced by the legislative history below, the court "having jurisdiction" over a place of detention does not speak to subject-matter or personal "jurisdiction." After all, immigration courts exercise personal jurisdiction over respondents via video hearings on a daily basis. To determine which immigration court has "jurisdiction over" a detention facility for purposes of filing a bond application, one must consult the government website listing the "administrative control courts" and immigration courts assigned to a particular geographical area, *available at* http://www.justice.gov/eoir/vll/courts3.htm (last visited June 10, 2014). *See also* 8 C.F.R. § 1003.11 (authorizing the designation of certain "administrative control Immigration Courts," which are defined as courts that "create[] and maintain[] Records of Proceedings for Immigration Courts within an assigned geographical area.").

equitable distribution of the caseload among Immigration Judges." 52 Fed. Reg. 2931, 2936 (Jan. 29, 1987); *id.* ("This will allow for greater control, a more orderly procedure, and more equitable distribution of workload. Commentators suggested various clarifications and additions which were deemed undesirable, such as mandatory telephonic hearings. The rule as promulgated in final form maintains maximum flexibility while being responsive to due process concerns"). Finding that the regulation governs the venue of bond applications is consistent with its procedural purpose and further achieves both the objectives of a "prompt" hearing, discussed in § III.D&E, *infra,* and a more "equitable distribution of the caseload among Immigration Judges." *Id*.

C. Application of Supreme Court Precedent Demonstrates that the Regulation Does Not Usurp IJ Jurisdiction To Conduct a Bond Proceedings.

At least two Supreme Court decisions compel the conclusion that 8 C.F.R. § 1003.19(c) does not usurp an IJ's jurisdiction to conduct a bond hearing if the respondent is not present. *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011); *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67 (2009). Subject-matter jurisdiction is about "the power to hear a case" whereas a claim-processing rule "does not reduce the adjudicatory domain of a tribunal . . . .", *Union Pacific*, 558 U.S. at 81 (internal citation and quotation omitted), but, rather, seeks "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203.

In *Henderson*, the Court considered whether Congress provided a "clear" indication that the statutory deadline for filing a notice of appeal in the Veteran's Court is "jurisdictional." *Henderson*, 131 S. Ct. at 1203. The Court relied on several factors relevant here to conclude that that deadline is not jurisdictional. Specifically, it noted the provision's absence of jurisdictional language in general, as compared to Congress's inclusion of jurisdictional language elsewhere in

the Veterans' Judicial Review Act; the provision's placement outside the judicial review section of the Act and in a subchapter entitled "Procedure"; and the canon that benefit provisions for members of the Armed Services are construed in the beneficiaries' favor. *Id*. at 1204-06.

Applying these factors to 8 C.F.R. § 1003.19(c) demonstrates that an IJ's jurisdiction over bond proceedings is not dependent on the respondent's physical location. Both the statute, INA § 236, and § 1003.19(c) itself, lack any language predicating jurisdiction on physical presence at the time of the bond hearing. Indeed, the law governing IJ jurisdiction over bond proceedings exist elsewhere, in INA § 236 and 8 C.F.R. § 1236.1(c)(10), (11). Additionally, noncitizens, like veterans, are entitled to favorable constructions of ambiguous regulations. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (applying the "long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien").

If *Henderson* leaves any doubt that an IJ's jurisdiction is not dependent on a respondent's physical location, the Court's decision in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, *supra*, eliminates it. In *Union Pacific*, the Court rejected the National Railway Adjustment Board's (NRAB) jurisdictional classification of a procedural rule for exhausting the grievance procedures in a collective-bargaining agreement based "on the false premise that it lacked power to hear them." *Union Pacific*, 558 U.S. at 86. The Court reasoned that "Congress alone controls the [NRAB's] jurisdiction," *id.* at 71, and "Congress gave the [NRAB] no authority to adopt rules of jurisdictional dimension," *id.* at 83-84.

Similarly here, immigration judges impermissibly refuse to adjudicate bond applications based "on the false premise that it lacks power to hear them." *Union Pacific*, 558 U.S. at 86. Congress gave the Attorney General authority to issue regulations governing removal proceedings, including bond proceedings, but did not give the Attorney General authority "to

adopt rules of jurisdictional dimension." *Id*. at 83-84. *See* 8 U.S.C. § 1103(g)(2) (granting Attorney General authority to "establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section."). Thus, just as Congress did not curtail jurisdiction in *Union Pacific* where a party failed to exhaust the grievance procedures, it similarly did not curtail jurisdiction before the immigration court to conduct bond proceedings where a respondent is not physically present.

Whether a rule is jurisdictional or a claim processing rule "is not merely semantic but one of considerable practical importance for judges and litigants." *Henderson*, 131 S. Ct. at 1202. Here, interpretation of § 1003.19(c) has "considerable practical importance" for respondents, attorneys, and immigration judges. *Id*. For respondents, construing the regulation as governing venue promotes speedier access to bond hearings by allowing pre-scheduled hearings to go forward notwithstanding respondent's subsequent transfer. *See* § III.D&E, *infra*. For attorneys, it affords more opportunities to take on bond cases and put on relevant (local) witnesses, knowing that transfer will not prevent the IJ from conducting the bond hearing. *Id*. For ICE, it increases efficiency as only one trial attorney (the attorney located where the respondent properly filed the bond request) need prepare for the bond hearing and attend it. For this Board and immigration judges, a procedural interpretation advances "the primary consideration" of a bond hearing by providing the most prompt and fair resolution possible. *Matter of Chirinos*, 16 I&N Dec. 276, 277 (BIA 1977).

In sum, application of Supreme Court precedent to § 1003.19(c) demonstrates that the Board should not regard the regulation as jurisdictional.

D. Consistent With More Than Three Decades of Board Precedent, Construing the Regulation as Procedural Promotes Expeditious Bond Hearings.

Interpreting 8 C.F.R. § 1003.19(c) to promote expeditious bond proceedings is consistent with established Board precedent. In *Matter of Chirinos*, the Board held:

> Our primary consideration in a bail determination is that the parties be able to place the facts *as promptly as possible* before an impartial arbiter. To achieve this objective we not only countenance, but will encourage, informal procedures so long as they do not result in prejudice. Thus, we even favor "telephonic" hearings before the immigration judge with the consent of the parties, where feasible.

16 I&N Dec. at 277 (emphasis in the original). The Board echoed this sentiment in *Matter of Valles-Perez*, stating:

> *When an alien is detained, the district directors, the Immigration Courts, and this Board give a high priority to resolving the case as expeditiously as possible*. Circumstances may change rapidly, and factual issues arise relating to an alien's bond status that are more appropriately evaluated by the district director or the Immigration Judge in the first instance. Allowing an Immigration Judge the opportunity to hear a bond redetermination request, without the need to first seek a remand from the Board, *is a more expeditious procedure*, *when every day represents either an unwarranted delay in the release of an alien or a delay in the immediate detention of an alien who represents a risk of flight or a threat to the community*.

21 I&N Dec. 769, 772 (BIA 1997) (emphasis added). Thus, as this Board recognizes, it is axiomatic that expeditious bond hearings serve the interest of respondents, ICE, and the Immigration Courts.

Construing § 1003.19(c) as a jurisdictional limitation on an IJ's authority to conduct a bond hearing undermines this objective by forcing transferred detainees to forego scheduled bond hearings, re-file bond applications in a new court, and wait days – sometimes weeks – for a new bond hearing. *See*, *e.g.*, Exhibit 1, Affidavit of Omar Baloch (delay of "anywhere from 5 to 25 days to have a bond hearing in a new location"); Exhibit 4, Declaration of Beckie Moriello (attesting to clients having to wait "approximately two additional weeks in detention" for a bond

hearing, or deciding to "forego having a bond hearing altogether"); Exhibit 2, Declaration of Jaclyn Shull-Gonzalez (recounting case where respondent's bond hearing was delayed "for over a month"); Exhibit 3, Affidavit of Jordan Forsythe (attesting to 18 day detention prior to bond hearing following three facility transfers); Exhibit 5, Declaration of Thomas E. Fulghum (attesting to a 12-day delay in bond proceedings); Exhibit 6, Declaration of Jessica L. Yanez ("anywhere from 7 to 14 days").[6]

Were 8 C.F.R. § 1003.19(c) construed as governing venue, as it should be, it would eliminate this delay; bond hearings could take place provided: (1) the bond hearing request was properly filed with the court while the respondent was physically within the assigned geographic area of the court at the time the request was filed; and (2) "where feasible," *Matter of Chirinos,* 16 I&N Dec. at 277, the immigration judge obtains the respondent's consent.

The regulations authorize an immigration judge to waive a respondent's appearance in removal proceedings. 8 C.F.R. § 1003.25(a)&(b). Where the EOIR permits an IJ to authorize a respondent's absence from the more formal proceedings under INA § 240, it is absurd to prohibit an immigration judge from waiving a detainee's presence in bond proceedings, which are *more informal* than removal proceedings.[7]

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[6] *See also* declarations originally submitted in the case of *In re Mauricio Munoz Guerrero*, A087-948-595, copies of which are attached hereto as Exhibit 7. Exhibit 7B, Declaration of Rob Heroy (attesting to delayed bond proceedings ranging anywhere from 7 to 45 days); Exhibit 7C, Declaration of Gabriella Castillo (attesting to a 9 day wait to have a bond hearing in a new location); Exhibit 7F, Declaration of Chris Kozoll (attesting to a 75-day delay of bond proceedings); Exhibit 7G, Declaration of Rachel Newton (attesting to a delay of "anywhere from a week to over a month to have a bond hearing in a new location").

[7] Any assertion by DHS that a detainee cannot waive his or her appearance would be wrong. *See Matter of Chirinos*. 16 I&N Dec. at 277 (encouraging "informal procedures so long as they do not result in prejudice," including telephonic hearings "with the consent of the parties, where feasible"). If an immigration judge conducted a bond hearing without a respondent's consent to waive presence, the respondent could raise those objections on appeal to the Board. *Matter of Garcia-Flores*, 17 I&N Dec. 325, 329 (BIA 1980).

In addition, as a practical matter, immigration judges in Charlotte, North Carolina, from where this case arises, and elsewhere, routinely hear bond cases without the detainee physically or even telephonically present. *See*, *e.g.*, Exhibit 3, Declaration of Jordan Forsythe; Exhibit 7E, Declaration of Andres Lopez. *See also* Exhibit 8, Declaration of Cynthia Aziz (original attached to Respondent's Brief on Certification in the case of *In re K. Cruz-Lopez*, A200-577-344).

Moreover, when the issue in the bond hearing is purely legal and a respondent gives consent to waive his or her appearance, ICE has no plausible argument for requiring a respondent's presence at the hearing. *See* Exhibit F, Declaration of Chris Kozell (…[T]here was no apparent reason for DHS to argue for a lack of jurisdiction, or for the Memphis Court to enter such a ruling. The Court hearing was set, the judge and government counsel were both present, I was appearing by telephone, and the only issue was a pure legal issue regarding whether my client was subject to mandatory detention"). An immigration court's duty to expeditiously and fairly conduct bond hearings is served by allowing the hearing to go forward.

Unless the Board construes the regulation as procedural, a respondent's properly filed bond application and pre-scheduled bond hearing cannot timely proceed. As a result, respondents must file new bond applications and wait for a second, third or fourth immigration court (depending on the number of transfers) to schedule and conduct a bond hearing. This contravenes, rather than serves, the Board's stated interest of promoting expeditious bond proceedings.

E. Due Process Concerns Require Interpreting the Regulation As Procedural.

Interpreting § 1003.19(c) as eliminating immigration judge jurisdiction over bond proceedings would violate due process, whereas interpreting the regulation as governing the venue for filing a bond application does not. As the Supreme Court has stated:

> [W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail— *whether or not those constitutional problems pertain to the particular litigant before the Court.*

Clark v. Martinez, 543 U.S. 371, 380-81 (2005) (emphasis in original). *See also Strawser v. Atkins,* 290 F.3d 720, 730 (4th Cir. 2002) ("a court will not decide a constitutional question, particularly a complicated constitutional question, if another ground adequately disposes of the controversy"). Here, interpreting the regulation as governing the location of filing the bond application allows for expeditious bond hearings, promotes access to counsel and prevents ICE from having the ability to unilaterally manipulate the location of bond proceedings.

1. Due Process Requires a Prompt Bond Hearing.

Every respondent in immigration detention has a constitutional, statutory and regulatory liberty interest in freedom from physical restraint. U.S. Const. Amend. V. ("[n]o person shall . . . be deprived of . . . liberty . . . without due process of law . . . ."); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects") (citation omitted); INA § 236; 8 C.F.R §§ 1003.19(a) and 1236. *Accord Diop v. ICE/Homeland Security*, 656 F.3d 221, 223 (3d Cir. 2011) (finding that the Due Process Clause of the Fifth Amendment permits mandatory detention for only a "reasonable period of time").

Recognizing the importance of this liberty interest and the need for prompt bond hearings, the immigration regulations allow a bond hearing to take place as soon as ICE takes an individual into custody, even before the agency files the Notice to Appear. *See* 8 C.F.R. § 1003.14(a) ("no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.").

Board precedent also prioritizes prompt hearings. *See also Matter of Chirinos*, 16 I&N Dec. 276, 277 (BIA 1977); *Matter of Valles-Perez*, 21 I&N Dec. 769, 772 (BIA 1997). *Cf. Diop v. ICE/Homeland Security*, 656 F.3d 221, 232 (3d Cir. 2011) (noting that Supreme Court upheld mandatory detention as constitutional "so long as the alien is given some sort of hearing when initially detained at which he may challenge the basis of his detention.").

Unlawful, lengthy and repeated delays in bond proceedings compromise a respondent's due process interest in liberty. Moreover, such delay has a devastating impact on the lives of American families and communities. *See*, *e.g.*, Exhibit 2, Declaration of Jaclyn Shull-Gonzalez (attesting that client's detention "for over one month in a remote location, thousands of miles from his family and home of 17 years" took a significant emotional toll on his wife and daughter, including severe hemorrhaging due to elevated stress levels requiring two emergency blood transfusions); Exhibit 1, Affidavit of Omar Baloch (delayed bond hearings creates "an added burden to our clients in terms of costs and separation away from US citizen or permanent resident relatives such as their spouses and children.").

Another attorney articulated the emotional impact that additional time in detention waiting for a bond hearing has on clients and their ability to stay in this country:

> I have to warn potential clients that it may be several weeks before a bond hearing can be heard, and that they will have to pay for me to travel to Chicago if the Judge denies my motion for a telephonic hearing. The removal to a distant location too far for family or friends to visit, and where they can be transferred from one jail to the other with no warning or notice to the detainee or counsel, is a crushing blow to many of them. I have seen many detainees become dispirited, giving up and agreeing to be deported to avoid the additional expense and hardship on their families. I have seen this happen even in cases where they were potentially eligible for some sort of relief. I have seen that decision tear apart their families. What starts as a simple legal question of where the bond hearing may occur can have devastating ripple effects on the very real people whose lives are caught up in these cases.

Exhibit 7G, Declaration of Rachel A. Newton. *See also* Exhibit 4, Declaration of Beckie Moriello (attesting to clients deciding to "forego having a bond hearing altogether").

In sum, delaying bond proceedings needlessly infringes on the right to liberty and devastates respondents and their families. The Board must interpret § 1003.19(c) as procedural as that is the only interpretation that is consistent with its duty to avoid a "multitude of constitutional problems," *Clark*, 543 U.S. at 380-81, and would further its objective of "plac[ing] the facts *as promptly as possible* before an impartial arbiter." *Matter of Chirinos*, 16 I&N Dec. at 277 (emphasis in the original).

2. Due Process Requires Promoting Access to Counsel.

Interpreting 8 C.F.R. § 1003.19(c) as a venue regulation also promotes access to counsel. Where a respondent (or his family/friends) secures local counsel at the initial place of detention, allowing an IJ to conduct a bond hearing with the respondent's permission despite transfer avoids the financial, procedural and logistical barriers of either arranging for existing counsel to appear for the bond hearing at the new (often distant) location or arranging for new counsel.[8] This is especially true as ICE frequently detains respondents in rural facilities which may have more bed space and where there are far fewer attorneys available.

Moreover, as a result of IJ practice to treat § 1003.19(c) as a barrier to jurisdiction, attorneys who practice in urban areas either are unwilling or unable to represent remote detainees. Indeed, several attorneys already have stopped taking detained cases because

[8] Human Rights Watch Report, *Locked Away: Immigration Detainees in Jails in the United States,* at 64 (Sept. 1998) ("Incarceration far from friends and family who can locate and pay for lawyers, frequent transfers from facility to facility, restrictive visitation policies and limited telephone access create significant obstacles to adequate representation. The remote location of local jails - sometimes hundreds of miles away from an urban center - permits only infrequent visits by attorneys of record for interviews and case preparation.").

immigration judges refuse to conduct bond hearings if ICE transferred the respondent.[9] The travel costs and other expenses associated with out of state representation often prohibit a respondent or his or her family from retaining counsel. In addition, transfer away from counsel also impedes an attorney's ability to fully represent detainees by forcing counsel to appear telephonically and forego presentation of witnesses and community support. *See*, e.*g*., Exhibit 2, Declaration of Jaclyn Shull-Gonzales (attesting that, due to respondent's indigence, he could not pay to have counsel or his four bond witnesses travel from San Francisco to Arizona for bond hearing and IJ denied counsel's motion for appearance of telephonic witnesses). Transfer also makes clients with limited resources choose between spending their money to post bond or to retain an attorney to fight their removal case.[10]

Third, respondents who have counsel and who ICE subsequently transfers face difficulties communicating with counsel. One attorney in Greensboro, North Carolina explains:

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[9] Indeed, IJ refusal to conduct such hearings has created a particular disincentive among attorneys in Charlotte, North Carolina. *See* Exhibits 5 and 7A, Declarations of Thomas E. Fulghum; Exhibit 7B, Declaration of Rob Heroy; Exhibit 7C, Declaration of Gabriella Castillo; Exhibits 3 and 7D, Declarations of Jordan Forsythe; Exhibit 7E, Declaration of Andres Lopez; Exhibit 1, Affidavit of Omar Baloch; Exhibit 4, Declaration of Beckie Moriello; and Exhibit 6, Declaration of Jessica L. Yanez.

[10] *See*, *e.g*., Exhibit 7F, Declaration of Chris Kozoll, stating:

> The treatment of these cases also, inevitably, affects the advice I provide my clients, and creates a conflict in my ability to represent detained individuals. Specifically, while my legal research, and the immigration court practice manual, indicate that clients are eligible to have a bond hearing in the court with control over the area in which they are detained, when determining how to advise a client detained in Kentucky, I am forced to balance what, in my legal opinion, is a clear and unequivocal statement allowing the Memphis Court to exercise jurisdiction, with the knowledge (confirmed through conversations with other attorneys practicing in this area) that the Memphis Immigration Court regularly refuse to exercise such jurisdiction. Accordingly, I often advise my clients that their financial resources may be better spent on the merits of their removal case and, therefore, they may spend an additional several weeks in detention.

> ICE's practice of transferring respondents before the date of their scheduled bond hearing . . . limits my ability to speak with clients, determine any forms of relief from removal, and prepare a thorough bond motion.
>
> In many of my cases, clients have been transferred to three, four, or even five different detention facilities before they end up in Stewart where their bond motion is finally heard. I feel like I am constantly trying to locate them and communicating with each facility becomes time consuming. Every time a person is transferred their family members have to figure out how to contact the person and how to deposit money into the account at each respective facility.

Exhibit 6, Declaration of Jessica L. Yanez. *See also* Exhibit 5, Declaration of Thomas E. Fulghum ("I was unable to communicate with my client for several days after his transfer. I was in fact only able to speak with him on the day of the Feb. 17 bond hearing."). Repetitive transfers, often without notice to counsel and always without notice to family members, frustrate attorney-client communications. The government acknowledged this problem in an Office of Inspector General Report, stating:

> When ICE transfers detainees far from where they were originally detained, their legal counsel may request a release from representation because the distance and travel time of cost make representation impractical. Transferred detainees have had difficulty or delays arranging for legal representation, particularly when they require pro bono representation. Difficulty arranging for counsel or accessing evidence may result in delayed court proceedings. Access to personal records, evidence and witnesses to support bond or custody redeterminations, removal, relief or appeal proceedings can also be problematic in these cases.

Office of the Inspector General, Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers, Report No. OIG-10-13, at 4 (Nov. 10. 2009). Allowing immigration judges to conduct bond hearings soon after ICE takes a respondent into custody would render these repetitive transfers and associated communication difficulties unnecessary if the IJ grants, and the individual posts, bond.

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3. The Board Should Not Allow ICE to Unilaterally Deprive Immigration Judges of Jurisdiction Over A Properly Requested and Scheduled Bond Proceeding.

While ICE is responsible for a respondent's physical location, the location of a detainee's bond hearing is rightfully within EOIR's control. Whether one party may unilateral control litigation raises an issue of exceptional importance. *Cf. Boumediene v. Bush*, 553 U.S. 723, 765-66 (2008) (rejecting argument that would allow "the political branches to govern without legal constraint"). As long as immigration judges continue to interpret § 1003.19(c) as stripping jurisdiction, ICE may change the place of the bond proceedings by transferring a detainee despite the fact, as here, that the immigration court already scheduled a hearing.

Amici acknowledge that ICE comprises both the Office of Chief Counsel (OCC), consisting of trial attorneys who represent the agency in immigration court, and Enforcement and Removal Operations (ERO), consisting of officers who arrange, facilitate and execute the transfer of respondents. Amici note, however, that several attorneys attest that ICE OCC usually is on notice of a respondent's scheduled bond hearing yet ICE ERO nevertheless transfers the person prior to the hearing. *See*, *e.g.*, Exhibits 1- 4, 6 (attorney declarations).

In other contexts, this Board and circuit courts reject affording ICE unilaterally control of other aspects of immigration litigation. *Matter of Diaz-Garcia*, 25 I&N Dec. 794, 796 (BIA 2012) ("Interpreting 8 C.F.R. § 1003.4 as the ICE proposes would allow an unlawful deportation or removal by the ICE, whether intentional or not, to unilaterally deprive the Board of further jurisdiction over the case."); *Prestol Espinal v. AG of the United States*, 653 F.3d 213, 223 (3d Cir. 2011) ("if aliens are permitted to file motions to reconsider but are then removed by the government before the time to file has expired, the right to have that motion adjudicated is abrogated."); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010) (rejecting DHS

ability to withdraw a motion to reopen by deporting noncitizen, stating "[i]t is unnatural to speak of one litigant withdrawing another's motion").

Likewise here, the Board should reject an interpretation of the regulation that permits DHS to unilaterally manipulate the forum of bond proceedings after respondent properly filed a bond hearing request.

V. CONCLUSION

For the foregoing reasons, the Board should interpret 8 C.F.R. § 1003.19(c) as a procedural regulation that governs only the venue for filing a bond application, not the immigration judge's jurisdiction to conduct a bond proceeding.

Respectfully submitted,

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AMICI STATEMENTS OF INTEREST

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The NIPNLG provides technical assistance and legal training to the bar and bench on the rights of noncitizens and is the author of four immigration treatises published by Thompson-West. NIPNLG has participated as amicus curiae in several significant immigration-related cases before the federal courts. A A large percentage of NIPNLG's membership provides direct representation to respondents in removal and bond proceedings before the immigration courts.

The Carolinas Chapter of the American Immigration Lawyers Association is one of 38 local chapters of the American Immigration Lawyers Association. The Carolinas Chapter has over 300 members, most of whom practice immigration law in the Chapter's geographic territory of North Carolina and South Carolina. It is organized to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.

Catholic Charities of the Archdiocese of Newark has one of the largest non-profit immigration legal programs in New Jersey. It provides a wide range of social services in Bergen, Essex, Hudson, and Union Counties. It has provided immigration assistance since 1976, including representing detained individuals in bond hearings and removal proceedings. It also works with other non-profit organizations to provide Know Your Rights presentations to a substantial number of immigrants detained in New Jersey. Its mission seeks to help people and provide them with a greater sense of self-worth and dignity.

Dolores Street Community Services (DSCS) is a multi-service non-profit agency with a thirty-year history of providing services to San Francisco's low-income immigrant population. With a staff of three full time attorneys, DSCS's Deportation Defense and Legal Advocacy program specializes in removal defense, and regularly represents individuals who are detained in the custody of Immigration and Customs Enforcement (ICE). DSCS attorneys regularly represent immigrant detainees who are transferred outside of the local San Francisco jurisdiction while proceedings are pending, which has posed a barrier to the attorney client relationship and has inhibited DSCS attorneys from providing effective representation for the clients they represent.

The **Northwest Immigrant Rights Project** is a non-profit legal organization dedicated to the defense and advancement of the legal rights of non-citizens in the United States with respect to their immigrant status. NWIRP provides legal orientation sessions to immigrants detained at the Northwest Detention Center in Tacoma and provides direct representation to low-income immigrants in removal proceedings and before the federal courts. NWIRP is acutely aware of the necessity of expeditious bond proceedings and the harm suffered by individuals and their families when bond proceedings are delayed.