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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

In the Matter of	
M-G-G-,	A- *Redacted*
Respondent.	In Removal Proceedings

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

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REQUEST TO APPEAR AS AMICUS CURIAE

The Federation for American Immigration Reform ("FAIR") respectfully requests leave to file this amicus curiae brief, pursuant to the invitation of the Attorney General. *See* invitation for amicus briefing, 27 I&N Dec. 469 (A.G. Sep. 18, 2018).

INTEREST OF AMICUS CURIAE

FAIR is a not for profit 501(c)(3) charitable organization incorporated in the District of Columbia. FAIR is the nation's largest and oldest public interest organization dedicated to educating the public, policymakers, and stakeholders in the administration of our immigration laws concerning the need and options for controlling illegal immigration and reducing lawful immigration to sustainable levels.

The Immigration Reform Law Institute ("IRLI"), a supporting organization of FAIR, has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (BIA 2010); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (BIA 2016); and, and *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

ISSUES AND FACTS PRESENTED

The Attorney General (AG) has requested amicus briefs "relevant to the disposition of" *Matter of M-G-G*, which has been referred from the Board of Immigration Appeals (BIA). *See* invitation for amicus briefing, 27 I&N Dec. 469 (A.G. Sep. 18, 2018). The AG specifically requests briefing on whether a 2005 BIA decision that held that "immigration judges may hold bond hearings for certain aliens screened from expedited removal proceedings under [INA] Section 235(b)(1)… into removal proceedings under section 240, … should be overruled in light of *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)." The Board has not made available, to either amici or the public, record extracts, decisions, or orders of the immigration court below, or any other facts concerning the underlying proceeding in immigration court and the subsequent appeal to the BIA.

While the AG has provided no statement about the policy concerns that prompted the referral of the appeal from the BIA, amicus FAIR surmises that the current Administration is concerned with the rising numbers of alien applicants for admission apprehended within 100 miles of the border after entry without inspection, and thus screened for expedited removal. These illegal aliens, often through organized coaching before entry, learn to prepare statements of credible fear of persecution that, though most likely destined to be found unsubstantiated or fraudulent, are sufficient under current BIA doctrine to suspend their orders for expedited removal, and consequently to enable them to request release from custody pending adjudication of their asylum claims in immigration court. This potential for release is not enjoyed by arriving aliens screened for expedited

removal at ports of entry, who must stay in detention until their asylum claims are adjudicated, and thus has created a perverse incentive for law-breaking.

SUMMARY OF THE ARGUMENT

The alien found to be eligible for a bond redetermination hearing in *Matter of M-K*, 23 I&N Dec. 731 (BIA 2005) belonged to a statutory class of inadmissible aliens subject to screening for expedited removal, that is, "aliens … described in clause (iii)." INA § 235(b)(1)(A)(i). Pursuant to that clause, § 235(b)(1)(A)(iii), the Secretary of Homeland Security had designated a limited class of "certain other aliens."

The BIA concluded that that clause and that designation "do not expressly alter the jurisdiction conferred by the regulations on Immigration Judges to re-determine the custody status of aliens in removal proceedings." 23 I&N Dec. at 736. The Board clarified that it was only reviewing "custody jurisdiction over an alien in the 'certain other aliens' class after there has been a final determination that the respondent has a credible fear and section 240 proceedings have been initiated." *Id.* at 734. If an alien in this subclass of clause (iii) detainees "is found to have a credible fear of persecution …, the asylum officer shall … issue a Form I-862, Notice to Appear, for full consideration of the asylum … claim in proceedings under section 240 of the Act." 8 C.F.R. § 208.30(f).

Recently, the Supreme Court held that INA § 235(b)(1) "mandate[s] detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin." *Jennings v. Rodriguez*, 138 S. Ct. 830, 845

(2018). The "clause (iii)" expedited removal sub-class to which the alien in *Matter of X-K* belonged is subject to this holding.

Jennings thus overruled the parts of the Board's holding in *Matter of X-K* finding a lack of specificity in relevant law and regulation regarding relief from mandatory detention for the designated "clause (iii)" aliens, but not the Board's related conclusion that an immigration judge gains exclusive custody jurisdiction once removal charges are filed with the immigration court.

Categorically barring immigration courts from considering future requests for bond redeterminations from such designated detainees would oblige immigration judges to disregard custody jurisdiction regulations that have the force and effect of law. FAIR thus recommends that the Attorney General determine (1) that immigration judges must continue to accept bond redetermination requests from aliens placed in removal proceedings pursuant to 8 C.F.R. § 208.30(f), but (2) that, after *Jennings*, clause (iii) "certain other aliens" are subject to the INA § 235(b) mandatory detention mandates, and thus ineligible for bond re-determination, absent certain very limited circumstances, as a matter of law.

ARGUMENT

I. The relevant subclass of inadmissible aliens subject to screening for expedited removal was designated by DHS in 2004 pursuant to clear statutory requirements.

INA § 235 is captioned "Inspection by Immigration Officers; Expedited Removal of Inadmissible Arriving Aliens; Referral for Hearing" and codified at 8 U.S.C. § 1225. The expedited removal language in § 235 was enacted by IIRIRA §302(a), P.L. 104-132 (effective Apr. 1, 1997), which replaced the entire former

INA section with the same number. INA § 235(b)(1)(A) is the "screening" provision of INA 235. It has three clauses. Clause 235(b)(1)(A)(i) requires that immigration officers, principally port of entry inspectors, remove aliens whom they determine belong to one of two statutory classes "without further hearing or review."

The first class is aliens "arriving in the United States" who are inadmissible under one of two grounds, INA § 212(a)(6)(C) (misrepresentation to procure an immigration benefit or to claim citizenship), INA § 212(a)(7) (not in possession of a valid required entry document). "Arriving alien" is defined by regulation. 8 C.F.R. § 1.2.

The second clause is INA § 235(b)(1)(A)(ii) (Claims for asylum). It provides the most important exception to the expedited removal requirement in clause (i). The exception applies if "the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution," and mandates that the immigration inspector "shall refer the alien for an [asylum interview] under subparagraph (B)."[1] INA § 235(b) mandates, without exception, that aliens provided an asylum interview "be detained pending a final determination of credible fear of persecution, and if found not to have such a fear, until removed." INA § 235(b)(1)(B)(iii)(IV) (Mandatory Detention).

[1] An exception to eligibility for a credible fear interview for both arriving aliens and certain other aliens described in clause (iii) are aliens who may be removed to a safe third country pursuant to an international agreement, notably asylum-seekers entering from Canada. INA § 208(a)(2)(A), 8 C.F.R. § 1003.42(h)(1).

The third clause defines a second class of similarly inadmissible aliens subject to screening for expedited removal, "aliens … described in clause (iii)." INA § 235(b)(1)(A)(i). Arriving aliens defined under clause (i) are ineligible for designation under clause (iii). For example, aliens who enter the United States without inspection (EWIs), and aliens who have departed the United States but were refused admission in another country and thereafter returned to U.S. jurisdiction, are *not* arriving aliens, and must be designated under clause (iii) in order to be subject to expedited removal procedures. DHS Inspectors Field Manual 1.15(a)(1).

INA § 235(b)(1)(A)(iii) grants the Secretary of Homeland Security "sole and unreviewable discretion" that "may be modified at any time" to apply "clauses (i) and (ii) … to any or all aliens described in sub clause (II) as designated by the [Secretary]." In 2004, the Secretary exercised his INA § 235(b)(1)(A)(iii) authority in a Federal Register notice. Due to resource restraints, the "certain other alien" designation would only apply to certain applicants for admission making "unlawful entries that have a close spatial and temporal nexus to the border…." 69 Fed. Reg. 48877, 48879 (Aug. 11, 2004). These aliens form the class currently designated as "certain other aliens."[2]

[2] In a demonstration of the Secretary's sweeping discretion to modify clause (iii) designations, ICE subsequently expanded the 2004 designation by memorandum to apply to aliens found within 100 miles of the northern (Canadian) border. Memorandum from ICE Exec. Associate Dir. Mead, *Strategic Use of Expedited Removal Authority*, (Apr. 5, 2011).

II. *Matter of X-K* held that Immigration Court jurisdiction to re-determine conditions of custody for designated certain other aliens was not restricted by the INA or regulations.

In *Matter of X-K*, the BIA considered, for bond review purposes, the status of a still more restricted subgroup of the "certain other aliens" class designated in 2004, comprised of members of the 2004 class who had been afforded an asylum interview, and found by the asylum officer to have "a credible fear of persecution," as defined in sub clause INA § 235(b)(1)(B)(v). 23 I&N Dec. 731 (BIA 2005).

Matter of X-K acknowledged that the INA "provides for the mandatory detention of aliens who are being processed under section 235(b)(1) proceedings '*pending* a final determination of credible fear of persecution and, if found not to have such a fear, until removed,'" 23 I&N 731, 734 (BIA 2005) (quoting INA § 235(b)(1)(B)(iii)(IV)) (adding emphasis). Furthermore, the Board recognized that "regulations also provide that pending the final credible fear determination, the DHS has the authority to grant parole" under INA § 212(d)(5), 8 U.S.C. § 1182(d)(5), in certain limited circumstances. *Id.* (citing 8 C.F.R. §§ 1212.5(a), (b), 1235.3(b)(4)(ii)). In other words, for aliens subject to mandatory detention "pending a final determination of credible fear of persecution," DHS by regulation has further limited its already restricted statutory parole authority[3] to individual exigent humanitarian and medical situations.

[3] In the same legislation that created expedited removal,Congress extended an existing prohibition on blanket or categorical parole to *all* aliens, by restricting INA § 212(d)(5)(A) to authorize parole "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." IIRIRA §602, P.L. 104-208 (1996). The legislative history indicates that Congress mandated this statutory prohibition on the categorical exercise of agency discretion out of "concern that

Third, the Board acknowledged that INA § 235(b)(1)(A)(iii) grants discretionary authority to the Secretary of Homeland Security, not the Attorney General, to administratively modify the designation of aliens to be included in the class of "certain other aliens" who may be screened for expedited removal pursuant to § 235(b)(1)(A). 23 I&N Dec. at 735.

Nonetheless, the BIA concluded that "those provisions *do not expressly alter the jurisdiction conferred by the regulations* on Immigration Judges to re-determine the custody status of aliens in removal proceedings." 23 I&N Dec. at 736 (emphasis added). The Board clarified that it was only reviewing "custody jurisdiction over an alien in the 'certain other aliens' class after there has been a final determination that the respondent has a credible fear and section 240 proceedings have been initiated," as distinguished from "arriving" aliens, aliens with final removal orders, and so forth. *Id.* at 734. For this subclass of clause (iii) detainees, regulations effective since 1999 provide that if an alien "is found to have a credible fear of persecution …, the asylum officer shall … issue a Form I-862, Notice to Appear, for full consideration of the asylum … claim in proceedings under section 240 of the Act." 8 C.F.R. § 208.30(f).

Applying the regulation, the Board held that "the expedited removal provisions in section 235(b)(1) of the Act and its implementing regulations provide no specific

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parole under § 1182(d)(5)(A) was being used by the executive to circumvent congressionally established immigration policy." *Cruz-Miguel v. Holder*, 650 F.3d 189, 198-200 (2d Cir. 2011) (citing H.R. Rep. No. 104-169, pt.1, at 140-41 (1996)).

guidance [regarding release from custody.]" *Id.* "Indeed, the language in the Act itself does not require that such aliens be placed in full section 240 removal proceedings." *Id.* "We are not persuaded," the Board asserted, "that there is a regulatory authority … that such aliens are not eligible for a bond hearing before an Immigration Judge." *Id.*

Such aliens do "not fit within any of the specified classes of aliens in removal proceedings who may not have their custody status re-determined by an Immigration Judge." *Id.* at 735. "[T]here is nothing," the Board concluded, "in the general detention provisions in 8 C.F.R. § 1003.19 or § 1236.1 excluding [from the IJ's custody jurisdiction]… 'certain other aliens,' even though, like arriving aliens, they also may have initially been screened for expedited removal under section 235(b) of the Act." 23 I&N Dec. at 735.

III. *Jennings v. Rodriguez* upheld mandatory detention for "certain other aliens" designated in 2004 for expedited removal screening.

The Supreme Court's decision in *Jennings v. Rodriguez* came nearly thirteen years after *Matter of X-K*. 132 S. Ct. 830 (2018). In the interim, the BIA did not further construe detention and removal for "certain other aliens" in general, or for the subclass designated in the 2004 Federal Register designation. In *Jennings*, the Supreme Court reversed a decision by the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit had "imposed an implicit 6-month time limit on an alien's detention" under INA §§ 235(b), 236(a) (Arrest, detention and release) or 236(c) (Detention of criminal aliens), after which the alien could only be detained following a custody hearing under INA § 236(a). 132 S. Ct. at 833 (citing 804 F.3d 1060).

The alien in *Matter of X-K* had been detained and screened for expedited removal pursuant to INA § 235(b)(1)(A)(iii). The sub-class to which the alien in *Matter of X-K* belonged is thus subject to *Jennings'* holding on mandatory detention of aliens under INA § 235(b)(1).

In *Jennings*, three points of statutory construction are directly relevant to the BIA holding in *Matter of X-K* regarding detention requirements and custody jurisdiction. First, the Supreme Court held that "a series of textual signals" distinguish INA § 235(b) from INA § 241(a)(6) (8 U.S.C. §1231(a)(6), as construed in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Those distinctions mean that an alien who has been ordered removed may not be detained beyond a "period reasonably necessary to secure removal," a period that is presumptively six months. 132 S. Ct. at 844. In contrast, INA § 235(b) mandates detention for one of two specified periods of time. For "certain other" aliens, that is, aliens subject to expedited removal who have been found to have a credible fear of persecution, INA § 235(b)(1)(B)(ii) mandates detention until immigration officers have finished "consider[ing]" the asylum application. *Jennings*, 132 S. Ct. at 844. For "other" applicants for admission, INA § 235(b)(2)(A) mandates detention until removal proceedings have concluded. *Id.*

Second, *Jennings* held that in both §§ 235(b)(1) and 235(b)(2) (8 U.S. §§ 1225(b)(1) and 1225(b)(2)), the INA uses the unequivocal mandate "shall be detained," which the Court construed as a "requirement of detention [that] precludes a court from finding ambiguity here…." 132 S. Ct. at 844.

Third, *Jennings* noted that INA § 235(b) specifically provides for the exercise, by the Secretary of Homeland Security, of the INA provision authorizing temporary parole from § 235(b) detention "only on a case-by case basis for urgent humanitarian reasons or significant public benefit." 132 S. Ct. at 844 (citing 8 U.S.C. § 1182(d)(5)(A). *Jennings* was comparing the status of aliens subject to detention under INA § 235(b)—that is, applicants for admission—with those subject to detention under INA § 241—that is, aliens subject to a final order of removal. In *Zadvydas*, the Supreme Court had found no similar release provision applicable to INA § 241(a)(6). *Id.*

Significantly, the *Jennings* majority held that as a unique exception to mandatory detention, the availability of parole, consistent with the "Negative Implication Canon" of statutory construction (*expressio unius est exclusio alterius*) "implies that there are no *other* circumstances under which aliens detained under §1225(b) may be released," and further "precludes the sort of implicit time limit on detention that we found in *Zadvydas*." 132 S. Ct. at 844 (emphasis in original).

IV. *Jennings* has partially overruled *Matter of X-K.*

FAIR is of the view that the *Jennings* decision has overruled the parts of the Board's holding in *Matter of X-K* finding a lack specificity in relevant law and regulation regarding relief from mandatory detention for certain designated aliens who have been screened for expedited removal, but who then pass a credible fear interview and are placed in removal proceedings. By contrast, *Jennings* has not altered the Board's related conclusion that an immigration judge gains exclusive custody jurisdiction once removal charges are filed with the immigration court.

The classes of aliens with respect to whom an immigration judge many *not* re-determine conditions of custody are listed in immigration court regulations. 8 C.F.R. § 1003.19(b)(2)(i). In *Matter of X-K*, the Board correctly noted that in 2005 the § 1003.19(b)(2)(i) list did not include aliens in removal proceedings subject to an order for expedited removal under section 235(b)(1)(A)(iii) of the Act *and* "detained for further consideration of the application for asylum" by an immigration judge under section 235(b)(1)(B)(ii). The Supreme Court, however, has now ruled:

> In sum, §§ 1225(b)(1) and (b)(2) mandate detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin.

Jennings, 138 S. Ct. at 845. As noted, the class of clause (iii) "certain other aliens" currently designated under INA § 235(b)(1)(A)(iii) are a subclass of aliens for whom detention is mandated "throughout the completion of applicable proceedings."[4]

Nonetheless, for the Attorney General to look beyond the specific holdings in *Jennings* and determine that the mandatory detention requirement for all §235(b)(1) detainees overrules the long-established doctrine that immigration judges retain custody jurisdiction over aliens in section 240 proceedings would be inadvisable,

[4] If, as the Board implied in *Matter of X-K*, it observes the "regulatory requirement of issuing a Notice to Appear (Form I-862) for full consideration of the respondent's asylum … claims in section 240 removal proceedings," 23 I&N Dec. at 733, then the clause (iii) "certain other aliens" class would also be ineligible for bond redetermination on a second ground, that they are "aliens in exclusion proceedings," one of the ineligible groups described in 8 C.F.R. § 1003.19(h)(2)(i)(A).

and unnecessary. Categorically barring immigration courts from considering future requests for bond redeterminations from such detainees pending a final determination of credible fear, or removal, would oblige immigration judges and also the Board itself to "disregard the regulations, which have the force and effect of law." *See Matter of L-M-P*, 27 I&N Dec. 265, 267 (BIA 2018). "Jurisdiction vests, and proceedings before an immigration judge commence, when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. § 1003.14(a). FAIR is concerned that carving out an obscure exception to the long-established IJ custody jurisdiction doctrine could have unforeseen collateral risks, for example, possible claims that § 235(b)(1) mandatory detention would again qualify as indefinite detention for due process purposes, or novel claims of jurisdiction-stripping for other aspects of immigration court proceedings.

FAIR recommends that the Attorney General find that *Jennings* had a more limited but still significant effect on bond redetermination applications and reviews under 8 C.F.R. §§ 1236.1(d)(1) and 1003.19. Immigration court regulations continue to provide that bond redetermination requests are to be adjudicated "separate and apart from, and shall form no part of, any … removal hearing or proceeding." 8 C.F.R. § 1003.19(d). Immigration judges have been restricted since 1998 from re-determining conditions of custody imposed on detainees who are "*arriving* aliens in removal proceedings including aliens paroled after arrival pursuant to section 212(d)(5) of the Act," a limitation that was not affected by *Jennings*. 8 C.F.R. § 1003.19(h)(2)(i)(A) (emphasis added). By addressing mandatory detention for all aliens subject to expedited removal screening, *Jennings*

has in effect confirmed that any regulatory gap between treatment of arriving aliens and clause (iii) "certain other aliens" has been filled, so that both subclasses are now subject to the INA § 235(b) detention mandates.

Consequently, the conclusions in *Matter of X-K* that (1) "the expedited removal provisions in section 235(b)(1) of the Act and its implementing regulations provide no specific guidance…" and (2) clause (iii) detainees found to have a credible fear after an asylum interview do "not fit within any of the specified classes of aliens in removal proceedings who may not have their custody status redetermined by an Immigration Judge," 23 I&N Dec. at 735, are simply no longer true. The effect of *Jennings* will be even more pronounced for "subsequent bond redetermination," as immigration judges will continue to have authority to consider such applications "only upon a showing that the alien's circumstances have materially changed since the prior bond determination." 8 C.F.R. § 1003.19(e).

CONCLUSION

In summary, immigration judges must, for due process purposes, continue to accept bond redetermination requests from aliens placed in removal proceedings pursuant to 8 C.F.R. § 208.30(f). In light of *Jennings*, however, the basis on which the Board granted release on bond to the *Matter of X-K* subclass of aliens described in 8 C.F.R. § 208.30(f) in 2005 no longer exists. Absent some hypothetical but unusual showing by the detainee of a material change in circumstances,[5] the immigration courts now must deny bond redetermination requests from applicants for admission detained under any of the provisions of INA §235(b)(1).

Respectfully submitted,

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[5] For example, a changed eligibility for temporary parole due to emergent humanitarian reasons or significant public benefit.

CERTIFICATE OF SERVICE

I hereby certify that, on October 11, 2018, I electronically submitted the foregoing *amicus curiae* brief to the United States Department of Justice, via email to AGCertification@usdoj.gov, and, via first class mail, sent three copies to the Office of the Attorney General at the United States Department of Justice for distribution to the parties.

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