UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[redacted]

Plaintiff,

v.

KIRSTJEN NIELSEN, et al.,

Defendants.

Civ. Action No. 17-[redacted]

CORRECTED PROPOSED BRIEF OF AMICI CURIAE IMMIGRATION LAW PROFESSORS AND SCHOLARS IN SUPPORT OF PLAINTIFF'S MOTION TO DISMISS

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INTEREST OF AMICI CURIAE

Amici Curiae Immigration Law Professors and Scholars are legal scholars and historians from a diverse range of U.S. law schools who teach and study in the area of immigration law and history. In addition to studying aspects of the immigration system, many Amici are active immigration law practitioners, supervising law school clinics that are regularly engaged in direct representation of persons in immigration proceedings.

Amici write to bring to this Court's attention historical and contemporary practices demonstrating that, particularly in times of crisis, the Executive has periodically overstated national security threats posed by non-citizens and used the looser evidentiary and procedural standards of immigration courts to detain or remove large numbers of particular categories of disfavored immigrant populations. Specifically, Amici explain that the Executive's allegations of gang membership are often based on unreliable and arbitrary criteria. Amici are concerned that, as in past cases of Executive overreach, the due process rights of Plaintiff and others may be disregarded amidst a politically-driven agenda. Mindful of the Executive's historical conduct and the importance of the Judiciary's role in our constitutional system of separation of powers, Amici urge this Court to carefully scrutinize the evidence in this case to ensure that the significant judgment to deny immigration benefits or relief from deportation is not based on conjecture or guilt by association, but is instead based on reliable and substantial evidence.

SUMMARY OF THE ARGUMENT

While the Executive has the broad power to regulate immigration, the courts have historically engaged in a review of immigration matters and imposed basic constitutional and evidentiary requirements to ensure that the Executive's basis for removing certain non-citizens is legally sufficient and grounded in substantial evidence. *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001) ("Because of [the Suspension Clause], some 'judicial intervention in deportation cases' is 'unquestionably required by the Constitution.'") (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)). "It is the province of the courts . . . to prevent abuse of [the Executive's] extraordinary power" over immigration. *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920). Over the past two years, the Trump Administration has targeted Latinx[1] immigrant youth, using unsubstantiated allegations of gang membership to deny immigration benefits and initiate deportation proceedings. The Trump Administration is treating *mere allegations* of gang membership as a crime, taking advantage of the less demanding procedural standards[2] in immigration court to push its anti-Latinx agenda. *See Felzcerek v. INS*, 75 F.3d 112, 115–16 (2d Cir. 1996) (noting that in immigration proceedings, "heightened procedural protections of a criminal trial 'are not necessarily constitutionally required.'"). Nowhere has this been more evident than in Plaintiff's home: Long Island, New York.

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[1] Latinx refers to a person of Latin American origin or descent (used as a gender-neutral or non-binary alternative to Latino or Latina). *Latinx*, Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/latinx (last visited Oct. 31, 2018).

[2] Amici note that even in criminal proceedings, courts too often fail to address the due process concerns raised by allegations of gang membership, with sometimes dire consequences for defendants. *See generally* K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 645–57 (2011).

The primary basis for the Executive's gang allegations in this case is an unsubstantiated assertion that "law enforcement agencies have confirmed" Plaintiff's membership with MS-13. Compl. ¶ 69. It is an affront to Plaintiff's due process rights that the source of this alleged confirmation is not shared with Plaintiff. The little evidence provided points to a flawed classification method that relies on vague allegations and assertions. Gang allegations, like those brought against the Plaintiff, are often based on notoriously unreliable government-generated gang databases which, like No-Fly lists, deny people—primarily black and brown men—fundamental due process rights. Several courts of appeal, including the Second Circuit, have recognized the problematic nature of relying solely on government-generated evidence in immigration proceedings. *Dickson v. Ashcroft*, 346 F.3d 44, 54 (2d Cir. 2003) (Sotomayor, J.) ("[F]actual narratives contained in [government reports] . . . may well be inaccurate [and therefore] . . . not a highly reliable basis for a decision of such importance as deportation."); *see also Francis v. Gonzales*, 442 F.3d 131, 143 (2d Cir. 2006). The Fourth, Eighth, Ninth, and Eleventh Circuits have all explicitly held that untested government-generated reports alone are insufficient to satisfy due process. *Anim v. Mukasey*, 535 F.3d 243, 258 (4th Cir. 2008); *Banat v. Holder*, 557 F.3d 886, 891 (8th Cir. 2009); *Olivas-Motta v. Holder*, 746 F.3d 907, 918–19 (9th Cir. 2013); *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1350 (11th Cir. 2010).

Even if the government's evidence were reliable, this Court must also consider whether due process requires the opportunity to rebut the government's allegations. *See Morissey v. Brewer*, 408 U.S. 471, 489 (1972). Plaintiff here has had no such opportunity. Yet, the First, Ninth, Fifth, and Seventh Circuits have explicitly held that the right to confrontation applies to immigration proceedings. *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004); *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997); *Olabanji v. I.N.S.*, 973 F.2d 1232, 1234–35 (5th Cir. 1992);

Pouhova v. Holder, 726 F.3d 1007, 1015 (7th Cir. 2013). Thus, Amici ask this Court to meaningfully scrutinize the record to ensure that the Executive's case against Plaintiff is grounded in reliable evidence—not conjecture, speculation, or associational guilt—as required by the due process clause of the Constitution. Additionally and in the alternative, Amici ask this Court to allow Plaintiff to confront the government's evidence against him.

ARGUMENT

I. THE TRUMP ADMINISTRATION OVERGENERALIZES THE GANG PROBLEM IN THE UNITED STATES TO UNJUSTIFIABLY TARGET LATINX ADOLESCENTS FOR DEPORTATION, RELYING ONLY ON SCANT AND UNRELIABLE EVIDENCE

Since the start of his campaign, President Donald Trump has falsely linked immigrants and people of color—specifically Latinxs—to criminality and acts of violence. Mr. Trump began his attacks on Latinxs as a presidential candidate, accusing Mexicans of "bringing drugs" and being "rapists." *See* Raul Reyes, *Taco Trucks to Bad Hombres: 7 Times Latinxs Figured In Trump's Campaign*, NBC News (Nov. 10 2016, 11:27 a.m.), https://www.nbcnews.com/news/Latinx/taco-trucks-bad-hombres-7-times-Latinxs-figured-trump-s-n680811. Such inflammatory rhetoric continued into his presidency. Mr. Trump recently characterized a group migrants approaching the United States—which includes asylum seekers—as "an invasion of our country." Michael Shear and Thomas Gibbons-Neff, *Trump Sending 5,200 Troops to the Border in an Election-Season Response to Migrants,* New York Times (Oct. 29, 2018)*,* https://www.nytimes.com/2018/10/29/us/politics/border-security-troops-trump.html. On October 31, 2018, Mr. Trump again politically weaponized race and immigration, tweeting a midterm campaign ad that used fear of one Latinx criminal to vilify all Latinx immigrants. *See* Allyson Chiu, *Trump revives 'Willie Horton' tactic with ad linking illegal immigrant killer to Democrats*, Washington Post (Nov. 1, 2018), https://www.washingtonpost.com/nation/2018/11/01/democrats-let-him-into-our-country-trumps-new-ad-links-opponents-illegal-immigrant-killer-its-far-worse-than-infamous-willie-horton-ad-say-critics/. Even Senator Jeff Flake condemned the ad: "This is just a new low in campaigning." *Id*. As explained below, this false narrative of immigrants-as-a-menace is also being put into policy as the Trump Administration is targeting Latinx immigrant youths—unjustifiably classifying them as gang members without substantive evidence and threatening to deport them without due process. Plaintiff is one such youth.

a. With Conclusory Assertions, the Trump Administration has Unjustifiably Labeled Latinx Immigrant Youth as the Wellspring of MS-13

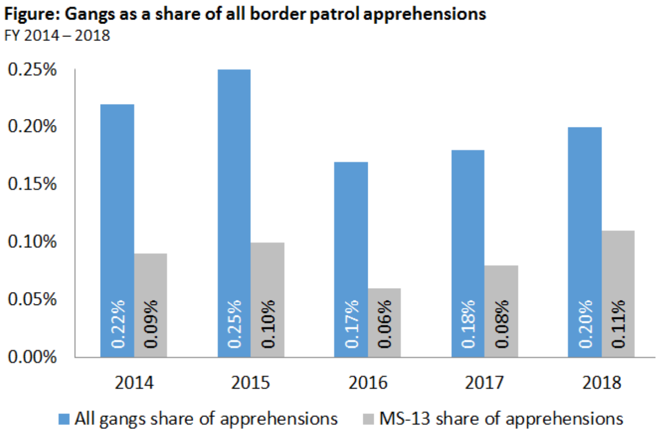
Mara Salvatrucha (MS-13) has become the rallying cry for the Trump Administration's politically motivated attacks on Latinx youth. MS-13 was born during a period of gang violence in 1980s Los Angeles and has since spread to several countries including Guatemala, Honduras, and El Salvador. Nermeen Arastu et al., *Swept Up in the Sweep: The Impact of Gang Allegations on Immigrant New Yorkers* at 10–12, The New York Immigration Coalition (May 2018), *available at* https://www.nyic.org/2018/06/swept-up-in-the-sweep-report [hereinafter *Swept Up in the Sweep*]. Ironically, early United States efforts to curb the growth of MS-13, such as the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, directly led to MS-13's expansion. *Id*. As the United States deported MS-13 members back to countries lacking the societal infrastructure to absorb them, MS-13 grew in size and influence. *Id*. Ignorant of or ignoring history, the Trump Administration continues to "double down on law enforcement-only measures against MS-13, [which] will most likely not only perpetuate [the previous 40 years' worth of] failures, but risk growing MS-13's size and influence in the United States, while simultaneously violating rights and traumatizing already vulnerable communities." *Id*.; *see also* Daniel Denvir, *Deporting People Made Central America's Gangs. More Deportation Won't*

Help., Washington Post (Jul. 20, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/07/20/deporting-people-made-central-americas-gangs-more-deportation-wont-help/.

The targets of the administration's current MS-13 purge are—ironically—the same group of people who are fleeing gang violence in Latin America: Latinx immigrant youth. *See Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala* at 37-8, United Nations High Commissioner for Refugees (Jan. 2018), *available at* http://www.refworld.org/country,,,,,GTM,,5a5e03e96,0.html (partially because of "gang-related violence . . . from 2011 onwards there was a surge in arrivals from unaccompanied children and families fleeing Guatemala and the other Northern Triangle countries arriving at the United States' southern border."). As Attorney General Jeff Sessions ("AG Sessions") explains, the Justice Department, in "mak[ing] the decimation and dismantlement of MS-13 a top priority," is focusing its anti-MS-13 efforts on unaccompanied alien children ("UACs") "who come to this country as wolves in sheep [sic] clothing." *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out Its Immigration Priorities,* U.S. Dep't of Justice (Sept. 12, 2017), *available at* https://www.justice.gov/opa/speech/attorney-general-sessions-gives-remarks-federal-law-enforcement-boston-about [hereinafter Sessions Remarks]. AG Sessions insists that "[i]n fact [MS-13] uses [the UAC] program as a means by which to recruit new members." *Id*. Mr. Trump echoes this sentiment. *See* Seung Min Kim, *Trump warns against admitting unaccompanied migrant children: 'They're not innocent.'*, Washington Post (May 23, 2018), https://www.washingtonpost.com/politics/trump-warns-against-admitting-unaccompanied-migrant-children-theyre-not-innocent/2018/05/23/e4b24a68-5ec2-11e8-8c93-8cf33c21da8d_story.html? ("They look so innocent. They're not innocent."). Relying solely on conclusory assertions, the Trump Administration seeks to deny Latinx immigrant youth basic due process rights in furtherance of political goals that are served by their unjustified deportation.

b. Without Substantive Evidence, the Trump Administration Targets Latinx Immigrant Youth on Long Island as MS-13 Gang Members or Affiliates

Across the United States, immigrants are arrested, detained, and deported based on unsubstantiated allegations of gang membership or association that rely on subjective criteria. Despite the Trump Administration's rhetoric, its own statistics show that an almost negligible fraction of United States Customs and Border Patrol ("CBP") arrests are tied to gangs:



David Bier, *0.1% of Border Patrol Arrests Are MS-13*, Cato Institute (June 28, 2018, 2:13 p.m.), https://www.cato.org/blog/01-border-patrol-arrests-are-ms-13. This proportion approaches zero when restricted to UACs. According to a CBP report on the 260,000 UACs who migrated to the United States between FY 2012 and June 2017, only 159 UACs were *suspected* of being affiliated with gangs, and only 56 were "suspected or confirmed" of being affiliated with MS-13. Testimony of Carla Provost, Acting Chief of U.S. Border Patrol, *The MS-13 Problem: Investigating Gang Membership, its Nexus to Illegal Immigration, and Federal Efforts to End the Threat* (Jun. 21, 2017), *available at* https://www.judiciary.senate.gov/download/06-21-17-

provost-testimony; *see also* United States Border Patrol, *Total Unaccompanied Alien Children (0-17 Years Old) Apprehensions By Month* (FY2010–2017), *available at* https://www.cbp.gov/sites/default/files/assets/documents/2018-Jul/BP%20Total%20Monthly%20UACs%20by%20Sector%2C%20FY10-FY17.pdf. Thus, *suspected* gang members comprise a small minority—roughly 0.06%—of UACs; *suspected* MS-13 members, a mere 0.02%. Yet allegations of gang membership among Latinx immigrant youth have spiked. *See generally* Laila Hlass and Rachel Prandini, *Deportation By Any Means Necessary: How Immigration Officials are Labeling Immigrant Youth as Gang Members*, Immigrant Legal Resource Center (2018), *available at* https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf.

Nowhere is this crusade against Latinx immigrant youth more prominent than in Long Island, New York. AG Sessions himself called Central Islip in Suffolk County, Long Island "ground zero for MS-13." Sessions' Remarks. There, explains AG Sessions, MS-13 "is running rampant . . . and replenishing its ranks by taking advantage of the [UAC] program." *Id*. The Trump Administration, through AG Sessions, is painting Long Island as the epicenter of MS-13 activity. But this is not so. Of the approximately 10,000 MS-13 members in the United States, only 400—four percent—are estimated to be in Suffolk County. *Swept Up in the Sweep* at 16. Moreover, in 2016 the crime rate in Suffolk County "fell to an all-time low." Joseph De Avilla, *Overall Crime Falls to New Low in Suffolk County*, Wall Street Journal (Jan. 7, 2017, 7:00 a.m.), https://www.wsj.com/articles/overall-crime-falls-to-new-low-in-suffolk-county-1483790408?.

In 2017, The Department of Homeland Security ("DHS") launched a major operation against MS-13 on Long Island: Operation Matador. *See The Gang Crackdown (transcript)*, PBS Frontline, Season 36: Episode 5 (Feb. 13, 2018), https://www.pbs.org/wgbh/frontline/film/the-gang-crackdown/transcript/. Operation Matador aims to "target violent gang members and their associates, eradicate the violence they inflict upon our communities and stop the cash flow to transnational organized crime groups." *Operation Matador Nets 39 MS-13 Arrests in Last 30 Days*, Immigr. and Customs Enf't (June 14, 2017), https://www.ice.gov/news/releases/ operation-matador-nets-39-ms-13-arrests-last-30-days. In the first thirty days of Operation Matador, DHS, through Immigration and Customs Enforcement ("ICE"), arrested 45 individuals, 90% from Nassau and Suffolk counties in Long Island. *See id*. In 2018, that number rose to 475, 80% from Nassau and Suffolk counties. *Joint Operation Nets 24 Transnational Gang Members, 475 Total Arrests Under Operation Matador*, ICE (Mar. 29, 2018), https://www.ice.gov/news/ releases/joint-operation-nets-24-transnational-gang-members-475-total-arrests-under-operation. Surprisingly, DHS reported that "[n]inety-nine individuals arrested during this operation crossed the border as unaccompanied minors, all of which were confirmed as MS-13 gang members." *Id*. Prior to Operation Matador, DHS, via CBP, identified only fifty-six UACs as *confirmed or suspected* MS-13 gang members over a five-year span. Testimony of Carla Provost, Acting Chief of U.S. Border Patrol, *The MS-13 Problem: Investigating Gang Membership, its Nexus to Illegal Immigration, and Federal Efforts to End the Threat* (Jun. 21, 2017), *available at* https://www.judiciary.senate.gov/download/06-21-17-provost-testimony. In just over a year, DHS *confirmed* ninety-nine—twice the allegations in one-fifth the time.[3]

On Long Island, immigration law practitioners have noticed a significant increase in allegations of gang membership or association in their cases. *See Swept Up in the Sweep* at 19–23. Many of these allegations appear baseless. *See id*. at 22 ("78 percent of survey respondents report interactions where law enforcement made gang-related allegations or implied suspicions against immigrant community members."). News outlets report similar trends. *See, e.g.*, Christopher J. Eberhart & Seth Harrison, *Ecuador: N.Y. Teen Facing Deportation Not Involved in Gang Activity*, USA Today (June 16, 2017), https://www.usatoday.com/story/news/nation-now/2017/06/16/ecuador-n-y-teen-facingdeportation-not-involved-gang-activity/405385001.

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[3] Several other operations, such as Operation Raging Bull, have since been executed. *See, e.g.*, *Operation Raging Bull*, ICE (Jan. 1, 2018), https://www.ice.gov/features/raging-bull.

The most troubling aspect of Operation Matador and similar operations that ICE executes in partnership with local law enforcement is the lack of transparency and due process—it is a black box. Immigrants caught up in these inter-agency operations are "given little to no information about the source of the information being used against them." *Swept Up in the Sweep* at 23; *see also* Tom Hays and Colleen Long, *Much-touted MS-13 sweep keeps even most basic details secret*, Associated Press (Feb. 21, 2018), https://apnews.com/46700cb4f69745e4ae19dbd577c0c3f7; *see also Crackdown on MS-13 Gang Unfairly Targets Central American Youth*, Innocence Project (Aug. 21, 2017), https://www.innocenceproject.org/gang-crackdown-unfairly-targets-central-american-youth/. Official government statements show that this is purposeful. Tellingly, ICE admits that "[s]ome evidence is withheld in order to safeguard the integrity of law enforcement's investigative techniques and protect concurrent or future investigations." *Joint Operation Nets 24 Transnational Gang Members, 475 Total Arrests Under Operation Matador*, ICE (Mar. 29, 2018), https://www.ice.gov/news/releases/joint-operation-nets-24-transnational-gang-members-475-total-arrests-under-operation.

This opacity has been challenged in federal court. In 2017, the American Civil Liberties Union ("ACLU") filed a lawsuit in the Northern District of California that challenged Operation Matador's practice of detaining of children based on unfounded gang allegations. *Saravia v.*

Sessions, 280 F. Supp. 3d 1168 (N.D. Cal. 2017), *aff'd*, 18-15114, 2018 WL 4689978 (9th Cir. Oct. 1, 2018). The district court agreed with the ACLU, noting that "DHS sometimes makes an inference of gang membership from conduct, clothing, or associations that are far from unequivocal evidence of that conclusion." [4] *Saravia,* 280 F. Supp. 3d at 1199. The record here suggests that Latinx immigrant youth on Long Island, like Plaintiff here, continue to be classified as MS-13 members without substantive evidence.

c. Without Due Process, the Trump Administration and Local Law Enforcement Agencies Prosecute Latinx Immigrant Youth for Alleged MS-13 Ties, Using Immigration Procedures to Skirt Criminal Procedural Safeguards

Officials are taking advantage of immigration proceedings where the "heightened procedural protections of a criminal trial 'are not necessarily constitutionally required,'" and "the strict rules of evidence do not apply." *Felzcerek v. INS*, 75 F.3d 112, 115–16 (2d Cir. 1996) (citations omitted). In fact, the burden of proof to avoid detention in immigration proceedings is with the accused. 8 CFR § 1236.1(c)(8). This "shifting of evidentiary burdens . . . makes it easier for the agency to detain individuals in the first place." Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 156 (2013). To avoid the stricter protections of criminal proceedings, [5] the Trump Administration and local law enforcement agencies in effect use immigration proceedings to prosecute Latinx immigrant youth.

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[4] According to the ACLU, "over 30 of [children] were released because the government's evidence of gang affiliation was either flimsy or non-existent." *Saravia v. Sessions (Due Process for Immigrant Youth)*, ACLU Northern California (Aug. 11, 2017), https://www.aclunc.org/our-work/legal-docket/saravia-v-sessions-due-process-immigrant-youth.

[5] Amici note that unsubstantiated gang allegations in criminal proceedings, while not an issue before this Court, are similarly problematic. Gang allegations are a basis for criminal enhancements in many states. See *Enhanced*

Gang membership alone is not a crime. *Lanzetta v. New Jersey*, 306 U.S. 451, 457-58 (1939). Yet the Trump Administration is treating *mere allegations* of gang membership as akin to a crime punishable by deportation, taking advantage of the less demanding procedural standards in immigration court to push its anti-Latinx agenda. As ICE Assistant Special Agent in Charge of Long Island, Jason Molina, explains:

> [T]he purpose of classifying [an immigrant] as a gang member or a gang associate is because once he goes up in front of an immigration judge, we don't want him to get bail, because the whole point of this operation is to get these known gang members off the street.

Julianne Hing, *ICE Admits Gang Operations Are Designed to Lock Up Immigrants*, The Nation (Nov. 20, 2017), https://www.thenation.com/article/ice-admits-gang-operations-are-designed-to-lock-up-immigrants/. Local law enforcement officials follow. Suffolk County Police Commissioner, Timothy Sini, explained his department's methodology:

> For example, if we have intelligence that they are a gang member, that's not necessarily a crime, right? Certainly, being a gang member is not a crime, and the intel that we may have may not indicate a significant state crime. We may have something small on them, but nothing that's going to keep them in jail. So if we perceive someone as a public safety threat, we utilize all of our tools, which include immigration tools. So we'll partner with the Department of Homeland Security to target them for detention and removal.

The Gang Crackdown (transcript), PBS Frontline, Season 36: Episode 5 (Feb. 13, 2018), https://www.pbs.org/wgbh/frontline/film/the-gang-crackdown/transcript/. Clearly, the Trump Administration and local officials are participating in prosecutorial forum shopping, attempting to avoid the procedural requirements of due process.

Penalties—Sentencing, National Gang Center , https://www nationalgangcenter.gov/Legislation/Enhanced-Penalties-Sentencing (last visited Oct. 31, 2018).

II. THE LACK OF OBJECTIVE CRITERIA FOR DETERMINING MEMBERSHIP IN, OR ASSOCIATION WITH, A GANG MAKES SUCH DETERMINATIONS HIGHLY SUSCEPTIBLE TO ERROR

Allegations of gang membership against Plaintiff rely on two kinds of evidence—both of which are unsupported, conclusory, and unreliable. First, the government relies on attenuated inferences such as "wearing 'blue and white' at an unspecified place and time, making unspecified 'gang signs,' at an unspecified place and time" [Dkt. 66] at 8–9. Second, the government relies on guilt-by-association: "'hanging out' with unnamed individuals who are conclusively declared to be gang members, or 'frequent[ing] known areas notorious for gangs.'" *Id*. Similar subjective and arbitrary criteria are used to include people in gang databases.[6] "Immigration agencies' poor track record with data quality and management," including gang database records, is well documented. Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L. J. 1105, 1136–38 (2013).

Because there are no objective criteria for gang classification, and local jurisdictions have discretion to create their own criteria for determining gang membership, each jurisdiction devises its own unique—yet necessarily arbitrary—system. *See* K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 645–57 (2011). Even gang experts cannot agree on what it means to be a gang member. Kristy Matsuda et al., *Putting the "Gang" in "Eurogang": Characteristics of Delinquent Youth Groups by Different Definitional Approaches*, YOUTH GANGS IN INTERNATIONAL PERSPECTIVE, 17–18 (2011) ("Social scientists have been putting forth gang definitions since the 1920s but the discourse around definitions remains timely."). Definitions are arbitrary. Minneapolis, for instance, relies on a ten-point list to peg an individual as a gang member; only one criterion is related to criminality. *See id*. at 651–52. New York is no different. In New York City, an individual is entered into a gang database based on the following criteria:

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[6] Recently, a state audit of California's state-wide database, CalGang, revealed its profound unreliability. The audit found that 42 people were less than one year old when their names were added to the database; 28 of these infants purportedly "admitt[ed] to be[ing] gang members." Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, L.A. Times (Aug. 11, 2016), http://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story html.

> An individual will be entered if:
> 1. He/she admits to membership during debriefing OR
> 2. Through the course of an investigation an individual is reasonably believed to belong to a gang and is identified as such by two independent sources. (Ex. Pct. Personnel, Intell, School Safety, Dept. of Correction, or Outside Agency) . . . OR
> 3. Meets **any two below mentioned criteria**
>   a. Known gang Location
>   b. Scars/Tattoos Associated w/ Gangs
>   c. Gang-Related Documents
>   d. Colors Associated w/ Gangs
>   e. Association w/ Known Gang members
>   f. Hand Signs Associated with Gangs

Swept up in the Sweep at 24 (emphasis added). In Nassau County, Long Island, the criteria are:

> 1. Self-admission of gang membership -OR-
>
> **Any three of the following**, not necessarily on the same day:
> 2. Tattoos depicting gang affiliation
> 3. Style of dress consistent with gang membership
> 4. Possession of gang graffiti on personal property or clothing
> 5. Use of hand signs or symbols associated with gangs
> 6. Reliable informant identified person gang member
> 7. Associates with known gang members
> 8. Prior arrests with known gang members:
> 9. Crimes consistent with usual gang activity
> 10. Statements from family members indicating gang membership
> 11. Other law enforcement agencies identifying the subject as a gang member
> 12. Attendance at gang functions or known gang hangouts
> 13. Identified by other gang members or rival gang members

Id. (emphasis added) [7].

This unreliable “checklist” approach—“any two” in New York and “any three” in Nassau County—is particularly troubling. Several indicia are inherently subjective, and whoever files a report can argue that any given individual satisfies any given criterion. Take, for instance, the common criterion of “association with known gang members.” It can be argued that having a conversation is sufficient to qualify as “association.” With the common criterion of “colors” or “style of dress,” the blue-and-white of several national flags—Salvadoran, Guatemalan, Greek, Finnish, Israeli, etc.—can be classified as the blue-and-white of MS-13. While seemingly hyperbole, such overbreadth has been documented. *See Swept Up in the Sweep* at 34 (“If a student is seen talking to a known gang member, a school administrator or SRO may assume that student is involved with MS-13, as well, even without knowing the content of the conversation.”); *see also id*. at 32 (“Personal photos obtained from the Facebook account were later used to allege gang affiliation and the allegations were based upon specific clothing items or style (hats, sneakers, sporting teams, etc.) and colors of clothing.”). The multiplicity requirement does not save the system from being inherently arbitrary.[8]

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[7] This is the criteria as of 2010. Nassau Cty. Police Dep’t, Task Force Against Gangs, Coordinators Office, *Gang Identifiers* (produced to CUNY School of Law Professor Babe Howell in response to Freedom of Information Law request, postmarked July 26, 2010) (on file with authors). Criteria may have since changed.

[8] Holding that Tennessee’s gang enhancement statute was unconstitutional, the Tennessee Court of Criminal Appeals noted that the overbroad checklist-style gang membership criteria can capture an individual wearing a fraternity or sorority’s colors or appears in club photographs. *See State v. Bonds*, 502 S.W.3d 118, n.10 (Tenn. Crim. App. 2016) (“As written on May 30, 2012, a defendant who happened to be a member of a college Greek organization with at least a three person membership, *see* T.C.A. § 40-35-121(a)(1), and he or she wears the organization‘s colors and letters or appears in club photos, *see* T.C.A. § 40-35-121(a)(2)(D)(G), could be subject to a gang enhanced sentence if convicted of a minor criminal offense, wholly unrelated to the organization.”).

Gang membership determinations by law enforcement are notoriously inaccurate. Courts have recognized that "accusations of gang membership in particular involve a considerable risk of error." *Vasquez v. Rackauckas*, 734 F.3d 1025, 1045–46 (9th Cir. 2013). "The informal structure of gangs, the often fleeting nature of gang membership, and the lack of objective criteria in making the assessment all heighten the need for careful factfinding." *Id*. Scholars have noted the same. *See, e.g.*, Michael Cannell, *Assumed Dangerous Until Proven Innocent: The Constitutional Defect in Alleging Gang Affiliation at Bail Hearings*, 63 DEPAUL L. REV. 1027, 1035 (2014) (observing that in some jurisdictions as little as "wearing baggy pants [and being] seen chatting with a person who is already (rightly or wrongly) in the gang database" suffices for gang classification).

In racially segregated areas like Long Island, where immigrant communities tend to be ethnically homogenous, gang allegations based on association can spread like a viral scarlet letter. As each alleged gang member is added to the local gang database, another node on which to base a fresh allegation is born—extending the database's reach network-by-network. Gang databases are also perversely circular. Law enforcement agencies regularly "provide information from their gang databases to each other," further accelerating the spread of allegations. Howell, *Fear Itself*, 23 ST. THOMAS L. REV at 651.

III. THE JUDICIARY HAS AN ESSENTIAL ROLE ENSURING THAT THE MINIMUM STANDARDS OF FUNDAMENTAL FAIRNESS ARE MET, EVEN IN ADMINISTRATIVE PROCEEDINGS

a. The Courts Have Historically Checked the Executive's Tendency to Target Immigrant Communities

History demonstrates that, particularly in times of perceived crisis or wartime, the Executive has often exaggerated national security threats and enforced immigration laws in an overly-aggressive and regrettable fashion against politically disfavored immigrant populations.

See GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM*,* 5, 283–307, 528–29 (2004). Such instances include the round-up of "radicals" in the 1919 Palmer Raids, the political response to suspected Communist party members in the 1950s, and, most germane here, the post-9/11 detention and removal measures focused exclusively on Arabs and Muslims. *See id*. These actions by the government have followed a familiar trajectory to reach similar conclusions: in each, the harsh treatment afforded to thousands of immigrants was eventually discredited and demonstrated to have been based on faulty or exaggerated allegations of danger, xenophobia, and associational guilt rather than substantive evidence. *See* Sameer Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV 1185 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273; *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004).

With some regrettable exceptions, *see, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018)—the Judiciary has played an essential role in upholding the constitutional rights of immigrants. While the political branches have broad power to regulate immigration, the courts have historically engaged in a review of immigration matters and imposed basic constitutional and evidentiary requirements to ensure that the Executive's basis for removing certain non-citizens is legally sufficient and grounded in substantial evidence. *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001) ("Because of [the Suspension Clause], some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'") (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)). "It is the province of the courts . . . to prevent abuse of [the Executive's] extraordinary power" over immigration. *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920). This remains true today.

This Court is being called upon to determine whether the Executive has again abused its extraordinary power in basing its gang allegations on unsubstantiated evidence and unrebuttable assertions. It is not the first time that the Judiciary has been asked to review a pseudocriminal dossier. Indeed, whether post-9/11 No-Fly Lists pass Constitutional muster is still a matter before the courts. In 2014, a federal district court held that "[t]he procedures afforded to Plaintiffs through the [No-Fly List removal] process are wholly ineffective and, therefore, fall short of the elementary and fundamental requirement of due process to be afforded notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161 (D. Or. 2014) (internal quotes omitted). Other courts have held that whether due process is violated in such cases depends on the facts. *Mohamed v. Holder*, 995 F. Supp. 2d 520, 539 (E.D. Va. 2014) ("[T]he Court cannot conclude, as a matter of law, that [the No-Fly List Removal process] provides sufficient process to defeat Mohamed's procedural due process claim . . . the Court must engage in a fact-intensive consideration."); *see also Ibrahim v. Dep't of Homeland Sec.*, No. 06-00545, 2014 U.S. Dist. LEXIS 164963, at *4-5 (N.D. Cal. Jan. 14, 2014) ("Once a plaintiff shows concrete, reviewable adverse government action has occurred, and, as here, shows that the action resulted from an error by the government, then the plaintiff is entitled by due process to a post-deprivation remedy that requires the government to cleanse and/or correct its lists and records of the mistaken information and to certify under oath that such correction(s) have been made."). As courts have done in the No-Fly list context, Amici encourage this Court to scrutinize the evidence to determine whether reliance on the gang allegations against Plaintiff violates due process.

b. Federal Courts Have Acknowledged That Factual Findings in Immigration Proceedings Must Have an Adequate Basis to Satisfy Due Process

Beyond No-Fly lists, federal courts, including the Second Circuit, have recognized the importance of scrutinizing the government's evidence in immigration proceedings. While the Trump Administration is correct that immigration proceedings are not held to the same standard as criminal proceedings, due process still applies. "The due process test for admissibility of evidence in a deportation hearing is whether the evidence is probative and whether its use is fundamentally fair." *Felzcerek*, 75 F.3d. at 115 (quotations omitted). The Supreme Court has yet to directly address the issue. Several Circuits, however, have characterized government evidence of the sort proffered against Plaintiff as biased, unreliable, unfair, insufficient, inaccurate, unreasonable, unsubstantial, not probative, or various combinations thereof.

The Second Circuit explains that documents that come from "agencies whose jobs are to seek to detect and prosecute crimes" do not "necessarily emanate from a neutral, reliable source." *Francis v. Gonzales*, 442 F.3d 131, 143 (2d Cir. 2006). According to now-Justice Sotomayor, "factual narratives contained in [a pre-sentence report] are prepared by a probation officer on the basis of interviews with prosecuting attorneys, police officers, law enforcement agents, etc., they may well be inaccurate." *Dickson v. Ashcroft*, 346 F.3d 44, 54 (2d Cir. 2003). Thus, "[s]uch a narrative is not a highly reliable basis for a decision of such importance as deportation." *Id*.

The Fourth, Eighth, Ninth, and Eleventh Circuits all agree that judicial determinations based solely on untested, government-generated reports do not satisfy due process. The Fourth Circuit held that "[g]eneral deference to the Department of State cannot substitute for an adequate evaluation of the reliability of a document, especially when the document . . . provides practically no information upon which a reliability determination can be made." *Anim v. Mukasey*, 535 F.3d 243, 258 (4th Cir. 2008). Sole reliance on a government document offends the "right to a fundamentally fair proceeding . . . the first element of a due process violation." *Id.*; *see also Prudencio v. Holder*, 669 F.3d 472, 483–84 (4th Cir. 2012) (finding police reports unreliable). The Eighth Circuit held that "[r]eliance on reports of investigations that do not provide sufficient information about how the investigation was conducted [is] fundamentally unfair." *Banat v. Holder*, 557 F.3d 886, 891 (8th Cir. 2009); *see also United States v. Bell*, 785 F.2d 640, 643–44 (8th Cir. 1986) (finding police reports unreliable). The Ninth Circuit held that "something as potentially inaccurate as a police report cannot be 'clear and convincing evidence.'" *Olivas-Motta v. Holder*, 746 F.3d 907, 919 (9th Cir. 2013). Finally, the Eleventh Circuit explains that "[a]bsent corroboration, the arrest reports by themselves do not offer reasonable, substantial, and probative evidence." *Garces v. U.S. Attorney Gen.*, 611 F.3d 1337, 1350 (11th Cir. 2010).

Such judicial scrutiny of government-generated evidence has been applied to allegations of gang membership. The Fifth Circuit, for example, held that an officer's testimony of gang membership was inadmissible because "there was no direct evidence that [the Plaintiff] was *currently* in [a] gang." *United States v. Hamilton*, 723 F.3d 542, 546 (5th Cir. 2013) (emphasis in original). So too have district courts. In at least one SIJS case where "ICE claimed that Plaintiff had admitted in previous interviews that he was a member of the 'Mara Salvatrucha 13' street gang," a federal court held that ICE abused its discretion in failing to substantiate that claim. *A.A.-M v. Gonzales*, No. C05-2012C, 2005 WL 3307531, at *2 (W.D. Wash. Dec. 6, 2005); *see also Zheng v. Pogash*, 416 F. Supp. 2d 550, 559 (S.D. Tex. 2006).

Even if the government's evidence were reliable, this Court must also consider whether due process requires the opportunity to rebut the government's allegations. The Supreme Court, in reviewing parole revocation, explained that "minimum requirements of due process" include the "right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Morissey v. Brewer*, 408 U.S. 471, 489 (1972). The First, Ninth, Fifth, and Seventh Circuits have extended this requirement to immigration proceedings. *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004) ("[T]he INS may not use an affidavit from an absent witness unless the INS first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing") (internal quotations omitted); *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997) ("[W]e require that 'the government must make a reasonable effort in INS proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her.'") (quoting *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988)); *Olabanji v. INS*, 973 F.2d 1232, 1234–35 (5th Cir. 1992) ("This court squarely holds that 'the use of affidavits from persons who are not available for cross-examination does not satisfy the constitutional test of fundamental fairness unless the INS first establishes that despite reasonable efforts it was unable to secure the presence of the witness at the hearing.'") (quoting *Hernandez v. INS*, 882 F.2d 945, 948 (5th Cir. 1989)); *Pouhova v. Holder*, 726 F.3d 1007, 1015 (7th Cir. 2013) (Even where the government makes reasonable, but unsuccessful efforts to produce a witness, "[w]e do not see why making an unsuccessful effort to locate a witness renders the unreliable hearsay evidence any more reliable or its use any fairer than without such effort.").

Amici ask this Court to meaningfully scrutinize the record to ensure that the Executive's case against Plaintiff is grounded in reliable evidence—not conjecture, speculation, or associational guilt—as required by the due process clause of the Constitution. Additionally and in the alternative, Amici ask this Court to allow Plaintiff in this case to confront the government's evidence against him. *See, e.g.*, *McCubbin v. Weber Cty.*, No. 1:15-CV-132, 2017 WL 3394593, at *11 (D. Utah Aug. 7, 2017) ("Plaintiffs suffer a concrete and particularized injury in fact to their due process rights by Weber County's inclusion of their names on the gang database, without process to challenge their inclusion and despite knowledge that they are not gang members."); *Lira v. Cate*, No. C 00-0905 SI, 2009 WL 10677792, at *31 (N.D. Cal. Sept. 30, 2009), *aff'd sub nom. Lira v. Herrera*, 448 F. App'x 699 (9th Cir. 2011) (unpublished); *accord Lott v. Stephens*, No. 3:13-CV-2699-P BH, 2015 WL 3898091, at *6 (N.D. Tex. June 23, 2015) (finding sufficient evidence of gang membership *after cross-examination* of witness); *Draper v. Stephens*, No. CIV.A. H-13-0981, 2014 WL 1117828, at *7 (S.D. Tex. Mar. 20, 2014); *Torres v. Lopez*, No. CV 10-3537-JLS SP, 2014 WL 7339198, at *7 (C.D. Cal. Dec. 18, 2014), *aff'd sub nom. Torres v. Biter*, 662 F. App'x 549 (9th Cir. 2016) (unpublished).

CONCLUSION

Recognizing that the Trump Administration has systematically targeted Latinx immigrant youth, particularly on Long Island, based on unfounded allegations of gang membership, Amici ask this Court to meaningfully scrutinize the record to ensure that the case against the Plaintiff is grounded in reliable evidence and to allow Plaintiff to confront the government's evidence against him.

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Respectfully submitted,

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APPENDIX

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CERTIFICATE OF SERVICE

I, Jennifer K. Brown, declare under penalty of perjury that on November 7, 2018, I caused the foregoing documents to be electronically filed with the Court's CM/ECF Filing System, which will send a Notice of Electronic Filing to all parties of record who are registered with CM/ECF.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief contains 6,701 words (exclusive of the cover page, table of contents, and table of authorities, appendix, certificate of service, and certificate of compliance), and complies with Local Civil Rule 11.1 of the Southern District of New York, as well as with Individual Practice Rule 2.D of Judge John G. Koeltl.

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