No. 16-812

IN THE

# Supreme Court of the United States

ROSA ELIDA CASTRO, *et al.*,

*Petitioners*,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF OF REFUGEE AND HUMAN RIGHTS ORGANIZATIONS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are thirty-one organizations and scholars who study the implementation of U.S. immigration and asylum laws, advocate for greater asylum seeker protections, and represent indigent asylum claimants in expedited removal proceedings. *Amici* are well-positioned to describe noncitizens' experiences in expedited removal and how the processes designed to identify asylum seekers are implemented. In addition, *amici* have an interest in ensuring the fair and just application of immigration laws to individuals who fear return to their country of origin. A complete list of *amici* is contained in the Appendix.

## SUMMARY OF ARGUMENT

In the two decades since Congress created the expedited removal process for noncitizens who seek entry to or have recently entered the United States, this Court has never reviewed those proceedings. Unlike regular removal proceedings, which afford noncitizens some protections, expedited removal features few, if any, safeguards—permitting the rapid removal of a noncitizen after a single encounter with a Customs & Border Protection ("CBP") officer.

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[1] Counsel for *amici curiae* provided timely notice to counsel of record for all parties of *amici*'s intention to file this brief. Petitioners have consented to the filing of all *amicus* briefs, and Respondents' letter consenting to the filing of this brief is filed herewith. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Nevertheless, Congress did create, and the Executive Branch has promulgated, certain procedural and substantive protections for asylum claimants, like Petitioners, who first encounter immigration officials in expedited removal proceedings. Among other statutory and regulatory requirements, CBP officers must inform noncitizens of their right to seek protection, question them about their fear of return, and refer those noncitizens who fear return to asylum officers for further screening. Asylum officers must then interview noncitizens to determine whether they possess a credible fear of persecution, defined by statute as a "significant possibility" that the noncitizen could establish eligibility for asylum in removal proceedings.

In theory, these procedures are intended to identify potential asylum claimants and divert those noncitizens into regular removal proceedings, where they can then apply for and pursue asylum. In practice, however, these modest statutory and regulatory protections are often misapplied or flouted altogether. Petitioners allege specific violations of their substantive and procedural rights during their credible fear interviews. *Amici* and other organizations have documented widespread violations at all levels of the expedited removal process, which have produced an arbitrary asylum screening process that depends, to a large degree, on chance. And the Third Circuit's erroneous determination that Petitioners are *categorically* unable to invoke the Suspension Clause insulates the entire expedited removal process—from a noncitizen's initial encounter with a CBP officer through the credible fear interview—from any judicial review.

In light of substantial evidence that the procedural and substantive protections Congress provided are frequently misapplied or altogether ignored, safeguarding Petitioners' access to habeas corpus is of exceptional importance. For that reason, this Court should grant certiorari and reverse the judgment of the Third Circuit.

## ARGUMENT

### I. Compared to Regular Removal Proceedings, Expedited Removal Offers Few Procedural Protections.

Petitioners were ordered removed in expedited removal proceedings. Those truncated proceedings, which generally bypass immigration court entirely, differ significantly from regular removal proceedings.

#### A. Regular Removal Proceedings Feature Certain Basic Procedural Protections.

In regular removal proceedings under section 240 of the Immigration and Naturalization Act ("INA"), an Immigration Judge ("IJ") determines whether a noncitizen should be removed or, instead, should be granted asylum or other relief from removal. *See* 8 U.S.C. §1229a(a)(1). Those proceedings feature certain procedural protections similar to those afforded in typical court proceedings. A noncitizen may be represented by counsel (at her own expense), may examine the evidence offered against her, may present additional evidence on her behalf, and may cross

examine government witnesses.[2] *See id.* §1229a(b)(4)(A)–(B).

If the IJ orders removal or denies a noncitizen's application for asylum or other relief, the noncitizen may appeal that decision to the Board of Immigration Appeals ("BIA"). *See* 8 C.F.R. §§1003.1(b)(3), 1240.15. If the BIA affirms, a noncitizen can petition for review before the federal courts of appeal and this Court. *See* 8 U.S.C. §1252(a)(1); 28 U.S.C. §§2342, 2350.

### B. In Contrast, Expedited Removal Affords Only Truncated Consideration of a Noncitizen's Eligibility for Admission to the United States, and is Responsible for a Significant Proportion of Removal Orders.

In contrast to regular removal proceedings, Congress created an accelerated removal process—known as "expedited removal"—for noncitizens seeking admission at ports of entry or who have recently entered the country. With a limited exception for asylum claimants, that process generally bypasses immigration courts entirely and permits immediate removal of noncitizens whom CBP officers conclude are inadmissible.

1. Created in 1996, expedited removal is codified in section 235 of the INA. That section provides, in

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[2] As *amici* and others have explained elsewhere, however, despite affording some baseline protections, section 240 removal proceedings also feature significant flaws. *See generally, e.g.*, Am. Immigration Council, *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice* (2013).

relevant part, that if "an immigration officer determines that an alien" is inadmissible because she lacks appropriate documentation or has sought to obtain a visa, other documentation, or admission by fraud or misrepresentation, "the officer shall order the alien removed from the United States without further hearing or review." 8 U.S.C. §1225(b)(1)(A)(i); *see id.* §1182(a)(6)(C), (a)(7).

Expedited removal proceedings are considerably truncated. A noncitizen's inadmissibility is determined during a single encounter with a CBP officer. If the officer determines the noncitizen is inadmissible, the officer shall advise the noncitizen of those charges, request that she respond orally to the charges, and then serve her with the order of removal. 8 C.F.R. §235.3(b)(2)(i).

Nor is there a meaningful avenue to seek review of the officer's determination. Although an officer's supervisor must review any expedited removal order, a noncitizen is not entitled to an IJ hearing or an appeal to the BIA. *See id.* §§235.3(b)(7), 1235.3(b)(2)(ii). In habeas corpus proceedings a court may review whether "an order in fact was issued and whether it related to petitioner," but the INA prohibits review of "whether the alien is *actually inadmissible* or entitled to any relief from removal." 8 U.S.C. §1252(e)(5) (emphasis added). Below, the Third Circuit construed this language to foreclose any review of whether the expedited removal order was procedurally or substantively flawed. *See* Pet. App. 17a–27a.

In other words, once a supervisor confirms an officer's determination, a noncitizen is ordered removed

without further process or a meaningful opportunity to challenge that determination. Thus, in expedited removal proceedings, CBP officers effectively "serve as both prosecutor and judge—often investigating, charging, and making a decision all within the course of one day." Am. Immigration Council, *Removal Without Recourse: The Growth of Summary Deportations from the United States* 1 (2014).

2. Congress granted the Attorney General discretion to apply expedited removal proceedings to two categories of noncitizens: (1) noncitizens "arriving in the United States," and (2) noncitizens already within the country who have not been continuously present for two years.[3] *See* 8 U.S.C. §1225(b)(1)(A)(i), (iii)(II). Initially, the Attorney General elected to apply expedited removal only to arriving noncitizens, defined as applicants for admission at ports of entry. *See*, *e.g.*, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,313–14 (Mar. 6, 1997); *see also* 8 C.F.R. §235.3(b)(1)(i); *id.* §1.2 (previously codified at 8 C.F.R. §1.1(q)).

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[3] In fact, the Attorney General delegated this authority to the Commissioner of the former Immigration and Naturalization Service, and that authority was further transferred to the Secretary of Homeland Security in 2002. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,878 (Aug. 11, 2004). While the Department of Homeland Security construes references to the Attorney General or the Commissioner to refer to the Secretary, *id.*, for ease of reference *amici* refer to the Attorney General.

Since 1996, the Attorney General has twice extended expedited removal to cover certain noncitizens already in the United States. In 2002, the Attorney General expanded expedited removal to noncitizens who had entered the United States by sea, without inspection, and had not been continuously present within the United States for two years. *See* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,924–25 (Nov. 13, 2002). In 2004, the Attorney General again invoked this authority to authorize the use of expedited removal for any noncitizen apprehended within fourteen days of entry and within 100 miles of the border. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004).

Expedited removal orders now account for a plurality of removal orders. In Fiscal Year 2014, over 176,000 expedited removal orders were entered—nearly forty-three percent of all removal orders. *See* Bryan Baker & Christopher Williams, Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2014* 7 (2016).

## II. Congress Carved Out Limited Statutory Protections for Asylum Seekers, Which Have Been Supplemented by Regulation.

Because of the nature and immediacy of their flight, asylum seekers are seldom able to obtain the documentation—like visas or passports—required to enter the United States. In light of this reality, Congress carved out specific procedural and substantive protections for potential asylum seekers who first

encounter immigration officials in expedited removal proceedings. In theory, the statute and implementing regulations establish procedures through which potential asylum claimants should be identified and diverted into regular removal proceedings, where they can pursue their asylum claims.

1. During the initial encounter, CBP officers must identify noncitizens who fear persecution and refer those noncitizens for further screening before an asylum officer. *See* 8 U.S.C. §1225(b)(1)(A)(ii); 8 C.F.R. §235.3(b)(4). To accomplish this task, CBP officers must inform noncitizens about the possibility of seeking protection in the United States, and specifically ask whether they fear return. *See* 8 C.F.R. §235.3(b)(2)(i). Officers must read (or have read to) a noncitizen the information on Form I-867A, part of which informs the noncitizen that "U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country," and encourages noncitizens to express any fear of return. U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 75 (2016) [hereinafter USCIRF, *Barriers to Protection*] (reproducing Form I-867A).

To ascertain whether a noncitizen fears return, CBP officers must also ask four specific questions listed on Form I-867B, including whether the noncitizen fears "being returned to [her] home country or being removed from the United States," or "[w]ould be harmed if [she is] returned to [her] home country or country of last residence." *Id.* at 76; *see* 8 C.F.R. §235.3(b)(2)(i). If necessary, interpretation services must be provided to

facilitate this process. *See* 8 C.F.R. §235.3(b)(2)(i). The officer must record the noncitizen's response to each question, and permit the noncitizen to review the officer's transcription and offer corrections. *Id.*

If a noncitizen expresses any fear of return or persecution, the "officer *shall refer* the alien for an interview by an asylum officer," 8 U.S.C. §1225(b)(1)(A)(ii) (emphasis added), and "shall not proceed further with removal," 8 C.F.R. §235.3(b)(4). The CBP officer has no authority to evaluate a noncitizen's credibility or her likelihood of success in obtaining asylum.

2. After referral, a United States Citizenship and Immigration Services ("USCIS") asylum officer interviews the noncitizen to determine whether he or she has "a credible fear of persecution." 8 U.S.C. §1225(b)(1)(B)(ii). The credible fear standard serves as "a low screening standard for admission into the usual full asylum process," where a noncitizen's claim will be determined. 142 Cong. Rec. 25,347 (1996) (statement of Sen. Hatch). It is intentionally less onerous than the "well-founded fear" a noncitizen must show to receive asylum; to find a credible fear of persecution an asylum officer need only determine that "there is a *significant possibility*, taking into account the credibility of the statements made by the alien … and such other facts as are known to the officer, that the alien *could establish*

eligibility for asylum."[4] 8 U.S.C. §1225(b)(1)(B)(v) (emphasis added).

During the "nonadversarial" credible-fear interview, the asylum officer must "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. §208.30(d)(2). Interpretation services must be provided, and—although asylum claimants often lack counsel—a noncitizen may consult with individuals of her choosing before the interview, who may be present at the interview and, in the asylum officer's discretion, may make a statement at the interview's conclusion. 8 U.S.C. §1225(b)(1)(B)(iv); 8 C.F.R. §208.30(d)(4)–(5).

The asylum officer must then prepare a written record of his determination. If he finds that the noncitizen does not have a credible fear, his determination must set forth his "analysis of why, in the light of such facts, the alien has not established a credible fear of persecution." 8 U.S.C. §1225(b)(1)(B)(iii)(II).

3. A negative credible fear determination may be reviewed in an expedited and limited manner by an IJ. 8 C.F.R. §1208.30(g)(2). Review must take place "to the maximum extent practicable within 24 hours, but in no case later than 7 days" following the asylum officer's determination. 8 U.S.C. §1225(b)(1)(B)(iii)(III). The IJ makes a *de novo* determination of whether the noncitizen has shown a credible fear of persecution. *Id.*; 8 C.F.R. §1003.42(d). If the IJ finds a credible fear, she

[4] This Court has suggested that a noncitizen who faces even a ten percent chance of persecution holds a "well-founded" fear. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987).

will vacate the removal order and refer the noncitizen for section 240 removal proceedings. 8 C.F.R. §1208.30(g)(2)(iv)(B); *see id.* §1003.42(f). But if the IJ concurs with the negative credible fear determination, his decision is "final and may not be appealed," subject only to the narrow habeas review discussed previously. *Id.* §1208.30(g)(2)(iv)(A); *id.* §1003.42(f).

## III. In Practice, These Protections are Frequently Misapplied or Flouted Altogether.

In theory, these procedures are intended to identify potential asylum claimants in expedited removal and refer those claimants for regular removal proceedings so that they may "receive a full adjudication of the asylum claim—the same as any other alien in the U.S." H.R. Rep. No. 104-469, pt. 1, at 158 (1996). In practice, however, expedited removal's protections for asylum seekers are frequently misapplied or ignored altogether. And women and children from Central America like Petitioners face particular challenges in asserting asylum claims in expedited removal proceedings.

1. Government agencies and organizations have documented persistent and widespread shortcomings in the asylum screening process. Indeed, within two years of establishing expedited removal, Congress acknowledged that some immigration officers "may not always be following INS procedures designed to ensure that potential asylum claimants are properly referred" for credible fear interviews. H.R. Rep. No. 105-480, pt. 3, at 17 (1998). Congress therefore authorized the newly created United States Commission on International Religious Freedom ("USCIRF") to study the treatment

of asylum seekers in those proceedings. *See* 22 U.S.C. §6474.

Based on its direct observations of expedited removal proceedings, the Commission found that compliance with statutory and regulatory procedures "varied significantly," and identified "serious problems" that put asylum seekers at risk of return to countries where they could face persecution. U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations* 4, 10 (2005) [hereinafter USCIRF, *Asylum Seekers*]. Just last year, the Commission revisited its findings and concluded—a decade later—that there exist "continuing and new concerns about the processing and detention of asylum seekers." USCIRF, *Barriers to Protection*, *supra*, at 2. Other scholars and organizations likewise have identified serious flaws at all levels of the asylum screening process.

a. A noncitizen's initial encounter with a CBP officer is the first and often only opportunity to identify a noncitizen's fear. Yet, in approximately *half* of the inspections USCIRF observed, CBP officers—in violation of DHS regulations—failed to read the relevant portion of Form I-1867A advising noncitizens that U.S. law protects those facing persecution and that they should inform the officer if they fear return. USCIRF, *Asylum Seekers*, *supra*, at 54. For asylum seekers unfamiliar with U.S. and international law, this information is critical, and failure to convey it had a dramatic effect on a noncitizen's likelihood of expressing fear. Noncitizens receiving the information "were seven times more likely to be referred for a credible fear

determination." *Id.* Similarly, in fourteen percent of cases, CBP officers failed to ask both of the required fear-related questions listed on Form I-867B; in five percent of cases *neither* question was asked. This failure also had a significant effect: noncitizens asked even a single fear question were twice as likely to be referred, and those asked both questions were four times as likely to be referred. *See* Allen Keller, *et al.*, *Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States*, *in* U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume II: Expert Reports* 15–17 (2005).

Even if asked, the cursory record CBP officers compile may inaccurately reflect or wholly obscure noncitizens' expressions of fear. I-867 Forms sometimes include plainly inaccurate information or responses to questions that were never asked. Asylum officers report seeing "many forms with identical answers, and others with clearly erroneous ones"—including forms stating that men had been asked (and had answered) whether they were pregnant. USCIRF, *Barriers to Protection*, *supra*, at 21 (footnote omitted). Moreover, noncitizens are seldom asked to review and correct their statements. In nearly three-quarters of cases, noncitizens were not afforded that opportunity. USCIRF, *Asylum Seekers*, *supra*, at 57. One CBP officer even shared his view that reading back the contents of a Form I-867 took too long and, therefore—despite the regulatory requirement—he only reads back the contents if a noncitizen requests. USCIRF, *Barriers to Protection*, *supra*, at 20 & n.25.

Most alarmingly, even if noncitizens outwardly express "a fear of return, referral … [is] not guaranteed." Keller, *et al.*, *supra*, at 29. The statute states that CBP officers "*shall* refer" any alien who "indicates either an intention to apply for asylum … or a fear of persecution" for a credible fear interview. 8 U.S.C. §1225(b)(1)(A)(ii) (emphasis added). This language is unqualified. Yet, noncitizens expressing a fear of return were *not* referred in fifteen percent of cases USCIRF observed. USCIRF, *Asylum Seekers*, *supra*, at 54. Officers also sometimes inappropriately questioned noncitizens in detail about their fears, employed "aggressive or hostile interview techniques," or even improperly pressured noncitizens to withdraw their claims altogether. Keller, *et al.*, *supra*, at 31; *see* USCIRF, *Asylum Seekers*, *supra*, at 50. It is thus clear that, contrary to their statutory duty, "some CBP officers make *de facto* assessments of the legitimacy of expressed fears." Keller, *et al.*, *supra*, at 29.

b. *Amici* and other organizations have also documented numerous failures to follow or properly apply the statutory and procedural protections at the credible fear interview stage, similar to the violations Petitioners experienced.

First, interpretation services are often inadequate or wholly unavailable. A DHS Advisory Committee recently explained that, when provided, interpretation services for credible fear interviews are typically afforded through telephone or video. This poses numerous problems. Interpreters face difficulties hearing noncitizens or being heard, have limited opportunities to interrupt and seek necessary

clarification, and frequently are cut off—resulting in a delay or the substitution of a new interpreter. *Report of the DHS Advisory Committee on Family Residential Centers* 96–97 (2016).[5] Mistranslations often result, *id.* at 97, rendering meaningless a noncitizen's opportunity to express fear, *cf. Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996) ("[A]n asylum applicant's procedural rights would be meaningless in cases where the judge and asylum applicant cannot understand each other during the hearing.").

Speakers of non-Spanish indigenous languages face particular difficulties. Indeed, the Advisory Committee concluded that indigenous speakers' cases "are probably not receiving fair processing" because the department "systematically fails to provide appropriate language access" for these speakers. *DHS Advisory Committee*, *supra*, at 99, 79. In one typical instance, a Guatemalan indigenous speaker detained in Texas was interviewed in Spanish (in which she was not fluent). Her credible fear interview notes demonstrated that the asylum officer understood a particular event took place on ten occasions; but the woman maintains she was referring to ten perpetrators. Before she could secure legal counsel, she was removed. *See* Statement for the Record of Eleanor Acer, Dir., Refugee Protection, Human Rights First, *Hearing before the House Judiciary*

[5] https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf

*Subcommittee on Immigration and Border Security*, at 6 (Feb. 11, 2015).[6]

Second, in many cases officers fail to "elicit all relevant and useful information" concerning an applicant's fear of persecution. 8 C.F.R. §208.30(d). Asylum officers may ask simple yes or no questions, fail to fully explore noncitizens' claims, or neglect to question noncitizens about alternative grounds for asylum. For example, although the BIA accepts gender-based domestic violence as a valid basis for asylum, *see Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 392–95 (BIA 2014), some women, unaware that domestic violence can supply grounds for asylum, may not raise the issue themselves, and *amici* are aware of instances in which asylum officers failed to elicit such information, *see* Letter from Am. Immigration Lawyers Ass'n, *et al.*, to León Rodríguez, Dir., USCIS, and Sarah Saldaña, Dir., ICE 3 (Dec. 24, 2015) [hereinafter AILA Letter].[7]

Third, even when expressions of fear *are* elicited, some asylum officers apply an erroneously high burden to potential asylum claims. In 2014, USCIS released a revised lesson plan for asylum officers that, among other things, equates a "significant possibility" that the claimant can establish eligibility for asylum with a "substantial and realistic possibility" of success. *See* USCIS, Asylum Div. Officer Training Course, *Lesson*

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[6] http://docs.house.gov/meetings/JU/JU01/20150211/102941/HHRG-114-JU01-20150211-SD003.pdf.

[7] http://www.aila.org/advo-media/aila-correspondence/2015/letter-uscis-ice-due-process.

*Plan Overview: Credible Fear* 15 (2014). The phrase "substantial and realistic" appears nowhere in the statute. What is more, the lesson plan no longer reiterates that Congress intended the credible fear standard to be *lower* than the well-founded fear standard—which this Court has suggested is satisfied when a noncitizen faces even a ten percent chance of persecution, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987).

The lesson plan also "appears to treat credible fear interviews like full-blown asylum interviews" and suggests that a noncitizen must produce corroborating or other evidence in order to demonstrate credible fear—requirements that are not present in the statute. Human Rights First, *How to Protect Refugees and Prevent Abuse at the Border: Blueprint for U.S. Government Policy* 11, 36 (2014). As a result of these erroneous legal standards, some asylum claimants who meet the statutory threshold are nevertheless found to lack credible fear.

Fourth, asylum officers also often neglect to independently assess children's potential asylum claims. *See, e.g.*, AILA Letter, *supra*, at 8–10. Children may have claims wholly distinct from their parents'. Under DHS regulations, a child *can*—but need not—be included in her parent's credible fear determination. *See* 8 C.F.R. §208.30. And yet, requests for independent interviews for children are often denied. *See* AILA Letter, *supra*, at 8.

Finally, officers' written determinations frequently fail to comport with the statutory requirement that the asylum officer supply an "analysis of why" a noncitizen

has not established credible fear. 8 U.S.C. §1225(b)(1)(B)(iii)(II). As Petitioners' cases demonstrate, asylum officers often issue a boilerplate form and simply check a box indicating that a noncitizen failed to meet a particular legal requirement. *See* Pet. App. D. It is difficult to fathom how a noncitizen can dispute a negative credible fear determination before an IJ if she lacks any means of understanding why an asylum officer rejected her claim.

c. A noncitizen's right to seek review of a negative credible fear determination before an IJ, and to consult with an individual of her choice before doing so (to the extent she even has counsel), is often illusory. In *amici*'s experience, attorneys at some detention facilities are not notified of a review hearing until the evening prior to the hearing; in other cases, attorneys never receive notice of the hearing at all. *See* AILA Letter, *supra*, at 3. Consequently, some noncitizens are unable to consult with counsel or other individuals until *after* the IJ has upheld a negative credible fear determination. *Id.* The government also takes the position that there is "no right to representation prior to or during" IJ review, Exec. Office Immigration Review, *Interim Operating Policy and Procedure Memorandum 97-3* 10 (1997) (emphasis deleted)[8]—in conflict with the INA and the requirement that a noncitizen be afforded "an opportunity … to be heard," 8 U.S.C. §1225(b)(1)(B)(iii)(III), *see also id.* §1362 ("In any removal proceedings before an immigration judge … the

[8] https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/07/97-3.pdf.

person concerned shall have the privilege of being represented ….").

And although the USCIS, by regulation, may reconsider a negative credible fear finding notwithstanding an IJ's concurrence, *see* 8 C.F.R. §1208.30(g)(2)(iv)(A), when a noncitizen or her advocate manages to convince USCIS to exercise its discretion to reconsider a negative credible fear determination and re-interview an asylum claimant, some officials refuse to permit IJ review of that second determination, *see* AILA Letter, *supra*, at 6–7. The statute does not support this refusal. A noncitizen must be afforded review of any "determination … that the alien does not have a credible fear of persecution." 8 U.S.C. §1225(b)(1)(B)(iii)(III).

2. Women and children from Central America seeking asylum, like Petitioners, are particularly likely to experience these and additional challenges in expedited removal.

Petitioners fled domestic and gang-related violence in El Salvador, Guatemala, and Honduras—collectively referred to as the Northern Triangle. These women and children have been the targets of severe sexual abuse, violence, and threats by domestic partners and gang-members. Petitioner Elsa Milagros Rodriguez Garcia, for example, fled El Salvador with her then three-year-old son after she faced death threats from gang members and severe domestic violence. *See* Third Circuit Joint Appendix ("J.A.") 472, 475. Elsa was subjected to years of violence at the hands of her son's father, who would abuse her daily, leaving bruises all over her body. *Id.* at 475. When she ultimately ended the relationship, he

threatened to take her son away from her. *Id.* In addition, after Elsa witnessed gang members murder a man in the street, gang members repeatedly threatened to kill her or harm her son if she reported the murder. *Id.* at 472. Tragically, these types of crimes are prevalent in the Northern Triangle. *See generally* United Nations High Commissioner for Refugees, *Women on the Run* 15–30 (2015) [hereinafter UNHCR].

The BIA and the federal courts of appeals recognize that gang- and domestic-based violence can provide valid bases for asylum. *See, e.g.*, *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949–50 (4th Cir. 2015); *Garcia v. Att'y Gen. of the U.S.*, 665 F.3d 496, 503–04 (3d Cir. 2011); *Matter of A-R-C-G-*, 26 I. & N. Dec. at 392–95; *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (BIA 2014). Yet, some border officials erroneously believe that violence by non-governmental actors can never supply grounds for asylum. *See* United Nations High Commissioner for Refugees, *Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexican Border* 25 (2014) (reporting that "[a] significant number of officials … stated that persecution is limited to harm inflicted directly by the government and that children who fear gangs or cartels do not therefore fear persecution").

Moreover, credible fear interview conditions are particularly ill-suited to eliciting fear from these women and children. Some fleeing the Northern Triangle speak indigenous languages, posing the interpretation challenges identified above. Women also may be "far too traumatized to reveal personal details of rape or other

abuse," particularly if the interviewing asylum officer is male. AILA Letter, *supra*, at 2. Family detention centers often lack appropriate child care facilities, with the result that women are interviewed in front of their children. Yet, women are frequently hesitant to describe the violence they have experienced in front of their children, and children may be embarrassed to share their own stories—and bases for asylum—in their parents' presence. *See* Lutheran Immigration & Refugee Service and the Women's Refugee Commission, *Locking up Family Values, Again* 12–13 (2014).

Finally, while all noncitizens placed in expedited removal proceedings are typically subject to detention in jail-like facilities, *see* 8 U.S.C. §1225(b)(1)(B)(iii)(IV), detention has outsized effects on parents and children. Women report considering abandoning their claims in order to free their children from detention. *See* UNHCR, *supra*, at 47. Although detention impedes every noncitizen's access to counsel—and officers may inappropriately limit counsel's ability to assist in the expedited removal process—having counsel makes an exceptional difference for women and children. Data from regular removal proceedings indicate that "the odds of being allowed to remain in this country were increased more than fourteen-fold if women and children had representation." Transaction Records Access Clearinghouse, *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court "Women With Children" Cases* (July 15, 2015).[9]

[9] http://trac.syr.edu/immigration/reports/396/.

## IV. Failure to Afford These Protections Has Produced an Arbitrary Asylum System at Odds with United States Law and International Obligations.

As the deficiencies described above demonstrate, the government is largely unable, or unwilling, to ensure that asylum claimants receive the limited statutory and regulatory protections to which they are entitled. As a result, the expedited removal screening process for asylum seekers produces arbitrary results with tragic consequences for asylum seekers and their families.

1. Because compliance with some statutory and regulatory protections varies depending on "where the alien arrived, and which immigration judges or inspectors addressed the alien's claims," USCIRF, *Asylum Seekers*, *supra*, at 4, all too often fortuity determines whether an asylum seeker receives a credible fear interview or is referred for removal proceedings.

The credible fear passage rate for those held at family detention centers has fluctuated significantly across detention centers and over time. In July 2014, for example, the passage rate was as low as 43.4%, although in the five months that followed it rose to nearly 90% and then fell back to 67.5%. It has since risen again. *See* USCIS Asylum Div., *Family Facilities Credible Fear* (May 2016).[10] Some advocates have reported divergent outcomes based on the *same* facts. *See, e.g.*, Sara

[10] https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearReasonableFearFamilyFacilitiesFY14_16.pdf.

Campos & Joan Friedland, Am. Immigration Council, *Mexican & Central American Asylum and Credible Fear Claims* 11 (2014) (reporting that a husband passed credible fear but his wife did not even though both claims were premised on threats the family received after reporting the wife's sexual assault to police).

Worse still, IJ review fails to ensure consistency. Executive Office of Immigration Review statistics obtained through FOIA demonstrate that whether a credible fear determination is affirmed depends significantly on which IJ reviews a determination. For example, during Fiscal Years 2015 and 2016, one IJ reviewing credible fear determinations at the family detention center in Dilley, Texas affirmed 228 of the 333 credible fear determinations he reviewed, while another affirmed only 17 of 332 determinations.[11]

The result is an arbitrary asylum screening process. And the unlawful removal of those with viable asylum claims has tragic consequences. A noncitizen returned to her home country may be subjected to the same persecution from which she fled, and some may be killed.

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[11] These figures compare the decisions of Judges Dowell and de Jongh. This data, concerning credible fear affirmance rates at family detention centers, is available at: http://www.slideshare.net/abogadobryan/credible-fear-review-from-immigration-judges. A wider dataset also obtained through FOIA covering IJ determinations nationwide during Fiscal Years 2014 through 2016 shows similarly dramatic discrepancies in affirmance rates—with rates ranging from 100% to 8.5% for IJs who reviewed at least 100 determinations. That data is available at: http://www.slideshare.net/abogadobryan/immigration-judge-credible-fear-denial-rates-fy1416.

A forthcoming study identifies at least eighty-three nationals from the Northern Triangle deported between January 2014 and September 2015 who were murdered upon return. The majority of murders occurred within a year of return, and in some instances within twenty-four hours. *See* Jose Magaña-Salgado, Immigration Legal Res. Ctr., *Relief Not Raids: Temporary Protected Status for El Salvador, Guatemala, and Honduras* 6 (2016).

2. Respondents' failure to protect asylum seekers in expedited removal proceedings is also inconsistent with U.S. law and the United States' treaty obligations. The government has long considered its refugee laws to incorporate the United Nations Protocol Relating to the Status of Refugees and that treaty's *nonrefoulement* requirement prohibiting the return of refugees to countries where they may face persecution. *See INS v. Stevic*, 467 U.S. 407, 417–18 (1984); Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223. But the government's failure to adequately screen for asylum claimants in expedited removal proceedings certainly results in unlawful return.

Asylum claimants, who typically flee their countries in haste, are also "rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge." Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection* 5 (2001) (quoting a draft report of the *Ad hoc* Committee on Statelessness and Related Problems). Yet, the Protocol prohibits penalizing refugees for unlawful entry; in other words, "[s]o long as a refugee's

failure to present valid travel documents or to comply with the usual immigration formalities is purely incidental to his or her flight from the risk of being persecuted, he or she should not be sanctioned on a charge of illegal entry." James C. Hathaway, *The Rights of Refugees Under International Law* §4.2.2, at 406 (2005) (internal quotation marks omitted). By singling out noncitizens who arrive without documentation, and placing them in truncated removal proceedings that provide no reliable means to assert an asylum claim, the United States effectively penalizes noncitizens based solely on their manner of entry.

## V. Access to Habeas Is a Critical Bulwark For Asylum Claimants.

Congress anticipated that the procedural and substantive protections afforded in expedited removal would preclude any "danger that an alien with a genuine asylum claim will be returned to persecution." H.R. Rep. No. 104-469, pt. 1, at 158. Two decades of experience with expedited removal has only demonstrated the opposite: "In almost every particular, the promise of these carefully drawn and negotiated compromise safeguards has been broken through a failure to apply them adequately and with consistency." Michele R. Pistone & John J. Hoeffner, *Rules are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 Geo. Immigr. L.J. 167, 169 (2006).

The Third Circuit's conclusion that Petitioners are categorically barred from invoking the Suspension Clause essentially places the expedited removal regime beyond judicial review. *Amici* agree that the Third

Circuit's decision marks an unprecedented—and erroneous—break from this Court's consistent precedent holding that noncitizens who have entered the country are fully protected by the Constitution, including the Due Process Clause. *See* Pet. at 30–34. Regardless, this Court has also made clear that even a noncitizen arriving at a port of entry who enjoys no constitutional due process rights may "by habeas corpus test the validity of his exclusion." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212–13 (1953). And it is "uncontroversial" that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)). Yet, the Third Circuit's decision forecloses these types of claims. *See* Pet. App. 52a–53a.

Particularly given that the procedural and substantive protections provided to asylum claimants are consistently flouted or ignored, safeguarding Petitioners' access to habeas corpus is of exceptional importance.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

January 26, 2017

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# APPENDIX

# APPENDIX: LIST OF *AMICI CURIAE*[*]

The Advocates for Human Rights

The American Immigration Council

Amnesty International

Catholic Charities Community Services, Archdiocese of New York

Center for Gender & Refugee Studies, University of California, Hastings College of Law

The Center for Social Justice, Seton Hall University School of Law

The Center for Victims of Torture

Church World Service

Harvard Immigration and Refugee Clinical Program

HIAS

HIAS Pennsylvania

Human Rights First

KIND, Inc. (Kids in Need of Defense)

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[*] Institutional affiliations are listed for identification purposes only.

**The National Immigrant Justice Center**, a program of the Heartland Alliance for Human Needs and Human Rights

**University of California Davis School of Law Immigration Law Clinic**

**Women's Refugee Commission**

**Young Center for Immigrant Children's Rights at the University of Chicago**

**Lenni B. Benson**, Professor of Law and Director, Safe Passage Project Clinic, New York Law School

**Benjamin Casper Sanchez**, Director, Center for New Americans, University of Minnesota Law School

**Stacy Caplow**, Associate Dean for Professional Legal Education and Professor of Law, Brooklyn Law School

**Anju Gupta**, Associate Professor of Law and Director, Immigrant Rights Clinic, Rutgers School of Law—Newark

**Lindsay M. Harris**, Assistant Professor of Law, University of the District of Columbia David A. Clarke School of Law

**James C. Hathaway**, James E. and Sarah A. Degan Professor of Law and Director of the Program in Refugee and Asylum Law, University of Michigan; Distinguished Visiting Professor of International Refugee Law, University of Amsterdam

**Jennifer Nagda**, Lecturer in Law, University of Pennsylvania School of Law

**Sarah H. Paoletti**, Practice Professor of Law and Director, Transnational Legal Clinic, University of Pennsylvania School of Law

**Michele R. Pistone**, Professor of Law and Director, Clinic for Asylum, Refugee and Emigrant Services, Villanova University School of Law

**Galya Ben-Arieh Ruffer**, Senior Lecturer and Director, Center for Forced Migration Studies, Buffett Institute for Global Studies, Northwestern University

**Rebecca Sharpless**, Clinical Professor, Roger Schindler Fellow, and Director, Immigration Clinic, University of Miami School of Law

**Sheila I. Velez Martinez**, Clinical Assistant Professor of Law and Director, Immigration Law Clinic, University of Pittsburgh Law School

**Shoba Sivaprasad Wadhia**, Samuel Weiss Faculty Scholar, and Director, Center for Immigrants' Rights Clinic, Penn State Law–University Park

**Maria Woltjen**, Lecturer in Law, University of Chicago School of Law