No. 19-161

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, et al.,
Petitioners,

v.

VIJAYAKUMAR THURAISSIGIAM,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE IMMIGRATION AND HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENT

MATTHEW E. PRICE
JENNER & BLOCK LLP
1099 New York Ave NW
Suite 900
Washington, DC 20001
(202) 639-6873
mprice@jenner.com

Counsel to Amici Curiae

January 22, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that monitor the implementation of U.S. immigration and asylum laws, advocate for greater protections for asylum seekers, and/or represent asylum seekers 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 countries of origin.

The American Immigration Council ("the Council") is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears in federal courts on immigration issues relating to the procedural rights of noncitizens in removal proceedings, including summary removal proceedings. The Council has a keen interest

---

[1] Both Petitioners and Respondent have provided written consent to the filing of this brief. Counsel for *Amici* state that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *Amici* or their counsel made a monetary contribution for its preparation or submission.

in protecting the constitutional rights of noncitizens subject to expedited removal.

The National Immigrant Justice Center ("NIJC") is a national nonprofit organization that represents thousands of noncitizens each year, with a significant focus on serving detained individuals and those seeking protection from persecution and torture. In addition, NIJC provides pro se support to litigants, including those in detention, explaining to them the process for appearing in immigration court and the rights that they have in the immigration system. Through this experience, NIJC is keenly aware of the limitations that exist for noncitizens facing expedited removal and the limited opportunities an individual in that context has to assert a claim for protection from persecution or torture.

Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants placed in removal proceedings, including those placed in expedited removal proceedings who are seeking to apply for asylum and other forms of protection from removal. NWIRP has experience representing asylum seekers who were initially issued negative credible fear findings in expedited removal proceedings because of clear legal or factual errors, and other times based on a clearly flawed process, such as when the asylum officer did not interview the applicant in a language in which they could adequately communicate.

The Refugee and Immigrant Center for Education and Legal Services ("RAICES") defends the rights of immigrants and refugees, empowers individuals, families, and communities, and advocates for liberty and justice. RAICES, based in San Antonio, Texas, serves immigrant communities through a combination of legal and social services, community engagement, advocacy, policy, and litigation. In 2018, RAICES closed nearly 38,000 cases. Each year RAICES provides legal services and representation to thousands of detained asylum seekers placed into expedited removal proceedings. The outcome of this matter will have a significant impact on RAICES staff, volunteers, and the communities that it serves.

The Southern Poverty Law Center ("SPLC") is a nonprofit organization that works to make the nation's constitutional ideals a reality for everyone. The SPLC's Immigrant Justice Project has represented thousands of noncitizens throughout the South in civil rights matters and is currently engaged in impact litigation to promote and protect the rights of asylum seekers at our southern border. The SPLC's Southeast Immigrant Freedom Initiative provides pro bono legal representation to detained immigrants, including many asylum seekers, at five immigrant detention centers in Georgia and Louisiana.

SUMMARY OF ARGUMENT

Expedited removal permits the rapid removal, often after a single encounter with a Department of Homeland Security ("DHS") officer, of certain noncitizens who seek admission or have entered the United States without authorization within the

previous two years. However, Congress created certain procedural and substantive protections for asylum seekers, like Mr. Thuraissigiam, who first encounter immigration officials in expedited removal proceedings. Among other statutory and regulatory requirements, DHS officers must inform noncitizens of their right to seek protection, question them about their fear of return to their countries of origin, 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 and channel asylum seekers into regular removal proceedings, where they can then apply for and pursue asylum and other forms of relief from removal. In practice, however, these modest statutory and regulatory protections are often misapplied or flouted altogether. Here, for example, Mr. Thuraissigiam alleges specific violations of his substantive and procedural rights during his credible fear interview. *Amici* and other organizations have documented widespread violations of these protections at all stages of the expedited removal process. The result is an arbitrary asylum screening process that depends, to a large degree, on chance.

Habeas provides a structural backstop crucial to ensuring the rule of law and preventing the arbitrary and lawless deprivation of liberty, by empowering

courts to ensure that the Executive is complying with the protections established by Congress and by the agency itself in its regulations. At a minimum, the Suspension Clause entitles a petitioner "to a meaningful opportunity to demonstrate he is being held 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 government's position, if accepted, would insulate the entire expedited removal process from essentially any judicial review. Because Mr. Thuraissigiam is entitled, at minimum, to challenge "the erroneous application or interpretation of relevant law" that occurred in his expedited removal proceeding, the judgment of the Ninth Circuit should be affirmed.

ARGUMENT

I. Although Expedited Removal Generally Offers Few Protections, Congress Did Provide Asylum Seekers With Rights to Prevent Their Erroneous Removal.

A. In General, Expedited Removal Affords Only Truncated Consideration of a Noncitizen's Eligibility for Admission to the United States.

In regular removal proceedings under section 240 of the Immigration and Nationality Act ("INA"), an Immigration Judge ("IJ") determines whether a noncitizen should be ordered removed or, instead, should be granted asylum or other relief from removal. *See* 8 U.S.C. §§ 1229, 1229a(a)(1). Those proceedings

feature certain procedural protections similar to protections 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, including expert evidence, and may cross examine government witnesses.[2] *See id.* § 1229a(b)(4)(A)–(B).

If the IJ denies a noncitizen's application for asylum or other relief and orders removal, the noncitizen may appeal that decision to the Board of Immigration Appeals ("BIA"). *See* 8 U.S.C. § 1101(a)(47)(B); *id.* § 1229(c)(5); 8 C.F.R. §§ 1003.1(b)(3), 1240.15. If the BIA affirms the IJ's decision, 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.

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 been in the country for as long as two years without authorization. With a limited exception for asylum seekers, expedited removal occurs outside of immigration courts entirely and permits immediate removal of certain noncitizens whom DHS officers conclude are inadmissible. DHS

---

[2] Despite affording some baseline protections, however, Section 240 removal proceedings have 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), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf.

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).[3]

Specifically, if "an immigration officer determines" that a noncitizen 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).

Thus, a noncitizen's inadmissibility is determined during a single encounter with a DHS 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 an order of removal. 8 C.F.R. § 235.3(b)(2)(i).

There is no meaningful avenue to seek review of the officer's determination. Although an officer's supervisor must review any expedited removal order, such review does not involve an independent interview of the noncitizen, and the noncitizen is not entitled to an IJ hearing or an appeal to the BIA. *See* 8 C.F.R. §§ 235.3(b)(7), 1235.3(b)(2)(ii). In habeas corpus

---

[3] Available at https://www.americanimmigrationcouncil.org/sites/default/files/research/removal_without_recourse.pdf.

proceedings a court may review whether "an order in fact was issued and whether it relate[d] to the 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). Thus, under the statute, once a supervisor confirms an officer's determination, a noncitizen may be ordered removed without further process or any realistic opportunity to challenge that determination.

Congress granted DHS discretion to apply expedited removal proceedings to two categories of noncitizens: (1) noncitizens "arriving in the United States," and (2) noncitizens "as designated by [DHS]" who entered without authorization and who have not been continuously present for two years.[4] *See* 8 U.S.C. § 1225(b)(1)(A)(i), (iii)(II). Initially, expedited removal applied 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)).

---

[4] 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). For ease of reference, *amici* refer to DHS.

In 2002, DHS invoked its designation power to expand 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, DHS again expanded the use of expedited removal for any noncitizen not admitted or paroled into the United States who was 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).

On July 23, 2019, the Attorney General sought to further expand expedited removal to apply to noncitizens apprehended anywhere within the United States, who have been continuously present in the United States for fewer than two years after entering without authorization. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019). This further expansion is currently enjoined.[5]

B. Congress Carved Out Limited Statutory Protections for Asylum Seekers.

For a variety of reasons, including that asylum seekers often must flee suddenly, they frequently are unable to obtain the documentation—like visas or passports—required to enter the United States. In

[5] *See Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), *appeal docketed*, No. 19-5298 (D.C. Cir. Oct. 31, 2019).

light of this reality, Congress carved out specific procedural and substantive protections for asylum seekers who first encounter immigration officials in expedited removal proceedings. In theory, the statute and implementing regulations establish procedures through which legitimate asylum seekers should be identified and channeled into regular removal proceedings where they can pursue their asylum claims. Congress enacted these provisions not only to effectuate its policy of providing refuge to victims of persecution, but also to comply with its international treaty obligations. *See INS v. Stevic*, 467 U.S. 407, 417 (1984); Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223.

During the initial encounter, DHS 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, DHS 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) (USCIRF, *Barriers to Protection*) (reproducing Form I-867A).[6]

To ascertain whether a noncitizen fears return, DHS 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). Where needed, 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 DHS officer has no authority to evaluate a noncitizen's credibility or her likelihood of success in obtaining asylum.

After referral, an asylum officer interviews the noncitizen to determine whether he or she has "a credible fear of persecution." 8 U.S.C.

---

[6] Available at http://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf.

§ 1225(b)(1)(B)(ii).[7] This standard 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." 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). Interpretation services must be provided, and—although asylum seekers generally lack counsel—a noncitizen may consult before the interview with individuals of her choosing, 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.

---

[7] The statute requires the credible fear interview to be conducted by an "asylum officer," defined as an immigration officer with the requisite training. 8 U.S.C. § 1225(b)(1)(E)(i); 8 C.F.R § 208.1(b) While historically credible fear interviews were conducted by USCIS officers, DHS has recently begun using CBP officers to conduct credible fear interviews. *See* Complaint, *Am. Immigration Council v. U.S. Customs & Border Prot.*, No. 1:19-civ-02965 at *13 ¶36 (D.D.C. Oct. 7, 2019) (describing the change and listing news coverage).

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 government has taken the position that an asylum seeker has no right to counsel in these proceedings. *Compare* 8 C.F.R. § 1003.42(c) *with* 8 C.F.R. § 208.30(d)(4). 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, the removal order is vacated and the noncitizen's case is referred 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, the 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).

II. In Practice, Protections for Asylum Seekers Are Frequently Misapplied or Ignored Altogether.

In theory, these procedures are intended to identify legitimate asylum seekers in expedited removal and refer them 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, protections for asylum seekers in expedited removal are frequently misapplied or ignored altogether.

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), *as reprinted in* 1998 U.S.C.C.A.N. 602, 629. Congress therefore authorized the United States Commission on International Religious Freedom ("USCIRF"), created in 1998, to study the treatment of asylum seekers in those proceedings. *See* 22 U.S.C. § 6474.

Troublingly, based on its direct observations of expedited removal proceedings, the USCIRF 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) (USCIRF, *Asylum Seekers*).[8] More recently, 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.

---

[8] Available at http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf.

A noncitizen's initial encounter with a DHS officer is the first and often only opportunity to identify a noncitizen's fear. Yet, in approximately *half* of the inspections USCIRF observed, DHS 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, DHS officers failed to ask both 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* 15–18 (2005).[9]

---

[9] Available at http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/evalCredibleFear.pdf.

USCIRF's continuing research has revealed the same problems still exist and confirmed that most of USCIRF's 2005

Even if asked, the cursory record DHS 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 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 upon request. 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 DHS officers "*shall* refer" any noncitizen 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*

---

recommendations have not been implemented. *See* USCIRF, *Barriers to Protection*, *supra*, at 17, 20.

Seekers, *supra*, at 54. Officers also sometimes inappropriately questioned noncitizens in detail about their fears and employed "aggressive or hostile interview techniques," Keller, *et al.*, *supra*, at 31; *see* USCIRF, *Asylum Seekers*, *supra*, at 50. *Amici* are also aware of cases in which officers instructed applicants not to testify at all about certain enumerated grounds for asylum. Thus, contrary to their statutory duty, "some [DHS] officers make *de facto* assessments of the legitimacy of expressed fears." Keller, *et al.*, *supra*, at 29. Indeed, *Amici* have even documented instances where officers improperly coerced asylum seekers to withdraw their asylum claims altogether, and sign a form falsely stating the asylum seeker had no fear of return. *See* Second Amended Complaint, *Al Otro Lado v. Nielsen*, No. 3:17-cv-02366, at *9-10, ¶¶ 24-26 (S.D. Cal. Nov. 13, 2018).

In multiple cases, individuals were not referred for a credible fear interview despite telling officers they were afraid to return to their counties of origin, *see* Letter to Megan H. Mack, DHS Officer for Civil Rts. and Civil Liberties, and John Roth, DHS Inspector General, *Inadequate U.S. Customs and Border Protection (CBP) screening practices block individuals fleeing persecution from access to the asylum process* 13, 16-18 (Nov. 13, 2014) (hereinafter "CRCL Letter").[10] These errors often result in improper deportations. *See id.* at 6; *see also e.g.*, *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1070 (9th Cir. 2016).

[10] Available at https://bit.ly/30AmkVI.

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, including asylum officers' failure to screen for or acknowledge fear, officers' use of intimidation and coercion in the credible fear interview, and officers' failure to record an expression of fear or failure to record accurate information.

First, and most critically in this case, asylum officers frequently fail to "elicit all relevant and useful information" concerning an applicant's fear of persecution, contrary to regulatory requirements. 8 C.F.R. § 208.30(d). Asylum officers often ask simple yes or no questions, fail to fully explore noncitizens' claims, or neglect to question noncitizens about clear alternative grounds for asylum. Some noncitizens, unaware of the viable grounds for asylum, may not raise critical information themselves, and *amici* are aware of many instances in which asylum officers failed to take obvious steps to elicit such information, *see* Letter from Am. Immigration Lawyers Ass'n, *et al.*, to León Rodríguez, Dir., USCIS, & Sarah Saldaña, Dir., ICE 3 (Dec. 24, 2015) ("AILA Letter").[11]

Here, for example, the asylum officer failed adequately to elicit information regarding the dangers that Tamil asylum seekers face if returned to Sri Lanka—even though reported cases[12] and readily

---

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

[12] *E.g.*, *Gaksakuman v. U.S. Atty. Gen.*, 767 F.3d 1164, 1170 (11th Cir. 2014) (describing a series of reports submitted by the

available country conditions information posted by the Department of Justice to assist asylum officers attest to those dangers,[13] including abductions by government forces driving white vans, and even though DHS itself has taken the position in litigation that Sri Lanka persecutes failed Tamil asylum seekers who are deported back to Sri Lanka.[14] It was a legal error to deny Mr. Thuraissigiam's credible fear claim in light of the country conditions evidence alone. *See* 8 U.S.C. § 1225(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2); USCIS Asylum Division Officer Training Course, *Credible Fear of Persecution and Torture Determinations* 13 (Apr. 30, 2019) ("USCIS Training Course") (explaining that asylum officers must consider relevant country conditions information as part of credible fear

---

petitioner that "tended to prove that officials in Sri Lanka tortured at least some failed asylum seekers," and that "there was a risk of detainment and torture regardless of" the asylum seeker's particular circumstances); *Thayaparan v. Sessions*, 688 F. App'x 359, 371 (6th Cir. 2017) (similar).

[13] *E.g.*, Immigration & Refugee Board of Canada, *Sri Lanka: Treatment of Tamil returnees to Sri Lanka, including failed refugee applicants*, Feb. 12, 2013, www.justice.gov/eoir/vll/country/canada_coi/sri%20lanka/LKA104245.E.pdf.

[14] *See Fernando v. U.S. Att'y Gen.*, 554 F. App'x 852 (11th Cir. 2014) (government successfully taking position that the Sri Lankan government has a long history of persecuting and torturing failed asylum seekers as a ground for rejecting an asylum seeker's claim that changed circumstances in Sri Lanka justified his motion to reopen); *Perera v. Holder*, 750 F.3d 25, 29 (1st Cir. 2014) (upholding BIA's denial of motion to reopen on ground that the applicant's "complained-of threat of torture" of failed Tamil asylum seekers "is, sadly, an old condition that has continued, which … makes her reopen motion a nonstarter").

process).[15] But it was also incumbent on the asylum officer to elicit all additional evidence from Mr. Thuraissigiam by, for example, asking questions with regards to the danger he would face as a failed asylum seeker and as someone who was previously abducted and tortured.

Second, even when expressions of fear *are* elicited, some asylum officers, including the officer who interviewed Mr. Thuraissigiam, apply an erroneously high burden to potential asylum claims. Congress intended the credible fear standard to be *lower* than the well-founded fear standard. 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, 34 (2014).[16] As a result of these erroneous legal standards, some asylum seekers who meet the statutory threshold are nevertheless found to lack credible fear.

Moreover, 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.

---

[15] Available at https://www.aila.org/infonet/uscis-updates-officer-training-credible-fear.

[16] Available at http://www.humanrightsfirst.org/sites/default/files/Asylum-on-the-Border-final.pdf.

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);[17] Exec. Office Immigration Review, *Immigration Court Practice Manual*, Ch. 7.4(d)(iv)(C) (Dec. 2016) ("the alien is not represented at the credible fear review")[18]—in conflict with the INA, 8 U.S.C. § 1362 ("In any removal proceedings before an immigration judge … the person concerned shall have the privilege of being represented ….").

Further, 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

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

[18] Available at https://www.justice.gov/eoir/file/1205666/download.

delay or the substitution of a new interpreter. *Report of the DHS Advisory Committee on Family Residential Centers* 96–97 (2016) (*DHS Advisory Committee*).[19] 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 indigenous languages face particular difficulties. Indeed, the Advisory Committee concluded that indigenous speakers' cases "are probably not receiving fair processing" because DHS "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 Subcomm. on*

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

Immigration and Border Security of the H. Comm. Judiciary, at 6 (Feb. 11, 2015).[20]

Finally, noncitizens from Guatemala, Honduras, and El Salvador now face an additional barrier to receiving a reliable credible fear interview. An Interim Final Rule issued on November 19, 2019, creates a procedure for the removal, including via expedited removal, of noncitizens to third countries that have entered into Asylum Cooperative Agreements (ACAs) with the United States. Implementing Bilateral and Multilateral Asylum Cooperation Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019) (codified at 8 C.F.R. § 208.30(e)(7)). Guatemala has entered such an agreement. Thus, under the rule, the United States may remove nationals of other countries (so far, Honduras and El Salvador) to Guatemala and require them to seek protection there.

The ACA compounds the possibilities for error outlined above. As noncitizens subject to the ACA are never given a credible fear interview, they have no opportunity to express their fear of return and seek asylum. They are not allowed counsel, often do not have time to speak with family, and interviews are frequently conducted over the phone, compounding possible errors in translation. *Amici* are aware of many individuals from Honduras and El Salvador who have

---

[20] Available at http://docs.house.gov/meetings/JU/JU01/20150211/102941/HHRG-114-JU01-20150211-SD003.pdf (at pdf page 109).

been removed to Guatemala without access to independent review.[21]

As the deficiencies described above demonstrate, asylum seekers frequently do not receive even 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.

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.

For example, Executive Office for Immigration Review statistics obtained through FOIA demonstrate that whether a credible fear determination is affirmed depends significantly on which IJ reviews a determination. During fiscal years 2014 through 2016, the IJ who reviewed Mr. Thuraissigiam's credible fear determination denied credible fear in 82 cases and found credible fear in only four, a denial rate of 95.3 percent. Meanwhile, a different IJ sitting on the same Immigration Court denied credible fear in 28 cases and

[21] A determination by an asylum officer that the noncitizen can be removed under the ACA is only reviewed by a "supervisory asylum officer." 8 C.F.R. § 208.30(e)(7)(i)(A), (e)(8); 8 C.F.R. § 1003.42(h)(3)-(4).

found credible fear in 26, a denial rate of only 51.8 percent.[22] Similar anomalies are present across the nation. For example, one IJ reviewing credible fear determinations at the family detention center in Dilley, Texas denied 321 and granted 163 of the credible fear determinations he reviewed, while another denied 58 and granted 563 credible fear determinations. While such variance exists in the ordinary removal process as well, the difference here is that neither the BIA nor the federal courts review the IJ's decisions.

The result is an arbitrary asylum screening process. And the unlawful removal of those with viable asylum claims has tragic consequences. Noncitizens returned to their home countries may be subjected to the same persecution from which they fled, and some will likely be killed.[23] A study identifies at least eighty-three

---

[22] 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. The data was obtained through FOIA and covers IJ determinations nationwide during fiscal years 2014 through 2016. Credible fear denial rates ranged from 100 percent to 8.5 percent 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.

[23] *See RSC v. Sessions*, 869 F.3d 1176, 1180-81 (10th Cir. 2017). RSC is an indigenous Guatemalan who fled gender-based violence in that country. She tried to express a fear to immigration officials, but they failed to recognize her fear and reprimanded her for speaking. After two failed attempts, RSC had her claim heard and was in "withholding of removal" proceedings where she ultimately received withholding of removal. *Id.* at 1181; *see also* CRCL Letter at 18. Yesenia Maldonado Lopez had a similar experience.

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).[24] Thus, the government's failure to screen asylum seekers in expedited removal proceedings in a manner consistent with regulatory and statutory requirements certainly results in unlawful return, with devastating effects.[25]

III. Access to Habeas Is a Critical Bulwark for Asylum Seekers.

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."

She sought protection based on her status as a Salvadoran lesbian, received an expedited removal order when officials failed to consider her claim, and returned to the United States only after suffering additional persecution. *See* Brief in Support of Petition for Review, *Maldonado Lopez v. Holder*, No. 12-72800 (9th Cir. May 30, 2013) at 8-9 (Maldonado Lopez fled El Salvador because of fear of violence based on her sexual orientation; she was then assaulted by four women eleven months after she returned to El Salvador).

[24] Available at https://bit.ly/2v3Zvyc.

[25] If these individuals return to the United States to seek protection again, they are generally barred from asylum because of their prior erroneous removal order. *RSC*, 869 F.3d at 1183 & n.6 (collecting cases).

H.R. Rep. No. 104-469, pt. 1, at 158. Two decades of experience with expedited removal have 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 government's position in this case would essentially place the expedited removal decisions beyond judicial review altogether. Such a holding would be a grave and dangerous break from consistent and longstanding precedent holding that noncitizens are constitutionally guaranteed judicial review of the legality of their removal orders. *INS v. St. Cyr*, 533 U.S. 289, 302 (2001).[26] Indeed, this Court has long held

---

[26] Only a very small proportion of individuals in Mr. Thuraissigiam's position would likely seek habeas review *Cf.* David Hausman, *The Failure of Immigration Appeals*, 164 U. Pa. L. Rev. 1177, 1193 (2016) (finding only three percent of pro se noncitizens who lose before an IJ in Section 240 proceedings pursue an appeal to the BIA). Indeed, during the last decade of the finality era, 1941-1950, only about two percent of exclusion and deportation orders were challenged on writs of habeas corpus. *See* Annual Report of the INS for the Fiscal Year Ended June 30, 1950, at Table 20A ("Aliens excluded from the United States, by cause: years ended June 30, 1892 to 1950") (30,263 total excluded 1941-1950); Table 24A ("Aliens deported and aliens departing voluntarily under proceedings: years ended June 30, 1892 to 1950") (110,849 total deported who did not depart voluntarily 1941-1950); Table 48 ("Writs of habeas corpus in exclusion and deportation

that a noncitizen arriving at a port of entry 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. at 779 (quoting *St. Cyr*, 533 U.S. at 302). Yet the government's position would foreclose these types of claims.

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

---

cases: years ended June 30, 1941 to 1950") (2,909 total writs of habeas corpus disposed of and 118 still pending 1941-1950), https://eosfcweb01.eosfc-intl.net/U95007/OPAC/Details/Record.aspx?BibCode=9025135. Nevertheless, the availability of independent judicial review for some serves important values: protecting the rule of law, preventing erroneous deprivation of liberty, and promoting Executive adherence to statutory protections.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

January 22, 2020

Respectfully submitted,

MATTHEW E. PRICE
JENNER & BLOCK LLP
1099 New York Ave NW
Suite 900
Washington, DC 20001
(202) 639-6873
mprice@jenner.com

Counsel to Amici Curiae Immigration and Human Rights Organizations