No. 13-70579 (Not Detained)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RONY ESTUARDO PEREZ GUZMAN
AKA RONNIE PEREZ-GUZMAN,
PETITIONER,

V.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES
RESPONDENT.

PETITION FOR REVIEW OF A DECISION OF THE
BOARD OF IMMIGRATION APPEALS
NO. A200 282 241

BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA & NATIONAL IMMIGRANT JUSTICE CENTER

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INTRODUCTION

Petitioner Rony Perez Guzman fled Guatemala twice in six months, hoping for protection in the United States. His asylum claim is based on his having been targeted for death after his testimony against gang members resulted in their conviction. (AR 394-402.) His request for protection is also based on his having been kidnapped and brutally beaten by police. (AR 96-97; 172.) While claims of such persecution ordinarily merit serious consideration, *see Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc), Petitioner has never been given a chance to secure asylum or even to be considered for it. When he first arrived in the United States, he was issued an expedited removal order without receiving a credible fear interview or an opportunity to seek asylum. (AR 130-40.) And upon his subsequent return, that prior order was reinstated even though he was found to have credibly demonstrated a reasonable fear of persecution in Guatemala. (AR 389-90; 395.)

Petitioner asks this Court to determine whether he may properly be denied consideration for asylum solely on the basis of having returned to the United States after having been removed. This question has profound implications for those who seek protection after enduring unimaginable horrors abroad only to be denied the right to seek asylum based on their immigration history. In amici's view, the answer to the question must be "no."

Amici are aware of countless individuals facing the same problem. For example, Yesenia tried to enter the United States in 2010 but was subjected to an expedited removal order even though she was eligible for asylum based on her sexual orientation.[1] When she was 14, Yesenia was forced to marry a man 50 years her senior to "cure" her of her sexual orientation. That man drugged, raped, and impregnated her. When Yesenia fled here, she was not asked about these experiences; instead officers pressured her to sign an expedited removal order. After she was forced back to her native El Salvador, women from her town beat Yesenia and left her for dead after they learned she was a lesbian. This renewed violence prompted Yesenia to return to the United States, but when she tried to reenter, like Petitioner, she was placed in "withholding only" proceedings until, following settlement before this Court, the Government granted her a chance to seek asylum.

The Government's mistaken belief that returning to the United States after removal or departure under an order renders noncitizens ineligible for asylum also serves to exclude individuals who endure experiences giving rise to an asylum claim only *after* their initial removal. For example "Mirabel," who was removed to Honduras in 2001 and subsequently became romantically involved with an abusive

[1] Yesenia's case, raising the same issue presented here, was before this Court until a settlement allowed for consideration of her asylum claim. *See Maldonado Lopez v. Holder*, No. 12-72800 (9th Cir. dismissed Feb. 4, 2014).

man.[2] He isolated and confined her to his home, raped her over and over again, and even allowed his friends to gang rape her. In one incident, after torturing her, he forced her to cook for his friends. When she did not perform to his liking, he broke a beer bottle, cut her, and beat her until she fell unconscious. After Mirabel's abuser left her for dead, she escaped to Mexico. While there, Mirabel bumped into one of her abuser's friends who had raped her. He told Mirabel that her former boyfriend was looking for her and planned to kill her. Mirabel then fled to the United States, where the Government reinstated her prior removal order. Although an asylum officer found that she had a "reasonable fear" of persecution, Mirabel was placed in "withholding only" proceedings and deemed ineligible for asylum.

"David" is another individual whose claim for asylum developed after deportation. When he was originally placed in removal proceedings, he was an unrepresented 17-year-old boy who had begun to recognize himself as gay but who had not yet come to the fuller understanding that he was transgender. He could not discuss his identity with his family, and his then-guardian, an aunt, refused to take him to his court hearing. As a result, a judge issued an *in absentia* order. David returned to Honduras, but the violence against sexual minorities in that country prompted her to return to the United States. She was caught at the border and immediately removed based on the reinstated order without an opportunity to seek

[2] Except where indicated, pseudonyms are used here to protect the confidentiality of individuals with pending claims. The facts of these cases are on file with amici.

a reasonable-fear determination. After being forced to return to Honduras, she was shot in the face for being transgender and lost an eye. When she again fled to the United States, an officer questioned her about her fear. This time, she received a favorable reasonable-fear determination and is now in "withholding only" proceedings.

While their circumstances vary, these individuals share one critical set of facts in common. Like Petitioner, each has been found to have reasonable fear of persecution and none has previously applied for asylum. And yet, the Government is denying them that opportunity, maintaining that the provision allowing reinstatement of prior removal orders, 8 U.S.C. § 1231(a)(5), renders them ineligible for asylum. This is simply wrong.

Before our nation deports any noncitizen, we must determine that the person will not face persecution on account of a protected ground if returned to his home country. *See* 8 U.S.C. § 1158(a)(1) (providing that "any alien…irrespective of such alien's status" may apply for asylum); *see also* 8 U.S.C. §§ 1101(a)(42) (defining "refugee"); 1225(b)(1)(B) (establishing procedures to allow individuals with credible fear of persecution to apply for asylum). This commitment to asylum is founded in the Refugee Act of 1980, and Congress has never restricted first-time bona fide claimants from applying for protection based solely on prior immigration history. Indeed, Congress expressly allows individuals who *have* previously

applied for asylum and been ordered removed to apply a second time when changed circumstances affect eligibility. 8 U.S.C. § 1158(a)(2)(D).

Only those subject to the delineated exceptions and limitations specifically set forth in the asylum statute, 8 U.S.C. § 1158, can be barred from asylum. If the provisions of that statute do not exclude an individual, the application must be adjudicated, and asylum may be granted. The Government cannot by regulation categorically bar from asylum those who may be granted protection.

Amici write to elaborate on a critical point made by Petitioner that the reinstatement statute, 8 U.S.C. § 1231(a)(5), cannot be read to preclude an application for or grant of asylum under § 1158. The plain language of the asylum statute and basic canons of statutory construction make this clear. Further support for this conclusion is found in the anomalous results that flow from the Government's approach—results that Congress could not have intended.

Indeed, the closer one looks at the asylum statute, the clearer it becomes that the reinstatement statute is irrelevant to the availability of protection under § 1158, which provides the sole determinants of asylum eligibility. The reinstatement regulations limiting protection from persecution to withholding of removal must be struck down, so that individuals like Petitioner are afforded consideration for asylum, as Congress intended.

STATEMENT OF INTEREST OF AMICI

Amici are public interest organizations with longstanding commitments to serving immigrants, refugees, and asylum seekers. Each has decades of experience representing asylum seekers and therefore a vested interest in ensuring that the federal laws in place for adjudicating an immigrant's eligibility for asylum are properly applied. In the course of their respective case-screening procedures, amici and their members frequently encounter immigrants who, because of a prior removal order, are being denied the right to seek asylum. Many of those prior removal orders were issued through streamlined proceedings that are incomprehensible to most immigrants but that have the effect of denying the individual the opportunity to seek asylum.

The American Immigration Lawyers Association (AILA) is a national association with more than 12,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and

Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeals, and Supreme Court.

Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR) is a civil rights and legal services organization that protects and promotes the rights of communities of color, low-income individuals, immigrants, and refugees. LCCR's nationally recognized pro bono Asylum Program was founded in 1983 and has since assisted thousands of individuals fleeing persecution in countries around the world.

The National Immigrant Justice Center (NIJC) is a Chicago-based national non-profit organization that provides free legal representation to low-income refugees and asylum seekers. With collaboration from more than 1,500 pro bono attorneys, NIJC represents approximately 250 asylum seekers at any given time before the Asylum Office, the Immigration Courts, the Board of Immigration Appeals, and the Federal Courts. In addition to the cases that NIJC accepts for individual representation, it also screens and provides legal orientation to hundreds of potential asylum applicants every year.

As organizations dedicated to ensuring that bona fide refugees and their families are afforded the protection of asylum, amici have a substantial interest in ensuring that the right to seek asylum is afforded to all non-citizens, including those with prior removal orders.

No party or party's counsel authored this brief in whole or in part or contributed money intended to fund its preparation or submission. A motion seeking leave to file this brief is being filed concurrently.

ARGUMENT

In amici's experience, many bona fide refugees who seek protection in the United States are denied the opportunity to seek asylum. There are two main scenarios where the problem arises. Both demonstrate fundamental flaws with the Government's approach. One is like that of Petitioner: an individual whom the Government bars from asylum through reinstatement of an expedited removal that was issued when he instead should have been afforded a credible fear interview and permitted to seek asylum. The other involves individuals like Mirabel, who did not have a reason to seek asylum when originally ordered removed and who returns to the United States only after persecution abroad prompts her to flee.

One aspect of Congressional intent that is clear is that, outside of the narrowly drawn exceptions set forth in § 1158, individuals fleeing persecution are to be afforded consideration for asylum. And an individual must be provided a new opportunity to apply when there are material, changed circumstances, even if that person had a prior application denied. But under the Government's interpretation, asylum is categorically unavailable to those who reenter after removal or departure

under an order, even if those individuals never before applied for asylum, and regardless of whether there are changed circumstances.

The Government's use of the reinstatement statute, § 1231(a)(5), to bar asylum to those who reenter (or seek to do so) after removal or departure cannot be reconciled with § 1158, which establishes the exclusive factors for determining who may apply for and be granted asylum. The agency cannot use regulations to categorically exclude otherwise eligible noncitizens from asylum. Yet this is precisely what the Government does with the reinstatement regulations.

In Section I, we explain why § 1231(a)(5) cannot be employed to exclude noncitizens from seeking protection under § 1158, the statute specifically governing asylum. In Section II, we address two types of cases to explain how the Government's contrary approach contravenes Congressional intent and leads to arbitrary results.

I. Section 1158 Establishes The Sole Determinants Of Who May Apply For And Be Granted Asylum.

Two provisions of the Immigration and Nationality Act (INA) are at issue here: the asylum statute, § 1158, and the reinstatement statute, § 1231(a)(5).[3] With limited exceptions, § 1158 provides that "any alien…irrespective of such alien's status" may apply for and be granted asylum if the person meets the "refugee"

[3] Section § 1225, discussed *infra*, is also relevant. It establishes procedures designed to ensure that individuals are permitted to seek asylum before being subjected to expedited removal when they have credible fear of persecution.

definition. Section 1231(a)(5) provides for the reinstatement and execution of prior removal orders and renders covered individuals ineligible for "relief."[4] While the latter provision appears broad when read in isolation, the portion of the statute specifically addressing asylum indicates that § 1231(a)(5) does not affect asylum eligibility. Section 1158 establishes who may apply for and be granted asylum, and the reinstatement provision does not impact those determinations. Several aspects of § 1158 make this clear.

A. Congress's 1996 Revision of the INA

1. The Asylum Statute

In 1980, Congress opened the nation's doors to asylum seekers, directing the Attorney General to establish procedures for noncitizens to apply for asylum, irrespective of their status, and allowing for asylum to be granted to noncitizens who were "refugees" within the meaning of the Act. *See* Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 102. Despite several major ensuing changes to the INA, the broad availability of asylum largely remained constant for years.[5]

[4] Claiming § 1231(a)(5) as its authority, the agency promulgated 8 C.F.R. §§ 208.31, 241.8, 1208.31, 1241.8, which allow noncitizens facing reinstatement to be referred for an asylum officer's determination of whether there is a reasonable fear of persecution or torture, but limits those found to have such fear to consideration for withholding only.

[5] Between 1980 and 1996, the only changes to the asylum statute were to bar individuals with aggravated felonies from asylum and to limit access to work authorization for those with pending applications. *See* Pub. L. No. 101–649, title

Then, in 1996, Congress revamped the asylum statute and prescribed from stem to stern the authority for who can and who cannot secure asylum. *Compare* 8 U.S.C. § 1158(a) (1995), *with* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, Title VI, § 604, 110 Stat. 3009. To begin, Congress created a new section, entitled "Authority to apply for asylum." 8 U.S.C. § 1158(a). It divided this section into two: (1) a provision providing that "any alien…irrespective of such alien's status" may apply for asylum under § 1158 (or § 1225(b) as appropriate), and (2) exceptions to this general provision. Congress then directed that the Attorney General "establish a *procedure*"—not further exceptions—"for the consideration of asylum applications filed under [§ 1158(a).]" *Id.* § 1158(d)(1) (emphasis added).

Section 1158(a) governs eligibility to seek asylum. Subject to three limited exceptions, it affords *any* noncitizen who is physically present or arrives in the United States an opportunity to apply for asylum, *without regard to status*. Indeed, when Congress re-crafted the statute in 1996, it expanded the provision for "an" alien to apply for asylum "irrespective of such alien's status" to "any" such alien arriving or physically present in the United States. *Compare* 8 U.S.C. § 1158(a) (1995), *with* IIRIRA, Pub. L. No. 104-208, div. C, § 604, 110 Stat. 3009.

V, § 515(a)(1), 104 Stat. 5053 (1990); Pub. L. No. 103–322, title XIII, § 130005(b), 108 Stat. 2028 (1994).

The exceptions limiting an individual's ability to seek asylum are spelled out equally clearly. Individuals may not seek asylum if they (A) can be removed to a safe third country, (B) applied more than one year after arrival, or (C) previously filed for asylum. 8 U.S.C. § 1158(a)(2)(A)-(C).[6] If a noncitizen is not covered by § 1158(a)(2), she may apply for asylum.

The next part of § 1158 addresses the "[c]onditions for granting asylum." *See* § 1158(b). Congress also divided this subsection into two: § 1158(b)(1) provides the general authority to grant asylum to those who meet the "refugee" definition; § 1158(b)(2) establishes the exceptions—those applicants who must be denied even when they are "refugees." The mandatory grounds of denial are: if the noncitizen persecuted others, was convicted of a particularly serious crime, committed a serious nonpolitical crime outside the United States, poses a national security threat, was firmly resettled in another country, or engaged in terrorist activity. *Id.* §§ 1158(b)(2)(A)(i)-(vi). The terrorism-related exception is particularly notable because it is the only instance in which Congress employed by cross-reference an existing inadmissibility or deportability ground either to limit who could apply for or be granted asylum. *See id.* §§ 1158(a)(2), (b)(2)(A).

[6] There are exceptions to the exceptions, one of which authorizes successive asylum applications based on changed circumstances. *See* 8 U.S.C. § 1158(a)(2)(D). That exception is particularly relevant here and is addressed in Section II.B.

Subsection (b) also has a provision allowing the Attorney General authority to establish by regulation "additional limitations and conditions, *consistent with this section*, under which an alien shall be ineligible for asylum under paragraph (1)." *Id.* § 1158(b)(2)(C) (emphasis added). With the provision, Congress thus specified that any regulatory constraints on the availability of asylum must derive directly from § 1158 itself and not some other section of the INA.

2. The Reinstatement Statute

At the same time Congress amended the asylum statute, it enacted what is now § 1231(a)(5), on which the Government relies here. IIRIRA, Pub. L. No. 104-208, div. C, § 305, 110 Stat. 3009. That statute provides for reinstatement of a prior removal order when an individual illegally reenters the United States after removal or other departure under an order. The reinstated individual "is not eligible and may not apply for any relief under this chapter" and "shall be removed under the prior order." 8 U.S.C. § 1231(a)(5). As discussed herein, this provision does not bear on asylum.

B. The Statute's Plain Language Makes Clear that Asylum is Available to Individuals Who Reenter After Removal or Departure Under a Removal Order.

A basic canon of statutory construction is that the specific governs the general. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 2071 (2012). Here, the only ambiguity lies with the general provision—the

reinstatement statute—which does not clearly indicate it applies to an individual seeking asylum.[7] In contrast, § 1158, which specifically addresses the question of who can seek and be granted asylum, is quite clear. Nothing on its face suggests that individuals who reenter (or seek to reenter)[8] after removal or departure under an order can categorically be barred from asylum. To the contrary, such persons are authorized to apply for and be granted that protection.

First, there is the broad grant of authority to apply for asylum afforded "any alien . . . irrespective of such alien's status." 8 U.S.C. § 1158(a)(1); *see Matter of Benitez*, 19 I. & N. Dec. 173, 176 (BIA 1984) (interpreting "any alien" literally to mean "any"); *Matter of M-R-*, 6 I. & N. Dec. 259, 260 (BIA 1954) (same).

Further, nowhere in the exceptions to who can apply for asylum or the conditions for granting asylum did Congress specify that one may not apply for or

[7] Petitioner identifies various ambiguous aspects of the reinstatement statute. He notes that the reinstatement statute makes no mention of asylum eligibility and that its broad ban on relief, if construed to encompass asylum, would be in tension with the right to file a successive asylum application based on changed circumstances. (Pet'r Br. 33-36.) He also argues that, although § 1231(a)(5) imposes a bar to some form of "relief," that term itself is ambiguous and this Court and others have granted various forms of immigration relief notwithstanding this language. (Pet'r Br. 39-42.) Amici will not repeat those arguments, but we note that these ambiguities reinforce the conclusion that § 1231(a)(5) was not intended to, and does not in fact, disrupt the statutory scheme for asylum in § 1158. Indeed, where there is ambiguity, this Court is required to resolve that ambiguity in favor of Petitioner. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

[8] An additional ambiguity worth noting is that § 1231(a)(5), which pertains only to one who has "reentered . . . illegally," does not even clearly apply to an asylum seeker who comes into custody without having effected an entry.

be granted asylum if he reenters following removal. Indeed, § 1158(a)(2), which sets forth the limitations on who may apply for asylum, does not even hint that asylum is unavailable to those who enter following a prior removal. The same is true for § 1158(b)(2), which addresses the conditions where an individual may not be granted asylum even if he meets the definition of a refugee.

Section 1158's omission of any reference to § 1231(a)(5) is striking given that Congress crafted the two provisions at the same time.[9] Viewed in the context of Congress's focus on the details of the asylum scheme, the lack of any reference to reinstatement is evidence that § 1231(a)(5)'s generalized provision does not displace § 1158's specific provisions. "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the enactment." *MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944).

[9] Congress also contemporaneously added an inadmissibility ground that relates to reinstatement, IIRIRA, Pub. L. No. 104-208, div. C, § 301, 110 Stat. 3009, *codified at* 8 U.S.C. § 1182(a)(9)(C)(i)(II) (deeming inadmissible one who is ordered removed and then enters or attempts to reenter without being admitted). Inadmissibility grounds not specifically listed in § 1158 do not bear on asylum eligibility, but § 1182(a)(9)(C)(i)(II) is nonetheless notable because it shows that Congress acted explicitly when it wished to make post-order reentry relevant. Had Congress intended § 1231(a)(5) to impact asylum eligibility, one would have expected the addition of a cross-reference in § 1158. This is what Congress did when it incorporated terrorism-related inadmissibility and deportability grounds as an exception to the general provision that one who meets the "refugee" definition may be granted asylum. *See* 8 U.S.C. § 1158(b)(2)(A)(v) (cross referencing § 1182(a)(3)(B)(i) and § 1227(a)(4)(B) (relating to terrorist activity) to create exception to who may be granted asylum).

As the Supreme Court has taught, the "general/specific canon explains that the 'general language'" of one clause "although broad enough to include it, will not be held to apply to a matter specifically dealt with in" another clause. *RadLAX*, 132 S.Ct. at 2071-72. Like the statute at issue in *RadLAX*, there are no "textual indications" suggesting that § 1231(a)(5)'s general provision supplants § 1158's specific directives; indeed, the "structure here would be a surpassingly strange manner of accomplishing that result[,]" which "would normally be achieved by setting forth the" prohibition directly in § 1158. *Id.* at 2072.

To read § 1231(a)(5) as barring asylum, the Court would have to believe Congress wanted the word "relief" in § 1231(a)(5) to burrow its way into § 1158 without referencing § 1158 or asylum at all, despite the varying understandings of "relief" and the broader, clearer terms Congress had at its disposal. (*See* Pet'r Br. at 39-42.) And the Court would have to believe Congress meant § 1231(a)(5), unlike any other INA provision, to be an additional "exception" besides those that Congress specifically set forth in § 1158. Neither belief is sustainable.

Simply put, § 1231(a)(5) cannot bar asylum because § 1158 creates a closed universe for asylum. Unless § 1158, on its own or by explicit incorporation of another provision, bars a noncitizen from seeking or being granted asylum, that person must be permitted to pursue such protection.

Section 1158 leaves no doubt about this in providing that the authority to promulgate regulations imposing "additional limitations and conditions" on asylum eligibility must be "*consistent with this section*." 8 U.S.C. § 1158(b)(2)(C) (emphasis added); *see also* 8 U.S.C. § 1158(d)(1) (Attorney General may "establish a *procedure* for the consideration of asylum applications.") (emphasis added). The words "consistent with this section" plainly bar the agency from borrowing from a different section to exclude from asylum those who reenter the United States after a prior removal when nothing in § 1158 suggests that such an exclusion is authorized and in fact conveys the opposite message.

Accordingly, § 1231(a)(5) cannot bar asylum. The Government cannot derive power from that section to exclude from consideration for asylum those whom § 1158 otherwise permits to apply, including those who return after removal. The Government thus lacks authority for the reinstatement regulations limiting protection from persecution to withholding of removal.

II. Interpreting The Reinstatement Statute To Preclude Asylum Conflicts With Congressional Intent And Leads To Arbitrary Results.

The primary victims of the improper use of reinstatement to bar asylum are (1) those who were subjected to expedited removal or a similar administrative order when they feared persecution but were not able to secure consideration for asylum at the time, and (2) those who had a prior proceeding but did not at that time have (or did not establish) a basis for seeking asylum. Petitioner and Yesenia

are examples from the first category, while David and Mirabel are examples from the latter. In both case types, reinstatement results in asylum being withheld from individuals whom Congress intended to have access to such protection.

A. Bona Fide Refugees Are Improperly Denied The Opportunity For Asylum Through Reinstatement Of Expedited Removal Orders.

A key fact about Petitioner's case is that he *never* received consideration for asylum. When he arrived in the United States the first time, he had been shot by gang members, and then after he testified against them, he had been threatened with death, placed on a hit list, and kidnapped. (AR 171-72; 394-401.) Although he should have been given a chance to seek asylum, he was urged to sign an expedited removal order when he first arrived, and when he came back, that order was reinstated. (AR 130; 389-90.) This is not what Congress intended.

When Congress provided for expedited removal for certain noncitizens, it instituted procedures to identify arriving aliens fearing persecution and afford them consideration for asylum. These special procedures include an interview by an asylum officer for anyone who expresses fear, written determination of whether there is credible fear of persecution, access to review by an immigration judge of a negative determination, and an opportunity to apply for asylum where there is a finding of credible fear. 8 U.S.C. §§ 1225(b)(1)(A)-(B). The purpose of this scheme was to ensure access to asylum for legitimate asylum seekers. *See, e.g.*, H.R. Rep. No. 104-469, pt. 1, at *13 (1996) ("Throughout the process, the

procedures protect those aliens who present credible claims for asylum by giving them an opportunity for a full hearing on their claims."); *id*. at 107-08 ("[A]rriving aliens with credible asylum claims will be allowed to pursue those claims."); *id.* at 158 ("If the alien meets this [credible fear] threshold, the alien is permitted to remain in the U.S. to receive a full adjudication of the asylum claim—the same as any other alien in the U.S."); *id.* ("Under this system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution").

Despite Congress's efforts to ensure asylum's availability to those fleeing persecution, the process frequently fails. When Petitioner attempted to enter the country in June 2011 he was quickly encountered by border agents. The Immigration Judge asked Petitioner if he told those agents he feared returning to Guatemala. He responded, "They never asked me those questions [concerning my fear] that I can recall. They only came out with the paper so that I could sign." (AR 107.) And so, with no process, Petitioner was removed from the United States. When he attempted to reenter several months later, still afraid for his life, the original order was reinstated. (AR 124-26.) An asylum officer *then* interviewed him to determine if he merited a chance to seek withholding of removal. He "passed" that interview, and was referred to an immigration judge for adjudication of his application for withholding of removal. (AR 394-404.)

Petitioner's experience is not unique. In amici's experience, numerous bona fide refugees with reinstated removal orders have never had an opportunity to apply for asylum. Yesenia, described in the introduction, also testified that the officers neglected to ask her about fear and urged her to sign her removal papers. She too would have been excluded from asylum eligibility but for litigation before this Court. *See Maldonado Lopez v. Holder*, No. 12-72800 (9th Cir. dismissed Feb. 4, 2014). Herlinda Alvarez Mendoza is another prominent example. She is a family member of a key witness in a human rights case against the Guatemalan military that went before the Inter-American Court and U.S. Supreme Court. The Inter-American Court found that the family was in a "situation of extreme gravity and urgency." After a brother disappeared and Ms. Alvarez attempted to find him, making repeated rebuffed inquiries with police, men broke into her home and attacked her with a machete. Though Ms. Alvarez was seriously injured, she survived and fled to the United States, attempting to enter with false papers. When apprehended, she said she was Guatemalan but that she was married to a Mexican man and had been living in Mexico for the preceding 20 years. She expressed fear of return to Chiapas, but officers mistakenly wrote that she expressed no fear of returning to Mexico and ordered her removed without referral to an asylum officer. Ms. Alvarez successfully entered the United States a short time later and applied for asylum. When she appeared for her interview, ICE officials arrested and

detained her and issued an order reinstating the expedited removal order. In proceedings that followed a "reasonable fear" finding, an Immigration Judge found Ms. Alvarez eligible for withholding and stated on the record that, but for reinstatement, she would have qualified for asylum. *See Alvarez v. Ashcroft*, No. 04-13559-I (11th Cir. Mar. 30, 2005).

These cases are not isolated. A 2005 congressionally authorized study of asylum seekers in expedited removal revealed substantial evidence that individuals with potentially valid asylum claims "slip through the cracks" of the expedited removal process. U.S. Commission on International Religious Freedom, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (Feb. 2005) (authorized by section 605 of the International Religious Freedom Act of 1998). In particular, the study found widespread noncompliance with procedural safeguards meant to protect asylum seekers. In roughly half the observed cases, Customs and Border Protection (CBP) officers did not give arriving aliens the required explanation of the availability of protection under U.S. law; as a result, these individuals may not have known about asylum, "may not understand the purpose of the Secondary Inspection interview and may not realize that this interview is their primary, if not sole opportunity to express concerns or seek asylum." *Id.* at 28-29. In a smaller but still troubling number of cases, "CBP officers did not specifically inquire about fear of returning" to the country of origin. *Id.* at 29. And in one sixth of the cases

where fear was expressed, no referral for a credible fear interview was made—the individual was either ordered removed or permitted to withdraw the application for entry. *Id.* at 20, 23.[10]

Even when officers fully comply with all procedures and conduct themselves with care and concern, the expedited removal process can still fail to detect bona fide refugees. Factors like language and cultural differences, trauma, stress, and fear can impede communication between officers and those arriving. As one might expect with challenges like these, the study revealed "considerable confusion" among individuals in expedited removal. *Id.* at 25 ("[N]early one third of the aliens…interviewed reported having no knowledge of what was going to happen to them after the Secondary Inspection interview," and "less than half of the individuals being removed were aware that this would be the outcome of their interview," despite having signed statements indicating they had been informed, and "[e]ven among the subset of individuals who withdrew their application for admission…, roughly a third did not realize that they were going to be returned to their country of origin.").

[10] Even for those permitted to pursue asylum, the study found that flaws in the expedited removal process continued to cause harm. Of particular concern was the weight given to records created in the process that were of questionable reliability. *Id.* at 30, 68-70, 237. Nearly ten years later, these problems persist. In February 2014, AILA forwarded 19 cases involving improper screening by Customs and Border Protection (CBP) to the Office of Civil Rights and Civil Liberties for investigation. Documentation of this investigation is on file with amici.

Additionally, the circumstances in which the expedited removal process can occur may not always be conducive to the highly personal revelations that can be required to raise an asylum claim. This can be especially true in cases such as those involving sexual abuse or other harm that may engender feelings of shame, or where the individual must identify herself as gay or lesbian, or where the individual's persecutor was a law enforcement official. *See, e.g.*, *Mousa v. Mukasey*, 530 F.3d 1025, 1028 (9th Cir. 2008). Further, where the individual does not realize the harm she suffered would qualify her for asylum (or where it is harm that has become normalized in the home country), she may not think to report what in fact constitutes persecution.

Even if the rate at which the expedited removal process fails is relatively low, there is cause for great concern, first, that bona fide refugees are forced to return to places where they are unsafe, and second, that those who flee back to the United States are deprived of protection yet again through reinstatement. Statistical evidence underscores the danger that the Government's use of reinstatement has created an asylum-free zone in which some never have the chance to file: Three quarters of removals are carried out under the authority of an expedited or reinstated removal order. In 2012, 39% of all removals were expedited removals,

and 36% were the result of reinstatements.[11] These numbers have only grown over the years; in 2011 the percentages of expedited removals and reinstated removals respectively were 31% and 33%; in 2010 they were 29% and 34%.[12]

Given Congress's concern, commitment, and expressed intent that genuine asylum seekers be given an avenue for seeking and securing that protection, *see supra* pp. 18-19, it is extraordinarily unlikely that Congress at the same time intended that § 1231(a)(5) be interpreted and applied to preclude those very individuals from seeking asylum, particularly when they were not permitted or otherwise able to do so prior to being given the removal order that is being reinstated.

B. Barring Asylum For Persecution Arising After Removal Is Inconsistent With § 1158 And Creates Arbitrary Results.

Another problem with the Government's interpretation of the reinstatement statute is that it contradicts the subsection of the asylum statute that permits

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[11] John Simanski & Lesley M. Sapp, U.S. Dep't of Homeland Security, Office of Immigration Statistics – Policy Directorate, IMMIGRATION ENFORCEMENT ACTIONS: 2012, 1 (Dec. 2013), *available at* https://www.dhs.gov/publication/immigration-enforcement-actions-2012.

[12] John Simanski & Lesley M. Sapp, U.S. Dept. of Homeland Security, Office of Immigration Statistics – Policy Directorate, IMMIGRATION ENFORCEMENT ACTIONS: 2011, 1, 5 (Sept. 2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration- statistics/enforcement_ ar_2011.pdf ; U.S. Dept. of Homeland Security, Office of Immigration Statistics – Policy Directorate, ENFORCEMENT ACTIONS: 2010 1, 4 (June. 2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf.

successive asylum applications based on changed circumstances. *See* 8 U.S.C. § 1158(a)(2)(D). As Petitioner notes in his brief, Congress expressly provided for limited circumstances where an individual might apply for asylum not once but twice. (Pet'r Br. 34-39.) While dictating that one who "previously applied for asylum and had such application denied" generally may not apply for asylum, 8 U.S.C. § 1158(a)(2)(C), Congress directed that an individual *can apply again* if "changed circumstances materially affect the applicant's eligibility for asylum," *Id.* § 1158(a)(2)(D). Considering the Government's interpretation of § 1231(a)(5) in tandem with § 1158(a)(a)(2)(D) shows the illogic of the former, as it has the effect of making asylum available only to those who have violated immigration law by remaining in the United States after having been ordered removed.

By its very words, § 1231(a)(5) is not triggered unless a person has first been removed or departed under an order and has then reentered illegally. For one who has absconded or otherwise evaded removal, there is no provision for reinstatement and thus, under the Government's approach, no bar to asylum in the event of changed circumstances. That individual can move to reopen. For changed country conditions that are material, the motion—and consideration for asylum—can be brought years after the original denial of asylum, and it does not matter if the

individual has previously sought reopening.[13] *See, e.g.*, *Joseph v. Holder*, 579 F.3d 827 (7th Cir. 2009); *Chen v. Mukasey*, 524 F.3d 1028 (9th Cir. 2008). In contrast, the Government would presumably deem ineligible for asylum the individual who complied with a removal order and then returned to the United States to seek protection based on changed circumstances. But it makes no sense that one who complied with a removal order in the first instance would be barred from asylum, while one who evaded removal could be considered for such protection, even if only when there are changed circumstances.

Moreover, nothing in § 1158(a)(2)(D) suggests that a successive application based on changed circumstances is not permitted for one who has left under an order resulting from the denial of a previous application.[14] On the face of the statute, one who is denied asylum and then faces persecution related to changed circumstances can apply and be considered anew for asylum. Given this provision,

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[13] Although motions to reopen generally must be filed "within 90 days of the date of entry of a final administrative order of removal," 8 U.S.C. § 1229a(c)(7)(C)(i); *see* 8 C.F.R. § 1003.2(c)(2), an exception to this limitation allows for motions "based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. § 1229a(c)(7)(C)(ii); *see* 8 C.F.R. § 1003.2(c)(3)(ii).

[14] "The plain language of the [implementing] regulation also does not restrict the concept of 'changed circumstances' to some kind of broad social or political change in the country, such as a new governing party, as opposed to a more personal or local change." *Joseph*, 579 F.3d at 834 (addressing threat of forced marriage and consequences of refusal as "changed circumstances" under 8 C.F.R. § 1003.2(c)(3)(ii)).

it is difficult to accept the notion that asylum is not available when changed circumstances lead to actual or threatened persecution for an individual who did not previously apply for asylum, even when that individual has been forced to flee back to the United States after a prior removal.

C. The Agency's Arbitrary Approach Warrants No Deference And Should Be Rejected.

As detailed here and in Petitioner's brief, there are many reasons to conclude that, however one might interpret § 1231(a)(5) if read in isolation, § 1158 unambiguously communicates that asylum is available to *any* alien who is not otherwise barred by its subsections, even if that person was previously removed and then returned to the United States. But even if one were to conclude that the statute is ambiguous, there is no evidence that the Agency grappled with, let alone contemplated, that there was such ambiguity. Instead, it appears to have mistakenly convinced itself its "interpretation [was] compelled by Congress." No deference is due to it as a result. *Gila River Indian Community v. United States*, 729 F.3d 1139, 1149 (9th Cir. 2013) (internal quotations omitted); *see Judulang v. Holder*, 132 S. Ct. 476, 479, 484 (2011); *Negusie v. Holder*, 555 U.S. 511, 523 (2009).

Finally, notwithstanding the interpretation embodied in its regulations, the agency appears to reserve for itself authority to choose not to reinstate a removal order or not to execute an order. (Indeed, the settlement in Yesenia's case, discussed above, resulted when the Government agreed to rescind the reinstated

removal order and issue a Notice to Appear, placing the applicant in ordinary removal proceedings where she is now free to seek asylum. *See Maldonado Lopez v. Holder,* No. 12-72800 (9th Cir. dismissed Feb. 4, 2014).) It does not appear, however, that there are guidelines for the exercise of such authority, which would leave decisions to the unfettered discretion of lower-level officers. *Judulang*, 132 S.Ct. at 487. But resting such weighty decisions on the whim of one person who happens to be assigned the matter cannot be sustained, particularly when a matter as grave as protection from persecution is at issue. *Id.*

CONCLUSION

The governing statute authorizes any noncitizen arriving or physically present in the United States to apply for asylum notwithstanding whether he has returned here after removal or departure under an order. The Government's contrary interpretation is wrong and should be rejected.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Keren Zwick, certify that, pursuant to FED. R. APP. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this brief is double spaced, using 14-point proportional font and contains 6,870 words (not including the table of contents, table of citations, certificate of service or certificate of compliance).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 2, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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