No. 17-302

IN THE
SUPREME COURT OF THE UNITED STATES

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Rony Estuardo Perez-Guzman,
*Petitioner*,

v.

Jefferson B. Sessions III,
Attorney General of the United States,
*Respondent.*

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

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# BRIEF OF *AMICUS CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF THE PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

Founded in 1946, the American Immigration Lawyers Association ("AILA") is a nonpartisan, nonprofit voluntary bar association comprised of over 15,000 U.S. attorneys and legal scholars that practice and teach immigration law. AILA provides continuing legal education, professional services, and other immigration resources to its members through a network of 36 local chapters and over 50 national committees. It is also the leading publisher of information and analysis for practicing immigration lawyers and other parties seeking insight into U.S. immigration law. Notable titles include *Kurzban's Immigration Law Sourcebook* and *Essentials of Immigration Law*, as well as various primers on asylum law, criminal law, and litigating immigration cases in federal court.

AILA's mission is to promote justice, advocate for fair immigration laws and policies, and advance the quality of immigration law practice. To these ends, AILA's members represent a broad spectrum of

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief. The parties have consented to the filing of this brief in communications on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

immigration clients on a *pro bono* basis, including asylum seekers, foreign students, and U.S. families separated from close relatives in foreign countries. AILA members also represent artists and athletes seeking employment in the United States, as well as U.S. corporations seeking professional talent in the global marketplace.

AILA submits this *amicus curiae* brief in support of Rony Estuardo Perez-Guzman's Petition for Writ of Certiorari because the U.S. Court of Appeals for the Ninth Circuit (the "Ninth Circuit") erroneously granted deference to a U.S. Department of Homeland Security ("DHS") regulation[2] that fails to resolve an irreconcilable conflict between the Asylum Statute and the Reinstatement Statute.[3] In doing so, the Ninth Circuit discounted DHS's systemic failure to conduct credible fear interviews and the consequences of that failure for refugees subject to removal orders. AILA's members routinely engage DHS regarding these issues. As such, the association is uniquely positioned to offer this Court insight into the practical implications of the Ninth Circuit's erroneous decision.

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[2] *See* 8 C.F.R. § 1208.31(e).

[3] *Compare* 8 U.S.C. § 1158(a)(1) ("Any alien who is physically present in the United States[,] . . . irrespective of such alien's status, may apply for asylum. . . .") with 8 U.S.C. § 1231(a)(5) ("If the Attorney General finds that an alien has reentered the United States illegally after having been removed . . . the prior order of removal is reinstated . . . [and] the alien . . . may not apply for any relief under [the Immigration and Nationality Act] . . . .").

## STATEMENT

Petitioner Rony Estuardo Perez-Guzman ("Petitioner") first fled from Guatemala to the United States following death threats from Guatemalan gang members and a brutal beating by Guatemalan police. Although such persecution merits serious consideration in the Ninth Circuit,[4] DHS issued the Petitioner an expedited removal order without conducting a credible fear interview or providing an opportunity to seek asylum.

Following his removal, the Petitioner fled Guatemala a second time and again sought refuge in the United States. Although the Petitioner received a reasonable fear interview and was found to possess a reasonable fear of persecution, DHS reinstated his prior removal order, thus precluding a potential asylum claim. When the Petitioner challenged DHS's actions, the Ninth Circuit found that precluding asylum applications was a "reasonable interpretation of the statutory scheme" and therefore entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), notwithstanding the fact that two statutory sections were in conflict, and DHS did not address both statutes in its regulation.[5]

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[4] *See Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc).

[5] *Perez-Guzman v. Lynch*, No. 14-72439 (9th Cir. 2016).

AILA respectfully submits that the conflict between the Asylum Statute and Reinstatement Statute should be resolved in favor of the former. To that end, it writes separately to describe the practical implications of the Ninth Circuit's ruling and to emphasize the importance of this Court granting certiorari. Resolving this issue in favor of the Asylum Statute would save lives, reunite families, and ensure that non-non-citizens may seek asylum in a manner consistent with U.S. laws and treaty obligations. Allowing the Ninth Circuit's decision to stand, by comparison, would perpetuate DHS's illegal practices, exacerbate errors in the expedited removal process, and deny *bona fide* refugees asylum based on flawed immigration histories.

## SUMMARY OF ARGUMENT

The Ninth Circuit's erroneous application of *Chevron* deference carries disturbing implications for *bona fide* refugees across the United States. As shown by the U.S. Commission on International Religious Freedom ("USCIRF"), an independent bipartisan federal agency, as well as other independent observers, DHS routinely issues expedited removal orders without conducting credible fear interviews or notifying detained persons of their right to seek asylum, in violation of applicable federal law.[6] The Petitioner's experience

[6] *See* U.S. COMM'N. ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, Vol. 1 at 2 (2005), *available at*

is a case in point. With expedited removal orders and reinstatement orders now constituting 84 percent of all deportations occurring at or near the U.S. border, DHS's failure to comply with these requirements undermines the integrity of the U.S. immigration system.[7]

The Ninth Circuit's decision exacerbates these failures in two ways. First, it ignores the fact that DHS frequently denies *bona fide* refugees like the Petitioner a credible fear interview, the opportunity to seek asylum, or both. In doing so, it ignores that Congress intended the Asylum Statute to apply to "[a]ny alien who is physical present in the United States . . . irrespective of such alien's status . . ."[8] Second, the Ninth Circuit's deference allows DHS to preclude *bona fide* refugees from seeking asylum based on expedited removal orders resulting from these prior oversights. As a result, non-citizens

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http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal (last accessed 09/18/2017) [hereinafter "2005 USCIRF Report"].

[7] According to data obtained from U.S. Immigration and Customs Enforcement ("ICE") and evaluated by the nonprofit, nonpartisan Migration Policy Institute, expedited removals and reinstatement orders accounted for 53 percent and 31 percent of all deportations within 100 miles of the U.S. border, respectively. *See* MARC R. ROSENBLUM & KRISTEN MCCABE, DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE (2014) at 23, *available at* http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change (last accessed 09/24/2017).

[8] 8 U.S.C. § 1158(a)(1).

seeking asylum in the Ninth Circuit can become subject to reinstatement orders despite DHS's prior mistakes and malfeasance. This is the case even if these refugees become subject to persecution and torture *after* their removal from the United States.

These outcomes subvert the Asylum Statute while undermining the fair and impartial administration of the asylum process. As shown by USCIRF and other observers, non-citizens who are improperly denied the right to seek asylum and subjected to expedited removal proceeding are often returned to countries where murder, rape, torture, and other abuses are endemic. Survivors frequently return to the United States, only to be apprehended, detained, and removed under DHS reinstatement orders. The result is a Kafkaesque nightmare, with the most vulnerable refugees caught in a perpetual cycle of flight and return with no opportunity to seek asylum and no relief from the underlying persecution.

## ARGUMENT

### I. THE ASYLUM STATUTE PROTECTS ALL ASYLUM SEEKERS REGARDLESS OF IMMIGRATION STATUS

### A. CONGRESS AND DHS ESTABLISHED PROTECTIONS FOR REFUGEES IN THE EXPEDITED REVIEW PROCESS.

Congress first established the expedited removal program under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

("IIRIRA").[9] Prior to the IIRIRA, undocumented individuals who were previously removed from the United States and subsequently returned were entitled to a hearing before an immigration judge. These proceedings allowed them to seek asylum, withholding of removal, and other legal relief. Beginning in 1997, however, such individuals faced summary removal without such hearings. To ensure protection for refugees fleeing persecution, torture, and other abuses, the Immigration and Nationality Act ("INA") required immigration officers to refer any undocumented individual who seeks asylum or expresses a fear of persecution to an asylum officer for a credible fear interview.[10] The purpose of this measure was to ensure that *bona fide* asylum seekers could obtain refuge in the United States, even if they found themselves in expedited removal proceedings.[11]

The DHS regulations governing expedited removal contain similar provisions. They require immigration officers to inform non-citizens of their right to seek asylum and record their responses in

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[9] *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546 (1996).

[10] 8 U.S.C. § 1225(b)(1)(A)(ii).

[11] *See* Immigration in the National Interest Act, H.R. REP. No. 104-469, pt. 1, at *13 (1996) ("[These] procedures protect those aliens who present credible claims for asylum by giving them an opportunity for a full hearing on their claims.").

writing.[12] Associated DHS forms specifically ask whether the foreign national has "any fear or concern about being returned to [his] home country or being removed from the United States"[13] and contain mandatory statements explaining the credible fear interview process.[14] Related DHS regulations specifically prohibit immigration officers from pursuing expedited removal before a credible fear interview occurs.[15] Together with the Asylum Act's promise that "*any* alien" can seek asylum

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[12] *See* 8 C.F.R. § 235.3(b)(2) ("In every case in which the expedited removal provisions will be applied and before removing an alien from the United States pursuant to this section, the examining immigration officer shall create a record of the facts of the case and statements made by the alien . . . using Form I-867AB . . . [and] shall read (or have read) to the alien all information contained on Form I-867A.").

[13] *See* U.S. Citizenship & Immigration Services, Form I-867B.

[14] *See* U.S. Citizenship & Immigration Services, Form I-867A. The form requires immigration officers to read the following statement:

> U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

[15] *See* 8 C.F.R. § 235.3(b)(4).

*regardless* of his or her status,[16] these measures guard against oversights and abuses in the expedited removal process.

None of these protections appears in this case. Although the petitioner sought sanctuary in the United States, immigration officers overlooked his desire for asylum, ignored his expressed fear of return, and ultimately failed to refer him for a credible fear interview. The result was the same scenario that Congress sought to prevent. Rather than following the Asylum Statute and its own internal regulations, DHS expedited the Petitioner's removal without considering the Petitioner's past persecution and *bona fide* asylum claims.

## B. DHS ROUTINELY AND ILLEGALLY DENIES THESE PROTECTIONS DURING EXPEDITED REMOVAL PROCEEDINGS

Rigorous longitudinal studies by bipartisan U.S. Government commissions and nonpartisan research organizations demonstrate that DHS routinely and illegally denies crucial protections to undocumented individuals during expedited removal proceedings. Notable examples include the failure to inquire into a fear of removal, the failure to advise non-citizens of their right to seek asylum, and the failure to refer these individuals for credible fear interviews. While some of these oversights reflect sloppiness, poor training, and institutional inertia,

[16] 8 U.S.C. § 1158(a)(1).

independent observers identify many instances where DHS officials purposely subverted the Asylum Statute and corresponding regulations.

### 1. THE USCIRF REPORTS

USCIRF's studies are a case in point. After establishing this independent, bipartisan commission under the International Religious Freedom Act of 1998,[17] Congress asked USCIRF to examine whether immigration officers exercising expedited removal authority were: (1) encouraging the withdrawal of asylum applications; (2) failing to refer eligible non-citizens for credible fear interviews; (3) removing non-citizens to countries where they faces persecution; or (4) improperly detaining non-citizens eligible to apply for asylum. USCIRF's 2005 report answered each of these questions in the affirmative.[18] Drawing on direct observations of DHS immigration officers conducting expedited removal proceedings, the commission found "serious problems" that exposed asylum seekers to improper removal to their native countries.[19]

At one port of entry, for example, researchers found that DHS immigration officers used strong language to coerce individuals to withdraw their

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[17] *See generally* International Religious Freedom Act, Pub. L. No. 105-292, 112 Stat. 2787 (1998).

[18] 2005 USCIRF Report, *supra*, note 6, at 50-62.

[19] *Id.*, at 10.

asylum applications, ultimately convincing half of the individuals observed to concede without referral to an asylum officer.[20] At another location, DHS officials informed asylum seekers that they could not present their cases due to their illegal entry, and warned others that they would be held in detention for over a month.[21] While such statements may appear innocuous, researchers noted that they could be construed as encouraging the individuals to withdraw their asylum claims.[22]

USCIRF found similar problems with mandatory notices and referrals to asylum officers. According to the Commission's 2005 report, immigration officers routinely led asylum seekers subject to expedited removal to believe that their only options were to withdraw their applications for admission without penalty or face expedited removal with a five-year ban on returning. Only 50 percent of the officers observed informed non-citizens of their right to seek asylum despite the requirements enumerated in DHS regulations and the mandatory language appearing in the accompanying forms.[23]

Even when non-citizens affirmatively expressed a fear of returning to their home countries, immigration officers still failed to refer

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[20] *Id.*, at 50.

[21] *Id.*

[22] *Id.* at 50-51.

[23] *Id.*, at 51.

these individuals for credible fear determinations in 15 percent of the observed cases.[24] USCIRF's review of the records associated with those oversights found that more than half of the forms completed by immigration officers incorrectly stated that the foreign national had no fear of return.[25] Working from this basis, USCIRF concluded that DHS lacked sufficient controls to ensure that its officers referred non-citizens to asylum officers for credible fear interviews.[26]

Subsequent studies showed no discernable improvement in DHS's performance. In USCIRF's 2007 progress report, for example, researchers found that DHS ignored most of the Commission's previous recommendations and gave the agency a failing grade for disregarding required credible fear interview referrals. [27] A third comprehensive study released by USCIRF in 2016 found no change in DHS practices, with immigration officers still failing

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[24] *Id.* at 54.

[25] *Id.*

[26] *Id.* at 55.

[27] U.S. COMM'N. ON INTERNATIONAL RELIGIOUS FREEDOM, EXPEDITED REMOVAL STUDY REPORT CARD: 2 YEARS LATER, at 3-4 (2007), *available at* http://www.uscirf.gov/reports-briefs/special-reports/expedited-removal-study-report-card-2-years-later (last accessed 09/18/2017) [hereinafter "2007 USCIRF Report"].

to advise detainees of their rights or refer them for credible fear interviews nearly eleven years later.[28]

The 2016 USCIRF Report is notable for two reasons. First, researchers traveled to California, New York, New Jersey, Florida, Puerto Rico, and Texas to inspect and observe expedited removal adjudications at five ports of entry, four Border Patrol stations, and five asylum offices. USCIRF also inspected 15 immigrant detention facilities around the United States, met with DHS and facility officials, and interviewed detainees seeking asylum during a three-year period between 2012 and 2015.[29] This methodology ensured direct access to immigration officers at facilities closed to the general public.

Second, the 2016 USCIRF report documented evidence indicating the DHS officials deliberately denied individuals in expedited removal proceedings the opportunity to express a fear of persecution or torture. In one instance, a Guatemalan asylum seeker in DHS custody informed USCIRF researchers that immigration officers refused to give her "the opportunity to talk" and instead forced her to sign papers when she tried to explain the reasons

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[28] U.S. COMM'N. ON INTERNATIONAL RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL (2016) *available at* https://www.uscirf.gov/reports-briefs/special-reports/barriers-protection-the-treatment-asylum-seekers-in-expedited-removal (last accessed 09/18/2017) [hereinafter "2016 USCIRF Report"].

[29] *Id.* at 9.

for her flight to the United States.[30] Another Central American detainee reported that immigration officers told him "whether you sign or not, we are going to deport you,"[31] while other undocumented individuals said that DHS agents told them that "it's better if you just ask to be deported" or "we're going to throw you out."[32]

Much like the 2005 USCIRF Report, these findings reflect systemic, institutionalized indifference to the protections that the Asylum Statute and DHS regulations provide for asylum seekers in expedited removal proceedings. The detention of one Bangladeshi asylum seeker and his companions is a case in point. Despite requesting asylum from the first officer he encountered at a U.S. Customs & Border Protection ("CBP") field office, the officer turned him and his two companions away, instructing them to seek asylum in Mexico. When the three Bangladeshis returned to the same immigration officer an hour later to repeat their request for asylum, the officer ordered them to return to Mexico once again.[33]

The 2016 USCIRF Report also documented errors in DHS recordkeeping. These included several instances where immigration officers incorrectly indicated that detainees had no fear of

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[30] *Id.* at 22.

[31] *Id.*

[32] *Id.*

[33] *Id.*

persecution on the relevant I-867B interview forms. In one instance, a Salvadoran detainee reported that immigration officers failed to identify his credible fear of persecution despite discussing this issue with him and seizing a letter from a police officer explaining that gang members threatened the detainee.[34] In another instance, immigration officers falsely indicated that a Guatemalan woman came to the United States to seek employment despite the fact that she "had a good job in Guatemala but had to leave it because [she] needed protection."[35] Other detainees reported similar mistakes, with immigration officers dismissing assertions of fear, recording "no" when detained answered "yes," or refusing to write down information indicating a foreign national's desire to seek asylum.[36]

The similarities between these incidents and the Petitioner's own treatment are striking. Like the Guatemalan woman described above, the Petitioner fled Guatemala to escape violent threats. Like the Salvadoran detainee, the Petitioner expresses a fear of return. And like other Central Americans interviewed or observed by USCIRF, the Petitioner received no guidance regarding his right to seek asylum and no referral for a credible fear interview despite seeking sanctuary in the United States. Working from this basis, USCIRF's research

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[34] *Id.* at 21.

[35] *Id.*

[36] *Id.* at 21-22.

indicates that DHS does not – and ultimately will not – view Guatemalans and other Central Americans as bona fide refugees.

### 2. OTHER REPORTS

Independent analysis by Human Rights Watch ("HRW") confirms several of the findings identified in USCIRF's reports. Drawing on statistics published by DHS and interviews with detainees located in the United States or removed to Honduras, HRW found that less than half of the detainees who expressed a fear of returning to their home countries received a credible fear interview or reasonable fear interview, while virtually all of them were summarily deported under expedited removal proceedings or reinstatement orders.[37]

HRW's analysis of DHS data shows similar trends. Although some 80 percent of Hondurans detained by DHS undergo expedited removal or reinstatement proceedings, only 1.9 percent are flagged for credible fear interviews or reasonable fear interviews.[38] This disparity is remarkable given the fact that the data covered a period when Honduras had the highest recorded murder rate in

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[37] HUMAN RIGHTS WATCH, "YOU DON'T HAVE RIGHTS HERE:" US BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM (2014), *available at* https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk (last accessed 09/18/2017) [hereinafter "HRW Report"].

[38] *Id.* at 21-22.

the world.[39] Credible fear interview referral rates for Mexicans, Salvadorans, and Guatemalans were equally low, ranging between 0.1 and 5.5 percent of the detained population.[40] With the referral rate for all other countries averaging around 21 percent during the same period, these figures indicate a tendency to disregard asylum claims made by Central American detainees while favoring those articulated by other nationalities.[41] Such patterns are inconsistent with the impartial enforcement of U.S. immigration law and may indicate an inherent bias against Hispanic asylum seekers.

Research conducted by other advocacy organizations found similar trends. In 2014, for example, AILA filed a formal complaint with DHS's Office of Civil Rights and Civil Liberties ("CRCL") on behalf of non-citizens denied the opportunity to seek asylum due to flaws in the expedited removal process.[42] Much like the USCIRF and HRW reports describe above, the AILA complaint documented

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[39] AM. CIVIL LIBERTIES UNION, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 35 (2014), *available at* https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/american-exile (last accessed 09/18/2017) [hereinafter "ACLU Report"].

[40] HRW Report, *supra*, note 36, at 22-22.

[41] *See id.*

[42] AM. IMMIGRATION LAW ASS'N., INADEQUATE U.S. CUSTOMS AND BORDER PROTECTION PRACTICES BLOCK INDIVIDUALS FLEEING PERSECUTION FROM ACCESS TO THE ASYLUM PROCESS (2014), at 1.

immigration officers' failure to advise non-citizens of their right to seek asylum, to inquire regarding their fear of return, and to acknowledge such fear when expressed.[43] In several instances AILA and its counterparts also documented instances where DHS officials used intimidation or coercion to further the expedited removal process – including forcing undocumented individuals to sign removal orders.[44] Coercion and intimidation appears in other studies as well, with researchers from the American Civil Liberties Union ("ACLU") finding that immigration officers ignored, dismissed, or openly mocked detainee claims regarding persecution and torture in their home countries.[45] Other detainees surveyed for the same study reported that immigration officers threatened them with lengthy detentions unless they signed removal orders,[46] and forcibly pressed their fingers or thumb on official DHS forms to indicate their assent.[47]

The same study found similar failings with respect to credible fear interviews and reasonable fear interviews as well. Among the detainees interviewed by ACLU attorneys, 55 percent reported that they were never asked about their fear of persecution, or else never received such a question in

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[43] *Id.* at 12-19.

[44] *Id.* at 13, 17-19.

[45] ACLU Report, *supra*, note 38, at 38-39 and 75.

[46] *Id.* at 36.

[47] *Id.* at 39 and 42.

a language they understood.[48] Another 40 percent affirmatively told immigration officers that they feared persecution in their home countries, only to be summarily removed without a credible fear interview or reasonable fear interview. Significantly, only 28 percent reported that immigration officers asked about their fear of persecution despite the fact that DHS regulations and expedited removal forms mandate such inquiries.[49]

These failings carried serious consequences. In one instance, immigration officers told an illiterate Guatemalan mother seeking refuge that she was "worthless" and a "criminal" who "[did not have the right to anything…" despite being targeted for extortion by a Guatemalan gang members.[50] DHS later removed the woman to Guatemala despite her refusal to sign expedited removal orders, where she was subsequently raped and shot by gang members.[51] In another case, immigration officers concluded that a transgender Mexican woman had no fear of removal and issued an expedited removal order despite memorializing her account of a recent gang attack.[52] She subsequently faced repeated

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[48] *Id.* at 32-33.

[49] *Id.*

[50] *Id.* at 38.

[51] *Id.*

[52] *Id.* at 18.

attacks and sexual assaults following her removal to Mexico.[53]

The ACLU report also described the persecution endured by detainees subject to reinstatement orders. In one notable instance, DHS placed a Guatemalan woman in Reinstatement Proceedings despite her clearly articulated fear of removal.[54] Immigration officers refused to refer her case to an asylum officer and ultimately concluded that her prior removal precluded any asylum claim.[55] After returning to Guatemala, the woman was gang-raped and shot by police due to her political beliefs.[56]

## II. THE NINTH CIRCUIT'S ERRONEOUS DECISION PRODUCES HARMFUL AND ARBITRARY RESULTS

### A. PRECLUDING ASYLUM APPLICATIONS EXACERBATES PRIOR ERRORS AND HARMS *BONA FIDE* REFUGEES

The last case described above illustrates how the Ninth Circuit's erroneous *Chevron* deference exacerbates DHS errors and harms *bona fide* refugees. Like the Petitioner in this case, the Guatemalan woman described above entered the

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[53] *Id.*

[54] *Id.* at 21-22.

[55] *See id.*

[56] *Id.*

United States, failed to receive a credible fear interview, and was removed under an expedited removal order. Like the Petitioner, she subsequently returned to the United States and articulated a credible fear of return based on the threats against her in Guatemala. And like the Petitioner, DHS issued a reinstatement order despite the credible and continuing threat of persecution. In both instances, a ministerial review of each individual's prior immigration history trumped any consideration of the violence they would face.

Granting *Chevron* deference to a DHS regulation that does not purport to address the Asylum Statute subverts the asylum process in two ways. First, allowing DHS to preclude future asylum petitions on the basis of past removal orders presumes that immigration agents carefully and consistently apply the protections Congress created to safeguard *bona fide* refugees in expedited removal proceedings. As demonstrated by USCIRF and other observers, however, DHS routinely denies non-citizens who possess or express a credible fear of return the opportunity to apply for asylum.[57] Under these circumstances, DHS's failure to comply with the Asylum Statute and its own internal regulations during expedited review denies eligible individuals access to the asylum process both in the first

[57] *See*, *e.g.*, 2005 USCIRF Report, *supra*, note 6; 2007 USCIRF Report, *supra*, note 27; 2016 USCIRF Report, *supra*, note 28; HRW Report, *supra*, note 36; and ACLU Report, *supra*, note 38.

instance and in every other instance thereafter. And because there is no evidence that DHS ever considered these outcomes from a policy perspective, the Ninth Circuit's decision delegated vital questions of statutory interpretation to the same immigration officers that consistently fail to enforce the law.

Second, the Ninth Circuit's erroneous deference to DHS's regulation addressing the Reinstatement Statute disregards persecution occurring *after* an individual's removal from the United States. In doing so, it presumes that social and political conditions in foreign countries will remain static, and that there are no future circumstances where non-citizens subject to removal orders might merit relief. This comfortable fiction flouts the plain text of the Asylum Statute[58] while ignoring the invasions, insurrections, and repressions that dominate contemporary world events. After 2011, for example, many Syrians faced persecution and torture perpetrated by the Syrian Government on political, religious, and ethnic grounds.[59] After 2014, Iraqis living in Mosul and surrounding regions faced similar horrors at the hands of the Islamic State of Iraq and Syria ("ISIS").[60] And after 2016, lawyers, activists, and

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[58] *See* 8 U.S.C. § 1158(a)(2)(D).

[59] *See* U.S. DEP'T OF STATE, 2016 SYRIA HUMAN RIGHTS REPORT 4-9 (2017), *available at* https://www.state.gov/documents/organization/265732.pdf.

[60] *See* U.S. DEP'T OF STATE, 2016 IRAQ HUMAN RIGHTS REPORT 4, 6, 9, 13, and 21 (2017), *available at* https://www.state.gov/documents/organization/265710.pdf.

minority groups in China experienced a new wave of arbitrary arrests, brutal beatings, forced confessions, and other outrages as part of the Chinese Communist Party's new campaign to stifle internal dissent.[61]

Each of these recent examples demonstrates how swiftly conditions in foreign countries change. And like the Petitioner's experience in Guatemala, they show how severe the resulting persecution can be. Yet despite these changed circumstances, undocumented individuals in the Ninth Circuit who receive removal orders and suffer persecution and torture after their departure currently have no right to seek asylum, no prospect of securing asylum, and almost no hope of finding refuge in the United States. The same is equally true in each of the other federal circuits granting precedence to the Reinstatement Statute. This preclusion flouts Congress's efforts to protect *bona fide* refugees caught in expedited removal proceedings.[62] It also applies arbitrarily – including in those instances where a foreign national's previous flight to the United States invites new persecution on political or religious grounds.

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[61] *See* U.S. DEP'T OF STATE, 2016 CHINA HUMAN RIGHTS REPORT 2-6, and 13 (2017), *available at* https://www.state.gov/documents/organization/265540.pdf.

[62] *See e.g.*, 8 U.S.C. § 1225(b)(1)(A)(ii).

## B. PRECLUSION TREATS VULNERABLE ASYLUM SEEKERS LESS FAVORABLY AND PRODUCES ABSURD RESULTS

In addition to perpetuating the false presumptions described above, precluding asylum applications under the Reinstatement Statute treats unsuccessful asylum seekers more favorably than *bona fide* refugees who were previously denied an opportunity to apply. Under the Asylum Statute, non-citizens may seek asylum whenever "changed circumstances materially affect the applicant's eligibility. . . ."[63] Those present in the United States may submit application years or even decades after the U.S. Government denies their initial petition, and may do so even if they previously sought to re-open their cases.[64]

This measure is consistent with the Asylum Statute's language authorizing any foreign national in the United States to seek asylum regardless of their immigration status.[65] When read together, the two provisions show that Congress sought to protect *bona fide* refugees suffering persecution as the result of changed circumstances and rejected the notion that prior applications should bar future relief. The result was a pragmatic, facially neutral process

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[63] *See* 8 U.S.C. § 1158(a)(2)(D).

[64] *See*, *e.g.*, *Joseph v. Holder*, 579 F.3d 827 (7th Cir. 2009) and *Chen v. Mukasey*, 524 F.3d 1028 (9th Cir. 2008).

[65] 8 U.S.C. § 1158(a)(1).

emphasizing an applicant's ability to demonstrate either a credible or reasonable fear of persecution.

Granting *Chevron* deference to a DHS regulation addressing the Reinstatement Statute sabotages this system in two ways. First, the Ninth Circuit's decision favors individuals possessing valid visas over those subject to expedited removal proceedings. This approach establishes an arbitrary distinction between asylum seekers based on their prior immigration status rather than the substantive merits of their claims. More seriously, it privileges individuals with the time, resources, and relationships necessary to obtain legal status in the United States, while precluding some of the most vulnerable refugees from seeking the relief Congress intended. The result is a system that tends to favor wealthier asylum seekers arriving at international airports while penalizing poorer Central American refugees crossing the southern border.

Second, the Ninth Circuit's erroneous application of *Chevron* deference produces absurd results. Under the Reinstatement Statute, for example, a prior removal order cannot be reinstated unless an undocumented individual leaves the United States and subsequently returns.[66] This means that non-citizens who remain in the United States illegally after receiving a removal order can seek asylum, while those complying with a removal order cannot. In this manner, the Ninth Circuit and

[66] *Id.*

other circuits granting precedence to the Reinstatement Statute favor individuals that that violate U.S. law above the *bona fide* refugees that Congress sought to protect.

These arbitrary outcomes carry profound implications for the asylum process. Resolving these issues in favor of the Asylum Statute will save lives and reunite families while guarding against the systemic and thoroughly-documented abuses in the expedited removal program. Neglecting them, by comparison, will reward errors, foster abuses, and circumvent Congressional intent. Absent this Court's intervention, the Petitioner and other similarly-situated refugees will remain trapped in a twilight zone between the homeland they must flee and the sanctuary they can never have.

## CONCLUSION

For all of these reasons, *amicus curiae* urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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SEPTEMBER 27, 2017