No. 12-1516

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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Marko Vrljicak
Petitioner,

v.

Eric H. Holder, Jr.,
Attorney General of the United States
Respondent.

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# BRIEF BY *AMICUS CURIAE* NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF MARKO VRLJICAK'S PETITION FOR REVIEW

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# CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-1516
Short Caption: Vrljicak v. Holder

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

**The National Immigrant Justice Center**

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

**The National Immigrant Justice Center**

(3) If the party or amicus is a corporation:

1) Identify all of its parent corporations, if any; and

**The Heartland Alliance for Human Needs and Human Rights**

2) list any publicly held company that owns 10% or more of the party's or amicus' stock:

**None.**

---

Attorney's Signature **s/ Keren Zwick** Date: **August 13, 2012**

Attorney's Printed Name: **Keren Zwick**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes**

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**None.**

---

Attorney's Signature **s/ Charles Roth** Date: **August 13, 2012**

Attorney's Printed Name: **Charles Roth**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **No**

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The National Immigrant Justice Center (NIJC), a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based non-profit organization that provides free legal representation to low-income refugees and asylum seekers. With collaboration from more than 1,000 *pro bono* attorneys, NIJC represents approximately 200 asylum seekers at any given time before the Asylum Office, the Immigration Courts, the Board of Immigration Appeals, the Federal Courts of Appeals, and the Supreme Court. In addition to the cases that NIJC accepts for individual representation, it also screens and provides legal orientation to hundreds of additional potential asylum applicants every year. One of the biggest hurdles affecting these asylum applicants is the enforcement of the one-year filing deadline. Accordingly, NIJC has subject-matter expertise that is relevant to the subject of Petitioner's case and is well positioned to assist this Court in its consideration of the present case.

## SUMMARY OF ARGUMENT

Petitioner's case presents a legal challenge to the standards applicable to the one-year filing deadline in asylum cases. Because of the Agency's flawed interpretation, many bona fide refugees are excluded from legal protections in the United States, contrary to the purpose behind the statute. Some, like Petitioner, are granted the alternative yet inferior form of protection provided by withholding of removal, but others are ordered removed to countries where they face possible persecution.

Petitioner argues that the filing deadline is applied in a manner that is so vague that it violates the Fifth Amendment of the Constitution. NIJC, as amicus curiae, offers a narrower and antecedent argument. NIJC contends that the Agency's interpretation of the statute is unreasonable because it has become completely unhinged from the purposes and goal of the underlying statutory provision. The legislative history shows that Congress was seeking to eliminate any incentive to put forward frivolous asylum claims, particularly to obtain work authorization; the structure of the statute and the statutory and regulatory context confirms this understanding. Yet the Agency's interpretation of the one-year filing deadline makes literally no account of this rationale and goal. Accordingly, NIJC submits that it is unnecessary for the Court to reach Petitioner's constitutional arguments. The Court should grant the Petition for Review and remand to permit the Agency to enunciate a reasonable policy for the statute that takes into account the underlying Congressional goals.

## ARGUMENT

### I. The Court ought to address the statutory arguments which follow as logically prior to the issues raised in Petitioner's brief.

Amicus NIJC argues that the Board of Immigration Appeals (BIA or Agency) fails to properly analyze the factors relevant to the one-year filing deadline for asylum cases because it ignores entirely the purpose of the deadline, as evidenced by legislative history and the structure and context of the provision. As a result, individuals who are refugees and who pose no threat whatsoever to the safety and security of this nation are

excluded from asylum protections. The Court has jurisdiction to consider whether the agency's interpretation of the statute is reasonable, and ought to address those arguments prior to considering Petitioner's constitutional arguments. The Court has previously substituted statutory arguments for constitutional ones in immigration cases, and ought to follow that practice here. NIJC's narrowly tailored position would avoid the need to reach constitutional arguments.

### A. This court retains jurisdiction to consider Petitioner's challenge to the legality of the one-year filing deadline in asylum cases.

A threshold question for this Court in immigration cases is its jurisdiction to consider the appeal. While this court lacks jurisdiction to review the application of the one-year filing deadline in asylum cases, *see* 8 U.S.C. § 1158(a)(3); *Paez Restrepo v. Holder*, 610 F.3d 962, 964-65 (7th Cir. 2010); *Ishitiaq v. Holder*, 578 F.3d 712, 715-16 (7th Cir. 2009), it does have jurisdiction to consider questions concerning the constitutionality or legal application of the deadline. *See* 8 U.S.C. § 1252(a)(2)(D); *Viracacha v. Mukasey*, 518 F.3d 511, 514 (7th Cir. 2008) (explaining interplay between § 1158(a)(3) and § 1252(a)(2)(D)). This court has commented that a petitioner cannot avoid the jurisdictional bar imposed by § 1158(a)(3) by framing a challenge to the Agency's factual or discretionary analysis as one raising a constitutional or legal question. *See Abraham v. Holder*, 647 F.3d 626, 632 (7th Cir. 2011); *Viracacha*, 518 F.3d at 514. But because Petitioner's argument is a challenge to the validity of the reasonableness element of the one-year filing deadline itself—and not merely to its application to the facts of his case—this Court retains

jurisdiction to consider the arguments presented by Petitioner in his opening brief and by NIJC in this brief.

The importance of this Court's jurisdiction to consider Petitioner's legal challenge to the one-year filing deadline is underscored by the Supreme Court's recent decisions in *Kucana v. Holder*, 130 S. Ct. 827 (2010), and *Judulang v. Holder*, 132 S. Ct. 476 (2012). In *Kucana* the Supreme Court reaffirmed the jurisdiction of the federal courts to review the denial of a motion to reopen, and in doing so it emphasized the importance of the presumption favoring judicial review of administrative decisions. *Kucana*, 130 S. Ct. at 839-40. And in *Judulang*, a unanimous Court, exercised its question-of-law jurisdiction to reject a developed by the BIA for § 212(c) of the Immigration & Nationality Act (INA), on grounds that the Agency's rule was so divorced from the purpose of the underlying statute that it was arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A). *Judulang*, 132 S. Ct. at 484. *Judulang* involved a discretionary waiver application where the Court's jurisdiction was limited by 8 U.S.C. § 1252(a)(2)(B)(ii) to questions of law and constitutional questions. It thus reinforces this Court's authority to review the reasonableness of the Agency's interpretation of the reasonableness component of the one-year filing deadline, including the factors relevant to that analysis. *See also, e.g.*, *Champion v. Holder*, 626 F.3d 952, 956-57 (7th Cir. 2010) (granting petition for review under § 1252(a)(2)(D) to assess whether agency properly considered factors for cancellation of removal).

### B. Both NIJC and Petitioner are offering the Court reasons to invalidate the Agency's interpretation of the exceptions to the one-year asylum deadline.

Another important consideration for the Court when evaluating the arguments presented in a brief submitted by *amicus curiae* is the extent to which the arguments coincide with those presented by the relevant party. The Court is not required to consider the arguments raised by an amicus if that position is not also advanced by the Petitioner. *See Knetsch v. United States*, 364 U.S. 361, 370 (1960); *Garcia v. United States Bd. of Parole*, 557 F.2d 100, 107 (7th Cir. 1977). The arguments presented in this brief, however, correspond to, and compliment, those raised in Petitioner's opening brief.

Petitioner argues that the regulations implementing the exceptions to the one-year filing deadline for asylum applications are "susceptible [to] arbitrary enforcement" because, under the existing scheme, more than 260 judges in 59 different immigration courts are free "to classify the same conduct in contrary ways."[1] (Pet'r Br. 37-39.) Petitioner frames his challenge to the arbitrary nature of the Agency's action as an argument under the Fifth Amendment of the Constitution. NIJC frames its argument as a matter of statutory interpretation, but the gravamen of NIJC's position is similar: the Agency's interpretation of the one-year deadline and the exceptions thereto is arbitrary and inconsistent with statutory intent. This Court thus has authority to consider the content of NIJC's brief. *See Citizens United v. FEC*, 130 S. Ct. 876, 893 (2010) (noting that

[1] *See* U.S. DEP'T OF JUSTICE, OFFICE OF THE CHIEF IMMIGRATION JUDGE, http://www.justice.gov/eoir/ocijinfo.htm (last visited Aug. 12, 2012).

"any argument in support of a claim" can be presented long as the argument does not raise a completely new claim); *Voices for Choice v. Ill. Bell Telephone Co.*, 339 F.3d 542 (7th Cir. 2003) (Posner, J. in chambers) (noting that a brief submitted by amicus curiae must do more than merely repeat the arguments made by the parties).

Indeed, NIJC's position is motivated by the doctrine of constitutional avoidance and aims to offer this Court a means of ruling in favor of Petitioner without concluding that the Agency's action is unconstitutional. *See Sankoh v. Mukasey*, 539 F.3d 456, 464 (7th Cir. 2008) ("Given the canon of constitutional avoidance, . . . 'aliens are better-served by arguing . . . that immigration proceedings infringed [some] statutory [or] regulatory right'—not that the proceedings fell short of what the constitution requires." (quoting *Khan v. Mukasey*, 517 F.3d 513, 518 (7th Cir. 2008)). If the court accepts NIJC's position that the Agency's method for applying the exceptions to the one-year filing deadline violates the APA, it need not reach the more significant question whether the exceptions to the one-year rule are constitutional.

## II. The Agency applies the exceptions to the one-year filing deadline in ways that harm legitimate applicants and that contradict legislative intent.

Although the INA provides the agency with fairly broad authority to administer the one-year filing deadline and the accompanying exceptions and also limits the Court's authority to review the application of the rule to individual cases, the Agency's position is constrained by the evident purpose and intent of the statute. The decision

below does not adequately account for the purpose and intent of the statute, and the Agency has not done so in any other authoritative manner.

### A. The statutory and regulatory scheme provides the Agency with limited guidance as to the application of the one-year deadline.

The INA requires an asylum applicant to "demonstrate by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States," 8 U.S.C. § 1158(a)(2)(B), but it also gives the Agency authority to excuse an applicant's failure to file within one year for "changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application." *Id.* § 1158(a)(2)(D).

The Agency has promulgated regulations instructing that an applicant relying on a "changed" circumstance must file "within a reasonable period given those 'changed circumstances.'" *See* 8 C.F.R. § 1208.4(a)(4)(ii). And an applicant relying on "extraordinary" circumstances is subject to a similar limitation: "Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances." *Id.* § 1208.4(a)(5).

In 2010 the BIA issued its only published decision addressing the one-year filing deadline, but it failed to set any meaningful rules to guide the application of the rule. *See In re T-M-H-*, 25 I. & N. Dec. 193 (BIA 2010). In that case, the applicants were a Chinese couple who applied for asylum between 9 and 12

months after the birth of their second child. *Id.* at 193. On appeal the couple argued that a change in circumstances should automatically extend the filing deadline for an additional year. *Id.* The BIA refused to adopt that bright-line rule, but declined to set forth any different rule or any standards for adjudication. *Id.* at 195-96. Instead, the BIA remanded the case to the IJ to consider whether the case constituted one of the "rare instances" where a delay of a year or more would be justified. *Id.* Nowhere in its decision did the BIA instruct the IJ as to how to go about this assessment.

Although the BIA's decision falls far short in terms of setting forth meaningful guidance for adjudicators, it does provide some additional insight into how the Agency understands the rule. The BIA noted that the "reasonable period" language originated out of a concern that applicants file for asylum "as soon after the deadline as practicable given [the] circumstances." *Id.* at 194 (quoting *Asylum Procedures*, 62 FED. REG. 10,312, 10,316 (Mar. 6, 1997)). The BIA then implied that the reasonableness of the delay would depend on the specifics of the case. It suggested that in the case of an applicant "whose immigration status is simply terminated or expires" a shorter period of time would be reasonable while leaving open the possibility that other changed or extraordinary circumstances might give rise to a longer reasonableness window that should be adjudicated on a "case-by-case basis." *Id.* at 194-96. Thus, more

than 15 years after the one-year deadline was enacted, the BIA's only guidance to adjudicators is to apply the rule on a case-by-case basis, in light of limited factors specified in regulation.

### B. In enacting the one-year deadline, Congress expressly intended to ensure that it not be applied to exclude legitimate refugees from asylee status.

The legislative history behind the one-year filing deadline is sparse, but the stated intent of Congress was clearly to reduce the filing of false or frivolous asylum applications, and not to affect legitimate asylum-seekers. A prominent concern of supporters was to curb the then-prevalent practice of filing an asylum application for purposes of obtaining work authorization.[2] *See* 142 CONG REC. S4468 (daily ed. May 1, 1996) (statement of Sen. Simpson) (explaining the desire to target individuals who apply for asylum "because they know that [the] procedures are interminable.").

The debate over a filing deadline largely centered on the need to protect legitimate refugees. For instance, Senator Kennedy advocated for an extended deadline in order to protect legitimate refugees.

> [T]he cases where there appears to be the greatest validity of the persecution claims—the ones involving individuals whose lives would be endangered by a forced return to their particular countries—are often the most reluctant to come forward. They are individuals who have been, in the most instances, severely persecuted. They have been brutalized by

[2] By the time the one-year rule became law, the then Immigration & Naturalization Service had already taken substantial steps to reduce fraud in the asylum process, including eliminating the practice of issuing a work permit to all individuals with pending asylum claims. *See* Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693, 696 (2008).

> their own governments. They have an inherent reluctance to come forward and to review their own stories before authority figures. Many of them are so traumatized by the kinds of persecution and torture that they have undergone, they are psychologically unprepared to be able to do it. It takes a great deal of time for them to develop any kind of confidence in any kind of legal or judicial system, after what they have been through, and to muster the courage to come forward.

142 CONG. REC. S3282 (daily ed. Apr. 15, 1996) (statement of Sen. Kennedy). Supporters of the provision acknowledged the need for "adequate protections" to protect legitimate refugees, 142 CONG. REC. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch), and "to ensur[e] that those with legitimate claims of asylum are not returned to persecution." 142 CONG. REC. S11840 (daily ed. Sept. 30, 1996) (pre-vote colloquy between Sen. Abraham and Sen. Hatch). Even Senator Simpson, one of the provision's main proponents, commented that it was not designed to bar legitimate applications. He remarked, "We are not after the person from Iraq, or the Kurd, or those people. We are after the people gimmicking the system." 142 CONG REC. S4468 (daily ed. May 1, 1996) (statement of Sen. Simpson).

These concerns led to the modification of the initially proposed filing deadline, and the creation of the two exceptions. *See* Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 10 (2001). Two Senators instrumental in the passage of the one-year deadline, Senator Hatch (one of the conferees) and former Senator Abraham, engaged in a colloquy on the floor of the Senate in which they repeatedly described these exceptions as "important" and

intended to cover "a broad range of circumstances that may have changed and that affect the applicant's ability to obtain asylum," including "situations that we in Congress may not be able to anticipate at this time." 142 CONG. REC. S11839-40 (daily ed. Sept. 30, 1996) (pre-vote colloquy between Sen. Abraham and Sen. Hatch).

### C. The structure of the filing deadline in the context of asylum and refugee law confirms the legislative intent.

The expressed legislative intent of the sponsors of the one-year filing requirement is supported by the structure of the rule, and particularly how it intersects with national treaty obligations and other statutory authority.

While Congress required that asylum applications be filed within one year of arrival in the United States, it did not enact a similar rule for withholding of removal. *Cf.* 8 U.S.C. § 1231(b)(3). Withholding of removal is necessary, and is intended, to bring domestic law into compliance with treaty obligations to protect refugees. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432-41 (1987) (recounting legislative history); 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150; 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. Thus, individuals who are not permitted to seek asylum due to the one-year filing deadline are nonetheless permitted to seek protection from removal. *See*, *e.g.*, *Khan v. Mukasey*, 517 F.3d 513, 518 (7th Cir. 2008).

Individuals seeking withholding of removal are given a hearing before an Immigration Judge on their applications. 8 C.F.R. § 208.16. They are afforded an appeal

to the BIA, and removal is stayed pending adjudication of the appeal. 8 C.F.R. § 1003.6(a). The individual may even seek judicial review over the denial of withholding of removal. *See, e.g.*, *Khan*, 517 F.3d at 517-18. The one-year filing deadline does not speed the removal process in such cases; nor should Congress be understood to have been seeking to speed the removal process by means of a rule that would not accomplish that end.

The structure of the immigration laws and how they function illuminates the significance of Congress's rule. Unlike asylum, which may be sought affirmatively from the government, 8 C.F.R. § 208.2(a), withholding of removal may only be sought defensively, that is, by an individual who is in removal proceedings or has been ordered removed. 8 C.F.R. §§ 208.2(c)(2); 208.16(a). Moreover, the statute and regulations authorize an asylum applicant to obtain employment authorization under some circumstances. *See* 8 U.S.C. § 1158(d)(2); 8 C.F.R. § 208.7. Those regulations do not apply to applicants for withholding of removal. Together, these provisions create a significant functional difference between asylum applicants and withholding applicants. Individuals may seek asylum when not in removal proceedings, and may obtain a work authorization in some cases; individuals not in removal proceedings may not seek withholding of removal, and individuals in removal proceedings are not able to obtain work authorization through a withholding application. In short, the

application system for withholding of removal is not susceptible to "gimmicking the system" as was asylum before this statute was adopted.

NIJC submits that the structural context illuminates and confirms the stated intentions of the sponsors of the one-year filing deadline. The stated goal of the sponsors of this provision was to weed out weak and frivolous asylum applications. The effect of the deadline was to eliminate an incentive to file weak or frivolous asylum applications. The statute ought to be interpreted consistently with this goal.

### D. As this case illustrates, the Agency's implementation of the statutory scheme has not been faithful to the intent and purpose behind it.

In practice the application of the exceptions to the one-year rule has had exactly the effect that Congress intended to avoid: it excludes legitimate refugees from asylee protections. Each year, many applicants—like Petitioner—are granted withholding of removal but denied asylum merely for failure to meet the one-year filing deadline. An individual who is granted withholding must show that it is more likely than not that he will face persecution in his home country on account of his membership in a protected group. *See* 8 U.S.C. § 1231(b)(3)(A); *INS v. Stevic*, 467 U.S. 407, 413, 429-30 (1984). In light of this standard, an individual who is granted withholding has gone beyond what is necessary to satisfy the "reasonable possibility" standard required to prove eligibility for asylum. *See Cardoza-Fonseca*, 480 U.S. at 440 (noting that a reasonable possibility can be as low as a one in ten chance of future persecution); *Kllokoqi v. Gonzales*, 439 F.3d 336,

345 (7th Cir. 2005). Yet, despite satisfying a more rigorous standard, these individuals are excluded from asylum protections.

In 2010 NIJC conducted a study of 3,472 asylum and withholding cases filed and decided by the BIA in a single month (January) of four different years from 2005 to 2008. *See* Heartland Alliance Nat'l Immigrant Justice Ctr. et al., *The One-Year Asylum Deadline and the BIA: No Protection, No Process* (2010).[3] The study found that the filing deadline poses a hurdle for approximately 20 percent of applicants with cases pending before the BIA. *Id.* at 6-7. The data also revealed that in nearly *half* of those cases involving the filing deadline, failure to satisfy either of the exceptions to the rule is the *only* reason given by the BIA for denying asylum (as opposed to denials based on issues like credibility, criminal records, or failure to satisfy the definition of a refugee). *Id.* at 6.

The breadth of the impact of the one-year filing deadline cannot be overlooked. "Between 1999 and 2005, Asylum Officers (AOs) denied at least 35,429 claims on account of the one-year bar." *See* Musalo & Rice, 31 HASTINGS INT'L & COMP. L. REV. at 698. There are countless examples of individuals from around the world who are denied asylum based exclusively because of their failure to meet the one-year deadline:

- "A Gambian mother who was married against her will at the age of 15, forcibly subjected to female genital cutting (FGC), suffered years of domestic violence and rape, witnessed domestic violence against her children, and finally escaped to the United States. As part of her asylum application, she submitted evidence of her diagnosis with Post Traumatic Stress Disorder (PTSD), resulting from the

[3] *Available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/1YD%20report%20FULL%202010%2010%2020%20FINAL.pdf.

years of abuse. In spite of this, the IJ denied asylum because of the one-year bar and granted withholding." *Id.* at 700 (citing CGRS case, *Matter of Anon*).

- NIJC currently represents a young Rwandan Tutsi who was seven years old at the time of the 1994 genocide. After witnessing the murder of his mother and two nieces, the young man came to the United States on a student visa in 2007. He applied for asylum seven or eight months after his student status ended and nine months after one of his family members was killed in Rwanda by a recently-released genocidaire. The Asylum Office concluded that he failed to submit his application within a reasonable time given his changes in circumstances. His case remains pending before the immigration court.

- A bisexual man from Jamaica was denied asylum because the one-year deadline made him ineligible. Even though the BIA credited his testimony and found "the documentary evidence of widespread violence directed against bisexual and homosexual individuals living in Jamaica troubling," it nonetheless concluded that the applicant "failed to establish a clear probability of persecution or torture upon his return to Jamaica." Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. CITY L. REV. 233 (quoting decision in Immigration Equality case, *Matter of L-R-*).

These examples are by no means exhaustive. The one-year filing deadline poses a challenge in approximately 25% of the more than 200 cases that NIJC's asylum project is currently handling, and many of those stories are equally compelling.

**E. The effect of the agency's departure from the statutory purpose is to deny meaningful protections to legitimate refugees.**

The arbitrary application of the exceptions to the one-year filing deadline is particularly problematic in light of the substantial consequences of excluding an individual from eligibility for asylum. Petitioner mentions two of the most significant limitations to a grant of withholding, the lack of a pathway to permanent residency and

the perpetual limbo that stems from living in the United States while under a final order of removal (Pet'r Br. 31), but there are more.

One of the most significant drawbacks to a grant of withholding of removal is that, as opposed to asylees, these individuals face long-term, if not permanent, separation from their families as a result of two different limitations in the regulations. First, individuals who are granted asylum are able to petition for their spouses and children to join them as derivatives on their asylum status, but individuals who receive only withholding of removal enjoy no such benefit. *Compare* 8 U.S.C. § 1158(b)(3) *and* 8 C.F.R. § 1208.21 (allowing asylees to file derivative petitions for their spouses and children) *with* 8 U.S.C. § 1231(b)(3) (failing to provide any authority for recipients of withholding of removal to file derivative applications); *see Ali v. Ashcroft*, 394 F.3d 780, 782 n. 1 (9th Cir. 2005); Philip G. Schrag, et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 669 (2010). Thus, an applicant who misses the filing deadline and fails to convince the judge that the delay in filing was "reasonable" will be unable to file a petition for family members living abroad. Second, an individual who receives withholding cannot travel abroad to visit his family or for any other purpose. *See* 8 C.F.R. § 223.2 (establishing procedures for asylees and refugees, but not recipients of withholding of removal, to apply for a foreign travel document); Neilson & Morris, 8 N.Y. CITY L. REV. at 244-45 & n. 79. Because recipients of withholding of removal are unable to petition for their families,

are unable to travel abroad, and often hail from countries where it is difficult for family members to receive a visa to visit the United States, family reunification becomes practically impossible.

Recipients of withholding of removal are also subject to numerous additional conditions and restrictions on their status in the United States. They must apply annually for a work permit while asylees can work without special authorization. *See* Memorandum from William Yates Bureau of Citizenship & Immigration Services, *The Meaning of 8 C.F.R. 274a. 12(a) as it Relates to Refugee and Asylee Authorization for Employment,* (Mar. 10, 2003). They are subject to periodic check-ins with immigration officials, and they must seek to reopen their immigration cases if they later become eligible for some other immigration benefit. While these limitations may be appropriate for those individuals that Congress intended to exclude from asylum eligibility (for example, those with serious criminal convictions), there is no indication that such limits should apply to individuals who, by virtue of their grant of withholding of removal, necessarily qualify as refugees.

## III. The case should be remanded for the Agency to enunciate a rational rule for addressing cases like the Petitioner's case.

As Amicus has explained above, the Agency's policy with regard to the one-year filing deadline has become "unmoored from the purposes and concerns of the immigration laws." *Judulang*, 132 S. Ct. at 490. The fact that the statute is drawn so as to give the Agency broad discretion over the contours of the application of the exception

to the filing deadline does not eliminate the obligation for the Agency's rules to be reasonable as measured against the statute's goals: "[e]ven if the statute is ambiguous, and even if the Attorney General is empowered to issue regulations to fill in gaps in the statute, those regulations must be 'reasonable in light of the legislature's revealed design.'" *Zheng v. Gonzales*, 422 F.3d 98, 116 (3d Cir. 2005) (quoting *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)). The Agency's one-year rule fails in this regard.

It has now been 15 years since the one-year asylum deadline became part of the INA, but the BIA has yet to issue any published decision addressing the arguments raised in this brief. The BIA's unpublished decisions are not entitled to deference under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Arobelidze v. Holder*, 653 F.3d 513, 521 (7th Cir.2011). More significantly, unpublished decisions do not purport to, and cannot serve to, guide Immigration Judges or to express the policy of the Agency. Thus, as it stands, neither the BIA's published decisions nor the Agency's regulations offer substantive guidance on this point. When the result is the denial of meaningful protections to bona fide refugees, the lack of guidance is intolerable. The Court should remand this case to the BIA with instructions to provide such guidance.

### A. The Agency has not explained why the merits of an asylum case are not relevant for purposes of applying the exceptions to the one-year filing deadline.

As the discussion of the statutory purpose above makes clear, the one-year filing deadline was never intended to exclude bona fide refugees from the protections provided by asylum. Yet that is precisely what is occurring under the current regulatory scheme. This court should remand this case with instructions that the Agency apply of the one-year deadline in a manner that takes into account whether an applicant meets the definition of a refugee and that favors a grant of asylum for those individuals who, but for the existence of the filing deadline would be eligible to receive that protection. NIJC's proposed application of the filing deadline would not require a cosmic shift in the statutory or regulatory scheme. To the contrary, there are at least two ways in which this consideration could be factored into the existing analysis.

#### 1. The Agency has not explained why a grant of withholding of removal is not a change in circumstances within the meaning of the statute.

Changed circumstances include "circumstances materially affecting the applicant's eligibility for asylum." 8 C.F.R. § 1208.4(a)(4)(i)(B). Contrary to the Immigration Court's decision in this case, a "changed circumstance" for purposes of applying the exception to the deadline need not be something that occurred in the applicant's home country. *See Id.* (including "[c]hanges in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country

of feared persecution that place the applicant at risk."). A change in circumstances that affects asylum eligibility is material if it amounts to "an effect that increases, in a non-trivial way, the applicant's likelihood of success in his application." *Vahora v. Holder*, 641 F.3d 1038, 1044 n.4 (9th Cir. 2011).

Amicus perceives no sound reason why a grant of withholding of removal would not operate as a change in circumstances under this standard. As discussed above, a grant of withholding is a clear signal that an applicant meets the definition of a refugee, and indeed that the person has overcome a burden of proof that is more stringent than the burden for asylum applicants. The grant of withholding under 8 U.S.C. § 1231(b)(3) necessarily signifies that the applicant has met all of the requirements for asylum, except for the one-year filing requirement and the discretionary component of an asylum grant.

**2. The Agency has not explained why a grant of removal does not trigger the regulatory requirement that a discretionary denial of asylum must be reconsidered after a grant of withholding of removal.**

The statute requires applicants seeking to invoke an exception to the one-year rule to prove their eligibility "to the satisfaction of the Attorney General." 8 U.S.C. § 1158(a)(2)(D). As this Court has repeatedly commented, this language places the adjudication of the one-year filing deadline squarely within the discretion of the adjudicator. *See Khan v. Filip*, 554 F.3d 681, 687 (7th Cir. 2009); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005).

The discretionary nature of this analysis is most often invoked as a factor in stripping appellate courts of judicial review of the application of the one-year deadline to the facts of a given case. But there is another consequence. The regulations provide that, "In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section. . . the denial of asylum shall be reconsidered." 8 C.F.R. § 1208.16(e). The purpose of this regulation is primarily to counteract one of the severe consequences of withholding discussed above, family separation. The regulation mandates reconsideration in recognition of the fact that denial of asylum "will preclude the alien from admitting his/her spouse or minor children" as derivatives, and adjudicators are instructed to consider such factors as "reasonable alternatives" for family reunification. *See id.*; *Wu Zheng Huang v. INS*, 436 F.3d 89, 92 (2d Cir. 2006).

Despite the frequency with which the one-year asylum filing rule is invoked, this regulation has been cited only infrequently. It is only cited in three appellate court cases. *See Arif v. Mukasey*, 509 F.3d 677, 680-81 (5th Cir. 2007); *Zheng*, 436 F.3d at 89; *Huang v. INS*, 436 F.3d 89, 91 (2d Cir. 2006).

The Agency has given no justification as to why a grant of withholding of removal should not trigger this obligation to reconsider an applicant's grant of asylum. Such reconsideration is generally appropriate given the grave effects on all refugees denied asylum, and in light of the fact that an individual granted withholding

necessarily meets the definition of a refugee and thus should be eligible for asylum. Applying the regulation in this fashion would enable the Agency to consider applications for asylum in a manner that is more consistent with the statutory purpose.

**B. The Court should remand the matter to the Agency to permit it to enunciate a rational policy in the first instance.**

The Supreme Court has adopted an "ordinary remand rule" in immigration cases, under which the federal courts avoid pronouncing on legal matters in the first instance. *See Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (remand to Agency is proper course when additional determination or explanation is necessary); *INS v. Ventura*, 537 U.S. 12, 16 (2002) (*per curiam*) (same). The Supreme Court has prudentially declined to decide matters prior to affording the Board an opportunity to do so. *See Negusie v. Holder*, 555 U.S. 511 (2009) (declining to decide scope of persecutor bar in the first instance).

In other contexts, sister courts of appeals have remanded matters to the BIA for issuance of a published decision. *See*, *e.g.*, *Ucelo-Gomez v. Gonzales*, 464 F. 3d 163, 171-72 (2d Cir. 2006). The Second Circuit has enunciated six factors governing when that court will remand to the Board for authoritative guidance:

> (1) insufficient attention by the IJ and the BIA to the questions identified here; (2) the desirability of national uniformity given the grave consequences …; (3) the ambiguity of the statute and corresponding regulations; (4) the dearth of law in this circuit related to these questions; (5) the high volume of cases that this issue implicates; and (6) the severe impact … on an alien's immigration prospects.

*Mei Juan Zheng v. Mukasey*, 514 F.3d 176, 181 (2d Cir. 2008) (citing *Yuanliang Liu v. U.S. Dep't of Justice*, 455 F.3d 106, 116 (2d Cir.2006). All six factors are present here. First, as noted above, the Board has issued only one precedential decision related to the one-year asylum deadline, though that is the basis for denial of thousands of cases annually. Second, it is particularly important for there to be a national standard for asylum applications because individuals are commonly transferred in detention, and because non-detained asylum-seekers might otherwise move to circuits perceived as being more favorable to their claims. Third, the statute and regulations leave the Board exceptionally broad discretion, which in this case has led to a vagueness challenge. Fourth, while this Court has case law regarding issues of jurisdiction, the effect of those decisions is to preclude merits-based review of the BIA's reasoning, which leads to the same result. Fifth, the volume of cases implicated by the rule is immense, as noted above. Finally, the impact of an asylum denial is substantial, even where, as here, the effect is not removal to possible persecution but permanent legal limbo without the opportunity to move towards citizenship.

The Second Circuit's remand approach has been cited approvingly by the Attorney General. Board of Immigration Appeals: Publication of Precedent Decisions, 73 F.REG. 34,654, 34,660 (proposed June 18, 2008) (cited in *Rajah v. Mukasey*, 544 F.3d 449, 455 (2d Cir. 2008). The Second Circuit has described remands for authoritative responses as functioning as if the matter were certified to a state Supreme Court. *Ucelo-*

*Gomez*, 464 F. 3d at 172. The analogy appears apt. Just as state supreme courts bear particular responsibility and expertise as to state law, the Board's expertise and the courts' policy of deference towards administrative agencies make remand to the BIA appropriate in cases such as this. In cases such as this one, Amicus believes this process to be appropriate.

## CONCLUSION

For the foregoing reasons, NIJC urges the Court to conclude that the Agency's interpretation of the one-year filing deadline for asylum applicants is so untethered from the purpose and goal of the statute as to be unreasonable. The Court should grant Petitioner's Petition for Review and remand to the Board to permit the Agency to provide authoritative guidance in this matter.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), this is to certify that the foregoing Brief complies with the type-volume limitation of Rule 32(a)(7)(B), because this brief contains 6,245 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). Amicus curiae's brief has been prepared using the Microsoft Word, and it uses 12-point proportional font (Palatino Linotype).

August 13 , 2012

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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 Seventh Circuit by using the appellate CM/ECF system on August 13, 2012. 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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