12-72800

NOT DETAINED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YESENIA MARISOL MALDONADO LOPEZ

A#200-595-716

Petitioner

v.

ERIC HOLDER

ATTORNEY GENERAL OF THE UNITED STATES

Respondent

Petition for Review of a Decision of the Board of Immigration Appeals

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BRIEF OF AMICUS,
AMERICAN IMMIGRATION LAWYERS ASSOCIATION & LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA

AMERICAN IMMIGRATION LAWYERS ASSOCIATION
1331 G STREET NW, SUITE 300
WASHINGTON DC 20005

Counsel listed on following page

LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA
131 STEUART STREET,
SUITE 400
SAN FRANCISCO CA 94104

Counsel for Amicus

Robin L. Goldfaden
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OF THE SAN FRANCISCO BAY AREA.
131 Steuart Street, Suite 400
San Francisco CA 94105
415.543.9444 x.201
rgoldfaden@lccr.com

Stephen W. Manning
IMMIGRANT LAW GROUP PC
For the American Immigration Lawyers Association
PO Box 40103
Portland OR 97204
503.241.0035

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Introduction

Before the Court is the question of whether Yesenia Marisol Maldonado Lopez should have been considered for asylum when found to have a reasonable fear of persecution upon her arrival to the United States after having previously been removed. The answer to this question has profound implications for others who seek protection here after enduring unimaginable horrors in their home countries, but who, in the Government's view, are limited to withholding of removal because they previously departed or were removed under an order of removal, deportation, or exclusion.

These individuals include "Mirabel,"[1] a Honduran woman who was ordered removed in 2001. Mirabel returned to Honduras, where she became romantically involved with a man who became abusive after she moved in with him. He isolated and confined her to his home and raped her over and over again. He tied her up and permitted 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

[1] Except where otherwise indicated, pseudonyms are used here to protect the confidentiality of individuals with pending claims for protection.

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 to finish the job of killing her. Mirabel then sought refuge in the United States, where the Government reinstated her prior removal order. Although an asylum officer reached a positive "reasonable fear" determination, Mirabel is now in "withholding only" proceedings in which she will not even be considered for asylum.[2]

Like Mirabel, "David" was persecuted *after* being ordered removed. When David was originally placed in removal proceedings, she was an unrepresented 17-year-old boy who had begun to recognize herself as gay but who had not yet come to the fuller understanding that she was transgender. She was not able to talk about this with her family, and her then-guardian, an aunt, refused to take her to her court hearing. As

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[2] The facts of Mirabel's case have been confirmed by letter from Mirabel's counsel, dated June 25, 2013, on file with the authors and are also on file as Case No. 9569 with the Center for Gender & Refugee Studies at U.C. Hastings College of the Law (CGRS) (http://cgrs.uchastings.edu/), which maintains a database of asylum cases adjudicated across the country.

a result, an *in abstentia* order of removal issued. After David returned to Honduras, the increasing threat of persecution on account of being transgender led her to flee back to the United States. She was caught at the border, and based on the reinstated *in abstentia* removal order – but without a "reasonable fear" interview – she was removed. After being forced to return to Honduras, David was shot in the face for being transgender and lost an eye. She again fled to seek safety in the United States, and this time, an officer questioned her about her fear. David received a favorable "reasonable fear" determination and is now in "withholding only" proceedings.[3]

What David, Mirabel, Ms. Maldonado, and others like them have in common is they have all been found to have reasonable fear of persecution, they have never before applied for asylum, and the Government is nonetheless denying them the opportunity to do so. The stated basis for refusing to allow these individuals even to be considered for asylum is that 8 U.S.C. § 1231(a)(5) permits the reinstatement of

[3] The facts of David's case have been confirmed by letter from David's counsel, dated June 24, 2013, on file with the authors and are also on file as Case No. 9372 with CGRS. *See supra* note 2.

their prior orders to render them ineligible for asylum.[4] But this is simply wrong.

Before our nation deports any noncitizen, we must first 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 while others without such fear are subjected to expedited removal). Our nation's unwavering commitment to asylum is founded in the Refugee Act of 1980, and *never* has Congress acted to restrict first-time bona fide claimants from applying for protection based solely on prior immigration history. Indeed, Congress continues to allow individuals who have been ordered removed to apply *a second time* when changed circumstances materially affect eligibility. 8 U.S.C. § 1158(a)(2)(D). Only those who fall under the

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[4] The Government's interpretation of the statute is expressed in regulations, 8 C.F.R. §§ 208.31, 241.8, 1208.31, 1241.8, limiting returning post-order individuals with reasonable fear of persecution to consideration for withholding of removal.

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

Amici, American Immigration Lawyers Association (AILA) and Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR), write to amplify the 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 that § 1158 allows. The plain language of § 1158 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 possibly have intended.

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 who

may apply for and be granted asylum. The reinstatement regulations limiting protection from persecution to withholding of removal must be struck down, so that individuals like Ms. Maldonado, Mirabel, and David are afforded consideration for asylum, as Congress intended.

Statement of Interest of Amici

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.

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, founded in 1983, has assisted thousands of individuals fleeing persecution. In its screening process, LCCR often finds that clients have had prior contact with immigration officials but have no understanding of what transpired during or resulted from that contact. In many cases, these individuals were subjected to expedited removal when they had suffered serious persecution and remained at risk for further harm. As an organization dedicated to ensuring that bona fide refugees are afforded the protection of asylum, LCCR has great concern about reinstatement of prior orders to bar access to asylum.

No party or party's counsel, nor any other person other than amici, their members or 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 apply for asylum. There are two main case types 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 she instead should have been afforded a credible fear interview and been permitted to apply for asylum. The other is the individual – like Mirabel – who may have previously been afforded a hearing but who did not have past persecution or a well-founded fear when originally ordered removed and who returns to her home country only to be driven by persecution to flee to safety in the United States (that is, the person who develops a need for protection *after* removal).

One particular aspect of congressional intent that is quite 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 changed circumstances material to the claim for protection, 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 § 1231(a)(5) to bar asylum to those who reenter (or seek to do so) after removal or departure under an order cannot be reconciled with § 1158, which alone establishes who may apply for and be granted asylum and who may not. The agency cannot by regulations preclude an application that § 1158 permits. 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 bar from asylum those who are otherwise eligible for protection under § 1158, the statute specifically governing asylum. In Section II, focusing on two categories of cases in which the Government has been employing § 1231(a)(5) to bar asylum, we examine key ways in which the Government's approach contravenes Congressional intent and leads to arbitrary results.

We take no position on the merits of Petitioner's asylum claim. References to the facts in this case are for illustrative purposes only.

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 primarily at issue here – the asylum statute, § 1158, and the reinstatement statute, § 1231(a)(5).[5] 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" definition. Section 1231(a)(5) provides for the reinstatement and execution of prior removal orders and renders covered individuals ineligible for "relief."[6]

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[5] Also implicated is §1225, discussed *infra*, which establishes specialized procedures designed to ensure that individuals are permitted to seek asylum before being subjected to expedited removal when they have credible fear of persecution.

[6] In full, the reinstatement statute provides:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. § 1231(a)(5). Claiming this provision 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.

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.

The INA's asylum provision, 8 U.S.C. §1158, establishes who may apply for and be granted asylum. The separate reinstatement provision does not bear on such determinations. Several aspects of §1158 make this clear.

A. Congress's 1996 Revision of the Statute

1. The Asylum Statute

In 1980, Congress widely 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. Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 102. Through several major changes to the INA, the broad availability of asylum remained constant.[7]

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[7] Between 1980 and 1996, the only changes to the asylum statute were to provide that an individual with an aggravated felony conviction could neither apply for nor be granted asylum and to address work authorization for applicants. Pub. L. No. 101–649, title V, §515(a)(1),

Then, in 1996, Congress substantially revamped the asylum statute and prescribed from stem-to-stern the authority for who *can* and who *cannot* apply for 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." § 1158(a). It divided this section into two: (1) a general 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).]" 8 U.S.C. § 1158(d)(1) (emphasis added).

Section 1158(a) is the gateway to a merits adjudication of an asylum application. Unless a specifically enumerated exception applies,

(continued…)

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

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 it re-crafted the asylum statute in 1996, Congress 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.

There are only three exceptions to the broad authority to apply for asylum – if the individual (A) can be removed to a safe third country, (B) seeks asylum more than one year after arrival, or (C) previously filed for asylum. 8 U.S.C. § 1158(a)(2)(A)-(C).[8] If a noncitizen is not covered by § 1158(a)(2), she may apply for asylum.

For merits adjudications, Congress specified the "[c]onditions for granting asylum" in 8 U.S.C. § 1158(b). Congress also divided this section 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

[8] There are exceptions to these exceptions, *see* 8 U.S.C. § 1158(a)(2)(D)-(E), one of which is particularly relevant to the issue before the Court, *see infra* Section II.B.

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 is described by cross-reference to other parts of the INA as having engaged in terrorist activity.[9] 8 U.S.C. § 1158(b)(2)(A)(i)-(vi). In this part of the statute, Congress granted the Attorney General authority to establish by regulation "additional limitations and conditions, c*onsistent with this section*, under which an alien shall be ineligible for asylum under paragraph (1)." 8 U.S.C. § 1158(b)(2)(C) (emphasis added).

2. The Reinstatement Statute

At the same time Congress amended the asylum statute, it enacted what is now § 1231(a)(5), upon 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 voluntary

[9] The terrorism-related exception to who may be granted asylum is notable in that it is the only instance in which the 1996 Congress employed by cross-reference (or otherwise) an existing inadmissibility or deportability ground either to limit who could apply for asylum or who could be granted asylum. *See* 8 U.S.C. §§ 1158(a)(2), (b)(2)(A).

departure under an order. The reinstated individual "is not eligible and may not apply for any relief under this Act" and "shall be removed under the prior order." § 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*, -- U.S. --, 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.[10] In contrast, § 1158, which indisputably is specific to the question of who can and cannot apply for and be granted asylum, is quite clear. Nothing on its face

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[10]As Petitioner has delved into aspects of the reinstatement statute that are ambiguous, 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 complete statutory scheme for asylum that Congress set forth in § 1158. *See* Opening Br. In Supp. Of Pet. For Rev. (Opening Br.) at 21-22, 27 (discussing INA's varying uses and meanings of "relief" and the lack of a "notwithstanding" clause in § 1231(a)(5) in relation to § 1158). *Compare, e.g.*, 8 U.S.C. §§ 1231(b)(3)(A), 1229b(e)(2), 1226a(b)(2)(A) (all employing "notwithstanding").

suggests that individuals who reenter (or seek to reenter) 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." § 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 (or elsewhere in § 1158) did Congress specify that one may not apply for or be granted asylum if he reenters following removal. In § 1158(a)(2), which sets forth the limitations on who may apply for asylum, there is no hint that an unauthorized post-order reentry prohibits one from consideration for asylum. The enumerated exceptions in § 1158(b)(2) to who may be granted asylum, assuming the "refugee" definition is met, similarly do not suggest that this form of protection is unavailable to those who return after leaving under an order.

Section 1158's omission of any reference to § 1231(a)(5) is striking, especially given that Congress crafted the two provisions at the same time.[11] Viewed in the context of Congress's particularized focus on the details of the asylum scheme, the omission there of any reference to reinstatement is strong 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).

The Supreme Court has taught, the "general/specific canon explains that the 'general language'" of one clause "although broad

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[11] Congress did contemporaneously add an inadmissibility ground that correlates with the reinstatement provision, 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 the U.S. 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 in showing 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 to that provision. *Compare, e.g.*, 8 U.S.C. § 1158(b)(2)(v) (cross referencing subclauses of 8 U.S.C. § 1182(a)(3)(B)(i) and 8 U.S.C. § 1227(a)(4)(B) (relating to terrorist activity) to create exception to who may be granted asylum).

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 that point in the other direction" that § 1231(a)(5)'s general provision supplants § 1158's specific directives; 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.[12] *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 ambiguity and varying understandings of "relief" and the broader, clearer terms Congress had at its disposal. *See* Opening Br. at 21-22. *Compare, e.g.*, 8 U.S.C. §§ 1182(a)(6)(C)(ii), 1227(a)(3)(D)(i) (employing the words "any purpose or benefit"). And the Court would have to believe Congress meant § 1231(a)(5), unlike any other INA provision, to

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[12] 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. 8 U.S.C. § 1158(b)(2)(A)(v).

be an additional "exception" besides those that Congress specifically set forth in § 1158. Neither belief is sustainable.

The Government cannot defend using § 1231(a)(5) to bar asylum because § 1158 creates a closed universe for asylum. Unless § 1158, on its own or by explicit incorporation of another provision, specifically bars a noncitizen from applying for or being granted asylum, that person is eligible for and 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 . . . under which an alien shall be ineligible for asylum" is limited to provisions that are "c*onsistent with this section*." § 1158(b)(2)(C) (emphasis added); *see also* § 1158(d)(1) (Attorney General may "establish a *procedure* for the consideration of asylum applications filed under [§ 1158(a)]") (emphasis added). The Government's regulations excluding reinstated aliens from asylum cannot be reconciled with this language. Had Congress intended to permit the agency to render noncitizens ineligible for asylum through regulations promulgated under a *different section*, § 1158(b)(2)(C) would not explicitly withhold authority to do so.

Accordingly, § 1231(a)(5) does not bar asylum. The Government cannot derive power from that section to exclude from consideration for asylum under § 1158 those whom the asylum statute 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. Using Reinstatement To Bar Asylum Violates The Statute And Congressional Intent And Leads To Arbitrary Results.

The primary victims of the Government's erroneous interpretation and improper use of reinstatement to bar asylum are (1) those who were subjected to expedited removal 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 then have (or did not establish) they had past persecution or well-founded fear and who need protection from persecution post-removal. Ms. Maldonado is an example 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 would 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 contained in the record is that Ms. Maldonado has *never* received consideration for asylum *despite* having experienced forced marriage, rape, assault, harassment, and exclusion on account of a protected ground and *despite* having been found credible. A.R. 118, 171, 311. Her experience is unfortunately consistent with the experience of others: Though § 1158 does not facially excluded her from asylum, the Government has made this protection unavailable to her, first through expedited removal and then through reinstatement.

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, written determination of whether there is credible fear of persecution, access to immigration judge review 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).

Congress thus designed a process intended to ensure that all legitimate asylum seekers get a full hearing on their claims. *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").[13]

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[13] The Congressional Record contains numerous statements indicating concern and commitment that genuine asylum seekers be permitted to apply for asylum. 142 Cong. Rec. S11491-02 (1996) (statement of Sen. Hatch) (commenting on how IIRIRA was an improvement over the Terrorism Act because "the Terrorism Act would not have provided adequate protection to asylum claimants, who may arrive in the United States with no documents or with false documents that were needed to exit a country of persecution"); 142 Cong. Rec. S11838-01 (1996) (statement of Sen. Hatch to Sen. Abraham) ("Let me say that I share the Senator's concern that we continue to ensure that asylum is available for those with legitimate claims of asylum") ("Like you, I am committed to ensuring that those with legitimate claims of

Despite Congress's efforts to ensure asylum is available to those fleeing persecution, the process can fail. When Petitioner attempted to enter the country without authorization in 2010, she underwent expedited removal.[14] That order was reinstated when she returned here after being attacked in her home country. A.R. 295-96, 312-13, 319-22. An asylum officer then interviewed her to determine if she merited a chance to seek withholding of removal. A.R. 309-327. The notes of that interview are revealing:

> Q. Why didn't you claim fear of return to your country in 2010 before you were deported?
>
> R. They made me sign and I talked to a person here and I didn't have nobody to respond for me.
>
> Q. When they picked up in August of this year, you were asked if you were afraid to return to your country and you responded no. Why didn't you claim a fear at that point?
>
> R. No, they didn't ask me anything. They said sign here, sign here, sign here.

(continued…)

asylum are not returned to persecution, particularly for technical deficiencies.").

[14] The record does not contain this order.

Q. It says here that they asked you about your fear.

R. They didn't ask me anything.

A.R. 326; *see* A.R. 159. In the expedited removal process, the Government appears not to have asked about fear and instead "made [her] sign." In the reinstatement process, the earlier failure to assess fear is disregarded, with protection limited to withholding. A.R. 129-30.

The Government's use of § 1231(a)(5) to bar asylum is not derived from a plausible interpretation of the statute. At the time of the 2010 expedited removal, Ms. Maldonado had already been forced into a sexual relationship with a man approximately 50 years her senior to "cure" her attraction to women, and she had then been raped by that man. A.R. 312-13, 319-22. One cannot dispute that she should have had a chance to apply for asylum then. Ms. Maldonado also appears to have come close to being removed again without examination of her fear – this time pursuant to reinstatement – despite at that point having additionally been beaten and threatened by women who communicated that their enmity toward her was on account of her being a lesbian. A.R. 162-63, 299, 313-14, 322-23. Fortunately, someone finally registered Ms. Maldonado's fear of return to El Salvador and started the "withholding

of removal only" process. A.R. 306-27; *see Ortiz-Alfaro v. Holder*, 694 F.3d 955, 956-57 (9th Cir. 2012) (describing complex "withholding of removal only" procedures). Apparently the Government at no point considered a course other than using reinstatement to paper over what went wrong in the earlier expedited removal process.

Ms. Maldonado's situation is not unique. In amici's experience, numerous bona fide refugees with reinstated removal orders have never had an opportunity to apply for asylum. Take for example Herlinda Alvarez Mendoza, 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 former 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* Petr.'s Opening Br. at 4-9, *Alvarez v. Ashcroft*, No. 04-13559-I (11th Cir. Mar. 30, 2005).

The cases of Ms. Maldonado and Ms. Alvarez 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.[15]

Even when officers fully comply with all procedures and conduct themselves with care and concern, the expedited removal process can fail to detect bona fide refugees. Factors like language and cultural differences, trauma, stress, and fear can impede communication

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[15] 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 reliance on records created in the process that were of questionable reliability. *Id.* at 30, 68-70, 237.

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.").

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 after a lifetime of having to hide this, 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: Two thirds of removals are carried out under the authority of an expedited or reinstated removal order. In 2011, 31% of all removals were expedited removals, and 33% were the result of reinstatements.[16] The numbers for 2010 are similar – expedited and reinstated removals

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[16] John Simanski & Lesley M. Sapp, U.S. Dept. of Homeland Security, Office of Immigration Statistics – Policy Directorate, ENFORCEMENT ACTIONS: 2011 1, 5 (Sept. 2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

respectively accounted for 29% and 34% of all removals.[17] In all, approximately 75% of all orders and returns are without any form of independent, judicial-like review.[18]

Given Congress's concern, commitment, and expressed intent that genuine asylum seekers be given an avenue for seeking and securing that protection, *see supra* pages 31-32, 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 Contravenes § 1158 And Creates Arbitrary Results

Congress, in addition to providing a first opportunity to apply for asylum for all but those delineated in § 1158(a)(2), established that

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[17] U.S. Dept. of Homeland Security, Office of Immigration Statistics – Policy Directorate, ENFORCEMENT ACTIONS: 2010 1, 4 (Sept. 2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf.

[18] Transactional Records Access Clearinghouse (TRAC), ICE BYPASSING IMMIGRATION COURTS? DEPORTATIONS RISE AS DEPORTATION ORDERS FALL (Aug. 13, 2012), *available at* http://trac.syr.edu/immigration/reports/291/.

there be a second opportunity in the event of changed circumstances. 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," § 1158(a)(2)(D). This latter provision provides further evidence that Congress did not intend post-order return or reentry to bar asylum.

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. Moreover, "[t]he 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 v. Holder*, 579 F.3d 827, 834 (7th Cir. 2009) (addressing threat of forced marriage and consequences of refusal as "changed circumstances" under 8 C.F.R. § 1003.2(c)(3)(ii)). 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, 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.

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.[19] *See, e.g.*, *Joseph*, 579 F.3d

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[19] 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) (time and numerical limitations do not apply to motions to reopen proceedings to apply or reapply for asylum based on changed circumstances in the

827; *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 (as Petitioner did) and then returned to the United States in search of safety from changed conditions that created a new or heightened risk of harm. 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.

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* arriving alien who is not otherwise barred by § 1158, even if that person was previously removed and then returned to the United States.

(continued…)

country of nationality if such evidence is material and was not available and could not have been discovered or presented at prior hearing).

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, the agency 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,* -- F.3d --, 2013 WL 3388500, *6-8 (9th Cir. 2013) (internal quotations omitted); *see Judulang v. Holder*, -- U.S. --, 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 not to reinstate a removal order or not to execute an order. 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 she has returned here after removal or departure under an order. The Government's contrary interpretation is wrong and should be rejected.

Respectfully submitted,

Robin L. Goldfaden
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OF THE SAN FRANCISCO BAY AREA.
131 Steuart Street, Suite 400
San Francisco CA 94105
415.543.9444 x.201
rgoldfaden@lccr.com

Stephen W. Manning
IMMIGRANT LAW GROUP PC
PO Box 40103
Portland OR 97204
503.241.0035

Certificate of Service

I, Stephen Manning, certify that on July 26, 2013, I electronically filed the **Brief of Amicus, American Immigration Lawyers Association, in support of Petitioner**, with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen W. Manning

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STEPHEN W MANNING

Attorney for Amicus

IMMIGRANT LAW GROUP PC

(503) 241.0035

Certificate of Compliance with Format

I, Stephen Manning, 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 6,819 words (not including the table of contents, table of citations, certificate of service, certificate of compliance).

s/ Stephen W. Manning

STEPHEN W MANNING

Attorney for Amicus

IMMIGRANT LAW GROUP PC

(503) 241.0035