No. 14-60546

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FANY JACKELINE RAMIREZ-MEJIA,
also known as Fany Ramirez,
also known as Fany Ramirez de Quinteros,
Petitioner,

v.

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

ON PETITION FOR REVIEW OF A FINAL ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

I, Rebecca Sharpless, attorney for *Amicus Curiae*, certify that the American Immigration Lawyers Association does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Dated: September 18, 2015 /s/ Rebecca Sharpless

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PARTIES

I, Rebecca Sharpless, attorney for *Amicus Curiae*, certify that, in addition to those parties who have already been disclosed, the following parties have an interest in the outcome of the appeal:

- American Immigration Lawyers' Association
- Collopy, Dree, Attorney for *Amicus Curiae* American Immigration Lawyers' Association
- Lerner, Romy, University of Miami School of Law Immigration Clinic
- McGee, Caroline, Law Student, University of Miami School of Law Immigration Clinic
- Morgan, Carmel, Attorney for Respondent
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- Ramirez-Mejia, Fany, Petitioner
- Sharpless, Rebecca, Attorney for *Amicus Curiae* American Immigration Lawyers' Association

Dated: September 18, 2015 /s/ Rebecca Sharpless

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STATEMENT PURSUANT TO FRAP 29(c)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *Amicus Curiae* states that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting a brief; no person other than *Amicus Curiae* or their counsel contributed money intended to fund preparing or submitting the brief.

Dated: September 18, 2015 /s/ Rebecca Sharpless

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INTEREST OF THE *AMICUS CURIAE*

American Immigration Lawyers Association (AILA) is a professional trade association dedicated to promotion of justice for immigrants. Through their experiences representing immigrants, AILA attorneys have gained extensive knowledge of the ways in which the Department of Homeland Security's (DHS) interpretation of the reinstatement statute as containing a bar to asylum affects our nation's immigrants and their families. AILA submits this brief in support of Petitioner's motion for rehearing en banc to demonstrate how the panel decision in this case will lead to irrational outcomes and devastating real-life consequences for bona fide asylum seekers, many of whom end up being granted withholding of removal, a lesser form of relief from removal.

AILA is a national association with more than 13,000 members throughout the United States and abroad, 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 DHS and the Executive Office for Immigration Review, as well as before the United States

District Courts, United States Courts of Appeals, and United States Supreme Court.

STATEMENT OF THE ISSUE

The case of Petitioner Fany Jackeline Ramirez-Mejia presents an issue of exceptional importance to AILA and the many immigrants for whom it advocates: whether the DHS regulation denying individuals who have been previously deported the opportunity to apply for asylum is *ultra vires*. The asylum statute affords "any alien . . . irrespective of such alien's status" the right to apply for asylum, unless she or he falls under clearly delineated exceptions. 8 U.S.C. § 1158(a). These exceptions do not include individuals with prior orders of removal. Notwithstanding the specificity of the asylum statute, the panel in this case held that the statutory provision authorizing reinstatement of removal orders of people previously removed contains a generic bar to "relief" that bars otherwise eligible individuals from asylum. 8 U.S.C. § 1231(a)(5).

AILA agrees with Petitioner that the panel's opinion in this case was wrongly decided. Established canons of statutory construction dictate that the asylum statute governs who is eligible to apply for asylum and that the reinstatement statute does not bar individuals subject to reinstatement from applying for asylum. Legislative history, international law, and the rule of lenity also support Petitioner's position that the statute unambiguously permits

individuals with prior orders of removal to apply for asylum. Moreover, even DHS acknowledges that the reinstatement bar to "relief" does not encompass all forms of relief from removal, as DHS has promulgated a regulation permitting people who fear return to their home countries to apply for some forms of "relief," namely withholding of removal and relief under the Convention Against Torture. 8 C.F.R. §§ 208.31, 241.8, 1208.31, 1241.8.

SUMMARY OF THE ARGUMENT

AILA writes to amplify Petitioner's arguments in two respects. First, the panel's interpretation of the reinstatement and asylum statutes leads to two similarly situated groups of individuals being treated differently. If the panel's opinion is permitted to stand, individuals who develop a fear of return *after* their first deportation from the United States are barred from asylum, whereas people who remain in the United States after a failed bid for asylum have the option of applying a second time if changed circumstances exist. Second, defects in the expedited removal process prevent many bona fide asylum seekers from being referred to an Asylum Officer for consideration of their claims, resulting in expedited removal orders that are later reinstated and used to bar a subsequent asylum application. As the stories below demonstrate, the panel's opinion disqualifies otherwise deserving asylum applicants from the full safeguards of our persecution-based protection scheme. Relegated to receiving only the second-class

status of withholding of removal, bona fide asylum seekers suffer permanent separation from their families and are barred from lawful permanent residency and travel abroad.

ARGUMENT

I. Under the Panel's Decision, Individuals Inside The Country Can File Multiple Times For Asylum Based on Changed Circumstances While People Who Were Deported Before They Had A Fear Of Return Cannot Apply Even Once.

The panel's interpretation of the reinstatement statute as a bar to asylum leads to an irrational result: people who remain in the United States after losing their asylum cases can apply multiple times based on changed circumstances, whereas people who were previously deported before they had reason to file for asylum cannot file even once, despite their current fear. The asylum statute permits successive or reopened asylum applications based on changed circumstances. 8 U.S.C. § 1158(a)(2)(D). Congress directed that an individual may apply for asylum a second time if "changed circumstances materially affect the applicant's eligibility for asylum." *Id.* Similarly, an individual may move to reopen removal proceedings "based on changed country conditions . . . if such evidence is material and was not available . . . at the previous proceeding." 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii). *See, e.g.*, *Joseph v. Holder*, 579 F.3d 827, 828 (7th Cir. 2009); *Chen v. Mukasey*, 524 F.3d 1028, 1029–30 (9th Cir. 2008); *Panjwani v. Gonzales*, 40 F.3d 626, 631 (5th Cir. 2005). Because the reinstatement statute is triggered by

removal or departure under an order of removal followed by unlawful reentry, no reinstatement provision applies to those who remain in the United States after they have been ordered removed.[1] As a result, these individuals may at any time move to reopen a previously denied asylum application based on changed country conditions.

The panel's interpretation of the reinstatement statute as a bar to asylum denies applicants who complied with their deportation orders the opportunity to apply for asylum when circumstances arising after deportation make them newly eligible for asylum. This harsh result holds even if "changed circumstances" exist and even when the applicants had no reason to ask for asylum on their first trip to the United States. As a result, the panel's interpretation precludes these individuals from applying for asylum even once. As the following stories illustrate, individuals who complied with prior orders of removal and whose fear of return arose after their departure will be barred from asylum if the panel's decision is permitted to stand. While these individuals may be eligible for withholding of removal, they cannot seek permanent status or extend derivative benefits to spouses or minor children. 8 C.F.R. § 1208 (derivative benefits for spouses and minor children may be extended to individuals granted asylum, but not to those granted withholding of

[1] There are a number of reasons an individual might remain in the United States after he has been ordered removed. For example, a person might have applied for, or been granted, an administrative stay of removal or prosecutorial discretion.

removal). Furthermore, they must meet the higher standard of proof required for withholding of removal. *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (holding that the "more likely than not" standard of proof for withholding claims is higher than the standard for asylum claims, where even a ten percent chance of persecution may be sufficient).

A. Juan de Jesus Lanza Was Shot and Threatened with Death After Being Deported in 1996.

Juan de Jesus Lanza was deported from the United States to Honduras in 1996. Years later, he became a police officer and fought powerful companies with ties to the Honduran government who were engaged in illegal logging. Corrupt police officers shot Juan and he received death threats. He fled to the United States with his young son, and an immigration judge granted him withholding of removal. Juan is now separated from six of his children because the judge found that she could not grant him asylum based on the reinstatement regulations.[2] Juan's grant of withholding of removal does not permit him to seek derivative benefits for his family members who remain in Honduras. Nor is withholding of removal a path to residency or citizenship that would allow him to eventually petition for visas on their behalf. Juan is also concerned about the safety of his family members, as they remain under surveillance in Honduras. The grant of withholding does not permit

[2] Juan Lanza filed a petition for review to the U.S. Court of Appeals for the Eleventh Circuit and the case resulted in a settlement.

Juan to travel outside the United States, even to a third country, to spend time with his family.

B. "Mirabel"[3] Was Deported and Then Became a Victim of Domestic Violence.

After being deported in 2001, Mirabel became romantically involved with a severely abusive man in her home country. She sought protection in the United States but was barred from asylum because of her prior removal. Mirabel's abuser had confined Mirabel to his home, raped her, and allowed his friends to gang rape her. On one occasion, he cut her with a broken beer bottle and beat her until she lost consciousness. Mirabel escaped to Mexico but discovered that her abuser was looking for her and planned to kill her. Fearing for her life, Mirabel fled to the United States. Although Mirabel was granted withholding, she was deemed ineligible for asylum under the reinstatement regulations because of her prior order of removal.

C. After "Carlos" Was Deported In 2005, He Became An Environmental Activist and Was Kidnapped and Tortured.

Carlos was ordered removed in absentia and voluntarily returned to his native country in 2005. He then became an environmental activist and was kidnapped and tortured. Under the reasoning of the panel's decision, Carlos cannot

[3] Pseudonyms are identified by quotations and are used to protect confidentiality. The facts of these cases are on file with *Amicus Curiae*.

now apply for asylum, even though his fear of return did not exist when he was first in the United States.

Carlos founded an environmental organization that advocated against the water contamination and deforestation caused by the cattle ranching industry. He worked with local impoverished communities and taught them about reforestation and water filtration. Powerful ranchers perceived him as a threat, and, in 2014, Carlos was kidnapped and tortured for three days. When he reported what had happened, he learned that one of his kidnappers was a police officer. Carlos fled to the United States in fear for his life, and immigration authorities detained him at the border. An immigration judge granted him withholding of removal. By satisfying the withholding standard, Carlos also met the far less onerous burden of proof for asylum, and the immigration judge explicitly stated that she would have granted him asylum had she been permitted to do so under the regulations. Carlos' grant of withholding does not permit him to petition for visas on behalf of his family, whose house was ransacked after he fled to the United States.

II. The Panel's Decision Bars From Asylum Bona Fide Refugees Who Were Wrongly Subject to Expedited Removal.

Many bona fide refugees are wrongly subject to expedited removal upon fleeing persecution and arriving in the United States. The panel's interpretation of the reinstatement statute as a bar to asylum strips these individuals from a chance

to seek asylum, all because of screening errors by Customs and Border Protection (CBP) officers.

The expedited removal provisions of the Immigration and Nationality Act (INA) allow CBP officers to order the immediate removal of certain individuals without a hearing before a judge. 8 U.S.C. § 1225(b)(1)(A). In enacting these provisions, Congress established procedures intended to safeguard against returning bona fide refugees to situations of persecution and to ensure U.S. compliance with its legal obligations under the UN Convention and Protocol Relating to the Status of Refugees. *See* Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967; U.S. acceded 1968). These procedures require enforcement officials to screen for potential asylum-seekers during the expedited removal process. *See id.*; *see also* 8 C.F.R. §§ 235.3(b)(2)(i), 1235.3(b)(2)(i). To complete this screening, enforcement officials must read specific information about asylum to the individual in a language he or she can understand.[4] 8 C.F.R. §§

[4] Form I-867A includes the following information, which must be read to all individuals subject to expedited removal: "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

235.3(b)(2)(i), 1235.3(b)(2)(i). The officials are to ask the individual specific questions about any fear of return to his or her home country.[5] *Id.* If the individual indicates an intention to apply for asylum or a fear of harm, the statute forbids CBP from proceeding with removal and CBP must instead refer the individual to an Asylum Officer who is specially trained to interview asylum-seekers. 8 C.F.R. §§ 235.3(b)(2)(i), 235.3(b)(4), 1235.3(b)(2)(i), 1235.3(b)(4).

However, studies document the widespread failure of CBP officers to follow the required screening procedures. For example, a study of the United States Commission on International Religious Freedom's (USCIRF), which was authorized by Congress, reported that "researchers observed overt attempts by CBP officers to coerce aliens to retract their fear claim and withdraw their applications for admission."[6] USCIRF, *Evaluation of Credible Fear Referral in Expedited Removal*

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determine if you should remain in the United States and not be removed because of that fear." Form I-867A.

[5] Form I-867B includes the following questions, which must be asked to all individuals subject to expedited removal: "Why did you leave your home country or country of last residence? Do you have any fear or concern about being returned to your home country or being removed from the United States? Would you be harmed if you are returned to your home country or country of last residence? Do you have any questions or is there anything else you would like to add?" Form I-867B.

[6] The study also issued recommendations to DHS to ensure that CBP's unlawful and coercive practices did not continue. However, USCIRF's "report card" issued two years after the study gave CBP an "F" grade on its implementation of the recommendations. USCIRF, *Expedited Removal Study Report Card: 2 Years Later*, at 3-4 (2007), *available at* http://www.uscirf.gov/sites/default/files/Reportcard%20Scorecard_0.pdf.

at Ports of Entry in the United States (Feb. 8, 2005). In addition, the study found that CBP officers routinely failed to provide the required screening information and that individuals who expressed a fear were not referred to an Asylum Officer for a credible fear interview. *Id.* at 6. Moreover, the researchers identified inconsistencies between their observations and the official records prepared by the investigating officers. *Id*. Other groups have documented that CBP officers ignore expressions of fear, utilize abusive practices that prevent expressions of fear, and fail to ask the required screening questions about fear. *See, e.g.,* NIJC et al., *Complaint to DHS Office of Civil Rights and Civil Liberties: Inadequate U.S. Customs and Border Protection (CBP) Screening Practices Block Individuals Fleeing Persecution from Access to the Asylum Process*, (Nov. 13, 2014), http://bit.ly/1xfFsog. A U.S. Court of Appeals also has questioned the reliability of CBP interviews, noting that such interviews should be "carefully scrutinized for reliability before being utilized by the fact-finder." *Qing Hua Lin v. Holder*, 736 F.3d 343, 355 (4th Cir. 2013).[7]

[7] Other U.S. Courts of Appeals have made similar statements. *See, e.g., Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) ("We have rejected adverse credibility findings that relied on differences between statements a petitioner made during removal proceedings and those made during less formal, routinely unrecorded proceedings."); *Tang v. Att'y Gen.,* 578 F.3d 1270, 1279 (11th Cir. 2009) ("[W]hen considering whether later testimony qualifies as a contradiction, as opposed to an elaboration, of an applicant's airport interview statements, an IJ should note that during an airport interview, unlike in a hearing with full due process accorded, the alien is not represented by counsel and may be markedly intimidated by official questioning, particularly if the alien has indeed been subject to government abuse in her country of origin."); *Moab v. Gonzales*, 500 F.3d 656, 660–61 (7th Cir. 2007)

As a result of these pervasive problems, CBP erroneously orders bona fide refugees removed and returned to situations of persecution. Many of these asylum-seekers return to the United States in renewed flight, only to find that they are barred from asylum under the regulations due to reinstated removal orders.

A. CBP Ordered "Bernardo"'s Expedited Removal Despite Three Written Requests to Immigration Officers For Asylum.

Bernardo is a vocal opponent of the gang violence that has plagued Honduras and was a member of a Honduran community group that advocates for peace. He witnessed the Mara 18 murder his friends and neighbors. Bernardo fled to the United States in 2013 and, upon arrival, was detained by CBP officials. CBP never provided Bernardo the required information about asylum or asked him the required screening questions. Bernardo only learned about his rights as an asylum-seeker from talking with a fellow detainee. Bernardo sent three written requests to immigration officers telling them about his fear of return and requesting a chance

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("[A]irport interviews . . . are not always reliable indicators of credibility . . . . [I]nterviews in which the questions asked are not designed to elicit the details of an asylum claim, or the INS officer fails to ask follow-up questions that would aid the alien in developing his or her account [are less reliable]."); *He Chun Chen v. Ashcroft*, 376 F.3d 215, 223–24 (3d Cir. 2004) ("We recognize that we have counseled against placing too much weight on an airport interview, especially when the IJ and BIA lack important information as to the manner in which the interview was conducted."); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) ("The airport interview is an inherently limited forum for the alien to express the fear that will provide the basis for his or her asylum claim, and the BIA must be cognizant of the interview's limitations when using its substance against an asylum applicant.").

to apply for asylum. However, instead of referring him to an Asylum Officer as required by 8 U.S.C. § 1225(b)(1)(A), immigration officials deported him to Honduras under the expedited removal provisions. Upon Bernardo's return to Honduras, the Mara 18 attacked him and murdered his friends. In 2014, Bernardo again fled to the United States. This time, his statements of fear were acknowledged and he was referred to an Asylum Officer. An immigration judge granted him withholding of removal but the reinstatement regulation barred him from applying for asylum on account of his prior, erroneous removal.

B. CBP Refused to Listen to "Rita"'s Expression of Fear, Stating That "All Guatemalans Are Telling the Same Lies."

Rita is an indigenous woman from Guatemala, who was harassed, abused, and raped on four occasions before she fled to the United States in December of 2013. Upon being detained, she expressed her fear to CBP agents, who responded: "Don't talk. These are all lies. Stop speaking . . . . All Guatemalans are telling the same lies." Rita was forced to sign a removal order without being referred to an Asylum Officer. Upon her removal to Guatemala, she was drugged, raped, and impregnated. Rita fled a second time to the United States in April 2014, and upon being apprehended, was again denied the opportunity to express her fear and deported within days. In July of 2014, Rita fled a third time to the United States, this time with her eight-year-old son, after armed men entered their home and threatened them. She presented herself to immigration agents and, at last, was

referred to an Asylum Officer for an interview. Rita's son, who had not previously been removed, was found eligible for asylum. Rita, however, was barred from asylum and instead granted only withholding of removal because of her prior, erroneous removal.

C. Despite a Clear Expression of Fear, Herlinda Alvarez Mendoza Was Deported After Immigration Officers Incorrectly Wrote That She Expressed No Fear of Return.

Herlinda Alvarez Mendoza is a family member of a witness in a human rights case against the Guatemalan military that went before the Inter-American Court and U.S. Supreme Court. *Bámaca-Velásquez v. Guatemala*, Judgment of November 25, 2000 (Merits), Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 20, 2000); *Christopher v. Harbury*, 536 U.S. 403 (2002). The Inter-American Court found that the family was in a "situation of extreme gravity and urgency." Bámaca-Velásquez, Inter-Am. Ct. H.R. at ¶ 70. After one of her brothers disappeared, Herlinda attempted to find him and was repeatedly rebuffed by the police. Men then broke into her home and attacked her with a machete. Although Herlinda was seriously injured, she survived and managed to flee to the United States. When CBP officers arrested her, she expressed a fear of return, but immigration officers erroneously wrote on her sworn statement form that she expressed no fear and ordered her removed. After she was deported, Herlinda re-entered the United States to again seek protection. Following reinstatement of the expedited removal

order against her, she was found to have a reasonable fear of persecution. An immigration judge later granted her withholding of removal, stating on the record that, but for the reinstatement regulation's bar on asylum, Herlinda would have qualified for asylum.[8]

CONCLUSION

For the above reasons, *Amicus Curiae* American Immigration Lawyers Association supports rehearing *en banc* in this case.

Respectfully submitted,

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[8] Herlinda filed a petition for review with the U.S. Court of Appeals for the Eleventh Circuit challenging her denial of asylum. The case resulted in a settlement.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2015, I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. 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.

/s/ Rebecca Sharpless

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(4) and Fed. R. App. P. 32 (a)(7), this brief is double-spaced, using 14-point proportional font and is no longer than fifteen pages (not including the Table of Contents, Table of Citations, Certificate of Service, or Certificate of Compliance).

/s/ Rebecca Sharpless

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