No. 18-70484

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANA PINCHUPA,

Petitioner,

v.

JEFFERSON B. SESSIONS III
United States Attorney General,

Respondent.

ON PETITION FOR REVIEW FROM AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, NATIONAL JUSTICE FOR OUR NEIGHBORS, AND CATHOLIC LEGAL IMMIGRATION NETWORK INC. IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae submit the following corporate disclosure statement:

Each of the Amici Curiae herein is a not-for-profit organization. None has any parent corporation. None has any capital stock held by a publicly traded corporation.

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

Proposed *Amici Curiae* are non-profit organizations with extensive experience in the field of asylum law and each have been involved in litigation involving motions to reopen.

The American Immigration Lawyers Association ("AILA") is a national association with more than 15,000 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 the jurisprudence of 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, the Executive Office for Immigration Review, the Immigration Courts, the Board of Immigration Appeals ("BIA" or "Board"), U.S. District Courts, the Federal Courts of Appeals, and the U.S. Supreme Court.

[1] This brief was authored entirely by counsel for *Amici*. No party, or any counsel for a party, authored this brief, in whole or in part, nor did any party, party's counsel or any other person or entity contribute money to fund the preparation or submission of this brief. This brief is submitted *pro bono,* by counsel of record. Petitioner has consented to the filing of this brief. Respondent does not oppose this filing.

National Justice for Our Neighbors ("JFON") was established by the United Methodist Committee On Relief in 1999 to serve its longstanding commitment and ministry to refugees and immigrants in the United States. JFON's goal is to provide hospitality and compassion to low-income immigrants through immigration legal services, advocacy, and education. JFON employs a small staff at its headquarters in Annandale, Virginia, which supports 17 sites nationwide. Those 17 sites collectively operate in 12 states and Washington, D.C., and include over 40 clinics. Last year, JFON served clients in more than 13,000 cases. JFON advocates for interpretations of federal immigration law that protect vulnerable asylum-seekers.

The Catholic Legal Immigration Network, Inc. ("CLINIC"), based in Silver Spring, Maryland, protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC's network includes almost 350 affiliates in 47 states, Puerto Rico, and the District of Columbia. The network employs more than 1,200 Department of Justice accredited representatives and attorneys who, in turn, serve hundreds of thousands of low-income immigrants each year, many who are minors. Through its affiliates, as well as through the BIA Pro Bono Project and the Dilley Pro Bono Project, CLINIC advocates for the just and humane treatment of asylum seekers and other immigrants through direct representation, *pro bono* referrals, and engagement with policy

makers. Its staff authors practice advisories, conducts trainings nationwide, and offers webinars and e-learning courses. CLINIC'S work draws from Catholic social teaching to promote the dignity and protect the rights of immigrants in partnership with its network.

SUMMARY OF ARGUMENT

A motion to reopen to seek asylum or related relief based on changed circumstances in the country of return is exempt from the time and numerical limitations at 8 U.S.C. § 1229a(c)(7) and 8 C.F.R. § 1003.2(c)(2). In *Toufighi v. Mukasey*, 538 F.3d 988, 996 (9th Cir. 2008), this Court explained that there are four distinct requirements to prevail on such a motion: (1) the movant must "produce evidence that [country] conditions [have] changed;" (2) "the evidence [must] be 'material;'" (3) "the evidence must not have been available … at the previous proceeding;" and (4) the movant must "demonstrate that the new evidence, when considered together with the evidence presented at the original hearing, would establish *prima facie* eligibility for the relief sought." *Id.* Additionally, "in cases where the ultimate grant of relief is discretionary…, the BIA may leap ahead, as it were, over the [foregoing] threshold concerns," "and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief." *I.N.S. v. Abudu*, 485 U.S. 94, 105 (1988).

Each of these discrete requirements to reopen proceedings based on changed country conditions must be analyzed and evaluated separately. *See id.* at 104. Indeed, three decades ago the Supreme Court made clear that it is error to conflate the "quite separate issues" of "whether the [movant] … has presented a *prima facie* case for asylum and whether the [movant] … has indeed offered previously unavailable, material evidence." *Id.*; *see also Aviles-Torres v. I.N.S.*, 790 F.2d 1433, 1436 (9th Cir. 1986); *Duran v. I.N.S.*, 756 F.2d 1338, 1340 n.1 (9th Cir. 1985); *Samimi v. I.N.S.*, 714 F.2d 992, 994 (9th Cir. 1983).

Yet, the decision by the Board in this case reveals the sort of conflation the Supreme Court proscribed so long ago. The Board apparently denied Petitioner's motion principally because she did not satisfy the "materiality requirement of 8 C.F.R. § 1003.2(c)(3)(ii)," which provides that a motion to reopen "based on changed circumstances arising in the country of nationality" must be supported by "evidence [that] is *material* and was not available and could not have been discovered or presented at the previous hearing." *See* A.R. 4; 8 C.F.R. § 1003.2(c)(3)(ii) (emphasis added).

The Board's dearth of analysis on this "materiality requirement" forces the reader to speculate as to the reasoning the Board employed, but it seems that the BIA concluded Petitioner did not satisfy this requirement because it felt (1) Petitioner did "not establish[] that the conflict between the Shuar community and the …

government ha[d] *materially changed*," (i.e., country conditions are not "*markedly* different") A.R. 3 (emphasis added); (2) Petitioner's evidence did "not demonstrate that there exists a *reasonable possibility* of harm rising to the level of persecution on account of … [a] protected ground" and thus she did not "establish *prima facie* eligibility" A.R. 4 (emphasis added); or (3) Petitioner's "new evidence offered would [not] likely change the result in the case" A.R. 3 (emphasis added). In each of these three possible interpretations, the Board committed reversible error.

In addressing the Board's trifecta of error, *Amici* have structured the three sections of this brief accordingly: In section one, *Amici* make the case for what the Court should adopt as the proper test for materiality in the context of a motion to reopen. In section two, *Amici* discuss the proper understanding of the *prima facie* eligibility requirement—and the importance of not conflating it with the materiality requirement—to highlight how the Board errantly applied a heightened standard here. Finally, in section three, *Amici* address a recurring error related to inappropriately denying such motions because the "new evidence offered would [not] likely change the result in the case."

ARGUMENT

I. FOR EVIDENCE OF A CHANGE IN COUNTRY CONDITIONS TO BE MATERIAL, THAT EVIDENCE MUST HAVE SOME LOGICAL CONNECTION WITH THE MOVANT'S CLAIM FOR ASYLUM.

Amici argue that the material evidence requirement is best understood by looking to the plain and ordinary meaning of those words. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Material evidence is that which has "some logical connection with the consequential facts or issues." *Black's Law Dictionary* (10th ed. 2014), *available at* Westlaw. In this context then, *material evidence* should be understood as evidence of changed country conditions that has some logical connection to the facts or issues of consequence to the applicant's claim for asylum, withholding of removal, or related relief. *See id*.; 8 C.F.R. § 1003.2(c)(3)(ii). While the Board and many Courts have not always been clear in their treatment of the statutory term *material* in this context, *Amici* urge the Court to use this case to add much-needed clarity.

A. The Ordinary Understanding Of The Term "Material Evidence" Is Entirely Consistent With This Court's Precedent Related To Motions To Reopen Based Upon Changed Country Conditions.

1. Evidence This Court Has Found To Be *Material*.

In *Malty v. Ashcroft*, 381 F.3d 942, 945 (9th Cir. 2004), the Court held that the Board abused its discretion by finding that Malty had not submitted new, material evidence of changed circumstances in Egypt. At his initial asylum hearing, the Immigration Judge ("IJ") held that Malty's experience of harassment as a Coptic

Christian "did not rise to the level of persecution." *Id.* at 944. In his motion to reopen, he "submitted new evidence detailing rising levels of violence against Egyptian Coptic Christians generally and specific acts of violence against his family in particular, … all of which occurred after Malty's asylum hearing." *Id.* In denying his motion, the BIA held he "had not demonstrated changed circumstances" because he had "described a continuance of the circumstances that gave rise to his first claim." *Id*. at 944–45. This Court disagreed, concluding that Malty's evidence was both *new* and *material*. *Id.* at 945.

The Court began by explaining that "[a] petitioner's evidence regarding changed circumstances will almost always *relate* to his initial claim." *Id.* (emphasis added). In this regard, Malty's evidence unquestionably had a "logical connection" to his claim for asylum and was thus *material.* However, to determine whether the evidence was *new*, the Court looked to whether it was "qualitatively different from the evidence presented at his asylum hearing." *Id.* Because Malty's initial evidence "described only incidents of harassment and discrimination," and his "new, previously unavailable evidence" indicated that the "harassment had increased to the level of persecution," *id.* at 945–46, the Court concluded the BIA had "abused its discretion in dismissing" the new evidence as "a mere continuance of the previous circumstances." *Id.* at 946.

Once the Court concluded Malty had submitted new, material evidence of changed circumstances in Egypt, it proceeded to the next distinct step of the analysis to consider whether "in light of this evidence" he had a "'reasonable likelihood' of meeting the statutory requirements for demonstrating a well-founded fear of persecution on account of religion." *Id*. at 947 (citing *Ordonez v. I.N.S.*, 345 F.3d 777, 785–86 (9th Cir. 2003)). The Court's delineated treatment of these two discrete requirements supports the conclusion that *prima facie* eligibility must be analyzed separately from the consideration of whether the new evidence is material.

Similarly, in *Bhasin v. Gonzales*, 423 F.3d 977 (9th Cir. 2005), this Court again found that the BIA erred in denying Bhasin's motion to reopen. *Id.* at 983. In her initial asylum hearing, the IJ and BIA concluded that she had not established "persecution on account of membership in her family social group" in part because "other close members of … [her] family are living in India without difficulty." *Id.* at 982. Bhasin moved to reopen proceedings using new evidence that showed since her initial asylum hearing, both her daughters and her son-in-law had been threatened and subsequently disappeared. *Id*. at 983, 985. The Court found the BIA erred by discrediting her evidence. *Id.* at 986. Indeed, the Court noted that Bhasin's "evidence … completely undermined" the Board's "rationale for concluding that the … [nexus] requirement had not been met," and stated that there was a "*direct relationship* between the Board's justification for its initial denial and Bhasin's

newly presented evidence." *Id.* (emphasis added). As in *Malty*, the Court in *Bhasin* used the ordinary understanding of the term *material evidence* (i.e., having some logical connection with the consequential facts or issues). Once the Court in *Bhasin* concluded that the petitioner's previously unavailable evidence was material, it then stated that this "new evidence" need only "establish[] prima facie eligibility for relief" in light of the record as a whole. *Id.* at 987.

Relatedly, in *Salim v. Lynch*, 831 F.3d 1133 (9th Cir. 2016), this Court held the BIA erred where it denied the motion to reopen of a Christian convert—finding that his evidence was "largely cumulative" (i.e., not new), and did not "*relate*[] specifically to" him (i.e., was not material). *Id.* at 1136–37 (emphasis added). The Court explained that in a changed country conditions analysis the two relevant periods of time to compare are the circumstances "at the time of the petitioner's previous hearing, and those at the time of the motion to reopen." *Id.* at 1137. As applied to Salim, the Court concluded his new evidence—documentation of "'an upsurge of religious radicalism,' … growth of an 'extremist fringe[,]'" and more frequent "cases of intolerance"—was sufficient to demonstrate changed country conditions. *Id.* at 1138.

Turning then to materiality, the Court explained that where country conditions have indeed changed, they "can become material due to … [the] petitioner's personal circumstances." *Id.* (citing *Chandra v. Holder*, 751 F.3d 1034, 1038 (9th Cir.

2014)). Further elaborating on the materiality requirement, the Court stated that the BIA must consider "whether the motion to reopen demonstrates a change in country conditions *with respect to the petitioner's current basis for relief*." *Id.* (emphasis added). Given Salim's conversion, the Court had no trouble in concluding the changes in country conditions were material to his claim for relief. *See id.*

Having "concluded that Salim's motion to reopen [met] the changed country conditions exception," the Court proceeded to the next distinct step of the analysis to consider whether these changes, in light of the record as a whole, were "sufficient [to] show[] …individual risk" to Salim by analyzing whether he had "establish[ed] a prima facie case for relief." *Id.* The Court emphasized that the movant "need not conclusively establish that [he] warrants relief." *Id.* (citing *Ordonez v. I.N.S.*, 345 F.3d 777, 786 (9th Cir. 2003)). Rather, where the evidence merely "reveals *a reasonable likelihood* that" there is a "one-in-ten chance of future persecution," the movant has met that burden. *Id.* 1139–40 (emphasis added).

2. Evidence This Court Has Found To Be *Not Material*.

In contrast, this Court in *Najmabadi v. Holder*, 597 F.3d 983 (9th Cir. 2010), upheld the BIA's denial of that petitioner's motion to reopen. In *Najmabadi*, the Court found the submitted evidence deficient in two respects: the evidence was neither material nor new. *Id.* at 986 (explaining that the "evidence [in support of the

motion to reopen] … was *not linked* to Najmabadi's 'particular circumstances,'" and was already in the record from "the prior hearing") (emphasis added)).

The Court in *Najmabadi* distinguished the evidence submitted in that case with the evidence in *Malty*. *Id.* at 987. The *Najmabadi* Court explained that while Malty's evidence was "related to [his] initial claim," it was still "'new' evidence" because it was "qualitatively different" from his previous evidence. *Id.* at 987–88. The Court noted, "in *Malty*, … we juxtaposed harassing telephone calls with torture, beatings, and death threats." In *Najmabadi*, by contrast, the evidence submitted "describe[d] conditions similar to those" submitted in the initial proceedings that described the "Government's poor human rights record… in almost carbon copy form." *Id.* at 989. Additionally, the Court noted that the evidence in support of that motion to reopen did "not share the same type of *individualized relevancy* … required in *Malty*." *Id*. (emphasis added).

The Court then turned to *Bhasin* as an example of materiality. *Id.* at 990. The *Najmabadi* Court described Bhasin's "later-discovered evidence" that "rebut[ted]" the Board's nexus finding as *material*, and distinguished it from Najmabadi's evidence that "simply recounted[ed] generalized conditions in Iran." *Id.* Because Najmabadi had failed "to provide evidence *linked* to her particular circumstances" and thus failed "to introduce previously unavailable, *material* evidence," the Court concluded it did not need to proceed to the next discreet step of the analysis to "reach

the question of whether [she]… established a prima facie case for relief." *Id.* at 991–92 (emphasis added).

For the same reasons, this Court in *Toufighi v. Mukasey*, 538 F.3d 988 (9th Cir. 2008), upheld the BIA's denial of Toufighi's motion to reopen. In his initial asylum hearing, Toufighi claimed to fear persecution in Iran based upon his alleged conversion from Islam to Christianity. *Id*. at 991. However, the IJ found Toufighi's claimed conversion not credible, which the BIA upheld. *Id.* at 994–95. Toufighi later moved to reopen proceedings due to "newly available evidence… related to persecution of Christians in Iran," but the BIA rejected his motion. *Id.* at 992, 994. The Board reasoned that "the newly available evidence … was *irrelevant* because the IJ had already determined … [he] had not converted to Christianity." *Id.* at 994 (emphasis added).

In upholding the Board's decision, the Court reasoned that "[e]ven assuming the newly available evidence presented … demonstrated a general increase in persecution of apostates in Iran," because Toufighi "was not an apostate," he would not "be *directly affected* by any" of those changes. *Id.* at 996 (emphasis added). As such, the Court concluded that "the new evidence regarding persecution of apostates" was "*immaterial*." *Id.* at 997 (emphasis added).

* * *

While neither this Court nor the BIA has announced a formal test for materiality in the motion to reopen context, as explained above, this Court has operated under a common sense understanding of the term material evidence (i.e., it must have "some logical connection with the consequential facts.") *See Black's Law Dictionary* (10th ed. 2014), *available at* Westlaw. In their combination, the above decisions define "material evidence" as evidence that is *related* or *linked* to an element of the asylum or withholding claim, or otherwise has a *direct relationship* or some *individualized relevancy* to an aspect of the claim for protection. *Malty*, 381 F.3d at 945 (related); *Najmabadi*, 597 F.3d at 986 (linked and individualized relevancy); *Bhasin*, 423 F.3d 986 (direct relationship); *Toufighi*, 538 F.3d at 994 (relevant); *accord Salim*, 831 F.3d at 1138.

B. *Material Evidence* Of A Change In Country Conditions Does Not Require A Dramatic or Significant Change In Country Conditions.

Contrary to the Board's assertion in the instant case, for new evidence of a change in country conditions to be material, it need not establish a dramatic or *marked* change. *Joseph v. Holder*, 579 F.3d 827, 831, 835 (7th Cir. 2009) (holding that the Board erred in narrowly interpreting "changed circumstances" to require "a dramatic change in the political, religious or social situation"). The Seventh Circuit has reasoned that "[t]he plain language of the regulation … 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." *Id.* at 834. Likewise, this Court's

decisions have clearly recognized that gradually worsening conditions may constitute a change in country conditions. *See e.g.*, *Malty*, 381 F.3d at 945; *Bhasin*, 423 F.3d at 986.

Likewise, *material evidence* of a change in country conditions is not equivalent to a *material change in country conditions.* *Cf.* 8 U.S.C. § 1229a(c)(7)(C); 8 C.F.R. § 1003.2(c)(3)(ii). The statute and regulations demonstrate that the word "material" relates to the type of *evidence* that must be submitted in support of a motion to reopen, not to the type of *change in country conditions*. *See* 8 U.S.C. § 1229a(c)(7)(C) (A motion to reopen "based on changed country conditions" must be supported with "*evidence* [that] is *material* and was not available … at the previous proceeding.") (emphasis added); 8 C.F.R. § 1003.2(c)(3)(ii) (explaining that the time and number bars "shall not apply to a motion to reopen … [t]o apply for asylum …based on changed circumstances arising in the country of nationality … if such *evidence* is *material*…") (emphasis added); *accord Chandra*, 751 F.3d at 1036–37 (noting that the "regulations establish three evidentiary requirements: (1) 'changed circumstances arising in the country of nationality…,' (2) *evidence that is 'material'*; and (3) evidence that was not 'available' … at the time of the previous hearing") (emphasis added); *Toufighi*, 538 F.3d at 996 (stating that to prevail in a motion to reopen, the movant must "produce

evidence that [country] conditions" have "changed;" and "*the evidence*" must "be material").

While a number of Courts, including this one, have treated *materiality* as defining the type of change in country conditions required, such an interpretation cannot be fairly derived from the statute or regulations. *Compare Jiang v. U.S.*, 568 F.3d 1252, 1256 (11th Cir. 2009) (noting that "that Jiang had not established a *material change in China's country conditions*.") (emphasis added); *Zheng v. Holder*, 710 F.3d 769, 771 (7th Cir. 2013) ("The parties do not dispute that … Zheng was required to show that China's *conditions materially worsened* for Christians.") (emphasis added); *Feng Gui Lin v. Holder*, 588 F.3d 981, 989 (9th Cir. 2009) (finding the evidence "was insufficient to establish *a material change in country conditions*.") (emphasis added); *Matter of J-J-*, 21 I&N Dec. 976, 981 (BIA 1997) (noting "the documents presented … [do] not show *materially changed circumstances* in Liberia…") (emphasis added) *with* 8 U.S.C. § 1229a(c)(7)(C); 8 C.F.R. § 1003.2(c)(3)(ii); *Chandra*, 751 F.3d at 1036–37; *Toufighi*, 538 F.3d at 996.

II. A MOVANT ESTABLISHES *PRIMA FACIE* ELIGIBILITY BY SHOWING THAT THE MATERIAL EVIDENCE OF CHANGED COUNTRY CONDITIONS—COUPLED WITH THE EXISTING RECORD EVIDENCE—REFLECTS A "REALISTIC CHANCE" THAT SHE WILL BE ABLE TO ESTABLISH ELIGIBILITY AT A FULL HEARING.

This Court's cases have been careful to delineate the separate elements of "*prima facie*" eligibility (i.e., reasonable likelihood test) and the requirement to

present "previously unavailable, material evidence" of changed country conditions. *See e.g.*, *Salim*, 831 F.3d 1133; *Najmabadi*, 597 F.3d 983; *Toufighi*, 538 F.3d 996; *Malty*, 381 F.3d 942; *Cf. Ali v. Holder*, 637 F.3d 1025, 1028, 1032 (9th Cir. 2011) (reversing the Board's conclusion that "the evidence was 'new, but not *material*'" because the evidence "reveals a *reasonable likelihood* that the statutory requirements for relief have been satisfied," apparently conflating the *prima facie* eligibility and materiality analyses).[2]

Indeed, any approach that equates materiality with the *prima facie* requirement would be error for at least three reasons. First, this approach runs afoul of the Supreme Court's admonition against conflating the separate elements of a motion to reopen. *Abudu*, 485 U.S. at 108. Second, it renders superfluous the distinct requirements of *materiality* and *prima facie* eligibility to hold that their meanings are synonymous. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) ("Our practice . . . is to 'give effect, if possible, to every clause and word of a statute.'"); *Black & Decker Corp. v. Comm'r of Internal Revenue*, 986 F.2d 60, 65 (4th Cir. 1993) (applying same cannon of construction to regulations).

[2] While *Amici* contend that *Ali* was correctly decided—as any new evidence that "reveals a *reasonable likelihood* that the statutory requirements for relief have been satisfied" necessarily has "some logical connection with the consequential facts or issues"—any interpretation of *Ali* conflating materiality with *prima facie* eligibility would be error. *Abudu*, 485 U.S. at 108.

Third, and most importantly, conflating *materiality* and *prima facie* eligibility is inconsistent with the lion's share of this Court's case law. *See Salim*, 831 F.3d 1133; *Najmabadi*, 597 F.3d 983; *Toufighi*, 538 F.3d 996; *Malty*, 381 F.3d 942. The Board's failure in the instant case to provide distinct analyses of these two separate elements was error. *See* A.R. 3.

A. The Standard To Make Out A *Prima Facie* Case Must Be Less Than The Standard To Be Granted The Underlying Relief On The Merits.

The requirement that a motion to reopen establish a *prima facie* case for relief did not originate in regulation, although 8 C.F.R. § 1003.2(a) does state that "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief." The *prima facie* case requirement was instead developed through BIA caselaw. *Fernandez v. Gonzales*, 439 F.3d 592, 600 n.6 (9th Cir. 2006) (citing *I.N.S. v. Jong Ha Wang*, 450 U.S. 139, 141 (1981) (citing *Matter of Lam*, 14 I&N Dec. 98 (BIA 1972); *Matter of Sipus*, 14 I&N Dec. 229 (BIA 1972))).

Because motions to reopen serve a "limited screening function," *see Reyes v. I.N.S.*, 673 F.2d 1087, 1090 (9th Cir. 1982), the *prima facie* case standard *does* "*not require*[] a conclusive showing that eligibility for relief has been established." *Ordonez v. I.N.S.*, 345 F.3d 777, 785 (9th Cir. 2003) (quoting *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000)) (emphasis added). Rather, reopening is warranted "where the new facts alleged, when coupled with the facts already of record, satisfy

[the adjudicator] that it would be worthwhile to develop the issues further at a plenary hearing on reopening." *Id.*; *see also Kay v. Ashcroft*, 387 F.3d 664, 674 (7th Cir. 2004) (quoting *Matter of L-O-G-*, 21 I&N Dec. 413, 418–19 (BIA 1996)).

This Court's seminal decision, *Reyes v. I.N.S.*, 673 F.2d 1087 (9th Cir. 1982), explained that the standard to make out a *prima facie* case at the motion to reopen phase is not high. There, the Board had denied Reyes's motion to reopen to seek suspension of deportation because it found she had not established a *prima facie* case of extreme hardship, doubting the uncorroborated facts in the affidavits she submitted. *Id.* at 1089. The Court reversed, finding that the Board, "[i]n disbelieving the facts stated in her affidavits, … [had] imposed a heavy [evidentiary] burden …[,] which is inconsistent with the limited screening function served by a motion to reopen." *Id.* The Court reasoned:

> The motion to reopen is only a preliminary proceeding, representing the first in a series of hurdles that the alien must clear to obtain relief …. [It] is *not intended to be a substitute for a hearing*. ***Its purpose is merely to allow the Board to screen out those claims that clearly lack merit and thus can be disposed of without a hearing***. The function of the Board at the motion-to-reopen stage of the proceedings is *not to make a determination of the alien's eligibility for [the underlying] relief*…. The function … is *merely to determine whether the alien has set forth a prima facie case of eligibility*….

Id. (emphasis added).

Thus, the *Reyes* Court found that "[t]he Board's premature assessment and rejection of the truth of the facts stated in Reyes's affidavits … was manifestly

unfair" and could not be reconciled with the purpose of the *prima facie* case requirement for a motion to reopen, i.e., "*merely* to allow the Board to screen out … claims that *clearly lack merit*." *See id.* at 1089–90 (emphasis added).

Moreover, "since motions to reopen are decided without [the] benefit of a hearing, common notions of fair play and substantial justice … require that the Board accept as true" the facts set forth in a movant's affidavits "unless they are inherently unbelievable." *See id.* at 1090 (citing *Wang v. I.N.S.*, 622 F.2d 1341, 1350 (9th Cir. 1980)); *see also Ordonez,* 345 F.3d at 786 (citing *Limsico v. U.S. I.N.S.,* 951 F2d 210, 213 (9th Cir. 1991)); *Ghadessi v. I.N.S.,* 797 F.2d 804, 806 (9th Cir. 1986) (noting that unless the alleged facts are deemed "inherently unbelievable," evidence corroborative of the movant's affidavits "is not necessary to establish a *prima facie* case.")

In *Ghadessi*, 797 F.2d 804 (9th Cir. 1986), this Court reversed the Board's denial of a motion to reopen for failure to establish a *prima facie* case for asylum. Ghadessi asserted a fear of persecution in Iran based on her activism with an anti-Khomeini organization in the U.S., which began after she had been ordered deported. *Id.* She submitted an affidavit describing her political activities and her parents' detention and interrogation in Iran, as well as a Department of State advisory opinion. *Id.* at 806. The Court found that, in concluding that Ghadessi had not made out a *prima facie* case for asylum, "[t]he BIA simply failed to appreciate the *limited*

screening nature of the motion to reopen review," as its conclusion "was due solely to the Board's weighing of the *quality,* rather than the *sufficiency*, of her evidence." *Id.* at 806–07 (emphasis added). Instead of accepting Ghadessi's allegations as true, the Board's decision "strongly indicated that it found her allegations to be *un*true, or at least insufficiently corroborated by other evidence; a finding which the BIA is prohibited from making in considering a motion to reopen," where the facts alleged are not inherently unbelievable. *See id.* (emphasis in original).

The Court proceeded to find that, accepting Ghadessi's affidavit as true, she had made "a *prima facie* showing of a well-founded fear of persecution [because she] presented '*specific facts that give rise to an inference* that … [she] has been or has good reason to fear … she will be singled out for persecution.'" *Id.* at 807 (emphasis added). Therefore, although not conclusive, Ghadessi's evidence "*la[id] a strong foundation* for a reasonable fear of persecution." *Id.* at 809 (emphasis added). Significantly, the Court concluded that while the evidence "*may or may not be sufficient to establish … eligibility for asylum* after a full hearing on the merits, *… it is sufficient to establish a prima facie case* of a well-founded fear of persecution" and reopening was therefore warranted. *See id.* (emphasis added).

More recently, this Court in *Ordonez*, 345 F.3d at 785, found that the Board erred by "dismiss[ing] the new evidence [offered in support of that motion to reopen], stating that it would not alter its conclusion that Ordonez had not shown

extreme hardship," a requirement to be granted suspension of deportation. To do so, "[t]he BIA, in effect, made an adverse finding regarding Ordonez's credibility," as it relied on his failure to mention in a prior filing threats to his family members that occurred before that submission "as the basis to discount and disregard the facts set forth in his declaration" filed with the motion to reopen. *See id.* at 786. This was error because the Board "violates an alien's due process rights when it makes a sua sponte adverse credibility determination without giving the alien an opportunity to explain alleged inconsistencies." *Id.* The Court explained that "[b]ecause the movant *must only make a prima facie showing*," the BIA was required to accept the facts alleged as true, as they were not inherently unbelievable. *See id.* (emphasis added). In *Ordonez*, the Ninth Circuit also joined other Circuit Courts in adopting the Board's language that the *prima facie* case standard is satisfied where "the evidence reveals a *reasonable likelihood* that the statutory requirements for relief have been satisfied." *Ordonez*, 345 F.3d at 785 (emphasis added), citing *Matter of S-V-*, 22 I&N Dec. at 1308; *see also Smith v. Holder*, 627 F.3d 427, 437 (1st Cir. 2010); *Sevoian v. Ashcroft*, 290 F.3d 166, 173 (3rd Cir. 2002); *M.A. v. U.S. I.N.S.*, 899 F.2d 304, 310 (4th Cir. 1990); *Marcello v. I.N.S.*, 694 F.2d 1033, 1035 (5th Cir. 1983); *Alizoti v. Gonzales*, 477 F.3d 448, 452 (6th Cir. 2007); *Boika v. Holder*, 727 F.3d 735, 742 (7th Cir. 2013); *Matter of L-O-G-*, 21 I&N Dec. at 419.

* * *

The First, Second, Third, and Sixth Circuits, as well as the Board, have referred to the *Reyes* Court's above explanation of the *prima facie* case standard in equating the "reasonable likelihood" language to a "*realistic chance*" that the movant "can *at a later time*" (i.e., in the reopened proceeding) "establish that asylum should be granted." *See Guo v. Ashcroft*, 386 F.3d 556, 564 (3rd Cir. 2004) (emphasis added); *see also Poradisova v. Gonzales*, 420 F.3d 70, 78 (2nd Cir. 2005); *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007), all citing *Reyes v. I.N.S.*, 673 F.2d 1087, 1089 (9th Cir. 1982); *see also Smith*, 627 F.3d at 437 (1st Cir. 2010); *Tiansheng Zou v. Holder*, 517 F.App'x. 385, 388 (6th Cir. 2013). Put another way, a "realistic chance" of establishing asylum eligibility upon reopening is the phrase coined by other Circuit Courts to describe the type of analysis in which this Court engaged in *Reyes*.

Amici urge the Ninth Circuit to use the instant case to formally adopt this phrasing. Because the "reasonable likelihood" language is susceptible to conflation with the ultimate standard to be granted asylum on the merits, i.e., a "reasonable possibility"—as demonstrated by the Board in this case, *see* A.R. 3—the "realistic chance" phrasing underscores that the standard to make out a *prima facie* case at the motion to reopen phase is different from, and necessarily less than, the standard to be granted asylum.

B. The Board Erred By Holding Petitioner To The Higher Standard To Be Granted Asylum On The Merits, Rather Than The Lower *Prima Facie* Case Standard.

As the Court's analysis in the foregoing decisions reflects, because the *prima facie* standard is lower than the standard to be granted asylum on the merits, the Board here erred when it required the movant to "proceed to end-game" and conclusively show a "well-founded fear of persecution" in her motion to reopen. *See Guo*, 386 F.3d at 564; *accord Ordonez*, 345 F.3d at 785; *Reyes*, 673 F.2d at 1089. The *prima facie* case standard for a motion to reopen merely requires evidence demonstrating a "realistic chance" that the movant "can *at a later time* establish that asylum should be granted." *See Guo*, 386 F.3d at 564 (emphasis added). Although this "distinction may at first appear to be subtle shading, … without it 'prima facie' (meaning at first sight) would lack meaning." *Id.*

As the BIA itself has explained, "[i]n considering a motion to reopen, the Board should not *prejudge the merits of a case* before the alien has had an opportunity to prove the case…. The ultimate determination on a[n] … application rests with the [IJ] after the [applicants] have had an opportunity to present all the evidence and arguments in their favor at the hearing." *Matter of L-O-G-*, 21 I&N Dec. at 418–19 (emphasis added). If proceedings could only be reopened where the BIA determined that the movant was clearly eligible for the underlying relief sought, there would be nothing more to do at the reopened hearing.

Whereas the standard to be granted asylum on the merits is a "well-founded fear"—i.e., a "reasonable possibility" or at least a one-in-ten chance—of persecution, *see* 8 U.S.C. § 1101(a)(42); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987), the "reasonable likelihood" or "realistic chance" standard to make out a *prima facie* case for asylum at the motion to reopen phase is significantly lower. As the *Salim* Court explained, under a proper application of the *prima facie* standard, "Salim's motion to reopen must establish *only a reasonable likelihood* that, if returned to Indonesia, he faces *at least a one-in-ten chance* of persecution because of his Christian faith." *Salim v. Lynch*, 831 F.3d 1133, 1140 (9th Cir. 2016) (emphasis added). The Court deemed Salim's personal declaration and a letter from his sister detailing "the recent threats against the family's local church and their growing inability to freely practice their [Christian] faith" sufficient evidence of the heightened individualized risk he would face in Indonesia to satisfy the *prima facie* case standard. *See id.*; *accord Malty*, 381 F.3d at 948.

In the instant case, the Board required Petitioner to demonstrate eligibility for relief under the ultimate standard to be granted asylum, rather than the lower *prima facie* standard. The Board decision states: "[Petitioner's] generalized claim of increased harassment and episodes of strife between the government and the Shuar indigenous community does not *demonstrate that there exists* a *reasonable possibility* of harm rising to the level of persecution on account of her political

opinion, membership in a particular social group or other protected ground." A.R. 4 (emphasis added). By requiring Petitioner to "demonstrate that there exists" a "reasonable possibility" of persecution—the standard that must be satisfied to be granted asylum on the merits—rather than asking whether the evidence supports a "reasonable likelihood" that she will demonstrate asylum eligibility in the reopened proceedings, the Board held her to a heightened standard and thereby committed reversible error. *See Salim*, 831 F.3d at 1140; *Ghadessi*, 797 F.2d at 807–09.

III. NEITHER THE MATERIALITY NOR THE *PRIMA FACIE* REQUIREMENT MAY BE EQUATED WITH A REQUIREMENT THAT THE NEW, MATERIAL EVIDENCE BE OUTCOME DETERMINATIVE.

The Board in the case at bar cited *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) in referencing the "heavy evidentiary burden" a movant for reopening must carry. *See* A.R. 3 (citing *Coelho*, 20 I&N Dec. at 473) (describing the "heavy burden" as "evidence of such a nature that the Board is satisfied that if proceedings … were reopened…, the new evidence offered would likely change the result in the case"). Such language often bleeds into the Board's analysis of the materiality and *prima facie* eligibility requirements,[3] as it apparently did in the instant case. Not

[3] *See e.g.*, *Jiang v. U.S.*, 568 F.3d 1252, 1256 (11th Cir. 2009); *Li v. U.S. Att'y Gen.*, 488 F.3d 1371 (11th Cir. 2007); *Allabani v. Gonzales*, 402 F.3d 668, 676 (6th Cir. 2005) (affirming Board's denial of a motion to reopen finding that "if the proceedings were reopened, the respondent would [not] likely establish eligibility for asylum … based on the evidence submitted.")

only is such conflation error, it also represents a dramatic misreading of *Coelho*. In this section, *Amici* advocate for a more limited application of *Matter of Coelho*, one which construes the "likely to change the result" language as applying only to the last alternative ground for denying a motion to reopen, i.e., denials as a matter of discretion. *See e.g.*, *Abudu*, 485 U.S. at 105.

The Board in *Matter of Coelho,* 20 I&N Dec. 464 (BIA 1992), was confronted with the issue of how to weigh a motion to reopen filed in the context of a denied application for relief under former section 212(c) of the Immigration and Nationality Act. There, the movant had been convicted of possession of cocaine with intent to distribute and sentenced to three years imprisonment. *See id.* at 465–66. At the time of his initial hearing, the IJ found he was statutorily eligible for a 212(c) waiver because—as a lawful permanent resident of twenty-three years—he had more than the required seven years of residence. *Id.* However, 212(c) also requires an applicant to establish that the favorable factors outweigh the negative, and that he merits a positive exercise of discretion. *Id.* In weighing Coelho's many significant adverse considerations against the positive, the IJ concluded that Coelho did not merit 212(c) relief and ordered him deported. *Id.* On appeal, Coelho also filed a motion to reopen to submit additional information related to his rehabilitation. *Id.*

Coelho argued that because he was *prima facie* eligible for 212(c) relief (given his more than seven years of residence), and in light of new evidence material to his

application for 212(c) relief (i.e., evidence of rehabilitation), his proceedings should be reopened and remanded. *Id.* In considering his request, the Board recited the "three independent grounds" for denying a motion to reopen referenced in *Abudu*. *Id.* at 472 (citing *Abudu*, 485 U.S. 104–05, in explaining that the BIA may deny a motion to reopen (1) for "failure to establish a prima facie case," (2) for failure to offer "previously unavailable, material evidence," or (3) "where the ultimate relief is discretionary, the Board may conclude that … [it] would not grant relief in the exercise of discretion."). The Board then observed the following:

> ***In a case such as the present one***, *making a prima facie showing* of eligibility for the underlying relief being sought *is largely irrelevant*, as the respondent has already established eligibility to be considered for relief under section 212(c) of the Act and has already been provided the opportunity to apply for such relief. Moreover, *the issue is not simply whether there is "new" evidence as, in some respects,* ***there arguably always will be additional evidence regarding a respondent's application for relief under section 212(c)*** *…, as the mere passage of time can be said to augment an applicant's equities*. Rather, ***in cases such as this***, *the Board ordinarily will not consider a* ***discretionary grant*** *…* ***unless the moving party meets a "heavy burden"*** *and* ***presents evidence*** *of such a nature that the Board is satisfied* ***that if proceedings*** *…* ***were reopened***, *…* ***the new evidence offered would likely change the result in the case***.

Id. at 473 (emphasis added).

Coelho's circumscribed analysis with regard to that "heavy burden" is clearly limited to instances in which the initial case was denied in an exercise of discretion, and probably should not be applied outside the 212(c) context. *See id.*; *Abudu*, 485 U.S. at 105. In such cases, it is perfectly reasonable to refuse to reopen the case

where "the *new evidence offered would [not] likely change the result in the case*" even though there is new, material evidence and the movant is *prima facie* eligible. *Id.*

However, it is entirely nonsensical to apply that "heavy burden" standard—specific to discretionary denials—to the separate *materiality* or *prima facie* prongs of an asylum-based motion to reopen analysis. Indeed, applying that "*likely* to change the result" test to the materiality or *prima facie* elements here not only runs afoul of the Supreme Court's prohibition on conflation, *Abudu*, 485 U.S. at 108, it also renders the materiality and *prima facie* requirements superfluous in contravention of well-settled principles of statutory and regulatory construction. *See Advocate*, 137 S. Ct. at 1659; *Black & Decker Corp.*, 986 F.2d at 65.

Additionally, conflating *Coelho's* "heavy burden" standard with *materiality* and *prima facie* eligibility would be utterly inconsistent with this Court's precedent related to the correct tests for those distinct requirements. *See Ghadessi*, 797 F.2d at 809 (finding that while the new evidence "may or *may not [have been] sufficient to establish Ghadessi's eligibility for asylum after a full hearing* on the merits, … *it [was] sufficient to establish a prima facie case* of a well-founded fear of persecution" and reopening was therefore warranted) (emphasis added)); *Reyes v. I.N.S.*, 673 F.2d 1087, 1089 (9th Cir. 1982) (holding that to "impose[] a *heavy* [*evidentiary*] *burden*" would be "inconsistent with the limited screening function

served by a motion to reopen" and its prima facie eligibility requirement) *see also Salim*, 831 F.3d at 1138; *Najmabadi*, 597 F.3d at 986; *Toufighi*, 538 F.3d 997; *Bhasin*, 423 F.3d 986; *Malty*, 381 F.3d at 945..

Amici contend that any construction of *Coelho* that mandates the new evidence of changed country conditions to "*likely* change the outcome" would consume this Court's materiality and *prima facie* analyses described above. *See supra* Section I (materiality merely requires the new evidence to have some logical connection to the consequential facts or issues); *supra* Section II (*prima facie* eligibility merely requires the movant to show a "reasonable likelihood" or "*realistic chance*" that she could be granted asylum in the reopened proceeding). Both requirements would be rendered a nullity if *Coelho* is interpreted broadly to apply to all motions to reopen. Consequently, to avoid this absurd result, *Coelho*'s "heavy burden" must be cabined to apply only to motions denied solely for discretionary reasons. *See e.g.*, *Abudu*, 485 U.S. at 105.

IV. CONCLUSION

For the reason's provided above, *Amici* respectfully support Petitioner's request to vacate the Board's decision and remand with instructions to reopen Ms. Pínchupa's case.

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By: /s/ Charles Shane Ellison

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because the brief contains 6,653 words, as counted by Microsoft Word, excluding parts of the brief exempted by Fed. R. App. P. 32(f). This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font (Microsoft Word 2016).

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

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