No. 19-161

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Petitioners,

v.

VIJAYAKUMAR THURAISSIGIAM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* ASYLUM LAW PROFESSORS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are professors of asylum law. They study and publish on U.S. immigration and asylum law and policy, and they represent indigent claimants in removal and asylum proceedings. *Amici* have an interest in advocating the fair and just application of immigration laws to persons who seek asylum in the United States.

Amici are:

Deborah Anker, Clinical Professor of Law and Founder of the Harvard Law School Immigration and Refugee Clinical Program. Professor Anker is the author of a leading treatise in the field, *Law of Asylum in the United States*, originally published in 1994 and updated regularly through 2019. She has published numerous articles on immigration and asylum law. Her work has been cited by this Court.

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Karen Musalo, Professor and Bank of America Foundation Chair in International Law at the

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[1] All parties have consented to the filing of this brief. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici curiae* or their counsel, has made a monetary contribution to this brief's preparation or submission.

University of California, Hastings College of Law. Professor Musalo is the principal author of a leading casebook in the field, *Refugee Law and Policy: An International and Comparative Approach*. She is an internationally recognized expert on refugee and asylum issues and has written extensively on the topic.

INTRODUCTION AND SUMMARY OF ARGUMENT

By domestic and international law, the United States assumed legal obligations to provide protection to refugees fleeing persecution or torture. In the Refugee Act of 1980, Congress authorized executive branch officials to grant asylum to "refugee[s]," 8 U.S.C. § 1158(b)(1)(A)—persons who are unable or unwilling to return to their home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* §§ 1101(a)(42)(A), 1158(b)(1)(B)(i); see also 8 U.S.C. § 1158(a). The Refugee Act implemented the United States' obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, ratified by the Senate in 1968.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) established the expedited removal process. Pub. L. 104–208, § 302, 110 Stat. 3009–546, 579-84 (codified at 8 U.S.C. § 1225). Under that process, individuals arriving in this country without valid entry documents may be summarily returned to their countries of origin "without further hearing or review." 8 U.S.C. § 1225. To guard against the risk that bona fide asylum

seekers might be summarily removed in expedited removal proceedings, persons with a "credible fear of persecution" are screened out of the expedited removal process and placed in formal removal proceedings. *Id.* § 1225(b)(1)(B)(ii).

The credible fear standard is met if there is a significant possibility that the person could establish eligibility for asylum. The assessment of credible fear in the expedited removal process deliberately uses a much lower threshold than *well-founded* fear of persecution on statutorily specified grounds.[2] The latter standard is used in adjudicating on the merits whether an asylum claim will be successful. The lower credible fear standard is merely a screening threshold intended to safeguard meritorious claims against return to persecution or torture.

In practice, however, the expedited removal system has often screened out persons with legitimate claims of credible fear of persecution or torture. Bona fide asylum seekers are routinely removed despite having strong claims to protection. Respondent Vijayakumar Thuraissigiam's case is paradigmatic of how, without review, executive officers sometimes do not appropriately interpret and apply the safeguards built into the expedited removal system.

Because the reality of the expedited removal process fails to meet the statutory and regulatory requirements governing that process, a noncitizen's ability to challenge an expedited removal order is of critical importance. Only review by the independent Article III judiciary can ensure that the system

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[2] Except where context dictates otherwise, all references in this brief to either a "credible" or a "well-founded" fear refer to fear based on one of the statutorily specified characteristics.

achieves accuracy in making the determinations it is set up to make. The court of appeals ordered nothing more than that, and its judgment should be affirmed.

LEGAL FRAMEWORK

By international treaties, domestic statutes, and implementing regulations, the United States has assumed legal obligations to provide protection to "persons physically present or arriving in the United States who fear persecution or related serious harm in their home countries." Deborah Anker, *Law of Asylum in the United States* § 2:1 (2019 ed.) (footnote omitted).

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, codified provisions for granting asylum to refugees. See 8 U.S.C. § 1158. By statute, a person is eligible for asylum in the United States if he or she has a "well-founded fear" of persecution on account of his or her race, religion, nationality, membership in a particular social group, or political opinion (the nexus requirement). 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i). This Court has explained that the "well-founded fear" standard is a lower standard than "more likely than not." A noncitizen satisfies the well-founded fear standard if there is a one-in-ten chance that he or she will be persecuted on account of a protected ground. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431-432 (1987).[3]

[3] In addition to asylum protection, a refugee also may seek withholding of removal (under 8 U.S.C. § 1231(b)(3)) or protection under the Convention Against Torture (ratified by the Senate in 1994 and implemented in the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, 112 Stat. 2681), which imposes a duty not to return potential victims to countries where they may suffer torture. Anker, *Law*

Congress extended asylum protection to persons fleeing persecution, regardless of the location or manner of a person's entry. 8 U.S.C. § 1158(a)(1) (a person may seek asylum "whether or not" he or she enters at a designated port and "irrespective of . . . status"). Neither the manner nor the location of a person's entry bears on the danger or threat of persecution faced by asylum seekers.[4]

A. The Expedited Removal System: Statutory and Regulatory Framework

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 established expedited removal procedures for noncitizens who were inadmissible because they lacked valid travel documents. IIRIRA § 302 (codified at 8 U.S.C. § 1225).

A person subject to expedited removal is ordered summarily removed by an immigration officer "without further hearing or review." 8 U.S.C. § 1225(b)(1)(A)(i), (B)(iii)(I). This process differs significantly from regular removal proceedings (also called formal removal proceedings), which provide a noncitizen with certain procedural rights like the right to an administrative hearing before an immigration judge, the right to appeal an adverse removal decision to the Board of Immigration Appeals (BIA), and the right to seek judicial review. See 8

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of Asylum §§ 1:2, 7:2. Both forms of relief require meeting the higher "more likely than not" standard. See 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(b)(2); 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1).

[4] Furthermore, asylum seekers—who are fleeing circumstances of persecution and torture—often are not able to present themselves at a port of entry.

U.S.C. § 1252; 8 C.F.R. § 1003.1(b); Anker, *Law of Asylum* § 1:11. The availability of review provides a procedural safeguard against an erroneous removal decision, the consequence of which is a refugee's return to circumstances of persecution or torture. See *Cardoza-Fonseca*, 480 U.S. at 449 ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.").

In the expedited removal system, special procedures go into effect if the noncitizen expresses a fear of persecution or torture. The noncitizen is referred to a "credible fear interview" to determine whether he or she may apply for asylum. If the noncitizen is found to have a credible fear of persecution or torture, he or she must be diverted from expedited removal proceedings under 8 U.S.C. § 1225 and placed in formal removal proceedings under 8 U.S.C. § 1229a. 8 C.F.R. § 208.30(f). The asylum officer *must* refer a noncitizen with a positive credible fear determination to formal removal proceedings and has no discretion to do otherwise. *Ibid.* A determination that the noncitizen has demonstrated credible fear does *not* mean that the noncitizen will be granted asylum; rather, the noncitizen is permitted to apply for asylum, withholding of removal, or protection under the Convention Against Torture.

If, however, the credible fear interview results in the finding that the noncitizen does not have a credible fear of persecution or torture, and an immigration judge concurs in that negative determination, then the noncitizen is removed from

the United States. 8 U.S.C. § 1225(b)(1)(A)(i), (B)(iii)(I); 8 C.F.R. § 235.3(b)(2)(ii).

B. The Expedited Removal Process

Customs & Border Protection Inspection. A noncitizen subject to expedited removal must first undergo an "inspection" by an officer of U.S. Customs and Border Protection (CBP). During this initial processing, the CBP official is required to ask four questions relating to a noncitizen's fear of return to his or her home country:

> Q: Why did you leave your home country or country of last residence?
>
> Q: Do you have any fear or concern about being returned to your home country or being removed from the United States?
>
> Q: Would you be harmed if you returned to your home country or country of last residence?
>
> Q: Do you have any questions or is there anything else you would like to add?

Form I-867 Side B.

If the noncitizen expresses a fear of return or persecution, the "officer *shall* refer the alien for an interview by an asylum officer," 8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added), and "shall not proceed further with removal," 8 C.F.R. § 235.3(b)(4). The CBP officer has no authority to evaluate the noncitizen's credibility or claim of fear.

Credible Fear Interview. The credible fear interview is a screening process that evaluates whether a noncitizen could qualify for asylum, withholding of removal, or protection under the Convention Against Torture. "The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the applicant has a

credible fear of persecution or torture." 8 C.F.R. § 208.30(d).

Noncitizens claiming fear are interviewed by U.S. Citizenship and Immigration Services (USCIS) asylum officers, who make a finding as to whether the noncitizen has a "credible fear of persecution or torture." 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(d).[5] To find a credible fear of persecution, an asylum officer must determine that "there is a *significant possibility*, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added); see also 8 C.F.R. § 208.30(e)(2), (e)(3) (significant-possibility standard for withholding of removal and Convention Against Torture claims).

If the asylum officer finds that the noncitizen has a credible fear of persecution or torture, the noncitizen must be referred to formal removal proceedings, where he or she will get a full administrative hearing, subject to judicial review, on the far more exacting claim of a well-founded fear of persecution or torture. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30(f), 235.6(a)(1)(ii).[6] If the asylum officer determines that

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[5] According to recent news reports, CBP officers, rather than USCIS asylum officers, have begun conducting credible fear interviews. See Molly O'Toole, *Border Patrol agents, rather than asylum officers, interviewing families for 'credible fear,'* L.A. Times, Sept. 19, 2019, https://lat.ms/2uUV9t1.

[6] Likewise, if there is a significant possibility that the noncitizen is eligible for withholding of removal or protection under the Convention Against Torture, then the noncitizen must be referred to formal removal proceedings. 8 C.F.R. § 208.30(e)(2)-(4), 208.30(f).

a noncitizen does not have a credible fear of persecution or torture, the noncitizen may seek review of the credible fear determination before an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1208.30(g)(1).

Review of Credible Fear Determination. On request by the noncitizen, the asylum officer will refer the noncitizen to an immigration judge for review of the negative determination. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. §§ 208.30(g)(1), 235.6(a)(2)(i), 1003.42(a), 1208.30(g)(2)(i). The immigration judge is directed to "make a de novo determination as to whether there is a significant possibility" that the noncitizen can demonstrate eligibility for asylum or withholding of removal. 8 C.F.R. § 1003.42(d)(1).

If the immigration judge concurs with the asylum officer's negative credible fear finding, "the case shall be returned to [the Department of Homeland Security (DHS)] for removal of the alien," and the immigration judge's decision "is final and may not be appealed." 8 C.F.R. § 1208.30(g)(2)(iv)(A). Conversely, if the immigration judge finds that the noncitizen has a credible fear of persecution or torture, the immigration judge will vacate the asylum officer's negative credible fear determination, and the noncitizen will be placed in formal removal proceedings, where the noncitizen can further pursue his or her claim for relief. *Id.* § 1208.30(g)(2)(iv)(B).

The statute precludes administrative review by the BIA or judicial review by the federal courts of appeals of credible fear determinations. 8 U.S.C. § 1225(b)(l)(A)(i); 8 C.F.R. § 235.3(b)(2)(ii). The statute provides for judicial review in habeas corpus proceedings of only whether "an order in fact

was issued and whether it related to petitioner," but not review of "whether the alien is actually inadmissible or entitled to any relief from removal." 8 U.S.C. § 1252(e)(5).

ARGUMENT

The credible fear standard is deliberately set as a low screening threshold to ensure that noncitizens with viable asylum claims will not be removed without the protections of the full process. For this screening process to work, asylum officers must effectively divert bona fide asylum claims out of expedited removal proceedings, which are intended for those noncitizens lacking valid entry documents who do not have fear of persecution or torture on protected grounds.

In practice, however, expedited removal proceedings consistently fail to ensure that bona fide asylum claims are directed into formal removal proceedings. This failure is threefold: (1) a misunderstanding of the burden of proof necessary to satisfy the credible fear standard; (2) failures by asylum officers to "elicit" all information from asylum seekers relating to credible fear and make determinations using country conditions evidence; and (3) failures by border officials to refer asylum seekers to a credible fear interview.

The result is the expedited removal of bona fide asylum seekers to circumstances of persecution and torture. Mr. Thuraissigiam's case is but one example of an erroneous credible fear determination, highlighting the importance of review by an Article III court.

I. THE "CREDIBLE FEAR" STANDARD IS A LOW SCREENING THRESHOLD.

To satisfy the credible fear standard, a noncitizen need show only "a significant possibility" that he or she could establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture. 8 U.S.C. § 1225(b)(1)(B)(v) (defining "credible fear of persecution"); 8 C.F.R. § 208.30(e)(2), (e)(3).

Credible fear screening is not a full adjudication of an asylum claim; rather, "it is an initial review meant to quickly identify potentially meritorious claims and screen out frivolous ones." U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 34 (2016) (*Barriers to Protection*), https://bit.ly/2NzFJkz; see also 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997) (credible fear standard is a screening mechanism that sets "a low threshold of proof of potential entitlement to asylum; many aliens who have passed the credible fear standard will not ultimately be granted asylum").

Accordingly, the credible fear standard is intentionally less rigorous than the well-founded fear standard used in evaluating an asylum claim on its merits. The credible fear standard is satisfied if there is a "significant possibility" of a well-founded fear, which in turn is merely a one-in-ten chance that a noncitizen will be persecuted on account of a protected ground. See *Cardoza-Fonseca*, 480 U.S. at 431-432 (describing well-founded fear standard as a one-in-ten chance of persecution).

The credible fear standard was intentionally set low so that "there should be no danger that an alien with a genuine asylum claim" would be summarily "returned to persecution." H.R. Rep. No. 104-469, Pt.

1, at 158 (1996). As the principal sponsor of the bill, Senator Orrin Hatch, explained when IIRIRA was enacted, the credible fear standard is "a low screening standard for admission into the usual full asylum process." 142 Cong. Rec. 25,347 (1996).[7]

In practice, however, immigration officials frequently fail to understand this low screening threshold. See *Reflections from the Border*, Harvard Law Today, Nov. 2, 2018, https://bit.ly/37167vc (immigration judge reviewing negative credible fear findings "was misstating the legal standards, mixing up the higher bar for those who had already been previously deported from United States with the lower one for those who had just entered for the first time"); *ibid.* (asylum seeker in a negative credible fear proceeding "compellingly recounted his story of horrific persecution on account of his race only for the [immigration] judge to declare, inexplicably, that he had not testified that he was persecuted on account of his race"); see also *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 Notre Dame J.L. Ethics & Pub. Pol'y 1, 70 (2001) (three-year study documenting problems with "the accuracy of determinations made during the expedited removal process" and with

[7] See also Former Immigration Judge Jeffrey S. Chase, *Attorneys and Credible Fear Review* (July 22, 2018), https://bit.ly/2NuUipo ("This interview is designed as a screening, not a full-blown application for asylum. The noncitizen being interviewed has just arrived, is detained, often has not yet had the opportunity to consult with a lawyer, probably does not yet know the legal standard for asylum, and has not had the opportunity to compile documentation in support of the claim. Therefore, the law sets what is intended to be a very low standard[.]").

officers' handling of "complex legal or factual determinations").

The asylum officer training materials exacerbate this issue: Although the asylum officers' training materials previously included language about the low screening standard, USCIS (the component of DHS governing the asylum office) issued revised training materials in February 2014 that "eliminated the above statement from Senator Hatch about the low screening standard." *Barriers to Protection* 35. The revised materials also removed prior materials' accurate characterization of the credible fear standard as a "protective net" that "will capture all potential refugees and individuals who would be subject to torture if returned to their country of feared persecution or harm." See USCIS, RAIO Asylum Division Officer Training Course, Lesson Plan on Credible Fear 12 (Apr. 14, 2006) (2006 Credible Fear Training Course), https://bit.ly/30wCcJ5.

The consequence is a substantial risk, borne out in practice, that asylum officers are erroneously concluding that the credible fear standard has not been met. Indeed, after these revised training materials were implemented, the rate of positive credible fear determinations declined substantially from what it had been for years. See *Barriers to Protection* 36 (discussing decline of more than 10% in credible fear grant rates from the preceding year).

Without judicial review, immigration officials will continue to misunderstand and consequently misapply the low screening threshold of the credible fear standard. This circumstance is not new or unique to expedited removal: Until the Court clarified the well-founded fear standard in *Cardoza-Fonseca* in 1987, immigration judges and the BIA incorrectly

thought that the well-founded fear standard was equivalent to a more-likely-than-not standard. See 480 U.S. at 448–449 (holding that the well-founded fear standard is lower than the more-likely-than-not standard). Judicial review in the expedited removal process is needed to provide guidance on the legal standard for credible fear.

II. ASYLUM OFFICERS FAIL TO PROVIDE ASYLUM SEEKERS WITH SUFFICIENT OPPORTUNITY TO SHOW CREDIBLE FEAR.

By statute, noncitizens claiming fear of return to their home country must be referred to a "credible fear" interview. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4). The regulations specify that the credible fear interview must be conducted by an asylum officer, and "[t]he purpose of the [credible fear] interview shall be to *elicit* all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d) (emphasis added).

As the USCIS's training materials acknowledge, in "eliciting" information, it is "critical" to "prob[e] for additional information and follow[] up on [the asylum seeker's] statements." USCIS Adjudicator's Field Manual, App. 15-2, Pt. 2, https://bit.ly/2soq941. Asylum officers, however, frequently fail to discharge their regulatory obligation to elicit all information from the asylum seeker and to use country conditions evidence in assessing credible fear of persecution or torture.

A. The Asylum Officer Has an Affirmative Obligation to Elicit Information and Assess Credible Fear Using Country Conditions Evidence.

"Eliciting" requires more than merely asking a rote question. See *Elicit*, Oxford English Dictionary (3d ed. 2019) (To "elicit" means "to draw forth" or "to bring out."). As the USCIS's training materials explain, "'[e]liciting' information often means more than simply asking questions and receiving responses. The officer may need to draw forth from the interviewee information that has a bearing on his or her eligibility [for asylum]." USCIS Adjudicator's Field Manual, App. 15-2, https://bit.ly/3a1ftZW; accord USCIS, RAIO Asylum Division Officer Training Course, Lesson Plan on Credible Fear of Persecution and Torture Determinations 13 (Feb. 13, 2017) (2017 Credible Fear Training Course), https://bit.ly/378rr22.

Consistent with the regulatory requirement that an asylum officer "elicit all relevant and useful information" relating to the asylum claim, 8 C.F.R. § 208.30(d), the asylum officer must "ask questions to expand upon and clarify the interviewee's statements and information contained on the form," see USCIS Adjudicator's Field Manual, App. 15-2, https://bit.ly/3a1ftZW. "The response to one question may lead to additional questions about a particular topic or event that is material to the claim." *Ibid.* Among other things, follow-up questions may probe into the circumstances surrounding a traumatic event, see *ibid.*, or inquire into any history of problems with the police or government, see *Tan Jin Yu* v. *United States Dep't of Justice*, 226 Fed. App'x 73, 75 (2d Cir. 2007); see also *Ramsameachire* v. *Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004).

In assessing the asylum seeker's claim of credible fear, the asylum officer is statutorily required to consider "such other facts as are known to the officer" beyond the information the asylum seeker provides during the interview. See 8 U.S.C. § 1225(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2). By statute, "such other facts" include country conditions information, on which asylum officers are required to have been trained. 8 U.S.C. § 1225(b)(1)(E)(i) ("'[A]sylum officer' means an immigration officer who has had professional training in country conditions . . . ."); see also 2017 Credible Fear Training Course 14 ("Such 'other facts' include relevant country conditions information.").

Accordingly, to elicit all information relevant and useful to the asylum seeker's claim of credible fear, the asylum officer should ask follow-up questions that are informed by the conditions of the country from which the asylum seeker fled. Cf. 2006 Credible Fear Training Course 31 ("An officer who has a good understanding of country conditions can identify the most relevant parts of the testimony more clearly and ask specific questions to develop the relevant issues further.").

B. Because of the Barriers in Communication, Asking Informed Follow-Up Questions Is Critical to the Duty to Elicit.

It is often extremely difficult to elicit the full story from an asylum seeker at first. Psychological issues, as well as differences in language and culture, are systemic barriers to the communication of an asylum seeker's fear of persecution or torture. In these circumstances, probing an asylum seeker's story and asking follow-up questions is critical to understanding whether the asylum claim is legitimate.

Reticence. "[B]ecause those most in need of asylum may be the most wary of governmental authorities, the BIA and reviewing court must recognize, in evaluating the statements made in an interview, that an alien may not be entirely forthcoming in the initial interview." *Ramsameachire* v. *Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004). Indeed, "former members of political parties and groups which were illegal in their home countries have deeply internalized the values of secrecy and suspicion toward outsiders." See Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 Int'l Migration Rev. 230, 232 (1986). Accordingly, those individuals may be reserved in the manner in which they communicate, leading them to "present . . . fragmented and confusing stor[ies]." *Ibid.* The same is true for other refugees and members of minority groups that were persecuted in their home countries.

Trauma. Even if a noncitizen can relay some details regarding his or her persecution or torture, it is common for victims of trauma to be reluctant to share the details of their traumatic circumstances. Indeed, it can take experienced asylum attorneys several meetings over many days to build the trust needed for clients to share the traumatic circumstances that prompted them to flee to the United States. See, *e.g.*, Letter from Am. Immigration Council et al. to Directors of USCIS and ICE, 2-3 (Dec. 24, 2015) (AIC Letter), https://bit.ly/370sX6i.

It is therefore unsurprising that asylum seekers, as victims of trauma, may be less forthcoming about the circumstances of their persecution or torture. See Sabrineh Ardalan, *Access to Justice for Asylum Seekers*, 48 U. Mich. J.L. Reform 1001, 1001-1002

(2015) (discussing story of man who was overwhelmed when trying to discuss his abduction, beating, and torture by government forces during his interview with an asylum officer).

Refugees, due to the very trauma that led them to flee their homes, are prone to high levels of depression and Post-Traumatic Stress Disorder (PTSD). Jane Herlihy et al., *Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum*, 26 Appl. Cognit. Psychol. 661, 664-665 (2012). Depression and PTSD negatively affect the encoding of memories. Jessica Chaudhary, *Memory and Its Implications for Asylum Decisions*, 6 J. Health & Biomedical L. 37, 44-45 (2010); Herlihy, 26 Appl. Cognit. Psychol. at 663-669. As a result, refugees suffering from those conditions are less likely to recall the details of their persecution, especially peripheral details, consistently over time, and are more likely to recall memories in overgeneralized terms. See Chaudhary, 6 J. Health & Biomedical L. at 49; Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 Hastings Race & Poverty L.J. 235, 257 (2007); Herlihy, 26 Appl. Cognit. Psychol. at 663, 667, 671.

Language Barriers. Although it is required that translators be present during credible fear interviews,[8] the government regularly fails to provide qualified translators. *Barriers to Protection* 27-28; Kathryn Shepherd et al. *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers*, American Immigration Council

[8] See 8 C.F.R. §§ 235.3(b)(2)(i), 208.30(d)(5).

(2017) (*The Perils of Expedited Removal*), https://bit.ly/30smBtY. When a qualified translator is unavailable, immigration officials sometimes require asylum seekers to proceed in a language they do not speak fluently, require another noncitizen being processed to interpret, or ask airport staff to interpret. *Barriers to Protection* 27-28.

These alternatives lead to badly skewed results. *Ibid.*; see also *The Perils of Expedited Removal* 15-16 (Guatemalan woman struggled to tell officers in Spanish about the repeated rape threats she had received when no translators for her native indigenous language were available); CARA Family Detention Pro Bono Project Complaint, AILA Doc. No. 15121011, at 8 (Dec. 10, 2015), https://bit.ly/2FYsSnR (An asylum seeker who spoke the Mayan language Achi had his credible fear interview conducted in the different Mayan language Quiche, although documentation stated the interview was conducted in Spanish. Because of inadequate interpretation, the asylum seeker was "[u]nable to properly communicate his fear of return," resulting in a negative determination.).

Even when a translator is available, the translator frequently fails to translate idioms or cultural differences in language, potentially resulting in erroneous negative credible fear determinations. For example, an asylum officer may erroneously reject as implausible an asylum seeker's claim that his "brothers" helped him both escape jail, purchase plane tickets, and clear customs at the border; however, in some cultures, "brothers" refer to all members of a tribe rather than familial relatives. See Kälin, 20 Int'l Migration Rev. at 234; see also Rachel Nolan, *A Translation Crisis at the Border*, The New Yorker,

Dec. 30, 2019, https://bit.ly/2syU4GE (woman was deported after translator did not make clear that when the asylum seeker said she was persecuted in Guatemala because of her "blouses," she meant she was persecuted because of her *huipil*, a handwoven blouse worn by Mayans). Translation by phone creates further difficulties in comprehension between the asylum seeker and the translator, as discussed *infra*.

Because of these psychological, linguistic, and cultural barriers to an asylum seeker's communication of the details of his fear and persecution, it is critical that asylum officers use all tools at their disposal to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). At a minimum, an asylum officer cannot just recite the questions listed on her interview form. Rather, the asylum officer must probe and ask follow-up questions that are informed not only by the asylum seeker's statements but also by information relating to the country from which the asylum seeker has fled. See 8 U.S.C. § 1225(b)(1)(B)(v), (1)(E)(i); 8 C.F.R. § 208.30(e)(2) (asylum officer must consider "such other facts" known to the officer).

The USCIS's recent update to the asylum officer training manual exacerbates these problems. This update removes language directing asylum officers to consider the impact of cross-cultural issues, trauma, and problems with interpretation when making credibility assessments. Compare 2017 Credible Fear Training Course 19-20, with USCIS, RAIO Asylum Division Officer Training Course, Lesson Plan on Credible Fear of Persecution and Torture Determinations 14-15 (Apr. 30, 2019) (2019 Credible

Fear Training Course), https://bit.ly/3awB3Wt. By failing to alert asylum officers to psychological, linguistic, and cultural issues of communication, the update increases the possibility that asylum officers will ignore the impact of these issues on asylum seekers' ability to explain what has happened to them, and that asylum officers accordingly will reach the wrong conclusions.

C. Asylum Officers Systematically Fail to Discharge Their Duty to Elicit.

It cannot be repeated often enough that the government has recognized (and imposed on its agents) a duty to "elicit all relevant and useful information bearing on whether the applicant has credible fear of persecution or torture." 8 C.F.R. § 208.30(d); see also 2017 Credible Fear Training Course 13 ("[A]sylum officers have an affirmative duty to elicit all information relevant to the legal determination.").

Yet asylum officers systematically fail to elicit all relevant information and to ask informed follow-up questions. For example, asylum officers often direct asylum seekers to give short "yes" or "no" answers to questions, repeatedly cut off the asylum seekers' responses, or fail to flesh out details of the noncitizen's asylum claim. See, *e.g.*, AIC Letter 5 (describing the stories of Kezia, who was told to give yes or no answers to questions, and Adriana, who was repeatedly cut off by her asylum officer); Katherine Shattuck, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 Wash. L. Rev. 459, 482-483 (2018). (quoting an attorney's discussion of how asylum officers at one detention facility neglected to elicit

sufficient detail from the asylum seeker relevant to the asylum claim).

The result is erroneous negative credible fear determinations. Take the example of Beatriz. Beatriz received a negative determination from the asylum officer when she did not disclose during her credible fear interview that she had witnessed the murder of her mother while she and her sister "were hit with bullets fired by gang members demanding extortion." *The Perils of Expedited Removal* 25-26. Although she disclosed those facts before the immigration judge, the immigration judge declined to reverse the negative determination. *Ibid.* In both proceedings, she failed to share that she also had been gang-raped by men targeting her for extortion "to show [her] that they followed through on their threats," because she was "afraid it would get back to the men in Guatemala." *Ibid.*[9]

The risk of erroneous credible fear decisions is heightened by the USCIS's increased use of telephonic credible fear interviews. In 2009, only two percent of all 5,369 credible fear interviews were conducted by telephone. *Barriers to Protection* 36. The number and rate of telephone interviews skyrocketed in just five years: By 2014, 59 percent of the 51,001 credible fear interviews were conducted by telephone. *Ibid.* Telephonic interviews, however, are inherently problematic. "Asylum seekers interviewed by telephone may find it more difficult to recount fully to the asylum officer, through an interpreter, the details of violent and traumatic events." *Ibid.*

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[9] Without the assistance of her counsel, Beatriz likely would have been deported. She ultimately was not. *Ibid.*

For example, in the case of Fiorella, "the use of a phone interpreter" during the credible fear interview "made her feel uncomfortable and prevented her from sharing important details." *The Perils of Expedited Removal* 20. As Fiorella explained:

> I could not express myself fully because I kept losing my train of thought because the officer would cut me off so that the interpreter could finish translating… I felt as though the asylum officer was very dismissive of what I was telling her and would not let me share my story and the real reason why I am afraid to return to Haiti.

Ibid. Legal service providers have reported "that telephonic credible fear interviews are shorter, less accurate, and more confusing than in-person interviews." *Barriers to Protection* 36.

D. Review by Immigration Judges Is Not an Effective Check Against Erroneous Credible Fear Determinations.

The government contends that the de novo review of an immigration judge is a sufficient safeguard against erroneous credible fear determinations. See Pet. Br. 45-46. But asylum officers' failure to elicit relevant information results in a flawed record on appeal, regardless of the standard of review. Some immigration judges "see their role on review as strictly appellate in nature, and will only consider that which was submitted to the [asylum officer] or referenced in the [asylum officer] referral." Katharine Ruhl & Christopher Strawn, *Accessing Protection at the Border: Pointers on Credible Fear and Reasonable Fear Interviews*, in 2015 AILA Immigration Practice Pointers 741, 748 (2015), https://perma.cc/H25L-

AK2H. They refuse "to consider any information outside 'the four corners' of the credible fear interview." Shattuck, 93 Wash. L. Rev. at 496 n.252 (quoting interview with asylum attorney). Because the immigration judge often relies on the asylum officer's record, immigration judge review does not remedy the asylum officer's failure to elicit relevant information.

Some immigration judges permit the noncitizen to introduce additional testimony or evidence. But in practice this has not proven to be a meaningful safeguard. Some immigration judges conclude that providing new details at the review hearing that were not offered during the credible fear interview is indicative of untruthfulness. "[I]n 25 percent . . . of the cases in which the credible fear notes were cited as a basis to find that the applicant lacked credibility, the immigration judge specified that the applicant was not credible because at the immigration hearing, (s)he added detail to the claim originally expressed during the credible fear interview." U.S. Commission on International Religious Freedom, Report on Asylum Seekers in Expedited Removal, Vol. I, at 58 (2005), https://bit.ly/38qUIFz; see also *Reflections from the Border*, Harvard Law Today, Nov. 2, 2018, https://bit.ly/37167vc ("[T]he Judge essentially cross-examined my client over every tiny discrepancy or omission in his Credible Fear Interview.").

Furthermore, the role of attorneys is limited during these immigration judge proceedings. At the direction of the Attorney General, the Executive Office for Immigration Review issued an Immigration Court Practice Manual to provide guidance to parties appearing before immigration judges. Dep't of Justice, Exec. Office for Immigration Review,

Immigration Court Practice Manual (Sept. 26, 2019), https://bit.ly/2NzL9Mr. According to the Practice Manual, although an attorney may consult with the asylum seeker before the proceeding, the attorney is not permitted "to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments." *Id.* at 116.

Finally, immigration judge review proceedings are often extremely brief, sometimes taking as little as ten minutes. And usually those brief proceedings comprise boilerplate advisals, findings, and translation. Many of the hearings are conducted by telephone or videoconference, additionally hindering the noncitizen's communication of his or her credible fear for the same reasons discussed *supra*.

III. BORDER OFFICIALS FAIL TO REFER ASYLUM SEEKERS TO CREDIBLE FEAR INTERVIEWS.

The credible fear interview is no safeguard at all when asylum seekers are not referred to the credible fear interview in the first place. Although border officials are required to refer all noncitizens expressing any fear of persecution or torture, 8 U.S.C. § 1225(b)(1)(A)(ii), border officials frequently fail to do so.

The U.S. Commission on International Religious Freedom (USCIRF) is an independent and bipartisan U.S. government advisory body that is statutorily authorized to study and advise the executive and legislative branches on U.S. refugee and asylum policy. See International Religious Freedom Act of 1998 (IRFA) § 201 (codified at 22 U.S.C. § 6431) (establishing the USCIRF); IRFA § 605 (codified at 22

U.S.C. § 6474) (authorizing USCIRF to study expedited removal proceedings). Based on its monitoring of expedited removal proceedings for "more than a decade," USCIRF concluded, "DHS officials often fail to follow required procedures to identify asylum-seekers and refer them for credible fear determinations." USCIRF, 2019 Annual Report 17, https://bit.ly/2uVVfAL.

Pursuant to the International Religious Freedom Act of 1998, USCIRF conducted a study in 2005 on the impact of expedited removal proceedings on asylum seekers. IRFA § 605 (codified at 22 U.S.C. § 6474). The study revealed systematic failures by border officials to divert asylum seekers to formal removal proceedings. *Barriers to Protection* 19 ("[I]n nearly 15 percent of the cases observed . . . asylum seekers who expressed a fear of return were removed without referral to a USCIS asylum officer for a credible fear determination. Moreover, in nearly half of those cases, the files indicated that the asylum seeker had not expressed any fear."); see also American Immigration Council, *Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants* 2 (2017), https://bit.ly/2R50mau ("More than half of the respondents surveyed (55.7 percent) were not asked if they feared returning home."); *The Expedited Removal Study*, 15 Notre Dame J.L. Ethics & Pub. Pol'y at 57-58 (documenting "cases . . . in which persons who expressed a fear were not referred to a credible fear interview"). Indeed, sometimes CBP officers "improperly pressured asylum seekers to retract their fear claims and withdraw their applications for admission." *Barriers to Protection* 19.

To date, these problems have not been addressed. See, *e.g.*, Letter from Harvard Immigration and

Refugee Clinical Program to Acting Secretary of Homeland Security Kevin K. McAleenan re Request for Comment on Designating Aliens for Expedited Removal (Sept. 23, 2019), https://bit.ly/3afhz8t. "[T]he unaddressed flaws in the system [have] placed even more asylum-seekers at risk of erroneous return." USCIRF, 2019 Annual Report 17.

IV. THE ASYLUM OFFICER ERRED IN CONCLUDING THAT MR. THURAISSIGIAM DID NOT HAVE A CREDIBLE FEAR OF PERSECUTION.

Based on *amici*'s review of the record, the asylum officer indisputably erred in concluding that Mr. Thuraissigiam had not established a credible fear of persecution based on a protected ground.

Mr. Thuraissigiam's statements during his credible fear interview satisfied the low screening threshold of credible fear of persecution. Furthermore, the asylum officer failed to discharge her legal obligation to elicit all relevant information. If the asylum officer had assessed Mr. Thuraissigiam's claim in the context of conditions in Sri Lanka and had asked him informed follow-up questions, then the asylum officer should have concluded that Mr. Thuraissigiam satisfied the credible fear standard.

A. The Asylum Officer Erroneously Concluded that Mr. Thuraissigiam Failed to Satisfy the Low Credible Fear Standard.

During his credible fear interview, Mr. Thuraissigiam provided the asylum officer with

sufficient information to establish a credible fear of persecution.

Tamils have been the target of persecution by the Sri Lankan government for decades. See, *e.g.*, Global Legal Research Center, The Law Library of Congress, Report for the U.S. Dep't of Justice on Treatment of Tamil Minority 1 (2012), https://bit.ly/2TvECGc (discussing continued "arbitrary detention without trial, abductions and disappearances, [and] killings" for Tamils following conclusion of Sri Lanka's civil war).[10] Accordingly, asylum law recognizes that Tamils who are persecuted for Tamil-nationalist political views satisfy the nexus requirement. See, *e.g.*, *In re S-P-*, 21 I. & N. Dec. 486, 496 (BIA 1996) (Tamil asylum seeker satisfied the nexus requirement because "it is reasonable to believe that those who harmed [the Tamil person] were in part motivated by an assumption that his political views were antithetical to those of the Government").

Mr. Thuraissigiam is Tamil. J.A. 67. During his credible fear interview, Mr. Thuraissigiam explained that men came to his farm, abducted him in their van, and then beat him severely. See J.A. 70-74. He consistently referred to his seizure as an "arrest," see J.A. 70-71, a term associated with seizure of people by government officials. See *Arrest*, Webster's New Third International Dictionary (2020) (defining "arrest" as

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[10] To date, Tamil persons who have a real or perceived connection, however minimal, with a Tamil nationalist group are targeted for torture by the Sri Lankan government. See Int'l Truth and Justice Project, *Unstopped: 2016/17 Torture in Sri Lanka* 14 (2017), https://bit.ly/38ieVgw (documenting cases where Tamils were detained or tortured due to political work for a Tamil candidate, even where that work was as low level as canvasing and passing out flyers).

"to take or keep in custody by authority of law"). These facts are consistent with Sri Lankan country conditions evidence that the Sri Lankan government persecutes Tamils through abductions of ethnic Tamils by plainclothes officers in white vans—a practice so common that it is referred to simply as "white van abductions." See Freedom From Torture, *Tainted Peace: Torture in Sri Lanka since May 2009* 28, 32 (2015), https://bit.ly/2Nwtipo. Mr. Thuraissigiam's testimony alone, which was found to be credible, should have been sufficient for the asylum officer to find that Mr. Thuraissigiam satisfied the low credible fear standard.

Instead, in concluding that the nexus requirement was not satisfied, the asylum officer relied on the fact that Mr. Thuraissigiam did not identify his attackers. See J.A. 87. But Mr. Thuraissigiam was asked whether he knew the identity and "name(s)" of the individuals who arrested him, J.A. 71—not generally whether there was a connection between his abductors and Sri Lankan government officials. These kinds of misunderstandings, as discussed above, are common among asylum seekers during a credible fear interview.

B. Mr. Thuraissigiam's Asylum Officer Failed to Elicit Mr. Thuraissigiam's Credible Fear.

Had the asylum officer who interviewed Mr. Thuraissigiam considered his asylum claim in the context of Sri Lankan country conditions and probed for additional information, the asylum officer should have concluded that Mr. Thuraissigiam had a credible fear of persecution.

The asylum officer failed to ask Mr. Thuraissigiam follow-up questions relating to whether he had any previous political activity, even though Mr. Thuraissigiam was Tamil, a minority group whose members have been persecuted for nationalist political beliefs. The asylum officer also failed to ask key questions regarding the factual circumstances of Mr. Thuraissigiam's abduction, even though he had stated that he had been kidnapped in a van. See J.A. 70-74. Mr. Thuraissigiam repeatedly stated that he had been "arrested," but the asylum officer failed to ask him whether his "arrest" had any connection to the state authorities. J.A. 70-71. Mr. Thuraissigiam testified that he could not go to the Sri Lankan police because "the problems will be more," and that he was "fearful of returning to Sri Lanka," J.A. 72, 75, 80, but the asylum officer failed to ask any follow-up questions regarding Mr. Thuraissigiam's fear of the Sri Lankan police.

The asylum officer failed to elicit all relevant facts by failing to ask these follow-up questions. Had the asylum officer elicited the fact of Mr. Thuraissigiam's political work and the circumstances of his abduction and "arrest," the asylum officer should have learned, among other things, that Mr. Thuraissigiam had a history of supporting and arranging public meetings for M.K. Shivajilingam, a local politician belonging to the Tamil National Alliance, a Tamil-affiliated political group. J.A. 23 ¶¶ 37, 40 (habeas petition). The asylum officer also failed to consider Mr. Thuraissigiam's responses in the context of country conditions evidence, which should have made manifest that the circumstances of Mr. Thuraissigiam's abduction were consistent with the "white van abductions" used in the persecution of

Tamils. J.A. 23 ¶ 42 (habeas petition). That information should have easily passed the "low screening standard" in establishing Mr. Thuraissigiam's credible fear of persecution or torture.

The immigration judge's review did not provide a meaningful safeguard against the asylum officer's mistakes. The immigration judge likewise failed to consider Mr. Thuraissigiam's credible testimony of fear in the context of country conditions evidence on Tamils in Sri Lanka. J.A. 29 ¶ 58 (habeas petition).

Because the asylum officer and immigration judge did not correctly apply the low screening standard for credible fear, Mr. Thuraissigiam was erroneously removed during the expedited removal proceedings.[11]

* * * * *

If properly applied, expedited removal proceedings should screen bona fide asylum claims into the full asylum process. But expedited removal proceedings have systematically failed to provide a robust process. The unfortunate reality is that the expedited removal process results in the erroneous removal of refugees fleeing persecution or torture. The erroneous determination that Mr. Thuraissigiam lacked credible fear is just one example, of which there are many, of

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[11] The consequence of an erroneous removal decision for a Tamil asylum seeker like Mr. Thuraissigiam is serious. Tamil persons who fail to secure asylum are particularly at risk of arrest, sexual assault, and torture upon their return to Sri Lanka. See *Gaksakuman* v. *United States Attorney Gen.*, 767 F.3d 1164, 1170 (11th Cir. 2014); Immigration & Refugee Board of Canada, *Sri Lanka: Treatment of Tamil returnees to Sri Lanka, including failed refugee applicants* (2013), https://bit.ly/36aocps.

the systematic failures of the expedited removal process.[12]

In practice, the expedited removal system fails to provide its intended protective net for bona fide asylum seekers. Instead, bona fide asylum seekers are summarily returned to the circumstances of persecution and torture from which they are fleeing, in contravention of the United States' obligations under domestic and international law. Without meaningful judicial review of their expedited removal orders, Mr. Thuraissigiam and other asylum seekers who were erroneously removed under expedited removal proceedings cannot seek protection.

CONCLUSION

The judgment of the court of appeals should be affirmed.

[12] The risk of erroneous removals is further heightened by recent regulations restricting asylum to persons presenting themselves at ports of entry only. See 83 Fed. Reg. 55,934 (Nov. 9, 2018). These "ports of entry" restrictions ignore the legal requirement that persons are eligible for asylum regardless of their manner of entry. See 8 U.S.C. § 1158(a)(1). They also ignore the reality that asylum seekers, who are fleeing persecution or torture, are often not able to present themselves at a port of entry.

Respectfully submitted.

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