January 22, 2020

ATTORNEY GENERAL RAOUL URGES SUPREME COURT TO ACKNOWLEDGE LACK OF VITAL PROTECTIONS FOR RESIDENTS IN IMMIGRATION PROCEDURES

Chicago — Attorney General Kwame Raoul today led a coalition of 20 attorneys general in filing an amicus brief urging the United States Supreme Court to acknowledge the severe shortcomings in federal procedures used to remove individuals from the country and their harmful effects on the states, and to hold that individuals who receive a negative decision in the expedited removal process are entitled to review by a court before being deported.

Raoul and the coalition filed an amicus brief in the U.S. Supreme Court supporting the respondent in Department of Homeland Security v. Thuraissigiam, who was subject to these procedures after being apprehended in the United States. In the brief, Raoul and the attorneys general argue that the process of expedited removal can result in an order of removal from the United States being issued on the spot, and offers no meaningful review for individuals who receive such orders and wish to claim incorrect legal principles or a misuse of the process. Likewise under the expedited removal process, people who announce an intention to seek asylum receive a critical interview to assess their credible fear of returning home that is stacked against them from the start.

“These immigration procedures put millions of residents in Illinois and across the country at risk of hasty or erroneous removal from the country without any meaningful chance for review,” Raoul said. “I urge the Supreme Court to acknowledge that these federal procedures are unfair, unlawful, and – above all else – un-American. I will continue to fight against any policy that threatens to harm immigrants and work to ensure that the rights of all people living in this country are protected.”

Expedited removal was historically applied only to individuals who had been present in the United States for less than 14 days and were found within 100 air miles of an international U.S. land border. However, in July 2019 the federal government issued a new rule that removed the border proximity requirement and extended the presence requirement to two years. As a result, residents of all 50 states may now be potentially subject to expedited removal without the protections afforded in normal removal proceedings, such as the right to an attorney or a hearing before a judge.

In the brief, Raoul and the coalition highlight the flaws of federal procedures to remove individuals from the country, including expedited removal and credible fear interviews:

- **Expedited removal puts residents at risk of immediate deportation without a hearing or any form of review.** The expedited removal process offers no limitations on how or where the initial stop and subsequent inquiry can occur, meaning an immigration officer can approach individuals at any time or place and begin an expedited removal inquiry. The individual must then present, to the satisfaction of a rank-and-file immigration officer, that they have continuously resided in the United States for up to two years. Without that evidence, the individual may be ordered to be removed immediately. There is virtually no possibility of claims of legal errors being reviewed by a judge in this process. This system exposes even United States citizens, legal permanent residents, individuals who have been granted asylum, and refugees to the risk of erroneous deportation.

- **Credible fear interviews do not provide sufficient safeguards against erroneous decisions.** A person in expedited removal proceedings is permitted to claim asylum, which is

> supposed to lead to an interview with an asylum officer to determine the person's "credible fear" of returning to their home country. The case is then referred to an asylum officer to determine if that fear of persecution is credible. But the federal government has repeatedly revised the credible fear inquiry to make it more difficult for immigrants to fairly navigate this process. If an officer makes a negative credible fear determination, the only recourse available is a review by an immigration judge. The regulations contain no requirement that reasons be given for the immigration judge's final decision.

Raoul and the coalition argue that these flaws within expedited removal procedures harm the states in several ways. States lose valuable contributions of residents when expedited removal causes their deportation or spreads fear that forces them to live in the shadows. Additionally, remedying the harm to state residents caused by expedited removal and similar policies places a strain on state services intended to assist newcomers.

The attorneys general also note that the abrupt and erroneous deportations that could result from these procedures will inflict serious harm on families and communities. Mixed-status households with both citizens or permanent residents and undocumented residents may be torn apart with little or no time to prepare or seek legal representation. The prospect of sudden and unexpected separation can cause children to experience serious mental health problems, including depression and anxiety.

Joining Raoul in the brief are the attorneys general of California, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

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 FOR THE STATES OF ILLINOIS, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI STATES

The States of Illinois, California, Connecticut, Delaware, Hawai'i, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia (collectively, the "amici States") submit this brief in support of respondent.

The amici States have a significant interest in ensuring that individuals within their borders who are facing expulsion are able to invoke the protections of the Suspension Clause when no other available legal process is constitutionally adequate. The amici States thus urge affirmance of the court of appeals, which correctly held that 8 U.S.C. § 1252(e) violates the Suspension Clause as applied to respondent because the procedures in expedited removal do not provide him "a 'meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law.'" Pet. App. 2a (quoting *Boumediene v. Bush*, 553 U.S. 723, 779 (2008)) (additional quotations omitted).

It is the amici States' experience that these inadequate procedures place their residents at risk of erroneous deportations. Many individuals in expedited removal proceedings are never provided with an adequate opportunity to show that they are qualified to remain in this country or a forum to review whether their removal orders were entered in error. And when incorrect decisions occur, the harmful consequences are not limited to the person who is deported; on the contrary, the negative impact is felt by family members and throughout the amici States'

communities. In the absence of meaningful review within the expedited removal process, habeas review is critical to ensure that those within the amici States' borders are not deported based on an erroneous order of removal.

The amici States are further interested in the correct application of Suspension Clause protections in this context because of the reach of the expedited removal program. The Department of Homeland Security ("Department") has deported thousands of the amici States' residents via expedited removal since 2003.[1] This practice could increase, as the Department announced on July 23, 2019, that it would expand the use of expedited removal from ports of entry and areas near the border to the entire country, for any individual unable to establish a continuous presence in the United States for two years. See 84 Fed. Reg. 35,409 (July 23, 2019). Accordingly, many individuals who would otherwise be subject to full removal proceedings—with all of the rights that accompany them—could instead be placed in expedited removal. The amici States have an interest in ensuring that these individuals receive a meaningful review of their legal claims before being deported.

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[1] See, *e.g.*, *Latest Data: Immigration and Customs Enforcement Removals*, Transactional Records Access Clearinghouse (TRAC) Immigration Project (Aug. 2018), https://bit.ly/2QmrP7h. (For authorities available on the internet, all websites were last visited on January 17, 2020.)

SUMMARY OF ARGUMENT

The process that governs expedited removal offers no meaningful review for individuals who receive removal orders based on an erroneous interpretation of the law, a misuse of the process, or other legal errors. On the contrary, expedited removal allows an immigration officer to deem an individual inadmissible following a cursory inquiry and issue an immediate order of removal. The amici States' residents subject to these proceedings—a group that has gradually expanded—are thus at risk of hasty and potentially erroneous deportation, leaving their lives irrevocably changed without any real possibility of challenging the outcome.

Petitioners suggest, however, that individuals like respondent receive adequate protections because they are able to suspend expedited removal proceedings by expressing an intention to apply for asylum or articulating a fear of persecution, which is supposed to trigger a credible fear inquiry before an asylum officer. Pet. Br. 42-43. As the court of appeals recognized, however, the credible fear inquiry is far from a rigorous adversarial proceeding. Pet. App. 39a-40a. And if the asylum officer makes a negative credible fear determination, the only recourse available is summary review by an immigration judge.

In practice, this means that individuals with meritorious asylum claims might never be given an adequate opportunity to show in the first instance that they are qualified to remain in this country or, alternatively, that the asylum officer's negative credible fear determination was incorrect. These

inadequate proceedings, which can result in erroneous deportations, cause significant harm to those who are forced to leave the United States, their family members who remain, and the amici States who lose the valuable contributions made by immigrant communities. This Court should affirm the lower court decision concluding that expedited removal proceedings without the possibility of habeas review violate the Suspension Clause.

ARGUMENT

I. Expedited Removal Places Residents Of The Amici States At Risk Of Deportation Without Sufficient Safeguards Or Any Meaningful Opportunity For Review.

Since its inception over two decades ago, expedited removal has resulted in hasty deportations with practically none of the safeguards used in typical immigration proceedings to mitigate the risk of erroneous removal. An individual may be placed in expedited removal proceedings if he or she arrives in the United States with fraudulent or improper documentation or, as relevant here, if he or she was not admitted into the United States upon arrival and has not shown recent continuous physical presence in the country. See 8 U.S.C. § 1225(b)(1)(A)(i), (b)(1)(A)(iii)(I)-(II). Once an immigration officer determines that an individual is inadmissible under either standard, the officer "shall order" the individual removed "without further hearing or review" unless he or she has triggered a credible fear inquiry by expressing a fear of persecution or the intention to apply for asylum. *Id.* § 1225(b)(1)(A)(i).

This truncated system suffers from a number of procedural and practical shortcomings. To begin, the expedited removal statute and regulations offer no limitations on how or where the initial expedited removal inquiry can occur. See 8 U.S.C. § 1225; 8 C.F.R. § 235.3. In practice, this means that an immigration officer can approach individuals on their way to school, to work, or to pick up their children and begin the expedited removal process. Once stopped, individuals face an immediate and affirmative evidentiary burden to show, "to the satisfaction of an immigration officer," that they have been physically continuously present in the United States for as long as two years. 8 U.S.C. § 1225(b)(1)(A)(iii)(II). And "[a]ny absence from the United States shall serve to break the period of continuous physical presence." 8 C.F.R. § 235.3(b)(1)(ii). When these inquiries begin, individuals are not given an opportunity to obtain an attorney, collect evidence "that is not with them at the time of apprehension,"[2] or to air their evidence in a public hearing.[3] See 8 U.S.C. § 1225; 8 C.F.R. § 235.3.

In some instances, an individual may not even know or understand that he or she is in expedited

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[2] *Removal Without Recourse: The Growth of Summary Deportations from the United States* at 3, Am. Immigr. Council (Apr. 2014), https://bit.ly/3aghOjU.

[3] Daniel Kanstroom, *Expedited Removal and Due Process: 'A Testing Crucible of Basic Principle' in the Time of Trump*, 75 Wash. & Lee L. Rev. 1323, 1335 (2018).

removal until it is too late.[4] Immigration officers are not required to provide notice of the specific charges of removal until after the officer has completed questioning and the individual has signed a statement prepared by the officer. See 8 C.F.R. § 235.3(b)(2)(i). At times, an individual may receive this notice but be unable to understand it because of language or education issues.[5]

An individual who cannot make an on-the-spot showing that he or she has resided in the United States for the requisite period will not go on to receive a hearing before a neutral arbiter before being deported. Rather, upon a failure to make the required showing, the immigration officer must order the individual removed. 8 U.S.C. § 1225(b)(1)(A)(i). The sole form of review contemplated in the regulations is for an expedited removal order to be "reviewed and approved by the appropriate supervisor." 8 C.F.R. § 235.3(b)(7). But even this review—which at times does not occur at all[6]—comes with the caveat that it can be delegated to a "second line supervisor, or a person acting in that capacity." 8 C.F.R. § 235.3(b)(7). And as numerous studies have

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[4] *Toolkit to Assist People Facing Expanded Expedited Removal* at 3, Stanford Law School, Immigrants' Rights Clinic (July 2019), https://bit.ly/30mFKgQ.

[5] Elizabeth Cassidy & Tiffany Lynch, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* at 50-53, U.S. Comm'n on Int'l Relig. Freedom (2016), https://bit.ly/2EMCTE9.

[6] Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 Geo. Immigr. L.J. 167, 185 (2006).

shown, supervisors often ignore or fail to notice the errors made by immigration officers.[7] Once a person is deported pursuant to an expedited removal order, he or she is barred from re-entering the country for five years. 8 U.S.C. § 1182(a)(9)(A)(i).

The entirety of this process—from the initial stop to deportation—can occur within a matter of hours or days, during which time the "person subject to expedited removal . . . often has no time to communicate with her family members or to seek legal counsel."[8] The Department itself has indicated that it "expects to make and *implement* most of its deportation decisions under expedited removal within forty-eight hours of an applicant's arrival."[9] Indeed, the Department has made this process "so truncated that frequently a person with an expedited removal order has no idea why he or she was deported."[10]

In short, expedited removal decisions are hastily made without the opportunity to develop an adequate record or have a neutral arbiter review the evidence. Due to these shortcomings, the expedited removal process creates a significant risk of erroneous determinations. Indeed, past expedited removal decisions have even resulted in the wrongful deportation of U.S. citizens and others authorized to be in this country. See, *e.g.*, *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 61 (D.D.C. 2019)

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[7] *Id.* at 185 & n.87 (collecting studies).

[8] Kanstroom, *supra* note 3, at 1335.

[9] Pistone & Hoeffner, *supra* note 6, at 168 (emphasis in original).

[10] *Removal Without Recourse*, *supra* note 2, at 3.

(noting that "mistakes do happen" during the Department's administration of expedited removal proceedings, resulting in removal of those who "have a legal right to remain in the United States"); *Diaz v. Reno*, 40 F. Supp. 2d 984, 985 (N.D. Ill. 1999) (describing how an American citizen was erroneously placed in expedited removal proceedings and deported to Mexico after he entered the United States via O'Hare International Airport and had presented documentation of his citizenship). Reflecting on the history of errors in expedited removal proceedings, one article described the "likelihood that tens of thousands of persons have been wrongly deported via expedited removal."[11]

In one tragic example, expedited removal twice prevented a U.S. citizen with diminished mental capacity from returning to his home in North Carolina. See *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1266 (M.D. Ga. 2012). On his first attempt to cross back into the United States, immigration officers issued him an expedited removal order even though he had informed them of his citizenship. *Id.* at 1272-73. From there, he "wandered around Central America for 125 days, sleeping in the streets, staying in shelters, and being imprisoned and abused." *Id.* at 1266. Following periods of detention in Mexico, Honduras, and Nicaragua, he ultimately obtained a United States passport in Guatemala and flew back to the United States. *Id.* at 1273. But when he arrived, the Department's agents again issued an expedited removal order against him. *Ibid.* That this could happen to a U.S. citizen possessing

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[11] Pistone & Hoeffner, *supra* note 6, at 171.

proper documentation underscores the risk of mistakes inherent in this inadequate process and the harm borne by those who are wrongfully deported because of it.

The risk and number of erroneous decisions reached in expedited removal are likely to increase as the Department seeks to expand its use. Expedited removal was initially designed to facilitate removal of persons arriving at ports of entry without the requisite documents. See 8 U.S.C. § 1225(b)(1)(A)(i). It was extended in 2002 to entrants by sea, see 67 Fed. Reg. 68,923 (Nov. 13, 2002), and then in 2004 to those "encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border," 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004).[12] These expansions tripled the number of individuals annually deported through expedited removal.[13]

Now, however, the Department is attempting to use expedited removal throughout the country. In 2019, the Department published a rule authorizing expedited removal of individuals "encountered any-

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[12] The rule was not fully implemented until 2006. See Hillel R. Smith, *Expedited Removal of Aliens: Legal Framework* at 51-52, Cong. Research Serv. (Oct. 8, 2019), https://bit.ly/361hUsk.

[13] In 2002, 34,326 people were removed through expedited removal, accounting for 23% of all removals. See *2002 Yearbook of Immigration Statistics* at 176, Dep't of Homeland Sec., Office of Immig. Statistics (Oct. 2003), https://bit.ly/39ElLyg. By 2017, 103,704 individuals were removed through expedited removal, or 35% of all removals. See *Annual Report on Immigration Enforcement Actions: 2017*, at 12 tbl.6, Dep't of Homeland Sec. (Mar. 2019), https://bit.ly/37zsR5y.

where in the United States" who have been present "for less than two years." 84 Fed. Reg. 35,409 (July 23, 2019). Pursuant to the 2019 rule, the Department intends expedited removal for "hundreds of thousands of" noncitizens who reside in "the interior of the United States." *Id.* at 35,411. A district court has preliminarily enjoined enforcement of this rule, see *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), but petitioners are appealing, see Pet. Br. 6 n.2.

The Department's attempted expansion of expedited removal would expose even more people to the risk of erroneous deportation without recourse. Indeed, petitioners' own pronouncements demonstrate an intention to have immigration officers in every State to pursue expedited removal. *Ibid.* The changes anticipated by the 2019 rule are significant: while the 100-mile scope of the 2004 rule authorized expedited removal in many States,[14] the accompanying 14-day time limit ensured it would focus on the narrower category of recent arrivals. The Department's decision to maximize expedited removal will place a greater number of the amici States' residents at risk of erroneous deportation in an effectively reviewless system.

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[14] The 2004 rule authorizes expedited removal within 100 miles of a border in all border patrol sectors for the mainland United States except for two. See 69 Fed. Reg. at 48,880 (stating the notice will take effect "with respect to apprehensions made within the CBP Border Patrol sectors of (Laredo, McAllen, Del Rio, Marfa, El Paso, Tucson, Yuma, El Centro, San Diego, Blaine, Spokane, Havre, Grand Forks, Detroit, Buffalo, Swanton, and Houlton)").

II. The Credible Fear Process Does Not Provide Sufficient Safeguards Against, Or Meaningful Review Of, Erroneous Decisions.

Despite the shortcomings in the expedited removal process, petitioners argue that individuals like respondent received sufficient procedural safeguards because of the supposed protections within the "multilevel administrative-review" credible fear process. Pet. Br. 42. This is incorrect. The court of appeals properly concluded that the credible fear process offers "no rigorous adversarial proceedings prior to a negative credible fear determination." Pet. App. 39a. What is more, the Department has repeatedly diluted the few safeguards that should exist in the credible fear process, making it increasingly difficult to proceed fairly through it.

A. The "credible fear" interview that is supposed to be available to applicants in expedited removal proceedings offers inadequate protections.

An individual under expedited removal questioning by one of the Department's officers may "indicate[ ] either an intention to apply for asylum . . . or a fear of persecution," at which point "the officer shall refer the alien for an interview by an asylum officer." 8 U.S.C. § 1225(b)(1)(A)(ii). The task of the asylum officer is to determine whether the individual has a credible fear of persecution in the individual's home country. See 8 U.S.C. § 1225(b)(1)(B)(ii). To that end, the regulations require that the credible fear interview be conducted "in a nonadversarial manner" with the goal of eliciting "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). Although petitioners view this inquiry as providing sufficient opportunity for a person to demonstrate a credible fear, see Pet. Br. 42-43, they ignore the significant structural and practical obstacles faced by applicants seeking to demonstrate credible fear or receive adequate review of an adverse decision.

At the threshold, detainees such as respondent are fortunate if an immigration officer correctly refers them for an interview with an asylum officer at all. A study commissioned by Congress found that immigration officers fail to ask questions necessary to probe the existence of credible fear "in approximately half of inspections observed,"[15] while other officers coerced applicants into retracting fear claims.[16] Even among those applicants who expressed fear, an estimated 15% were deported without a credible fear interview.[17] More recent reports by nongovernmental organizations confirm continued problems with immigration officers failing to ask the required questions about fear, mocking and ignoring fear when expressed, conducting interviews without proper interpretation, and even pressuring people to waive rights to seek asylum in exchange for reunifi-

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[15] *Report on Asylum Seekers in Expedited Removal*, Vol. I at 54, U.S. Comm'n on Int'l Relig. Freedom (2005), https://bit.ly/30utCu8.

[16] *Id.* Vol. I at 50; *id.* Vol. II at 23-24.

[17] *Id.* Vol. II at 20 tbl. 3.1, 23.

cation with their children.[18] For these reasons, among others, commentators have predicted the "likelihood" that "many thousands have been wrongly denied asylum" within the expedited removal process.[19]

Further, a person granted a credible fear interview during expedited removal "shall be detained" pending the interview absent special dispensation by the Department. 8 C.F.R. § 235.3(b)(4)(ii). This detention makes it far less likely that applicants will be able to gather evidence or obtain counsel or other assistance prior to the interview. For example, the U.S. Commission on International Religious Freedom found in 2016 that the "vast majority of asylum seekers in Expedited Removal continue to be detained in immigrant detention centers" and very few had access to counsel.[20] Studies estimate that the

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[18] *You Don't Have Rights Here: US Border Screening and Returns of Central Americans to Risk of Serious Harm* at 8, 29, Human Rights Watch (2014), https://perma.cc/LMB6-T9G2; Sara Campos & Joan Friedland, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context* at 9-11, Am. Imm. Council (2014), https://perma.cc/YF6N-VDQM; *Separated Families Report Trauma, Lies, Coercion*, Human Rights Watch (July 26, 2018), https://bit.ly/38h3ENp; B. Shaw Drake, Eleanor Acer, & Olga Byrne, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers*, Human Rights First (May 2017), https://bit.ly/2NvmKYp; *Facing Walls: USA and Mexico's Violations of the Rights of Asylum-Seekers* at 19-21, Amnesty Int'l (2017), https://bit.ly/2Ntc38q.

[19] Pistone & Hoeffner, *supra* note 6, at 171.

[20] Cassidy & Lynch, *supra* note 5, at 40, 52.

presence of counsel at least doubles one's likelihood of being granted asylum.[21]

These conditions persist despite a separate requirement that credible fear applicants be allowed to consult with persons of their choosing prior to the credible fear interview. See 8 C.F.R. § 208.30(d)(4). As the court of appeals noted, there are obstacles to obtaining this outside help, as any consultation must not "unreasonably delay the process" and must be "at no expense to the government." Pet. App. 40a. Moreover, the credible fear interview itself is often conducted over the phone, and many asylum officers do not permit counsel attending the interview to interject in order to correct the record.[22]

If the asylum officer makes a negative credible fear finding, the applicant may request a review of the determination by an immigration judge, 8 C.F.R. § 208.30(g)(1), who may then review the finding along with the asylum officer's notes and any other materials upon which the determination was based, *id.* § 208.30(g)(2). Petitioners view this as an adequate opportunity for review of a negative decision. Pet. Br. 43. Yet the review is extremely truncated, as it "shall [be] conclude[d] . . . to the maximum extent practicable within 24 hours" and in no case more than seven days after the initial credible fear determination, providing applicants another ex-

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[21] See *id.* at 52 (summarizing government studies showing asylum grants were two times more likely for applicants with counsel).

[22] Lindsay M. Harris, *Withholding Protection*, 50 Colum. Hum. Rts. L. Rev. 1, 25-26 (2019).

tremely short window to gather potentially life-altering evidence, and often while sitting in detention. 8 C.F.R. § 1003.42(e). The immigration judge's review can take place entirely over the telephone, *id.* § 1003.42(c), and, once again, even those applicants with attorneys find that generally their counsel are not permitted to speak.[23]

Finally, the regulations contain no requirement that reasons be given for the immigration judge's decision. 8 C.F.R. § 1003.42. As the court of appeals observed in respondent's case, "the IJ simply checked a box on a form stating that the immigration officer's decision was 'Affirmed.'" Pet. App. 40a. And there is no right to an appeal from the immigration judge's decision, for any reason. 8 C.F.R. § 1003.42(f).

B. The Department has transformed the "credible fear" interview in ways that make it far more difficult for applicants.

In addition to the insufficient safeguards that adhere in the credible fear process, the Department has instituted policies in recent years making it even more difficult for applicants to show a credible fear and begin the process toward a successful asylum claim. Petitioners fail to acknowledge these policies, many of which have been implemented through the Department's issuance of "lesson plans" to its asylum officers. These documents impose new burdens and standards of review on credible fear applicants that

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[23] Kathryn Shepherd & Royce Bernstein Murray, *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers* at 23, Am. Immig. Council (May 2017), https://bit.ly/2QgbnVZ.

have never been promulgated through statute or regulation. They also contradict the requirement that credible fear interviews be "nonadversarial" and "elicit all relevant and useful information." 8 C.F.R. § 208.30(d).

In 2014, for example, the Department issued a lesson plan that makes the credible fear inquiry more onerous on asylum seekers. The 2014 lesson plan deleted guidance from the 2006 lesson plan, which had correctly noted that the "significant possibility" standard applicants must satisfy at an initial credible fear interview is "a protective net" that "is intended to be a low screening standard for admission into the usual full asylum process."[24] Breaking with the prior instructions, the 2014 lesson plan declared that a credible fear applicant's testimony establishes a credible fear only if it "is sufficiently credible, persuasive, and specific to be accorded sufficient evidentiary weight to meet the significant possibility standard."[25] This new standard mirrors the testimony requirements in asylum hearings, see 8 U.S.C. § 1158(b)(1)(B)(ii),[26] which

[24] Compare *Asylum Division Officer Training Course: Credible Fear* at 11, U.S. Citizenship & Immigr. Servs. (2006), https://bit.ly/34CYA3Y (adding, "The purpose of the credible fear screening is to ensure access to a full hearing for all individuals who qualify under the standard.") (2006 Lesson Plan) with *Asylum Division Officer Training Course: Credible Fear*, U.S. Citizenship & Immigr. Servs. (2014), https://bit.ly/38WacSU (2014 Lesson Plan).

[25] 2014 Lesson Plan at 13-14.

[26] An applicant's testimony in full asylum proceedings is considered "sufficient to sustain the applicant's burden without corroboration, but only if . . . the applicant's testimony is

occur after credible fear interviews and after asylum seekers have had more time to develop their claims.

Three years later, the Department again modified the lesson plan. In the 2017 lesson plan, the Department removed a passage instructing asylum officers that "[w]hen there is reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a positive credible fear determination."[27] This shift, again made without explanation, jettisons prior instructions to asylum officers that they must give the benefit of the doubt to credible fear applicants, a directive that accorded with the threshold nature of the credible fear interview. And whereas the 2014 lesson plan advised that "[t]rivial or minor inconsistencies" in an interview "will not be sufficient to find an applicant not credible in the credible fear context," the 2017 plan noted that such trivial or minor issues may in fact be sufficient after all.[28]

Finally, in 2019, the Department revised its lesson plan yet again, to make credible fear interviews even

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credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. § 1158(b)(1)(B)(ii).

[27] Compare 2014 Lesson Plan at 16 with *Asylum Division Officer Training Course: Credible Fear of Persecution and Torture Determinations* at 13-14, U.S. Citizenship & Immigr. Servs. (2017), https://bit.ly/2S9acJl (2017 Lesson Plan).

[28] Compare 2014 Lesson Plan at 20 with 2017 Lesson Plan at 21 (noting that "on occasion such credibility concerns may be sufficient to support a negative credible fear determination considering the totality of the circumstances and all relevant factors").

more challenging for applicants. Under the 2006, 2014, and 2017 lesson plans and consistent with the regulatory requirement that asylum officers "elicit all relevant and useful information," 8 C.F.R. § 208.30(d), officers assessing an applicant's credibility were required to consider elements favorable to applicants, including trauma the applicant has endured; "the challenges inherent in cross-cultural communication"; problems that might affect the accuracy of the interpreter's description of events, such as "differences in dialect or accent, ethnic or class differences," or any other differences that might affect "the objectivity of the interpreter or the applicant's comfort level"; and the passage of time since the events described.[29] These instructions, however, are now omitted.[30]

The 2019 plan, moreover, deletes the "affirmative duty" imposed on officers to "fully develop the record to support a legally sufficient determination."[31] As a result, officers are no longer instructed to consider "the culture and patterns of persecution within the applicant's country of origin . . . especially if the applicant is having difficulty answering questions regarding motivation" when determining if the applicant's persecutor was motivated by the appli-

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[29] See 2006 Lesson Plan at 17; 2014 Lesson Plan at 19-20; 2017 Lesson Plan at 20.

[30] See *Asylum Division Officer Training Course: Credible Fear of Persecution and Torture Determinations*, U.S. Citizenship & Immigr. Servs. (2019), https://tmsnrt.rs/2VJPtOk (2019 Lesson Plan).

[31] Compare 2019 Lesson Plan with 2017 Lesson Plan at 13 and 2014 Lesson Plan at 12-13.

cant's protected characteristics.[32] The 2019 lesson plan also makes the "significant possibility" standard more difficult to meet by adding the instruction that "[t]he standard requires the applicant to identify more than 'significant evidence' that the applicant is a refugee entitled to asylum"[33]—placing further burdens on applicants to meet the standard that appear nowhere in the relevant regulation or statute.

These changes demonstrate that the Department's recent alterations to the credible fear screening process have gone in one direction: against applicants. By whittling away the few safeguards that are supposed to adhere once an individual exits expedited removal proceedings to begin the asylum process, the Department has further diminished the already limited protections in the credible fear process.

III. The Inadequate Procedures In Expedited Removal Harm The Amici States And Their Residents.

The consequences of the shortcomings inherent in the expedited removal and credible fear processes are grave. When placed in these processes, individuals are subject to deportation without having a meaningful opportunity to demonstrate that they are entitled to stay in the United States and without judicial review of an often hastily made decision. Without additional protections, residents of the amici States are at risk of the harms associated with unlawful

[32] Compare 2019 Lesson Plan with 2017 Lesson Plan at 26-27 and 2014 Lesson Plan at 25.

[33] 2019 Lesson Plan at 12.

deportations, and the amici States themselves are at risk of being deprived of valued members of their communities. These unlawful deportations, moreover, hinder the mental and emotional development of the children and the financial viability of the families that deported individuals leave in the United States, including in the amici States.

A. Expedited removal harms the amici States' residents.

The amici States are concerned about the use of expedited removal without opportunity for habeas review because it encourages hastily made, and sometimes mistaken, deportation decisions. Even for those who are not subject to it, expedited removal causes fear among newcomers, creates distrust and uncertainty, and affects the families of deportees living in the amici States.

Nearly six million U.S. citizen children live with at least one family member who is unauthorized to be in the United States, and about 16.7 million people in the country as a whole have at least one unauthorized family member.[34] Children with a family member who is detained or deported by immigration authorities have experienced sudden declines in school performance, depression, and emotional trauma that is likely to affect their long-term health.[35] Some children refuse to eat, pull out their

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[34] Silva Mathema, *Keeping Families Together: Why All Americans Should Care About What Happens to Unauthorized Immigrants* at 2 tbl. 1, Ctr. for Am. Progress (Mar. 2017), https://ampr.gs/3038Hyk.

[35] Samantha Artiga & Barbara Lyons, *Family Consequences of Detention/Deportation: Effects on Finances, Health, and*

hair, and turn to self-destructive outlets such as cutting themselves; many struggle to maintain relationships with their nondeported parent or new guardian.[36] Concern about a parent's immigration status alone can cause a regression in cognitive development, aggression among peers, and anxiety.[37]

Wrongful deportations also unduly threaten the ability of residents of the amici States to meet their most basic needs. When the leading earner of a family is deported, children face housing instability, food insecurity, and other economic hardship.[38] In a recent survey of deportees, 74% of respondents said their partner in the United States lacked enough money to support their children or to live on, and 40% had dependents with chronic health conditions

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Well-Being, Kaiser Family Found. (Sept. 18, 2018), https://bit.ly/2ZPlKTZ.

[36] Heather Koball, *et al.*, *Health and Social Services Needs of US-Citizen Children with Detained or Deported Immigrant Parents* at 5, Urban Inst. & Migration Policy Inst. (Sept. 2015), https://urbn.is/38lYm3w.

[37] Jens Hainmueller, *et al.*, *Protecting Unauthorized Immigrant Mothers Improves Their Children's Mental Health*, 357 Science 1041, 1042-43 (2017); Randy Capps, *et al.*, *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families: A Review of the Literature* at 8-9, Urban Inst. & Migration Policy Inst. (Sept. 2015), https://urbn.is/30vgR2s.

[38] Society for Community Research & Action, *Statement on the Effects of Deportation and Forced Separation on Immigrants, Their Families, and Communities*, 62 Am. J. Cmty. Psychol. 3, 5 (2018).

such as autism and cancer.[39] In the most extreme cases, children are forced to enter state foster care systems after a caregiver is deported.[40]

The seriousness of these harms underscores the importance of procedural safeguards to prevent erroneous removals, and explains why many of the amici States fund immigrant legal services. California alone allocated $199 million to nonprofit legal service organizations for immigration-related programs in recent years.[41] Connecticut, the District of Columbia, Illinois, Massachusetts, New Jersey, New York, Oregon, and Washington, among others, also provide millions of dollars toward legal services for immigrants.[42]

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[39] Donald Kerwin, *et al.*, *Communities in Crisis: Interior Removals and Their Human Consequences* at 2-3, Kino Border Initiative (Nov. 2018), https://bit.ly/2ZY9rEB.

[40] See, *e.g.*, Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* at 22-23, Applied Research Ctr. (Nov. 2011), https://tinyurl.com/ARCFam (estimating that at least 5,100 children presently in foster care have parents who have been detained or deported).

[41] *Immigration Services Program Update* at 1, Cal. Dep't of Soc. Servs. (Mar. 2019), https://bit.ly/3771G1U.

[42] See I.R.S. Form 990 (2018), Conn. Bar Found., Inc. (May 14, 2019), https://tinyurl.com/CBF-990 (showing Connecticut Judicial Branch's funding of nonprofit legal service providers in 2018); Press Release, Office of the Mayor, *Mayor Bowser Awards Over $2 Million to Support Immigrant Rights* (Sept. 24, 2019), https://tinyurl.com/ucfckh4 (announcing $2.5 million in fiscal year 2020 funding for twenty-two community based programs that provide legal services to immigrants); *Immigrant Integration, Family & Comm. Servs. Grant Information*, Ill. Dep't of Hum. Servs. (Mar. 6, 2019), https://bit.ly/376KTfs

B. Immigrants are valuable members of the amici States' communities.

The amici States reject characterizations of immigrants, including undocumented immigrants, as threats to and drains on the States. See Az. Br. 11-12.[43] On the contrary, the facts show that immi-

(showing Illinois provides grants that fund legal services provided to immigrants); *FY 2020 Final Budget*, 191st Gen. Ct. of the Commonwealth of Mass. (2019), https://tinyurl.com/t345nvf (showing an allocation of over $1 million in state funds to a state agency, the Office of Refugees and Immigrants, that provides citizenship services); *The Governor's FY2020 Budget-Detailed Budget* at D-419, N.J. Office of Mgmt. & Budget (Mar. 2019), https://tinyurl.com/NJ-Budget-2020 (showing New Jersey provides $2.1 million in state funds to provide legal services relating to immigration status); Press Release, Office of the Governor, Governor Cuomo and Legislative Leaders Announce 2020 Enacted Budget Includes $10 Million to Support Expansion of the Liberty Defense Project (Apr. 5, 2019), https://tinyurl.com/NYGOV-PR (announcing funding of project for immigrant legal services); H.B. 5050, 80th Legis. Assemb., 2019 Reg. Sess. (Or. 2019), https://tinyurl.com/Or-HB5050 (allocating $2 million for immigration defense services); 2018 Wash. Sess. Laws 2152, https://tinyurl.com/WA-SessLaw (allocating $1 million for fiscal year 2019 for immigrant legal representation).

[43] The amici States also reject the notion that the relative busyness of federal court dockets is a serious interest in deciding whether respondent's habeas rights should be preserved. See Az. Br. 12-14. If it were considered, the consistent decrease in federal court filings in recent years weighs toward preserving federal courts' jurisdiction. Compare *ibid*. (describing the percentage of immigration filings as increasing) with *Federal Judicial Caseload Statistics 2018*, U.S. Courts (2018), https://bit.ly/2v0J6KW (reporting a 18.2% decrease in federal appeals court filings since 2009, and a 41.5% decrease in administrative agency appeals).

grants provide valuable contributions to state economies and communities. Wrongful deportations without meaningful review deprive the amici States and their residents of these valuable contributions.

As one example, undocumented immigrants help make our neighborhoods and communities safer. Several studies have found that undocumented immigrants commit less crime than native-born Americans. Studying arrest data and state-level estimates of undocumented populations between 1990 and 2014, one recent study determined that increased undocumented immigration was significantly associated with decreases in DUI and drug arrests.[44] Another regression analysis showed that an increased share of unauthorized immigrants in a metropolitan area's population results in lower rates of property crime.[45] In general over the past four decades, increases in the foreign-born population have coincided with decreased violent and property crime in U.S. cities.[46]

Undocumented immigrants' contributions also exceed the amount of money spent on them. *Cf.* Az. Br. 11-12. Undocumented immigrants in Illinois, for example, contribute nearly $760 million per year

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[44] Michael T. Light, *et al.*, *Undocumented Immigration, Drug Problems, and Driving Under the Influence in the United States, 1990-2014*, 107 Am. J. Pub. Health 1448, 1451-52 (2017).

[45] Mike Maciag, *The Mythical Link Between Immigrants and High Crime Rates*, Governing (Mar. 2, 2017), https://bit.ly/2tF3DE7.

[46] Robert Adelman, *et al.*, *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, 15 J. Ethnicity in Crim. Justice 52, 69 (2017).

directly to state and local governments in the form of taxes.[47] The nationwide annual state and local tax contribution of undocumented immigrants is $11.74 billion.[48] This total skyrockets to $328.2 billion when all immigrants are included.[49] The Social Security Administration found that in 2010, undocumented immigrants increased the cash flow of the Social Security program alone by $12 billion.[50]

Immigrants also significantly contribute to the economy and bolster U.S. housing markets. Ninety percent of undocumented people in the United States have jobs, filling significant portions of the agricultural, food service, construction, and landscape maintenance industries.[51] Though petitioners' amici highlight part of a report to emphasize the costs of immigrants, see Az. Br. 11-12, that same report finds that most estimates conclude that tax revenues generated by immigrants collectively exceed the cost of the services they use, and that the amount spent on unauthorized immigrants typically is less than five percent of state and local spending for those

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[47] Lisa Christensen Gee, *et al.*, *Undocumented Immigrants' State & Local Tax Contributions* at 3, Inst. on Taxation & Econ. Policy (Mar. 2017), https://bit.ly/34cuaGh.

[48] *Id.* at 2.

[49] *Taxes & Spending Power*, New Am. Econ., www.newamericaneconomy.org/issues/taxes-&-spending-power.

[50] Stephen Goss, *et al.*, *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds* at 2, Social Sec. Admin. (Apr. 2013), https://bit.ly/2PFy2L4.

[51] *Undocumented Immigrants*, New Am. Econ., https://bit.ly/35Jeknk.

services.[52] While reliable national aggregate estimates for the fiscal impact of undocumented immigrants may not exist, States such as Texas have estimated their impacts and found a windfall for the State.[53] In short, immigrants are valuable members of the amici States' communities, and threats to their wellbeing threaten the welfare of all of our residents.

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[52] U.S. Congressional Budget Office, *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments* at 1, 3 (Dec. 2007), https://bit.ly/373Jwy8; see also Michael Greenstone & Adam Looney, *Policy Memo: Ten Economic Facts About Immigration* at 6, Brookings Inst. (Sept. 2010), https://bit.ly/2QZmthm ("The consensus of the economics literature is that the taxes paid by immigrants and their descendants exceed the benefits they receive—that on balance they are a net positive for the federal budget.").

[53] Carole Keeton Strayhorn, *Special Report: Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budget and Economy* at 20, Office of the Comptroller of Texas (Dec. 2006), https://bit.ly/30afSou ("[T]he comptroller's office estimates that state revenues collected from undocumented immigrants exceed what the state spent on services, with the difference being $424.7 million.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

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