No. 23-1270

IN THE

Supreme Court of the United States

PIERRE YASSUE NASHUN RILEY,
Petitioner,

v.

MERRICK B. GARLAND,
UNITED STATES ATTORNEY GENERAL,
Respondent.

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

BRIEF FOR AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND AMERICAN IMMIGRATION COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amicus American Immigration Lawyers Association ("AILA") is a national, nonpartisan, and nonprofit organization comprising nearly 17,000 attorneys and law professors who practice and teach immigration law. AILA seeks to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration law practice. AILA member attorneys represent petitioners seeking asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"), as well as U.S. businesses seeking talent from the global marketplace.

Amicus AILA has a direct interest in ensuring that individuals with fear-based claims under the Immigration and Nationality Act ("INA") are not removed from this country without effective access to judicial review. AILA attorneys frequently represent petitioners who seek judicial review of Board of Immigration Appeals ("BIA") decisions denying withholding of removal under the INA and withholding and deferral of removal under the CAT. Petitioners seek judicial review of BIA orders when the BIA, for instance, (A) makes legal errors by misinterpreting immigration statutes, ignoring precedent, or applying the wrong standard of review; (B) relies on irrelevant or distorted evidence; (C) fails to act as a neutral arbiter; or (D) ignores critical evidence proffered by a petitioner. In such cases, effective judicial

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

review represents petitioners' last remaining option for vindicating their right to remain in the United States.

Amicus the American Immigration Council (the "Council") is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of immigration laws, and protect the legal rights of noncitizens. The Council frequently appears before federal courts on issues relating to fear-based relief, jurisdictional questions, and interpretation of the INA. The Council has a strong interest in ensuring that noncitizens seeking protection in the United States have full and fair access to legal proceedings, including judicial review of their claims.

Amici AILA and the Council submit this brief to share the experiences of immigrant petitioners across the country who successfully sought review of erroneous immigration judge and BIA decisions before U.S. Courts of Appeal—and prevailed in obtaining lawful outcomes in the courts. Had the respective circuit courts taken the Fourth Circuit's approach and declined to exercise jurisdiction over the petitions for review, the petitioners would have been erroneously removed to countries where they faced persecution, torture, and even death. These cases leave no doubt that judicial review of BIA decisions in "withholding-only proceedings," which Congress preserved through 8 U.S.C. § 1252, is essential to the lawful administration of the INA and noncitizens' due process rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

Given the life-or-death stakes frequently posed by fear-based claims under the INA, it is vital the BIA adjudicates those claims in compliance with the law.

As petitioner's brief explains, the Fourth Circuit's interpretation of Section 1252(b)(1)'s filing deadline effectively forecloses judicial review of BIA decisions in withholding-only cases.

Amici AILA and the Council submit this brief to illustrate, using real-world examples, the likely consequences of the Fourth Circuit's erroneous interpretation of the statute. "It is no secret that when processing applications, licenses, and permits," entities like the BIA "sometimes make[] mistakes." *Patel* v. *Garland*, 596 U.S. 328, 347 (2022) (Gorsuch, J., dissenting). Federal court review is the only mechanism through which BIA errors can be detected, adjudicated, and corrected. Without an effective mechanism for judicial review, an erroneous BIA order denying statutory withholding or protection under the CAT would function as a final decision immune from judicial review.

The cases discussed below illustrate how U.S. Courts of Appeals have routinely corrected the BIA's misapplications of the immigration laws and, consequently, have enforced noncitizens' statutory right to be protected from persecution, torture, and death in their countries of origin. As these cases make clear, effective judicial review of BIA removal orders ensures that laws entitling noncitizens to withholding of removal are applied correctly, and that appellate courts continue to guide and correct the BIA and immigration judges. Amici thus respectfully submit that, if the Fourth Circuit's interpretation of Section 1252(b)(1) prevails, the courts will have "turned an agency once accountable to

the rule of law into an authority unto itself." *Patel*, 596 U.S. at 365 (Gorsuch, J., dissenting).[2]

ARGUMENT

I. FEDERAL COURT REVIEW IS INTEGRAL TO ENSURE LAWFUL APPLICATION OF FEDERAL IMMIGRATION LAWS

The Fourth Circuit held that a summary administrative document issued by a U.S. Department of Homeland Security ("DHS") officer is a "final" order of removal under Section 1252(b)(1) that triggers an immigration petitioner's 30-day window to seek judicial review of that order. *See Martinez* v. *Garland*, 86 F.4th 561, 570 (4th Cir. 2023). If that petitioner, however, has a fear-based claim, DHS is obligated, after issuing that summary administrative document, to place them in "withholding-only" proceedings in which they may present that claim to an immigration judge and appeal an adverse decision to the BIA. 8 C.F.R. § 1208.31(e), (g)(2)(ii).

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[2] *Patel* considered judicial review of discretionary agency decisions. The withholding of removal petitions at issue in this case are not discretionary: If a petitioner demonstrates they qualify for withholding of removal, the agency *must* afford relief. 8 C.F.R. §§ 1208.16(d), 1208.17(a) (if eligibility is proved, relief "shall be granted"). *Moncrieffe* v. *Holder*, 569 U.S. 184, 187 n.1 (2013) (government "has no discretion to deny relief to a noncitizen who establishes his eligibility"). Accordingly, judicial review is especially necessary to ensure the agency complies with statutes in affording this mandatory relief.

Because a DHS officer's administrative decision will, as a practical matter, almost always issue more than thirty days before an immigration judge, let alone the BIA, adjudicates the petitioner's fear-based claim in withholding-only proceedings, the 30-day period to seek judicial review already will have expired before the BIA issues a decision. And under the Fourth Circuit's approach, not only is the initial administrative document immune from judicial review, but so too is the agency's later adjudication of the noncitizen's fear-based claim. *See Martinez*, 86 F.4th at 566. The Fourth Circuit's interpretation of Section 1252(b)(1) thus effectively forecloses noncitizens from seeking judicial review of BIA orders in withholding-only cases, giving the agency the last word even when the agency's decision rests on legal error.

The Fourth Circuit did not consider the serious and detrimental consequences of insulating withholding-only BIA decisions from judicial review. The cases below are exemplary of common agency errors that, if present in withholding-only proceedings, would go uncorrected under the Fourth Circuit's interpretation of Section 1252(b)(1). Though some of the cases discussed below did not involve DHS administrative decisions, all of them involved erroneous BIA rulings that, but for judicial review, would have deprived noncitizens of their statutory right to protection from torture, persecution, or death in their countries of origin. These cases show that immigration judges and the BIA at times make drastic errors, including: (A) legal errors consisting of misapplications of binding appellate precedent; (B) reliance on irrelevant or distorted evidence; (C) blatantly partial rulings; and

(D) ignoring highly relevant evidence. The Fourth Circuit's interpretation of Section 1252(b)(1) would effectively foreclose judicial review of these types of errors and of immigration judge and BIA decisions in withholding-only cases more generally.

The cases discussed below thus exemplify what this Court recently recognized in *Loper Bright*: federal court review of agency decision is essential to the "steady, upright and impartial administration of the laws." *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 385 (2024). Indeed, federal courts are an indispensable check on agencies, like the BIA, that are susceptible to "influence from the political branches." *Id.* To ensure that courts continue to play a meaningful role in ensuring the agency correctly adjudicates withholding-only claims, this Court should reject the Fourth Circuit's flawed interpretation of Section 1252(b)(1).

A. Legal Errors

The BIA regularly misinterprets immigration statutes, ignores controlling precedent, and applies the wrong standard of review. Judicial review of legal errors is critical because "[t]he fact remains … that even agency experts 'can be wrong.'" *Kisor* v. *Wilkie*, 588 U.S. 558, 622 (Gorsuch, J., concurring). This Court has more than once addressed this concern. For instance, in *Mach Mining* v. *EEOC*, this Court explained:

> Absent [judicial] review, the Commission's compliance with the law would rest in the Commission's hands alone. We need not doubt the [Commission's] trustworthiness, or its fidelity to law, to shy away from that result. We need only know—and know that Congress knows—

> that legal lapses and violations occur, and especially so when they have no consequence.

575 U.S. 480, 488-489 (2015). The cases discussed in this section illustrate the critical role that U.S. Courts of Appeals have played in correcting the BIA's legal errors. Although this section exclusively highlights cases from 2023 and 2024, these are a small sample of a much larger catalog of cases where immigration judges and the BIA committed legal error, which, if the Fourth Circuit's rule is allowed to stand, would go undetected and uncorrected. As this Court recognized in *Mach Mining*, such legal errors would likely become more common if the agency knew that its decision could not be subject to any judicial review.

1. *Tista-Ruiz de Ajualip* v. *Garland*

In this case, absent Sixth Circuit review, the BIA would have applied outdated law in evaluating a fear-based asylum claim and the petitioner and her family would have been removed to a potentially life-threatening situation. On remand to the BIA, the petitioner's family's case now will be decided under the correct legal standard.[3]

Marta Lidia Tista-Ruiz de Ajualip fled to the United States from Guatemala after local police failed to protect her family from domestic violence. *See Tista-Ruiz de Ajualip* v. *Garland*, 114 F.4th 487, 491-492 (6th Cir. 2024). Before fleeing, Ms. Tista-Ruiz de Ajualip and her children lived in a remote mountain village with her

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[3] For each of the cases detailed herein, counsel for amici have been in contact with the petitioners' respective counsel, who shared information about the cases' current postures.

daughter's boyfriend. *Id.* at 491. The boyfriend physically abused Ms. Tista-Ruiz de Ajualip's entire family. *Id.* When Ms. Tista-Ruiz de Ajualip told him to leave, the boyfriend confiscated the family's phones, sharpened a machete in front of them, and threatened to kill them. *Id.* at 492. Months later, he again threatened their lives, saying he could find someone to kill the entire family. *Id.*

Ms. Tista-Ruiz de Ajualip and her family fled to the United States after local police refused to assist her unless she first underwent a psychological evaluation. 114 F.4th at 492. Soon after they entered the United States, the DHS initiated removal proceedings. *Id.* At the hearing, the immigration judge rejected the Tista-Ruiz de Ajualip family's asylum petition because "victims of domestic violence" could not form a cognizable particular social group under the then-Attorney General's decision in *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018). *See id.* at 493-494. After the immigration judge's decision but before the BIA decision, *Matter of A-B-* was vacated in its entirety and the law again recognized that victims of domestic violence may qualify for asylum. *See Matter of A-B-III*, 28 I&N Dec. 307 (A.G. 2021). Yet, despite this intervening precedent, the BIA affirmed. *Tista-Ruiz de Ajualip*, 114 F.4th at 494.

On review, the Sixth Circuit held that there were "many mistakes made in this case." 114 F.4th at 496. Most significantly, under controlling precedent, the BIA should have remanded the case to the immigration judge for further consideration after the change in the law. *Id.* at 497-498. The Sixth Circuit therefore vacated and remanded the BIA's decision, stating that "[t]he Board cannot simply ignore the change in law." *Id.* at 498.

2. *Rivera* v. *Garland*

This case presents another instance in which the BIA's misapplication of precedent would have gone undetected under the Fourth Circuit's rule. Absent Eight Circuit review, the petitioner would likely have been removed despite the immigration judge and BIA applying the incorrect legal standard. Here again, on remand to the BIA, Mr. Rivera's case now will be decided under the correct legal standard.

Jose Maria Rivera fled to the United States from El Salvador after members of the MS-13 gang threatened his family and killed a converted gang member in his presence. *See Rivera* v. *Garland*, 108 F.4th 600, 603 (8th Cir. 2024). Mr. Rivera, a pastor, often preached to gang members to encourage them to stop participating in illicit activities. *Id.* After Mr. Rivera persuaded a local MS-13 member to join his parish, MS-13 members accosted Mr. Rivera in front of his wife and daughter as he left church by striking his head, putting a gun to his temple, and pulling the trigger without discharging the gun. *Id.* The gang members told Mr. Rivera that the local MS-13 member who Mr. Rivera converted to the church "belonged to [the gang], not to Christ." *Id.* The gang members later shot and killed the convert five feet away from Mr. Rivera's family. *Id.* The local police instructed Mr. Rivera to leave his town because of the risk that the gang would kill them "for being witnesses and for reporting the homicide." *Id.* Mr. Rivera and his family fled to the Unted States and applied for asylum, withholding of removal, and CAT relief. *Id.* at 603-604.

The immigration judge found Mr. Rivera credible but rejected his asylum claim, finding an insufficient nexus between Mr. Rivera's religion and his persecution. 108 F.4th at 604. The BIA affirmed.

On review, the Eighth Circuit found that the BIA and immigration judge misapplied precedent in evaluating Mr. Rivera's asylum claim. 108 F.4th at 604. Instead of asking whether religion was *one* motive behind Mr. Rivera's persecution, the BIA and immigration judge required religion to be the *only* motive behind his persecution. *See id.* at 606-609. The Eighth Circuit vacated and remanded the BIA's decision, characterizing its analysis as "an impermissibly narrow view of what it means to be persecuted 'on account of' religion." *Id.* at 607.

3. ***F.J.A.P.*** **v.** ***Garland***

In this case, absent Seventh Circuit review, the BIA's use of the wrong standard of review would have resulted in the petitioner being at risk of removal to face torture in El Salvador. The Seventh Circuit, in fact, also considered Section 1252(b)(1)'s 30-day filing deadline, but it took the opposite view of the Fourth Circuit, correctly holding that a petition for review may be filed within 30 days of the BIA's decision denying withholding of removal. *See* Petitioner's Br. 33. Under the Fourth Circuit's rule, the petitioner would have been removed to his likely death despite the errors in the BIA's decision. On remand to the BIA, the petitioner's case will now be decided under the correct standard of review.

F.J.A.P. fled to the United States from El Salvador after MS-13 gang members extorted and threatened to kill him. *See F.J.A.P.* v. *Garland*, 94 F.4th 620, 624 (7th Cir. 2024). Among other threats, the gang came to F.J.A.P.'s house and demanded $2,000, saying they would "kill you all." *Id.* F.J.A.P. reported the threat to the police, went into hiding, and fled to the United States. *Id.* Shortly after coming to the United States, F.J.A.P.'s cousin informed him that the gang was "looking for both of [them]." *Id.* Less than a year later,

F.J.A.P. learned that the gang had murdered that same cousin in front of his pregnant wife. *Id.* F.J.A.P. believes his cousin was murdered because he refused to divulge F.J.A.P.'s location. *Id.*

The DHS reinstated F.J.A.P.'s removal order, and F.J.A.P. applied for withholding of removal under the CAT.[4] 94 F.4th at 625. The immigration judge granted F.J.A.P. relief under the CAT, finding him to be credible. *Id.* Yet, the BIA reversed, finding the immigration judge had relied on "'assumptions'" and "'hypotheticals.'" *Id.* The BIA ordered F.J.A.P. removed and denied his subsequent requests to reopen proceedings. *Id.*

F.J.A.P. appealed the BIA's order to the Seventh Circuit. The Seventh Circuit held that the BIA committed numerous errors, including by reviewing the immigration judge's decision *de novo*, rather than under the correct clear error standard of review. 94 F.4th at 640. Accordingly, the Seventh Circuit granted F.J.A.P.'s petition and remanded his case to the BIA for reconsideration. *Id.*

4. *Francois* v. *Garland*

Similarly, in this case, the BIA applied the wrong standard of review to the immigration judge's decision. Absent Fifth Circuit review, the petitioner would have faced removal to Haiti despite an immigration judge finding that he would "'more likely than not'" be subjected to "'abuse and mistreatment amounting to persecution,'" such as "'physical punishment, torture[,] and isolation.'" *Francois* v. *Garland*, 120 F.4th 459, 466 (5th

[4] F.J.A.P. had previously entered the United States and was removed. 94 F.4th at 624.

Cir. 2024) (alteration in original). On remand to the BIA, the petitioner's case will now be decided under the correct standard of review.[5]

Alex Francois sought refuge in the United States to avoid removal to Haiti, where he would be persecuted and imprisoned on account of his poor mental health. 120 F.4th at 462. Now in his mid-sixties, Mr. Francois has lived and worked in the United States for most of his life. *Id.* He suffers from severe mental health issues, including schizophrenia, psychotic disorder, and bipolar disorder, which have required hospitalization and have instigated encounters with law enforcement. *Id.*

In 2017, Mr. Francois was arrested in Texas for trespassing, found incompetent to stand trial, and admitted for psychiatric treatment. 120 F.4th at 462. After his treatment, he was transferred to U.S. Immigration and Customs Enforcement ("ICE") custody and charged with removability under 8 U.S.C. § 1182(a)(6)(A)(i). *Id.* Mr. Francois subsequently sought asylum, withholding of removal, and CAT protection based on his mental illness. *Id.*

An immigration judge granted Mr. Francois's request for withholding of removal. 120 F.4th at 463. The immigration judge cited an expert report describing a prevailing view in Haitian culture that mental illness is related to "witchcraft and contagion," resulting in government-sanctioned violence, torture, and forced detention. *Id.* at 462. The BIA *sua sponte* remanded for further factfinding. *Id.* at 463. On remand, although neither party submitted any new evidence or argument, the

[5] The government filed a petition for rehearing before the Fifth Circuit, which is currently pending.

immigration judge reversed its prior decision and denied Mr. Francois's claims. *Id.*

On review, the Fifth Circuit held that the BIA deprived Mr. Francois of his constitutional due process rights when it remanded his case to the immigration judge for further fact-finding, notwithstanding the clear error standard of review. 120 F.4th at 463-466. As the Fifth Circuit explained, the BIA "violat[ed] its own regulations" when it engaged in de novo review; for each question the BIA remanded the immigration judge to address, the immigration judge had "already made these exact findings" in its first order. *Id.* at 464-466. Consequently, the Fifth Circuit vacated the decision and remanded for the BIA to apply the correct standard of review. *Id.* at 466.

5. *Saban-Cach* v. *Attorney General*

In this case, numerous legal errors in the immigration judge's and BIA's analyses would have gone uncorrected under the Fourth Circuit's rule, and, as a result, the petitioner would have been removed to a country where he and his family suffered extensive persecution on account of their ethnicity. On remand, Mr. Saban-Cach's case will now be decided under the correct legal standard.

Selvin Heraldo Saban-Cach fled to the United States from Guatemala, where his Kaqchikel Mayan indigenous ethnicity made him a target of gang violence. *Saban-Cach* v. *Attorney General*, 58 F.4th 716, 720 (3d Cir. 2023). As a teen, Mr. Saban-Cach was repeatedly harassed and assaulted by members of a local gang associated with MS-13; they insulted his ethnicity and demanded he join them. *Id.* When he left the area, the gang redirected their violence towards his father, who was beaten in the street. *Id.* at 722. One day, Mr. Saban-

Cach was surrounded by gang members who struck him in the eye with a glass bottle, stabbed him in the lower back, and cursed at him for being indigenous. *Id.* at 721. Because the hospital was far away, his grandmother tended to his injuries. *Id.*

Mr. Saban-Cach fled to the United States. As retaliation for his escape, the gang kidnapped, beat, and raped his 16-year-old sister for more than a month, and threatened the lives of Mr. Saban-Cach's wife and children. 58 F.4th at 722.

Mr. Saban-Cach applied for withholding of removal and CAT protection. 58 F.4th at 722. Although the immigration judge found his testimony credible, it concluded that he did not establish sufficient probability of persecution on account of a protected ground. *Id.* The BIA affirmed, reasoning that "'because most of the incidents did not involve physical injuries, and because the worst attack did not require him to seek professional medical care for his physical injuries,'" Mr. Saban-Cach had not established past persecution. *Id.* at 723.

On review, the Third Circuit held that "[a]t times, the [immigration judge]'s decision completely conflict[ed] with the record. Yet, for reasons that are not at all apparent, the BIA affirmed the immigration judge's decision in its entirety." 58 F.4th at 724. The Third Circuit identified a long list of the BIA's legal errors, including affirming the immigration judge's conclusions regarding past harm. The Third Circuit explained, "[t]o find this incident insufficient to rise to the level of persecution suggests that egregiousness must go beyond being stabbed, kicked into unconsciousness, and left bleeding with pieces of flesh hanging out." *Id.* at 728. The Third Circuit observed that "neither the [immigration judge] nor the BIA bothered to inquire what, if any,

professional medical care was available" to the petitioner. *Id.* at 726. The Third Circuit vacated the BIA's order and remanded for further proceedings.

B. Reliance On Irrelevant Or Distorted Evidence

The cases below illustrate that immigration judges and the BIA regularly deny petitions based on manifestly irrelevant or distorted evidence, including evidence from patently unrelated cases. Where factfinders rely on indisputably irrelevant evidence, judicial review is critical because "findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the [agency's] decision from being justified." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951). Here again, under the Fourth Circuit's rule, had their claims arisen in withholding-only proceedings, the petitioners below would have been removed to face persecution and torture despite never having their claims adjudicated lawfully.

1. ***Jian Tao Lin* v. *Holder***

In this case, the immigration judge relied on evidence that had nothing to do with the petitioner's case and that was illegitimately transposed into his immigration file. *Jian Tao Lin* v. *Holder*, 611 F.3d 228, 237 (4th Cir. 2010). Absent Fourth Circuit review, that grave error, which was affirmed by the BIA, would have gone undetected. As a result of the Fourth Circuit's review and correction of this error, an immigration judge granted the petitioner's application on remand.

Jian Tao Lin and his wife, Xue Yun Zheng fled to the United States from China's Fujian Province, "'where the one-child policy [was] enforced with special vigor.'" 611 F.3d at 230-231. Mr. Lin and Ms. Zheng had a daughter before they were legally able to get married in China.

Id. at 231. They sent their daughter away to be raised by Mr. Lin's sister. *Id.* The couple later had a son, after which Ms. Zheng was forced to use an IUD and report for regular pregnancy tests. *Id.* When an exam revealed that Ms. Zheng was again pregnant, village officials subjected her to a forced abortion. *Id.* A year later, government authorities discovered the couple's first daughter and ordered Mr. Lin and Ms. Zheng to be sterilized.

To avoid forced sterilization, the couple fled to the United States and sought asylum, withholding of removal, and protection under the CAT. 611 F.3d at 231. At Mr. Lin's hearing, the immigration judge deemed him not credible and denied his claims. *Id.* at 234. In doing so, the immigration judge predicated several findings on a statement submitted by the government describing the actions of a different asylum applicant in an unrelated case. *Id.* Even though the immigration judge confused Mr. Lin with a completely different applicant in a different case, the BIA denied Mr. Lin's appeal. *Id.* at 235.

On review, the Fourth Circuit found that "the adverse credibility determination made by the immigration judge and affirmed by the BIA was erroneously—and fatally—predicated on the unrelated Liu evidence," with "most of the delineated deficiencies" being "derived, nearly verbatim" from the unrelated petition. 611 F.3d at 237. Accordingly, it vacated the BIA's decision and remanded for further proceedings.

2. *Serra* v. *Attorney General*

In this case, absent Eleventh Circuit review, the petitioner would likely have been removed based on a minor translation error gone uncorrected. *Serra* v. *Attorney General*, 60 F.4th 653, 661-663 (11th Cir. 2024). As a result of the Eleventh Circuit's review, on remand, DHS

granted Mr. Serra's request for prosecutorial discretion and the BIA dismissed Mr. Serra's removal proceedings.

Ignacio Balaez Serra fled to the United States from Cuba after experiencing politically motivated incarceration and police brutality. 60 F.4th at 655-656. Mr. Serra stopped reporting to compulsory military service after being mistreated by his superiors. *Id.* In response, Cuban authorities labeled Mr. Serra a "counter-revolutionary" and imprisoned him on four separate occasions. *Id.* Cuban police physically and verbally assaulted Mr. Serra during his periods of incarceration. *Id.*

Mr. Serra fled to the United States after being released from prison in Cuba and sought asylum, withholding of removal, and CAT protection. 60 F.4th at 655, 658. But the immigration judge determined Mr. Serra was not credible because of discrepancies in his testimony regarding the date he passed a kidney stone. *Id.* at 657. The immigration judge denied his asylum application and the BIA affirmed. *Id.* at 657-658.

On review, the Eleventh Circuit examined the record and found that Mr. Serra's inconsistencies about the date he passed his kidney stone were attributable to translation errors and semantics, and therefore could not be the basis for an adverse credibility determination. 60 F.4th at 663. Accordingly, the Eleventh Court vacated and remanded the BIA decision. *Id.* at 664.

3. *Diaz Ortiz* v. *Garland*

In this case too, absent First Circuit review, the immigration judge's reliance on a deeply flawed report, which a thirty-six-year veteran of the Boston Police Department and criminal justice professor described as an unreliable criminalization of "normal teenage" activities, would have gone undetected. *Diaz Ortiz* v. *Garland*,

23 F.4th 1, 12 (1st Cir. 2022). On remand to the BIA, the petitioner's application will be determined based on relevant, probative information.

Christian Josue Diaz Ortiz fled to the United States from El Salvador because he and his family experienced gang violence on account of their evangelical Christian faith. 23 F.4th at 3-4. In his early teens, Mr. Diaz Ortiz emerged as a visible youth leader in his church. *Id.* at 4. As a result, MS-13 threatened to kill Mr. Diaz Ortiz and his family. *Id.* They demanded that he join them and warned him to cease practicing Christianity and preaching against "'the gang way of life.'" *Id.* After the gang physically attacked Mr. Diaz Ortiz, his parents sent him to the United States. *Id.* Mr. Diaz Ortiz was subsequently arrested as part of a law enforcement operation against MS-13 in the United States. "Although he had no prior arrests and had not been observed participating in any gang activity," he was detained by ICE. *Id.* at 3. He applied for asylum, withholding of removal, and CAT protection. *Id.* at 3-4.

At his removal hearing, the immigration judge relied on a point system used by the Boston Police to determine whether someone qualified as a "gang member." 23 F.4th at 9. Mr. Diaz Ortiz was assigned points for smoking marijuana with another teenager, being observed "loitering" with other Hispanic teenagers who the database characterized as members of MS-13, and for carrying a "metal chain with a padlock" in his backpack. *Id.* at 10-11. Even though none of these behaviors resulted in criminal charges against Mr. Diaz Ortiz, *id.* at 8, both the immigration judge and BIA relied on the points system and ordered Mr. Diaz Ortiz's removal to El Salvador.

On review, the First Circuit corrected these factual errors. 23 F.4th at 17. It observed: "If the [immigration judge] and BIA had performed even a cursory assessment of reliability, they would have discovered a lack of evidence to substantiate the gang package's classification of Diaz Ortiz as a member of MS-13." *Id.* As the First Circuit explained, the Boston Police Department's points system "assigned point values for largely unexceptional teen behaviors." *Id.* at 21. Consequently, it did not contain "reasonable, substantial, and probative evidence of gang membership or association." *Id.* at 22 (quotation marks omitted). The First Circuit vacated the BIA's order and remanded for further proceedings.

C. Violations Of The Right To A Neutral Arbiter

The cases below illustrate that the BIA regularly fails to act as a neutral arbiter in withholding-only cases, including when it affirms immigration judges who blatantly violate petitioners' due process rights. Where agency actors fail to be impartial, judicial review is critical because executive officials "have their own interests, their own constituencies, and their own policy goals" and "may choose to press the case for the side [they] represen[t]" in carrying out their roles. *See Kisor*, 588 U.S. at 615 (Gorsuch, J., concurring) (alterations in original and quotation marks omitted).

1. ***Abulashvili* v. *Attorney General***

In this case, absent Third Circuit review, the petitioner and his wife would have been removed following a hearing where the adjudicator misread or ignored significant parts of his application and then acted as opposing counsel, denying Mr. Abulashvili any opportunity to correct his error. *Abulashvili* v. *Attorney General*, 663 F.3d 197, 199 (3d Cir. 2011). On remand, the immigration

judge granted Mr. Abulashvili asylum in the United States.

Vasil Abulashvili fled to the United States from the Republic of Georgia after facing persecution for reporting the murder of an innocent woman by two men associated with the country's ruling party. 663 F.3d at 199. Mr. Abulashvili was a member of the opposition Labor Party of Georgia ("LPG") at the time he reported the crime. *Id.* at 200. In response to his report, the police detained Mr. Abulashvili and warned him to forget what happened. *Id.* But Mr. Abulashvili persisted in informing the LPG Chairman that associates of the ruling party had committed the murder. *Id.*

Over the next few months, Mr. Abulashvili was detained, beaten, and threatened by the police, and one of the members extorted and beat him. 663 F.3d at 200. His roommate and fellow LPG member was likewise arrested and tortured by militia members. *Id.* After his roommate was murdered, Mr. Abulashvili and his wife fled to the United States, where they applied for asylum, withholding of removal, and CAT protection. *Id.*

Mr. Abulashvili's removal hearing, the immigration judge's decision, and the BIA's affirmance were all deeply flawed. The government attorney arrived at the immigration court hearing unprepared and unfamiliar with the record. 663 F.3d at 201. To make up for this, "[a] few minutes into the questioning, the [immigration judge] took over the cross-examination" and asked a total of eighty-seven questions. *Id.* 202-207. Based on her own cross-examination, the immigration judge determined that Mr. Abulashvili was not credible because his application and testimony were purportedly contradictory. *Id.* at 203-204. The BIA affirmed. *Id.* at 202.

On review, the Third Circuit held that the immigration judge violated Mr. Abulashvili's due process rights when the "supposedly neutral fact finder … assum[ed] the role of opposing counsel." 663 F.3d at 207-208. Moreover, the Third Circuit held that "[e]ven a cursory review" of Mr. Abulashvili's file revealed his testimony did not contradict his application. *Id.* at 203, 206. Rather, the immigration judge had not properly read the application. *Id.* at 206. The Third Circuit accordingly remanded Mr. Abulashvili's case to the BIA to consider the entire application. *Id.* at 209.

2. *Serrano-Alberto* v. *Attorney General*

In this case, absent Third Circuit review, the due process violations committed by the immigration judge and summarily affirmed by the BIA would have been left uncorrected. On remand, the petitioner will be afforded due process rights and, as a result of the urging of the Third Circuit, may be assigned to a new and impartial immigration judge.

Ever Ulises Serrano-Alberto fled to the United States from El Salvador, where he and his family were viciously attacked because he was a successful player in the Salvadorian national soccer league. *Serrano-Alberto* v. *Attorney General*, 859 F.3d 208, 211 (3d Cir. 2017). The MS-13 gang shot Mr. Serrano-Alberto's brother, who was left paralyzed, and extorted, threatened to kill, and then shot Mr. Serrano-Alberto, his nephew, and a neighbor. *Id.* His neighbor died and his nephew was hospitalized. *Id.* When Mr. Serrano-Alberto tried to report the violence, the police refused to file a report. *Id.* at 211-212. The harassment persisted for years despite Mr. Serrano-Alberto's attempts to relocate. *Id.* at 212. The gang later shot another of Mr. Serrano-Alberto's

brothers, and, in 2012, Mr. Serrano-Alberto survived another attempted shooting. *Id.*

Mr. Serrano-Alberto fled to the United States and was apprehended at the Texas border, where he applied for asylum, withholding of removal, and protection under the CAT. 859 F.3d at 212. An immigration judge denied his claims, and the BIA summarily affirmed. *Id.* at 219.

On review, the Third Circuit held that the "immigration judge's conduct cross[ed] the line." 859 F.3d at 221. "From the outset, the immigration judge took an argumentative tone and expressed exasperation." *Id.* at 216. Moreover, the immigration judge repeatedly interrupted Mr. Serrano-Alberto's testimony, limited him to "'yes or no' answers," and "interfere[ed] with Serrano-Alberto's presentation of his case." *Id.* at 217. Finally, the Third Circuit found that the immigration judge "remarkably" concluded that Mr. Serrano-Alberto's fear of persecution was not objectively reasonable based "on her observation that the drive-by shooters in 2008 and 2012 did not stop to tell him the reason 'why they were shooting at him.'" *Id.* at 224 (citations omitted).

The Third Circuit held that the immigration judge violated Mr. Serrano-Alberto's due process rights, granted his petition for review of the BIA's denial, and "urge[d] the BIA … to reassign this matter to a new immigration judge." 859 F.3d at 225.

D. Ignoring Critical Evidence

The cases below illustrate that immigration judges and the BIA also make factual errors by ignoring critical evidence proffered by petitioners. In withholding-only proceedings, federal court review of BIA decisions is a necessary recourse, because immigrants typically have

no other opportunity for the facts of their case to be heard in court. *See Nasrallah* v. *Barr*, 590 U.S. 573, 585-586 (2020) ("Because the factual components of CAT orders will not previously have been litigated in court and because those factual issues may be critical to determining whether the noncitizen is likely to be tortured if returned, it makes some sense that Congress would provide an opportunity for judicial review.").

1. *Marynenka* v. *Holder*

In this case, absent Fourth Circuit review, the petitioner would have been removed to a country where she had been brutally abused because of the immigration judge's disregard of corroborating evidence. The petitioner was granted asylum on remand.

Hanna Marynenka fled to the United States from Belarus after being abducted, beaten, and raped because of her membership in a pro-democracy youth group. *Marynenka* v. *Holder*, 592 F.3d 594, 597-598 (4th Cir. 2010). On multiple occasions, she was arrested for participating in demonstrations and beaten. *Id.* In late 2002, Ms. Marynenka and a friend were arrested, taken to a forest, and raped by four policemen. *Id.* at 598. Ms. Marynenka subsequently fled to the United States and applied for asylum, withholding of removal, and CAT relief. *Id.* at 597.

Despite recognizing the dire conditions in Belarus and not making an adverse credibility determination, the immigration judge denied Ms. Marynenka's claims because, among other things, the immigration judge determined that Ms. Marynenka did not submit persuasive corroborating evidence regarding her rape. 592 F.3d at 598-599, 601. Specifically, the immigration judge rejected a medical record indicating Ms. Marynenka had been sexually assaulted because the record was not

written on clinical letterhead and a chain of custody could not be established. *Id.* at 601. The BIA adopted and affirmed the immigration judge's reasoning. *Id.* at 600.

On review, the Fourth Circuit held that the immigration judge had repeatedly "used legally unsupportable reasons," including chain of custody standards inapplicable in immigration court, to disregard persuasive corroborating evidence. 592 F.3d at 602. Contrary to the immigration judge's conclusions, the Fourth Circuit found that Ms. Marynenka's medical record "confirms a brutal rape" and bore "a rectangular stamp or seal that reads 'Gomel City Clinic No. 20.'" *Id.* at 601. The Fourth Circuit therefore vacated the BIA's decision and remanded for further proceedings. *Id.* at 602.

2. *Mboowa* v. *Lynch*

In this case too, absent First Circuit review, the BIA's failure to review the entire record would have been left uncorrected and the petitioner would have been removed to face persecution on account of his political identity. The petitioner was granted asylum on remand.

Henry Mboowa fled to the United States from Uganda after he experienced violence and persecution because of his membership in the "Youth Unity Peace Initiative" ("YUPI"), a political opposition group. *Mboowa* v. *Lynch*, 795 F.3d 222, 224 (1st Cir. 2015). Mr. Mboowa was hanging posters in support of the presidential challenger when he was stopped and beaten by more than a dozen soldiers, resulting in numerous injuries. *Id.* at 224-225. Armed men later ransacked his home and struck him on the jaw with the butt of a gun, warning that such was the "price" for his activism. *Id.* at 225. Mr. Mboowa's father, who actively supported the political

opposition, disappeared for several days, resurfaced with "signs of poisoning," and died soon afterwards. *Id.* Mr. Mboowa's cousin and a colleague, also members of YUPI, disappeared and were found beheaded. *Id.*

Upon arriving in the United States, Mr. Mboowa applied for asylum but was denied. 795 F.3d at 224. After DHS began removal proceedings against him, he sought asylum, withholding of removal, and protection under the CAT. *Id.* The immigration judge found Mr. Mboowa not credible based on purported inconsistencies between his original asylum application and later application. *Id.* at 225-226. The BIA affirmed. *Id.* at 226.

On review, the First Circuit vacated the BIA's decision because the immigration judge and BIA inexplicably confined their review to only one section of Mr. Mboowa's application and ignored the totality of the record, which demonstrated that Mr. Mboowa had consistently alleged persecution against him and his family. 795 F.3d at 227-228. The First Circuit thus remanded the case to the BIA with instructions to reconsider the adverse credibility determination. *Id.* at 228.

3. *Aleman-Belloso* v. *Garland*

In this case, absent Ninth Circuit review, the BIA's factual and legal errors would have been left uncorrected and the petitioner likely would have faced removal. On remand to the BIA, the petitioner's case will be decided based on all information contained in his petition.

Jose Ernesto Aleman-Belloso fled to the United States from El Salvador after the local political party punished him for refusing to use his religious position to influence elections. *See Aleman-Belloso* v. *Garland*,

121 F.4th 1165 (9th Cir. 2024). In 2015, members of the governing party approached Mr. Aleman-Belloso and asked him to use his influence as a local minister to encourage church members to vote for the party in an upcoming local election. *Id.* at 1172. Mr. Aleman-Belloso refused and five days after the party lost the election, four masked gunmen attacked Mr. Aleman-Belloso, put a gun to his head, and ransacked his home. *Id.* They told Mr. Aleman-Belloso he had three days to get out of town. *Id.* Mr. Aleman-Belloso fled to the United States and applied for asylum, withholding of removal, and CAT relief. *Id.*

The immigration judge and the BIA rejected Mr. Aleman-Belloso's petition, finding that he had failed to establish a nexus between his persecution and any protected grounds. 121 F.4th at 1174.

On review, the Ninth Circuit held that the immigration judge and BIA ignored substantial evidence of Mr. Aleman-Belloso's past persecution and risk of future persecution. *See* 121 F.4th at 1174-1176. Specifically, the immigration judge and BIA ignored evidence that Mr. Aleman-Belloso expressed a political opinion when he refused to help the governing party, and evidence that the governing party exercised power throughout El Salvador. *Id.* at 1174-1180. The Ninth Circuit vacated and remanded the BIA's decision, holding that its flawed reasoning "cannot stand" and "must be redone." *Id.* at 1180 (quoting *Cole* v. *Holder*, 659 F.3d 762, 771-772 (9th Cir. 2011)).

CONCLUSION

As the cases discussed herein and other similar cases demonstrate, federal court review of BIA decisions denying relief from removal is essential to ensure the faithful and correct application of immigration laws

in cases that carry life-and-death consequences. Amici AILA and the Council urge the Court to reverse the decision of the Fourth Circuit.

Respectfully submitted.

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