No. 19-2215

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

[redacted]

Petitioner,

—v.—

ATTORNEY GENERAL UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF NONPROFIT IMMIGRATION LEGAL SERVICES PROVIDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ALEXANDRA LEEPER
COOLEY LLP
3175 Hanover Street
Palo Alto, California 94304
(650) 843-5000
aleeper@cooley.com

MARC SUSKIN
COOLEY LLP
55 Hudson Yards
New York, New York 10001
(212) 479-6000
msuskin@cooley.com

KRISTIN BEALE
COOLEY LLP
500 Boylston Street
Boston, Massachusetts 02116
(617) 937-2300
kbeale@cooley.com

Attorneys for Amici Curiae
American Gateways, Capital Area Immigrants' Rights Coalition, Catholic Legal Immigration Network, Inc., Florence Immigrant and Refugee Rights Project, Heartland Alliance's National Immigrant Justice Center, Northwest Immigrant Rights Project and Pennsylvania Immigration Resource Center

STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* American Gateways, Capital Area Immigrants' Rights ("CAIR" Coalition), Catholic Legal Immigration Network, Inc. ("CLINIC"), Florence Immigrant and Refugee Rights Project, Heartland Alliance's National Immigrant Justice Center ("NIJC"), Northwest Immigrant Rights Project ("NWIRP"), and Pennsylvania Immigration Resource Center ("PIRC"), by and through undersigned counsel, state that they are nonprofit organizations and therefore are not publicly held corporations that issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Rules

Regulations

PAGE(S)

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief in support of Petitioner. *Amici* are nonprofit legal services organizations that assist immigrants. All of the *amici* operate programs that assist *pro se* and/or detained *pro se* asylum seekers, and some serve as Legal Orientation Program providers under contract with the Executive Office of Immigration Review ("EOIR"). *Amici* are listed below.

American Gateways (formerly the Political Asylum Project of Austin) serves the indigent immigrant population in central Texas through free legal representation, education, *pro se* assistance, and advocacy before the Department of Homeland Security and the immigration courts.

Capital Area Immigrants' Rights ("CAIR") Coalition strives to ensure equal justice for all immigrants at risk of detention and deportation in the D.C. metropolitan area and beyond through direct legal representation, "know-your-rights" presentations, and impact and advocacy work. The CAIR Coalition advises detained immigrant men, women, and children who are recent arrivals and may be eligible to pursue asylum and withholding of removal.

---

[1] Pursuant to Federal Rules of Appellate Procedure Rule 29(a), *amici* represent that Petitioner and Respondent both consent to the filing of this brief. *Amici* certify that no party or counsel for a party authored any portion of this brief or made a monetary contribution intended to fund its preparation or submission. FED. R. APP. P. 29(c)(5). No person other than *amici*, their members, or their counsel have made such monetary contribution. *Id.*

Catholic Legal Immigration Network, Inc. ("CLINIC") is an immigration-focused nonprofit that assists low-income immigrants in their claims for immigration relief. CLINIC partners with a network of nonprofit immigration legal services programs to protect the rights of asylum seekers. CLINIC's network includes up to 380 diocesan and other affiliated immigration programs at this time, with 400 offices around the country. CLINIC supports the work of its network through various technical assistance programs.

The Florence Immigrant and Refugee Rights Project ("Florence Project") provides free legal and social services to immigrant men, women, and children detained in immigration custody in Arizona. The Florence Project is part of a national network that provides free legal information to thousands of detained men, women, and unaccompanied minors in removal proceedings who do not have attorneys.

National Immigrant Justice Center ("NIJC"), a program of Heartland Alliance for Human Needs and Human Rights, provides legal representation and consultation to low-income immigrants, refugees, and asylum seekers across the country. NIJC represents asylum seekers before the immigration courts, Board of Immigration Appeals, and the Courts of Appeals, through its legal staff and a network of pro bono attorneys.

Northwest Immigrant Rights Project ("NWIRP") provides direct representation to detained immigrants in removal proceedings and presents legal orientation programs for unrepresented detained individuals in removal proceedings.

Pennsylvania Immigration Resource Center ("PIRC") serves vulnerable immigrant populations in Pennsylvania. PIRC provides free legal representation, education, and advocacy to detained immigrants, including scores of asylum seekers who must navigate the immigration system without the benefit of counsel.

Amici meet the requirements of Rule 29 because they are interested in the outcome of this case due to the nature of their work with *pro se* and/or detained *pro se* asylum seekers. Proposed *amici* present an important perspective that is relevant to the Court's analysis.

Amici's work with *pro se* asylum applicants, especially detained *pro se* applicants, renders them well-positioned to speak to the devastating effects the Board of Immigration Appeals ("BIA")'s unjust legal standard will have on these vulnerable populations if the Court adopts the decision below. In *W-Y-C-*, the BIA heightened the already-high bar for *pro se* asylum applicants by requiring they plead their particular social group ("PSG") with "exact delineation" before the immigration judge ("IJ"). *Matter of W-Y-C- & H-O-B*, 27 I. & N. Dec. 189, 191 (BIA 2018) ("*W-Y-C-*"). In this case, the BIA restricted the rights of *pro se* asylum applicants even further, requiring specification of the PSG by the applicant herself and precluding even the IJ from refining it.

While the asylum seeker in this case has counsel and was represented before the IJ, a decision by this Court adopting the BIA's application of *W-Y-C-* will affect all asylum seekers, including the thousands who are unrepresented. Asking asylum applicants without counsel to navigate the idiosyncrasies of the English language and notoriously complex legal issues involved in specifying a PSG, else forfeit forever their viable claims for asylum would be unconscionable and have life-and-death consequences. Such a standard would be particularly challenging, if not impossible, for detained *pro se* asylum applicants given their extremely limited access to legal resources.

The Court's decision in this case will have a direct impact on *amici*'s work and clients. *Amici* have a substantial interest in ensuring that the asylum application process is understandable, reasonable, and fair for all asylum seekers, including *pro se* and detained *pro se* applications. Moreover, *amici* have unique insights into the experiences of detained *pro se* asylum applicants that enable them to provide valuable information to this Court.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Petitioner to highlight the prejudicial impact that adopting the BIA's decision in this case would have on the large and expanding population of *pro se* and detained *pro se* asylum applicants. *Amici* respectfully request that the BIA's decision in this case be overturned and that this Court not adopt the BIA's decision in *W-Y-C-*.

The Supreme Court of the United States has long held that procedural due process rights extend to *all persons* in the United States, including those whose immigration status is uncertain. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."). In this case, the BIA established a pleading standard that is at best unfair, and at worst, a potential death sentence for asylum seekers who have viable asylum claims.

Expecting primarily non-English-speaking *pro se* asylum applicants, especially those who are detained, to describe their PSGs *exactly*, without the ability to amend their descriptions even minimally on appeal, or, as in this case, prohibiting an IJ from reformulating a PSG, would violate due process.

The IJ in this case properly ruled that [redacted] was a member of the legally cognizable PSG "independent professional women in Mexico." BIA Dec. at 2; *see* 8 U.S.C. § 1231(b)(3)(A). However, the BIA held, wrongly, that the IJ "misidentified" the proposed PSG because [redacted] had initially described her PSG to the IJ as "independent *working* professional women in Mexico." Further, the BIA held that [redacted] improperly modified the PSG to "independent professional women in Mexico" on appeal to the BIA. BIA Dec. at 2. [redacted] adoption of the IJ's modification to her PSG was not improper. This modification was inconsequential to her claims to asylum, and reflected the IJ's decision. On appeal, [redacted] further proposed two additional PSGs: "Mexican women" and "Mexican women in relationships who are unable to leave." BIA Dec. at 2 n.1. Citing to *W-Y-C-*, the BIA erroneously concluded that it would consider only the proposed group as originally presented to the IJ, and analyzed neither the groups [redacted] proposed on appeal nor the group as re-articulated by the IJ. *Id.*

In *W-Y-C-*, the BIA erroneously held that the petitioner waived her right to establish her membership in a PSG because the PSG proposed before the BIA was not identical to the one asserted in immigration court. *Id*. at 191-92. The BIA's holding in *W-Y-C-* would (1) require asylum applicants, many of whom are *pro se* or detained *pro se* applicants, to specify the *exact* PSG on account of which they fear persecution and (2) prohibit them from reformulating, even immaterially, a prior description of that group on appeal to the BIA. Adopting the BIA's holding in the present case would unfairly prejudice *pro se* and detained *pro se* asylum applicants further by prohibiting an IJ from reformulating the PSG description at the merits hearing.

Adopting the BIA's holding in the present case would impose an additional and prejudicial barrier to *pro se* and detained *pro se* asylum applicants on top of already complex legal standards and other obstacles. ***First,*** the BIA's new "exact delineation" requirement from *W-Y-C-* would impose unfair and unlawful barriers on asylum applicants, in particular *pro se* and detained *pro se* applicants. ***Second,*** the prejudicial impact to the already-disadvantaged populations of *pro se* and detained *pro se* applicants would be widespread given the dramatic rise in both *pro se* and detained *pro se* applicants**.** ***Third***, the injustice to detained *pro se* applicants would be particularly dire given the barriers to accessing law-related resources within detention centers.

Adopting the BIA's decision that neither the BIA nor the IJ can consider any proposed PSG other than those directly presented by the asylum applicant would have catastrophic effects on asylum applicants, especially *pro se* and detained *pro se* applicants, and the Third Circuit should reject it.

ARGUMENT

I. THE BIA'S NEW "EXACT DELINEATION" STANDARD UNFAIRLY PREJUDICES *PRO SE* AND DETAINED *PRO SE* ASYLUM APPLICANTS BY IMPOSING AN ADDITIONAL, UNLAWFUL BARRIER ON TOP OF ALREADY COMPLEX LEGAL STANDARDS.

The BIA's decision purporting to prevent both the IJ and the BIA from considering any PSG other than those specifically articulated by the applicant in immigration court would pose an unfair and unlawful barrier to obtaining asylum. The BIA's decision in this case was flawed in at least two fundamental ways: (1) the BIA applied its flawed holding from *W-Y-C-* that asylum applicants must provide "the exact delineation of any particular social group(s) to which [they] claim to belong" at a hearing before an IJ, 27 I. & N. Dec. at 191; and (2) the BIA further heightened that flawed holding by refusing to consider the IJ's own slight re-articulation of the applicant's PSG that relied on the same facts as those presented by the applicant. Both errors improperly restrict the ability of asylum applicants to obtain relief.

These unfair and unlawful decisions will have profound and life-altering effects on *pro se* and detained *pro se* asylum applicants with strong asylum claims.

First, the BIA's new standard is unlawful because it contravenes the typical rules governing waiver, which generally require the court to review a claim as long as parties have provided the court below with fair notice of the general argument asserted on appeal. Second, the new standard heightens an already near-insurmountable burden on *pro se* and detained *pro se* applicants to comprehend the notoriously confusing concepts used to define a "particular social group." Third, the BIA's present application of its new standard dismisses an IJ's affirmative obligation to assist *pro se* asylum applicants in developing their case. These vulnerable groups of asylum seekers should not be expected, let alone required, to effectively articulate their PSG on the first try, with no leeway for an IJ to make even slight verbiage modifications.

A. Requiring Exact Delineation of the Particular Social Group is Improper and Marks a Significant Departure from Standard Rules of Preservation and Waiver.

The high bar imposed by the BIA's new "exact delineation" standard disregards the usual rules of waiver applied by federal courts. The Supreme Court has held that any issue or argument may be considered if a party pleaded or presented a claim *embracing that issue or argument*. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* Additional waiver standards articulated by circuit

courts are consistent with the Supreme Court's rule and not nearly as strict as an "exact delineation" standard. *See e.g. TD Bank N.A. v. Hill*, 928 F.3d 259, 276 n.9 (3d Cir. 2019) (citing *Lebron* to support holding that where two arguments relate so closely, neither is waived, and considering an alternative argument where the petition, "though couched in terms of a different but closely related theory, fairly embraced it.").

This same principle should apply to asylum appeals. Indeed, the BIA has recently acknowledged that a reasonable measure of flexibility is required in applying strict rules of procedural default to complex, evolving questions of immigration law, and even the government sometimes needed the opportunity to refine its legal theories on appeal. *Matter of Ramon Jasso Arangure*, 27 I. & N. Dec. 178, 182 (B.I.A. 2017). The Seventh Circuit has similarly held that so long as the essential elements of the PSG are set forth below, inconsistencies in the precise wording used do not defeat an applicant's claim so long as the descriptions adequately "articulated the parameters of the relevant social group." *Cece v. Holder*, 733 F.3d 662, 670-71 (7th Cir. 2013).

Furthermore, courts typically recognize the difficulty *pro se* litigants face and afford them *more* leniency in the precise wording of legal issues. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (a document filed *pro se* is "to be liberally construed" and "held to 'less stringent standards than formal pleadings drafted by lawyers.'"). The

Third Circuit is particularly mindful of a court's obligation to construe *pro se* litigants' pleadings liberally, and has applied this standard to the BIA. *See Higgs v. Att'y Gen. of the U.S.*, 655 F.3d 333, 339 (3d Cir. 2011) (BIA erred by failing to afford *pro se* litigant a liberal construction of a notice of appeal). This policy "is 'driven by the understanding that '[i]mplicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training.'" *Id.* Requiring a *pro se* asylum applicant to plead her PSG with "exact delineation" runs contrary to this Court's precedent.

This Court's practice is particularly applicable in asylum cases. Notably, the I-589 form by which an applicant applies for asylum does not ask for <u>*any*</u> specific delineation of a PSG. *See* USCIS Form I-589. Instead, the viability and existence of a PSG is a question of law which the BIA reviews *de novo*. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 209-210 (B.I.A. 2014); 8 C.F.R. § 1003.1(d)(3)(ii). No new fact-finding is necessary for the BIA to determine, given the existing record, the viability of a PSG, as clarified on appeal. This makes the articulation of a PSG precisely the type of scenario in which *pro se* litigants should be afforded a liberal construction. *Cf. Higgs*, 655 F.3d at 339. Doing so would help ensure that *pro se* and detained *pro se* asylum applicants avoid "inadvertent forfeiture of important rights because of their lack of legal training." *Id.*

Accordingly, this Court should continue its practice of affording *pro se* litigants, including detained *pro se* applicants, a liberal interpretation of their PSG articulations and reject the BIA's decision and reliance on *W-Y-C-* in this case. This is of heightened importance in the asylum sphere, where failure to provide such a right could result in harm or death to the applicant seeking asylum.

B. The Requirements of a "Particular Social Group" are Nuanced and Complex.

An asylum applicant who claims eligibility for asylum based on membership in a PSG must establish that (1) the members of her group share a common immutable characteristic; (2) the group is defined with "particularity"; and (3) the group is "socially distinct within the society in question."[2] *Matter of W-G-R-*, 26 I. & N. Dec. at 208. These requirements have been the source of profound confusion since they were first announced.

Multiple circuits have expressed concern that the BIA's prior tests for determining asylum eligibility have been inconsistent and nonsensical. *See, e.g.*, *Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 603-4 (3d Cir. 2011) (rejecting the BIA's "social visibility" test as inconsistent with prior BIA decisions and posing "an unsurmountable obstacle to refugee status"); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087-88 (9th Cir. 2013) (BIA's case-by-case application of

[2] Until 2014, the BIA labelled the final requirement "social visibility." *See W-G-R-*, 26 I. & N. Dec. at 212.

its standard for evaluating PSGs is "inconsistent"); *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (new formulation requiring social visibility "makes no sense").

Both lawyers and immigration judges struggle to parse the "particularity" and "social distinction" prongs—let alone *pro se* and detained *pro se* asylum applicants. *See, e.g.*, Bernardo M. Velasco, *Who Are The Real Refugees? Labels As Evidence Of A "Particular Social Group,"* 59 AZ. L. REV. 235, 235 & 252 (2017) ("PSG doctrine is unnecessarily complicated and inconsistent . . . Perhaps courts are simply incapable of reliably making PSG determinations—at least following the current approach."). In the recent past, the Third Circuit has criticized and rejected previous standards issue by the BIA, finding even the *difference* between the "particularity" and "social distinction" elements to be unclear. *See Valdiviezo-Galdamez*, 663 F.3d at 608 (noting that "particularity" and "social visibility" "appear to be different articulations of the same concept and the government's attempt to distinguish the two oscillates between confusion and obfuscation, while at times both confusing and obfuscating"); *accord Henriquez-Rivas*, 707 F.3d at 1088, 1090-91 (noting that the BIA had "blended" the two concepts); *but see S.E.R.L v. Att'y Gen. U.S.A.*, 894 F.3d 535, 540 (3d Cir. 2018) (adopting BIA's later statement of PSG requirements in *Matter of M-E-V-G*, 26 I. & N. Dec. 227 (BIA 2014) and *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014)).

At a minimum, the definition of these complex concepts continues to evolve over time. The result is a series of confusing pronouncements that leave the concepts of particularity and social distinction far from clear and virtually incomprehensible for *pro se* asylum applicants, especially detained *pro se* asylum applicants. *Pro se* and detained *pro se* asylum applicants, most of whom are non-native English speakers, cannot be reasonably expected to fully comprehend these complexities to the extent necessary to provide an "exact delineation" of their proposed PSGs to such a level that they cannot alter a single word.

C. Immigration Judges have an Affirmative Obligation to Assist *Pro Se* Asylum Seekers in Developing Their Case.

Given the difficulty inherent in immigration proceedings and the dire consequences of failing to satisfy the relevant requirements, and consistent with the broadly applicable requirement to liberally construe *pro se* pleadings, immigration judges must provide more guidance for *pro se* respondents than for other respondents. *See, e.g.*, *Barragan-Ojeda v. Sessions*, 853 F.3d 374, 381 (7th Cir. 2017); *Dent v. Holder*, 627 F.3d 365, 373–74 (9th Cir. 2010). In a context where asylum seekers do not have a right to court-appointed counsel, this Court and others have recognized that IJs and the BIA "have certain obligations under international law to extend refuge to those who qualify for such relief." *Mulanga v. Ashcroft*, 349 F.3d 123, 134 (3d Cir. 2003) (quoting *Matter of S-M-J-*, 21 I. & N. Dec. 722 (1997) ("*S-M-J-*")). This obligation means, *inter alia*, that the BIA and IJs "all bear the

responsibility of ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim." *Id.* at 135. Thus, "[a]lthough the burden of proof in establishing a claim is on the applicant, the Service and the Immigration Judge have a role in introducing evidence into the record." *Id; see also Senathirajah v. I.N.S.*, 157 F.3d 210, 221 (3d Cir. 1998) ("Justice requires that an applicant for asylum or withholding of deportation be afforded a meaningful opportunity to establish his or her claim"). The BIA has previously directed IJs to take a "cooperative approach" in assisting asylum applicants to develop the record and legal theories. *S-M-J-*. at 723-24. Accordingly, IJs hitherto followed a practice of assisting *pro se* applicants to clarify their proposed PSGs. *See, e.g.*, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 15-16 (2011) ("It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared . . .").

In *amici*'s experience, despite IJs' obligation to assist *pro se* applicants in developing their cases, they virtually *never* explain the PSG standards before an applicant's merits hearing. The lack of assistance provided by IJs to *pro se* asylum applicants, especially detained *pro se* applicants, *before* their merits hearings makes more critical the assistance both IJs and the BIA should provide at the time of the merits hearing and appeal.

Although the applicant in the present case is represented, adopting *W-Y-C-* and the BIA's broad holding in this case that neither the IJ nor the applicant can redefine the originally described PSG would disregard the judicial obligations due to all asylum applicants, including *pro se* and detained *pro se* applicants. Under this rule, a *pro se* asylum applicant would be denied relief if she is unable to plead her PSG with "exact delineation" at the merits hearing without the assistance of a lawyer or an immigration judge—a standard which would pose an insurmountable barrier to most unrepresented applicants and thus deny relief to many who would otherwise have been eligible for asylum.

II. *PRO SE* ASYLUM APPLICANTS, WHO COMPRISE A LARGE AND GROWING POPULATION OF THE IMMIGRANT COMMUNITY SEEKING RELIEF FROM REMOVAL, FACE ADDITIONAL CHALLENGES TO APPLYING FOR ASYLUM THAT MAKE AN "EXACT DELINEATION" STANDARD A VIRTUALLY INSURMOUNTABLE OBSTACLE.

Upholding the BIA's new "exact delineation" standard in *W-Y-C-* and its application in this case would have concrete, negative implications for *pro se* asylum applicants. Applying for asylum is already sufficiently complex to render the process "impenetrable" for unrepresented applicants, many of whom speak little English and have no legal experience. Chicago Appleseed Fund for Justice, *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts*, at 29 (2009). Unrepresented applicants "often enter the system without any understanding of the process before them, much less of the grounds for relief that may be available

to them." *Id.* Requiring "exact delineation" without the possibility of later refinement, even by the IJ, would only exacerbate the problem. Under the BIA's new standard in *W-Y-C-* and expanded application in the present case, even *pro se* asylum applicants with strong claims would be increasingly likely to be removed from the United States and returned to a country where they will be persecuted or even killed. The consequences are profound: the number of *pro se* and detained *pro se* asylum applicants is increasing significantly due to law and policy changes.

A. The Number of *Pro Se* and Detained *Pro Se* Asylum Applicants who Would be Prejudiced by the BIA's New Standard has Risen Drastically in Recent Years.

Because the number of *pro se* and detained *pro se* asylum applicants has continued to rise in recent years, the standards governing asylum eligibility have the potential to affect the thousands of individuals seeking asylum and their ability to obtain relief. If this Court upholds the BIA's new "exact delineation" standard and its application in the present case, it will set up many *pro se* applicants for failure. In practice, such a decision would foreclose most from obtaining asylum by requiring that they describe with exact delineation their PSG, without the assistance of counsel or the IJ, or any chance for the IJ to refine the PSG's contours.

The number of asylum applications have increased drastically in recent years. In 2014, there were 30,886 defensive asylum cases filed in immigration court; in 2018, there were 110,469. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T

OF JUSTICE, FY 2018 Statistics Yearbook, https://www.justice.gov/eoir/file/1198896/download (2018). In total, there were just under 1,000,000 cases pending in immigration court as of November 2019. *Immigration Court Backlog Tool*, TRAC Immigration, https://trac.syr.edu/phptools/immigration/court_backlog (Nov. 2019).

The number of detained asylum applicants in particular has increased markedly since the mid-1990s. These increases are primarily attributable to policy changes in immigration law in 1996 and 2007 requiring increased detention of immigrants. Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATLANTIC Q. 621, 622 (2014) ("Chacón"). By 2016, the United States detained an average of 28,000 immigrants daily. U.S. Gov't Accountability Office (GAO), GAO-16-231, *Report to the Ranking Member, Immigration Detention, Additional Actions Needed to Strengthen Management and Oversight of Detainee Medical Care* (Feb. 2016).

Additional policy changes implemented in 2017 further increased detention rates. Detention facilities increased capacity to 45,700 detainee beds by the end of the fiscal year. GOV'T ACCOUNTABILITY OFFICE, GOA-18-343, REPORT TO CONGRESSIONAL COMMITTEES, IMMIGRATION DETENTION, OPPORTUNITIES EXIST TO IMPROVE COST ESTIMATES, at 2 n.5 (Apr. 2018); Julie Hirschfeld Davis and Ron Nixon, *Trump Budget Takes Broad Aim at Undocumented Immigrants*, THE NEW

YORK TIMES, https://www.nytimes.com/2017/05/25/us/politics/undocumented-immigrants-trump-budget-wall.html (May 25, 2017). These expanded facilities were required to accommodate the rising levels of detainees; by the end of 2017, ICE reported 143,470 total administrative arrests, an overall 30% increase from the previous year. *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://perma.cc/278N-3HV4 (2017). At the same time, Immigration and Customs Enforcement ("ICE") arrested more than 41,000 individuals, an increase of 37.6% over the same period in 2016. *ICE ERO Immigration Arrests Climb Nearly 40%,* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/features/100-days (Nov. 2, 2017). In 2018, the government detained approximately 42,000 immigrants per day and approximately 50,000 per day in 2019. Geneva Sands, *This year saw the most people in immigration detention since 2001*, CNN POLITICS, https://www.cnn.com/2018/11/12/politics/ice-detention/index.html (Nov. 12, 2018); Katie Sullivan, Jeff Mason, *Immigration Detention in the United States: A Primer*, BIPARTISAN POLICY CENTER, https://bipartisanpolicy.org/blog/immigration-detention-in-the-united-states-a-primer/ (Apr. 24, 2019).

The recent increases in asylum cases and detention inevitably lead to—and *amici* have witnessed—a correlating influx in both *pro se* and detained *pro se* asylum applicants. Despite the rising numbers of detainees and pending cases in the

immigration courts, asylum applicants remain plagued by a lack of legal counsel, without which it is nearly impossible for them to describe with exact delineation their PSG as the BIA required in this case. In 2016, nearly 40% of initial case completions at immigration court were for *pro se* applicants. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2016 Statistics Yearbook, http://perma.cc/EKH7-LJH7 (2016).

For asylum applicants in detention, the situation is even more dire. A national study analyzing more than 1.2 million removal cases from 2006-2012 revealed that only 14% of detained individuals were represented. Ingrid V. Eagly and Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015) ("Eagly"). Even when detainees receive the requisite time to find counsel, most are unable to do so. Eagly at 33-34. The remote location of many detention facilities makes finding counsel difficult, and detainees typically have few or no resources with which to retain counsel even if they can find an attorney. *Id.* at 34-35. Moreover, there are structural impediments that deter attorneys from taking cases for detained immigrants. Attorneys face long wait times in visiting with clients, limited use of electronics, limited access to experts and evidence, and pressure by courts to complete detained cases quickly—all of which contribute to detained applicants' difficulty finding representation. *Id*. at 35; *see also* Complaint, *Dilley Pro Bono Project et al. v. Immigration and Customs Enforcement et al.*, No.

1:17-cv-01055 (June 1, 2017) ECF No. 1;[3] Complaint, *Southern Poverty Law Center v. U.S. Dep't of Homeland Security et al*., No. 1:18-cv-00760 (Apr. 4, 2018) ECF No. 1. These constraints, among others, present significant challenges for detainees trying to engage counsel, and as the population of detained asylum applicants grows, so too will the population of detained *pro se* applicants.

As a result of the increasing numbers of *pro se* and detained *pro se* asylum applicants, the Court's decision in this case will have far-reaching implications for these vulnerable populations who will be unduly prejudiced should this Court adopt the BIA's new standard.

B. *Pro Se* Applicants, Especially Those in Detention, Already Struggle to Present Successful Asylum Claims and Will Be Further Prejudiced By the BIA's New Standard.

Pro se and detained *pro se* asylum applicants are already unlikely to succeed in claiming asylum, and will face even worse odds should this Court adopt the BIA's new standard as set forth in *W-Y-C-* and uphold the BIA's expanded application of that standard in the present case. Only 5% of cases for which asylum was granted between 2007-2012 were for applicants without counsel. Eagly at 15. Respondents with counsel were "ten-and-a-half times more likely to prevail in their case when

[3] This action was voluntarily dismissed as the result of a settlement. Stipulation and Order Dismissing Case with Prejudice and Retaining Jurisdiction for the Purpose of Enforcing Settlement, *Dilley Pro Bono Project et al*., No. 1:17-cv-01055 (Aug. 16, 2017) ECF No. 27.

compared to *pro se* litigants." Eagly at 49. Only 3.7% of unrepresented immigrants filed applications for asylum, and only 3% of unrepresented detained respondents sought any form of relief at all. Eagly at 29, Tbl. 1 and 53, Tbl. 3. In contrast, represented immigrants applied for asylum between 28% and 61% of the time, depending on the type of representation. *Id*. at 29, Tbl. 1. In fact, "whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case." Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

Even immigrants clearly eligible for relief will not obtain relief if they cannot navigate the application process—and the data shows that *pro se* asylum applicants already cannot navigate the byzantine asylum applicant process. Under the existing standards and practices of IJs and the BIA pre-*W-Y-C-*, *pro se* asylum applicants were unable to navigate the application paperwork and hearings while marshalling sufficient evidence and arguments to establish their membership in a PSG. Even when afforded a liberal pleading standard, assistance from the IJ in formulating or re-formulating their PSG, and the ability to refine that PSG on appeal is essential. In light of the already steep odds *pro se* asylum applicants face, piling on the additional hurdle of describing their PSG with exact delineation, on the first try, in order to receive a positive outcome would make successfully obtaining asylum all but impossible.

III. THE IMPACT OF ADOPTING THE BIA'S STANDARD IN *W-Y-C-* AND UPHOLDING THE BIA'S DECISION IN THIS CASE ON DETAINED *PRO SE* AYLUM APPLICANTS WOULD BE PARTICULARLY UNCONSCIONABLE BECAUSE THEY HAVE LIMITED ACCESS TO BASIC LEGAL MATERIALS AND EVIDENCE.

The prejudicial effect that the BIA's opinion would have on the growing numbers of detained *pro se* asylum applicants is compounded by the additional limitations on detainees' ability to access basic legal materials and sources of evidence to support their claims for relief. These constraints pose significant barriers to adequate self-representation, and make it crucial that legal and evidentiary standards are as understandable as possible. The BIA's new standard in *W-Y-C-* and its application in this case fail to take any of these constraints into account; adopting *W-C-Y-* and the BIA's decision in this case would therefore exacerbate the challenges faced by detained *pro se* asylum seekers to a significant degree.

A. There is No Uniform Set of Standards Governing Detainee Access to Legal Materials.

There are no legally binding, uniform standards governing immigration detainees' access to outside communication and law libraries. ICE has promulgated standards that purport to provide uniform policies for detainee care and access at facilities operated by ICE, private prison company contractors, and state and local county jails that house immigration detainees. U.S. Immigration and Customs Enf't, 2011 Operations Manual ICE Performance-Based National Detention Standards,

https://www.ice.gov/detention-standards/2011 (as modified Dec. 2016) ("PBNDS 2011" or the "2011 Standards"), 5.6 at 359; PBNDS 2011, 6.1 at 388; *see also* U.S. Comm'n on Civil Rights (USCCR), With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities 25, http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf (2015) ("USCCR Report").

However, the 2011 Standards "are internal ICE policies, drafted without the opportunity for public comment, and as such are not legally binding on the agency." American Civil Liberties Union (ACLU), Holiday on ICE: The U.S. Department of Homeland Security's New Immigration Detention Standards 14, https://www.aclu.org/other/aclu-statement-hearing-titled-holiday-ice-us-department-homeland-securitys-new-immigration (2012). ICE takes few, if any, affirmative steps to ensure that these standards are enforced uniformly to all detainees in its custody. *Id.* at 6; *see also* Tara Tidwell Cullen, *Ice Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming,* NATIONAL IMMIGRANT JUSTICE CENTER, https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet (March 13, 2018) ("Cullen"). Instead, in practice, ICE uses three different sets of detention standards, promulgated in 2000, 2008, and 2011. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-153, REPORT TO CONGRESSIONAL REQUESTERS, IMMIGRATION DETENTION, ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND

STANDARDS at 28, https://www.gao.gov/assets/670/666467.pdf (October 2014) ("GAO Report"). The most recent estimate, provided by ICE in the Fiscal Year 2016 Report to Congress, reported that only 28 of at least 222 facilities had adopted the 2011 standards. FISCAL YEAR 2016 REPORT TO CONGRESS, *Progress in Implementing 2011 PBNDS Standards and DHS PREA Requirements at Detention Facilities* at 15, https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBNDS%20Standards.pdf (January 17, 2017); GAO Report at 22.

Regardless of which standards apply and how much access is required, information regarding detainee access to communication and legal materials is not communicated effectively to detained asylum seekers. The 2011 Standards require that each detainee receive a handbook that describes the facility's rules and policies, including procedures for mail, telephone, and law library access. PBNDS 2011, 6.1 at 388. However, many detainees claim that some privately-owned detention facilities do not notify them that the detention facilities in which they are housed have a law library. USCCR REPORT, *supra*, at 42.

Further, the 2011 Standards require facilities to communicate the standards to detainees in a language or manner that detained asylum seekers can understand. PBNDS 2011, 5.1 at 328; 5.6 at 360; 6.3 at 402. This standard is not applied with any consistency. A study in Washington State found that complete detainee

handbooks were not available in Spanish, let alone in less common languages. SEATTLE UNIV. SCH. OF LAW INT'L HUMAN RIGHTS CLINIC, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington* at 14–15, http://www.law.seattleu.edu/documents/news/archive/2008/DRFinal.pdf (2008) ("VOICES FROM DETENTION").

In this environment, expecting detained *pro se* asylum seekers to obtain even a rudimentary understanding of the legal standards, let alone a sophisticated enough understanding to develop a permanent PSG that neither they nor the IJ can later refine, is unreasonable.

Amendments to the 2011 Standards in 2016 included an expansion of the "Communication Assistance" requirements. ICE 2011 OPERATIONS MANUAL ICE-PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, *Summary of Revisions to the ICE Performance-Based National Detention Standards, December 2016*, ICE, https://www.ice.gov/detention-standards/2011 (Updated Jan. 2, 2018). This section was updated to "describe more precisely" the federal requirements to provide communication assistance to detainees with disabilities and detainees who have limited English proficiency. *Id.* It is currently unclear whether any of these amendments have been carried out in any detention facilities.

B. Detained Asylum Applicants' Access to Law Libraries and Legal Information is Very Limited.

Further, detained asylum applicants lack consistent access to law libraries and legal information. For the 86% of detainees who are unrepresented, such access is vital to learning about and fully understanding their eligibility for asylum, including how to argue that they belong to a PSG.

Even facilities that follow the 2011 Standards need only provide very limited legal materials, and access to those materials is not uniformly provided. Moreover, under the 2011 Standards, facilities are required to allow only five hours of access to the law library weekly. PBNDS 2011, 6.3 at 401. According to the 2011 Standards, the only reports on the list of required materials to be provided to detainees include the "Country Reports on Human Rights Practices" written by the U.S. Senate Department and the "World Report" authored by Human Rights Watch. PBNDS 2011, 6.3 at App. 6.3.A: List of Legal Reference Materials for Detention Facilities; *see also generally* HUMAN RIGHTS WATCH, WORLD REPORT, https://www.hrw.org/world-report/2016 (2017). These sources do not provide any guidance on how to apply for asylum, let alone how to plead a PSG.

The gap between the information available to detained applicants and the legal requirements they must plead has only become wider in the past several years. In 2018 and 2019, the attorney general significantly increased the burden on applicants to prove each element of their PSG and purported to narrow the types of PSGs that

can be deemed viable. *See Matter of A-B-* 27 I. & N. Dec. 316 (A.G. 2018) and *Matter of L-E-A-* 27 I. & N. Dec. 581 (A.G. 2019) (both overruling precedential BIA decisions on established PSGs and requiring every asylum applicant to prove the viability of the proposed PSG in every case).

Lack of access to translation and interpretation can also hinder unrepresented detainees' ability to identify and effectively use resources. The 2011 Standards require that translation and interpretation services be provided as needed, but do not indicate when those services are considered necessary. PBNDS 2011, 5.6 at 362. Detainees have reported no or limited access to legal materials in languages they understand, resulting in reliance on other detainees and guards for translation. AMNESTY INT'L, *Jailed Without Justice, Immigration Detention in the USA* at 36, https://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (2009).

The United States government itself has deemed detainees' access to law libraries and information about legal services inadequate. A 2015 report by the United States Commission on Civil Rights (the "Commission") revealed that:

> CDFs [(Contract Detention Facilities)][4] may not be providing detainees with access to legal services in general. . . . Detainees at Stewart and NGDC complained that DHS failed to inform them about pro bono services, and many detainees complained about delays in gaining access to the legal library.

[4] Contract Detention Facilities are owned and operated by private prison corporations that contract with ICE. PBNDS 2011, 7.5.

USCCR Report, *supra*, at 43. Based on the evidence the Commission collected, the Commission found that certain ICE-owned detention facilities also do not provide adequate legal information and information about detainee rights. *Id*. at 44.

The limited resources to which *pro se* detained asylum applicants *do* have access do not alleviate the difficulty. Certain *amici* operate "legal orientation programs" ("LOPs") in some (but not nearly all) detention facilities. The programs are designed to assist detained *pro se* asylum applicants. Through the LOPs, *amici* regularly encounter applicants who are unable to comprehend the legal requirements for articulating a PSG. But the LOPs typically include only one-hour group orientations, short individual orientations, and occasionally, short group workshop sessions. They are not intended to include full-scope representation, nor to teach the intricacies of asylum law and PSG jurisprudence. *Amici* almost never have the opportunity to fully explain how to articulate a satisfactory PSG that meets the complex legal standards. Instead, they use their limited time to explain the types of *facts* that applicants should consider presenting to the IJ. If the IJ is barred from considering how those facts might meet the PSG definition, as the BIA suggests in the instant case, such *pro se* applicants would have virtually no chance of success to obtain safety in the United States.

C. Detained Asylum Applicants Have Limited Access to Communication with the Outside World.

Even in those facilities that purport to follow the 2011 Standards, detained asylum applicants have extremely limited access to outside communication. This inhibits their ability to consult with anyone to better understand asylum eligibility standards, and to obtain evidence to support their claims. Detainees are allowed only limited communication by mail or telephone and do not have access to fax, email, or the internet. *See generally* PBNDS 2011, 5.6. These restrictions make the proper pleading of a complicated asylum standard, like establishing a particular PSG, almost impossible to achieve.

Under the 2011 Standards, detainees may correspond by mail at their own expense. PBNDS 2011, 5.1 at 327, 333. The 2011 Standards call for a postage allowance for indigent detainees, but it is up to the facility administrator to determine whether mail, even law-related mail, qualifies for the postage allowance. *Id*. at 328, 333. When a detainee is transferred, the 2011 Standards do not require mail forwarding. HUMAN RIGHTS WATCH, A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES at 17, http://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf (2011) (hereinafter "A COSTLY MOVE"); *see generally* PBNDS 2011, 5.1; PBNDS 2011, 7.4. As a result, detained asylum seekers' mail is often lost when they are transferred. Phone access for detained asylum seekers is also exceedingly limited.

The 2011 Standards require only one working telephone for every 25 detainees, and facilities may limit telephone access hours. PBNDS 2011, 5.6 at 360, 362. These barriers severely restrict the ability of detained asylum seekers to gather additional evidence in support of their asylum applications.

Lack of access to external communication, the internet, and legal resources create significant barriers for unrepresented detained asylum seekers to obtain even basic information about the asylum process and requirements they must satisfy. These limitations hamper detained asylum seekers' ability to understand even simple legal standards, much less the complex and nuanced legal standards that apply to the definition of a PSG. As a result, the vast majority of detained *pro se* applicants fail even to file their asylum applications, let alone successfully present their case and obtain relief. *See supra*.

The BIA's "exact delineation" standard in *W-Y-C-* preventing applicants from refining their proposed PSGs on appeal, and its expanded application in this case to prevent even the IJ from refining the PSG, will only make this worse. *Pro se* and detained *pro se* asylum applicants who already struggle to navigate immigration court proceedings cannot be expected to understand asylum law sufficiently to perfectly articulate a viable PSG on their first try and without assistance. Adopting this standard would effectively foreclose *pro se* asylum applicants from obtaining

relief. *Amici* therefore respectfully request that this Court decline to adopt the BIA's holdings in either *W-Y-C-* or *A-C-T-*.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reject the BIA's new "exact delineation" standard as articulated in *W-Y-C* and overrule the BIA's expanded application of *W-Y-C-* in the present case.

Dated November 22, 2019

ALEXANDRA LEEPER
COOLEY LLP
3175 Hanover Street
Palo Alto, California 94304
(650) 843-5000
aleeper@cooley.com

/s/ Marc Suskin
MARC SUSKIN
COOLEY LLP
55 Hudson Yards
New York, New York 10001
(212) 479-6000
msuskin@cooley.com

KRISTIN BEALE
COOLEY LLP
500 Boylston Street
Boston, Massachusetts 02116
(617) 937-2300
kbeale@cooley.com

Attorneys for Amici Curiae
American Gateways, Capital Area Immigrants' Rights Coalition, Catholic Legal Immigration Network, Inc., Florence Immigrant and Refugee Rights Project, Heartland Alliance's National Immigrant Justice Center, Northwest Immigrant Rights Project and Pennsylvania Immigration Resource Center

CERTIFICATIONS

I hereby certify the following:

1. I am a member of good standing of the Bar of the United States Court of Appeals for the Third Circuit.
2. This brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) and 32(b)(5). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman and contains 6,497 words in compliance with the 6,500-word limit on briefs of *amicus curiae* set forth in Fed. R. App. P. 29(a)(5) and Third Circuit Local Appellate Rule 29.1(b).
3. The text of the electronic brief filed by ECF and the text of the hard copies to be filed with the Court are identical.
4. The electronic copy of the brief has been scanned for viruses using Webroot SecureAnywhere Endpoint Protection v9.0.24.49.

/s/ Marc Suskin
Marc Suskin

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Brief of Nonprofit Immigration Legal Services Provides as *Amici Curiae* in Support of Petitioner to be served on all counsel via the Notice of Docket Activity generated by the Court's electronic filing system (i.e., CM/ECF) and via electronic mail pursuant to Local Appellate Rules 31.1(d) and 113.4(a):

Sabrineh Ardalan
Harvard Law School
6 Everett Street, Suite 3106
Cambridge, MA 02138
(617) 384-7504

Anjum Gupta
Rutgers University School of Law
123 Washington Street
Newark, NJ 07102
(973) 353-2518

Attorneys for Petitioner

William P. Barr
Jane T. Schaffner
United States Department of Justice
Office of Immigration Litigation
P.O. Box 878
Ben Franklin Station
Washington, DC 20044
(202) 616-4971

Attorneys for Respondent

I certify that an electronic copy was uploaded to the Court's electronic filing system on November 22, 2019.

Seven hard copies of the foregoing Brief of Nonprofit Immigration Legal Services Provides as *Amici Curiae* in Support of Petitioner were sent to the Clerk's Office via Federal Express Next Business Day Delivery to:

Clerk of Court
United States Court of Appeals, Third Circuit
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106
(215) 597-2995

on the 25th day of November 2019.

/s/ Samantha Collins
Samantha Collins