No. 18-9500

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADAMA HEUREUX MATUMONA,
*Petitioner,*

v.

JEFFERSON B. SESSIONS, III,
UNITED STATES ATTORNEY GENERAL,
*Respondent.*

On Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A209 862 986

# *AMICI CURIAE* BRIEF OF RETIRED IMMIGRATION JUDGES AND FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS IN SUPPORT OF PETITIONER'S BRIEF

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## Identity and Interest of *Amici Curiae*[1]

*Amici curiae* are retired Immigration Judges and former members of the Board of Immigration Appeals.[2] Based on their substantial combined years of service, *amici* have intimate knowledge of the operation of immigration courts, as well as a deep appreciation for the value that legal representation has on an immigrant's ability to successfully navigate the many complexities of removal proceedings.

*Amici* seek to illuminate for this Court the major access-to-justice barriers that detained immigrants must navigate during their removal proceedings. In *amici*'s experience, the combination of remote detention and lack of access to counsel effectively undercuts an immigrant's ability to meaningfully investigate and develop her case to a degree that is consistent with the requirements of due process. This not only impedes immigrants' access to justice, but also overburdens the operation of the immigration system as a whole.

*Amici* are invested in the resolution of this case because they have dedicated their careers to improving the fairness and efficiency of the U.S. immigration

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[1] No party's counsel authored this brief in whole or in part. No party, or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made such a monetary contribution. All parties have consented to the filing of this brief pursuant to Circuit Rule 29-2(a).

[2] *See* Appendix for a*mici*'s biographies.

system. Given *amici*'s familiarity with both the procedures of immigration court and the access-to-justice barriers that immigrants must circumvent in their removal proceedings, *amici* respectfully submit that this Court should grant petitioner Adama Heureux Matumona's Petition for Review, vacate the Board of Immigration Appeals' decision, and remand his case. In addition, this Court should encourage Immigration Judges to adopt certain best practices, described below in Part III, to ensure that a detailed record is developed in cases with *pro se* immigrants so that they receive meaningful review of their claims for relief.

## ARGUMENT

Thousands of immigrants are currently detained in detention facilities that are located hours away from the nearest urban areas. *See* Kyle Kim, *Immigrants held in remote ICE facilities struggle to find legal aid before they're deported*, L.A. Times (Sept. 28, 2017), http://www.latimes.com/projects/la-na-access-to-counsel-deportation/ ("About 30% of detained immigrants are held in facilities more than 100 miles from the nearest government-listed legal aid resource."); Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two Year Review* 44 (2011), https://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf ("40 percent of all ICE bed space is currently more than 60 miles from an urban center."). These immigrants will struggle, and often fail, to

retain an attorney who has the time, resources, and relevant expertise to represent them through complex removal proceedings. Even when detained immigrants do secure legal representation, this relationship may be jeopardized by a variety of remote detention conditions: lack of adequate access to telephones in detention facilities; the possibility of being transferred from one detention facility to another; and the difficulty for attorneys to regularly visit remote detention facilities.

For those immigrants that must journey through the labyrinth of immigration court proceedings alone, countless obstacles abound. *See Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004) ("[T]he immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth."); *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) ("This case vividly illustrates the labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."); *Lok v. Immigration & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1997) (noting that the Immigration and Nationality Act bears a "striking resemblance . . . [to] King Minos's labyrinth in ancient Crete"). Language barriers will often undermine an immigrant's ability to effectively represent herself. Although *pro se* immigrants will receive interpreters during their court hearings, they are still required to complete asylum applications and other court filings in English. In addition, the

law libraries at remote detention facilities often have inadequate legal resources that are not up-to-date and/or have not been translated into the immigrant's native language. These obstacles make it extremely difficult for *pro se* immigrants to learn about possible claims for relief and determine whether they are even eligible to make such claims. *See* Chicago Appleseed Fund for Justice, *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts* 29 (2009), http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf ("Those immigrants appearing without a lawyer, or 'pro se,' 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.").

Petitioner Adama Heureux Matumona of the Democratic Republic of Congo faced many of these access-to-justice obstacles because he was detained at the Cibola County Detention Center, which is located approximately 300 miles away from some of the nearest pro bono legal services providers and 500 miles away from his immigration court hearings. (AR 20, 432) Mr. Matumona was unable to secure legal representation because he did not have the financial means to pay for a private attorney. (AR 10, 16, 277) Of the three pro bono legal services providers that the Immigration Judge recommended, two did not represent immigrants in Cibola and the third did not have adequate interpretation services to communicate

with Mr. Matumona, who is a native Lingala speaker. (AR 250, 252, 432) In addition, Mr. Matumona could not find pro bono counsel on his own because he did not have enough money to pay for the telephone service at Cibola and was not granted free access to telephones at Cibola. (AR 10, 20)

As a *pro se* litigant, Mr. Matumona's likelihood of securing relief in his removal proceedings was significantly limited. Despite the fact that Mr. Matumona does not speak English, the Immigration Judge expected him to complete his asylum application and other court filings in English. (AR 303) All the while, Mr. Matumona has endured residual trauma from fleeing his home country out of fear that his community organizing activities would lead to his imprisonment, disappearance, or death by the ruling regime. (AR 339-42) This trauma was further exacerbated by the many months Mr. Matumona has spent in detention, separated from his wife, eight children, and other family members. (AR 324) All of these factors made it more burdensome for Mr. Matumona to build and present his case than if he had been represented by counsel from the beginning.

In *amici*'s decades of experience, immigrants like Mr. Matumona who lack access to counsel and are held in remote detention facilities will be deprived of a meaningful opportunity to investigate and develop their cases to a degree that is consistent with the requirements of due process. Immigration Judges are limited in their ability to fill this justice gap due to time constraints caused by backlogged

dockets and pressure to avoid coaching *pro se* immigrants because it contravenes their mandate of impartial arbiter. While Immigration Judges can grant continuances to give *pro se* immigrants additional time to find counsel or collect evidence, this action also has the negative consequences of increasing docket backlog and prolonging an immigrant's time in detention. In addition, the Executive Office for Immigration Review has cautioned that "an Immigration Judge must carefully consider not just the number of continuances granted, but also the length of such continuances" and "should not routinely or automatically grant continuances absent a showing of good cause or a clear case law basis." Exec. Office for Immigration Review, *Operating Policies and Procedures Memorandum 17-01: Continuances* 3 (July 31, 2017), https://www.justice.gov/eoir/file/oppm17-01/download ("OPPM 17-01: Continuances"). This kind of directive has a chilling effect on Immigration Judges who may be inclined to grant continuances in cases where they believe it is necessary to protect due process. Moreover, there is no guarantee that a continuance will enable a *pro se* immigrant to secure counsel or obtain needed evidence—especially in light of the other obstacles that detained immigrants face in remote detention facilities. Thus, the combination of remote detention and lack of legal representation not only impedes immigrants' access to justice, but also overburdens the operation of the immigration system as a whole.

*Amici* respectfully submit that the Board of Immigration Appeals did not recognize the various access-to-justice barriers that Mr. Matumona faced in presenting his case to the Immigration Judge. Therefore, this Court should grant Mr. Matumona's Petition for Review, vacate the Board of Immigration Appeals' decision, and remand his case. In addition, *amici* request that this Court encourage Immigration Judges to adopt certain best practices, described below in Part III, that will ensure a detailed record is developed in cases with *pro se* immigrants so that they receive meaningful review of their claims for relief.

## I. Immigrants face significant obstacles to accessing justice when they are held in remote detention facilities

Immigrants held in detention facilities are significantly less likely to secure legal representation than their nondetained counterparts. One study of immigration cases from 2007 to 2012 found that "nondetained respondents were almost five times more likely to obtain counsel than detained respondents." Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 32 (2015); *see also* Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings: New York Immigrant Representation Study Report: Part 1*, 33 Cardozo L. Rev. 357, 367-68 (2011) (finding that "detained individuals with cases adjudicated in New York Immigration Courts were unrepresented 67% of the time, while nondetained individuals in the same courts were unrepresented only 21% of the time"). This

disparity in legal representation exists because detained immigrants will struggle to secure counsel due to obstacles such as "[being detained in] remote facilities, short visiting hours, restrictive telephone policies, and the practice of transferring detainees from one facility to another — often more remote — location without notice . . . ." Am. Bar Ass'n Comm'n on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-9 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf.

Detention is an even greater bar to securing counsel when an immigrant is held in a remote detention facility. In the present case, Mr. Matumona was detained at the Cibola detention facility, which is a 90-minute drive from the nearest largest city (Albuquerque, New Mexico) and 500 miles away from the immigration court where his hearings were held in Denver, Colorado. *See* Nat'l Immigrant Justice Ctr., *Report: "What Kind of Miracle . . ." - The Systematic Violation of Immigrants' Right to Counsel at the Cibola County Correctional Center* (Nov. 29, 2017), https://www.immigrantjustice.org/research-items/report-what-kind-miracle-systematic-violation-immigrants-right-counsel-cibola-county. Because the Cibola facility is far removed from the nearest urban areas, "only 21 attorneys – including free and low-cost legal service providers as well as members

of the private bar – [are] willing to take removal defense cases" from that facility. *Id.* If each of these attorneys provided counsel to 42 individuals (a full caseload for them), it would only cover about six percent of Cibola's detention population. *Id.* Thus, the vast majority of Cibola immigrant detainees are forced to navigate their complex removal proceedings on their own.

An immigration judge can provide a recommended list of pro bono legal services providers to help immigrants retain counsel, but this is not a guaranteed solution. Mr. Matumona's Immigration Judge recommended three pro bono legal services providers, all of which were located approximately 300 miles away from Cibola. (AR 432) Two providers did not represent any immigrants at Cibola, and the third did not have adequate interpretation services to communicate with Mr. Matumona, who is a native Lingala speaker. (AR 250, 252, 432)

The few immigrant detainees who do secure counsel may have this relationship jeopardized by other access-to-justice barriers that exist in remote detention. Attorney-client communication may be disrupted or limited in a number of different ways. First, it can be extremely difficult for attorneys to make regular journeys to meet their clients at remote detention facilities. Nat'l Immigrant Justice Ctr., *supra* (quoting an immigration attorney who stated that "it was infeasible to regularly travel five hours to the Cibola prison from the organization's office in Las Cruces"); *Hamama v. Adducci*, 261 F. Supp. 3d 820, 827-28 (E.D.

Mich. 2017) (noting that it was "nearly impossible" and "impractical" for attorneys to visit clients because they were detained in detention facilities approximately four hours away).

Second, ICE officials may bar attorneys from seeing clients when they arrive at the detention facility. *Hamama*, 261 F. Supp. 3d at 837 (recounting one attorney's experience of "making the four-hour drive from Detroit to the Youngstown, Ohio facility, [and being] twice denied an opportunity to meet with her clients"); *Nak Kim Chhoeun v. Marin*, No. SACV 17-01898-CJC(GJSx), 2018 U.S. Dist. LEXIS 13539 at *20 (C.D. Cal. Jan. 25, 2018) (noting that "ICE officials initially denied attorneys access to visit Petitioners who had been detained" and that "[w]hen attorneys have ultimately been able to meet with detained individuals, the attorneys were made to wait two to three hours before doing so"); *Nunez v. Boldin*, 537 F. Supp. 578, 582 (S.D. Tex. 1982) ("Considering the remoteness of the Los Fresnos detention facility, prohibiting attorneys from visiting with their clients after 3:30 p.m. is unduly restrictive.").

Third, ICE officials may transfer detainees from urban detention facilities to facilities in "'far-flung' locations with surplus beds—often in 'rural, geographically isolated' areas." *See Developments in the Law: Immigration Rights and Immigration Enforcement, Representation in Removal Proceedings,* 126 Harv. L. Rev. 1658, 1661-62 (2013). This undermines an attorney's ability to

consistently communicate with their client as they build a case for relief. *See Hamama*, 261 F. Supp. 3d at 827 ("Relocation of Petitioners impedes retaining and communicating with counsel . . . And it impedes local community efforts to find and maintain counsel for Petitioners when they are shuttled around the country."); *Nak Kim Chhoeun*, 2018 U.S. Dist. LEXIS at *20-21 (noting that "[a]ttorneys' attempts to maintain communication with their clients have been further frustrated by the constant relocation of Petitioners to different detention centers . . . These transfers have made it difficult for attorneys to contact, or even locate, their clients"); *Louis v. Meissner*, 530 F. Supp. 924, 926 (S.D. Fla. 1981) ("Having made a long and perilous journey on the seas to Southern Florida, these refugees, seeking the promised land, have instead been subjected to a human shell game in which the arbitrary Immigration and Naturalization Service has sought to scatter them to locations that, with the exception of Brooklyn are all in desolate, remote, hostile, culturally diverse areas, containing a paucity of available legal support and few, if any, Creole interpreters. In this regard, INS officials have acted as haphazard as the rolling seas that brought these boat people to this great country's shores.").

Fourth, remote detention facilities often lack Internet access and up-to-date law library resources that are available in an immigrant's native language. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1073 (9th Cir. 2015) ("[T]he resources in

detention facility law libraries are minimal at best."), *reversed and remanded on other grounds sub nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)); Penn State Law Ctr. for Immigrants' Rights Clinic, *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers* 25 (2017), http://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf ("At Stewart [Detention Center], many of the detained immigrants expressed that the law library was not useful because all of the materials were in English and they cannot read English. At Irwin [County Detention Center] and Stewart, detained immigrants reported that they do not have access to the internet.").

Finally, detained immigrants may be deprived of adequate access to telephones in their detention facilities. *See* U.S. Government Accountability Office, *Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities* 10 (2007), http://www.gao.gov/assets/270/263327.pdf. Detained immigrants are deprived of adequate phone access in the following ways:

- Detention facilities may have a limited number of functioning telephones available for use;[3]

[3] *See* Dep't of Homeland Security Office of Inspector General, Management Alert on Issues Requiring Immediate Action at the Theo Lacy Facility in Orange, California 7 (2017) (identifying "telephone problems [at one detention facility that included] low volume and inoperable phones"); *Louis*, 530 F. Supp. at 927 ("In some locations . . . there were no available telephones in the detention facility.").

- Detention facilities charge per-minute fees or require detainees to purchase pre-paid phone cards—both of which are "prohibitively expensive" for many detainees like Mr. Matumona, or may require detainees to make collect calls—which the recipient may not accept;[4]
- Detention facilities limit the length of phone calls;[5]
- Detention facilities may require "positive acceptance" from the call recipient, which undermines immigrants' ability to leave messages and/or communicate with attorneys who have automated phone systems;[6] and

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[4] Nat'l Immigrant Justice Ctr., *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court* 8 (2010), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-04/Isolated-in-Detention-Report-FINAL_September2010.pdf; *see also Hamama*, 261 F. Supp. 3d at 827-28 (noting that an Arizona detention facility charges twenty-five cents per minute and that some petitioners are not permitted to call out-of-state legal services providers for free); *Louis*, 530 F. Supp. at 927 (noting "the obvious problems engendered by providing telephone numbers of attorneys in cities requiring long distance telephone calls.").

[5] *See Hamama*, 261 F. Supp. 3d at 827-28 (noting that an Ohio detention facility limits calls to ten minutes and an Arizona detention facility limits phone calls to fifteen minutes).

[6] *See* S. Poverty Law Ctr. et al., *Shadow Prisons: Immigrant Detention in the South* 47 (2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf ("I can't call [my attorney] with my phone card because a person has to accept the call and my lawyer has an automated system."); *Lyon v. ICE*, 171 F. Supp. 3d 961, 966 (N.D. Cal. 2016) (finding that "[t]he positive acceptance

- Detention facility guards may deny detainees permission to receive calls from their attorneys.[7]

Because many attorneys do not have the time or financial means to make regular visits to remote detention facilities like Cibola, it is essential for immigrant detainees to have reliable phone access so that they can build their case. *See* Nat'l Immigrant Justice Ctr., *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court* 8 (2010), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-04/Isolated-in-Detention-Report-FINAL_September2010.pdf. Phone access is also crucial for *pro se* immigrants who are searching for counsel and collecting evidence to build their cases.

These examples merely scratch the surface of detention conditions that impact thousands of immigrant detainees. *See, e.g.*, Dep't of Homeland Security Office of Inspector Gen., *DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities* (2017),

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requirement makes it impossible for detainees to navigate automated telephone systems to dial an extension or leave a voicemail message.").

[7] S. Poverty Law Ctr. et al., *supra*, at 47 (finding that detainees "reported that guards had not permitted them to receive scheduled calls from their attorneys, which meant detainees had to call their attorneys back on expensive pay phones within their units, which do not ensure confidentiality").

https://www.oig.dhs.gov/news/press-releases/2017/12142017/dhs-oig-inspection-cites-concerns-detainee-treatment-and-care (reporting instances of substandard care such as long waits to receive medical treatment and also detainee mistreatment such as indiscriminate strip searches). Remote detention conditions in particular pose significant obstacles for immigrants as they navigate their removal proceedings. *Amici* believe that Mr. Matumona's detention in Cibola—hundreds of miles away from viable immigration attorneys and without free access to telephones—limited his ability to effectively represent himself before the Immigration Judge.

## II. Immigrants are deprived of access to justice when they have no legal representation, and Immigration Judges are unable to meaningfully fill this justice gap

Immigrants are also deprived of access to justice when they are unable to secure legal representation. Although the Immigration and Nationality Act provides that immigrants are entitled to counsel in their removal proceedings, the burden of furnishing counsel falls squarely on the immigrant's shoulders. *See* 8 U.S.C. § 1229a(b)(4)(A) ("[Immigrants] shall have the privilege of being represented, *at no expense to the Government*, by counsel of the [immigrant]'s choosing who is authorized to practice in such proceedings.") (emphasis added).

Because immigrants face various obstacles to securing legal representation,[8] 388,202 immigrants were unrepresented during their removal proceedings from 2012 to 2016. *See* Exec. Office for Immigration Review, *FY 2016 Statistics Yearbook*, F1, Figure 10 (2017), https://www.justice.gov/eoir/page/file/fysb16/download ("FY 2016 Statistics"). This number of unrepresented immigrants is concerning in light of the Supreme Court's long recognition that "the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important." *Ardestani v. INS*, 502 U.S. 129, 138 (1991).

Without access to counsel, a detained immigrant must develop her own legal arguments for relief eligibility; gather evidence that is often located in her country of origin and accessible only there; complete application forms and court filings in English; and present a thorough and compelling case to the Immigration Judge. "The Immigration Court system, meanwhile, presents a maze of technical filing requirements and court procedures, as well as intricate legal burdens that can

[8] As discussed above, immigrants may be unable to secure legal representation if they are held in a remote detention facility. *See Developments in the Law, supra,* at 1662; *see also* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention,* 65 Hastings L. J. 363, 368 (2014). Immigrants may also be unable to secure legal representation because "detention prevents immigrants from maintaining employment, and absent a source of income[,] many detainees simply cannot afford to retain counsel." *Developments in the Law*, *supra*, at 1661-62.

present difficulties for even experienced lawyers with significant resources at their disposal." Chicago Appleseed Fund for Justice, *supra*, at 29.

Navigating removal proceedings as a *pro se* applicant is particularly difficult for immigrants who are not fluent in English. Approximately 90 percent of immigrants in removal proceedings do not have a sufficient grasp of the English language and require a translator to participate in their proceedings. *See* FY 2016 Statistics, *supra*, at E-1, Figure 9. "For a person who speaks little English and has no legal experience, the Immigration Court process can be impenetrable." Chicago Appleseed Fund for Justice, *supra*, at 29; *see also Hernandez-Gil v. Gonzales*, 476 F.3d 803, 807 (9th Cir. 2007) ("It is difficult to imagine a layman more lacking in skill or more in need of the guiding hand of counsel, than an alien who often possesses the most minimal of educations and must frequently be heard not in the alien's own voice and native tongue, but rather through an interpreter."). Even if a detention facility provides the most up-to-date legal materials available, these resources will be useless to many detainees if they are not available in languages other than English. Similarly, immigrants like Mr. Matumona, a native Lingala speaker, will struggle to complete asylum applications and other court filings in English without the assistance of legal counsel. (AR 303)

Many immigrants also cannot adequately represent themselves because they are suffering from physical and/or psychological harm. *See* Physicians for Human

Rights, *Punishment Before Justice: Indefinite Detention in the US* 11 (2011), https://s3.amazonaws.com/PHR_Reports/indefinite-detention-june2011.pdf ("Without any information about or ability to control the fact or terms of their confinement, [even healthy individuals in detention can] develop feelings of helplessness and hopelessness that lead to debilitating depressive symptoms, chronic anxiety, despair, dread of what may or may not happen in the future, as well as to PTSD and suicidal ideation."); Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention,* 65 Hastings L. J. 363, 368 (2014) (noting that "[t]he social isolation and uncertain duration of mandatory immigration detention cause well-documented psychological and physical harm"). Detained immigrants may struggle with the physical and psychological trauma brought on by weeks, months, and sometimes years of detention—during which they may have limited or no communication with loved ones that provide an essential emotional support system. Immigrants may also have previous histories of trauma, which can be further exacerbated by prolonged detention.

Numerous studies have all concluded that immigrants who do secure legal representation are able to meaningfully navigate removal proceedings and have a higher likelihood of securing relief. *See, e.g.*, Jennifer Stave et al., Vera Inst. of Justice, *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity* 6 (2017),

https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf (estimating that "48 percent of cases will end successfully for [New York Immigrant Family Unity Project (NYIFUP)] clients. This is a 1,100 percent increase from the observed 4 percent success rate for unrepresented cases at Varick Street before NYIFUP"); Lori A. Nessel & Farrin R. Anello, Seton Hall Ctr. For Soc. Justice, *Deportation Without Representation: The Access-to-Justice Crisis Facing New Jersey's Immigrant Families* 15 (June 2016) ("Among people who were detained throughout their proceedings, those with counsel avoided deportation 49 percent of the time, whereas those who were unrepresented avoided removal only 14 percent of the time . . . ."). For example, a 2016 report found that detained immigrants who secure legal representation are eleven times more likely to seek relief and twice as likely to win the relief sought. *See* Ingrid Eagly & Steven Shafer, Am. Immigration Council, *Access to Counsel in Immigration Court* (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

In BIA proceedings, the likelihood of an immigrant achieving a favorable result in their appeal jumped from 9.5% to 31% when BIA Pro Bono Project volunteers provided legal representation. *See* Exec. Office for Immigration

Review, *A Ten-Year Review of the BIA Pro Bono Project: 2002–2011* 12 (2014), https://www.justice.gov/eoir/file/oppm17-01/download; *see also* Board of Immigration Appeals, *The BIA Pro Bono Project Is Successful*, at i (Oct. 2004), https://cliniclegal.org/sites/default/files/BIAProBonoProjectEvaluation.pdf (noting that most unrepresented immigrants fail to file an appeal brief to the BIA and concluding that the BIA Pro Bono Project "generate[d] more and better briefs for review by the Board" and thus "facilitate[d] the legal review by Board attorneys by making it easier to understand the appellate issues").

Every day *amici* served on the bench they observed the singular importance of legal representation. While an immigrant may be fully capable of recounting her journey to the United States or the reasons she fled her home country, this is wholly different from identifying and articulating facts that are relevant to her legal claims. Immigration Judges must obtain answers to critical questions such as: *Is the respondent a United States citizen? When and how did the respondent arrive in the United States? Why did the respondent come to the United States?* All of these questions relate to whether the government has presented a valid charge of removability, and whether an immigrant is eligible for specific types of relief that she may not even know to request. Thus, Immigration Judges heavily rely on respondent's counsel to raise relevant facts and legal arguments.

Immigration Judges may struggle to fill the justice gap for *pro se* immigrants because they face ever expanding dockets and lack the time and resources to ensure that every unrepresented immigrant receives meaningful access to justice. *See, e.g.*, TRAC Immigration, *Backlog of Pending Cases in Immigration Courts as of December 2017*, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (noting that the number of pending deportation cases for the 2018 fiscal year is 667,839); Gov't Accountability Office, GAO-17-438, *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, 87 (2017), https://www.gao.gov/assets/690/685022.pdf ("The effects of the case backlog are significant and wide-ranging, from some respondents waiting years to have their cases heard to immigration judges being able to spend less time considering cases."); Noel Brennan, *A View from the Immigration Bench,* 78 Fordham L. Rev. 623, 626 (2009) ("Crushing caseloads and limited judicial resources result in tremendous pressure on an IJ to ensure that the proceedings are fair and rational and that the record is properly developed despite inadequate or no representation."). On any given day, Immigration Judges may oversee 50 to 70 cases in a three or four-hour period, which sometimes amounts to over 160 cases per day. As a result, some Immigration Judges may find that spending additional time on developing the facts of a *pro se* case will exacerbate an already overloaded

court docket. This in turn leads to Immigration Judges limiting themselves to making cursory inquiries about a case and failing to fully develop the record.

Another reason that Immigration Judges may struggle to fill the justice gap for *pro se* immigrants is the perceived conflict between the mandate of Immigration Judges to be impartial arbiters and the need to obtain sufficient information to ensure the appropriate adjudication of the case. For example, when Immigration Judges oversee cases with *pro se* unaccompanied minors who "may present sympathetic allegations," the Executive Office for Immigration Review has emphasized that all Immigration Judges "must remain neutral and impartial when adjudicating juvenile cases and shall not display any appearance of impropriety when presiding over such cases." Exec. Office for Immigration Review, *Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* 3 (Dec. 20, 2017), https://www.justice.gov/eoir/file/oppm17-03/download; *see also* Exec. Office for Immigration Review & Nat'l Ass'n of Immigration Judges, *Ethics & Professionalism Guide for Immigration Judges* 2 (2011), https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf ("An immigration judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the

merits of a particular case.") (citing 5 C.F.R. § 2635.101(b)(8)). This may lead some Immigration Judges to feel uncomfortable with asking follow-up or leading questions during a *pro se* immigrant's testimony out of fear that it may be misconstrued as witness coaching.

One short-term solution that many Immigration Judges have used to fill the justice gap is granting continuances as a way to afford *pro se* immigrants additional time to find a lawyer or collect necessary evidence. *See* Eagly & Shafer (2015), *supra*, at 61. But additional time does not inherently guarantee that *pro se* immigrants will be able to secure counsel, receive needed translations, or obtain needed evidence—especially in light of the other obstacles that detained immigrants face in remote detention facilities. For example, continuances may be harmful to *pro se* immigrants who are suffering from physical and/or psychological trauma due to prolonged detention. In addition, the Executive Office for Immigration Review has cautioned that "the delays caused by granting multiple and lengthy continuances, when multiplied across the entire immigration court system, exacerbate already crowded immigration dockets." OPPM 17-01: Continuances, *supra*, at 2. This kind of directive has a chilling effect on Immigration Judges who may be inclined to grant longer continuances (e.g., more than two weeks) so that *pro se* immigrants can find counsel. It also discourages Immigration Judges from granting continuances in cases where they believe it is

necessary to protect due process. These various complications associated with granting continuances clearly illustrate that Immigration Judges cannot be expected to rely on continuances as the only means for ensuring *pro se* immigrants receive meaningful review.

*Amici* believe that if Mr. Matumona had received legal representation during his initial immigration proceedings, then he would have been able to provide additional evidence in support of his claims and had a higher likelihood of winning relief. As a *pro se* applicant, Mr. Matumona would have benefited if the Immigration Judge had made more probing inquiries into the reasons he fled the Democratic Republic of Congo, his fear of returning there, and the nature of his stay in Angola. This would have allowed the Immigration Judge to more fully develop the record. Mr. Matumona also would have been benefited if the Immigration Judge had clearly explained the legal standard for firm resettlement in terms that Mr. Matumona could understand.

Ultimately, "immigrants who are represented by counsel do fare better at every stage of the court process—that is, their cases are more likely to be terminated, they are more likely to seek relief, and they are more likely to obtain the relief they seek." Eagly & Shafer (2015), *supra*, at 9. Legal representation so significantly impacts an immigrant's likelihood of success because it eliminates the language barriers that *pro se* immigrants must overcome, as well as the burdens of

legal research and evidence collection that *pro se* immigrants must shoulder. *See* Nessel & Anello, *supra*, at 4 ("Litigating a removal case typically presents challenges for even highly educated attorneys. It requires significant factual investigation and documentary evidence, and analysis of a complex web of federal and state laws that affect removal decisions."). In addition, legal representation puts immigrants on equal footing with the government prosecutors who have years of experience litigating removal proceedings. *Id.* In these ways, legal representation puts immigrants in the best possible position to have meaningful access to justice. *See Castro-O'Ryan v. United States Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) ("The importance of counsel for the alien in deportation cases has long been recognized. Over fifty years ago it was observed that in many cases a lawyer acting for an alien would prevent a deportation which would have been an injustice but which the alien herself would have been powerless to stop.") (internal quotations and citations omitted).

## III. Immigration Judges should adopt certain best practices that can better enable them to develop a proper record in cases involving *pro se* litigants

In addition to granting Mr. Matumona relief in this case, this Court should use its decision in this case to encourage Immigration Judges to adopt certain best practices to ensure a detailed record is developed in cases with *pro se* immigrants. This will alleviate some of the access-to-justice obstacles that *pro se* immigrants

must overcome, as well as limit the number of future remands based on procedural issues.

Explain the applicable legal standard. *Amici* recommend that Immigration Judges should always explain the legal standard, and any potential bars to relief, that will be applied in a *pro se* immigrant's case. Many immigrants will not have prior knowledge of asylum laws or various immigration statutes. Therefore, a clear explanation, in layman's terms, of the applicable legal standard is crucial for the *pro se* immigrant to understand what information is relevant to their legal argument and needs to be presented to the Immigration Judge. This is especially important in cases that involve complex, technical legal concepts that may bar an immigrant's eligibility for relief such as aggravated-felony determinations or the firm resettlement bar.

Use effective questioning techniques to build the record. *Amici* believe that open-ended questions should be combined with narrow, directed questions to ensure that *pro se* immigrants have the best chance of presenting all relevant information to the Immigration Judge. For example, the question "Why do you want to stay in the United States?" can elicit a wide array of responses. *Pro se* immigrants may mention concerns such as employment or staying with family members, but not mention the possible danger that awaits them in their home country. Therefore, broader questions should be accompanied by more narrow

questions such as, “Are there any reasons you fear returning to your home country?”

In addition, *amici* recommend that Immigration Judges ask follow-up questions and try to solicit additional information when a *pro se* immigrant’s testimony is unclear or contradictory. If an Immigration Judge has doubts about what the *pro se* immigrant is saying, then they should seek affirmative clarification. This is particularly important when the *pro se* immigrant is using an interpreter at her court hearings.

Introduce evidence of country conditions into the record. *Amici* recommend that Immigration Judges should always consider information about country conditions in asylum cases. For example, Immigration Judges can introduce the U.S. State Department country conditions report into the record as a starting point. *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 213 (BIA 2010) (“State Department reports on country conditions, including the *Profiles of Asylum Claims & Country Conditions*, are highly probative evidence and are usually the best source of information on conditions in foreign nations.”). Immigration Judges should actually take time to read these reports and understand how this information may affect a *pro se* immigrant who may not have access to such information in their law library.

Immigration Judges should also ensure that *pro se* applicants are aware of country conditions resources that are available on the Executive Office for Immigration Review's Virtual Law Library.[9] The EOIR country conditions database provides free access to State Department reports and a wide variety of reports from non-governmental organizations (e.g., World Health Organization, Freedom House, Amnesty International)—all of which may assist *pro se* applicants in learning information that is otherwise unavailable to them. That being said, the utility of the EOIR country conditions database is ultimately contingent on (1) whether a *pro se* immigrant has adequate access to Internet at her detention facility, and (2) whether the reports are available in her native language. In those cases, Immigration Judges must recognize that the *pro se* applicants are unable to access the EOIR country conditions database and the Immigration Judge should therefore take steps to ensure the country conditions report is entered into the record.

Advocate for free, uninterrupted access to telephones in detention centers. *Amici* recommend that Immigration Judges should advocate to the Attorney General and the Executive Office for Immigration Review for detained immigrants

[9] *See* U.S. Department of Justice, Executive Office for Immigration Review, *Country Conditions Research*, https://www.justice.gov/eoir/country-conditions-research.

to have free access to telephones for the purpose of inquiring about legal representation and communicating with retained counsel. Detained immigrants should not be charged to make calls to counsel, especially if they do not have the financial means to pay per-minute charges or purchase pre-paid phone cards. Also, telephone calls with counsel should not have a time limit because this undercuts attorney-client communication. Immigration Judges should advocate for these kinds of reforms to be adopted so that detained immigrants have a better opportunity to secure and retain counsel for the duration of their immigration case.

Adopting these best practices will allow Immigration Judges to avoid unnecessary remands over procedural issues. This in turn will allow *pro se* immigrants to benefit from a fully developed record as they navigate the complexities of immigration court alone. "However time-consuming, it is [the Immigration Judge's] duty to explain the law to *pro se* immigrants and to develop the record to ensure that any waiver of appeal or of a claim is knowing and intelligent." Brennan, *supra*, at 626. Therefore, this Court should encourage Immigration Judges to adopt these best practices to help detained immigrants meaningfully investigate and develop their cases to a degree that is consistent with the requirements of due process.

## CONCLUSION

*Amici* respectfully request that this Court should grant Mr. Matumona's Petition for Review, vacate the Board of Immigration Appeals' decision, and remand his case for rehearing since he now has legal representation.

Dated: March 21, 2017

Respectfully submitted,

/s/ Jean-Claude André

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)(A) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, based on the "Word Count" feature of Microsoft Word 2016, it contains 6,450 words, which is less than half of the length set by Fed. R. App. P. 32(a)(7)(5) for a party's principal brief, including footnotes and excluding parts of the brief exempted by Rule 32(f).

Dated: March 21, 2017 /s/ Jean-Claude André

# APPENDIX

## BIOGRAPHIES OF AMICI CURIAE

The **Honorable Steven R. Abrams** was appointed as an Immigration Judge in September of 1997. From 1999 to June 2005, Judge Abrams served as the Immigration Judge at the Queens Wackenhut Immigration Court at JFK Airport in Queens. He has worked at the Immigration Courts in New York and Varick Street Detention facility. Prior to becoming an Immigration Judge, he was the Special Assistant U.S. Attorney in the Eastern District of New York in the Criminal Division in charge of immigration. Judge Abrams retired in 2013 and now lectures on immigration in North Carolina.

The **Honorable Sarah M. Burr** began serving as an Immigration Judge in New York in 1994. She was appointed Assistant Chief Immigration Judge in charge of the New York, Fishkill, Ulster, Bedford Hills, and Varick Street immigration courts in 2006. Judge Burr served in this capacity until January 2011, when she returned to the bench full-time until she retired in 2012. Prior to her appointment, she worked as a staff attorney for the Criminal Defense Division of the Legal Aid Society in its trial and appeals bureaus. She also worked as the supervising attorney in the Legal Aid Society immigration unit. Judge Burr currently serves on the Board of Directors of the Immigrant Justice Corps.

The **Honorable Jeffrey S. Chase** served as an Immigration Judge in New York City from 1995 to 2007 and was an attorney advisor and senior legal advisor at the Board of Immigration Appeals from 2007 to 2017. He is presently in private practice as an independent consultant on immigration law, and is of counsel to the law firm of DiRaimondo & Masi in New York City. Prior to his appointment, he was a solo practitioner and volunteer staff attorney at Human Rights First. He was also the recipient of the American Immigration Lawyers Association's annual pro bono award in 1994 and chaired AILA's Asylum Reform Task Force.

The **Honorable Bruce J. Einhorn** served as a United States Immigration Judge in Los Angeles from 1990 to 2007. He now serves as an Adjunct Professor of Law at Pepperdine University School of Law in Malibu, California, and is a Visiting Professor of International, Immigration, and Refugee Law at the University of Oxford, England. Judge Einhorn is also a contributing op-ed columnist at the D.C.-based *The Hill* newspaper. He is a member of the Bars of Washington D.C., New York, Pennsylvania, and the Supreme Court of the United States.

The **Honorable Cecelia M. Espenoza** served as a member of the Board of Immigration Appeals from 2000-2003. She then served in various positions at the Office of the General Counsel for the Executive Office for Immigration Review from 2003-2017, including Senior Associate General Counsel, Privacy Officer,

Records Officer, and Senior FOIA Counsel. Judge Espenoza presently works in private practice as an independent consultant on immigration law and is also a member of the World Bank's Access to Information Appeals Board. Prior to her EOIR appointments, she was a law professor at St. Mary's University (1997-2000) and the University of Denver College of Law (1990-1997), where she taught Immigration Law and Crimes and supervised students in the Immigration and Criminal Law Clinics. Judge Espenoza is a graduate of the University of Utah and the University of Utah S.J. Quinney College of Law, and in 2014 she was recognized as the University of Utah Law School's Alumna of the Year. She also received the Outstanding Service Award from the Colorado Chapter of the American Immigration Lawyers Association in 1997 and the Distinguished Lawyer in Public Service Award from the Utah State Bar in 1989-1990. Judge Espenoza has published several articles on Immigration Law.

The **Honorable John F. Gossart, Jr.** served as an Immigration Judge from 1982 until his retirement in 2013 and is the former president of the National Association of Immigration Judges. At the time of his retirement, he was the third most senior immigration judge in the United States. Judge Gossart was awarded the Attorney General Medal by then Attorney General Eric Holder. From 1975 to 1982, he served in various positions with the former Immigration Naturalization Service, including as general attorney, naturalization attorney, trial attorney, and

deputy assistant commissioner for naturalization. From 1997 to 2016, Judge Gossart was an adjunct professor of law and taught immigration law at the University of Baltimore School of Law and more recently at the University of Maryland School of Law. He has been a faculty member of the National Judicial College, and has guest lectured at numerous law schools, the Judicial Institute of Maryland, and the former Maryland Institute for the Continuing Education of Lawyers. Judge Gossart is a past board member of the Immigration Law Section of the Federal Bar Association. Judge Gossart served in the United States Army from 1967 to 1969 and is a veteran of the Vietnam War.

The **Honorable Carol King** served as an Immigration Judge from 1995 to 2017 in San Francisco and was a temporary member of the Board of Immigration Appeals for six months between 2010 and 2011. Judge King previously practiced immigration law for ten years, both with the Law Offices of Marc Van Der Hout and in her own private practice. She also taught immigration law for five years at Golden Gate University School of Law and is currently on the faculty of the Stanford University Law School Trial Advocacy Program. Judge King now works as a Removal Defense Strategist, advising attorneys and assisting with research and writing related to complex removal defense issues.

The **Honorable Eliza Klein** served as an Immigration Judge from 1994 to 2015 and presided over immigration cases in Miami, Boston, and Chicago. During

her tenure, Judge Klein adjudicated well over 20,000 cases, issuing decisions on removal, asylum applications, and related matters. Judge Klein currently practices immigration law at the Gil Law Group in Aurora, Illinois.

The **Honorable Lory D. Rosenberg** served on the Board of Immigration Appeals from 1995 to 2002. She then served as Director of the Defending Immigrants Partnership of the National Legal Aid & Defender Association from 2002 until 2004. Prior to her appointment, she worked with the American Immigration Law Foundation from 1991 to 1995. She was also an adjunct professor of law and taught immigration law at American University Washington College of Law from 1997 to 2004. She is the founder of IDEAS Consulting and Coaching, LLC, a consulting service for immigration lawyers, and is the author of Immigration Law and Crimes. She currently works as Senior Advisor for the Immigrant Defenders Law Group.

The **Honorable Susan Roy** started her legal career as a Staff Attorney at the Board of Immigration Appeals, a position she received through the Attorney General's Honors Program. She served as Assistant Chief Counsel, National Security Attorney, and Senior Attorney for the Department of Homeland Security Office of Chief Counsel in Newark, New Jersey. She then became an Immigration Judge in Newark, New Jersey. Judge Roy has been in private practice for nearly five years, and two years ago she opened her own immigration law firm. She also

currently serves as the New Jersey Chapter Liaison to the Executive Office for Immigration Review for the American Immigration Lawyers Association and the Vice Chair of the Immigration Law Section of the New Jersey State Bar Association. In 2016, Judge Roy was awarded the Outstanding Pro Bono Attorney of the Year by the New Jersey Chapter of the Federal Bar Association.

The **Honorable Paul W. Schmidt** served as an Immigration Judge from 2003 to 2016 in Arlington, Virginia. He previously served as Chairman of the Board of Immigration Appeals from 1995 to 2001, and as a Board Member from 2001 to 2003. Judge Schmidt authored the landmark decision Matter of Kasinga, 21 I&N Dec. 357 (BIA 1995), which extended asylum protection to victims of female genital mutilation. He served in various positions with the former Immigration Naturalization Service, including Acting General Counsel (1986-1987, 1979-1981) and Deputy General Counsel (1978-1987). He worked as the managing partner of the Washington, D.C. office of Fragomen, DelRey & Bernsen from 1993 to 1995. He also practiced business immigration law with the Washington, D.C., office of Jones, Day, Reavis and Pogue from 1987 to 1992 and was a partner at the firm from 1990 to 1992. Judge Schmidt served as an adjunct professor of law at George Mason University School of Law in 1989 and at Georgetown University Law Center from 2012 to 2014 and 2017 to present. He was a founding member of the International Association of Refugee Law Judges

(IARLJ) and presently serves as Americas Vice President. He also serves on the Advisory Board of AYUDA, a nonprofit that provides direct legal services to immigrant communities in Washington, D.C. and Maryland. Judge Schmidt assists the National Immigrant Justice Center/Heartland Alliance on various projects, as well as writes and lectures on immigration law topics at various forums throughout the country. Judge Schmidt created immigrationcourtside.com, an immigration law blog.

## CERTIFICATE OF SERVICE

I hereby certify that, on December 17, 2016, I electronically filed the foregoing brief with the Clerk of the Court by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 21, 2017 /s/ Jean-Claude André