No. 20-71316

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KESLY SYLVESTRE,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Appeal from the Board of Immigration Appeals
Agency No. A209-391-477

BRIEF OF *AMICI CURIAE* RETIRED IJS AND FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are retired Immigration Judges ("IJs") and former members of the Board of Immigration Appeals ("BIA" or the "Board") who remain keenly interested in the quality of decision-making coming from the agency. From their many combined years of service, *amici* have intimate knowledge of the United States immigration system, including the importance of the role of IJs in fully developing the record when a respondent appears *pro se*.[2] *Amici* are invested in the resolution of this case because they have dedicated their careers to improving the fairness and efficiency of the United States immigration system. Drawing upon their familiarity with the procedures and realities of immigration court, *amici* respectfully submit that this Court should vacate the Board's decision and remand the case so that the immigration court may determine eligibility for asylum, withholding of removal and relief under CAT on a fully developed record.

ARGUMENT

As this Court has recognized, "when [an] alien appears pro se, it is the IJ's duty to 'fully develop the record.'" *Agyeman* v. *INS*, 296 F.3d 871, 877 (9th Cir. 2002) (quoting *Jacinto* v. *INS*, 208 F.3d 725, 733-34 (9th Cir. 2000)). Despite this long-recognized obligation, the record in this case demonstrates that this duty is

[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.

[2] *See* Appendix for biographies of *amici curiae*.

not always fulfilled; and that the consequence may be unfairness and injustice to the *pro se* petitioner who is unable to develop the record without guidance and assistance. We respectfully submit that this Court should use this case to provide much-needed guidance to IJs on the scope of their duty to work with *pro se* respondents to elicit the information necessary to develop the factual record. Based upon our own extensive experience, we are of the view that this can be done efficiently and effectively by conscientious IJs, so long as the rule that they are required to do so is clear.

I. IJS HAVE A DUTY TO FULLY DEVELOP THE FACTUAL RECORD OF *PRO SE* RESPONDENTS SEEKING ASYLUM.

A. The Fifth Amendment's Promise of a "Full and Fair Hearing" Requires a Fully Developed Factual Record.

In this Circuit, individuals "subject to deportation proceedings" are entitled to due process protections guaranteed by the Fifth Amendment. *Jacinto* v. *INS*, 208 F.3d 725, 727 (9th Cir. 2000). In the immigration context, "[d]ue process requires that an alien receive a full and fair hearing." *Id*.; *accord Colmenar* v. *INS,* 210 F.3d 967, 971 (9th Cir. 2000). As part of that full and fair hearing, "where applicants appear without counsel," IJs must "fully develop the record." *Jacinto*, 208 F.3d at 734; *see also Guerrero Cuevas* v. *Barr*, 785 F. App'x 491, 492 (9th Cir. 2019) (mem.) (remanding because "IJ failed to fully develop the record").

"One of the components of a full and fair hearing is that the IJ must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief." *Agyeman* v. *INS*, 296 F.3d 871, 877 (9th Cir. 2002). It is an IJ's responsibility to advise respondents of applicable exceptions and statutory bars to relief and to elicit information relevant not only to their claims, but also to the provisions that could bar their claims. *Godoy-Ramirez* v. *Lynch*, 625 F. App'x 791, 793 (9th Cir. 2015) (holding that IJ who failed to explain to a *pro se* asylum applicant that "she had filed her asylum application late or that she could argue that she qualified for an exception to the deadline" violated the applicant's due process rights and prejudiced her case). And, "when the alien appears *pro se*," it becomes "critical that the IJ 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" *Agyeman*, 296 F.3d at 877 (quoting *Jacinto*, 208 F.3d at 733).

B. It is Essential for IJs to Direct Development of the Removal Hearing Record for *Pro Se* Applicants, a Task Well Within Their Competence.

In our experience as former IJs and members of the Board, we have observed repeatedly that an IJ, a trained expert on immigration law, has not only the duty, but also the means, to aid a *pro se* applicant in providing the necessary information to assess the elements of their asylum claim. For an IJ, this is a straightforward task—simply ask the appropriate questions, in terms a layperson

can understand, that align with the categories of relief sought. For a *pro se* asylum applicant, by contrast, it may pose an "[u]nreasonable demand[]" to expect that applicants—unfamiliar with our nation's immigration laws and at sea in our court system without counsel to guide them—understand the nuances of their potential claims and the legal barriers to those claims. *See Matter of S-M-J-*, 21 I&N Dec. 722, 725, 727-29 (BIA 1997).

1. *IJs should be considered "examiners" and tasked with investigating the facts of the cases before them.*

IJs are not meant to be passive observers during immigration court proceedings. The regulations require IJs to take action that is "appropriate and necessary for the disposition of" individual cases. 8 C.F.R. § 1003.10(b). IJs should "seek clarification" where a respondent's claims are unclear, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018), and explain the factual allegations and charges against a respondent in "non-technical language" so that the respondent knows how to respond appropriately. *See* 8 C.F.R. § 1240.10(a).

The IJ's role is like that of an "examiner" as defined in the authoritative text interpreting the Refugee Convention, the United Nations High Commissioner for Refugee's Handbook on Procedures and Criteria for Determining Refugee Status (the "UNHCR Handbook").[3] According to the UNHCR Handbook, a party

[3] The UNHCR Handbook is relevant to United States immigration law because, as the Supreme Court has recognized, "[i]f one thing is clear . . . from the entire 1980 [Refugee] Act, it is that one of Congress' primary purposes was to bring United

determining refugee status—here, an IJ—should not place the burden on applicant to determine whether his circumstances meet the standards for protection. The Handbook explains: "Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail." UNHCR ¶ 66, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN doc HCR/IP/4/Eng/Rev.3 (1979, reissued 2019). Instead, "[i]t is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the [criterion] is met." *Id*. ¶ 67.

This Court has long recognized the value and authority of the UNHCR Handbook's guidance, *e.g.*, *Damaize-Job* v. *INS*, 787 F.2d 1332, 1336 n.5 (9th Cir. 1986) ("The United Nations definition of what factors are relevant in determining refugee status are particularly significant in analyzing [asylum] claims"), and this language is especially pertinent to the role of IJs, acting in their capacity as asylum adjudicators, in developing the factual record. As explained by former IJ Jeffrey S. Chase, one of the *amici*, "[a]sylum adjudicators are required to share the burden of documenting the asylum claim" and "once the facts are ascertained, it is the adjudicator who should identify the reasons for the feared persecution and

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States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (citations omitted).

determine if such reasons bear a nexus to a protected ground." Jeffrey S. Chase, *The Proper Role of IJs as Asylum Adjudicators*, Jeffrey S. Chase Blog (Feb. 4, 2018), https://www.jeffreyschase.com/blog/2018/2/4/the-proper-role-of-immigration-judges-as-asylum-adjudicators.

2. *As compared to* pro se *respondents, IJs are best suited to develop the factual record.*

Unrepresented respondents face unique challenges that underscore the need for an IJ to direct the development of the record. Immigration law is unusually complex and generally unintelligible to those without legal training. *Castro-O'Ryan* v. *INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the 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." (citation omitted)). Successfully navigating a removal proceeding requires an understanding of statutes, regulations, and sometimes conflicting federal court and administrative decisions interpreting those laws. Without access to counsel, *pro se* respondents are on their own in parsing these authorities and taking all of the steps that follow: developing legal arguments for relief eligibility; identifying key facts relevant to their cases; gathering evidence that is often located in their country of origin and accessible only there; completing application forms and court filings in English; and presenting a thorough and

compelling case to the IJ. In short, *pro se* litigants in immigration court face daunting difficulties.

The difficulties of this process are further compounded where, as here, the respondent is only able to participate in the immigration court proceedings through the use of an interpreter who may not transmit the respondent's full testimony to the IJ. (CAR 106 ("I wish to say the interpreter at the court did make a lot of mistake[s] because the[re] are to[o] much things I told to judge are untranslated in the transcript of my hearing.").) *See FY 2016 Statistics Yearbook* at E1 Fig. 9, Executive Office for Immigration Review (2017), https://www.justice.gov/eoir/page/file/fysb16/download (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). Translation challenges further underscore that IJs, not *pro se* respondents, are best situated to determine what information must be in the record and to elicit that information.

"Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country," the IJ's duty to fully develop the record "is critical." *Agyeman*, 296 F.3d at 877. The difference that guidance from an IJ can make is perhaps best illustrated by a study of immigration cases in New York City comparing the outcomes of persecution

asylum claims of the type at issue here for represented and unrepresented respondents between 2005 and 2010. While 84% of represented respondents secured relief, only 21% of unrepresented respondents were successful, a staggering differential. Stacy Caplow et al., *Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings: New York Immigrant Representation Study Report*, 33 CARDOZO L. REV. 357, 385 (2011). Although "not a substitute for counsel in removal proceedings," the IJ can and must narrow this gap by "ensuring a modicum of due process in immigration proceedings in various ways, such as developing the record themselves or by granting continuances for counsel to develop the record." *C.J.L.G* v. *Barr*, 923 F.3d 622, 636 (9th Cir. 2019). Where asylum seekers are unrepresented, it is incumbent upon the IJ to develop the record in order to provide those litigants with the opportunity to provide meaningful testimony that addresses the salient legal issues in their cases.

3. *An IJ's probing can be outcome determinative.*

Even a single question from an IJ can elicit testimony that radically alters the fate of an asylum applicant. Sometimes the smallest piece of testimony—however incidental—can meaningfully change the outcome of a case.

As one example, in *Hernandez-Chacon* v. *Barr*, 948 F. 3d 94 (2d Cir. 2020), the Second Circuit reversed a BIA finding that an asylum applicant had failed to

demonstrate persecution based on political opinion, finding instead that there was "ample evidence in the record to support" applicant's claim where she "testified that when the first gang member tried to rape her, she resisted 'because [she had] every right to.'" *Id*. at 103. The court took this statement as evidence of more than that she "did not want to be a crime victim, she was also taking a stand; as she testified, she had 'every right' to resist." *Id.* at 104. Similarly, the Fourth Circuit reversed the BIA's conclusion that an asylum applicant failed to establish the Salvadoran government's unwillingness or inability to protect her based on testimony that the applicant would "call the police every time" her partner became abusive but "[t]he police would not 'show up to [her] house for hours.'" *Orellana* v. *Barr*, 925 F.3d 145, 148 (4th Cir. 2019); *see also Lopez Ordonez* v. *Barr*, 956 F. 3d 238, 240 (4th Cir. 2020) (applicant's testimony that he threatened to "call the human rights right now" in response to a soldier's threat was evidence that his persecution was political).

In asylum cases, what is at stake is often a matter of life or death, and an IJ's asking of just one more question to better develop the claims at issue could translate into a life-saving difference.

C. The IJ's Duty to Develop the Record is Increasingly Significant for the United States Immigration System and this Circuit.

Throughout the United States immigration system, *pro se* representation abounds. A national study analyzing more than 1.2 million deportation cases from

2006-2012 found that only 37% of all immigrants—and 14% of detained immigrants—were represented by counsel. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7, 32 (2015). Those rates differ widely based on geographic area, detention status and country of origin. For instance, although "90% of nondetained immigrants in New York City secured counsel," in certain locations within this Circuit, such as Tucson, Arizona, "only .002% of detained respondents" were represented by counsel, and "[i]mmigrants from Mexico had the lowest representation rate of any major nationality group . . . , with only 21% represented in court." *Id*. at 8.

At the same time that the numbers of unrepresented applicants in immigration court are rising, IJs face increased pressure to push cases more quickly. Recent regulations set by the Executive Office for Immigration Review ("EOIR") have established quotas and increased caseloads for immigration judges. *See, e.g.*, EOIR Performance Plan: Adjudicative Employees (Apr. 3, 2018) (requiring IJs to resolve "700 cases per year"). This Circuit has acknowledged that increased demands and the "volume of cases on an IJ's docket severely limit[] the IJ's capacity to develop the record." *C.J.L.G*, 923 F.3d at 636.

Taking together this disturbing move towards an assembly-line, quota-driven approach to immigration proceedings and the overwhelming number of *pro se* applicants, it is essential that IJs be compelled to develop the record before closing

an asylum applicant's case. While we recognize (and have experienced first-hand) the burdens facing IJs, we believe that an IJ can properly and sufficiently develop a factual record with minimal additional burden. What we are advocating for is a minimal standard of fairness that can be satisfied with just a few well-chosen questions. As demonstrated above, eliciting even a single snippet of testimony can determine whether an asylum applicant meets the legal requirements that will permit them to remain in the United States or whether their claim is legally deficient. An unrepresented asylum seeker cannot be expected to know and adequately address all of the nuances that may affect their case. The respondents seeking relief are not the experts in immigration law; IJs are. And IJs should act in accordance with standards of neutrality to elicit factual information necessary to make the relevant legal determinations.

II. THE FACTS OF THIS CASE DEMONSTRATE THE NEED FOR THIS COURT TO PROVIDE GUIDANCE ON AN IJ'S DUTY TO DEVELOP THE FACTUAL RECORD.

This case unfortunately provides an opportune vehicle for this Court to clarify the duty of an IJ in developing the factual record—because the IJ below patently failed to satisfy that duty.

Based on our experience, there are a few, simple steps the IJ could have taken that would have made all the difference in clarifying for Sylvestre the contours of the claims and statutory bars at issue and assisting him to disclose

critical information, thus upholding Sylvestre's basic due process rights: (1) the IJ should have explained the relevant law affecting Sylvestre's claims; (2) the IJ should have affirmatively elicited testimony relevant to Sylvestre's claims and the corresponding statutory bars or exceptions to those claims; and (3) when Sylvestre offered information that was pertinent to the legal issues, the IJ should have allowed and encouraged Sylvestre to provide the potentially critical testimony.

As former IJs and members of the Board, we have collectively authored or reviewed tens of thousands of immigration opinions, and we have presided over countless immigration proceedings. In our combined experience, we believe the IJ's duty to probe and develop the record in an unrepresented respondent's case is both essential and can be performed efficiently. A fully developed record not only provides respondents with their constitutionally-required full and fair hearing; it also protects judicial resources by obviating the need for appeals like this one. What should have been expected of the IJ in this case—and of every IJ adjudicating a *pro se* asylum hearing—is neither onerous nor time consuming. These are simple, but essential steps that this Court should require as necessary to guarantee the due process rights of *pro se* respondents.

A. The IJ Was Required To Advise Sylvestre of the Elements of and Exceptions to His Claims, the Foundation for Developing a Full and Fair Record.

1. *The IJ failed to advise Sylvestre of the firm resettlement bar or exceptions to it.*

Much like the IJ in *Godoy-Ramirez*, who this Court criticized for failing to "explain to [the applicant], who appeared pro se, that she had filed her asylum application late or that she could argue that she qualified for an exception to the deadline," 625 F. App'x at 793, the IJ here never advised Sylvestre of the firm resettlement bar or that he arguably qualified for an exception to the bar. This failure effectively deprived Sylvestre of "the opportunity to argue that []he is eligible for such an exception." *Id.*

The firm resettlement bar to asylum relief requires "evidence of an offer of permanent, not temporary, residence in a third country where the applicant lived peacefully and without restriction." *Maharaj* v. *Gonzales*, 450 F.3d 961, 969 (9th Cir. 2006) (en banc). "Permanent" is a technical term; it means something more than a renewable but temporary visa or the ability to apply for a work permit. *Masihi* v. *Holder*, 519 F. App'x 963, 964 (9th Cir. 2013) (mem.). Even if the Government had been able to show that Sylvestre had a purported offer of permanent residence in Brazil—a fact that is in dispute and was little explored by the IJ—Sylvestre could have qualified for the "restrictive conditions" exception to the firm resettlement bar, which applies where, for example, persecution of the

applicant is so severe as to functionally deny resettlement. *See* 8 C.F.R. § 1208.15(b). That exception likely applied here given the discrimination faced by black Haitians living in Brazil that the Government of Brazil has apparently been unable or unwilling to control. (*See* CAR 48-49 (collecting sources).)

The IJ found, and the BIA agreed, that Sylvestre had been offered firm resettlement because he had an offer to participate in a program that would allow him to "apply for permanent status" (CAR 5), and did not qualify for an exception to the firm resettlement bar because "[h]e provided no evidence that the police in Brazil would not help him if he were to be targeted by bandits in the future." (CAR 162, 6 (BIA determined that "the evidence he presented of discrimination and criminal activity against Haitians in Brazil is limited in scope and does not establish that the Brazilian Government actively supports any mistreatment of Haitians").) In so concluding, however, the IJ never considered whether Sylvestre even knew that it mattered whether his mistreatment in Brazil was linked to actions by the Brazilian police and other government agents. And of course, without knowing this was a critical issue, he did not know that he should have presented evidence on the subject.

This is where the IJ's subject-matter expertise in immigration and asylum law is essential. Sylvestre—a native Haitian who communicated in his hearings with the assistance of a Creole translator—had no reason to know that firm

resettlement constitutes a bar to asylum, much less the legal exceptions to that bar. Concomitant with the IJ's duty to fully develop the record is the duty to explain statutory and regulatory bars and exceptions to the respondent so that the respondent can provide legally salient information. In our combined experience, this has not been a heavy burden—it merely requires close attention to the facts of the case, and a few additional sentences of explanation to ensure the respondent understands the relevant bars and exceptions. In a case like this, where the respondent appeared before the Immigration Court on five separate occasions before the IJ rendered his decision *and* the Government made clear it was seeking to apply the firm resettlement bar, it is unthinkable that the IJ never explained the relevant bars and exceptions. This failure is grounds for remand. *See Godoy-Ramirez*, 625 F. App'x at 793.

2. *The IJ failed to advise Sylvestre of the relevant law related to Sylvestre's persecution claim.*

The IJ held in the alternative that Sylvestre failed to establish asylum on the basis of persecution in Haiti because Sylvestre and his family were "victims of crime" rather than the victims of persecution against which the state was unable or unwilling to provide protection. (CAR 225.) This finding, however, is premised on a similar failure by the IJ to provide even minimal assistance to the *pro se* applicant. The IJ never explained to Sylvestre that his claim for asylum would require a showing that he was harmed either by the Haitian government or by

individuals that the Haitian government was either unable to unwilling to control. Thus, Sylvestre did not know to provide legally salient responses on the connection between his assailants and the government, the reasons why he did not report his assaults to the police, and why he believes he cannot simply move to another part of Haiti—all points that the IJ found to be "unclear" and thus unsupportive of a finding of persecution. (*See* CAR 225-28.) For each of these findings, however, the IJ failed to develop the record by not providing adequate guidance on the relevant legal standards affecting his decision, effectively ensuring that the very gaps on which the IJ relied to deny Sylvestre's petition would exist.

B. The IJ Failed to Develop the Record Both By Failing to Elicit Relevant Testimony and By Preventing Sylvestre from Testifying to Key Facts.

1. *The IJ failed to develop the record on the firm resettlement bar and its exceptions.*

Unlike Sylvestre, the IJ knew of the relevant exceptions to the firm resettlement bar, and should have been actively seeking information to assess whether those exceptions applied to the case before him. Instead, the IJ failed to develop additional information when Sylvestre testified that the police had not responded to or protected him from multiple robberies in Brazil. In fact, the IJ actively discouraged Sylvestre from giving such testimony.

Sylvestre testified that although he was robbed three times by bandits, he only reported the robbery to the police once. (CAR 273.) But the IJ never asked

Sylvestre *why* he decided not to report the other two robberies to the police. Had the IJ asked, he may have learned that Sylvestre understood that the police refused to address violence against Haitians. Indeed, shortly after testifying that he had not reported two of the robberies, Sylvestre testified that "[t]he police doesn't really come around [his neighborhood] too often" (CAR 275), yet the IJ never asked why that was. Even worse, when Sylvestre testified that he might be killed if he returned to Brazil, the IJ changed the subject:

> "I would rather not suffer the consequences that I've already had in Brazil . . . going back to the same situation . . . being robbed all the time. And then if they ask you and you don't have it or don't want to give it to them and then they threaten you. That's why I don't – they might even kill you. So I don't want to go back to that."

Rather than ask why Sylvestre believed that his life would be in danger in Brazil, the IJ took an entirely different tack, asking Sylvestre the unrelated question, "Are you married?" (CAR 277-78.)

There is a direct connection between the IJ's failure to develop testimony and the outcome of Sylvestre's case. The IJ based his opinion that no exception existed to the firm resettlement bar in part on the fact Sylvestre provided "no evidence that the police in Brazil would not help him." (CAR 162.) Similarly, both the IJ and BIA ruled that, despite Sylvestre's experience with robberies which he testified were motivated by his race and ethnicity, "there is no evidence to suggest that the abuse of foreign nationals in Brazil, or those identifying with the

respondent's race, is a systemic issue or that it is tolerated by the Brazilian government." (CAR 24, 161 (IJ noting that Sylvestre's only reasons against remaining in Brazil were "that he was impatient with the lawful status process in Brazil and the fact that he found it to be expensive, and the fact that he feared being robbed by bandits").) But when Sylvestre mentioned that Brazilian police rarely patrolled his largely Haitian and African immigrant neighborhood and the risk of death from bandits (*see, e.g.*, CAR 275), the IJ failed to develop crucial testimony about the experience of black Haitians in Brazil. This failure, too, calls out for remand to permit proper inquiry. Indeed, since the record includes several articles demonstrating the harsh conditions faced by black Haitians in Brazil (*see* CAR 48-49 (collecting sources)), we believe that further inquiry would be fruitful.

2. *The IJ failed to develop the record on Sylvestre's fear of persecution in Haiti.*

The IJ similarly abdicated his duty to uncover the relevant facts about Sylvestre's persecution claim. Such a claim turns on whether the "source of persecution" is "the government, a quasi-official group or persons, or groups that the government is unwilling or unable to control." (CAR 214 (citing *Avetova-Elisseva* v. *INS*, 213 F.3d 1192, 1196 (9th Cir. 2000)).) As an immigration expert, the IJ surely knew of the critical importance of evidence showing whether the Haitian government was in fact unable or unwilling to stop Sylvestre's attackers. Yet after failing to explain the significance of that information to Sylvestre, *see*

supra p. 15-16, the IJ never sought to elicit information about the relationship between his persecutors—identified as both "the Cannibal Army" and "partisans of AAA [the rival political party, Ayiti an Aksyon]"—and the Haitian government. (CAR 286, 299). Then, in reliance on this gap in the record, the IJ refused to grant relief on the ground that "[t]here is no evidence whatsoever that these individuals were somehow affiliated with the government," and that Sylvestre and his family were merely "victims of crime." (CAR 226.) As former IJs and Board members, we know that such gaps are easily avoided: ask a few simple questions that will prompt legally salient responses and then apply the relevant law to resolve the respondent's claim. The IJ neglected this duty at these obvious and critical opportunities.

First, after Sylvestre testified to a direct link between his persecutors and the powerful AAA political party, the IJ failed to follow up on the extent to which the AAA party controlled—or at least escaped control by—the Haitian government. When the IJ asked whether members of the "Cannibal Army" were "official party members of AAA or are they simply people who agree with the teachings or positions of AAA?" Sylvestre responded that the Cannibal Army was protected by, and an instrument of, the AAA:

> "I can say they have the support of AAA . . . They supported AAA, and AAA supported them also – because sometimes, when they commit some acts and – you cannot fight them because of the leader of AAA. And then you cannot do anything with them because they are

> protected by the authorities in the government. And also, those leaders, whenever they need to do some bad action, they use [the Cannibal Army]."

(CAR 332-33.) The IJ asked no follow-up questions and instead responded only "Uh-huh," after which Sylvestre volunteered that AAA leaders "will send the bandits in this area to wrestle the election" if they are losing. (*Id*.) Despite the fact that the connection between the AAA and the Haitian government was critical to the IJ's determination of Sylvestre's persecution claim, the IJ again probed no further. (*Id*.)

Second, the IJ did not follow up on direct evidence that the police were unable or unwilling to control the Cannibal Army. In recounting the three instances in which Sylvestre was physically harmed or intimidated for his political beliefs—on October 30, 2010, when he was assaulted with his cousin, on November 28, 2010, when he was confronted by the Cannibal Army and his cousin was murdered, and on February 12, 2011, when he and his sisters were sexually assaulted by members of Cannibal Army—Sylvestre described openly lawless scenes. During the October 30 attack, Sylvestre and his cousin were descended upon by "six to eight people" who beat them with "their feet, with their hands." (CAR 294-95). Similarly, when Sylvestre's cousin was murdered, Sylvestre described the horrific experience, which "happened in public, close to a voting police" (CAR 359), as one intended to send a violent message:

> These bandits, when they're killing people, they want to make sure that you know exactly what happened to them. They would take tires, put them on you and set you on fire. They want to make sure that you know you're going to get killed.

(CAR 301.) Finally, Sylvestre testified that when he and his sisters were sexually assaulted, "five people" entered his home and "a whole bunch of people" outside saw the scene as well. (CAR 303).

Although these three attacks were carried out in the open and before numerous witnesses, Sylvestre testified—throughout his five hearings—that he did not report to the police based on his fear that doing so would cause something to "happen to us." (CAR 353, 359-60.) These three public, overt attacks on Sylvestre and his family and his fear of reporting them strongly suggested that the Haitian government was unwilling or unable to control Cannibal Army. The IJ was required to follow up by asking how often public attacks occur, why the police did not intervene, and why Sylvestre did not seek their assistance. Instead, the IJ mused over the very question he should have raised, noting that it is "hard to understand why police intervention was not brought." (CAR 163). That is precisely the record the IJ should have developed.

Third, the IJ failed to elicit testimony regarding whether Sylvestre's persecution could be resolved by relocating to a different part of Haiti. On three occasions, Sylvestre attempted to explain his fear of returning to Hatiti, despite the fact that his family had resettled elsewhere in the country, but the IJ failed to

develop relevant testimony and instead moved on to unrelated matters. When Sylvestre first testified that he did not relocate with his family "because of the work I was doing I was well known. And the opposition that was coming against me is one that is country wide," the IJ interrupted to ask the unrelated question "[h]ow many siblings do you have?" (CAR 281.) Later, when Sylvestre testified that "this political party is a political party that is national" and he could not "go back and live in another part of the country because I am well known by those bandits" (CAR 307-08), the IJ responded with "Okay. Thank you. I'm going to leave it right there" before moving on to an administrative matter. Sylvestre then testified a third time that "if I return, they will attack me, because if I – because they know my face" (CAR 328), but the IJ failed to probe why this was true nationwide, instead turning—once again—to an unrelated issue. (CAR 329.)

* * *

Throughout his hearings, Sylvestre presented testimony that either directly addressed the salient legal issues at play or made statements that should have been clear notice to a trained IJ that there was more information that could resolve those same issues. The record is replete with instances in which the IJ either failed to ask relevant questions, changed the subject abruptly, failed to follow up on probative, unsolicited testimony provided by Sylvestre, or interrupted Sylvestre as he appeared to be providing key testimony. (*E.g.*, CAR 277-78, 281, 359-60.)

Where an applicant appears *pro se*, it is incumbent on IJs to do the opposite: to seize on these openings and "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." *Dent* v. *Holder*, 627 F.3d 365, 373-74 (9th Cir. 2010) (internal citations and quotations omitted)). Here, the IJ did not meet this standard, and in doing so violated Sylvestre's Fifth Amendment due process rights to a full and fair hearing.

Based upon our extensive experience in proceedings such as this, the follow-up required to provide a fair hearing would have been neither time consuming nor burdensome. It would simply have required brief guidance and a few questions in areas directly within the core expertise of any sitting IJ. The result of such inquiry—wherever it led—would have assured the fair hearing to which every asylum applicant is entitled but which Sylvestre did not get. Remand is appropriate to uphold these due process rights.

CONCLUSION

Amici respectfully request that this Court reverse and vacate the BIA's decision and remand for further proceedings not inconsistent with this opinion so that the immigration court may determine Sylvestre's eligibility for asylum, withholding of removal and relief under CAT on a fully developed record.

Date: November 19, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5,754 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Counsel's approximation is based on the "Word Count" function of the word processing program used to draft the enclosed brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Date: November 19, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: November 19, 2020

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APPENDIX

BIOGRAPHIES OF AMICI CURIAE

Listed in alphabetical order, *amici curiae* are the following former IJs and members of the Board:

- The **Honorable Steven Abrams** served as an IJ in New York from 1997 to 2013 at the New York, Varick Street, and Queens Wackenhut Immigration Courts. Prior to his appointment to the bench, he worked as a general attorney for the former Immigration and Naturalization Service ("INS").
- The **Honorable Terry A. Bain** served as an IJ in New York from 1994 to 2019.
- The **Honorable Sarah M. Burr** served as an IJ in New York from 1994 and was appointed as Assistant Chief Immigration Judge ("ACIJ") in charge of the New York, Fishkill, Ulster, Bedford Hills and Varick Street Immigration Courts in 2006. She served as an ACIJ until January 2011, when she returned to the bench full-time until she retired in 2012.
- The **Honorable Esmeralda Cabrera** served as an IJ from 1994 until 2005 in the New York and the Newark and Elizabeth, New Jersey Immigration Courts.

- The **Honorable Teofilo Chapa** served as an IJ in Miami, Florida from 1995 until 2018.
- The **Honorable Jeffrey S. Chase** served as an IJ in New York City from 1995 to 2007 and was an attorney advisor and senior legal advisor at the BIA from 2007 to 2017.
- The **Honorable George Chew** was appointed as an IJ in 1995 and served until his retirement in 2017. He also previously served as a trial attorney for the former INS in New York from 1979 to 1981.
- The **Honorable Joan V. Churchill** served as an IJ in Arlington, Virginia from 1980 until 200.
- The **Honorable Matthew D'Angelo** served as an IJ in Boston from 2003 until 2018.
- The **Honorable Bruce J. Einhorn** served as an IJ in Los Angeles from 1990 to 2007.
- The **Honorable Cecelia Espenoza** served as a Member of the Executive Office for Immigration Review ("EOIR") BIA from 2000-2003 and in the Office of the General Counsel from 2003-2017, where she served as Senior Associate General Counsel, Privacy Officer, Records Officer and Senior FOIA Counsel.

- The **Honorable Noel Ferris** served as an IJ in New York from 1994 to 2013 and an attorney advisor to the Board from 2013 to 2016, until her retirement. Previously, she served as a Special Assistant U.S. Attorney in the Southern District of New York from 1985 to 1990 and as Chief of the Immigration Unit from 1987 to 1990.
- The **Honorable James R. Fujimoto** served as an IJ in Chicago from 1990 until 2019.
- The **Honorable Jennie L. Giambastiani** served as an IJ in Chicago from 2002 until 2019.
- The **Honorable John F. Gossart, Jr.** served as an IJ from 1982 until his retirement in 2013 and is the former president of the National Association of IJs. From 1975 to 1982, he served in various positions with the former INS, including as general attorney, naturalization attorney, trial attorney, and deputy assistant commissioner for naturalization. Judge Gossart is a past Board member of the Immigration Law Section of the Federal Bar Association.
- The **Honorable Paul Grussendorf** served as an IJ in Philadelphia and San Francisco from 1997 to 2004.
- The **Honorable Miriam Hayward** is a retired IJ. She served on the San Francisco Immigration Court from 1997 until 2018.

- The **Honorable Charles M. Honeyman** served as an IJ in the Philadelphia and New York Immigration Courts from 1995 until 2020.
- The **Honorable Rebecca Jamil** served as an IJ from February 2016 until July 2018 at the San Francisco Immigration Court. From 2011 to February 2016, Judge Jamil served as assistant chief counsel for U.S. Immigration and Customs Enforcement in San Francisco. From 2006 to 2011, she served as staff attorney in the Research Unit, Ninth Circuit Court of Appeals, in San Francisco, focusing exclusively on immigration cases.
- The **Honorable William P. Joyce** served as an IJ in Boston, Massachusetts from 1996 until 2002. Prior to his appointment to the bench, he served as legal counsel to the Chief IJ. Judge Joyce also served as Associate General Counsel for enforcement for INS.
- The **Honorable Carol King** served as an IJ from 1995 to 2017 in San Francisco and was a temporary member of the BIA for six months between 2010 and 2011.
- The **Honorable Elizabeth A. Lamb** was appointed as an IJ in September 1995 and retired in 2018.

- The **Honorable Margaret McManus** was appointed as an IJ in 1991 and retired from the bench after twenty-seven years in January 2018.
- The **Honorable Charles Pazar** served as an IJ in Memphis, Tennessee, from 1998 until his retirement in 2017. Judge Pazar also served in the INS Office of General Counsel and was a Senior Litigation Counsel in the Office of Immigration Litigation ("OIL") immediately preceding his appointment as an IJ in 1998.
- The **Honorable John W. Richardson** served as an IJ in Phoenix, Arizona from 1990 until 2018.
- The **Honorable Lory D. Rosenberg** served on the BIA from 1995 to 2002. Judge Rosenberg has served as a member of the International Association of Refugee Law Judges, an elected member of the Board of Governors of the American Immigration Lawyers Association ("AILA") and Board Member of the Federal Bar Association, Immigration Law Section.
- The **Honorable Susan G. Roy** served as an IJ in Newark from 2008 to 2010.
- The **Honorable Paul W. Schmidt** served as an IJ from 2003 to 2016 in Arlington, Virginia. He previously served as Chairman of the BIA from 1995 to 2001, and as a Board Member from 2001 to 2003. He

served in various positions with the former INS, including Acting General Counsel (1986-1987, 1979-1981) and Deputy General Counsel (1978-1987). He was a founding member of the International Association of Refugee Law Judges 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.

- The **Honorable Ilyce S. Shugall** served as an IJ from 2017 until 2019 in the San Francisco Immigration Court.
- The **Honorable Helen Sichel** served as an IJ in New York from 1997 until 2020.
- The **Honorable Andrea Hawkins Sloan** was appointed an IJ in 2010 following a career in administrative law. She served on the Portland Immigration Court until 2017.
- The **Honorable Gustavo D. Villageliu** served as a BIA Member from July 1995 to April 2003. He then served as Senior Associate General Counsel for EOIR until he retired in 2011. Before becoming a Board Member, Judge Villageliu was an IJ in Miami from 1990 until 1995. He first joined the Board as a staff attorney in January 1978, specializing in war criminal, investor, and criminal alien cases.

- The **Honorable Polly A. Webber** served as an IJ from 1995 to 2016 in San Francisco, with details in facilities in Tacoma, Port Isabel, Boise, Houston, Atlanta, Philadelphia, and Orlando. Judge Webber practiced immigration law from 1980 to 1995 in her own private practice in San Jose. She was a national officer in AILA from 1985 to 1991 and served as National President of AILA from 1989 to 1990.
- The **Honorable Robert D. Weisel** served as an IJ in the New York Immigration Court from 1989 until his retirement at the end of 2016. Judge Weisel was an Assistant Chief IJ, supervising court operations both in New York City and New Jersey. He was also in charge of the nationwide Immigration Court mentoring program for both IJs and Judicial Law Clerks.