No. 25-10166

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JUAN CARLOS HERNANDEZ-LANDAVERDE,
Petitioner,

v.

PAMELA J. BONDI, U.S. Attorney General,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

AMICUS CURIAE BRIEF OF FORMER IMMIGRATION JUDGES & FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS IN SUPPORT OF PETITIONER AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Juan Carlos Hernandez-Landaverde v. Pamela Bondi, U.S. Attorney General, Appeal No. 25-10166

Counsel for *Amici Curiae* Former Immigration Judges & Former Members of the Board of Immigration Appeals certifies the following:

1. In addition to those identified in Petitioner's Opening Brief, *Amici* disclose the following listed persons and parties that may have an interest in the outcome of this case:

Hon. Steven Abrams, Immigration Judge, New York, Varick St., and Queens Wackenhut, 1997-2013

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Hon. Silvia R. Arellano, Immigration Judge, Phoenix and Florence, AZ, 2010- 2019

Hon. Terry A. Bain, Immigration Judge, New York, 1994-2019

Hon. Sarah M. Burr, Assistant Chief Immigration Judge and Immigration Judge, New York, 1994-2012

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Hon. Mimi Yam, Immigration Judge, San Francisco, Houston, 1995-2016

2. The undersigned certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

April 16, 2025 /s/ *Ashley Vinson Crawford*
Ashley Vinson Crawford

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former Immigration Judges ("IJ") and Members of the Board of Immigration Appeals ("BIA" or "Board") with decades of combined experience adjudicating removal cases and interpreting the Immigration and Nationality Act ("INA"). A complete list of *amici* is provided in Appendix A.

Amici have a strong interest in ensuring that removal proceedings are conducted fairly, that the statutory and regulatory framework governing appellate review is properly applied, and that IJs' factual determinations—particularly those involving credibility and predictions of future harm—receive the deference required by law. Because *amici* have personally conducted thousands of hearings involving applications for protection under the Convention Against Torture ("CAT"), they are uniquely positioned to assist the Court in understanding how the clear error standard operates in practice, and the institutional consequences of a reviewing body failing to adhere to it.

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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.

Amici do not take a position on the ultimate merits of Petitioner's claim for relief. Rather, they submit this brief to underscore the importance of maintaining the clear and proper division of responsibility between IJs as the triers of fact and the BIA as a reviewing body limited to correcting clearly erroneous findings.

INTRODUCTION

As former immigration judges and members of the BIA, *amici curiae* bring centuries of combined experience adjudicating removal proceedings and evaluating claims for relief under the INA and the CAT. Having served as both trial-level adjudicators and appellate reviewers, amici understand the importance of maintaining clear boundaries between those roles. Both former IJs and former BIA members are in full agreement that the system functions best when the agency's appellate body respects those institutional responsibilities and faithfully applies the clear error standard of review to factual findings.

This case exemplifies the danger of departing from that framework. The IJ—after conducting a full merits hearing and weighing the evidence—granted CAT relief based on a detailed and individualized factual record. The BIA, in a 2-1 decision, reversed the IJ without

identifying any clear error, instead substituting its own view of the facts for that of the IJ. That is not how the system is designed to operate.

Amici submit this brief to assist the Court in evaluating whether the BIA exceeded its authority in this case and to offer insight into how departures from the clear error standard compromise the integrity of immigration adjudications. In *amici*'s view, adherence to that standard is essential to the fairness, consistency, and lawfulness of the agency's decision-making process.

SUMMARY OF ARGUMENT

The BIA is allowed by regulation to review factual findings made by IJs only for clear error. This deferential standard, adopted by notice and comment rulemaking in 2002, preserves the division of responsibilities between trial-level adjudicators, who observe witness testimony and weigh evidence firsthand, and the appellate body, which must respect those findings unless plainly wrong. The integrity of the system depends on this separation of roles.

In recent years, *amici* have observed a troubling pattern: the BIA increasingly reverses IJ grants of relief—particularly under CAT—not because the IJ's findings were clearly erroneous, but because the BIA

would have weighed the evidence differently. These reversals often occur even when Department of Homeland Security ("DHS") fails to cite, let alone apply, the correct standard of review. The BIA frequently relies on language like "the record does not support" the IJ's conclusion, a phrase that reflects disagreement rather than the identification of any clear error. This practice violates the applicable regulations (8 C.F.R. §§ 1003.1(d)(3)(i) and 1003.3(b)) and undermines both the regulatory framework and the fairness of the appellate process.

This case reflects that broader trend. The IJ granted CAT relief based on substantial record evidence—including reports of systemic torture in Salvadoran detention and Petitioner's individualized risk due to his public identification as gang-affiliated. The IJ made detailed findings grounded in this credible evidence, yet the three-member BIA panel (with one member dissenting without opinion) reversed without identifying any clear error. Instead, the two-member majority cited two isolated statistics and ignored core aspects of the IJ's reasoning. It also failed to address DHS's inadequate notice of appeal, which did not articulate any factual error under the proper standard.

Amici are particularly concerned by the BIA's growing acceptance of the notion that, because the respondent bears the burden of proof, the Board must reassess that burden independently, even when DHS fails to preserve its arguments. This reasoning—previously embraced in *Matter of A-C-A-A-* but vacated by Attorney General Garland—continues to influence decision-making in practice. At the same time, the BIA selectively enforces waiver rules, routinely penalizing respondents for procedural missteps while overlooking equivalent failures by DHS.

The BIA also increasingly engages in factfinding on appeal, despite a regulatory prohibition against doing so. These patterns of behavior erode the principles of appellate review and result in outcomes that are neither procedurally fair nor legally sound.

The Court should reaffirm that IJs are the primary fact-finders, and that the BIA may not disturb their findings unless they are clearly erroneous. Because the BIA failed to apply this standard and instead substituted its judgment for that of the IJ, its decision must be vacated.

ARGUMENT

I. CLEAR ERROR REVIEW IS A CRITICAL PART OF THE AGENCY ADJUDICATORY SYSTEM

A. The Roles of Immigration Judges and the Board of Immigration Appeals

The Executive Office for Immigration Review ("EOIR") is structured to ensure that the factfinding function rests with IJs and that appellate bodies respect the findings they make after hearing testimony, assessing credibility, and weighing evidence firsthand. IJs conduct trials, admit and review evidence from both parties, and issue reasoned decisions applying law to fact. Because they observe witness demeanor, interact with the parties, and make real-time evidentiary rulings, IJs are uniquely suited to make credibility and factual determinations.

The BIA serves a distinct, appellate role. It reviews legal questions de novo but must review factual findings—including predictive findings about the likelihood of future harm—only for clear error. 8 C.F.R. § 1003.1(d)(3)(i). This regulatory constraint is not a formality; it reflects a structural safeguard designed to prevent appellate overreach and to preserve the integrity of immigration trial proceedings.

As former Immigration Judges and BIA members, *amici* observed firsthand how this division of roles is critical to the fair and efficient

adjudication of protection claims. Yet *amici* are increasingly concerned that the BIA is failing to observe these boundaries—particularly in appeals brought by the DHS challenging grants of relief. *See, e.g., Santos-Zacarias v. Garland*, 126 F.4th 363, 368-70 (5th Cir. 2015) (concluding that the BIA engaged in impermissible factfinding); *Francois v. Garland*, 120 F.4th 459, 465-66 (5th Cir. 2024) (reversing BIA where it engaged in de novo review even as the Board stated that it was using the clearly erroneous standard). It is not uncommon for the BIA to reverse such grants not because an IJ's findings were clearly erroneous, but because the BIA would have weighed the record differently.

This is not a new concern. While serving on the BIA, *amici* repeatedly observed that DHS appellate briefs often failed to identify any specific clear error in the IJ's factual findings. Many failed to invoke the clear error standard at all. Yet such briefing deficiencies were routinely overlooked, and the BIA would proceed to reverse based on independent reweighing of the record. In *amici*'s view, this practice reflects a shift away from neutral appellate review and toward an outcome-driven approach that undermines confidence in the system.

B. The Clear Error Standard and Its Importance in the Immigration Court System

The clear error standard has deep roots in appellate jurisprudence, and dates back more than two decades in the immigration court system. In 2002, the Department of Justice engaged in notice and comment rulemaking to codify the change from de novo review by the BIA to the clearly erroneous standard. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878, 54888 (Aug. 26, 2002) ("2002 Rulemaking"). Relying on Supreme Court precedent like *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), the Department emphasized that under the clear error standard, the Board must be "left with the definite and firm conviction that a mistake has been committed. A factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder." 2002 Rulemaking, 67 Fed. Reg. at 54889.

The Department thus recognized the principle, adopted from federal courts, that factfinding—especially when based on live testimony and complex evidentiary records—is best left to the trial-level adjudicator. "The 'clearly erroneous' standard reflects the major role of

immigration judges under the Act and implementing regulations as determiners of facts." *Id.* As the Department noted, "immigration judges, not the Board, [] have been given authority to 'administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.'" *Id.* (quoting 8 U.S.C. § 1229a(b)(1)). In short, "immigration judges may be better positioned than the Board to decide factual issues[.]" *Id.*

The Department further recognized that the clearly erroneous standard is a practical necessity in a system with increasing caseloads. Confining review of factual findings to the clear error standard reduces the risk of institutional bottlenecks and protects the integrity of the trial process. Quoting *Anderson*, the Department noted that "duplication of the trial judge's efforts by an appellate body would very likely contribute only negligibly to the accuracy of fact determination at a huge cost to diversion of judicial resources." *Id.* (quoting *Anderson*, 470 U.S. at 574-75) (cleaned up). Accordingly, the Department "concluded that the 'clearly erroneous' standard is an effective, reasonable, and efficient standard for appellate administrative review of factual determinations by immigration judges," and viewed it as a means of "eliminating the

duplication of resources involved in successive de novo factual determinations." *Id.* at 54890.

The Department's rationale holds particularly true today, when the BIA had a substantial caseload of more than 110,000 cases at the end of FY 2024, the highest figure on record.[2] The BIA simply cannot—and should not—reconstruct each case from scratch. The IJ is tasked with weighing the evidence and drawing reasonable inferences. The BIA's role is to assess whether that determination was plainly wrong—not merely debatable.

Adhering to this standard also ensures predictability for both parties. If the BIA applies clear error review faithfully, DHS is incentivized to appeal only when there is a genuine basis to believe the IJ made a serious mistake. But when the BIA inconsistently applies the standard—or treats it as a formality—it encourages routine DHS appeals and undermines the finality of IJ decisions, as well as unnecessarily increasing the appellate caseload. As the Department stated in the 2002 Rulemaking, a merits hearing before the immigration judge should be

[2] *See* Executive Office for Immigration Review Adjudication Statistics (Oct. 10, 2024), https://www.justice.gov/eoir/media/1344981/dl?inline.

"the main event … rather than a tryout on the road." 67 Fed. Reg. at 54889 (quoting *Wainwright v Sykes*, 433 U.S. 72, 90 (1977)).

Amici observed this pattern repeatedly. DHS briefs often failed to apply the correct standard of review or to identify any specific finding as clearly erroneous. Yet the BIA would nevertheless reverse, relying on language such as "the record does not show" or "the evidence does not support" the IJ's conclusion—language that reflects disagreement, not deference. That approach is inconsistent with the BIA's own precedent, which affirms that factual findings are not clearly erroneous simply because another view of the evidence is also permissible. *See Matter of Z-Z-O-*, 26 I&N Dec. 586, 588 (BIA 2015) (reiterating that an IJ's factual finding must stand unless clearly erroneous, and that reversal is not warranted where "there are two permissible views of the evidence"). In *amici*'s view, this shift away from applying the proper standard represents not merely legal error but an institutional turn toward a more prosecutorial posture.

The regulations are clear. Under 8 C.F.R. § 1003.3(b), the appealing party must "specifically identify the findings of fact, the conclusions of law, or both, that are being challenged." When DHS fails to do so, the BIA

must apply waiver principles—just as it does for respondents. Anything less creates a double standard that threatens the fairness of the appellate process and the legitimacy of the BIA itself.

C. The BIA's Failure to Apply the Clear Error Standard in This Case

This Circuit has long recognized the clearly erroneous standard, articulating it memorably as requiring the appellate body to find that the factual findings are "wrong with the force of a five-week-old, unrefrigerated dead fish." *Cox Enters., Inc. v. News-Journal Corp.*, 794 F.3d 1259, 1272 n.92 (11th Cir. 2015) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec. Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)). Rather than follow this approach, in the case at bar the Board instead treated the immigration judge's findings like fresh sushi-grade tuna, ready to be cut and served as the BIA wished. The IJ had granted CAT relief after making specific factual findings supporting a conclusion that Petitioner—who had been publicly identified in a U.S. indictment as gang-affiliated—would more likely than not be tortured upon return to El Salvador. The IJ's findings were based on unrebutted reports from the U.S. State Department, Amnesty International, and Human Rights Watch, which documented systemic abuse in Salvadoran detention

facilities. The IJ also credited evidence showing that authorities frequently torture detainees who deny gang affiliation in order to extract confessions—an especially salient risk given Petitioner's denial of any such affiliation.

The IJ's conclusion was not speculative; it was reasoned and well supported. The IJ relied on uncontroverted evidence of intentional and brutal mistreatment of inmates in Salvadoran prisons. The IJ's finding that Petitioner was especially likely to be targeted due to his public profile was grounded in credible record evidence and common-sense inferences.

The BIA stepped out of its regulatory role when it reversed that decision. Rather than show that it had a "definite and firm conviction that a mistake has been committed," 67 Fed. Reg. at 54889, the Board reached its own independent conclusion by focusing on two isolated data points from the record: a report from the Salvadoran Human Rights Ombudsman stating that 95% of complaints did not result in confirmed abuse, and a statistic that 190 deaths had occurred among 70,000 detainees. The BIA failed to show that the IJ's core findings were a mistake, instead selectively crediting narrow evidence and ignoring

contrary documentation—including reports indicating that the true number of deaths and abuses was likely underreported. *See F.J.A.P. v. Garland*, 94 F.4th 620, 639–40 (7th Cir. 2024) (reversing BIA's denial of CAT relief where it failed to engage with IJ's key factual findings, reweighed evidence, and offered no reasoned explanation for rejecting the IJ's conclusions).

Most significantly, the BIA failed to engage with Petitioner's individualized risk. It analyzed the record as though Petitioner were a generic detainee, not a publicly named figure linked—accurately or not—with gang activity. This omission undermines the entire premise of its reversal. A predictive factual finding need not be universally applicable; it need only be plausible based on the specific circumstances of the case. *See Matter of S-V-*, 22 I&N Dec. 1306, 1313 (BIA 2000) ("Specific grounds must exist that indicate the individual would be personally at risk.").

The BIA's approach in this case reflects de novo review in everything but name. Its reasoning echoes that rejected in *Matter of Z-Z-O-* and *F.J.A.P.*, where courts reversed BIA decisions for failing to respect the factfinding function of the IJ. The BIA's decision here should be reversed for the same reason.

II. COMMON MISTAKES AND INSTITUTIONAL CONCERNS OBSERVED BY FORMER ADJUDICATORS

A. Misconstruing the Respondent's Burden as License to Reweigh

Amici are particularly concerned by a recurring analytic error among BIA adjudicators: the belief that because the respondent bears the burden of proof, the BIA must independently assess whether that burden was met—regardless of whether the appealing party has identified any error. In *amici*'s experience, this view has led some BIA members to effectively insulate DHS from waiver, treating the burden as a perpetual invitation to reweigh the record.

This view gained temporary traction in *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) (hereinafter "*A-C-A-A- I*"), issued under former Attorney General Barr, which held that the BIA could not affirm a grant unless it independently concluded that the burden was met. That decision was vacated in 2021 by Attorney General Garland, who restored the BIA's discretion to recognize waiver and to rely on trial-level findings when DHS fails to challenge them properly. *See Matter of A-C-A-A-*, 28 I&N Dec. 351 (A.G. 2021). Despite this, *amici* observed that *A-C-A-A- I* continues to influence decision-making in practice, if not in name.

B. The BIA's Selective Approach to Waiver

While respondents—particularly *pro se* respondents—are routinely penalized for failing to preserve issues on appeal, DHS is often given a pass. In *amici*'s experience, this disparity is stark. DHS briefs frequently fail to cite the clear error standard or to apply it in any meaningful way. Yet the BIA often crafts arguments on DHS's behalf, treating a boilerplate "the IJ erred" assertion as sufficient to justify reversal.

This selective enforcement of waiver standards erodes the credibility of the appellate process. The BIA cannot purport to act as a neutral adjudicator while overlooking briefing failures by one party and enforcing them strictly against the other. The regulation at 8 C.F.R. § 1003.3(b) is clear: the appealing party must identify the error with specificity. DHS, particularly as a represented party, must be held to that standard.

C. The Danger of Factfinding on Appeal

Amici also observed a growing tendency among the BIA to engage in appellate factfinding. This includes introducing credibility concerns not raised below, emphasizing facts the IJ deemed immaterial, and downplaying core findings without explanation. These practices violate 8 C.F.R. § 1003.1(d)(3)(iv), which expressly bars the BIA from engaging in

factfinding on appeal. The 2002 Rulemaking made clear that the Board "merely has the authority to reverse erroneous fact findings and no authority to correct them." 67 Fed. Reg. at 54890.

In *amici*'s collective view, this trend reflects an erosion of deference and a disregard for institutional roles. The BIA is not equipped to perform the fact-intensive assessments that IJs undertake daily. Replacing deference with disagreement invites inconsistency, delays, and injustice—particularly in CAT cases, where lives may be at stake.

To be sure, the clearly erroneous standard does not mean that immigration judges always get it right or are deserving of overweening deference. What the standard means, though, is that the appellant—and the Board—must show that a clear mistake has been made with the trial record. That showing is not impossible—immigration judges are not perfect—but the Board must adhere to its role and require appellants to make that showing with more than cherry-picking, as happened here.

III. THE BIA ERRED IN THIS CASE BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE IJ

Even if this Court were to set aside broader institutional concerns, the BIA's decision in this case cannot stand. The IJ's finding that Petitioner is more likely than not to face torture if removed to El Salvador

was supported by detailed record evidence, logical inferences, and a clear application of the CAT standard. The BIA reversed that finding not because it was clearly erroneous, but because it disagreed with the IJ's assessment of the evidence.

That is not the BIA's role. As discussed, a finding is not clearly erroneous simply because another interpretation is plausible. *See Anderson*, 470 U.S. at 574; *Cooper v. Harris*, 581 U.S. 285, 293 (2017). The IJ's conclusion rested on unrebutted reports documenting systemic torture in Salvadoran detention facilities, including beatings, electrocution, and deaths caused by blunt force trauma. She further found that Petitioner was especially vulnerable to mistreatment given his public identification in U.S. indictments as gang-affiliated—information readily available to Salvadoran authorities.

The BIA failed to engage with these findings in any meaningful way. Instead, it came to its own conclusion, re-weighing the evidence by relying on narrow statistics to claim that the IJ's conclusion was unsupported. Indeed, the panel's language mirrored de novo disagreement rather than deferential clear error review. *See Arreaga*

Bravo v. Att'y Gen., 27 F.4th 182, 187 (3d Cir. 2022) (BIA may not reject IJ's findings simply because it would have decided differently).

The BIA also ignored DHS's failure to preserve its arguments. The Department did not apply or even cite the clear error standard in its notice of appeal. Yet the BIA reversed anyway, treating a generalized assertion of "error" as sufficient. That approach violates 8 C.F.R. § 1003.3(b) and further underscores the institutional double standard *amici* have described throughout.

When the record supports an IJ's predictive finding, and the appealing party has not shown clear error, reversal is improper. The BIA substituted its judgment for that of the IJ and failed to apply the governing standard of review. For that reason alone, its decision should be vacated.

CONCLUSION

For the reasons stated above, the Court should grant the petition for review, vacate or reverse the denial of Petitioner's claim for protection under the CAT, and remand the record for further proceedings.

Dated: April 16, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a) and 32(a)(7)(B) because this brief contains 3,597 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook.

April 16, 2025

/s/ *Ashley Vinson Crawford*
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APPENDIX A

Former Immigration Judges and Members of the Board of Immigration Appeals

Hon. Steven Abrams, Immigration Judge, New York, Varick St., and Queens Wackenhut, 1997-2013

Hon. Silvia R. Arellano, Immigration Judge, Phoenix and Florence, AZ, 2010- 2019

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