

No. 18-72974

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

██████████ U ██████████,
Petitioner

v.

WILLIAM P. BARR,
Respondent.

Review of Board of Immigration Appeals Decision
Agency No. ██████████
(Not Detained)

**BRIEF OF *AMICUS CURIAE* WOMEN'S REFUGEE COMMISSION IN
SUPPORT OF PETITIONER'S PETITION FOR REVIEW AND REMAND**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Women's Refugee Commission states it is a non-profit organization that has no parent company and it has not issued shares of stock.

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INTEREST OF AMICUS CURIAE

The Women’s Refugee Commission (the “Commission”) is a non-profit organization dedicated to improving the lives and protecting the rights of women, children, and youth displaced by conflict and crisis. The Commission works to identify gaps, research solutions, and advocate for change to improve the lives of crisis-affected women and children. The Commission’s goals are for refugee and internally displaced women, children, and youth to be safe, healthy, and self-reliant, to have their human rights respected and protected, and to be empowered to contribute to their own solutions.

For more than two decades, the Commission has monitored immigration detention facilities and migrant children’s facilities operated under what is now the jurisdiction of Immigration and Customs Enforcement (“ICE”), Customs and Border Protection (“CBP”), and the Office of Refugee Resettlement (“ORR”). It has interviewed facility staff, local service providers, asylum seekers, and migrant children about the policies, practices, and conditions of custody that relate to the ability to access protection. The Commission has been monitoring border screening policies, including family separation, for more than four years.

The Commission has participated as *amicus curiae* in cases concerning the separation of families within immigration detention, as well as cases addressing protections for individuals seeking asylum. The Commission’s amicus briefs have

been accepted in numerous federal courts across the country. Last year, the Commission joined in an amicus brief submitted in the *Ms. L v. United States Immigration & Customs Enforcement* litigation challenging the government's removal of children from parents in immigration detention.¹ The Commission also joined in an amicus brief submitted in a case raising questions regarding the government's application of credible fear policies in the asylum process for victims of gender-based violence.²

The Commission is concerned about the effects of the government's immigration policies at the United States border and the separation of families. The government continues to use and apply a restrictive definition of "family," splitting asylum-seeking families at the border, detaining them separately, and dividing their related removal cases. Family separation at the border and the division of related removal cases of asylum-seeking families creates serious due process consequences. It also leads to inefficiencies in the asylum process and inconsistent and unjust outcomes.

¹ See *Ms. L v. U.S. Immigration & Customs Enforcement* ("ICE"), No. 18 Civ. 428 (S.D. Cal.), Brief by *Amici Curiae* in Support of Plaintiff's Habeas Corpus Petition and Complaint for Declaratory and Injunctive Relief, March 2, 2018 (ECF No. 17-3).

² See *Grace v. Sessions*, No. 18 Civ. 1853 (D.C. Cir.), Brief of the Tahirih Justice Center, et al. as *Amici Curiae* in Support of Plaintiffs' Opposition and Motion for Summary Judgment, September 28, 2018 (ECF No. 72-1).

The Commission submits this amicus brief to highlight the real-world implications of separating families at the border and emphasize the importance of maintaining family unity during detention and the asylum-seeking process.

Because petitioner [REDACTED] U [REDACTED] was separated from his family and detained separately from his son, Mr. U [REDACTED] was not able to locate his son and present corroborating evidence of the threat of persecution at his removal hearing. In addition, despite having related asylum claims, the Department of Homeland Security (“DHS”) detained four family members in three different locations and placed them in three sets of removal proceedings before three different Immigrant Judges. Mr. U [REDACTED]’s application was denied, while his son’s application was granted.

Maintaining family unity will facilitate asylum applicants’ ability to access and present relevant evidence and allow Immigration Judges to make rulings based on more complete and developed records. It also will allow Immigration Judges to adjudicate cases more efficiently and fairly and reach more consistent and just results.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party’s counsel authored this brief in whole or part. No party’s counsel contributed money that was intended to fund the preparation or submission of this brief. No person – other

than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund the preparation or submission of this brief.

The Commission contacted the parties to obtain consent to the filing of an amicus brief. Petitioner U [REDACTED] has consented to the filing. Counsel for the government took no position with respect to the filing of the brief.

INTRODUCTION

The United States is at a crossroads – it can continue to enforce immigration policies and practices that result in constitutional violations and inhumane treatment or it can change its policies and practices to protect and promote family unity, due process, and humanitarian considerations. But the disregard for the principle of family unity and the due process rights of asylum-seeking immigrants like petitioner [REDACTED] U [REDACTED] cannot continue.

Mr. U [REDACTED] sought asylum in the United States after he and his family were threatened due to the democratic political activities of his son [REDACTED] [REDACTED]. By seeking refuge in the United States, Mr. U [REDACTED] thought he was protecting his family and giving them a chance at a better life. Instead, when they entered the United States at a port of entry in California, DHS tore Mr. U [REDACTED]'s family apart. Four different family members were sent to three different detention centers around the country and placed in three sets of removal proceedings before three different Immigration Judges.

This forcible separation prevented Mr. U [REDACTED] from presenting at his asylum hearing corroborating evidence from his son [REDACTED] about the threats of persecution in [REDACTED]. Mr. U [REDACTED] did not know where [REDACTED] was being held and no one from the government would assist him in locating [REDACTED]. Despite Mr. U [REDACTED]'s request for a continuance so that he could find [REDACTED], who would have provided supporting documentation and testimony, the Immigration Judge denied his request. As a result, Mr. U [REDACTED] was unable to present all probative evidence at his hearing in violation of his due process right to a full and fair hearing. Ultimately, the Immigration Judge rejected Mr. U [REDACTED]'s asylum application, finding him not to be credible.

The forcible separation of Mr. U [REDACTED] from his family also resulted in the separate processing of their asylum claims, creating inefficiencies in the process and inconsistent and unfair results. Despite having related asylum claims based on the same underlying facts, Mr. U [REDACTED]'s case was processed and adjudicated separately from his son's case. Mr. U [REDACTED]'s claim was denied, while his son's claim was granted.

The government's policy and practice of applying a restrictive definition of "family" and forcibly splitting, separately detaining, and dividing the related removal cases of asylum-seeking families is alarming. Mr. U [REDACTED]'s case is but one example of the difficulties separated families face in obtaining and

presenting evidence of the conditions experienced in their home country, risks of persecution, and why asylum is warranted. It also illustrates how the policy and practice of family separation creates tremendous inefficiencies in the asylum process and can lead to inconsistent and unjust results. Linked asylum claims are processed and heard separately, frequently in separate immigration courts in different parts of the country, and disparate outcomes are reached based on the same underlying facts.

Granting Mr. U [REDACTED]'s petition for review and remanding his case to the Board of Immigration Appeals for further proceedings is a step in the right direction toward protecting the fundamental principle of family unity and the due process rights of asylum-seeking families.

FACTUAL BACKGROUND

Mr. U [REDACTED] is a citizen of [REDACTED]. (Certified Administrative Record (“CAR”) 002.) His son [REDACTED] [REDACTED] belonged to the ruling party in [REDACTED] but was eventually ex-communicated after advocating for free and fair elections in the country. (CAR 101-02.)³ As a result of [REDACTED]'s political activities, Mr. U [REDACTED], Mr. U [REDACTED]'s thirteen-year old son T.U., and [REDACTED] have been threatened by the police and criminal agents in [REDACTED]. (CAR 237, 252-

³ [REDACTED] is Mr. U [REDACTED]'s stepson but Mr. U [REDACTED] considers [REDACTED] his son because he raised [REDACTED] from a young age. (CAR 365.)

56, 260, 366.) For example, the police threatened to accuse and convict Mr.

U [REDACTED] of trumped up charges and made clear they knew where T.U. went to school, what sports he played, and other details of his family life – implying their ability and willingness to hurt Mr. U [REDACTED]'s immediate family. (CAR 81.)

In response to these threats, Mr. U [REDACTED], along with [REDACTED], T.U., and [REDACTED]'s wife, fled to the United States, where they presented at the San Ysidro, California port of entry on October 18, 2017 to seek asylum. (CAR 342, 363.) During his intake and evaluation by DHS, Mr. U [REDACTED] consistently told DHS that his asylum claims were related to his sons' claims – [REDACTED] and T.U. – and he explained to DHS officers that [REDACTED] had possession of all his supporting documentation. (CAR 304, 318, 325, 365-66.)

Nonetheless, despite having related asylum claims, DHS separated the family and sent the four family members to three separate detention centers: Mr. U [REDACTED] was sent to the Otay Mesa Detention Center; [REDACTED] and his wife to the Adelanto Detention Center; and Mr. U [REDACTED]'s minor son T.U. was separated from his father, rendered unaccompanied, and transported alone to an Office of Refugee Resettlement shelter in Chicago, Illinois. (CAR 54, 96, 220,

231, 275, 280, 325.) The government also placed them in three different removal proceedings before three different Immigration Judges. (CAR 54, 96, 275.)⁴

On May 8, 2018, Mr. U [REDACTED] appeared for his merits hearing before Immigration Judge Scott Simpson. At the outset of the hearing, Mr. U [REDACTED] requested a continuance to have legal counsel present and also to locate [REDACTED] so that [REDACTED] could testify in support of Mr. U [REDACTED]'s asylum claim. [REDACTED]'s asylum case "involved many of the same issues," and he could provide corroborating evidence for Mr. [REDACTED]'s fear of persecution. (CAR 280.) Judge Simpson made only a cursory inquiry regarding [REDACTED]'s location and the feasibility of bringing [REDACTED] to testify. (CAR 223.) After counsel for the government simply stated that he did "not have any information" on [REDACTED] (CAR 224), Judge Simpson summarily denied Mr. U [REDACTED]'s motion for a continuance, forcing him to proceed without counsel and without [REDACTED]'s testimony even though Mr. U [REDACTED] clearly indicated [REDACTED]'s testimony would have corroborated his claims. (CAR 63, 224.)

⁴ DHS recorded in Mr. U [REDACTED]'s record of determination/credible fear worksheet that Mr. U [REDACTED] specifically asked to include T.U. in his "Form I-870 CF Determination." (CR 359.) Because T.U. had not "been placed in Expedited Removal Proceedings," like his father," DHS stated that T.U. could not be included. (*Id.*)

██████'s testimony also could have addressed Judge Simpson's concerns about Mr. U ██████'s credibility. Ultimately, Judge Simpson denied Mr. U ██████'s petition for asylum because he did not find Mr. U ██████ to be credible. (CAR 58.) In ruling that Mr. U ██████ was not credible, Judge Simpson focused on minor inconsistencies, such as whether it was the police or criminal agents who threatened ██████ at the pool. (CAR 187, 257-58.) ██████'s testimony would have been vital in clarifying the purported discrepancies because at his own hearing, ██████ made clear that both a political officer and a criminal agent threatened him at the pool. (CAR 102.)

But ██████'s asylum hearing took place on April 2018, three hours away in Adelanto before a different Immigration Judge – Judge Ian Simons. (CAR 96-110.)⁵ During his hearing, ██████ explained that his political activity and advocacy for democratic reform led to threats from the police and ruling political party, as well as criminal agents apparently acting at the behest of the ruling party. ██████ also testified that the Ministry of Internal Affairs informed his mother that his

⁵ Judge Simons' decision notes that ██████ testified on "May 8, 2017" (CAR 97), which appears to be a typographical error given that Mr. U ██████ and his family presented at the San Ysidro port of entry on October 18, 2017. (CAR 342.) Elsewhere, the decision indicates that ██████ testified on April 28, 2018 (CAR 101), and his wife testified on April 16, 2018. (CAR 98.)

father is wanted on a warrant. (CAR 102.) Judge Simons found [REDACTED]'s testimony credible and granted his application for asylum. (CAR 110.)

Mr. U [REDACTED]'s hearing was complicated further because he does not speak English and communicated with Judge Simpson through an interpreter. (CAR 220.)⁶ The May 8 hearing transcript reveals that translation difficulties clearly affected Mr. U [REDACTED]'s testimony. (*See generally* CAR 215-78.) Translation problems also affected Mr. U [REDACTED]'s written asylum application, which was “translated” into English by a fellow detainee at the Otay Detention Center who was not a certified interpreter. (CAR 321.)

At the conclusion of his removal hearing, Mr. U [REDACTED] asked Judge Simpson, “If I am deported, will my youngest son [T.U.] be also removed with me?” (CAR 275.) Judge Simpson responded: “I don’t have your son’s case on my docket so I don’t have any authority over your son. My decision will only apply to you.” (*Id.*) Judge Simpson then turned to counsel for the government and asked, “Is there any information you could provide with that?” (*Id.*) The government responded simply, “Your honor, the only information that I have regarding his son is that he indeed in Chicago. He is – he is an unaccompanied

⁶ It is unclear from the transcript of the May 8 hearing whether the interpreter was physically present at the hearing or whether he was translating through the telephone. In every other hearing, the translator appeared telephonically. (CAR 195, 199, 203, 211, 216.)

minor, and he has an upcoming master calendar for August. That's the only information that I could give on him." (*Id.*) Judge Simpson thus informed Mr. U [REDACTED], "So, it just sounds like your son has his own separate case . . . All I can say, sir is I like I said, I don't have his case on my docket. I don't have any authority over his case so I can't tell you one way or another. I just don't know. All I can tell you about is about your case." (CAR 276.)

THE GOVERNMENT'S POLICY AND PRACTICE OF SEPARATING ASYLUM-SEEKING FAMILIES AT THE BORDER

Over the last decade, there has been a shift in the demographics of migrants arriving at the United States border from a majority of adult males seeking employment to families fleeing together seeking protection in the United States.⁷ Unfortunately, instead of protecting and promoting family unity, the government

⁷ See Women's Refugee Commission, Lutheran Immigration and Refugee Service, and Kids in Need of Defense, *Betraying Family Values: How Immigration Policy at the United States Border is Separating Families* (2017) at 1, <https://www.womensrefugeecommission.org/rights/gbv/resources/1450-betraying-family-values> ("*Betraying Family Values*"); Leigh Barrick, *Divided by Detention: Asylum-Seeking Families' Experiences of Separation*, American Immigration Council (Aug. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/divided_by_detention.pdf ("*Divided by Detention*"); United Nations High Commissioner for Refugees, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico* (Washington, DC: UNHCR, October 2015), <http://www.unhcr.org/en-us/about-us/background/56fc31864/women-on-the-run-full-report.html>.

has pursued policies and practices that subject families to separation, which affects not only their well-being but their due process rights.

As an increasing number of families migrate together to the United States, the number of documented cases of family separation have increased.⁸ This increase in family separations is the result, in large part, of the government's implementation of various policies and practices designed to separate families at the border.

For example, on March 7, 2017, then-Secretary of Homeland Security John Kelly confirmed a report that the Trump administration was considering separating families at the border, claiming it would “deter more movement along this terribly dangerous network.”⁹ One step toward accomplishing this goal was ending the Family Care Management Program in June 2017, which allowed families to be released from detention and placed into a program together, connecting them with a case manager and legal orientation to ensure they understood the asylum

⁸ See generally *Betraying Family Values; Divided by Detention*.

⁹ See Daniella Diaz, “Kelly: DHS is considering separating undocumented children from their parents at the border” (March 7, 2017), <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border>.

application process.¹⁰ Under this program, there was a 99.6% appearance rate at immigration court hearings for those enrolled in the program.¹¹

Another step was the government's "zero-tolerance" policy prioritizing the prosecution of certain immigration offenses. This policy was first implemented in July 2017 as a pilot in the El Paso area and then expanded nationally in May 2018.¹² Under "zero tolerance," CBP was required to refer any migrant attempting to cross into the United States without authorization, including asylum-seeking families, for criminal prosecution. To implement this policy, when families were apprehended together, DHS would separate the family, transferring parents to the custody of the U.S. Marshals Service to await prosecution for immigration offenses, while transferring their children to the care of ORR within the Department of Health and Human Services ("HHS").¹³

In February 2018, the American Civil Liberties Union filed a class action suit in federal district court, *Ms. L. v. ICE*, No. 18 Civ. 0428 (S.D. Cal.),

¹⁰ See Amrit Cheng, Fact-Checking Family Separation (June 18, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/fact-checking-family-separation>.

¹¹ *Id.*

¹² Department of Homeland Security, Office of the Inspector General, *HHS-OIG Issue Brief*, OEI-BL-18-00511 (January 2019) at 3-4, <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>.

¹³ *Id.*

challenging the government's family separation practices. The Commission filed an amicus brief in that action. On June 26, 2018, the court preliminarily enjoined the government from continuing to separate parents in immigration custody from their minor children and required reunification of families already separated. *Ms. L. v. ICE*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (granting motion for class-wide preliminary injunction).¹⁴

The total number of children who have been separated from a parent or guardian by immigration authorities is not known. Following the court's preliminary injunction in the *Ms. L.* litigation, pursuant to court order, the government identified 2,727 children who were separated from their parents.¹⁵ However, the government has acknowledged that thousands of children may have been separated before the court-required accounting.¹⁶

At the time, the government instituted its "zero-tolerance" policy and increased practice of separating of families at the border, it had no system in place

¹⁴ On June 26, 2018, the court also granted the plaintiffs' motion for class certification. *See Ms. L. v. ICE*, No. 18 Civ. 0428, 2018 WL 8665001 (June 26, 2018). Following the court's November 15, 2018 approval of a final settlement of a portion of the *Ms. L.* litigation and two other cases that challenged the DHS family separation practice, the preliminary injunction entered on June 26, 2018 remains in place. *See Ms. L. v. ICE*, No. 18 Civ. 0428 (S.D. Cal. November 15, 2018) (Order Granting Final Approval of Class Action Settlement) (ECF No. 321.)

¹⁵ *HHS-OIG Issue Brief* at 1.

¹⁶ *Id.*

to identify and track separated children or to facilitate communication between parents and separated children. As the court in the *Ms. L* litigation concluded:

The government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainees' release, at all levels—state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as property. Certainly, that cannot satisfy the requirements of due process.

Ms. L v. ICE, 310 F. Supp. 3d at 1144.

Today, there still is no meaningful system to track families who are separated at the border or to facilitate communication between them.¹⁷ And beyond the injunction in the *Ms. L* litigation, government agencies have little policy guidance on family unity principles and separation.¹⁸ Indeed, in many cases, families are not identified as families because DHS has adopted a very

¹⁷ *The Department of Homeland Security's Family Separation Policy: Perspectives from the Border: Hearing Before the House Committee on Homeland Security: Subcommittee on Border Security, Facilitation and Operations* (Mar. 26, 2019) (Written Testimony of Michelle Brané, Director, Migrant Rights and Justice Program, Women's Refugee Commission) at 11, <https://www.womensrefugeecommission.org/images/zdocs/House-Committee-on-Homeland-Security-Written-Testimony-of-Michelle-Brane-3-22-2019.pdf> (“*The Department of Homeland Security's Family Separation Policy: Perspectives from the Border* (Written Testimony of Michelle Brané)”).

¹⁸ *Betraying Family Values* at 4.

restrictive definition of “family” to mean only parents or legal guardians accompanied by a child or children under the age of 18.¹⁹ This restrictive definition means that DHS does not consider married adults, grandparents and grandchildren, parents and adult children, or aunts and uncles to be “family.”²⁰ There are no standards to protect the unity of families other than what CBP defines as a “family unit” – a parent or legal guardian and their minor children.²¹ Consequently, families composed of spouses or partners, adult children, siblings, aunts, uncles, or grandparents traveling together do not receive the designation of a “family unit” and do not receive any special consideration for the preservation of their family.²² As a result, asylum-seeking families often are separated at the border, and the government does not make a consistent effort to keep their cases connected, as Mr. U [REDACTED]’s experience demonstrates.²³

Once families are separated, it is extremely difficult for individuals to locate or communicate with their family members as no meaningful tracking or

¹⁹ *Id.* at 5.

²⁰ *Id.* at 5.

²¹ See U.S. Customs and Border Protection, *Southwest Border Migration FY 2019*, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration>; see also *Betraying Family Values* at 5.

²² *Betraying Family Values* at 5.

²³ See *Betraying Family Values* at 11, 13; *Divided by Detention* at 18-20.

communication system for separated family members exists.²⁴ The agencies within DHS, including ICE, CBP, and ORR, do not have shared databases. And although there is a process for those agencies to share data, information relating to separated family members often is not transmitted – again, the precise situation Mr. U [REDACTED] experienced.²⁵ Instead, divided families must navigate an intricate web of government agencies that may be involved in their cases.²⁶

Although much national attention has been focused on the forced separation of parents and their minor children, as a result of the government’s narrow definition of “family” and “family unit,” the practice of separating asylum-seeking families at the border remains a significant concern. The lack of a meaningful system to track family members or facilitate communication increases further the challenges asylum applicants face in presenting and supporting their claims. Once family members are separated and sent to different detention centers, their related asylum claims likely are to be separated and will need to be pursued individually.²⁷ Because of challenges in locating and communication separated family members,

²⁴ *The Department of Homeland Security’s Family Separation Policy: Perspectives from the Border* (Written Testimony of Michelle Brané) at 11.

²⁵ *Id.* at 5.

²⁶ *Id.* at 4; *Divided by Detention* at 18.

²⁷ *Betraying Family Values* at 13; *Divided by Detention* at 18-19.

individuals may not be able to obtain and present records and testimony to corroborate their asylum claims.²⁸

Mr. U [REDACTED]'s case presents a salient example of the system's current dysfunction and the constitutional issues it creates.

ARGUMENT

The government's practice of separating asylum-seeking families at the border raises serious due process concerns because, as in the case of Mr. U [REDACTED], they may be denied the ability to present evidence to support their asylum claims. The practice of separating asylum-seeking families without coordinating their cases also creates inefficiencies in an already back-logged system, leading to inconsistent and unjust outcomes.

I. FAMILY SEPARATION OF ASYLUM-SEEKING FAMILIES CREATES SERIOUS DUE PROCESS CONSEQUENCES

Immigrants "facing deportation from this country are entitled to due process rights under the Fifth Amendment." *Walters v. Reno*, 145 F.3d 1032, 1037 (9th Cir. 1998). Due process in immigration proceedings includes the right to "present testimony and other evidence in support of [that] application." *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926 (9th Cir. 2007).²⁹ The Immigration and Nationality

²⁸ *Betraying Family Values* at 13-14; *Divided by Detention* at 18-19.

²⁹ See also *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (en banc) ("A vital hallmark of a full and fair hearing is the opportunity to present evidence and

Act (“INA”) codifies the right to present evidence. *See* 8 U.S.C. § 1229a(b)(4); *Baires v. INS*, 856 F.2d 89, 91 (9th Cir. 1988) (the INA guarantees immigrants a reasonable opportunity to present evidence on their behalf). Unlike an Article III judge, an Immigration Judge “is not merely the fact finder and adjudicator but also has an obligation to establish the record.” *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002).

Mr. U [REDACTED]’s case demonstrates how the government’s narrow definition of “family” and current practice of separating asylum-seeking families can interfere with an asylum applicant’s due process right to present his or her case. During his initial interview with CBP, Mr. U [REDACTED] explained that “he left his country because his son is a politician and that he and his son were being persecuted by the [REDACTED] government.” (CAR 304.) Mr. U [REDACTED] also emphasized that his asylum claims were related to his sons’ claims – [REDACTED] and T.U. – and explained to DHS officers that [REDACTED] had possession of all his supporting documentation. (CAR 304, 318, 325, 365-66.) Despite these pleas, DHS separated the family and effectively prevented them from communicating with one another. (CAR 89, 92, 269.) Indeed, Mr. U [REDACTED] believed [REDACTED]

testimony on one’s behalf.”); *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (Fifth Amendment guarantees a “full and fair hearing” in removal proceedings).

was detained in Oceanside, when there is no detention center in Oceanside. (CAR 223, 230, 325.)

In his motion to continue his May 8, 2018 merits hearing, Mr. U [REDACTED] specifically identified the need to obtain [REDACTED]'s testimony to present fully his claims for asylum. (CAR 280.) Judge Simpson, however, made only a cursory investigation into [REDACTED]'s location and the feasibility of bringing [REDACTED] to testify when he asked counsel for the government, "is there anything you can tell me about the stepson's case which might have some parallels to this case?" (CAR 223.) After counsel for the government responded, "No, your honor, I don't have any information on the older stepson" (CAR 224), Judge Simpson summarily denied the motion to continue without considering the value of [REDACTED]'s testimony to a fair and appropriate determination of Mr. U [REDACTED]'s case or making any additional effort to locate [REDACTED]. (CAR 224.)

Judge Simpson compounded his error in denying the motion to continue when he denied Mr. U [REDACTED]'s petition for asylum because he did not find Mr. U [REDACTED] to be credible. (CAR 58.) Given that [REDACTED]'s asylum case "involved many of the same issues," [REDACTED]'s testimony could have provided corroborating evidence for Mr. U [REDACTED]'s asylum fear of persecution. (CAR 280.) *See Makonnen v. INS*, 44 F.3d 1378, 1385-86 (8th Cir. 1995) (acts of persecution against immediate family members with similar political views are relevant to

show well-founded fear of persecution). [REDACTED]'s testimony also could have addressed Judge Simpson's credibility concerns. *See Morgan v. Mukasey*, 529 F.3d 1202, 1211 (9th Cir. 2008) ("The testimony of percipient witnesses when an issue is in doubt can remove the doubt; such testimony is far from cumulative."); *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003) (perceived inconsistencies and evasiveness that are the result of faulty or unreliable translation may not be sufficient to support a negative credibility finding).

By denying Mr. U [REDACTED]'s request for a continuance and preventing him from locating his son, who could have provided corroborating testimony, Judge Simpson deprived Mr. U [REDACTED] of his right to a full and fair hearing. *See, e.g., Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075 (9th Cir. 2005) (Immigration Judge's refusal "to permit testimony from" witness who "could have corroborated his claims for relief by recounting past persecution of his family" violated right to fair hearing). Judge Simpson also disregarded his own obligation to develop a full and fair record for Mr. U [REDACTED]. *See Oshodi*, 729 F.3d at 889 (citing *Jacinto v. INS*, 208 F.3d 725, 733-34 (9th Cir. 2000)).

Mr. U [REDACTED]'s case vividly illustrates how separating asylum-seeking families interferes with the ability to present asylum claims fully and effectively. Studies have shown that the vast majority of asylum-seeking families already are at

a disadvantage because they are without legal representation.³⁰ Splitting asylum-seeking families and depriving them of the ability to communicate with family members further deepens this disadvantage. It makes it much more difficult for them to present evidence that may be critical to their cases and address fundamental credibility issues. For example, as in Mr. U [REDACTED]'s case, one separated family member may have the supporting documentation for the entire family, leaving other family members without documentation.³¹ In other instances, separated family members may not know all the details of the asylum claim. Valid asylum claims, like Mr. U [REDACTED]'s, can be jeopardized easily if family members with related claims do not have the ability to remain in contact, communicate, and support their claims.³²

Separation of asylum-seeking families at the border has significant due process consequences, as Mr. U [REDACTED]'s case demonstrates. Mr. U [REDACTED]'s petition for review should be granted and his case should be

³⁰ *Divided by Detention* at 17 (citing Ingrid V. Eagly and Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (December 2015)).

³¹ *Betraying Family Values* at 14.

³² *Betraying Family Values* and *Divided by Detention* present additional examples of how separation of asylum-seeking families at the border affected their ability to present evidence. See *Betraying Family Values* at 14; *Divided by Detention* at 17-20.

remanded to the Board of Immigration Appeals with directions that the Board permit Mr. U [REDACTED] to present additional evidence, including [REDACTED]'s testimony to support his claim for asylum, render new credibility findings, and consider his eligibility for asylum, withholding of removal, and relief under the Convention Against Torture.

II. FAMILY SEPARATION OF ASYLUM-SEEKING FAMILIES IS INEFFICIENT AND CAN LEAD TO INCONSISTENT AND UNJUST OUTCOMES

Forced family separations not only result in due process violations, they also create inefficiencies in the asylum process and can lead to inconsistent and unjust results. Here, four family members with related asylum claims were sent to three different detention centers and placed in three separate sets of removal proceedings before three different Immigration Judges. (CAR 54, 96, 220, 231, 275, 280.) Mr. U [REDACTED]'s asylum claim was denied (CAR 54-64), while his son [REDACTED]'s related claim based on the same set of underlying facts and adjudicated by a different Immigration Judge was granted. (CAR 110.)

Mr. U [REDACTED]'s experience is not an isolated case. DHS makes no effort to identify and track familial relationships or consolidate related petitions. As a result, even though family members may have the same claim for asylum and their cases could be linked or consolidated, they proceed as two separate cases before

two separate Immigration Judges.³³ This separation of cases creates numerous inefficiencies. For example, each Immigration Judge may take testimony, receive exhibits, and review the same set of facts to adjudicate different family members' related asylum claims. This inefficiency is alarming given the backlog of immigrations cases. Currently more than 800,000 immigration cases are pending, with asylum cases making up almost half of the total caseload in the last year – a record 159,590 cases.³⁴ Separating related cases only increases the backlog.

These inefficiencies also can lead to injustice because Immigration Judges may reach inconsistent results based on the same facts, as they did here. Judge Simpson denied Mr. U [REDACTED]'s asylum claim, while Judge Simon approved [REDACTED]'s claim. If the same Immigration Judge had heard the two claims together, both applications likely would have resulted in the same outcome – approved.

Trends in the adjudication of asylum claims vary significantly among Immigration Judges and across geographic regions of the United States and

³³ *Betraying Family Values* at 5, 13; *Divided by Detention* at 17-20.

³⁴ Denise Lu & Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall*, N.Y. Times, Jan 24, 2019, <https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html>; Jennifer Earl, *Asylum requests overwhelm US immigration system: A look at the number*, Fox News, July 15, 2019, <https://www.foxnews.com/us/immigration-system-overwhelmed-asylum-requests-look-at-numbers>.

detention facilities.³⁵ Which Immigration Judge hears an asylum case can have a dispositive effect on whether the claim will be successful. Some Immigration Judges deny roughly 97% of the asylum cases they hear, while others grant asylum 95% of the time.³⁶ Although differences among individual Immigration Judges cannot be eliminated, the DHS has the ability to consolidate related cases so that the facts are presented uniformly to one Immigration Judge, rather than having multiple Immigration Judges reach different conclusions based on the same set of facts.

Consolidating cases arising from a common set of facts – including the cases of separated family members – would promote judicial efficiency and lead to more consistent and just outcomes.

CONCLUSION

Mr. U [REDACTED]'s case illustrates the significant due process consequences and inefficiencies arising from the government's practice of separating asylum-seeking families at the border. Petitioner [REDACTED] U [REDACTED]'s petition for review should be granted and his case should be remanded to the Board of

³⁵ *Divided by Detention* at 20.

³⁶ Transactional Records Access Clearinghouse, Judge-by-Judge Asylum Decisions in Immigration Courts: FY 2013-2018, <https://trac.syr.edu/immigration/reports/judge2018/denialrates.html>. Transaction Records Access Clearinghouse ("TRAC") is a research organization affiliated with Syracuse University. See <https://trac.syr.edu/aboutTRACgeneral.html>.

Immigration Appeal with instructions to permit Mr. U [REDACTED] to present additional evidence, including [REDACTED]'s testimony, render new credibility findings, and consider Mr. U [REDACTED]'s eligibility for asylum, withholding of removal, and relief under the Convention Against Torture.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I am counsel for *Amicus Curiae* Women's Refugee Commission.

This brief contains 5,496 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

I certify that this brief is an amicus brief and complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5).

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2019, I electronically filed the foregoing Brief of *Amicus Curiae* Women's Refugee Commission in Support of Petitioner's Petition for Review and Remand with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate 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.

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