No. 20-2078; 19-1408

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

B.C., *Petitioner*

v.

ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

On appeal from the Board of Immigration Appeals

BRIEF OF *AMICI CURIAE* IMMIGRANT JUSTICE AND FAITH ORGANIZATIONS, IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amici* certifies that *Amici Curiae* are registered non-profits and have no parent corporations, nor does any publicly held corporation own 10% or more of their stock.

Dated: August 31, 2020

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Rule 29(a), Federal Rules of Appellate Procedure, *Amici Curiae*, immigrant justice and faith organizations, have obtained consent from all parties to submit this brief in support of Petitioner. *Amici* are groups that have provided direct services to detained noncitizens in Pennsylvania, and across the United States. They have developed expertise in asylum law, immigration detention, detention conditions, and supporting detained noncitizens who are unrepresented by counsel. All have an interest in the just administration of the country's immigration courts, equal treatment of non-English speakers, and a fair chance for *pro se* asylum seekers to make their claims. *See* Appendix A for a complete list of *Amici Curiae* organizations and selected individual statements of interest.

Pursuant to Rule 29(a)(4)(E), F.R.A.P., counsel for *Amici Curiae* confirms that neither a party nor a party's counsel to this case has authored this brief in whole or in part. This brief was authored by listed counsel, Matthew Lamberti, with support from the signatories. No person or organization contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This case presents a fact pattern that *Amici* organizations have observed before: a detained immigrant, who does not speak English as his/her first language, and who does not have an attorney, is denied asylum owing more to the obstacles the adjudication system presents, than to the merits of his/her claim. *Pro se* detainees face serious barriers to justice at every stage of interaction with the immigration system. These barriers include a lack of access to phones, medical services, law libraries, and their own property. Each of those challenges is compounded when the noncitizen also faces a language barrier. In immigration court proceedings, these barriers can amount to, or contribute to, a denial of due process. For this reason, Immigration Judges (IJs) owe detained, *pro se* asylum applicants a duty to administer proceedings in a fair manner, that acknowledges the realities of immigration detention. Similarly, the Board of Immigration Appeals (BIA) must factor a *pro se* Respondent's detention into their analysis of what evidence is "reasonably available" to asylum seekers, and whether a lack of access to experts, research, mail, and other resources affects his/her attempts to corroborate a claim with supporting evidence.

ARGUMENT

I. DETAINED, PRO SE ASYLUM SEEKERS FACE HURDLES IN PRESENTING EVIDENCE TO SUPPORT THEIR CLAIMS

The Department of Homeland Security (DHS) operates a vast immigration detention system, operating or contracting with many types of facilities to detain noncitizens. ICE detains noncitizens within a network of nearly 200 facilities, including family detention centers, county prisons, privately-operated facilities, and facilities overseen by ICE. U.S. Dept. of Homeland Sec., Office of Inspector General, *Early Experiences with COVID-19 at ICE Detention Facilities*, June 18, 2020, OIG-20-42, at 2. By early 2019, the number of noncitizens detained on a daily basis exceeded 48,000. *Detained Immigrants and Access to Counsel in Pennsylvania*, Penn State Law Center for Immigrants' Rights, October 2019, at 5. In response to the current COVID-19 pandemic, ICE released 1,137 detainees for health-related reasons between March 17 and May 5, 2020. DHS OIG, *Early Experience with COVID-19*, OIG-20-42, *supra*, at 8. DHS has no uniform detention standards governing procedures such as access to mail or personal property, or provision of legal information to individuals in these facilities. Rather, since 2000, DHS has promulgated several sets of detention standards. U.S. Dept. of Homeland Sec., Immigration & Customs Enf't, *National Detention Standards for Non-Dedicated Facilities*, Revised 2019, at i. The most recently-issued standards, the 2019 National Detention Standards for Non-Dedicated Facilities (NDS), apply only at designated facilities, including York County Prison. All revisions to the Detention Standards continue to mirror a corrections-based model, and have been

critiqued as ill-suited for a civil detention system.[1] Further, in *Amici*'s experience, and as has been widely documented, the biggest shortcoming of all sets of standards is that they are aspirational in nature. Standards remain unenforced in detention centers all over the country.[2]

Thus, noncitizens in DHS custody who cannot retain counsel must navigate a detention system fraught with hurdles. Multiple obstacles prevent detained individuals from gathering evidence and other legal support to present their claims before the immigration court. The Supreme Court has recognized the difficulties that noncitizens face in collecting support to support their claims. *See Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (finding that detained noncitizens "have little ability" to locate witnesses and records, or otherwise "to collect evidence" to defend themselves against removal charges brought by the Government).

A. ICE detainees face a lack of adequate language access

[1] *ABA Civil Immigration Detention Standards*, American Bar Association, 2012, at 1-2. ("Despite DHS's civil legal authority, the management of the US immigration detention system is based on a criminal detention model… In February 2012, ICE released its revised PBNDS 2011, which continue to be based on ACA standards for pre-trial detention.") *See Reforming the Immigration System: Vol. 2, 2019 Update*, American Bar Ass'n, 2019, at UD 1-20, UD 1-21.

[2] *See*, generally, U.S. Dept. of Homeland Sec., Office of Inspector General, *Concerns About ICE Detainee Treatment and Care at Four Detention Facilities*, June 3, 2019, OIG-19-47; *Lives In Peril: How Ineffective Inspections Make ICE Complicit in Detention Center Abuse*, National Immigrant Justice Center, Oct. 2015, https://immigrantjustice.org/lives-peril-how-ineffective-inspections-make-ice-complicit-detention-center-abuse.

The most recent ICE detention standards state that facilities have an obligation to all limited-English proficient (LEP) individuals, extending "to all aspects of detention, including but not limited to intake, disciplinary proceedings, placement in segregation, sexual abuse and assault prevention and intervention, staff-detainee communication, mental health, and medical care." *ICE National Detention Standards*, Rev'd 2019, *supra*, at ii. However, the standards also seem to acknowledge that language access may not be evenly distributed to those who speak non-majority languages: "Generally, all written materials provided to detainees must be translated into Spanish and other frequently encountered languages. Oral interpretation or other language assistance must be provided to any detainee who speaks a language in which written material has not been translated or who is illiterate." *Id*. at iii.

Amici have worked with many asylum-seekers for whom the second step of providing oral interpretation for speakers of less common languages simply never happens. The Office of Inspector General (OIG) has also found that language access "problems began at intake where facility staff failed to use interpretation services for detainees who did not speak English. Further, according to the PBNDS, when detainees arrive, they are supposed to receive the *ICE National Detainee Handbook* and a local facility detainee handbook. These handbooks cover essential information, such as the grievance system, services and programs,

medical care, and access to legal counsel." U.S. Dept. of Homeland Sec., Office of Inspector General, *Concerns About ICE Detainee Treatment and Care at Detention Facilities*, December 11, 2017, OIG-18-32, at 4. At three facilities, detainees did not always receive these handbooks in a language they could understand, preventing them from understanding the basic facility rules and procedures. *Id*.

The lack of access to rules, procedures, and forms due to incomplete language services in the detention centers extends into detained-docket courtrooms. In 2019 the ABA noted: "The lack of qualified interpreters to service the ever-expanding diverse language needs of the immigration courts continues to raise due process concerns. Without reliable, accurate, and consistent translation services, noncitizens, who in many instances are already tasked to represent themselves in these complex legal proceedings, have little or no ability to meaningfully participate. This problem is particularly pronounced for noncitizens whose primary language is uncommon or a regional indigenous dialect, but can also arise in the context of faulty translations of more common languages." *Reforming the Immigration System: Vol. 2, 2019 Update*, American Bar Ass'n., 2019, at UD 2-25.

B. ICE detainees do not have adequate access to phone calls

Amici have experienced challenges in communicating with clients, or detained community members, by phone. Detainees seeking to gather evidence, contact witnesses, or obtain counsel often need to do so by phone, particularly in the time-compressed context of detained removal proceedings. Yet detainees must run a gantlet to make phone calls. Because cell phones are contraband, it may take detainees time just to locate a relevant phone number. In addition, detainees must request access to make one of the free calls permitted under the 2019 ICE detention standards, including calls to *pro bono* legal service providers and the immigration court. The current standards state that generally such permission should be granted within 8 hours, and no more than 24 hours. Facilities themselves may place some limitations on permitted hours, frequency, and duration of such calls. *ICE National Detention Standards*, Rev'd 2019, *supra*, at 159-160.

The DHS OIG has recently found that detention facilities do not always maintain the access recommended in the NDS. In December, 2017, for example, the OIG found, during a routine inspection, that telephones in one housing area were non-functional, and that another detention facility provided a number to the OIG hotline that produced a restricted access message. DHS OIG, *Concerns About ICE Detainee Treatment and Care at Detention Facilities*, OIG-18-32, *supra*, at 5. *Amici* and other legal service providers have noticed such gaps in phone access, even for detainees who have legal representation. An attorney who represents

detainees at York County Prison told interviewers from Penn State's Center for Immigrants' Rights that "phone conversations were impossible. There was no way, essentially, for someone to get in contact by telephone with someone inside the facility." *Detained Immigrants and Access to Counsel*, Penn State Law, *supra*, at 19.

C. ICE detainees cannot easily access their own belongings stored in property rooms in prison-like facilities

The reality of ICE detention compromises a detainee's ability to access personal property, such as identity documents, in much the same way that access to telephone calls is hindered by practical hurdles. The 2019 NDS state that excess personal property (more than a detainee can keep in his/her housing area as personal possessions) will be stored "in the facility's personal property storage area… Upon request, facility staff will provide the detainee with a copy of the document." *ICE National Detention Standards*, Rev'd 2019, *supra*, at 28.

As shown in Petitioner's submitted evidence, following this guidance did not produce his requested Southern Cameroons National Council (SCNC) card. *B. C. v. Barr Administrative Record* (Henceforth "A.R.") at 637-641. Between April 11 and May 28, 2018, Petitioner made four separate requests, specifying the piece of property he sought. The response from York County Prison, his custodian, was that

he should ask ICE, his opposing party in the removal case. When he followed this advice, ICE officers told him he should ask the York County Prison property room. *Id*.; *Petitioner's brief* at 11.

Amici, working with detainees and families of detainees at approximately ten different immigration detention sites around the country, encounter similar stories on a regular basis. Assisted by counsel, detained noncitizens can typically collect personal property or copies of documents by filling out a form; sometimes there is a delay before property can be collected. Unrepresented, detainees are left to submit multiple written requests to multiple actors, sometimes without receiving a reply at all. The detainees have few mechanisms (other than the IJ taking an active role to develop the record; see Section II.D, *infra*) to enforce their right to personal property, and some items like government documents and IDs may be considered contraband and even harder to obtain. *A.R.* at 489 (Trial Attorney noting that death certificate and family IDs mailed to Petitioner at York County Prison had been re-routed by the mail room to her office). Given that approximately 80% of detained noncitizens are unrepresented, the practical hurdles to accessing one's own property, which may include crucial evidence, are so severe as to implicate due process. *Reforming the Immigration System: Vol. 2, 2019 Update,* American Bar Ass'n., 2019, at UD 5-7; *Detained Immigrants and Access to Counsel in Pennsylvania*, Penn State Law Center for Immigrants' Rights, October 2019, at 3.

D. ICE detainees receive inadequate medical care to identify and treat conditions such as PTSD

Several recent reports by the DHS Office of Inspector General reveal a lack of adherence to ICE's own detention standards on provision of medical services. In 2017, the OIG performed unannounced inspections at six detention facilities. One finding was that deficient medical care was sometimes related to the problems with language access, discussed in Section I.A, *supra*. The OIG report notes that language barriers prevented detainees from understanding medical staff, medical staff did not always use telephonic interpretation services, even if they were available, some forms were available only in English, and staff did not adequately explain the content of English forms to non-English speaking detainees. "As a result, detainees may not have been providing enough information about their medical conditions to ensure adequate medical treatment while in detention." DHS OIG, *Concerns About ICE Detainee Treatment and Care at Detention Facilities*, OIG-18-32, *supra*, at 4-5. The OIG also interviewed detainees who reported long wait times for the provision of requested care, and poor documentation of detainee requests for care. *Id*. at 7.

Another OIG report in 2019, which focused on four detention centers, found inadequate medical care, deficient clothing and personal hygiene items to promote health, and unsanitary conditions. U.S. Dept. of Homeland Sec., Office of

Inspector General, *Concerns About ICE Detainee Treatment and Care at Four Detention Facilities*, June 3, 2019, OIG-19-47, at iii, 5, 12. The 2019 report further noted a lack of outdoor recreation space, which may be related to reduced mental health and welfare among detainees. *Id*. at 7. The relationship between detention, access to medical care, and mental health is particularly serious for asylum-seekers, who may have suffered severe trauma in their home country and during their travel to the United States. A lack of access to adequate mental health care has an outsized effect on detained asylum-seekers raising their persecution claims in an Immigration Court, a phenomenon *Amici* have observed in every detention center where they provide services.

In two Georgia detention centers, for example, detainees were not aware of *any* provision of mental health services, and were afraid to report mental health concerns out of fear that they would be placed in segregation. "Many immigrants spoke about how they felt depressed or had trauma from torture or other incidents in their home countries. However, the men said they were afraid to reach out for mental health for fear that they would be taken away, heavily drugged, or placed in segregation like others who had made mental health requests in the past. A detained immigrant from Guatemala added, 'I have no idea if there are mental health services here, nor do I know how to file a grievance.'… A male detained immigrant from Nepal expressed his concern by stating, 'Many detained

immigrants here have emotional issues and need more assistance.'" *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers*, Penn State Law Center for Immigrants' Rights and Project South, May 2017, at 36.

Several immigrants interviewed in the Georgia facilities reported no screening for mental health upon arrival at the detention centers, and were thus unaware of the existence of any treatment options. More disturbing, "segregation is also forced on individuals with mental health issues. These individuals are thrown into segregation without being provided proper psychiatric medications or the appropriate psychological treatment." *Id*. at 49. It is the experience of *Amici* that such practices are common, whether the facility is privately run, a county prison, or an ICE facility. The negative effects of prison generally, and behavioral isolation in particular, are particularly pronounced on individuals who were imprisoned and/or tortured in their home countries. As Petitioner's brief and the brief of *Amicus Curiae* the Public Justice Center note, re-traumatization of this type also affects an asylum-seeker's capacity to relate their own traumatic past. *Petitioner's brief* at 48; *See*, generally, *Brief of Amici Curiae Black Alliance for Just Immigration & Public Justice Center*.

II. DUE PROCESS REQUIRES ROBUST STATUTORY AND DUE PROCESS PROTECTIONS FOR DETAINED*, PRO SE* RESPONDENTS IN IMMIGRATION PROCEEDINGS

A. The Board of Immigration Appeals (BIA) must factor a *pro se* respondent's detention into the analysis of whether evidence is "reasonably available"

Petitioner submitted a timely motion to reopen to the BIA, based on newly available evidence that his *pro bono* attorney had helped him obtain, post-hearing. Among the newly obtained evidence was Petitioner's SCNC membership card. The BIA has jurisdiction to grant such a motion where the evidence offered "is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(3)(ii). The Third Circuit has not specifically addressed the question of whether documents that are kept from an immigration court Respondent by his/her custodian are "reasonably available" for purposes of a motion to reopen[3]. A plain reading of the regulation asks whether the evidence in question "could have been presented" at the former hearing. In Petitioner's case, given his four efforts to obtain the SCNC card, and his submission to the IJ documenting his efforts, this evidence could not have been presented at the time of his individual hearing.

[3] The Third Circuit has found, in the context of corroboration, that requiring an asylum applicant who has been gone from her country for four years, and detained throughout proceedings, to produce evidence of her party membership may be unreasonable – particularly where the IJ did not advise the applicant that the absence of such corroborating evidence would lead to a denial of her claim. *Mulanga v. Attorney Gen. of the U.S.*, 349 F. 3d 123, 136.

Other circuits have found that an asylum applicant's circumstances, particularly the circumstance of detention, play a role in the "reasonably available" analysis. For example, the Ninth Circuit Court of Appeals affirmed a BIA denial of a similar motion to reopen, noting that the Respondent "did not detail what efforts, if any, he took to obtain the documents. Nor, in his original motion to the BIA, did he present his current justification that he lacked internet access while detained, or otherwise provide concrete support for his inability to obtain the documents earlier." *Garcia-Gaday v. Barr*, 785 F. App'x 400, 402 (9th Cir. 2019). Similarly, the Tenth Circuit affirmed the BIA's denial of a motion to reopen where the detained respondent claimed that detention prevented his gathering of evidence, but did not state with specificity why the evidence could not be obtained previously. The Court further found that the Respondent did not state specifically what items in his laptop were relevant, or how they would change the outcome of the case. *Lavrenov v. Barr*, 804 Fed. App'x 938, 942 (10th Cir. 2020).

Petitioner's motion to reopen at the BIA based on newly-available evidence stated with specificity what evidence he sought to submit, why that evidence was impossible to submit at the prior hearing, and how that evidence would affect the IJ's decision. Petitioner's motion to reopen provided a copy of the SCNC card and specifically referred to his prior attempts to obtain it as evidence. Petitioner's motion also detailed the multiple steps that even his *pro bono* attorney had to take

to obtain the card at the appeal stage. *A.R.* at 26-39. As Petitioner's brief explains, this membership card was crucial to the Immigration Judge's analysis of both the evidentiary burden for asylum seekers, and his credibility analysis. *Petitioner's brief* at 21-23. Given the IJ's many comments on the record about country conditions and the SCNC, any proof of membership would have been relevant to a claim of past persecution or well-founded fear of future persecution. In addition, the IJ stated as part of his credibility analysis, "Moreover, Respondent did not submit evidence of his membership in either organization." *A.R.* at 428. In fact, Petitioner had documented to the IJ his multiple attempts to obtain such evidence, located in the same building where the IJ sat, and *pro bono* counsel catalogued those attempts along with his own, to the BIA.

The due process rights codified in the removal statute include "a reasonable opportunity… to present evidence on the alien's own behalf." 8 U.S.C. § 1229a(b)(4)(B). The right to present evidence, then, must not be merely theoretical, because it requires a "reasonable opportunity" to obtain and present that evidence. For detained, *pro se* applicants like Petitioner, the right to obtain evidence may implicate the institutional barriers discussed in Section I, *supra*. Particularly where a *pro se* asylum applicant has documented their multiple, good-faith efforts to obtain key, corroborating evidence, it is fundamentally unfair for an Immigration Judge to impugn credibility or deny protection based on a lack of corroborating

evidence. Similarly, the BIA did not analyze Petitioner's argument as to the SCNC's card "reasonable availability" at the time of the hearing, nor did they take into account the Petitioner's circumstances in detention.[4] The BIA's failure to consider what "reasonably available" means in the context of detention, *pro se* representation, and language barriers lends weight to Petitioner's claim that the BIA abused its discretion in denying Petitioner's motion to reopen. *Petitioner's brief* at 49.

B. Language barriers at multiple levels of adjudication affect asylum seekers' ability to present their claims

As noted in Section I.A, *supra*, detained individuals who speak rare third languages face hurdles in learning the rules of their facilities, accessing medical care, and presenting their legal claims. As his brief notes, Petitioner had functional capability in English when he presented himself at the border. Once he proceeded in English during that screening interview, however, he felt limited to standard

[4] This court has affirmed that due process requires that noncitizens facing deportation "are provided 'a full and fair hearing' that allows them 'a reasonable opportunity to present evidence' on their behalf." *Abdulrahman v. Attorney Gen.* 330 F.3d 587, 596 (3rd Cir. 2003)(citing *Sanchez-Cruz v. INS*, 255 F.3d 775, 779 (9th Cir. 2001)); *Aff'd Serrano-Alberto v. Attorney Gen.* 859 F. 3d 208, 213 (3rd Cir. 2017). The "reasonable opportunity" must include the right to gather such evidence; *See*, generally, Joshua S. Waldon, *Note: A Right to Gather Evidence: Interpreting Statutory Protections for Detained Immigrants Facing Removal Hearings*, 31 Stan. L. & Pol'y Rev. 103 (2020).

English as the language of all his subsequent proceedings. *Petitioner's brief* at 15, 33; *A.R.* 125.

In *Amici's* experience, speakers of rarer languages have additional hurdles compared with non-English speakers who may speak Spanish, French, or Mandarin. First, it is more likely that such an asylum seeker would be required to use a telephonic, rather than an in-person, interpreter. Nuances of body language, emotion, and facial expression may be lost, and connectivity or volume problems may interrupt testimony. Second, court scheduling may depend on the availability of non-majority language interpreters, a problem particularly acute for those like Petitioner who remain detained throughout their proceedings. Jennifer Medina, *Anyone Speak Ki'che' or Mam? Immigration Courts Overwhelmed with Indigenous Languages*, The NY Times (March 19, 2019). These challenges do not begin at the immigration court stage—problems regarding the availability of adequate interpretation exist at the border, as well. Rachel Nolan, *A Translation Crisis at the Border*, The New Yorker (Dec. 30, 2019). ("The U.S. government claims to provide proper translation at all points in the immigration process, but, in practice, it rarely offers Mayan-language translation at the border or in holding cells.")

In order to work within the system expeditiously, or even out of a desire to please immigration officials, non-English and non-Spanish speakers frequently opt

to proceed in those dominant languages. Petitioner's situation highlights the danger of such constricted options. He worked in detention to improve his standard English so that he could testify in immigration court. *Petitioner's brief* at 30. However, his attempts at oral testimony were cut off when the IJ drew negative inferences from Petitioner's demeanor and speaking style. The IJ suggested that Petitioner's testimony was rehearsed or memorized, and did not allow it to proceed. *A.R.* at 540-588. Further, when the IJ noted discrepancies between Petitioner's asylum interview and court testimony, he discounted Petitioner's explanation that language barrier may have been a factor: "Yes, my English wasn't fluent. I speak, but it wasn't really coming out. But now I practice a lot." *Id*. at 588.

The IJ considered written and oral statements taken from Petitioner over a span of almost seven months, during which Petitioner did not have an interpreter, did not have representation, and did not have adequate access to personal or country conditions evidence. *Petitioner's brief* at 13-15. In his written decision, the IJ noted that Petitioner's I-589 stated facts that Petitioner did not repeat in oral testimony. He noted that Petitioner's Credible Fear Interview and oral testimony provided different explanations for his release from detention in Cameroon. The IJ also noted, repeatedly, his dissatisfaction with Petitioner's demeanor and Petitioner's attempts to present his own testimony. *Id.* at 19; *A.R.* at 422-431.

Amici, who have worked with thousands of detained asylum seekers across the country, have observed similar communication challenges for *pro se* respondents going through removal proceedings in a second language, or with an interpreter. The IJ's credibility analysis never grappled with Petitioner's explanations that standard English is not his first language. Rather, when Petitioner explained that he grew up speaking "our local language," the IJ construed that as merely a variant of standard English, and stated, "Well, I know pidgin English." When an asylum applicant faces hurdles in presenting testimony and other evidence in his/her best language, the resulting imprecision and discomfort may lead the IJ to false conclusions about credibility. *See Brief of Amici Curiae Black Alliance for Just Immigration & Public Justice Center*, Section III.B.

C. Detained, *pro se* applicants generally cannot access evidence and experts to contextualize their claims

The BIA denied Petitioner's Motion to Reopen based on newly available evidence, ruling that both his expert linguistic testimony and his SCNC card were reasonably available during his individual hearing. As explained in Sections I.B and I.C, *supra*, detained, *pro se* noncitizens lack consistent access to crucial resources throughout their immigration proceedings. These resources extend to legal tools such as a law library, the internet, and expert witnesses. Petitioner himself noted to the BIA, in seeking a filing deadline extension, that "I am

detained and I have limited access to the law library and I do not have a lawyer." *A.R.* at 393. Detainees at two detention centers in Georgia reported that access to the law library is severely restricted, and there is no internet access. *Imprisoned Justice*, Penn State Law and Project South, *supra*, at 41-42. Gathering the type of evidence necessary for a robust asylum defense, "from sources including police departments, hospitals, psychologists, government officials, and expert witnesses in the U.S. and foreign countries, can be difficult to obtain even for someone with adequate financial resources, language skills, and legal counsel." Joshua S. Waldon, *Note: A Right to Gather Evidence: Interpreting Statutory Protections for Detained Immigrants Facing Removal Hearings*, 31 Stan. L. & Pol'y Rev. 103, 107 (2020). In Petitioner's case, the difficulty was exacerbated by his language barrier, his lack of financial resources, and the challenge of finding expertise on his own language, which is distinct but lesser-known.

Asylum claims often require extensive research on country conditions and a subject-matter expert to explain important nuances and background to the Immigration Judge. While in theory this kind of expertise existed during Petitioner's removal proceedings, in reality it was not reasonably available to him as long as he remained detained and without representation. Only when he gained *pro bono* representation on appeal was Petitioner able to undertake the challenge of identifying, contacting, preparing, and receiving expert testimony from two U.S.-

based linguists. Similarly, the evidence of deteriorating country conditions for Anglophone-identified political groups in Cameroon was not available to Petitioner during his proceedings before the IJ, both because those conditions have worsened over time, and because of his limited access to a law library and internet searches. *Amici* urge this Court to recognize that the IJ and BIA must take into account a *pro se*, LEP detainee's obstacles in considering whether corroborating or newly-obtained evidence is reasonably available. *See* Section II.A, *supra*.

D. The IJ has a duty to develop the record for *pro se* asylum-seekers

Noncitizens have statutory and due process rights in their removal proceedings. 8 U.S.C. § 1229a(b)(4); 8 C.F.R. § 1240.1(c); *Rodriguez Silva v. INS*, 242 F.3d 243, 247 (5th Cir. 2001). The due process rights contained in the immigration statute encompass a duty for IJs to receive evidence and witness testimony in a removal proceeding. 8 U.S.C. § 1229a(b)(1). Circuit courts have recognized the IJ's duty to develop the record of immigration court proceedings in a fair and impartial manner. *Sankoh v. Mukasey*, 539 F.3d 456, 467 (7th Cir. 2008); *Islam v. Gonzales*, 469 F.3d 53, 55 (2nd Cir. 2006); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 129 & n.14 (1st Cir. 2004).

At a minimum, immigration judges must not be allowed to develop the record in a manner that is biased against or prejudicial to an asylum-seeker. An

essential aspect of an IJ's duty is fairness, that is, an IJ must develop the record in a manner that observes neutrality and is aimed at helping an applicant develop facts essential to the elements of a claim. *Apouviepseakoda v. Gonzales*, 475 F.3d 881, 886 (7th Cir. 2007) (quoting *Kerciku v. INS*, 314 F.3d 913, 918 (7th Cir. 2002)) (Denial of the reasonable opportunity to be heard likely occurs "where a judge 'bars complete chunks of oral testimony that would support the applicant's claims.'"); *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989) ("In the ordinary course ... we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself").

These duties are particularly crucial in an adjudicatory system where many applicants lack access to counsel and do not speak English as a first language. While the immigration statute provides the right for a noncitizen to appear at a removal proceeding with counsel, it simultaneously states that noncitizens do not have a right to court-appointed counsel. *See* 8 U.S.C. § 1229a(b)(4) ("[T]he alien shall have the privilege of being represented, at no cost to the Government, by counsel of the alien's choosing"); *Matter of Gutierrez*, 16 I&N Dec. 226, 228-29 (BIA 1977). It has been the experience of *Amici* that the majority of asylum seekers in detention are indigent and cannot afford private representation.

The IJ failed to properly develop the record in two ways related to Petitioner's submitted, documentary evidence. First, the IJ entirely discounted his brother's death certificate after an FBI forensic analysis came back inconclusive, because the lab did not have a genuine example with which to compare it. The forensic analysis added "No physical evidence of data entry alteration was noted." *A.R*. at 604. The document entered into evidence was signed and notarized, and mailed directly to the Petitioner at York County Prison. It was accompanied by two signed statements from people familiar with the facts of Petitioner's brother's death, both of whom included contact information and expressed their willingness to provide further information if necessary. *Id*. at 623-632. As Petitioner pointed out in his appeal to the BIA, the IJ stated that he would give the certificate "whatever weight," (*Id*. at 508) but he did not refer to this potentially corroborating evidence in his written decision. The IJ's failure to solicit any testimony from Petitioner in regard to the death certificate fell short of his duty to observe neutrality (he heard the Trial Attorney on the issue) and help Petitioner develop a fact essential to his claim.

Second, the IJ failed to develop the record with regard to Petitioner's efforts to obtain his SCNC membership card. Petitioner, acting *pro se*, did what any party could be expected to do in the situation by following the recommended process for obtaining his personal property, documenting his attempts to obtain the property,

and, when the property was not forthcoming, sharing his efforts to obtain it with the Court. It is the experience of *Amici* that immigration judges have several options available to examine evidence, even as late as a final hearing day. On the detained docket, for example, where immigration court and ICE detention facilities are located in the same building, the IJ has the option of asking a corrections officer or the ICE Trial Attorney for assistance.[5]

These failures were relevant to the IJ's final decision both because he noted the Petitioner's failure to corroborate details of his claim, and because he made an adverse credibility determination based on an evidentiary record that excluded key evidence. Both of those findings were affected by the IJ's failure to develop the record with regard to evidence that Petitioner had submitted, or tried to submit. The failure to develop the record with regard to those pieces of documentary evidence only added to the IJ's failure to develop Petitioner's testimony by cutting off the recounting of his claim at several points.

CONCLUSION

For these reasons, *Amici* urge this Court to reverse the decision below, and remand Petitioner's case to the BIA for an asylum hearing that incorporates his

[5] The IJ refers to the corrections officers in the role of courtroom "bailiff" twice in the transcript of proceedings. *A.R.* at 504, 524.

now-available evidence and fully complies with the Immigration Court's standards for due process and fundamental fairness.

Appendix of *Amici Curiae*

American Immigration Council
Washington, DC 20005

American Immigration Lawyers Association
Washington, DC 20005

Casa San Jose
Pittsburgh, PA

Florence Immigrant & Refugee Rights Project
Florence, AZ

National Immigrant Justice Center
Chicago, IL

Northwest Immigrants' Rights Project
Seattle & Tacoma, WA

Unitarian Universalist Congregation of York
York, PA 17403

Statement of Interest of *Amicus* American Immigration Lawyers Association

The American Immigration Lawyers Association ("AILA") is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security (DHS), immigration courts and the Board of Immigration Appeals (BIA), as well as before federal courts.

Statement of Interest of *Amicus* Casa San Jose

Casa San Jose was founded in Pittsburgh in 2013, by the Sisters of St. Joseph of Baden. Casa San Jose has been a resource center for Latinos and other newcomers to Pittsburgh, and empowers the community by promoting self-sufficiency and integration. Relevant to this case, Casa San Jose runs English-language learning programs, and a local bond fund serving families with loved ones detained in the York County and Cambria County prisons. We work with many English language learners, including those who speak primarily indigenous languages from Central America. We have seen first-hand the challenges noncitizens, the great majority of whom lack legal representation, face in navigating the immigration detention system. Those challenges are heightened when there are language barriers, particularly for languages where competent interpretation may not be available. We stand with asylum seekers like Mr. B.C., who is deserving of a full and fair process to make his claim.

Statement of Interest of *Amicus* Unitarian Universalist Congregation of York

The Unitarian Universalist Congregation of York ("UUCY") is a religious organization whose principles include affirming justice and the inherent worth and dignity of every person. UUCY has a long history of supporting justice for individuals whose lives are affected by US immigration policy and procedures. Individual members of UUCY acted as sponsors of petitioner/appellant BC in order to secure his release from ICE detention in the York County Jail during the COVID 19 pandemic. Since his release from detention, petitioner/appellant BC has lived primarily off the charitable giving of members of the UUCY congregation.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,176 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. 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 it was prepared using a Microsoft Word 2016 proportionally-spaced typeface, in size 14 Times New Roman font.

Dated: August 31, 2020

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Rules 28.3(d) and 46.1(e) of the Local Rules of Appellate Procedure, I, Matthew Lamberti, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: August 31, 2020

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CERTIFICATE OF SERVICE

I, Matthew Lamberti, certify that I served the forgoing Amicus brief and attachments electronically via ECF, pursuant to L.A.R. 25.1 and L.A.R. Misc. 113.4, on all parties or their counsel of record through the CM/ECF system.

Dated: August 31, 2020

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CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

Pursuant to Rule 31.1(c) of the Local Rules of Appellate Procedure, I certify that the text of the electronic brief filed with the Court via ECF is identical to the text of the paper copies filed with the Court via Federal Express.

Dated: August 31, 2020

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CERTIFICATE OF VIRUS SCAN

Pursuant to Rule 31.1(c) of the Local Rules of Appellate Procedure, I certify that the PDF version of this brief has been scanned by Webroot antivirus software and no virus has been detected.

Dated: August 31, 2020

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