No. 13-74115

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Nelson ANDRADE-GARCIA,

Petitioner,

v.

Loretta E. LYNCH, Attorney General,

Respondent.

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# BRIEF OF THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND NORTHWEST IMMIGRANT RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

Agency No. 205-937-826

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On Review from Orders of the Immigration Judge and
Department of Homeland Security


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## CORPORATE DISCLOSURE STATEMENTS

I, Matt Adams, certify that the Northwest Immigrant Rights Project is a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporations which own 10% or more of its stock.

Dated: February 29, 2016

s/ *Matt Adams*
Matt Adams

I, Trina Realmuto, certify that the National Immigration Project of the National Lawyers Guild is a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporations which own 10% or more of its stock.

Dated: February 29, 2016

s/ *Trina Realmuto*
Trina Realmuto

## TABLE OF CONTENTS

**Page**

I. INTRODUCTION AND STATEMENT OF *AMICI*.....1

II. BACKGROUND……3

A. WITHHOLDING OF REMOVAL…….3

B. PROTECTION AGAINST TORTURE……..5

C. REINSTATEMENT OF REMOVAL…….6

III. ARGUMENT……..8

A. THE COURT SHOULD EMPLOY THE SAME STANDARDS OF REVIEW FOR REASONABLE FEAR CLAIMS AS IT EMPLOYS FOR ALL FEAR-BASED CLAIMS……...8

B. THE COURT MUST REJECT RESPONDENT'S INVITATION TO IMPOSE A "FACIALLY LEGITIMATE AND BONAFIDE" STANDARD OF REVIEW TO REASONABLE FEAR DETERMINATIONS……11

IV. CONCLUSION…….17

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

**Page**

### Cases


*Aguilar Gonzales v. Mukasey*, 534 F.3d 1204 (9th Cir. 2008) .....9
*Al-Harbi v. INS*, 242 F.3d 882 (9th Cir. 2001) .....5
*An Na Peng v. Holder*, 673 F.3d 1248 (9th Cir. 2012) .....16
*Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) .....9
*Boumediene v. Bush*, 553 U.S. 723 (2008) .....11
*Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008) .....15
*Castro-Cortez v. INS*, 239 F.3d 1037, 1044 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) .....8
*Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968) .....8
*Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013) .....15
*Edu v. Holder*, 624 F.3d 1137 (9th Cir. 2010) ..... 6, 10, 13
*Garcia v. Holder*, 756 F.3d 885 (5th Cir. 2014) .....10
*Ghebllawi v. INS*, 28 F.3d 83 (9th Cir. 1994) .....9
*Gonzalez-Posadas v. Attorney Gen. U.S.*, 781 F.3d 677 (3d Cir. 2015) .....10
*Gutierrez-Chavez v. INS*, 298 F.3d 8824 (9th Cir. 2002) .....15
*I.N.S. v. Stevic*, 467 U.S. 407 (1984). .....4
*INS v. Abudu*, 485 U.S. 94 (1988) .....13
*INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) ..... 12, 13
*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) ..... 3, 4, 13
*INS v. Doherty*, 502 U.S. 314 (1992) .....13
*INS v. St. Cyr*, 533 U.S. 289 (2001 .....15
*Jean v. Nelson*, 472 U.S. 846 (1985) .....15
*Kliendienst v. Mandel*, 408 U.S. 753 (1972) .....15
*Kucana v. Holder*, 558 U.S. 233 (2010) .....9
*Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2013) .....9, 10
*Marczak v. Greene*, 971 F.2d 510 (10th Cir. 1992) ..... 14, 15
*Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) .....5
*Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) .....15
*Negusie v. Holder*, 555 U.S. 511 (2009) ..... 3, 5, 6
*Noh v. INS*, 248 F.3d 938, 942 (9th Cir. 2001) ..... 15, 16
*Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012) ..... 7, 8, 12
*Padilla-Padilla v. Gonzales*, 463 F.3d 972 (9th Cir. 2006) .....16
*Price v. INS*, 962 F.2d 836 (9th Cir. 1992) .....16
*Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015) .....10
*Selgeka v. Carroll*, 184 F.3d 337 (4th Cir. 1999) .....4

*Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009) ..... 9
*Yan Xia Zhu v. Mukasey*, 537 F.3d 1034 (9th Cir. 2008) ..... 10

**Statutes**

8 U.S.C. § 1229a ..... 10
8 U.S.C. § 1231(a)(5) ..... 1, 16
8 U.S.C. § 1231(b)(3) ..... 1, 2, 4, 12
8 U.S.C. § 1252 ..... 9
8 U.S.C. § 1252(a)(1) ..... 8
8 U.S.C. § 1252(b)(4) ..... 8
8 U.S.C. § 1252(b)(4)(B) ..... 9
8 U.S.C. § 1253(h)(2)(B) (1980) ..... 4

Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 413(f), 110 Stat. 1214 (Apr. 24, 1996) ..... 4

Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277§ 2242, 112 Stat 2681 (Oct. 21, 1998) ..... 5, 13

Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ..... 4

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) .... 4

Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243, 66 Stat. 212 enacting former 8 U.S.C. § 1253(h) (1952) ..... 3

Refugee Act of 1980, Pub. L. No. 96-212, § 203I, 94 Stat. 102 (1980) ..... 3

**Other Authorities**

Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ... 3

Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, 19 U.S.T. 6223, 606 U.N.T.S. 267 ..... 4

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, S. Treaty Doc. No. 100–20 (1988), 1465 U.N.T.S. 85 (CAT) ..... passim

United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) .....4

**Rules**

Federal Rule of Appellate Procedure 29(c)(5).....1

**Regulations**

8 C.F.R. § 1208.16(d)(1).....6
8 C.F.R. § 1208.17(a).....6
8 C.F.R. § 208.2(c)(2)(i) .....7
8 C.F.R. § 208.31 ..... 6, 7, 8, 12
8 C.F.R. § 208.31(f), .....7
8 C.F.R. § 208.31(g) .....7
8 C.F.R. § 208.31(g)(1).....7
8 C.F.R. § 208.31(g)(2).....7, 12
8 C.F.R. § 241.8(a).....6
8 C.F.R. § 241.8(e).....6
8 C.F.R. § 1208.2(c)(2)(i) .....7
8 C.F.R. § 1208.31(g) ..... 1, 7, 16
8 C.F.R. § 1208.16(b) .....4
8 C.F.R. § 1208.16(c).....5, 12
8 C.F.R. § 1208.17(a).....5, 6
8 C.F.R. § 1208.18(a)(1).....6
8 C.F.R. § 1208.31(b) .....6
8 C.F.R. § 1208.31(f).....7
8 C.F.R. § 1208.31(g) .....7
8 C.F.R. § 1208.31(g)(1).....7

Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999). .....5

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## I. INTRODUCTION AND STATEMENT OF *AMICI*[1]

At issue in this case is the standard of review this Court applies when reviewing an immigration judge's (IJ) decision in a "reasonable fear" hearing under 8 C.F.R. § 1208.31(g). In such hearings, an IJ reviews an asylum officer's determination that an individual who is subject to reinstatement of removal under 8 U.S.C. § 1231(a)(5) lacks a reasonable fear of persecution or torture. Whether an individual may apply for withholding of removal under 8 U.S.C. § 1231(b)(3) or protection under the Convention Against Torture (CAT) hinges on the IJ's decision. Where, as here, an IJ affirms the officer's adverse decision, the individual faces imminent deportation to the country from which he or she has fled.

*Amici Curiae* National Immigration Project of the National Lawyers Guild and Northwest Immigrant Rights Project submit that the Court should find that the IJ's determination – like all protections premised on fear-based determinations – should be reviewed for substantial evidence if the claim challenges a factual finding and reviewed *de novo* review if the claim involves a legal or constitutional challenge.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

*Amici* urge the Court to reject Respondent's invitation to apply a "facially legitimate and bona fide" standard to these determinations. There is no legal support for this position. To the contrary, case law refutes any suggestion that this would be the appropriate standard.

The National Immigration Project of the National Lawyers Guild is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. Northwest Immigrant Rights Project is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status.

Both organizations have a direct interest in ensuring that this Court applies the correct standard of review to reasonable fear decisions so that noncitizens are not unlawfully denied the opportunity to apply for withholding of removal under 8 U.S.C. § 1231(b)(3) and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, S. Treaty Doc. No. 100–20 (1988), 1465 U.N.T.S. 85 (CAT).[2]

[2] Both organizations believe that individuals subject to reinstatement also are entitled to apply for asylum protection. Because that issue was not briefed or presented in this case, amici do not address it here.

## II. BACKGROUND

### A. WITHHOLDING OF REMOVAL

In 1952, Congress first created a statutory provision authorizing the Attorney General "to withhold deportation to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243, 66 Stat. 212 enacting former 8 U.S.C. § 1253(h) (1952). Through the Refugee Act of 1980, Pub. L. No. 96-212, § 203I, 94 Stat. 102 (1980), Congress amended this provision to require IJs to withhold deportation if the individual's "life or freedom would be threatened in [the country of deportation] on account of race, religion, nationality, membership in a particular social group, or political opinion."

Significantly, the Supreme Court has noted that the purpose of the 1980 Refugee Act was to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987); *see also Negusie v. Holder*, 555 U.S. 511, 520 (2009). The 1967 Protocol required signatory states to conform to the obligations of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (the Convention), and extended states' obligations under the Convention to persons who became refugees

after 1951. Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, 19 U.S.T. 6223, 606 U.N.T.S. 267 (the Protocol).[3]

"The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) . . .." *I.N.S. v. Stevic*, 467 U.S. 407, 416 (1984). "In part, the Protocol requires that a 'refugee have free access to the courts of law' of the United States." *Selgeka v. Carroll*, 184 F.3d 337, 343 (4th Cir. 1999) *citing* the Protocol at art. 1, para. 1.

An applicant for withholding of removal must demonstrate that it is more likely than not that "his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion." *See* 8 C.F.R. § 1208.16(b); *see also* 8 U.S.C. § 1231(b)(3). Further, withholding of removal is a mandatory form of relief over which the agency has no discretion. *Cardoza-Fonseca*, 480 U.S. at 429;

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[3] The 1980 version of the former withholding statute at 8 U.S.C. § 1253(h)(2)(B) remained in effect until November 29, 1990, when Congress amended the withholding of deportation statute. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990). Congress again amended the withholding of deportation statute on April 24, 1996. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 413(f), 110 Stat. 1214 (Apr. 24, 1996). Through the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), Congress replaced former § 1253(h) and redesignated it as 8 U.S.C. § 1231(b)(3). IIRIRA §§ 305, 308.

*Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001).

### B. PROTECTION AGAINST TORTURE

Through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277§ 2242, 112 Stat 2681 (Oct. 21, 1998), Congress implemented the Convention Against Torture (CAT). Pub. L. No. 105–277, Div. G, Title XXII, § 2242, 112 Stat. 2681, 2681–822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231). Congress expressly stated that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." *Id*. at § 2242(a). The United States adopted CAT as part of its ongoing obligations to ensure that all noncitizens are not returned to country where he or she will face torture. *See generally* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999).

Unlike many forms of immigration relief, individuals with any criminal conviction may seek protection under CAT.[4] 8 C.F.R. §§ 1208.16(c), 1208.17(a).

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[4] *See, e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682 n.1 (2013) (noting that "[a] conviction of an aggravated felony has no effect on CAT eligibility"); *Negusie v. Holder*, 555 U.S. 511, 514 (2009) ("Th[e] so-called 'persecutor bar' . . . does not disqualify an alien from receiving a temporary deferral of removal under the [CAT].").

CAT applicants must establish that it is "more likely than not" that he or she will be tortured (as opposed to being persecuted on account of a protected ground) if removed and that the torture will occur with the acquiescence of the government in the country of removal. 8 C.F.R. §§ 1208.17(a), 1208.18(a)(1); *see Negusie*, 555 U.S. at 536 n.6.

If an individual meets this standard, CAT protection is mandatory; i.e., the agency has no discretion to deny protection, the individual may not be removed to a country where he faces a likelihood of torture. *See Edu v. Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010) (citation omitted); 8 C.F.R. §§ 1208.16(d)(1) ("removal shall be granted" once eligibility for CAT withholding of removal is established); 1208.17(a) (noncitizen who satisfies the CAT standard "shall be granted deferral of removal").

### C. REINSTATEMENT OF REMOVAL

In the reinstatement of removal process, individuals face summary removal based solely on the decision of a DHS officer, i.e., without a hearing before an immigration judge. 8 C.F.R. §§ 241.8(a); 1208.31(b). However, DHS must refer individuals who express a fear of return during the reinstatement process to an asylum officer for a "reasonable fear" interview. 8 C.F.R. §§ 208.31; 241.8(e). If an asylum officer determines that the person has a "reasonable fear of persecution or torture," the person may apply for withholding or CAT before an IJ. 8 C.F.R.

§§ 208.31 (requiring asylum officer to refer case to IJ); 1208.31 (same); 8 C.F.R. §§ 208.2(c)(2)(i) (IJ jurisdiction in referred cases); 1208.2(c)(2)(i) (same).

If the asylum officer determines the person did not establish a reasonable fear, the person may seek review in a hearing before an IJ. 8 C.F.R. §§ 208.31(f), (g); 1208.31(f), (g). "[T]he record of determination, including copies of the Form I–863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination." 8 C.F.R. §§ 208.31(g); 1208.31(g). If the IJ disagrees with the asylum officer's conclusion, the person is entitled to a hearing on withholding of removal and CAT protection. 8 C.F.R. §§ 208.31(g)(2); 1208(g)(2). If the IJ affirms the asylum officer's conclusion, the person is subject to imminent removal and cannot appeal to the Board of Immigration Appeals (BIA), 8 C.F.R. §§ 208.31(g)(1); 1208.31(g)(1), but may seek federal court review.

An individual may file a petition for review of the IJ's decision within 30 days of the IJ's decision. *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 959 (9th Cir. 2012) ("If the IJ determines that Ortiz does not have a reasonable fear of persecution, Ortiz will have no further recourse under 8 C.F.R. § 208.31, and may petition for review of the regulations at that time.").

## III. ARGUMENT

### A. THE COURT SHOULD EMPLOY THE SAME STANDARDS OF REVIEW FOR REASONABLE FEAR CLAIMS AS IT EMPLOYS FOR ALL FEAR-BASED CLAIMS.

The INA generally provides that review of a "final order of removal" is available by petition for review in the courts of appeals. 8 U.S.C. § 1252(a)(1). It is well-established that this Court has jurisdiction to review reinstatement orders. *Castro-Cortez v. INS*, 239 F.3d 1037, 1044 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). This Court's jurisdiction over reinstatement orders includes review of reasonable fear proceedings; i.e., review of IJ decisions affirming an asylum officer's negative reasonable fear determination. *See Ortiz-Alfaro v. Holder*, 694 F.3d 955, 959 (9th Cir. 2010) (holding that "[i]n order to preserve judicial review over petitions challenging administrative determinations made pursuant to 8 C.F.R. § 208.31(e) or (g), . . ., the reinstated removal order does not become final until the reasonable fear of persecution and withholding of removal proceedings are complete").

The Immigration and Nationality Act and case law further provide that, in the absence of a jurisdictional bar, this Court's jurisdiction includes review of all claims; legal, factual, and discretionary. *See* 8 U.S.C. § 1252(b)(4) (setting forth standards of review, including substantial evidence standard for reviewing factual claims). *See generally Cheng Fan Kwok v. INS,* 392 U.S. 206, 212 (1968) ("A

jurisdictional statute . . . must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes"). The judicial review provisions of 8 U.S.C. § 1252 contain no exceptions for review of, or the standard of review for, withholding of removal and CAT protection claims. In *Kucana v. Holder*, 558 U.S. 233, 251 (2010), the Supreme Court reiterated "a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." As the Court noted, when there is no "clear and convincing evidence" that Congress intended to limit review over an agency decision, judicial review is presumed. *Id*.

With respect to asylum, withholding of removal, and CAT, or "fear-based" claims, this Court reviews factual claims for substantial evidence.[5] Questions of fact are conclusive unless "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). This standard does not deviate from the "usual" substantial evidence standard for factual determinations.[6]

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[5] *See*, *e.g.*, *Madrigal v. Holder*, 716 F.3d 499, 503 (9th Cir. 2013) (reviewing factual decisions for asylum, withholding of removal, and CAT for substantial evidence); *Wakkary v. Holder*, 558 F.3d 1049, 1059-62 (9th Cir. 2009) (reviewing denial of withholding of removal under substantial evidence standard); *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007) (reviewing denial of CAT claim under substantial evidence standard).

[6] *Ghebllawi v. INS*, 28 F.3d 83, 86 (9th Cir. 1994); *see also id*. at 85 ("we see no reason to treat the Board as a unique kind of administrative agency entitled to extreme deference"); *Aguilar Gonzales v. Mukasey*, 534 F.3d 1204, 1208 (9th Cir. 2008) (reviewing factual finding relating to smuggling charge for substantial evidence).

Similarly, as with all cases, this Court reviews legal and constitutional questions in fear-based cases *de novo*.[7] Courts have applied these standards of review to denials of withholding of removal and CAT protection even when the individual is subject to reinstatement of removal.[8]

In this case, where the individual challenges a reasonable fear determination, the individual's safety and life is no less at stake than an individual subject to a removal order under 8 U.S.C. §1229a. Individuals with reinstatement orders are equally entitled to submit fear-based claim and obtain judicial review of any denial of such claims as are individuals in removal proceedings under 8 U.S.C. § 1229a. As such, the same standards of review the Court employs to review a fear-based claim in a removal proceeding under § 1229a must apply to reasonable fear determinations. Moreover, the fact that the reasonable fear process already is truncated despite the critical rights at stake, further demonstrates why application

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[7] *See Madrigal v. Holder*, 716 F.3d 499, 503 (9th Cir. 2013) (stating that questions of law regarding denials of asylum, withholding of removal, and CAT reviewed *de novo*) (citation omitted); *Edu v. Holder*, 624 F.3d 1137, 1142 (9th Cir. 2010) (legal claims concerning denial of CAT reviewed *de novo*) (citation omitted); *Yan Xia Zhu v. Mukasey*, 537 F.3d 1034, 1038 (9th Cir. 2008) (questions of law regarding denials of asylum reviewed *de novo*) (citation omitted).

[8] *See*, *e.g.*, *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 492 (5th Cir. 2015) (reviewing merits of withholding of removal under traditional standards of factual review in reinstatement of removal case); *Gonzalez-Posadas v. Attorney Gen. U.S.*, 781 F.3d 677, 684 n.5 (3d Cir. 2015) (reviewing factual IJ determinations of withholding of removal for substantial evidence in reinstatement of removal case); *Garcia v. Holder*, 756 F.3d 885, 890 (5th Cir. 2014) (reviewing denial of withholding of removal under substantial evidence and *de novo* standards for individual issued order of reinstatement of removal).

of the existing standards of review for fear-based claims are critical to the process. *Cf. Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (emphasizing that the less process afforded to a petitioner, the more searching habeas review should be).

### B. THE COURT MUST REJECT RESPONDENT'S INVITATION TO IMPOSE A "FACIALLY LEGITIMATE AND BONAFIDE" STANDARD OF REVIEW TO REASONABLE FEAR DETERMINATIONS.

Respondent cites no case or law in support of invitation to apply the deferential "facially legitimate and bona fide" review standard. Instead, Respondent ignores controlling case law, incorrectly frames the issue presented in this case, and premises its proposed review standard on case law that is inapplicable.

The Court should reject Respondent's framing of the issue before this Court. Contrary to Respondent's depiction, this case is not about the reasonable fear screening *mechanism*.[9] Rather, the actual decision for which Petitioner seeks review is an IJ's decision about the *existence of a reasonable fear of persecution or torture*. If the IJ finds that a reasonable fear exists, the person is entitled to an

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[9] *See* Resp. Br. at 16-17 in which Respondent suggests that the court is reviewing "the reasonable-fear *screening mechanism* for reinstatement cases." *See also* Resp. Br. at 20 discussing "the *screening mechanism* the agencies use today"; at 21 referencing "the screening mechanism *at issue today*"; at 23 comparing parole to "the screening mechanism *at issue in this case*"; at 24 citing case quoting "[t]he *screening mechanism*" (citation omitted); and at 25-26 arguing that the nature of the nature of the dispute is about the "preliminary, expedited, threshold-*screening mechanism* . . .." (emphasis added).

opportunity to apply for withholding and CAT protection and present their claim in a individual hearing before an IJ. 8 C.F.R. §§ 208.31(g)(2); 1208(g)(2). If the IJ finds that a reasonable fear does not exist, the person may ask this Court to review the IJ's decision. *Ortiz-Alfaro*, 694 F.3d at 959.

Additionally, and perhaps more importantly, Respondent fails to acknowledge the mandatory nature of reasonable fear determinations as they relate to ensuring compliance with statutory and U.S. treaty obligations that afford withholding and CAT protection. These are mandatory forms of protection; they are not forms of discretionary relief from removal. 8 U.S.C. § 1231(b)(3)(A) (withholding of removal); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999) ("As a general rule, withholding is mandatory if. . ."); 8 C.F.R. § 1208.16(c) (CAT protection); and Resp. Br. at 22 n.7. Again, if a reasonable fear exists, that is the end of the inquiry; there is no exercise of discretion regarding outside factors and there is no discretion to disallow the person from developing his or her withholding and/or CAT protection claim in a full hearing. 8 C.F.R. §§ 208.31(g)(2); 1208(g)(2).

Withholding of removal and CAT ensure the United States' compliance with its treaty obligations and ensure that individuals are not removed to countries where they face persecution or torture. *See* Sections II.A and B, *supra*. Congress was clear in enacting the withholding statute that withholding of removal is

mandatory when the individual presents a clear probability of persecution, assuming other statutory bars set forth by Congress are not met. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999). Congress went even further in enacting FARRA, stating that: "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." FARRA § 2242(a); *Edu v. Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010). Any standard of review that restricts this Court from reviewing factual and legal claims underlying withholding of removal or CAT protection would violate the INA and FARRA.[10]

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[10] In his dissenting and concurring opinion in *INS v. Doherty*, 502 U.S. 314 (1992), Justice Scalia recognized the significance of the distinction between mandatory protection and discretionary relief. In that case, the Court reviewed the denial of a then-regulatory motion to reopen to seek asylum and withholding of deportation. The Court affirmed the denial of the motion under an abuse of discretion standard. *Id*. at 324 citing *INS v. Abudu*, 485 U.S. 94, 105 (1988). Justice Scalia argued that the scope of the agency's discretion is narrow, not broad, when it comes to mandatory forms of relief. *Id*. at 329-336 (Scalia, J., concurring in part and dissenting in part). He argued:

> Whether discretion has been abused in a particular case depends, of course, upon the scope of the discretion. . . . The imperative language of this provision is not an accident. As we recognized in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428-429, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987), the nondiscretionary duty imposed by § 243(h) parallels the United States' mandatory *nonrefoulement* obligations under Article 33.1 of the United Nations Convention Relating to the

Even assuming that an IJ's reasonable fear decision is "*not* a traditional denial" of withholding of removal or CAT protection application (Resp. Br. at 25), nothing about reasonable fear decisions distinguishes the standard under which the court should review such decisions from its review of traditional withholding and CAT denials due to the mandatory nature of withholding and CAT protection. To the contrary, given that the individual has not yet had an opportunity submit an actual application for withholding of removal and CAT protection on Form I-589 (which directs the applicant to provide detailed responses to the relevant factual matters) with supporting documentation, it is even more important.

Respondent erroneously asserts that a combination of the "realm of agency authority" and "nature of the petitioner's dispute" supports a "facially legitimate and bona fide" standard of review. Resp. Br. at 18. For this proposition, Respondent cites to *Marczak v. Greene*, a Tenth Circuit case affirming "truncated" habeas review over discretionary immigration parole decisions. 971 F.2d 510, 517 (10th Cir. 1992). In contrast, this Court's review over the instant petition for

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> Status of Refugees, . . .
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> Because of the mandatory nature of the withholding-of-deportation provision, the Attorney General's power to deny withholding claims differs significantly from his broader authority to administer discretionary forms of relief such as asylum and suspension of deportation.

*Id*. at 330-332 (Scalia, J., concurring in part and dissenting in part).

review is not similarly "truncated." *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001) ("In the immigration context, 'judicial review' and 'habeas corpus' have historically distinct meanings."). Furthermore, unlike parole decisions which courts long have recognized as discretionary, *see*, *e.g.*, *Jean v. Nelson*, 472 U.S. 846, 853 (1985); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075 (9th Cir. 2006), reasonable fear determinations are non-discretionary; i.e., IJs have no authority to balance or even review equities to deny a cognizable reasonable fear claim.[11]

Respondent's reliance on cases in other contexts also are not comparable both because of the nature of the claims involved and because individuals with reasonable fear claims are physically inside the United States. Resp. Br. at 19-20, 23-24. Respondent cannot compare the mandatory nature and international obligations behind reasonable fear claims with claims arising in the visa context,[12]

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[11] For these same reasons, Respondent's reliance on this Court's citation to *Marczak v. Greene* in *Gutierrez-Chavez v. INS*, 298 F.3d 8824, 831 (9th Cir. 2002) (Resp. Br. at 18) is also inapposite. In *Gutierrez-Chavez*, the court addressed the *scope* of habeas review under 28 U.S.C. § 2241, not the standard of review, in a case involving a challenge to discretionary relief under former 8 U.S.C. § 1182(c). The court held that the scope of habeas review did not extend to BIA decision to deny discretionary relief. *Id*. at 827. Unlike *Gutierrez-Chavez*, this case does not involve habeas review or discretionary relief.

[12] *See* Resp. Br. at 19 and 20 citing *Kliendienst v. Mandel*, 408 U.S. 753, 770 (1972); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008); and *Noh v. INS*, 248 F.3d 938, 942 (9th Cir. 2001). *See also* Resp. Br. at 26 citing *Din v. Kerry*, 718 F.3d 856, 863 (9th Cir. 2013). To the extent that these visa-related cases adopt a deferential standard of review, the courts did so, in part, based on plenary congressional power to exclude noncitizens outside the United States. *Mandel*, 408 U.S. at 765-66; *Bustamante*, 531 F.3d at 1062 (applying *Mandel*);

claims challenging the constitutionality of an INA provision[13] or claims challenging a question on a naturalization application.[14] Moreover, *An Na Peng v. Holder*, 673 F.3d 1248, 1258 (9th Cir. 2012), is inapposite as it focuses on the standard of review for a facial challenge to the constitutionality of a statute.

Respondent attempts to convince this Court to adopt a sweeping change in the standard of review of a fear-based determination simply because, had the person not expressed a desire to seek either withholding of removal or protection under CAT, the reinstatement scheme authorizes expeditious removal. Resp. Br. at 21-22. But this does not provide a basis for the Court to abdicate its responsibility of ensuring judicial review of fear-based claims raised by individuals who are denied the opportunity for full hearing to make their claim, *see* 8 C.F.R. § 1208.31(g).

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*Noh*, 248 F.3d at 942 (relying on *Mandel*). In contrast, Congress has enacted mandatory protections to ensure compliance with international treaty obligations and individuals challenging reasonable fear determinations already "have reentered" the United States. 8 U.S.C. § 1231(a)(5).

[13] *See* Resp. Br. at 20 citing *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 979 (9th Cir. 2006) (challenging ten-year physical presence requirement for cancellation of removal and stop-time rule provision as violating due process). The constitutionality of a statute is not at issue here.

[14] Resp. Br. at 20 citing *Price v. INS*, 962 F.2d 836, 842-44 (9th Cir. 1992). In *Price*, the petitioner challenged a question on the naturalization application requiring him to list affiliations with any organization as a violation of his First Amendment rights. *Price*, 962 F.2d at 841. This Court held that the facially legitimate and bona fide standard applied to questions regarding naturalization just as it applied to questions regarding admission to the United States. *Price*, 962 F.2d at 842. As such, this case is not relevant to the factual review of a decision.

In sum, this Court should reject Respondent's attempt to impose on this Court a "facially legitimate and bona fide" standard of review. Neither Respondent's reliance on the DHS's authority to issue reinstatement orders nor the nature and purpose of reasonable fear determinations favor application of this standard.

## IV. CONCLUSION

*Amici* urge the Court to review an IJ's reasonable fear determination for substantial evidence if the claim challenges a factual finding and reviewed *de novo* review if the claim raises a legal or constitutional challenge.

Respectfully submitted,

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Dated: February 29, 2016

## CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) and 29(d) because this brief contains 4,325 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Additionally, 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 2010 in 14 point Times New Roman font. This *amicus* brief is no more than one-half the maximum length authorized for a party's principal brief. Fed. R. App. P. 29(d).

DATED: February 29, 2016

s/ *Trina Realmuto*
Trina Realmuto

## CERTIFICATE OF SERVICE

I, Trina Realmuto, the undersigned, hereby certify that I electronically filed the foregoing brief by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: February 29, 2016

s/ *Trina Realmuto*
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