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## Forever Barred: Reinstated Removal Orders and the Right to Seek Asylum

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# Forever Barred: Reinstated Removal Orders and the Right to Seek Asylum

## **Cover Page Footnote**

Immigration Attorney, Law Office of Hillary Gaston Walsh, J.D. William S. Boyd School of Law 2012. I thank Fatma Marouf, Stacy Tovino, Ashley Nikkel, and Cayla Witty for their insightful comments on earlier drafts of this Article.

# FOREVER BARRED: REINSTATED REMOVAL ORDERS AND THE RIGHT TO SEEK ASYLUM

By Hillary Gaston Walsh, J.D.<sup>+</sup>

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<sup>+</sup> Immigration Attorney, Law Office of Hillary Gaston Walsh, J.D. William S. Boyd School of Law 2012. I thank Fatma Marouf, Stacy Tovino, Ashley Nikkel, and Cayla Witty for their insightful comments on earlier drafts of this Article.

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In 2007, “Emely” fled a violent Central American country, hoping for protection in the United States (U.S.) from a male gang leader who, intending to “cure” her of her sexual orientation, raped and impregnated her.<sup>1</sup> But when Customs and Border Protection (CBP) officers apprehended Emely near the border after she entered the U.S. without inspection, no one asked her about this or any other past experience, despite being required to do so.<sup>2</sup> Instead, the CBP officer instructed Emely, who does not speak English and has only a sixth grade education, to sign a form written in English.<sup>3</sup> Then, without ever appearing before an immigration judge, Emely was deported.<sup>4</sup> This process is known as “expedited removal.”<sup>5</sup> It applies when a noncitizen seeks entry with fraudulent or no travel documents, or when a noncitizen is apprehended within 100 miles of the border within two weeks of entering without inspection.<sup>6</sup> It is the most

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1. Where indicated, this Article uses pseudonyms to protect the confidentiality of individuals with pending claims. Emely’s records are on file with the Author’s law office.

2. 8 U.S.C. § 1225(b)(1)(A) (2012) (providing that immigration officers must screen noncitizens flagged for expedited removal and refer those who indicate a fear of persecution or intent to apply for asylum to a credible fear interview with an asylum officer).

3. See *supra* note 1 (DHS records indicate that CBP noted on this form that Emely expressed no fear of removal when asked about it, and was “amenable” to expedited removal.).

4. *Id.*

5. See 8 U.S.C. § 1225 (outlining that certain noncitizens must be expeditiously removed without a hearing unless they indicate a fear of persecution or an intention to apply for asylum); see also JOHN F. SIMANSKI, DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013 2 (Sept. 2014), [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf) (defining “expedited removal” as “removal without a hearing before an immigration judge of an alien arriving in the United States who is inadmissible because the individual does not possess valid entry documents or is inadmissible for fraud or misrepresentation of material fact; or the removal of an alien who has not been admitted or paroled in the United States and who has not affirmatively shown to the satisfaction of an immigration officer, that the alien had been physically present in the United States for the immediately preceding 2-year period”).

6. See 8 U.S.C. § 1225(b)(1)(A)(i) (referencing 8 U.S.C. § 1182(a)(7), which renders noncitizens inadmissible if they do not possess valid travel documents); see also Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6 (2014) (“Expedited removal applies to persons who arrive at a port-of-entry or within 100 miles of the border with fraudulent or insufficient documents.”). As originally enacted, Congress mandated expedited removal for any noncitizens arriving in the U.S. without valid travel documents, except for Cubans arriving by plane. 8 U.S.C. § 1225(b)(1)(A)(i), (b)(1)(F). At the same time, however,

common method by which the Department of Homeland Security (DHS) removes noncitizens.<sup>7</sup> These removal orders are completely insulated from judicial review.<sup>8</sup>

A few months later, Emely fled to the U.S. again.<sup>9</sup> Shortly after entering without inspection for a second time, CBP apprehended her. Because she had illegally reentered the country after being deported pursuant to a final order of removal, CBP reinstated her prior removal order and, without asking about her fear of removal, again deported her.<sup>10</sup> This process is known as “reinstatement of removal.”<sup>11</sup> It is triggered when a noncitizen illegally reenters the U.S. after being removed or voluntarily departing pursuant to final order of removal.<sup>12</sup> When a noncitizen’s prior order is reinstated, they are permanently barred from applying for or receiving “any relief” under the Immigration and Nationality Act

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Congress also gave the Attorney General the “sole and unreviewable discretion” to expand the application of expedited removal “at any time” to include undocumented noncitizens apprehended inside the United States within two years of entry. *Id.* § 1225(b)(1)(A)(iii). The Attorney General has exercised this authority several times over the past twenty years; today, the following noncitizens are subject to expedited removal proceedings: non-Cuban noncitizens arriving at ports-of-entry without valid travel documents, undocumented non-Cuban noncitizens who entered by sea within two years of their apprehension, and undocumented noncitizens apprehended within 100 miles of the border within two weeks of their entry without inspection. *Id.* § 1225(b)(1)(A)(i) (non-Cuban aliens arriving at ports of entry); Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,924–25 (Nov. 13, 2002) (undocumented non-Cuban aliens entering by sea within two years of their apprehension); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,877 (Aug. 11, 2004) (undocumented aliens apprehended within 100 miles of the border within two weeks of their entry).

7. SIMANSKI, *supra* note 5, at 5 tbl.7 (showing that in the fiscal year of 2013, the majority of all removed noncitizens were expedited removals).

8. 8 U.S.C. § 1225(b)(1)(A)(i) (providing that noncitizens must be removed pursuant to expedited removal orders “without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution”); 8 C.F.R. § 235.3(b)(7) (2016) (providing that at least a “second line supervisor” must review interviewing officer’s expedited removal order before it is final; this review must include “a review of the sworn statement and any answers and statements made by the alien regarding a fear of removal or return”); *see also* David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT’L L. 673, 686 (2000) (noting that in expedited removal, a “[CBP] officer can serve such an [expedited removal] order after the secondary inspection interview, but only following review of the sworn statement and proposed order by a high-level supervisor. The process takes a matter of hours . . .”).

9. *See supra* note 1.

10. *Id.* (CBP records indicate that when asked, Emely did not express a fear of removal; however, Emely claims she was never asked about her fear during this reinstatement interview.).

11. 8 U.S.C. § 1231(a)(5) states:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

12. *Id.*

(INA).<sup>13</sup> Reinstatement of removal is the second most common method of removal.<sup>14</sup> Like expedited removal orders, reinstated orders of removal are issued by CBP officers and are not subject to judicial review.<sup>15</sup> In fiscal year (FY) 2015, DHS removed 165,935 noncitizens through expedited and reinstated of removal orders (70.49% of all removals).<sup>16</sup>

In 2014, Emely's rapist began phone stalking her from prison, demanding to have sex with her, and threatening to kill her if she refused.<sup>17</sup> After the rapist's messenger approached her in her neighborhood, and warned her that she would be abducted and taken to the rapist soon, Emely fled to the U.S., again making the weeks-long, arduous journey across Central America and Mexico, and ultimately wading through the Rio Grande into the U.S.<sup>18</sup>

Shortly after illegally entering for a third time, CBP apprehended Emely and placed her in reinstatement of removal proceedings again.<sup>19</sup> However, this time, CBP asked Emely whether she had a fear of removal. Emely answered that she did, and CBP referred her to a "reasonable fear" interview; the first step in obtaining a form of relief from removal called "withholding of removal."<sup>20</sup> After being found to have a "reasonable fear" of persecution in that interview, Emely's claim was sent to an immigration judge for a hearing on the merits of her withholding of removal claim.<sup>21</sup> These proceedings are referred to as "withholding-only" pursuant to federal regulations mandating that noncitizens with reinstated removal orders may apply for withholding of removal only—not asylum.<sup>22</sup> Thus, because of her reinstated removal order, Emely was deprived of the chance to apply for asylum.<sup>23</sup>

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13. *Id.*

14. SIMANSKI, *supra* note 5, at 5 tbl.7 (reporting that of the noncitizens removed in the fiscal year 2013, 170,247 (38.8%) were removed pursuant to reinstated orders of removal).

15. See 8 U.S.C. § 1231(a)(5) (providing that a reinstated removal order "is not subject to being reopened or reviewed"); see also Wadhia, *supra* note 6, at 8 (noting that reinstated removal orders that are unilaterally issued by the DHS are not subject to any judicial review; however, when an immigration judge denies a noncitizen's withholding of removal claim and issues a reinstated removal order, the noncitizen can appeal the legality of this reinstated removal order to "a federal court of appeals through a legal vehicle called a 'petition for review.'").

16. U.S. DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2015 8 (Dec. 22, 2015), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf>.

17. See *supra* note 1.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*; see also 8 C.F.R. §§ 208.13(b)(1), 208.31(c) (2016) (defining a "reasonable fear" as a "reasonable possibility" that the noncitizen will be persecuted or tortured on a protected ground in his home country).

22. 8 C.F.R. § 241.8 (providing that noncitizens expressing a fear of persecution or torture must be referred to an asylum officer for a "reasonable fear" interview).

23. See *supra* note 1. During her withholding-only proceedings, the presiding immigration judge found Emely was credible, but still denied her claim, finding Emely, who was pro se, had not

The difference between withholding of removal and asylum is dramatic. To begin with, the legal standard for establishing withholding of removal eligibility is significantly higher than the asylum standard, and therefore more difficult to meet.<sup>24</sup> Moreover, considering reports that immigration judges find only 2% of pro se applicants eligible for asylum, the likelihood of obtaining withholding of removal when pro se is nearly impossible.<sup>25</sup> Additionally, the legal benefits flowing from withholding are scant compared to those flowing from asylum. Noncitizens granted asylum are placed on a path to citizenship, are granted work authorization, and are permitted to travel outside the country.<sup>26</sup> By contrast, withholding affords only the right not to be removed to the country of persecution; it neither confers a right to remain in the U.S., nor protection from

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established eligibility for withholding. Meeting the withholding standard is far more difficult than establishing asylum eligibility, and even that is nearly impossible to do for pro se litigants. In May 2015, the Author represented Emely in her appeal to the Board of Immigration Appeals (BIA), and argued the BIA should remand because, among other things, the federal regulation mandating these “withholding-only” proceedings conflicts with the INA. The BIA remanded, but on other grounds, and without addressing the regulation’s validity. In March of 2017, an immigration judge granted Emely withholding of removal.

24. See, e.g., *Tamang v. Holder*, 598 F.3d 1083 (9th Cir. 2010).

Withholding of removal requires the petitioner to demonstrate his or her “life or freedom would be threatened in that country because of the petitioner’s race, religion, nationality, membership in a particular social group, or political opinion.” Similar to asylum, a petitioner may establish eligibility for withholding of removal (A) by establishing a presumption of fear of future persecution based on past persecution, or (B) through an independent showing of clear probability of future persecution.

Unlike asylum, however, the petitioner must show a “clear probability” of the threat to life or freedom if deported to his or her country of nationality. The Supreme Court has defined “clear probability” to mean “it is more likely than not” that the petitioner would be subject to persecution on account of one of the protected grounds. The clear probability standard is more stringent than the well-founded fear standard for asylum.

*Id.* at 1091 (citations omitted).

25. Charles Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in 2 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EXPERT REPORTS 239 (2005), [http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum\\_seekers/ERS\\_RptVolII.pdf](http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/ERS_RptVolII.pdf) (“Of those individuals found to have a credible fear, who were subsequently represented by counsel, 25[%] were granted asylum by an Immigration Judge; whereas, only 2[%] of those not represented by counsel were granted asylum.” (footnotes omitted)); see also U.S. DEP’T OF JUSTICE, FY2014 STATISTICS YEARBOOK K5 fig.20 (Mar. 2015), <https://www.justice.gov/eoir/pages/attachments/2015/03/16/fy14syb.pdf> (reporting that in the FY2014, immigration courts granted only 1,463 withholding-of-removal claims, and denied the remaining 11,052 claims); see also Julianne Hing, *What’s the Difference Between a Refugee and a Deportee? A Lawyer.*, THE NATION (Feb. 13, 2016), <https://www.thenation.com/article/whats-the-difference-between-and-a-refugee-and-a-deportee-a-lawyer/> (quoting Lisa Koop of the National Immigrant Justice Center stating that “[f]or someone who’s a bona fide asylum seeker, the single biggest factor which determines whether they’re able to secure protection is whether they have an attorney”).

26. U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FACT SHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF, CONVENTION AGAINST TORTURE PROTECTIONS (Jan. 15, 2009), <http://1.usa.gov/1nOG2q9>.

removal to any other country, nor the ability to travel outside the country.<sup>27</sup> This “relief” from removal essentially places the noncitizen in immigration purgatory, belonging nowhere indefinitely yet separated forever from their family.<sup>28</sup> Thus, pursuant to the withholding-only regulation, a removal order, most often issued during expedited removal proceedings by a low-level CBP officer with no judicial oversight, carries serious consequences for noncitizens fleeing persecution, who, like Emely, find themselves stuck in the reinstatement pipeline based on a removal order that was entered in error to begin with.

This Article is the first academic piece to argue that the reinstatement of prior orders of removal should not bar individuals like Emely from access to asylum. Part I provides background about the legislative history that gave rise to the regulatory scheme that restricts individuals with reinstated orders of removal to withholding of removal access only. Part II examines a circuit split regarding the proper interpretation of the INA and the regulatory scheme, and argues that it is unreasonable to interpret the INA as prohibiting individuals with reinstated orders from applying for asylum. Part III presents policy arguments that further support why reinstated removal should not bar a noncitizen’s access to asylum. These policy arguments emphasize numerous errors that are routinely made by border patrol agents in issuing expedited removal orders, including their failure to ask mandatory questions designed to assess whether the individual has a fear of being harmed in her country of origin. Finally, Part IV makes specific recommendations to the DHS, immigration courts, federal appellate courts, and Congress to help ensure that bona fide asylum seekers receive proper protection in the U.S.

#### I. IIRIRA’S REVISIONS AND RAMIFICATIONS: THE STATUTORY AND REGULATORY BASIS FOR DENYING ASYLUM ACCESS TO NONCITIZENS WITH REINSTATED REMOVAL ORDERS

The expedited and reinstatement removal methods, in addition to the withholding-only regulatory scheme, stem from the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Before IIRIRA, a noncitizen could not be removed from the U.S. without first appearing before an

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27. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419–20 (1999) (“Whereas withholding only bars deporting an alien to a particular country or countries, a grant of asylum permits an alien to remain in the United States and to apply for permanent residency after one year.”); see also Letter from Ten Immigration and Human Rights Orgs. to John Roth, Inspector Gen., Dep’t of Homeland Sec. & Megan H. Mack, Officer of Civil Rights & Civil Liberties, Dep’t of Homeland Sec. 6 (Nov. 13, 2014) [hereinafter Right to Asylum Letter], <http://www.lccr.com/wp-content/uploads/Right-to-Asylum-CRCL-Complaint-Cover-Letter.pdf> (noting that “[a] grant of withholding of removal, unlike a grant of asylum, does not allow an applicant to sponsor a spouse or children for derivative status,” thereby “forc[ing] the noncitizen] to choose between reuniting with family and compromising their own safety” (citing U.S. DEP’T OF JUSTICE, *supra* note 26)).

28. See Right to Asylum Letter, *supra* note 27.



immigration judge.<sup>29</sup> If the noncitizen raised an asylum claim during this appearance, the immigration judge would determine whether the noncitizen is a “refugee,”—that is, the noncitizen either suffered past persecution or has a “well-founded fear” of future persecution—and is therefore eligible for asylum.<sup>30</sup> “[V]irtually all immigration court decisions,” including asylum eligibility decisions, “could be appealed to a regular federal court and decided by judges who, unlike immigration judges, were independent of the Department of Justice and had life tenure.”<sup>31</sup> But, as Emely’s story illustrated, IIRIRA’s new expedited removal and reinstatement procedures changed things significantly, especially for asylum seekers,<sup>32</sup> who comprise approximately 22% (51,001) of the noncitizens in expedited removal each year.<sup>33</sup>

This Part sets forth the background to the relevant changes IIRIRA made to the INA, which resulted in the promulgation of the withholding-only regulatory scheme. It first discusses the political climate in which IIRIRA was crafted;

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29. PHILIP G. SCHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* 228–29 (2000).

30. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987) (finding a “refugee” is “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion” (quoting 8 U.S.C. § 1101(a)(42)(A) (1980)); see also 8 C.F.R. § 1208.13(b)(2)(i) (2016) (providing that a fear of persecution is “well-founded” if (A) she has a fear of persecution in her country; (B) there is a reasonable possibility of suffering such persecution; and (C) she is unable or unwilling to return to that country because of such fear.) The Secretary of Homeland Security and the Attorney General are the ultimate authorities on whether asylum is granted; even if an immigration judge finds an applicant eligible, the Attorney General can still deny asylum relief. 8 U.S.C. § 1158(b)(1)(A) (2012) (“The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum . . .”).

31. SCHRAG, *supra* note 29, at 228–29 (noting that noncitizens won 25–40% of these appeals, indicating that immigration judges make “a lot of” procedural and substantive errors).

32. See Kate Jastram & Tala Hartsough, *A-File and Record of Proceeding Analysis of Expedited Removal*, in 2 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EXPERT REPORTS 52 (2005), [http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum\\_seekers/ERS\\_RptVolII.pdf](http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/ERS_RptVolII.pdf) (noting that refugees fleeing from persecution often use “false documents or documents obtained by misrepresentation,” which triggers their placement in expedited removal, because “they are often unable to obtain a passport or visa in their own name and must leave their country surreptitiously”).

33. See U.S. DEP’T OF HOMELAND SEC., OFFICE OF CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, ANNUAL REPORT 2015 59 (June 29, 2015), [https://www.dhs.gov/sites/default/files/publications/2015%20CISOMB%20Annual%20Report\\_508.pdf](https://www.dhs.gov/sites/default/files/publications/2015%20CISOMB%20Annual%20Report_508.pdf) (reporting that in FY2014, USCIS received 51,001 credible fear referrals). The most recent data the DHS has released itemizing the number of noncitizens removed through expedited removal was for FY2013. See SIMANSKI, *supra* note 5, at 2. Based on an average growth trend from fiscal years 2011 through 2013 (35,398) added to the 193,032 expeditiously removed in FY2013, approximately 228,430 people were expeditiously removed in FY2014. Thus, 51,001 credible fear interview referrals issued in FY2014 represents 22% of the approximate number of all people expeditiously removed in FY2014.

namely, Americans' anti-immigrant sentiment and belief that the asylum system was being abused, which is important to understanding Congress's intent when it simultaneously amended the asylum and reinstatement provisions and created the expedited removal process. This Part then discusses the changes IIRIRA made to these statutory provisions, and the subsequent promulgation of the withholding-only regulatory scheme. It then concludes with facts from several cases that illustrate the outcome this regulatory scheme has on bona fide asylum seekers.

*A. Legislative Context: The American Anti-Immigrant, Anti-Asylum Seeker Political Environment of the 1990s*

Americans' anti-immigrant sentiment increased significantly in the three decades leading up to the 1996 enactment of IIRIRA.<sup>34</sup> By the mid-1990s, this sentiment had reached a fever pitch.<sup>35</sup> This trend was partly due to a weak economy.<sup>36</sup> It was also due to two unprecedented terror attacks committed on American soil by lawfully present asylum seekers.<sup>37</sup>

The first attack occurred in January 1993, when a Pakistani asylum-seeker named Mir Aimal Kasi gunned down Central Intelligence Agency (CIA) employees who were waiting in their cars at a stoplight just outside Agency headquarters.<sup>38</sup> Kasi shot an AK-47 eleven times, and killed two men and wounded three others.<sup>39</sup> Kasi had entered the U.S. on a business visa in 1991, and about a year later, filed an asylum application that "included few details of the political persecution he claimed to fear in Pakistan."<sup>40</sup> This application was still pending when he attacked the CIA employees.<sup>41</sup>

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34. Joseph Carroll, *American Public Opinion About Immigration*, GALLUP (July 26, 2005), <http://www.gallup.com/poll/14785/immigration.aspx> (explaining that from 1965 to 1995, the number of polled Americans who believed that immigration should be decreased nearly doubled—from 33% in 1965 to 65% in 1995).

35. *Id.* (showing that from 1985 to 2005, the highest percentage of polled Americans who favored a decrease in immigration occurred from July 1993 through June 1995).

36. Seth Mydans, *Poll Finds Tide of Immigration Brings Hostility*, N.Y. TIMES (June 27, 1993), <http://www.nytimes.com/1993/06/27/us/poll-finds-tide-of-immigration-brings-hostility.html> (analyzing the growing "public reaction against immigration," and noting that of the Americans polled, "[m]any cited the economy as a factor in their opinion").

37. SCHRAG, *supra* note 29, at 38–39; Mydans, *supra* note 36 (quoting the then-director of the Refugee Project of the Lawyers Committee for Human Rights, "[i]f you can picture the image of the Statue of Liberty dissolving and being replaced by the image of the World Trade Center after it was bombed, you have the sense of the negative trends in the current debate").

38. Richard A. Serrano, *Pakistani Who Killed 2 at CIA Is Executed*, L.A. TIMES (Nov. 15, 2002), <http://articles.latimes.com/2002/nov/15/nation/na-execute15> ("Just as CIA employees were reporting to work on Jan. 25, 1993, Kasi stepped out of his pickup and began firing an AK-47 rifle near the entrance to the agency's headquarters.").

39. *Id.*

40. SCHRAG, *supra* note 29, at 38.

41. *Id.*; *see also* Serrano, *supra* note 38 (reporting that on November 14, 2002, Mir Aimal Kasi was executed by lethal injection).

The second attack occurred about a month later, when another asylum seeker with Pakistani connections, Ramzi Yousef, detonated a car bomb in New York City's World Trade Center parking garage.<sup>42</sup> Six people died, and over a thousand others were wounded.<sup>43</sup> It was “‘the largest-scale bombing on U.S. soil in modern history’ in terms of fatalities and material damage.”<sup>44</sup> It “generated so much physical force that it created a five-story crater.”<sup>45</sup> Yousef entered the U.S. after requesting asylum at the Kennedy Airport; he was not detained prior to his asylum hearing because the nearest detention center was full, “as usual.”<sup>46</sup> His asylum application was still pending when, only a month after arriving in the U.S., he detonated the bomb.<sup>47</sup> He flew back to Pakistan within hours of the explosion.<sup>48</sup>

Prior to these attacks, New York Immigration and Nationality Services District Director William Slattery had complained for years that noncitizens arriving at Kennedy Airport were purposely abusing the asylum process by making false claims of persecution, knowing that they would be allowed to enter indefinitely—and given work authorization immediately.<sup>49</sup> With America still reeling from these terror attacks, Slattery “seized the moment to make public appearances railing against the humanitarian leniencies of the asylum system,”

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42. SCHRAG, *supra* note 29, at 39.

43. Richard A. Serrano, *After 15 Years in Solitary, Convicted Terrorist Pleads for Contact with Others*, L.A. TIMES (Feb. 16, 2013), <http://articles.latimes.com/2013/feb/16/nation/la-na-yousef-solitary-20130217>.

44. Douglas Jehl, *Car Bombs: A Tool of Foreign Terror, Little Known in U.S.*, N.Y. TIMES (Feb. 27, 1993), <http://www.nytimes.com/1993/02/27/nyregion/explosion-twin-towers-car-bombs-tool-foreign-terror-little-known-us.html> (quoting terrorism expert Brian Jenkins).

45. Matt Pearce, *20 Years Ago, a Bomb Killed Six People at the World Trade Center*, L.A. TIMES (Feb. 26, 2013), <http://articles.latimes.com/2013/feb/26/nation/la-na-nn-1993-world-trade-center-anniversary-20130226> (reporting that “the blast also generated so much emotional force that officials erected a granite memorial—a fountain—bearing the victims’ names”: John DiGiovanni, Robert Kirkpatrick, Stephen Knapp, William Macko, Wilfred Mercado, and Monica Rodriguez Smith, who was pregnant).

46. SCHRAG, *supra* note 29, at 39.

47. *Id.*

48. *Id.*; see also Serrano, *supra* note 43 (reporting that Yousef was later brought back to the U.S. where, in addition to the World Trade Center bombing, “he was also convicted of trying to kill Pope John Paul II and President Clinton and trying to bomb 11 airliners on their way from Asia to the U.S.” At his sentencing, Yousef unapologetically told the judge: “Yes, I am a terrorist, and proud of it.” He is currently “serving life with no parole plus 240 years.” He has been in 24-hour solitary confinement for the past fifteen years. His cell is 7-by-11 feet, has no bars, and one small window. His meals are “shoved by unseen guards through a sally port between two steel doors.” His uncle, Khalid Shaikh Mohammed, is believed to be the September 11 mastermind.).

49. SCHRAG, *supra* note 29, at 39–40, 246 (discussing procedural issues with processing asylum claims in the 1990s, such as the “INS policy of granting work authorization to all affirmative asylum applicants without creating an adjudication staff large enough to interview the applicants promptly, and laws and regulations that provided scant preliminary asylum screening and inadequate detention space at ports of entry, particularly New York, which seemed swamped by aliens arriving with false documents”).

hoping that by playing the “media card,” he would get Congress’s attention.<sup>50</sup> This publicity campaign included interviews with *Newsday*, the *Los Angeles Times*, and the *New York Times*, where he reported that two-thirds of asylum applicants leave Kennedy Airport, never to be seen again, and that “people know they’ve got a 93% chance of walking right through into the United States,” because “only 7% of all inadmissible aliens are detained.”<sup>51</sup>

But rather than encouraging Congress to build more detention centers, he told reporters that “Congress must change the law to allow him to send most of them packing after a quick hearing at Kennedy . . . . The aliens have taken control.”<sup>52</sup> This idea of “summary exclusion,” or “expedited removal” as it was later enacted, was not new; a Senator had unsuccessfully advocated for it during the Reagan administration.<sup>53</sup>

In March 1993, Mr. Slattery did an interview with *60 Minutes* that generated “massive” national attention.<sup>54</sup> As video footage cut between scenes of terrorists and immigrants arriving at Kennedy Airport played on screen, *60 Minutes* reporter Lesley Stahl’s voice explained that Sheik Rahman—an asylum-seeker in the U.S. who had been charged with plotting terror attacks on U.S. landmarks and who had connections to the World Trade Center bomber—was “just one of hundreds of thousands of foreigners who have found an almost foolproof formula to stay in the United States.”<sup>55</sup> One of Ms. Stahl’s guests stated that “every single person on the planet Earth . . . can stay [in the U.S.] indefinitely by saying two magic words: political asylum.”<sup>56</sup> Mr. Slattery agreed, stating that “you don’t know what they have done, you really don’t even know their real names, and minimum, they’re in this country for eighteen months.”<sup>57</sup>

In the months following the *60 Minutes* broadcast, anti-immigrant sentiment in the U.S. reached a record high.<sup>58</sup> Nearly 70% of Americans favored a decrease in immigration, and 68% believed that “most of the people who have

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50. Deborah Sontag, *Waiting for a Rudder at I.N.S.*, N.Y. TIMES (June 13, 1993), <http://www.nytimes.com/1993/06/13/nyregion/waiting-for-a-rudder-at-ins.html> (reporting that at the time, “advocates for immigrants ha[d] long criticized the Immigration and Naturalization Service for its backlogged system, [and] Mr. Slattery and other officials turned the tables, blaming the supposedly crafty immigrants who stormed the gates”); see also SCHRAG, *supra* note 29, at 40 (author and Georgetown University Law Center Professor Philip G. Schrag’s personal interview with Slattery in which Mr. Slattery stated he intentionally “play[ed] the media card”).

51. SCHRAG, *supra* note 29, at 40–41.

52. *Id.* at 41.

53. *Id.*

54. *Id.* at 42–43.

55. *Id.* at 42.

56. *Id.*

57. *Id.* at 43.

58. Carroll, *supra* note 34 (discussing data showing that from 1985 to 2005, the highest percentage of polled Americans (65%) who favored a decrease in immigration occurred from July 1993 through June 1995); see also Mydans, *supra* note 36 (finding that 61% of polled Americans favored a decrease in immigration in June 1993).

moved to the United States in the last few years are here illegally.”<sup>59</sup> For context, in 1986, less than half of Americans shared these views.<sup>60</sup> This new social trend “imparted real power to political demands for a retrenchment,” and Congressional hearings “proliferated on what was suddenly being portrayed as an asylum crisis.”<sup>61</sup> It was with these social and political undertones that Congress crafted and enacted one of the largest overhauls of immigration law in U.S. history: the IIRIRA.<sup>62</sup>

### *B. IIRIRA’s Amendments to the INA and DHS’s Response*

Given its constituents’ concerns, it is unsurprising that Congress’s primary goals in enacting IIRIRA were to reduce illegal immigration and curb the perceived abuse of the asylum process.<sup>63</sup> To meet these goals, Congress simultaneously (1) created the expedited removal process, (2) revamped the existing reinstatement of removal process, and (3) amended the asylum provision. These revisions are examined below, as is (4) the withholding-only regulation promulgated shortly after the enactment of IIRIRA.

#### *1. The Expedited Removal Provision*

Congress’s goals of reducing illegal immigration and the abuse of asylum, while still protecting bona fide asylum seekers, are both apparent in the expedited removal provision. This provision provides that noncitizens who seek entry without valid documents or were apprehended within 100 miles of the border within two weeks of entering without inspection are removed virtually on the spot, without ever appearing before an immigration judge, pursuant to a final, unreviewable removal order issued by a CBP officer.<sup>64</sup>

But, to prevent the expedited removal of bona fide asylum seekers, Congress included a critical detail in the expedited removal statutory provision: if a noncitizen flagged for expedited removal “indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the [noncitizen] for

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59. Mydans, *supra* note 36; *see also* SCHRAG, *supra* note 29, at 53 n.114; Carrol, *supra* note 34 (discussing data showing that more than 65% of Americans polled between June and July 1993 favored a decrease in immigration).

60. Mydans, *supra* note 36.

61. SCHRAG, *supra* note 29, at 45, 53.

62. *See, e.g.,* Nken v. Holder, 556 U.S. 418, 423 (2009) (observing that the IIRIRA “substantially amended” the INA); Marogi v. Jenifer, 126 F. Supp. 2d 1056, 1059 n.3 (E.D. Mich. 2000) (“IIRIRA . . . was Congress’s latest major overhaul of the immigration laws.”); James E. Crowe, III, Comment, *Running Afoul of the Principle of Non-Refoulement: Expedited Removal Under the Illegal Immigration Reform and Immigrant Responsibility Act*, 18 ST. LOUIS U. PUB. L. REV. 291, 291 n.3 (1999) (noting that “[t]he last comprehensive overhaul of the [INA] is considered to have been the Immigration Act of 1952”).

63. *See, e.g.,* *In re* C-W-L-, 24 I. & N. Dec. 346, 349 (B.I.A. 2007) (“[The IIRIRA] was intended, in part, to curb abuse of the asylum process and other parts of removal proceedings.”).

64. 8 U.S.C. § 1225(b) (2012).

an interview by an asylum officer.”<sup>65</sup> To elicit a noncitizen’s indications of fear or an intent to apply for asylum, Congress instructed CBP officers to interview noncitizens in expedited removal proceedings.<sup>66</sup> DHS policies mandate that this interview entail reading a script that not only explains the purpose of the interview, but also asks the noncitizen four questions, three of which are clearly designed to elicit expressions of fear.<sup>67</sup> If the noncitizen expresses a fear during the course of this interview, the CBP officer is instructed to refer that noncitizen to a “credible fear” interview with an asylum officer.<sup>68</sup> If the asylum officer then finds the noncitizen has a credible fear, the asylum claim is then heard by an immigration judge, who, like under pre-IIRIRA procedures, determines whether the noncitizen has a well-founded fear of persecution and is a refugee.<sup>69</sup>

In sum, Congress set the bar for providing referrals extremely low—to a mere “indication” of fear or intent to seek asylum, rather than requiring a literal expression of fear and certainly not a fear based on a protected ground—while also explicitly placing the responsibility of assessing the merits of asylum claims in the hands of a trained asylum officer and immigration judge, not low level CBP officers.<sup>70</sup> Congress designed this process in an effort to “protect those aliens who present credible claims for asylum by giving them an opportunity for a full hearing on their claims,” that is “the same as any other alien in the U.S.”<sup>71</sup>

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65. *Id.* § 1225(b)(1)(A)(ii).

66. *Id.* (providing that officers must screen noncitizens flagged for expedited removal).

67. 8 C.F.R. § 235.3(b)(2)(i) (2016). The noncitizens are asked the following questions:

[1] Why did you leave your home country or country of last residence?

[2] Do you have any fear or concern about being returned to your home country or being removed from the United States?

[3] Would you be harmed if you are returned to your home country or country of last residence?

[4] Do you have any questions or is there anything else you would like to add?

Kuck, *supra* note 25, at 253 app. A (providing sample Form I-867B: “Record Sworn Statement in Proceedings Under Section 235(b)(1) of the Act”).

68. 8 U.S.C. § 1225(b)(1)(A)(ii). A noncitizen has a “credible fear” of persecution if they can show a “significant possibility” of establishing eligibility for asylum. *Id.* § 1225(b)(1)(B)(v) (defining “credible fear of persecution” as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum”).

69. Noncitizens who are not eligible for expedited removal are placed in formal removal proceedings and may raise asylum claims before an immigration judge in an adversarial proceeding. *See Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last updated Oct. 19, 2015).

70. *See* H.R. REP. NO. 104-469, pt. 1, at 16–17 (1996).

71. *Id.* at 12–13 (“Throughout the process, the procedures protect those aliens who present credible claims for asylum by giving them an opportunity for a full hearing on their claims.”); *id.* at 158 (“If the alien meets this [credible fear] threshold, the alien is permitted to remain in the U.S. to receive a full adjudication of the asylum claim—the same as any other alien in the U.S.”); *see also id.* at 107–08 (“[A]rriving aliens with credible asylum claims will be allowed to pursue those claims.”).

Based on these procedural safeguards, Congress was confident that “there should be no danger that an alien with a genuine asylum claim will be returned to persecution.”<sup>72</sup>

## 2. *The Reinstatement of Removal and Withholding of Removal Provisions*

Prior to IIRIRA, the reinstatement statutory provision applied only to certain illegal reentrants—those who were deemed “anarchists” or “subversives”—but even those individuals could still seek some discretionary relief.<sup>73</sup> Notably, however, in the thirty years prior to 1996, this provision was rarely invoked, with its last mention in a reported Board of Immigration Appeals decision occurring in 1966.<sup>74</sup>

Congress resurrected this dormant provision in 1996 with IIRIRA.<sup>75</sup> Now the reinstatement provision applies to all illegal reentrants, it explicitly insulates reinstated removal orders from judicial review, and it bars the noncitizen from applying for or receiving “any relief” under the INA.<sup>76</sup> Thus, much like the expedited removal process, the reinstatement provision streamlines the process of removing noncitizens who have already been deemed removable and are again unlawfully present.

While Congress significantly modified the reinstatement provision when enacting IIRIRA, it did not substantively alter the withholding of removal provision, which it recodified a few subsections below the reinstatement provision.<sup>77</sup> As previously noted, withholding of removal instructs that noncitizens may not be removed if their life or freedom will be threatened on account of a protected ground, subject to limited exceptions.<sup>78</sup> This language

72. *Id.* at 158 (“Under this [expedited removal] system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution.”).

73. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33–34 (2006).

74. *Castro-Cortez v. INS*, 239 F.3d 1037, 1040 n.1 (9th Cir. 2001) (noting that this provision had largely “fallen into desuetude,” and citing *Matter of Ibarra-Obando*, 12 I. & N. Dec. 576 (B.I.A. 1966) as the last time a published BIA opinion had considered it).

75. 8 U.S.C. § 1252(f) (1994), *amended by* 8 U.S.C. § 1231(a)(5) (Supp. II 1996) provides: If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated . . . and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

76. *Id.* Congress did not define “relief” in the INA; *see also* *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 489 (5th Cir. 2015) (“The immigration statutes do not define the word ‘relief’”).

77. The only revision IIRIRA made to the withholding of removal provision from its original form was to add an explanatory paragraph regarding two of the existing exceptions to eligibility. *Compare* 8 U.S.C. § 1253(h)(1) (1980) *with* 8 U.S.C. 1231(b)(3) (Supp. II 1996).

78. 8 U.S.C. § 1231(b)(3) (2012) states:

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.

mirrors the international law principle of “nonrefoulement,” a principle the U.S. is obligated to uphold as a signatory to the United Nations Protocol Relating to the Status of Refugees.<sup>79</sup> Thus, withholding of removal is the final safeguard against nonrefoulement when no other form of relief, such as asylum, is available. To determine if a noncitizen is eligible for withholding of removal, Congress instructed the Attorney General to apply the asylum interviewing process as outlined in the asylum statutory provision—that is, an immigration judge must ultimately evaluate the merits of the withholding of removal claim.<sup>80</sup>

### 3. *The Asylum Provision*

Prior to 1980, U.S. law did not address refugees or asylum seekers. In 1980, however, Congress enacted the Refugee Act of 1980, an amendment to the INA that opened the nation’s doors to asylum seekers for the first time.<sup>81</sup> In enacting the Refugee Act of 1980, “one of Congress’[s] primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.”<sup>82</sup>

Beginning with the Refugee Act of 1980, Congress has always distinguished between which noncitizens could apply for asylum, and those who, although they could apply, were nevertheless ineligible for it. Specifically, beginning with the Refugee Act of 1980, Congress placed no limitations on who could apply for asylum, but instead, simply instructed the Attorney General to “establish a procedure for an alien physically present in the United States or at a

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*Id.*

79. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (“The basic withholding [of the removal] provision [codified at 8 U. S. C. § 1231(b)(3)] . . . parallels Article 33 [of the Refugee Convention], which provides that ‘no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of [a protected ground].’”) (quoting Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150)). The *Aguirre-Aguirre* court also noted that nearly all the provisions of this Convention, including Article 33, were incorporated by reference in the U.N. Protocol Relating to the Status of Refugees, which the U.S. acceded to in 1968. *Id.*

80. 8 U.S.C. § 1231(b)(3)(C) (2012) (“In determining whether an alien has demonstrated that the alien’s life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien’s burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.”).

81. Refugee Act of 1980, Pub. L. No. 96-212, § 208, 94 Stat. 102 (1980) (codified as amended at 8 U.S.C. § 1158 (Supp. IV 1980)); see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 (1987) (“Prior to the 1980 amendments there was no statutory basis for granting asylum to aliens who applied from within the United States.”). Previously, “asylum for aliens who were within the United States had been governed by regulations promulgated by the INS, pursuant to the Attorney General’s broad parole authority.” *Id.* at 427 n.4.

82. *Cardoza-Fonseca*, 480 U.S. at 436.



land border or port of entry, irrespective of such [noncitizen's] status, to apply for asylum.”<sup>83</sup>

Regarding which applicants were eligible for asylum, Congress provided that the Attorney General may grant asylum to applicants who meet the definition of “refugee.”<sup>84</sup> In the definition of refugee, Congress placed one categorical bar to asylum *eligibility*: noncitizens who in any way “participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion” are not “refugees,” and therefore, although they may apply for asylum, they would nevertheless be ineligible to receive it.<sup>85</sup>

In 1990, Congress created the first bar on who could *apply* for asylum: noncitizens with aggravated felony convictions “may not apply for or be granted asylum.”<sup>86</sup> From 1980 to 1996, the only other amendment Congress made to the asylum statute was in 1994, when Congress limited asylum seekers’ access to work authorization while their asylum applications were pending.<sup>87</sup>

In 1996, Congress passed IIRIRA, which included significant structural and substantive changes to the asylum statutory provision. To begin with, Congress redrafted sections 1158(a), “Authority to Apply for Asylum,” and 1158(b), “Conditions for Granting Asylum.” These structural changes reiterated Congress’s long-standing delineation between (a) those who could *apply* for asylum and, of those applicants, (b) the guidelines for asylum *eligibility*.<sup>88</sup>

Turning first to who could apply for asylum, Congress divided § 1158(a) into two parts. Subpart (1) is a general rule stating that “any alien . . . irrespective of such alien’s status” may apply for asylum in accordance with the asylum provision (§ 1158) and the expedited removal provision (§ 1225(b)).<sup>89</sup> Notably, Congress’s reference to “any” noncitizen appears to be expansive when

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83. 8 U.S.C. § 1158(a) (Supp. IV 1980).

84. *Id.* at § 1158(b). A “refugee” is:  
any person . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, [his home] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .

8 U.S.C. § 1101(a)(42)(A) (2012).

85. 8 U.S.C. § 1101(a)(42)(A) (2012).

86. Immigration Act of 1990, Pub. L. No. 101-649, § 515, 104 Stat. 5053 (1990) (codified as amended at 8 U.S.C. § 1158(d) (Supp. II 1990)) (“An alien who has been convicted of an aggravated felony . . . may not apply for or be granted asylum.”). Previously, there were no bars to who could apply for asylum. *See* 8 U.S.C. § 1158(a) (1982).

87. 8 U.S.C. § 1158(e) (1994). Previously, asylum seekers received work authorization automatically upon applying for asylum. 8 U.S.C. § 1522(b)–(c) (Supp. IV 1980) (repealed 1994).

88. *Compare* 8 U.S.C. § 1158(a) (1994), *with* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 604, 110 Stat. 3009-690 (1996) (codified as amended at 8 U.S.C. § 1158(a) (Supp. III 1997)).

89. 8 U.S.C. § 1158(a) (2012).

considering that prior versions of the asylum statute contemplated asylum for merely “an alien.”<sup>90</sup>

The second part is Subpart (2), titled “Exceptions”; which lists three newly-legislated exceptions to the Subpart (1)’s general rule that “any” noncitizen may apply for asylum.<sup>91</sup> These exceptions amount to mandatory grounds for denial due to ineligibility and apply when the noncitizen: (A) could be removed to a safe third country; (B) failed to apply for asylum within a year of arriving in the U.S.; or (C) was previously denied asylum.<sup>92</sup> However, Congress also created one exception to the second and third ineligibility grounds: (D) if a noncitizen establishes changed or extraordinary circumstances, he or she may apply for asylum at any time, even after the one-year deadline has passed or after an initial asylum application is denied.<sup>93</sup> While adding these bars to asylum access and the changed circumstances exceptions, Congress simultaneously discarded the only pre-IIRIRA bar to who could apply for asylum—the aggravated felony bar.<sup>94</sup>

Turning to the eligibility for asylum provision, § 1158(b), Congress divided it into four parts—three of which are relevant here. Subsection (b)(1) is the same general rule as in prior versions of the INA; it gives the Attorney General the authority to grant asylum when an applicant is a “refugee” by definition.<sup>95</sup> Subsection (b)(2) lays out the exceptions to this general rule and bars the following noncitizens from asylum eligibility: noncitizens who participated in the persecution of another based on the protected asylum grounds; were convicted of a particularly serious crime, which includes aggravated felonies; probably committed a serious political crime outside the U.S. or are a danger to the security of the U.S.; committed terrorist activities;<sup>96</sup> or “firmly resettled in another country” prior to arriving in the U.S.<sup>97</sup> Subsection (b)(2)(C) provides that the Attorney General may create regulations that establish “additional limitations and conditions, consistent with this section, under which [a

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90. Compare 8 U.S.C. § 1158(a) (1994) with 8 U.S.C. § 1158(a) (2012).

91. 8 U.S.C. § 1158(a)(2)(A)–(D) (2012).

92. *Id.*

93. 8 U.S.C. § 1158(a)(2)(D) states:

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) [one-year deadline] and (C) [previous asylum application], if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B) [one-year deadline].

94. Compare 8 U.S.C. § 1158(a)(2) (Supp. II 1996) with Immigration Act of 1990, Pub. L. No. 101-649, § 515(a)(1), 104 Stat. 5053 (1990) (codified as amended at 8 U.S.C. § 1158(d) (1990)).

95. 8 U.S.C. § 1158(b)(1) (Supp. II 1996).

96. *Id.* This is the only instance in the asylum statute where Congress incorporated by cross-reference an existing ground of removability as a bar to asylum eligibility.

97. 8 U.S.C. § 1158(b)(2)(A)(vi) (2012).

noncitizen] shall be *ineligible* for asylum under [§ 1158(a)(1)]”; that is, who may apply but nevertheless may be found ineligible for relief.<sup>98</sup>

A final relevant revision IIRIRA made to the asylum statute was the addition of § 1158(d)(5)(B): “The Attorney General may provide by regulation for any other conditions or limitation on the consideration of an application for asylum not inconsistent with this chapter.”<sup>99</sup> When compared to prior versions of the asylum provision, this is restrictive language. Previously, Congress placed no restriction on the Attorney General’s regulatory authority, and instead, broadly instructed the Attorney General to “establish a procedure” for noncitizens to apply for asylum.<sup>100</sup>

In sum, these revisions all furthered Congress’s goal to reduce the perceived abuse of the asylum system, while still maintaining the long-held American ideal that America’s doors should never be shut in the face of bona fide refugees. The new restrictions on who could be eligible for asylum would, at least in theory, weed out bogus applicants, and even these new restrictions were not absolute, since Congress recognized that bona fide applicants may have good reason for applying late or even reapplying. Congress also seemingly broadened who could seek asylum by not only ensuring asylum access to “any” noncitizen, but also by restricting for the first time what type of regulations the Attorney General could promulgate regarding who may apply for asylum.

#### 4. *The Withholding-Only Regulation*

Although Congress expressly addressed the interplay between the asylum and the expedited removal provisions, both by cross-reference and by explicitly instructing immigration officers to screen noncitizens flagged for expedited removal to determine whether they have indicated a fear of persecution or an intent to apply for asylum, Congress made no such cross-references or mention relating to the reinstatement provision and the asylum and withholding provisions.

But rather than giving these three statutory provisions full effect, the DHS interpreted the reinstatement provision’s bar on “any relief” as trumping the asylum provision’s grant of asylum access to “any” noncitizen, subject to the three exceptions enumerated in the asylum provision.<sup>101</sup> The DHS further interprets the withholding of removal provision’s prohibition on removing

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98. *Id.* § 1158(b)(2)(C) (emphasis added).

99. *Id.* § 1158(d)(5)(B).

100. *See* 8 U.S.C. § 1158(a) (1994) (repealed 1996) (“The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien’s status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42) (A) of this title.”).

101. *Questions and Answers: Reasonable Fear Screenings*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings> (last updated June 18, 2013).

noncitizens who may be persecuted in their home country as the only protection available under the INA to a noncitizen fearing removal.<sup>102</sup>

Pursuant to this interpretation, the DHS promulgated regulations mandating that noncitizens with reinstated removal orders who fear persecution may apply for withholding of removal only.<sup>103</sup> This regulatory scheme further provides that when CBP believes a noncitizen has illegally entered the U.S., CBP must interview the noncitizen to determine their identity and whether they illegally reentered after having been removed or voluntarily departed pursuant to a prior removal order.<sup>104</sup> If so, CBP will automatically reinstate the removal order, and “[t]he alien has no right to a hearing before an immigration judge in such circumstances.”<sup>105</sup>

But, unlike the expedited removal statutory provision and regulation, both of which require CBP to issue a referral when the noncitizen merely “indicates” a fear of persecution, in reinstatement proceedings, the regulation requires the noncitizen to actually “express a fear of persecution”—a more stringent requirement—to receive a “reasonable fear” referral.<sup>106</sup> Additionally, CBP officers must ask a single, unexplained fear-based question during the reinstatement interview, compared to the interview and rights explanation and the three fear-based questions mandated in the expedited removal context.<sup>107</sup> This one question is mandated only by CBP internal policies, rather than by statute or regulation.<sup>108</sup> And because CBP has not made its current internal policies public, it is unclear whether this single question remains part of the CBP’s interview requirements.<sup>109</sup>

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102. *Id.*

103. *See* 8 C.F.R. § 241.8(e) (2016) (providing that noncitizens who express a fear of removal during the reinstatement of their prior order of removal should be referred to an asylum officer to determine whether the noncitizen has a “reasonable fear” of persecution or torture); *see also id.* § 1208.31 (providing how adjudicators are to process “reasonable fear” claims made during reinstatement of removal proceedings under 8 U.S.C. 1231(a)(5)).

104. *Id.* § 241.8(a)(1)–(3).

105. *See id.*; *see also* *Castro-Cortez v. INS*, 239 F.3d 1037, 1044 (9th Cir. 2001) (noting that under the former regulation, the noncitizen had the right to appeal an adverse decision to the Board of Immigration Appeals and ultimately to the federal courts of appeal).

106. *See* 8 C.F.R. § 241.8(e).

107. *See* Memorandum from John P. Torres, Acting Dir. of the Office of Det. and Removal Operations, U.S. Immigration & Customs Enforcement to Field Office Directors, § 14.8(b)(2) (Mar. 27, 2006), [https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/09684drofieldpolicymanual.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf) (updating CBP’s 2006 Instructor’s Field Manual with instructions on reinstatement of removal proceedings, including the requirement that interviewing CBP officers ask the noncitizen, “[d]o you have any fear of persecution or torture should you be removed from the United States?”).

108. *See id.*; 8 U.S.C. § 1231(b)(3) (Supp. II 1996); 8 C.F.R. § 241.8(e).

109. *See* AMERICAN IMMIGRATION COUNSEL, CBP RESTRICTIONS ON ACCESS TO COUNSEL 1 n.4 (Oct. 1, 2014), [https://www.americanimmigrationcouncil.org/sites/default/files/foia\\_documents/access\\_to\\_counsel\\_cbp\\_foia\\_factsheet.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_cbp_foia_factsheet.pdf) (stating “the Inspector’s Field Manual (IFM) . . . has been replaced by the electronic Officer Reference Tool (ORT). Since the ORT is not publicly available, it is unclear what guidance is currently in use. CBP’s Office of Field Operations has recognized that CBP officers are still using the IFM as a ‘reference,’ but stated that the officers

Ultimately, if CBP officers ask this question and the noncitizen answers affirmatively, the regulation requires CBP to refer them to a “reasonable fear” interview, the first step in applying for withholding of removal, rather than a “credible fear” interview, the standard for asylum.<sup>110</sup> If, however, the noncitizen does not express a fear of persecution, the noncitizen is immediately removed pursuant to an unreviewable reinstated removal order.<sup>111</sup>

*C. The Outcome: The Statutory and Regulatory Scheme in Practice*

Based on the withholding-only regulation, “countless” noncitizens have fled persecution and have been denied the opportunity to apply for asylum in the U.S. based solely on their reinstated removal order.<sup>112</sup> This includes individuals who were errantly removed through the expedited removal process because the interviewing CBP officer did not inquire about the noncitizen’s fear of persecution prior to entering the removal order. One such person is Yesenia, who, like Emely, is gay; and after being forced to marry a sixty-four-year-old man who drugged, raped, and impregnated her as a “cure” for her sexual orientation when she was only fourteen years old, she fled El Salvador.<sup>113</sup> When she arrived in the U.S., CBP placed her in expedited removal proceedings and, without ever asking about her fear of removal, quickly deported her.<sup>114</sup> When she fled to the U.S. a second time, her prior removal order was reinstated, but before deporting her, the CBP officer asked about her fear of removal; she responded by expressing her fears and as a result, she was then placed in withholding-only proceedings.<sup>115</sup> Yesenia appealed her placement in withholding-only proceedings all the way to the Ninth Circuit Court of Appeals, arguing she had the right to apply for asylum under the INA; however, prior to the Ninth Circuit’s consideration of this argument, the DHS agreed to allow Yesenia to apply for asylum, thereby settling the appeal in February 2014.<sup>116</sup>

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should be using ‘current guidance and policy issued by HQ.’”). Notably, Emely’s A-file states that she was asked this fear-based question and answered “no.” However, she claims she was never asked about her fear of persecution. *See supra* note 1.

110. *Compare, e.g.*, 8 C.F.R. § 241.8(e) (mandating that in reinstatement of removal screening, noncitizens expressing a fear of removal are to be referred to an asylum officer for a “reasonable fear” interview), *and id.* § 1208.31(a) (same), *with id.* § 235.3(b)(4) (establishing procedures for referrals to “credible fear” interviews), *and id.* § 208.30 (same), *and id.* § 1208.30 (same).

111. *Id.* § 241.8(a).

112. *See* Brief for American Immigration Lawyers Ass’n et al. as Amici Curiae Supporting Petitioner at 2, *Perez-Guzman v. Holder*, No. 13-70579 (9th Cir. Apr. 2, 2014) [hereinafter AILA Amicus Brief] (“Amici are aware of countless individuals facing the same problem.”).

113. Brief for Center for Gender & Refugee Studies et al. as Amici Curiae Supporting Petitioner at 11–13, *Maldonado Lopez v. Holder*, No. 12-72800 (9th Cir. June 6, 2013).

114. *Id.* at 3.

115. *See id.* at 24 n.20.

116. *Id.* at 3; *see also* Order of Dismissal, *Maldonado Lopez v. Holder*, No. 12-72800 (9th Cir. Feb. 4, 2014), EFC No. 41 (granting parties’ joint motion to dismiss petition for review).

Like Emely and Yesenia, Rony Guzman fled to the U.S. twice, fearing for his life after he was targeted for death for testifying against a gang member in Guatemala, in addition to being kidnapped and beaten by the police.<sup>117</sup> Yet CBP errantly removed him through an expedited removal order without inquiring about his fear of persecution. When he returned, CBP reinstated his prior order, but this time also referred him to a reasonable fear interview based on his expression of fear.<sup>118</sup> Like Yesenia, Rony appealed his placement in withholding-only proceedings to the Ninth Circuit, arguing that the withholding-only regulation conflicts with the INA.<sup>119</sup> The Ninth Circuit recently issued a decision in his case that created a circuit split with the Fifth Circuit Court of Appeals' 2015 decision—the only other opinion on this issue.<sup>120</sup> These decisions are discussed below in Part II.

The withholding-only regulation also bars noncitizens from applying for asylum even when the persecution they endured occurred *after* their initial removal from the U.S.<sup>121</sup> “Mirabel’s” is one such case. In 2001, she was removed from the U.S. to Honduras, and “subsequently became romantically involved with an abusive man,” who “confined her to her home, raped her [repeatedly], and even allowed his friends to gang rape her.”<sup>122</sup> When she fled to the U.S., Mirabel’s prior order of removal was reinstated, barring her from applying for asylum based on these events, all of which occurred after her 2001 order of removal was entered.<sup>123</sup>

Like Mirabel, the persecution compelling “David,” who is transgender, to flee Honduras occurred after the DHS removed her from the U.S.<sup>124</sup> She subsequently fled the violence against sexual minorities in Honduras; however, CBP deported her again without inquiring about her fear of persecution, this time pursuant to a reinstated removal order.<sup>125</sup> After her second deportation to Honduras, “she was shot in the face for being transgender and lost an eye.”<sup>126</sup> She then fled to the U.S. for the second time (her third entry), and was placed in withholding-only proceedings based on her expression of fear, unable to apply for asylum based on a removal order that occurred prior to her persecution.<sup>127</sup>

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117. AILA Amicus Brief, *supra* note 112, at 1.

118. *Id.*

119. *Id.* at 2.

120. See *Perez-Guzman v. Holder*, 835 F.3d 1066, 1074 (9th Cir. 2016), *reh'g denied*, No. 13-70579 (9th Cir. Apr. 26, 2017), EFC No. 130 (pending petition for a writ of certiorari to the Supreme Court); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 489 (5th Cir. 2015).

121. AILA Amicus Brief, *supra* note 112, at 2–3.

122. *Id.*

123. *Id.*

124. *Id.* at 3–4.

125. *Id.*

126. *Id.* at 4.

127. *Id.*

Furthermore, immigration advocates have reported that CBP reinstates removal orders when the noncitizen merely seeks entry without valid travel documents, rather than when the noncitizen illegally reenters, the only circumstance that by statute should trigger the reinstatement provision.<sup>128</sup> Thus, the withholding-only provision creates a vicious reinstatement-of-removal cycle that puts noncitizens fleeing persecution seriously at risk of being harmed or killed.<sup>129</sup>

The familiar *Chevron* framework governs the analysis of whether this withholding-only regulatory scheme is valid; this analysis, along with the Fifth and Ninth Circuits' recent interpretations of the INA on this issue, is explored below.

## II. PUTTING THE WITHHOLDING-ONLY REGULATORY SCHEME TO THE CHEVRON TEST

Under the Supreme Court's familiar holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the validity of an agency's regulation is governed by a two-step inquiry.<sup>130</sup> Under *Chevron* step one, the reviewing court asks whether Congress has clearly and unambiguously spoken to the question at issue.<sup>131</sup> If it has, the court then determines whether the regulation comports with Congress's clear intent.<sup>132</sup> If, however, the court determines the statute is silent or ambiguous regarding the specific question at issue, the reviewing court moves to *Chevron* step two and asks whether the regulation is based on a permissible, reasonable interpretation of the statute; an agency's unreasonable, manifestly unjust interpretations will not stand.<sup>133</sup> Here, the withholding-only regulatory scheme fails under both *Chevron* inquiries.<sup>134</sup>

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128. 8 U.S.C. § 1231(a)(5) (2012).

129. See Sibylla Brodzinsky & Ed Pilkington, *U.S. Government Deporting Central American Migrants to Their Deaths*, THE GUARDIAN (Oct. 12, 2015, 8:57 AM), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> (reporting, "The U.S. government is deporting undocumented immigrants back to Central America to face the imminent threat of violence, with several individuals being murdered just days or months after their return . . .," and as many as eighty-three people killed after their deportation since 2014); see also Brad Wong, *Domestic Violence Survivor Killed by Ex-Boyfriend After Deportation to Mexico, Lawsuit Says*, THE HUFFINGTON POST (June 25, 2013, 6:00 PM), [http://www.huffingtonpost.com/2013/06/25/domestic-violence-deportation\\_n\\_3499117.html](http://www.huffingtonpost.com/2013/06/25/domestic-violence-deportation_n_3499117.html) (reporting that according to court documents, CBP forcibly removed Laura, a twenty-two-year-old mother of three, over her tearful pleas for refuge in the U.S. from her violent former boyfriend. Five days after her removal, "her former boyfriend abducted her and took her to a hotel . . . . Later, her body was found in a burning car.").

130. 467 U.S. 837, 842–43 (1984).

131. *Id.*

132. *Id.*

133. *Id.*

134. Only federal appellate courts have jurisdiction to review agency regulations. See *Matter of Akram*, 25 I. & N. Dec. 874, 880 (B.I.A. 2012) (finding the immigration judge and BIA are bound to agency regulations). Federal appellate courts review issues of statutory interpretation and

*A. Has Congress Clearly and Unambiguously Spoken to Who May Not Apply for Asylum?*

To determine whether Congress has clearly and unambiguously spoken to who cannot apply for asylum, a court must analyze the plain and ordinary meaning of the statutory language, read in the context of the overall statutory structure, subject matter, historic context, and legislative history—all of which “help courts determine a statute’s objective and thereby illuminate its text.”<sup>135</sup> Courts also employ traditional canons of statutory interpretation as guides.<sup>136</sup>

*1. Ramirez-Mejia v. Lynch*

In 2015, the Fifth Circuit addressed this issue—an issue of first impression among all circuits at the time—in *Ramirez-Mejia v. Lynch*.<sup>137</sup> There, the court found that Congress had spoken to the question at issue in the INA,<sup>138</sup> and held that the plain language of § 1231(a)(5), the reinstatement-of-removal provision, bars noncitizens with reinstated orders from “all relief from removal, even asylum” under § 1158, the asylum provision.<sup>139</sup> In reaching this holding, the court’s analysis focused on two words in the reinstatement provision: “any” and “relief.”<sup>140</sup>

Regarding “relief,” the court found that Congress did not define this term in any immigration law, including in the INA; consequently, the court looked to Black’s Law Dictionary, which generally defines “relief” as “encompass[ing] any ‘redress or benefit’ provided by a court.”<sup>141</sup> The court also noted that courts commonly use the phrase “asylum relief,” compared to withholding of removal “protection.”<sup>142</sup> Based on this analysis, the court found that asylum is a form of

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construction de novo. *Padash v. INS*, 358 F.3d 1161, 1168 (9th Cir. 2004) (“We review questions of law regarding the INA de novo.”); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187 (9th Cir. 2001) (“We review de novo . . . the BIA’s interpretation of the Immigration and Nationality Act” (internal quotation marks and citation omitted)).

135. *Almendarez-Torres v. United States*, 523 U.S. 224, 228–29 (1998).

136. *See id.* at 228 (explaining that to determine Congressional intent, courts “look to the statute’s language, structure, subject matter, context, and history—factors that typically help courts determine a statute’s objectives and thereby illuminate its text” (citing *United States v. Wells*, 519 U.S. 482, 490 (1997) (applying the “interpretive hierarchy” of statutory canons in order to determine congressional intent))); *see also* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 343 (2010) (explaining that “‘canons of construction’ (also known as maxims of interpretation) guide the methods and sources used in statutory interpretation . . .”).

137. 794 F.3d 485, 490–91 (5th Cir. 2015).

138. Although the petitioner in *Ramirez-Mejia* attacked the validity of the withholding-only regulation, the court did not conduct *Chevron* analysis. Instead, the *Ramirez-Mejia* court held that the statutory scheme alone established the reinstatement bar to asylum, and found the Agency’s withholding-only regulation supported that holding. *Id.* at 48–91.

139. *Id.* at 90.

140. *Id.* at 489–90.

141. *Id.* at 489.

142. *Id.*



“relief” within the meaning of § 1231(a)(5), but that withholding of removal is not.<sup>143</sup>

Regarding the meaning of “any” relief, the court noted that “[r]ead naturally, the word ‘any’ has an expansive meaning,” and “[w]hen the word is not qualified by restrictive language, there is no basis in the text for limiting the word or clause it modifies.”<sup>144</sup> The court also found that a contrary interpretation—one allowing noncitizens with reinstated removal orders to apply for asylum—would be inconsistent with the reinstatement provision.<sup>145</sup> In support of this finding, the court reasoned that “Congress has many options in revising statutory schemes,” and “[a]dopting a clear limitation in one section [§ 1231(a)(5)’s reinstatement provision] without amending another section [§ 1158’s asylum provision] specifically dealing with the same subject is one such option.”<sup>146</sup> Put differently, the court found that the general provision (the reinstatement provision) trumped the specific provision (the asylum provision). As a result, the court held that “[t]he clear language in Section 1231(a)(5) suffices to bar all relief from removal, even asylum.”<sup>147</sup>

At each level, the court’s analysis contained flaws, but the root problem was the court’s failure to apply traditional canons of statutory construction, which resulted in an opinion that sets bad precedent. Before addressing the flaws in its resolution of the interplay between the asylum and reinstatement provisions, a

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143. *Id.* at 489–90.

144. *Id.* at 490 (citations omitted).

145. *Id.*

146. *Id.* The court’s understanding of the legislative history of these provisions is misguided; as addressed in Part I, Congress amended both sections simultaneously. This factual misunderstanding seriously undermines the court’s statutory interpretation, in addition to the fact that the court ignored well-established canons of statutory interpretation, such as the general/specific rule. *See, e.g., RadLAX Gateway Hotel, LLC v. Amalgamated Band*, 132 S. Ct. 2065, 2070–72 (2012).

147. *Ramirez-Mejia*, 794 F.3d at 490. The court further reasoned that analogous case law supported this conclusion, citing two cases holding that noncitizens with reinstated removal orders are not eligible for adjustment of status, a form of “relief.” *Id.* at 490–91. Notably, however, the regulation’s validity was not challenged in either of those cases, and therefore in reaching these holdings, these courts considered both the regulation and the statute in determining that the petitioners were not eligible for adjustment of status relief. *Compare id.* at 490 (“The clear language in Section 1231(a)(5) suffices to bar all relief from removal, even asylum.”), with *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35–36 n.4 (2006) (discussing the regulations that may be considered when an alien seeks withholding of removal, “[n]otwithstanding the absolute terms in which the bar on relief is stated”), and *Silva Rosa v. Gonzales*, 490 F.3d 403, 406 (5th Cir. 2007) (finding that the statutory language was unclear as to the “statutes proper reach”). *Ramirez-Mejia*, conversely, stands for the proposition that the plain language of the INA alone bars asylum relief. Interestingly, the DHS’s application of the withholding-only regulation actually undermines this plain-language holding. As cases like *Yesenia*’s illustrate, the Attorney General has exercised discretion in applying the § 1231(a)(5) reinstatement bar, and allowed a noncitizen to apply for asylum despite having a reinstated removal order. Thus, the Agency may not have promulgated the withholding-only regulation due to the plain language of the INA, as the *Ramirez-Mejia* court concluded, and if the Agency did, it has since departed from that interpretation of the INA.

few preliminary points regarding the court's analysis of "relief" are worth mentioning, as they further illustrate why the application of interpretive canons is vital to establishing good precedent.

First, there is no doubt that a court's ultimate goal when conducting statutory analysis is to determine congressional intent.<sup>148</sup> Therefore, when the *Ramirez-Mejia* court correctly found that Congress did not define "relief," the court should have next considered how Congress used "relief" in the INA before considering secondary sources like the dictionary or colloquial usage.<sup>149</sup> Had the *Ramirez-Mejia* court applied this "normal rule of statutory construction"—that "identical words used in different parts of the same act are intended to have the same meaning"<sup>150</sup>—it would have found that Congress explicitly refers to asylum *and* withholding of removal as forms of "relief" in several sections in the INA.<sup>151</sup> This alone undermines the court's holding, since it looked to the dictionary and colloquialisms, rather than Congressional usage, to find that "relief" included asylum, but not withholding of removal.<sup>152</sup>

Another well-established canon of statutory interpretation succinctly captures the court's other error: "It is a commonplace of statutory construction that the specific governs the general."<sup>153</sup> Under this canon, the "general language of a

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148. See, e.g., *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

149. Canons of interpretation provide that the dictionary's definition or the colloquial uses of a word may be indicators of what Congress intended when it used a particular word; however, those canons are less preferred in this case, where Congress itself used the word "relief" repeatedly in the INA, and therefore deducing its meaning based on these uses is more appropriate when determining congressional intent. See, e.g., *United States v. Wells*, 519 U.S. 482, 491 (1997) ("[Courts] do, of course, presume that Congress incorporates the common-law meaning of the terms it uses if those terms have accumulated settled meaning under the common law," but this canon of interpretation is appropriately employed only when "the statute does not otherwise dictate."); see also Scott, *supra* note 136, at 343.

150. See *Sullivan v. Stroop*, 496 U.S. 478, 486 (1990).

151. See, e.g., 8 U.S.C. § 1229a(c)(7)(C)(ii) ("There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 [asylum] or 1231(b)(3) [withholding of removal] of this title. . . ." (footnote omitted)). Moreover, as a general rule, Congress uses the term "relief" in the INA to reference mandatory benefits, such as withholding of removal, see *id.* § 1229a(c)(4)(A), and discretionary benefits, such as cancellation of removal, see § 1101(a)(13)(C)(v) (cross-referencing § 1229b(a)).

152. See *Ramirez-Mejia*, 794 F.3d at 489 (noting that courts commonly refer to asylum as "asylum relief" and withholding of removal as "forms of protection," as support for its holding that Congress intended to bar asylum relief, but not withholding protection (emphasis added)). However, this conclusion and reasoning ignores conflicting precedent. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419–20 (1999) (referring to asylum and withholding of removal as forms of "relief").

153. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.”<sup>154</sup> “The general/specific canon is perhaps most frequently applied to statutes,” like the one at issue here, “in which a general permission or prohibition is contradicted by a specific prohibition or permission.”<sup>155</sup> To eliminate the contradiction, the Supreme Court instructs that the specific provision should be construed as “an exception to the general one.”<sup>156</sup> This not only avoids contradiction, but also “the superfluity of a specific provision that is swallowed by the general one, ‘violating the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.’”<sup>157</sup>

Had the *Ramirez-Mejia* court applied these and other axiomatic rules of statutory construction, it would have reached a different result—one that would allow “any” noncitizen to apply for asylum, even noncitizens whose removal orders were reinstated. For example, as acknowledged in *Ramirez-Mejia*, the “general” provision is § 1231(a)(5), the reinstatement provision; it applies to noncitizens with reinstated orders of removal, and bars them from applying for “any relief.”<sup>158</sup> By contrast, the asylum provision, § 1158, “specifically” addresses who may and may not seek one particular form of “relief”—asylum.<sup>159</sup> However, in § 1158’s list of exceptions to its broad grant of who may apply for asylum—“any alien,” “irrespective of such alien’s status”—Congress neither cross-referenced nor mentioned the reinstatement bar.<sup>160</sup> Section 1158 also includes a provision allowing for multiple asylum applications based on changed country conditions.<sup>161</sup> Thus, to resolve the conflict between these provisions,

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154. *Id.* (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

155. *Id.*

156. *Id.*; see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (explaining that the canon to resolve ambiguities so as not to conflict with each other, as incorporated above, is based on the presumption that Congress intended to create “a symmetrical and coherent regulatory scheme”).

157. *RadLAX Gateway Hotel, LLC*, 132 S. Ct. at 2071 (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

158. *Ramirez-Mejia*, 794 F.3d 485, 490 (5th Cir. 2015) (“Congress has many options in revising statutory schemes. Adopting a clear limitation in one section [§ 1235(a)(5)] without amending another section *specifically dealing with the same subject* [§ 1158] is one such option.” (emphasis added)).

159. *Id.*

160. 8 U.S.C. § 1158(a)–(b) (2012). This is particularly relevant considering (a) that Congress crafted the two provisions simultaneously and (b) also while crafting §§ 1231 and 1158, Congress incorporated by cross-reference terrorism-related grounds for inadmissibility as an exception to who may be granted asylum. See *id.* § 1158(b)(2)(A)(v). Thus, the fact that Congress did not mention or even incorporate by cross-reference § 1231(a)(5)’s bar on relief, yet it did so with other grounds, further supports the conclusion that Congress intended § 1158 to be an exception to § 1231(a)(5)’s general bar on relief.

161. *Id.* § 1158(a)(2)(D). This shows that Congress necessarily intended that an applicant, having previously been denied asylum, and therefore also having previously been subject to a final order of removal and likely removed pursuant to it, would be permitted to re-apply for asylum. It follows, therefore, that Congress was cognizant that noncitizens with prior orders of removal would

courts should construe § 1158 as an exception to § 1231(a)(5) to resolve this contradiction between § 1231(a)(5)'s general prohibition on who may apply for "any relief" and § 1158's rules on who may apply specifically for "asylum." This reading of the statute avoids violating the "cardinal rule" of statutory interpretation. It gives effect to every clause of the INA, including § 1158(a)(2)(D), the statutory provision allowing for successive asylum applications, which contrary interpretations of the statute—like the *Ramirez-Mejia* court's and the Agency's—allow to be swallowed up by § 1231(a)(5).<sup>162</sup>

Other well-established canons of statutory interpretation lead to the same interpretation. For example, when Congress expressly legislates exceptions to a general rule as it did here, canons of interpretation encourage courts to narrowly construe the exceptions, rather than creating additional exceptions to those Congress listed in the statute.<sup>163</sup> Here, in § 1158(a)(2), titled "Exceptions,"<sup>164</sup> Congress expressly legislated three exceptions to § 1158(a)(1)'s general rule regarding who may apply for asylum, and therefore the *Ramirez-Mejia* and the DHS interpretations that the reinstatement of removal provision established a fourth exception is discouraged.<sup>165</sup> Similarly, the ancient *expressio unius est exclusio alterius* canon advises that Congress's express mention of one thing—here, three exceptions—excludes all others, including the reinstatement of removal provision.<sup>166</sup>

Interpreting the asylum provision as an exception to the reinstatement provision not only resolves the potential conflict created by the two provisions, but also resolves the conflict the Agency and *Ramirez-Mejia* court's interpretations create with U.S. obligations under international law. Under the centuries-old "Charming Betsy" canon of statutory interpretation, federal law "ought never to be construed to violate the law of nations if any other possible

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apply for asylum, yet Congress did not incorporate the § 1235(a)(5) reinstatement bar by cross-reference or any other method in § 1158.

162. See *Ramirez-Mejia*, 794 F.3d at 490–91; *but cf.* *RadLAX Gateway Hotel, LLC*, 132 S. Ct. at 2071 ("[T]he canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one, violating the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.").

163. *United States v. Smith*, 499 U.S. 160, 167 (1991) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980))); see also Scott, *supra* note 136, at 363 ("Interpreters are cautioned to read [exceptions] narrowly," and "not to create exceptions in excess of those specified by the legislature." (footnote omitted)).

164. "Titles are generally not viewed as part of the statute because in old English practice, the legislature did not provide them." Scott, *supra* note 136, at 363. U.S. legislators, by contrast, do provide the titles, and therefore "titles are not law, but they are not banished from interpretive significance." *Id.*

165. See *supra* note 147 and accompanying text.

166. See *Ventas, Inc. v. United States*, 381 F.3d 1156, 1161 (Fed. Cir. 2004) ("Where Congress includes certain exceptions in a statute, the maxim *expressio unius est exclusio alterius* presumes that those are the only exceptions Congress intended.").

construction remains.”<sup>167</sup> This canon is especially compelling here because Congress’s express purpose in enacting the Refugee Act of 1980 was to bring U.S. law into conformance with its obligations under the United Nations Protocol Relating to the Status of Refugees (Protocol).<sup>168</sup> For example, the Protocol requires the U.S. to provide documented refugees or asylum seekers with certain benefits, such as the right to travel internationally.<sup>169</sup> But under U.S. law, noncitizens granted withholding of removal under § 1231(b)(3) are not permitted to travel abroad, while those granted asylum are.<sup>170</sup> Therefore, a noncitizen who would otherwise meet the lower burden of establishing they are a “refugee,” but who is permitted to seek only withholding of removal due solely to the DHS’s current interpretation of the INA, is effectively denied a protection that the U.S. is obligated to provide under the Protocol.<sup>171</sup> This interpretation is not only contrary to the guidance of numerous canons of interpretation, but it also contrary to binding precedent, since an alternative, non-conflicting statutory construction is available.<sup>172</sup>

Based on these canons of statutory interpretation, in addition to the considerations addressed below, the *Ramirez-Mejia* court should have concluded that Congress has spoken to the question at issue: subject to only the three exceptions in the asylum provision, “any” noncitizen may apply for asylum, including those noncitizens with reinstated removal orders.

## 2. *Perez-Guzman*

In 2016, the Ninth Circuit became the second circuit court to address the interplay between the asylum and reinstatement provisions.<sup>173</sup> Though for

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167. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

168. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress[s] primary purposes 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.” (citation omitted)).

169. Convention for the Protocol Relating to the Status of Refugees art. 1, Jan. 21, 1967, 19 U.S.T. 6223 (adopting the United Nations Convention Relating to the Status of Refugees, which outlines the protocol for “Travel Documents” in article 28).

170. *See* 8 C.F.R. § 223.1 (2016) (permitting “refugee travel documents” for only noncitizens granted asylum or refugee status); *id.* § 241.7 (providing that any departure after successfully applying for withholding of removal constitutes “self-removal,” and must therefore apply to reenter).

171. *See Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003) (finding the applicant had failed to meet the lower burden of establishing asylum eligibility and therefore also failed to establish more stringent standard of withholding eligibility).

172. *See, e.g., Schooner Charming Betsy*, 6 U.S. at 118 (“It has also been observed that an act of Congress ought never be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”).

173. *Perez-Guzman v. Lynch*, 835 F.3d 1066 (9th Cir. 2016), *reh’g denied*, No. 13-70579 (9th Cir. Apr. 26, 2017), EFC No. 130 (pending petition for a writ of certiorari to the Supreme Court).

different reasons than those of the *Ramirez-Mejia* court, the *Perez-Guzman* court reached the same conclusion: the reinstatement of a removal order bars a noncitizen from seeking asylum.<sup>174</sup> But as thorough as the *Perez-Guzman* court's opinion is, the court still made significant legal errors that led to an incorrect conclusion.

Under *Chevron* step one, the court found that Congress has not directly spoken to the issue of whether asylum is available to a noncitizen who is subject to a reinstated removal order. Instead, the court found that the reinstatement and asylum provisions are “in conflict.”<sup>175</sup> Before addressing the court's *Chevron* analysis, it should first be noted that it is unclear whether *Chevron* even applies to a statutory conflict. That is, as a split U.S. Supreme Court recently discussed, it is clear that *Chevron* applies when the statutory scheme at issue is *silent* or creates an *ambiguity*.<sup>176</sup> In those cases, courts often find deference is owed to the agency “because [courts] presume that Congress intended to assign responsibility to resolve the [silence or] ambiguity to the agency.”<sup>177</sup> But, as Chief Justice Roberts and Justices Scalia and Alito recently observed,<sup>178</sup> a direct conflict in a statute is not an “ambiguity” that triggers *Chevron*: “Direct conflict is not *ambiguity*, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense.”<sup>179</sup> Thus, given that the *Perez-Guzman* court found these statutory provisions created a direct conflict, not an ambiguity or silence, the court arguably should not have applied *Chevron* to begin with.<sup>180</sup>

Turning to the court's *Chevron* analysis, the court applied only one canon of statutory interpretation, the general-specific canon.<sup>181</sup> The court found that both provisions spoke specifically to two subsets of individuals— asylum seekers and individuals with reinstated removal orders—but that neither provision

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174. *Id.* at 1082.

175. *Id.* at 1076. Notably, the court referred to the interplay between the two provisions as creating both an “ambiguity” and a “conflict,” yet it ultimately concluded that Congress was silent regarding the ultimate question at issue, whether asylum is available to noncitizens with reinstated removal orders. *Id.* at 1077.

176. See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) (Roberts, C.J. & Scalia, J., concurring in judgment) (plurality opinion).

177. *Id.*

178. See *id.* at 2216 (Alito, J., dissenting) (plurality opinion) (quoting Chief Justice Roberts' concurring opinion).

179. *Id.* at 2214 (Roberts, C.J. & Scalia, J., concurring in judgment) (plurality opinion) (emphasis added) (Justices Kagan, Kennedy, and Ginsburg found the statutory conflict was *Chevron*-eligible; the remaining three Justices did not take a position on this issue.).

180. See, e.g., *Petition for Panel Rehearing and Rehearing En Banc, Perez-Guzman v. Lynch* at 10–11, No. 13-70579 (9th Cir. Nov. 16, 2016), EFC No. 101 (arguing that because *Chevron* “relies on the premise that Congress intentionally delegated authority to an agency . . . . If statutes conflict, that means Congress did not delegate, it blundered.” And therefore, “[w]hen faced with a true statutory conflict between two unambiguous statutes, the Court should not defer to the agency.”).

181. *Perez-Guzman*, 835 F.3d at 1075–76.

contemplated subsets of individuals who met both conditions—noncitizens with reinstated removal orders seeking asylum.<sup>182</sup> Consequently, the court concluded the general-specific canon “does not help to *clearly* discern Congress’s intent as to which section should take precedence here.”<sup>183</sup>

The court also found the legislative history of the INA did not resolve the ambiguity created by the two provisions.<sup>184</sup> The court considered the amendments of the INA, including those enacted through IIRIRA, as essentially a tie: they “show Congress intended to add more detail to the existing asylum scheme while simultaneously expanding the scope and consequences of the reinstatement of an earlier removal order.”<sup>185</sup> And after finding neither party presented legislative materials, the court concluded “the legislative history is ‘silent on the precise issue before us.’”<sup>186</sup> Consequently, the court moved to *Chevron* step two analysis.<sup>187</sup>

But had the *Perez-Guzman* court applied the numerous other canons of statutory interpretation available to it, its conclusions would have been different. To begin with, the court was unable to determine whether the asylum provision’s grant of access to asylum to “any” noncitizen (save the three enumerated exceptions), generally or specifically addressed noncitizens with reinstated removal orders seeking asylum. But the application of the *expressio unius est exclusio alterius* canon—the express mention of one thing excludes all others—would have guided the court to find that the asylum provision is the “specific” provision that should control: the asylum provision expressly mentions three exceptions to asylum access, and therefore, all other exceptions, including the reinstatement provision, are excluded.<sup>188</sup>

Similarly, the court did not apply the Charming Betsy doctrine, which instructs courts to resolve statutory ambiguity in a way that avoids violating international law, including our treaty obligations under the Refugee Protocol, whenever possible.<sup>189</sup> But rather than resolving the ambiguity in a way that preserves the asylum provision, which codifies the U.S.’s obligations under the Refugee Protocol, the court “adopted an agency interpretation that violates [those] treaty obligations by penalizing refugees based [solely] on their unlawful entry or presence,” which the U.S., as a party to the Refugee Protocol, is

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182. *Id.* at 1076.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 862 (1984)).

187. *Id.* at 1077.

188. *See Ventas, Inc. v. United States*, 381 F.3d 1156, 1161 (Fed. Cir. 2004).

189. *See* Brief for Legal Scholars as Amici Curiae Supporting Petitioner at 9–11, *Perez-Guzman v. Lynch*, No. 13-70579 (9th Cir. Nov. 28, 2016) [hereinafter *Legal Scholars Amicus Brief*], EFC No. 102-2. The esteemed legal scholars of this amicus brief are Professor James C. Hathaway, Professor Deborah Anker, Dean Erwin Chemerinsky, Dean Kevin R. Johnson, Professor Hiroshi Motomura, Professor Karen Musalo, and Professor Victor C. Romero.

prohibited from doing.<sup>190</sup> Had the court applied the Charming Betsy doctrine, it would have resolved this tension in a way that preserves rather than disrupts this country's treaty obligations.

Also, contrary to the court's conclusion that legislative history was unhelpful in determining Congress's intent, IIRIRA's internal legislative history and the statutory amendments of the reinstatement and asylum provisions both compel the conclusion that reinstated removal orders should not categorically bar asylum access.<sup>191</sup> Regarding the amendments to the asylum provision, not only did Congress reconstruct the statute by clearly distinguishing who could apply for asylum and who was eligible to receive it, but it also added that "any" noncitizen, rather than just "a" noncitizen, could apply for asylum, subject to three exceptions.<sup>192</sup> All three of these exceptions were new, and Congress simultaneously discarded the only then-existing bar to asylum access, the aggravated felon bar. Thus, if Congress had intended the reinstatement of removal order to serve as a fourth exception to asylum access, it would have listed it here when simultaneously amending both the asylum and reinstatement provisions. Also notable is that in the asylum provision, Congress cross-referenced several other statutory provisions, including the new expedited removal provision, yet did not cross-reference the reinstatement provision, despite simultaneously amending it to include a bar on access to "all relief."<sup>193</sup> The court did not consider these amendments in its analysis.

Also persuasive is the fact that when revising the asylum provision, Congress contemplated placing a numerical cap on how many noncitizens could receive asylum per year; however, during this process, legislators lamented that not only would a cap be contrary to American ideals, but that it would also not solve the main problem voters wanted Congress to resolve: illegal entry.<sup>194</sup> Ultimately, a numerical cap was never enacted.<sup>195</sup> Congress also considered, but declined,

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190. *Id.* at 9.

191. See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005) ("[W]hen a sponsor or committee [of a bill] expresse[s] an understanding of the bill or the mischiefs at which it was aimed, federal courts often t[ake] that as probative evidence of the text's meaning.").

192. Compare 8 U.S.C. § 1158(a) (1994), with Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 604, 110 Stat. 3009-690 (1996) (codified as amended at 8 U.S.C. § 1158(a) (Supp. III 1997)).

193. See generally 8 U.S.C. § 1158 (2012).

194. H.R. REP. NO. 104-469, pt. 1, at 517 (1996) ("The admission of refugees to the United States is intimately connected to our foreign policy concerns . . . . Legislating a cap on refugee admissions would send the wrong message to nations that share the responsibility for the world's refugees and needlessly jeopardize the international system of protection and resettlement of those fleeing persecution, torture, and other life threatening situations." (statement of Rep. Reed)); see also *id.* at 526 ("Some argue that dramatic cuts in legal immigration and protection of refugees are supported by the American people. Unlike this bill[']s proposed cap on refugee admissions, however, voters draw a clear distinction between illegal and legal immigration." (dissenting views of Reps. Conyers, Jr., Schroeder, Jackson-Lee, Berman, Watt, Lofgren, Nadler, Scott, Frank, Serrano, and Becerra)).

195. See 8 U.S.C. § 1158.



creating a categorical bar on asylum applications not filed immediately because such a bar would only increase the chances of removing bona fide asylum seekers who had legitimate reasons for not voicing their fear of removal immediately.<sup>196</sup> Ultimately, Congress enacted a one-year deadline for filing an asylum application, but even that bar is not absolute if the applicant can show changed or extraordinary circumstances for filing an application after the deadline.<sup>197</sup>

Turning to the legislative history of the reinstatement provision, Congress certainly intended this new provision to “toe[] a harder line,” particularly on illegal immigration.<sup>198</sup> Indeed, Congress and its constituents (incorrectly)<sup>199</sup> believed unlawfully present noncitizens were depleting the finite resources available to Americans, such as jobs, public education, and other public benefits, and were determined to get this problem under control.<sup>200</sup> Undoubtedly, reducing illegal immigration was Congress’s primary purpose for crafting the expedited removal provision, which also served a secondary goal of reducing the abuse of the asylum process.<sup>201</sup> In light of this, the question the *Perez-Guzman* court was unable to consider—because it apparently had no legislative materials on the record before it—was: how hard a line did Congress intend to toe when it enacted the reinstatement provision?

Considering another congressional goal in crafting IIRIRA—Congress’s commitment to the U.S. policy of welcoming and protecting bona fide asylum seekers—further assists in interpreting the reinstatement provision and

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196. SCHRAG, *supra* note 29, at 230–31 (noting that some Senators “would have denied asylum summarily to anyone who sought to apply for it more than thirty days after entering the United States,” but “[i]n the end, the deadline was extended to one year, and exceptions were created not only for changed conditions in the applicant’s country, but also for other types of ‘changed’ circumstances and for ‘extraordinary’ circumstances.”).

197. *See id.*; *see also* 8 U.S.C. § 1158(a)(2)(D).

198. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 34 (“In IIRIRA, Congress replaced th[e] reinstatement provision with one that toed a harder line.”).

199. Maria Santana, *5 Immigration Myths Debunked*, CNN MONEY (Nov. 20, 2014, 7:12 PM), <http://money.cnn.com/2014/11/20/news/economy/immigration-myths/> (reporting that contrary to popular belief, immigrants do pay taxes and Social Security, they are not a drain on the system, nor are they taking American jobs).

200. 142 CONG. REC. 24,778 (1996) (“In California, our health facilities and our schools have been flooded with illegal aliens. Our public services are stretched to the breaking point. Tens of billions of dollars that should be going to benefit our own citizens are being drained away to provide services and benefits to foreigners who have come here illegally.” (statement of Rep. Rohrabacher)); *see also id.* at 24,775 (“As we all know, virtually all [illegal immigrants] are lured here by the prospect of jobs . . .” (statement of Rep. Beilenson)).

201. *See, e.g., id.* at 24,777–78 (“One of the things this bill does is to reform the whole process of asylum . . . . We have had lots of people coming in here claiming that. Most of them who claim it have no foundation in claim at all. Once they get a foot in the airport or wherever, they make that claim, they get into the system, many of them are never heard from again.” (statement of Rep. McCollum)).

answering that question.<sup>202</sup> This goal to protect asylum seekers was often discussed during the creation of IIRIRA; for example, Rep. Jackson-Lee commended the progress IIRIRA made in the protection of asylum seekers, noting that the U.S. is the leader in providing opportunities for justice, liberty, and freedom, and as such, “we should never deny the opportunity for those seeking political refuge and needing social justice and fleeing from religious persecution. Our doors should never be closed [to them].”<sup>203</sup>

Given this legislative history, it is difficult to believe that the reinstatement provision’s “harder line” on illegal entry was intended to categorically bar anyone with a reinstated order from access to asylum when—at the same time it enacted the reinstatement provision—Congress repeatedly rejected similar bars to asylum access, such as the numerical cap on refugees and the requirement that asylees immediately request asylum upon arrival, and instead enacted numerous measures intended to protect asylum seekers, including the changed circumstances exceptions to the one-year bar and prior-asylum-adjudication bar. Put differently, it is difficult to reconcile that on one hand, Congress made painstaking efforts to ensure asylum seekers have complete access to asylum in the asylum and expedited removal provisions, including appellate and reapplication rights and exceptions to two of the three bars on access to asylum, while on the other hand, simultaneously imposing a mandatory, categorical bar to asylum access in the illegal reentry context, even for those who experienced persecution *after* their initial order of removal was entered and have therefore never even had a chance to apply. It is especially difficult to reconcile this when applying canons of statutory interpretation, particularly the Charming Betsy doctrine and the rule of lenity, which instructs courts to resolve statutory ambiguities in immigration law in favor of the noncitizen—not the government.<sup>204</sup>

Also notable is the fact that Congress explicitly removed the responsibility of evaluating fear claims from “low level” CBP officers in the expedited removal process; Congress placed this responsibility exclusively with asylum officers

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202. H.R. REP. NO. 104-469, pt. 1, at 13 (1996) (“Throughout the process, the procedures protect those aliens who present credible claims for asylum by giving them an opportunity for a full hearing on their claims.”); *id.* at 107–08 (“[A]rriving aliens with credible asylum claims will be allowed to pursue those claims.”); *id.* at 158 (“If the alien meets this [credible fear] threshold, the alien is permitted to remain in the U.S. to receive a full adjudication of the asylum claim—the same as any other alien in the U.S. Under this system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution.”).

203. 142 CONG. REC. 24,779 (statement of Rep. Jackson-Lee). Additionally, Rep. Smith, echoed this sentiment in an article published less than a year after taking part in crafting and enacting IIRIRA, stating: “No aspect of our immigration policy is more closely tied to the history and founding principles of our nation than the practice of offering refuge to those suffering political or religious persecution abroad.” Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY’S L.J. 883, 894 (1997).

204. See *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (applying the rule of lenity and finding that “[e]ven if [a statute] lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in [the noncitizen’s] favor”).

and immigration judges.<sup>205</sup> Thus, it is extremely unlikely that Congress would account for no margin of error regarding some officers' inevitably errant decisions not to refer a bona fide asylum seeker to a credible fear interview, which then results in an errant expedited removal order, and then a permanent bar to asylum access.<sup>206</sup>

All of these considerations show that the *Perez-Guzman* and *Ramirez-Mejia* courts erred. The sounder conclusion is that Congress has spoken to the question at issue: subject to only the three exceptions in the asylum provision, "any" noncitizen may apply for asylum, including those with reinstated removal orders. Alternatively, courts should conclude the reinstatement provision's bar to any "relief" does not include access to asylum.<sup>207</sup>

*B. If the INA is Ambiguous, is the Withholding-Only Regulatory Scheme Based on a Permissible, Reasonable Interpretation of the Asylum, Reinstatement, and Withholding Statutory Provisions?*

Even if a court finds, as the *Perez-Guzman* court did, that the INA is silent or ambiguous regarding whether a noncitizen with a reinstated removal order may not apply for asylum, the DHS's interpretation does not deserve deference because it is unreasoned, unreasonable, and leads to arbitrary, manifestly unjust results.<sup>208</sup> To begin with, the agency has repeatedly maintained that there is no ambiguity or silence on this issue; instead, it has asserted that Congress expressly spoke to the issue in the reinstatement provision of the INA.<sup>209</sup> Therefore, *Chevron* deference to the agency is unwarranted because, as the agency concedes, its regulatory scheme did not involve reconciling conflicting policies or statutory provisions, nor was it the result of the agency's unique knowledge of implementing immigration laws—the bedrock reasons for *Chevron* deference.<sup>210</sup>

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205. See *supra* notes 66–69 and accompanying text.

206. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“[Courts] must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such . . . magnitude to an administrative agency.”).

207. See Legal Scholars Amicus Brief, *supra* note 189, at 16–17.

208. See *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (noting that regulations must be “reasonable in light of the legislature’s revealed design”); *Zheng v. Gonzales*, 422 F.3d 98, 120 (3d Cir. 2005) (“[T]he regulation’s effect . . . does not ‘harmonize with the plain language of the statute, its origin, and purpose.’” (quoting *Sekula v. FDIC*, 39 F.3d 448, 452 (3d Cir. 1994))).

209. *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1074–75 (9th Cir. 2016), *reh’g denied*, No. 13-70579 (9th Cir. Apr. 26, 2017), EFC No. 130 (addressing the government’s argument that Congress spoke unambiguously to the issue in the reinstatement provision).

210. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (explaining that “the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations”).

Deference is also not owed because this regulation is the byproduct of the agency's hyper-literal reading of the plain language of only the reinstatement provision; it does not take into account the asylum provision, which codified the U.S.'s treaty obligation to offer asylum without regard to the noncitizen's status. This is not reasoned decision-making that warrants *Chevron* deference.<sup>211</sup>

Moreover, “[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because [it is] not within its spirit[,] nor within the intention of its makers.”<sup>212</sup> And as addressed above, not only does the withholding-only regulation not contemplate the spirit of the law or Congress's clear intent to protect all bona fide asylum seekers, the regulatory scheme actually conflicts with both. It also creates discord with U.S. obligations under international law, and is contrary to the interpretation demanded by numerous canons of statutory construction.

Furthermore, the stories of Emely, Yesenia, Mirabel, David, Rony, and countless others illustrate that the regulation leads to absurd, manifestly unjust results, and is therefore owed no deference.<sup>213</sup> Specifically, Emely, Yesenia, and Rony were never given a chance to apply for asylum; they were errantly removed through the expedited-removal process—none of them were asked about their fear of persecution prior to being deported, despite statutory and regulatory rules mandating this inquiry—and when they returned, these wrongly-entered removal orders were reinstated, placing asylum protection just out of their reach. Given that Congress made considerable efforts to ensure asylum access to those in expedited removal, the regulation, coupled with CBP officers' refusal to comply with the INA, undermines this congressional intent.

These individuals' stories also show that the results of the withholding-only regulation serve no larger policy goal or reasoned consideration.<sup>214</sup> As the Supreme Court has found, withholding and asylum serve similar purposes, so allowing illegal reentrants access to withholding relief but not asylum is

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211. See *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 135 (D.C. Cir. 1984) (reversing an agency rule because it was not the result of a “reasoned decisionmaking process calculated to accommodate the conflicting policies”).

212. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

213. *Id.* at 459 (“If a literal construction of the words of a statute [lead to an absurd result], the act must be so construed as to avoid the absurdity.”).

214. See *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1145 (9th Cir. 2013) (explaining that deference to an agency's interpretation is unwarranted where the agency interpretation was not “a reasonable policy choice for the agency to make”). Rather, Congress's goal of deterring illegal entry and reentry through summary exclusion methods is directed toward inadmissible noncitizens, not bona fide asylum seekers. See also *Martin*, *supra* note 8, at 687 (noting the policy goals of summary removal methods, such as expedited removal and reinstatement of removal, include deterrence, and also “prevents inadmissible aliens from establishing homes, employment, and other ties to this country. This enforcement strategy also makes it easier for the individuals [summarily removed] to resume their lives in their countries of origin.”).

irreconcilable as a policy goal, as is punishing refugees for illegally reentering after being errantly removed in the first place.<sup>215</sup>

Cases like *Mirabel*'s further illustrate the manifestly unjust effect of the withholding-only regulatory scheme. It was after her deportation that *Mirabel* experienced the horrific persecution that caused her to flee; yet, when she arrived in the U.S., she was unable to apply for asylum due solely to her prior removal order. And contrary to the *Perez-Guzman* court's conclusion, this result is not the byproduct of a "difficult policy choice" the agency made.<sup>216</sup> Instead, the sounder conclusion is that it is arbitrary because it furthers no policy goals: if permitted to apply for asylum, *Mirabel* must still prove her eligibility through the same process as in withholding-only proceedings, and therefore the DHS must expend the same resources in litigating asylum claims.

Notably, this regulatory scheme also creates a direct conflict with the subpart of the asylum provision that provides for successive asylum applications based on changed circumstances.<sup>217</sup> Under the withholding-only regulatory scheme, however, successive asylum applications are not available to those with reinstated removal orders. Under the same regulation, however, it is available to noncitizens who remain in the U.S. in violation of their initial removal order.<sup>218</sup> The effect, therefore, is to reward those who refuse to comply with removal orders by allowing them to reapply for asylum, while punishing noncitizens who comply with their removal order and subsequently reenter based on new or renewed persecution in their home country.<sup>219</sup> This effect is untenable.

Additionally, a court should not give deference to the agency's interpretation because "the agency wrongly believe[d] that interpretation is compelled by Congress" when promulgating it.<sup>220</sup> Here, the agency promulgated the withholding-only regulation based on a literal interpretation of the INA that the agency believed was compelled by Congress; thus, the agency believed illegally reentering noncitizens are subject to a *mandatory, unreviewable* reinstatement

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215. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999) ("Under the immigration laws, withholding is distinct from asylum, although the two forms of relief serve similar purposes.").

216. *Gila River Indian Cmty.*, 729 F.3d at 1149 (finding that deferring to an agency's "unexplained caveat would permit the agency to sidestep its duty to bring its expertise to bear on the 'difficult policy choices' it is tasked with making" (quoting *Negusie v. Holder*, 55 U.S. 511, 523 (2009))).

217. 8 U.S.C. § 1158(a)(2)(C)–(D) (2012).

218. AILA Amicus Brief, *supra* note 112, at 26 (noting that "it makes no sense that [a noncitizen] who complied with a removal order in the first instance would be barred from asylum, while [a noncitizen] who evaded removal could be considered for such protection, even if only when there are changed circumstances").

219. *See id.*

220. *Gila River Indian Cmty.*, 729 F.3d at 1149 (internal quotation marks omitted) ("Deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress" (quoting *PKD Labs, Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004))).

of removal order and also face a mandatory bar to asylum access. However, the agency also maintains that it may exercise its discretion in reinstating removal orders, which allows some noncitizens to apply for asylum despite being initially subject to a reinstated removal order.<sup>221</sup> Indeed, the agency recently exercised that discretion and allowed a noncitizen with a reinstated removal order to seek asylum.<sup>222</sup> This departure from its previous hard line is strong evidence that the withholding-only regulation was premised on the agency's incorrect belief that the mandatory reinstatement created a mandatory bar to asylum access was compelled by Congress, a belief the agency no longer maintains and, accordingly, no deference is owed to it. In any event, the agency has issued no guidelines for exercising this discretion, which leaves this decision to the "unfettered discretion of lower-level officers."<sup>223</sup> Not only does this create absurd results, but it also conflicts with clear Congressional intent that such weighty decisions are to be made by asylum officers and immigration judges.<sup>224</sup>

Finally, a court's deference to the agency's interpretation is unwarranted because an interpretation that avoids these absurd, unjust results exists—the same construction all other considerations point to: allowing any noncitizen to apply for asylum, subject only to the exceptions enumerated in § 1158(a).<sup>225</sup>

For these reasons, the *Perez-Guzman* court erred in giving deference to the agency's regulatory scheme. And to avoid that error, other courts finding ambiguity or silence in the INA on this issue should not give deference to the agency's interpretation.

### III. FAIRNESS MATTERS: "ANY" NONCITIZEN SHOULD BE ALLOWED TO APPLY FOR ASYLUM

Even if a court disagrees with the previous Part's statutory analysis, there are still numerous policy reasons for amending the statutory or regulatory scheme, thereby allowing noncitizens with reinstated removal orders to apply for asylum. Many of these reasons stem from the errors CBP officers routinely make in issuing expedited removal orders. These errors often result in CBP issuing errant removal orders, which permanently bar bona fide asylum seekers from future asylum access. In addition to examining the evidence of these errors, this Part also addresses the secondary consequences of these errors, such as how immigration judges routinely deny asylum based on adverse credibility findings rooted in the inaccurate CBP interview records. Drawing on these problems in

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221. AILA Amicus Brief, *supra* note 112, at 27–28.

222. *Id.*

223. *Id.* at 28.

224. See 8 U.S.C. § 1225(b)(1)(A)(ii) (2012) (explicitly delegating the responsibility of deciding the fate of those seeking asylum and withholding relief to asylum officers and immigration judges).

225. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892) ("If a literal construction of the words of a statute [lead to an absurd result], the act must be so construed as to avoid the absurdity.").

the expedited removal context, this Part concludes by arguing that in the reinstatement of removal process these problems are likely even more rampant, given that the reinstatement process has far fewer procedural safeguards against the removal of bona fide refugees to situations of persecution.

#### A. Documented Errors in the Expedited Removal Process

As noted in Part I, when creating the expedited removal process, Congress left the delicate first step of screening potential asylum seekers in the hands of CBP officers, in addition to granting CBP the unreviewable authority to enter expedited removal orders.<sup>226</sup> These officers, who are “neither lawyers nor judges, . . . hold extraordinary power in determining the fate of arriving asylum seekers.”<sup>227</sup> But in this same provision, Congress also carved out a critical safeguard against the errant removal of bona fide asylum seekers: when noncitizens merely “indicate” a fear of persecution or an intention to apply for asylum, CBP must refer them to a credible-fear interview, rather than deporting them.<sup>228</sup>

To comply with this statutory provision, DHS regulations and internal policies instruct CBP officers to complete these three steps when interviewing noncitizens flagged for expedited removal:

1. Read Form I-867A, verbatim.<sup>229</sup> This form, a script, advises the noncitizen that lying to the CBP officer could result in criminal or civil charges or being barred from immigration benefits; that a removal order automatically bars the noncitizen from admission for five or more years; that the U.S. law protects noncitizens from persecution; and that the noncitizen should tell the officer of any fears.<sup>230</sup>

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226. See discussion *supra* Section I.B.1.

227. Right to Asylum Letter, *supra* note 27, at 3.

228. 8 U.S.C. § 1225(b)(1)(A)(ii) (“If an immigration officer determines that an alien . . . indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer.”).

229. 8 C.F.R. § 235.3(b)(2)(i) (2016) (“The examining immigration officer shall read (or have read) to the alien all information contained on Form I-867A.”).

230. U.S. DEP’T HOMELAND SEC., Form I-867A (1997) advises:

U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

See Kuck, *supra* note 25, at 252 app. A (providing sample of Form I-867A). Notably, like Emely, many asylum seekers have had only a few years of elementary school education at the most; thus, even if CBP reads this paragraph to the noncitizen, it is unlike the noncitizen will meaningfully comprehend it.

2. Ask the noncitizen the following questions from Form I-867B, verbatim:
  - a. “Why did you leave your home country or country of last residence?”
  - “Do you have any fear or concern about being returned to your home country or being removed from the United States?”
  - b. “Would you be harmed if you are returned to your home country or country of last residence?”
  - c. “Do you have any questions or is there anything else you would like to add?”<sup>231</sup>
3. Document the noncitizen’s responses, and allow the noncitizen to review and revise this record prior to signing and attesting to its accuracy.<sup>232</sup>

A federal statute, regulation, and the most-recently available CBP guidance further instruct that during this screening interview, CBP officers are not to evaluate the merits of the noncitizen’s potential asylum claim in deciding whether to issue a referral to an asylum officer; that is, CBP officers are to issue asylum interview referrals if the noncitizen indicates *any* fear in *any* fashion, and without weighing the plausibility or credibility of the noncitizen’s fear.<sup>233</sup> This

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231. *Id.* (providing sample of Form I-867B).

232. *See* 8 C.F.R. § 235.3(b)(2)(i) (“[T]he examining immigration officer shall record the alien’s response to the questions contained on Form I-867B, and have the alien read (or have read to him or her) the statement, and the alien shall sign and initial each page of the statement and each correction.”); *see also* Kuck, *supra* note 25, at 253 app. A (providing sample Form I-867B).

233. *See* 8 U.S.C. § 1225(b)(1)(A)(ii); *see also* 8 C.F.R. § 235.3(b)(4) (“If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer . . . .”); *see also* U.S. DEP’T OF HOMELAND SEC., U.S. CUSTOMS & BORDER PROTECTION, INSPECTOR’S FIELD MANUAL § 17.15(b)(1) (rev. 2006) [hereinafter INSPECTOR’S FIELD MANUAL]. The CBP Inspector’s Field Manual mandates:

[I]f the alien indicates in any fashion . . . that he or she has a fear of persecution, or that he or she has suffered or [might] suffer torture, you are required to refer the alien to an asylum officer for a credible fear determination. . . . [T]he inspecting officer has a responsibility to ensure that anyone who indicates a fear of persecution . . . is referred to an asylum officer for a credible fear determination. Inspectors should consider verbal as well as non-verbal cues given by the alien. The obligatory questions on the Form I-867B are designed to help in determining whether the alien has such fear. Do *not* ask detailed questions on the nature of the alien’s fear of persecution or torture: leave that for the asylum officer. In determining whether to refer the alien, inspectors should not make eligibility determinations or weigh the strength of the claims, nor should they make credibility determinations . . . . The inspector should err on the side of caution, apply the criteria generously, and refer to the asylum officer any questionable cases . . . . Do not make any evaluation as to the merits of such fear; that is the responsibility of the asylum officer.

*Id.*



is an essential component of the interview, since most asylum seekers often have hidden the source of their fears, such as their sexual orientation or gender identity, their entire lives in order to survive, and therefore expecting these same individuals to readily disclose this deeply-personal information to a stranger—especially a government official who just warned them about the civil, criminal, and immigration penalties that could arise from their statements—is unreasonable and unrealistic.<sup>234</sup>

Despite these requirements, however, human rights organizations and immigration advocates have consistently reported that “CBP’s processing of arriving asylum seekers is marred by careless errors, subversion of even minimal procedures, willful indifference, and, in some cases, outright intimidation and coercion.”<sup>235</sup> These findings are not new, either. In 2005, the bipartisan U.S. Commission of International Religious Freedom (USCIRF) similarly reported that CBP was in substantial noncompliance in every aspect of the expedited removal screening process, and that these errors were resulting in the errant removal of bona fide asylum seekers.<sup>236</sup> USCIRF’s report was based on

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234. Federal courts and legal experts have acknowledged a host of legitimate reasons why asylum seekers are hesitant to disclose their fears to CBP. See Allen Keller et al., *Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States*, in 2 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EXPERT REPORTS 21 n.22 (2005), [http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum\\_seekers/ERS\\_RptVolII.pdf](http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/ERS_RptVolII.pdf) (noting reluctance to disclose fear due to “considerable distrust of interviewing officers,” such as a belief CBP officers were lying, and CBP officers using “sarcastic” and “demeaning” behavior, in addition to “repeatedly” shouting at noncitizens prior to being interviewed); see, e.g., *Moab v. Gonzales*, 500 F.3d 656, 661 (7th Cir. 2007) (discussing reluctance to disclose sexual orientation); *Balogun v. Ashcroft*, 374 F.3d 492, 505 (7th Cir. 2004) (discussing reluctance to disclose personal information); *Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004) (discussing reluctance to disclose rape).

235. Right to Asylum Letter, *supra* note 27, at 10; see also Brief for American Immigration Lawyers Association et al. as Amici Curiae Supporting Petitioner at 8, *Ramirez-Mejia v. Lynch*, 813 F.3d 240 (5th Cir. 2016) (No. 14-60546) (“Many bona fide refugees are wrongly subject to expedited removal upon fleeing persecution and arriving in the United States.”); AILA Amicus Brief, *supra* note 112, at 19 (“Despite Congress’s efforts to ensure asylum’s availability to those fleeing persecution, the process frequently fails.”); HUMAN RIGHTS WATCH, “YOU DON’T HAVE RIGHTS HERE”: U.S. BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM 5 (Oct. 2014) [hereinafter HRW 2014 REPORT], [https://www.hrw.org/sites/default/files/reports/us1014\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us1014_web_0.pdf) (“The flaws [in screening for asylum seekers in expedited removal] are readily apparent today at the U.S.-Mexico border.”); *Letter to DHS Secretary Johnson and Attorney General Lynch on Protecting the Right to Seek Asylum*, HUMAN RIGHTS WATCH (Nov. 17, 2015, 2:55 PM) [hereinafter *Human Rights Watch Letter*], <https://www.hrw.org/news/2015/11/17/letter-dhs-secretary-johnson-an-attorney-general-lynch-protecting-right-seek-asylum> (“Well-documented deficiencies, particularly in the expedited removal process, result in protection claims overlooked or ignored, all too often deporting asylum seekers back to countries where their lives are at risk.”).

236. Pursuant to 22 U.S.C. § 6474(a)(2)(A)–(D), USCIRF was to determine whether immigration officers carrying out the expedited removal process are:

- (A) Improperly encouraging such aliens to withdraw their applications for admission.
- (B) Incorrectly failing to refer such aliens for an interview by an asylum officer for a determination of whether they have a credible fear of persecution . . . .

hundreds of hours of on-sight observation, the thorough review of numerous A-files, and analysis of immigration judges' reasons for denying asylum applications.<sup>237</sup> As discussed below, the USCIRF report, along with other human rights reports, found that (1) CBP officers are not reading the mandatory script during the screening interview; (2) even when noncitizens expressly claim a fear, CBP officers refuse to provide credible fear interview referrals; (3) CBP officers frequently discourage noncitizens from applying for asylum and harass those who do; and (4) CBP officers' keep inaccurate records of noncitizens' responses, yet immigration judges commonly use these records as a basis for denying asylum relief. Due to these errors, reinstated expedited-removal orders should not serve as a bar to asylum access.

*1. CBP Officers Are Not Reading the Mandatory Script During the Screening Interview*

USCIRF found that beginning with the most basic requirement of the screening interview, reading a script, CBP was noncompliant.<sup>238</sup> For example, USCIRF found that CBP officers often failed to read *any* of the information on Form I-867A—including the portion of the form explaining why the officer is interviewing the noncitizen; that is, to determine if they have a fear of removal—and in only 44.1% of the cases observed did CBP officers read the protection-based paragraph stating that U.S. law protects the persecuted and that this may be the noncitizen's only opportunity to voice such fears.<sup>239</sup>

USCIRF further found that this noncompliance directly and “significantly” impacted the likelihood of a noncitizen's chance of moving forward in the asylum application process—obtaining a credible fear interview—largely because “many [noncitizens] may not understand the purpose of the . . . interview and may not realize that this interview is their primary, if not sole opportunity to express concerns or seek asylum.”<sup>240</sup> For example, when CBP officers did read the protection-based paragraph of I-867A (“U.S. law provides protection to certain persons who face persecution, . . .”), the noncitizen was an

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(C) Incorrectly removing such aliens to a country where they may be persecuted.

(D) Detaining such aliens improperly or in inappropriate conditions.

22 U.S.C. § 6474(a)(2)(A)–(D) (Supp. V 1999).

237. Keller et al., *supra* note 234, at 3.

238. *Id.* at 13–14, 29–30 (reporting that “[a]lthough reading the I-867A form is a required element of every [CBP screening] interview in which Expedited Removal will be applied, we observed many cases in which the requisite information was not provided to the alien. In many other cases the alien was simply handed a photocopy containing the necessary information but was not read the information or offered any further explanation.”).

239. *See id.* at 14 tbl.21.

240. *Id.* at 28–29.

astounding seven times more likely to express a fear resulting in credible fear interview referral.<sup>241</sup>

Similarly, USCIRF found the likelihood of a credible fear interview referral increased significantly with each additional, mandatory, question asked from Form I-867B.<sup>242</sup> For example, if the CBP officer asked either, “Do you have any fear of returning?” or “Would you be harmed if you returned?” the likelihood of credible fear interview referral increased from 5.3% (when no fear questions were asked) to 8.6%.<sup>243</sup> When both fear-based questions were asked, the likelihood of referral jumped to 18%.<sup>244</sup> And while this data could be construed as evidence that these questions are “prompting” noncitizens to claim a fear of return, USCIRF concluded otherwise, finding that “there was little evidence that [noncitizens] are prompted to claim fear by the I-867 information and questions,” since about 63% of the observed individuals “spontaneously expressed a fear of returning to their home country during the question and answer session or in response to the question, ‘Why did you leave your home country or country of last residence?’” (a non-fear based question).<sup>245</sup>

Ultimately, this data shows that noncitizens simply do not understand the purpose of the screening interview because no one is explaining it to them. These noncitizens are then deported under an expedited removal order; in an instant, their only chance to seek asylum in the U.S. is gone.

## *2. Even When Noncitizens Expressly Claim a Fear, CBP Officers Refuse to Provide Credible Fear Interview Referrals*

CBP officers are required to issue a credible fear referral if a noncitizen “indicates” a fear of persecution or intent to apply for asylum.<sup>246</sup> However, USCIRF found that one in six noncitizens who clearly expressed a fear during the CBP screening interview—that is, they far exceeded the “indication” threshold—were not given a credible fear referral.<sup>247</sup> Instead, CBP either removed them pursuant to an order of expedited removal or allowed them to withdraw their application for admission and were then sent home.<sup>248</sup> Nearly a

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241. *Id.* at 13, 17 (finding “[t]he odds of being referred for a Credible Fear interview increased seven times when the [four]th paragraph [on Form I-867A] was read to aliens relative to when it was not”).

242. *Id.* at 17 (finding “the likelihood of a Credible Fear referral increased with each additional fear question asked”).

243. *Id.*

244. *Id.*

245. *Id.* at 21.

246. 8 U.S.C. § 1225(b)(1)(A)(ii) (2012).

247. Keller et al., *supra* note 234, at 29 (“Even when the alien expressed a fear of return, referral for a Credible Fear interview was not guaranteed. One in six aliens who expressed a fear of return [to CBP during the screening interview] were placed in Expedited Removal or allowed to withdraw their application for admission.”).

248. *Id.*

decade after USCIRF's report was released, Human Rights Watch (HRW) conducted additional field research and found this problem had worsened.<sup>249</sup>

Two of the individuals USCIRF observed who expressed a fear of removal but were not referred to a credible fear interview were women from countries in Central America where rampant persecution is well documented.<sup>250</sup> One woman spontaneously and tearfully begged the CBP officer to help her because she feared her ex-husband.<sup>251</sup> The CBP officer responded by warning her that she should cooperate or she would be "in trouble."<sup>252</sup> Then, immediately before asking her the I-867B fear questions, the officer cautioned that if she made a fear claim—even though she already had—she would not see her family for a long time.<sup>253</sup> The woman ultimately withdrew her application for admission into the U.S., but not before the CBP officer noted in her A-file that the woman's response to a question about her fear level was, "[n]ot a real fear. My ex-husband does not like me."<sup>254</sup> The second woman claimed a fear, too, however, when she asked how long she would be in custody and what would happen to her son, the officer responded, "[i]f you say you're afraid[,] you will go into detention for an unknown number of days until you have a hearing," and that she would not be able to contact her son, who did not live in the U.S.<sup>255</sup> She, too, withdrew her application for admission.<sup>256</sup>

In another instance, USCIRF researchers observed a political activist from South Asia express a fear that Islamic fundamentalists in his home country would kill him if he returned.<sup>257</sup> However, after the CBP officer confirmed that the man would be detained if he claimed a fear, he retracted his claimed fear.<sup>258</sup> The CBP officer did not refer him for a credible fear interview and he was subsequently removed on an expedited removal order.<sup>259</sup>

The 2014 HRW investigation also found that CBP repeatedly failed to issue credible fear interview referrals despite numerous noncitizens' explicit expression of fear.<sup>260</sup> Nearly all of these noncitizens were from Honduras, where "rampant crime and impunity for human rights abuses" are continually

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249. HRW 2014 REPORT, *supra* note 235, at 5. To create this report, HRW interviewed thirty-five Central American migrants in detention in the U.S. or recently deported to Honduras. All the interviewed migrants expressed a fear of return, including those who were deported, many of whom "had fear[s] so acute that they were living in hiding, afraid to go out in public." *Id.*

250. Keller et al., *supra* note 234, at 23.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 24.

258. *Id.*

259. *Id.*

260. HRW 2014 REPORT, *supra* note 235, at 21.

rising and well documented.<sup>261</sup> In spite of this, CBP referred only 1.9% of Hondurans in expedited removal and reinstatement proceedings for credible fear interviews; the remaining 81% were deported.<sup>262</sup> In one instance,

[a] man who was deported in September 2014 told Human Rights Watch that when he informed a Border Patrol officer of the threats to his life in Honduras, “[h]e told me there was nothing I could do and I didn’t have a case so there was no reason to dispute the deportation. . . I told him he was violating my right to life and he said, ‘[y]ou don’t have rights here.’”<sup>263</sup>

CBP’s refusal to issue referrals to these individuals, despite the fact that they have clearly expressed a fear, is potentially due to CBP’s improper judging of the merits of the asylum claim, a job Congress expressly delegated to asylum officers and immigration judges.<sup>264</sup> USCIRF’s researchers observed that in “many of the cases in which fear was expressed during the [CBP] interview but no referral was made, the nature of the fear expressed may not have been sufficient justification for an asylum hearing,” since, at the time, CBP’s internal guidelines instructed that referrals were not required when the noncitizen’s expressed fear would clearly not qualify them for asylum.<sup>265</sup> This policy, which has most likely been abandoned,<sup>266</sup> obviously conflicted with the statute and regulation’s purpose and statutory mandate that CBP issue a referral if a fear is “indicated,” without regard to the type of fear, and necessarily undermines the validity of any expedited removal order issued while this policy was in place.<sup>267</sup>

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261. *Id.* at 12.

262. *Id.* at 21.

263. *Id.* at 8–9.

264. Keller et al., *supra* note 234, at 22 (reporting that “[i]n many of the cases in which fear was expressed during the [CBP screening] interview but no referral was made, the nature of the fear expressed may not have been sufficient justification for an asylum hearing”).

265. *Id.* at 20 (noting that the CBP Field Manual indicates that when “the fear would clearly not qualify an individual for asylum[, the noncitizen] need not necessarily be referred [to a credible fear interview]”).

266. In December 2011, CBP posted a redacted copy of the 2006 Instructor’s Field Manual (IFM), which contains CBP’s internal policies and procedures. This IFM clearly instructs CBP officers to issue referrals any time a fear is expressed, regardless of the nature of the fear. *See* INSPECTOR’S FIELD MANUAL, *supra* note 233, § 17.15(b)(1). However, the IFM has since been replaced with an electronic Officer Reference Tool, which has not been made public. *See* AMERICAN IMMIGRATION COUNSEL, CBP RESTRICTIONS ON ACCESS TO COUNSEL 1 n.4 (Oct. 1, 2014), [http://www.americanimmigrationcouncil.org/sites/default/files/foia\\_documents/access\\_to\\_counsel\\_cbp\\_foia\\_factsheet.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_cbp_foia_factsheet.pdf). And in April 2014, CBP’s Office of Field Operations acknowledged that CBP is still using the IFM as a “reference,” so it is unclear what guidance CBP is currently using and what its policies actually state. *Id.*

267. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) (2012); SCHRAG, *supra* note 29, at 216 (noting that during the drafting of Forms I-867A and B, “INS officials assured the advocates that they were well aware that the [CBP] inspectors would not be trained in the nuances of asylum law (e.g., the requirement that only five specified grounds for feared persecution, such as persecution on account of religion, qualified an alien for asylum). Therefore, the form did not prompt inspectors to ask further questions about the nature of the alien’s fear, and they would not do so.”).

Also tending to show that CBP officers are still weighing the merits of asylum seekers' claims is the fact that despite employing a heightened evidentiary burden in the asylum interview than the burden of proof in the CBP screening interview, asylum officers find credible fears a vast majority of the time: in FY2013, 92% of all credible fear interviews ended in a credible fear finding.<sup>268</sup> Although this statistic could show that CBP agents are screening asylum applicants exceptionally well, that conclusion is unlikely, especially given the data showing that a miniscule number of Hondurans receive a credible fear referral despite the ample documentation of ongoing human rights abuses in that country,<sup>269</sup> and the fact that CBP guidelines do not require any inquiry into the nature of the fear, and instead require only an "indication" of a fear, before mandating CBP issue a credible fear interview referral.<sup>270</sup>

Rather, a more likely conclusion is that CBP officers are issuing referrals haphazardly, such as when the officer feels the individual is deserving of asylum or when the officer thinks the fear is legally valid.<sup>271</sup> Regardless of CBP officers' motives, the high number of credible fear findings by asylum officers strongly indicates that CBP officers have expanded the already immense power Congress delegated to them by absorbing the responsibility Congress delegated to trained asylum officers and immigration judges, not "low-level" employees of the federal government.<sup>272</sup> This is not only contrary to Congress's intent when enacting IIRIRA, but also warrants the elimination of the reinstatement bar to asylum access.

### *3. CBP Officers Frequently Discourage Noncitizens from Applying for Asylum and Harass Those Who Do*

The USCIRF and HRW reports both document that CBP officers commonly discourage asylum seekers from applying for asylum at all.<sup>273</sup> Recent reports

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268. See *Asylum Abuse: Is It Overwhelming Our Borders?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 2 (2013) [hereinafter *Asylum Abuse*] (stating DHS data shows that "USCIS makes positive credible fear findings in 92% of all cases decided on the merits" (statement of Rep. Goodlatte, Chairman, H. Comm. on the Judiciary)); see also Ana Campoy, *Illegal Immigrants Seeking Asylum Face a Higher Bar*, WALL STREET J. (Sept. 28, 2014, 7:02 PM), <https://www.wsj.com/articles/illegal-immigrants-seeking-asylum-face-a-higher-bar-1411945370> (reporting that in 2014, asylum officers found a credible fear 63% of the time in the month of July, and 83% of the time six months earlier).

269. See e.g., HRW 2014 REPORT, *supra* note 235, at 8.

270. See INSPECTOR'S FIELD MANUAL, *supra* note 233, § 17.15(b)(1), (providing only that "the inspector may ask a few additional follow-up questions to ascertain the general nature of the fear or concern" during the screening interview (emphasis added)).

271. Keller et al., *supra* note 234, at 22, 29 (reporting that "some CBP officers make *de facto* assessments of the legitimacy of expressed fears, returning aliens that they perceive to be inappropriate and referring those that they perceive as warranting asylum").

272. SCHRAG, *supra* note 29, at 209 (referring to CBP officers as "low-level" employees).

273. See Keller et al., *supra* note 234, at 23–24 (reporting numerous instances of CBP officers' apparent attempts to dissuade asylum seekers from making fear claims); see also HRW 2014 REPORT, *supra* note 235, at 26.

confirm that this is an ongoing, worsening problem.<sup>274</sup> These tactics ranged from possibly deliberate attempts—such as incorrectly telling noncitizens that because they entered without inspection, they may not have an opportunity to present their asylum case, and telling noncitizens that if they made a fear claim, they would be detained for three weeks to a month or more—to blatant refusal to allow the noncitizen to apply.<sup>275</sup> For example, CBP agents reportedly turned away five asylum seekers at the U.S.-Mexico border, telling them to “go away,” to “go back to where [you] came from,” and forcing them back into Mexico, despite their requests for asylum and despite the fact that they were African and Middle Eastern, not Mexican.<sup>276</sup> This group returned the next day, and as one man tearfully begged CBP agents to allow him to enter, CBP officers handcuffed them.<sup>277</sup> Their persistence ultimately paid off: CBP referred all five individuals to credible fear interviews.<sup>278</sup>

USCIRF reported that of the noncitizens CBP encouraged to retract their fear claims, CBP subsequently referred two of the men who refused to retract their claims to credible fear interviews.<sup>279</sup> In CBP’s attempt to persuade the first man to retract his claim, the CBP officer stated, “[w]hat you are experiencing is a personal problem, not one the U.S. offers people asylum for[.]”<sup>280</sup> The CBP further stated that if the man did claim a fear, he would be in detention for three months, and that “I know for sure you will be deported.”<sup>281</sup> To the other man, CBP officers described the undesirable characteristics of detention in detail, and repeatedly asked the noncitizen if he had a fear of returning, in what USCIRF described as an apparent attempt to elicit a different response, since the man had already expressed a fear of return.<sup>282</sup>

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274. Letter from Eight Immigration and Human Rights Orgs. to John Roth, Inspector Gen., Dep’t of Homeland Sec. & Megan H. Mack, Officer of Civil Rights & Civil Liberties, Dep’t of Homeland Sec. 1 (Jan. 13, 2017), [http://www.americanimmigrationcouncil.org/sites/default/files/general\\_litigation/cbp\\_systemic\\_denial\\_of\\_entry\\_to\\_asylum\\_seekers\\_advocacy\\_document.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/cbp_systemic_denial_of_entry_to_asylum_seekers_advocacy_document.pdf) (reporting individual stories of “numerous adult men and women, families and unaccompanied children who, over the past several months, were denied entry to the United States at ports of entry along the U.S.-Mexico border despite having asserted a fear of returning to their home countries or an intention to seek asylum under U.S. law”); Joshua Partlow, *U.S. Border Officials Are Illegally Turning Away Asylum Seekers, Critics Say*, WASH. POST (Jan. 16, 2017), [https://www.washingtonpost.com/world/the\\_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450\\_story.html?utm\\_term=.e6e42d4abdc9](https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.html?utm_term=.e6e42d4abdc9) (reporting numerous individuals have claimed they have been refused entry despite claiming fear in their home countries, which one immigration expert states “is happening on a daily basis”).

275. Keller et al., *supra* note 234, at 23–24.

276. *Id.* at 24.

277. *Id.*

278. *Id.*

279. *Id.* at 23.

280. *Id.*

281. *Id.*

282. *Id.*

Similarly, HRW reported that CBP's interviews were "brief and focused on explaining additional consequences of deportation."<sup>283</sup> One migrant woman reported that "[a]ll [CBP] said to me was that if I came back they would give me six months in prison."<sup>284</sup> CBP told another asylum-seeker, a man who had fled Honduras after being shot and seeing his mother murdered by gang members, "don't apply [for asylum], 90[%] of the people who do don't get it," and then instructed him to sign his removal paperwork, saying, "Fingerprint, fingerprint," repeatedly even though the man did not understand what he was signing.<sup>285</sup> When one noncitizen refused to sign his removal paperwork due to his fear of removal, CBP responded by insulting him, detaining him for six days in a frigid cell, and waking him every few hours to move him to a different "icebox."<sup>286</sup>

Similarly, USCIRF observed CBP officers use "aggressive or intimidating behaviors" toward asylum seekers.<sup>287</sup> This included "multiple occasions" of CBP shackling noncitizens in expedited removal, CBP telling a Central American man that he was a "woman" and a "sissy" who sat "like a girl," and a CBP officer calling a noncitizen a shockingly-profane word in the presence of another noncitizen.<sup>288</sup>

Given the nature of harm asylum seekers have endured and fled—often perpetrated by or with the acquiescence of their government's agents—these tactics employed by a uniformed, armed CBP officer are likely to be extremely effective in deterring asylum seekers from asking for protection.<sup>289</sup> Based on these considerations, the reinstatement of prior removal orders should not serve as a bar to asylum access.

#### *4. CBP Officers Keep Inaccurate Records of Noncitizens' Responses, Yet Immigration Judges Commonly Use These Records As a Basis For Denying Asylum Relief*

In addition to refusing to refer noncitizens expressing a fear of removal to a credible fear interview, CBP often fails to make any record of that fear. For

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283. HRW 2014 REPORT, *supra* note 235, at 27; see also Janet A. Gilboy, *Implications of "Third-Party" Involvement in Enforcement: The INS, Illegal Travelers, and International Airlines*, 31 LAW & SOC'Y REV. 505, 514–17 (1997) (noting that when noncitizens arrive on flights that make brief stopovers at an airport, CBP would rush through screening interviews so as to not disrupt flight schedules and avoid having to find detention space for the noncitizen).

284. HRW 2014 REPORT, *supra* note 235, at 27.

285. *Id.*

286. *Id.* at 27–28 & n.53 (explaining that "[i]cebox" or *hielera* is how migrants commonly refer to Border Patrol detention, in reference to the cold temperatures in the cells").

287. Keller et al., *supra* note 234, at 26 tbl.5.1 (noting that during roughly 10% of all screening interviews, CBP officers raised their voice, interrupted, used sarcasm/ridicule, were demanding, and left the room without explanation).

288. *Id.* at 26–27.

289. HRW 2014 REPORT, *supra* note 235, at 8 ("Uniformed CBP officers are usually armed while apprehending migrants; when they interview the migrants a few hours or days later their holsters are empty but visible . . .").



example, USCIRF “found that when CBP officials failed to ask the relevant fear questions [from Form I-867B], the official record frequently indicated that these questions had been asked and answered, typically containing just the word ‘no’ in response to fear questions that had not been asked.”<sup>290</sup> Other times, CBP officers recorded only a portion of the information the noncitizen disclosed.<sup>291</sup> USCIRF also found that the noncitizen’s signature on these forms as an attestation to the accuracy of the record is an inadequate safeguard against inaccurate A-file records, since nearly 17% of time, CBP did not even ask for the noncitizen’s signature, and when they did, this was usually as an instruction, not as an invitation to review the record.<sup>292</sup> For these reasons, USCIRF concluded that these administrative records are “deeply flawed,” a conclusion several circuit courts of appeals have also reached.<sup>293</sup>

Despite this, immigration judges routinely treat these administrative records as the noncitizen’s personal statements, rather than as a summary of part of what the noncitizen might have said.<sup>294</sup> And further compounding the inaccuracies made in the record is the fact that the noncitizen’s burden of proof increases at each stage of the preliminary screening, culminating at the merits hearing before the immigration judge.<sup>295</sup> Thus, the level of detail necessary for the noncitizen to move to the next screening is far less when before the CBP officer than when before the immigration judge.<sup>296</sup> Despite this, the DHS and immigration judges frequently treat the increase in detail contained in the administrative record as

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290. Keller et al., *supra* note 234, at 30.

291. *Id.*

292. *Id.* (“When [noncitizens] were asked to confirm their statements, most [noncitizens] were neither asked to read the statements, nor had their statements read to them, but were simply told to sign the forms.”).

293. Jastram & Hartsough, *supra* note 32, at 88; *see also* Qing Hua Lin v. Holder, 736 F.3d 343, 355 (4th Cir. 2013) (Thacker, J., concurring) (citing cases from the Second, Third, Seventh, Ninth, and Eleventh Circuits to show that “the circuit courts of appeals have uniformly held that these particular interviews should be carefully scrutinized for reliability before being utilized by the fact-finder to evaluate an applicant’s credibility”).

294. Jastram & Hartsough, *supra* note 32, at 67, 88 (reporting that in 56.6% of the cases introducing the CBP and asylum interview records, these records were used to impeach the noncitizen’s merits hearing testimony).

295. Initially, the standard for issuing a credible fear interview is met when noncitizen “indicates” intent to apply for asylum or expresses a fear of return. 8 C.F.R. § 235.3(b)(4) (2016). Then, the standard for finding credible fear is met when noncitizen shows “significant possibility” of establishing asylum eligibility. 8 U.S.C. § 1225(b)(1)(B)(v) (2012). Ultimately, the standard for establishing asylum eligibility in a merits hearing is met when the noncitizen has a “well-founded fear” of persecution. *Id.* § 1101(a)(42); *see* INS v. Cardozo-Fonseca, 480 U.S. 421, 439–40 (1987) (holding that a well-founded fear is a “reasonable possibility” that the applicant will be persecuted).

296. For a helpful comparison of these growing evidentiary burdens, *see* Jastram & Hartsough, *supra* note 32, at 66 tbl.3.

an inconsistency in the noncitizen's story, which often results in a well-insulated,<sup>297</sup> adverse credibility finding.<sup>298</sup>

These compounding flaws have two things in common. First, they result in the errant removal of bona fide asylum seekers, sometimes ending in their death, or as in David's case, being shot in the eye.<sup>299</sup> Second, these particular errors arise only in the expedited removal and reinstatement of removal context, since asylum claims asserted defensively—that is, after being placed in removal proceedings—are heard by immigration judges only, and therefore no other interviews, be it with CBP or an asylum officer, are part of this process.<sup>300</sup>

Due to these errors, reinstated removal orders should not serve as a permanent bar to asylum access.

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297. *Ridore v. Holder*, 696 F.3d 907, 911 (9th Cir. 2012) (finding immigration judge's credibility findings are reviewed under the clearly erroneous standard of review).

298. *See, e.g., Jastram & Hartsough, supra* note 32, at 68, 87 (finding that in at least 39% of cases, immigration judges deny asylum claims based on "deeply flawed" administrative records created by CBP and asylum officers, and "[w]here the prior records were cited as an element of the decision, protection was almost always denied"). Indeed, in the Author's experience representing numerous asylum seekers appealing adverse credibility findings, immigration judges routinely pin cite the "transcript" of the asylum interview—even though they know this is only a summary of the noncitizen's testimony—in finding noncitizens are not credible and consequently deny their asylum and withholding claims.

299. *See* sources cited *supra* note 129.

300. *See, e.g., Asylum Abuse, supra* note 268, at 49 (explaining that unlike asylum claims asserted affirmatively or during expedited or reinstatement removal proceedings, a noncitizen in removal proceedings "raises the issue of asylum during the beginning of the removal process. The matter is then litigated in immigration court, using formal procedures such as the presentation of evidence and direct and cross examination." (prepared statement of Ruth Ellen Wasem, Immigration Policy Specialist, Congressional Research Service)).

*B. With No Statutory or Regulatory Requirement to Inquire About the Noncitizen's Fear of Persecution in the Reinstatement of Removal Interview, CBP is Simply Repeating These Errors During the Reinstatement of Removal Process*

The errors arising in the expedited removal process also highlight the obvious need for more guidance in the reinstatement of removal process, where there is no statutory or regulatory requirement that CBP ask any fear-based questions or provide an explanation of the interview.<sup>301</sup> Thus, even if CBP is following its former internal guidance to ask one question regarding the noncitizen's fear of removal, it is unlikely the noncitizen will understand why the officer is asking this question since no guidance instructs the officer to explain the purpose of the interview. Consequently, the noncitizen may not divulge these personal details to a government official under these circumstances. Indeed, USCIRF concluded that when officers explained the interview's purpose, noncitizens were seven times more likely to be referred to a credible fear interview.<sup>302</sup> Furthermore, even if CBP officers ask the single question officers may be required to ask, this one question is still insufficient given USCIRF's finding that the more fear-based questions asked increased the likelihood of an expression of fear.<sup>303</sup> Also, given CBP's refusal to issue credible fear referrals even when the noncitizen explicitly expressed a fear in the expedited removal context, it is extremely likely that this problem also occurs in the reinstatement of removal context.

Finally, cases like Emely and David's show that CBP does not always inquire about noncitizens' fear of persecution prior to deporting them. Emely was raped and impregnated by a gang leader for being gay, yet CBP repeatedly deported her without ever asking about these events; it was not until her third illegal entry that CBP finally asked her about her fear of removal. Similarly, David, who was removed prior to being persecuted on account of her gender identity, was not asked about her fear of persecution during her reinstatement interview, despite this being her first time seeking protection in the U.S. Thus, even if CBP is required to inquire about the noncitizen's fear, these cases, coupled with the expedited removal data, show that CBP is not complying with that requirement.

Based on the rampant errors in the expedited removal process and the evidence indicating that similar noncompliance occurs in the reinstatement process, individuals in reinstatement proceedings should be permitted to apply for asylum and be interviewed based on at least the same guidelines that the DHS has established for the expedited removal interview.

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301. See 8 U.S.C. § 1231(a)(5) (2012); 8 C.F.R. § 241.8 (2016).

302. Keller et al., *supra* note 234, at 17 (finding “[t]he odds of being referred for a Credible Fear interview increased seven times when the [four]th paragraph [on Form I-867A] was read to aliens relative to when it was not”).

303. *Id.* at 17–18 (finding “the likelihood of a Credible Fear referral increased with each additional fear question asked”).

#### IV. POLICY RECOMMENDATIONS

The legislative history and statutory analysis explored in Parts I and II reveal that, contrary to circuit court interpretation and the federal regulation, the INA's asylum and reinstatement of removal provisions can be interpreted in a manner giving both provisions full effect, thereby allowing any noncitizen, even those with reinstated removal orders, to apply for asylum, subject only to the exceptions set forth in the asylum provision. Part III showed that removing the reinstatement bar also furthers important policy considerations. This Part makes recommendations tailored to federal and immigration courts, the DHS, and Congress that, if followed, would not only further these policy goals, but perhaps most importantly, would save the lives of people who have come to the U.S. under the most dire circumstances.

##### A. Recommendations for Congress

Congress should amend the reinstatement provision to reflect that asylum seekers, regardless of a reinstated order of removal, may apply for asylum and withholding of removal. In addition to the many reasons addressed in this Article and by numerous other experts raising due process concerns regarding the expedited removal process, this amendment is especially necessary due to the pervasive political environment breeding fear mongering regarding refugees, led, no less, by individuals vying to lead the executive branch, and also due to the greatest global refugee crisis in history. Failing to make this amendment places lives at stake and allows a message of fear and hate to trample on the core American value of protecting those seeking refuge. Thus, Congress should amend the reinstatement provision as follows:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, *except for relief under section 1158 and subsection (b)(3) of this section*, and the alien shall be removed under the prior order at any time after the reentry.

Additionally, to further reiterate its commitment to protecting asylum seekers and also as a remedial measure for the well-documented errors resulting in the errant expedited removal of bona fide refugees, Congress should pass a recently introduced bill, the Fair Day in Court for Kids Act of 2016.<sup>304</sup> If enacted, this

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304. Fair Day in Court for Kids Act of 2016, H.R. 4646, 114th Cong. (2016) (introduced in the House of Rep. Feb. 26, 2016). Another important remedial measure Congress could take is by making the reinstatement amendment retroactive; that is, in addition to amending § 1231(a)(5), Congress should also instruct the Attorney General to allow noncitizens who were previously barred from seeking asylum due to the reinstatement of their prior removal order to reopen their claim for relief and seek asylum pursuant to § 1158.

bill would require the DHS to appoint lawyers at the government's expense to represent victims of persecution or torture and other vulnerable noncitizens in removal proceedings, in addition to mandating that the DHS give noncitizens their nonprivileged A-file records, a right noncitizens in removal proceedings are commonly deprived of.<sup>305</sup>

Congress should also approve the reallocation of already appropriated funds to increase indigent asylum seekers' access to counsel.<sup>306</sup> One such method would be creating a pilot pro bono program in areas with high concentrations of asylum and withholding claims, through which attorneys are appointed to represent indigent applicants in their merits hearings before immigration judges and appeals before the Board of Immigration Appeals; these attorneys would not be compensated for their fees, but the allocated funds would reimburse them for their costs.<sup>307</sup> Considering that immigration judges are nearly thirteen times more likely to find asylum eligibility in cases where the applicant is represented, in addition to the immense stakes in these cases, this program would fulfill numerous policy goals while also increasing the efficiency and effectiveness of judicial review, and requiring only the nominal expenditure of already allocated funds.

#### *B. Recommendations for the Agency*

The DHS should undertake rulemaking to allow noncitizens to have access to asylum, regardless of a reinstated removal order. Indeed, a Petition for Rulemaking is currently pending with the DHS, and as proposed in that Petition, the DHS should amend the regulatory scheme to reflect that noncitizens with reinstated removal orders who express a fear of removal are to be referred to an asylum officer for a "credible" fear interview, rather than a "reasonable" fear interview.<sup>308</sup> Allowing asylum access will not place additional burdens on the system, since noncitizens claiming fear in reinstatement are already being pre-

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305. *Id.*; see also *Dent v. Holder*, 627 F.3d 365, 373–74 (9th Cir. 2010) (holding that the government's failure to furnish noncitizens in removal proceedings with their A-files violates due process).

306. See also HRW 2014 REPORT, *supra* note 235, at 43 ("To respect asylum seekers' right to access counsel, improve disposition of asylum claims, and better ensure that the U.S. does not return people to countries where they face repression or torture . . . Congress should[] [a]pprove reallocation of already appropriated funds to increase access to counsel for indigent asylum seekers and those requesting protection under the Convention Against Torture . . .").

307. These attorneys may also receive reimbursement of their fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (2012), by showing the government, including the DHS and the judiciary, was not "substantially justified" in its litigation position.

308. NAT'L IMMIGRATION JUSTICE CTR. & AM. IMMIGRATION LAWYERS ASS'N, PETITION FOR RULEMAKING TO PROMULGATE REGULATIONS VINDICATING THE STATUTORY RIGHT TO SEEK ASYLUM NOTWITHSTANDING REINSTATEMENT OF REMOVAL ORDERS app. § 1–12 (Aug. 7, 2015), <https://www.immigrantjustice.org/sites/default/files/Petition%2520for%2520Rulemaking%2520Asylum%2520during%2520Reinstatement%2520FINAL.pdf> (proposed amendments to current regulations).

screened by CBP and subsequently interviewed by asylum officers. Nor will allowing asylum access require significant additional government funding, since both forms of relief offer similar government benefits. Allowing asylum access will actually help conserve the DHS's limited resources, such as by alleviating its responsibility to process yearly work authorization requests filed by noncitizens granted withholding of removal; this a requirement that continues in perpetuity in the withholding context, but for only one year in the asylum context, after which an asylee is eligible to apply for permanent residence.<sup>309</sup>

In the interim, or alternatively, the DHS should establish a policy by way of public memorandum in which it instructs its officers to exercise prosecutorial discretion to cancel or decline to enter reinstatement orders when a noncitizen expresses fear of removal or the intent to apply for asylum. The DHS has already exercised this discretion in cases like Yesenia's, but only after she litigated her case to the Ninth Circuit. Exercising this discretion from the outset will allow the DHS to save considerable resources; the cost of litigating these cases at the immigration court, BIA, and circuit court, in addition to the detention costs during this time, are surely astronomical.<sup>310</sup> These resources could be better allocated to solving the many, well-documented shortcomings within the DHS's purview, including CBP officers' substantial, unabated noncompliance in screening noncitizens in expedited removal, which the government already expended significant resources in commissioning USCIRF's research.<sup>311</sup> In addition to the significant conservation of resources, declining to reinstate expedited removal orders for noncitizens claiming a fear of return would prevent the "grave injustice of depriving these individuals of the right to seek asylum on their second attempt for the sole reason that they were wrongfully deprived of that opportunity on their first try."<sup>312</sup>

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309. *Id.* at 5.

310. See, e.g., Antony Loewenstein, *Private Prisons Are Cashing in on Refugees' Desperation*, N.Y. TIMES (Feb. 25, 2016), [https://www.nytimes.com/2016/02/25/opinion/private-prisons-are-cashing-in-on-refugees-desperation.html?\\_r=0](https://www.nytimes.com/2016/02/25/opinion/private-prisons-are-cashing-in-on-refugees-desperation.html?_r=0) ("As the number of migrants and asylum seekers has grown . . . [Detaining them] has become a multimillion-dollar industry."); see also HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 8 (2009), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf> (reporting that the government "does not precisely track the number of detained asylum seekers or the actual length of their detention," and estimating that the government spent "more than \$20,000 to detain a refugee from Haiti for four months"). Additionally, the Author has won attorney's fees and costs under the Equal Access to Justice Act amounting to more than \$16,000 for fees and costs associated with an asylum appeal from the BIA to the Ninth Circuit alone. This award did not account for the government's fees and costs in defending this appeal, nor the significant litigation costs both sides expended in proceedings before the immigration court and BIA, nor the resources the immigration judge, BIA, and Ninth Circuit judges expended.

311. To date, the DHS has implemented only one of USCIRF's numerous recommendations. See, e.g., U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, EXPEDITED REMOVAL STUDY REPORT CARD: 2 YEARS LATER 2 (2007) ("[T]wo years later, most of the Study's recommendations have not been implemented.").

312. *Human Rights Watch Letter*, *supra* note 235.

Moreover, as long as the current regulatory scheme remains in effect, the DHS and the courts working with petitioners in withholding-only proceedings should apply the plain language of the statute, requiring actual illegal reentry to trigger the reinstatement provision, since currently, CBP initiates reinstatement proceedings any time a noncitizen has a prior order of removal, including when the noncitizen arrives at the border, and has therefore not effected an illegal reentry.<sup>313</sup>

Finally, the DHS should undertake rulemaking to instruct CBP to follow the same script in the reinstatement interview as CBP follows in the expedited removal screening interview. The risk of removing a bona fide asylum seeker is no less in reinstatement proceedings, and therefore the safeguards against errant removal should be the same in both contexts. This will also create consistency within CBP interviews, since the same form and questions will be asked in any summary exclusion proceeding. Additionally, the DHS should increase agency transparency by making the CBP's electronic Officer Reference Tool (ORT) available. It is unclear what guidance CBP currently follows; not knowing the internal rules CBP officers follow is particularly troubling given CBP's refusal to comply with statutory and regulatory mandates.

### C. Recommendations for the Judiciary

Federal courts presented with the issue of whether reinstatement of removal orders bar asylum access should find that pursuant to statutory analysis of §§ 1158 and 1231, the asylum provision is an exception to the reinstatement provision's general bar to "all relief," and hold that any noncitizen may apply for asylum, subject to the limited exceptions enumerated in § 1158. Based on this statutory interpretation, federal courts should also find the withholding-only regulation is invalid under *Chevron*. Not only will this give life to Congress's legislative intent, but it will also further the long-held policy goal of ensuring asylum seekers are afforded protection in the U.S., a goal currently thwarted due to widespread errors in the issuance of expedited removal orders, and exacerbated by the reinstatement of these errant removal orders.

Immigration courts and the BIA, although bound to apply the withholding-only regulation, should consider the overwhelming evidence of CBP noncompliance in the screening of asylum seekers—particularly the evidence of CBP discouraging noncitizens' expression of fear, harassing those who do express fear, and misrepresenting the noncitizen's testimony on official forms—and, accordingly, give no weight to records created during CBP and asylum officer interviews. Not only is this in line with what some federal courts have already commanded, this also comports with Congress's intent that asylum seekers in expedited removal be treated the same as other noncitizens seeking asylum. Because asylum seekers who are not in expedited removal are not interviewed by CBP, they are therefore not forced to overcome discrepancies

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313. See, e.g., AILA Amicus Brief, supra note 112, at 14 n.8.

arising from CBP records and subsequent credible fear records during their merits hearing testimony before an immigration judge; these discrepancies constitute one of the main reasons cited by immigration judges for denying relief.<sup>314</sup>

Additionally, all courts should permit noncitizens to reopen their asylum applications in extraordinary circumstances or when country conditions have changed, notwithstanding a reinstated removal order. This is an explicitly legislated exception to other legislated bars on access to asylum, and therefore an applicable exception to the reinstatement bar. This is especially necessary given the many errant removal orders entered in the expedited removal and reinstatement processes.<sup>315</sup>

## V. CONCLUSION

Reinstated removal orders should not bar noncitizens like Emely, who fled horrific persecution in her home country and sought protection in the U.S., from applying for asylum. Legislative history and the plain language of the INA show that contrary to the Agency's regulatory scheme that restricts Emely and countless other noncitizens with reinstated removal orders to withholding of removal relief, Congress did not intend for the reinstatement of removal statutory provision to serve as a bar to asylum access. Instead, Congress intended for asylum seekers to have the right to seek asylum even when placed in summary exclusion proceedings.

Canons of statutory interpretation also support this conclusion; these interpretive guides all point to an interpretation that treats the INA's asylum provision as an exception to the more general reinstatement of removal provision, thereby allowing noncitizens with reinstated removal orders to seek asylum. Because this interpretation directly conflicts with the Agency's interpretation as promulgated in the regulatory scheme, it is invalid under *Chevron*.

Furthermore, the Agency's interpretation is owed no judicial deference under *Chevron* because the Agency's interpretation yields absurd and manifestly unjust results, especially given the ample evidence that expedited removal orders are often errantly entered, in addition to the sobering reality that noncitizens who experience persecution for the first time after being deported are forever barred from seeking asylum protection.

If the six recommendations this Article makes are even partially implemented by Congress, the Agency, and the judiciary, significant progress would be made toward giving life to Congress's legislative intent: to protect bona fide asylum seekers who have fled persecution and torture and sought refuge in the Land of the Free and Home of the Brave, a core value this country has embraced since its founders arrived at America's shores, having themselves fled persecution.

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314. *Id.* at 19.

315. *See* discussion *supra* Section III.A.