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**Detained**

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**BOARD OF IMMIGRATION APPEALS**

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| **In the Matter of:** | ) | |
| **Clivian CONTRERAS-CASCO,** A202 138 499 | ) | **In Withholding Only Proceedings** |
| **Helen BETANCO-CONTRERAS,** A206 887 159 | ) | **In Removal Proceedings** |

*AMICUS CURIAE* BRIEF OF THE AMERICAN IMMIGRATION COUNCIL IN SUPPORT OF RESPONDENTS

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## I. Summary of Argument and Statement of Interest of *Amicus Curiae*

*Amicus* the American Immigration Council (the Council) submits this brief to address the special duty of Immigration Judges (IJs) to fully develop the record in pro se asylum and withholding of removal cases. The Board of Immigration Appeals (Board) and multiple federal courts have recognized that IJs have a duty to develop the record, *see Matter of E-F-H-L-*, 26 I&N Dec. 319, 323-24 (2014), and that this role is particularly important in cases involving pro se litigants. *See, e.g.*, *Matter of J-F-F-*, 23 I&N Dec. 912, 922 (AG 2006); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464-65 (8th Cir. 2004); *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002). But further clarity is needed to ensure that IJs fulfill their obligation in these cases. Although the specific actions required will vary by case, to comply with their duty to develop the record, IJs must 1) provide pro se noncitizens with relevant information about the relief that they are seeking and 2) actively elicit relevant information regarding their claims. Given that the government is always represented by a trained lawyer in removal proceedings, pro se litigants operate at a troubling disadvantage. IJs must play a more active role in those cases in order to ensure that litigants without legal representation receive a meaningful opportunity to be heard.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council has previously appeared as *amicus* before the Board and the federal courts of appeals on issues relating to the interpretation of federal immigration laws and policies, and has a direct interest in ensuring a full and fair removal process for all individuals in removal proceedings, including those without legal representation.

## II. Relevant Factual and Procedural Background

Respondent Clivian Contreras-Casco (Ms. Contreras) and her then-seven-year-old daughter Helen Betanco-Contreras arrived in the United States on December 27, 2014 and subsequently were detained at the South Texas Family Residential Center in Dilley, Texas. Respondents' Brief at 2. Ms. Contreras expressed fear of returning to Honduras and was scheduled for an interview with an Asylum Officer. *Id.* On January 15, 2015, an Asylum Officer interviewed Ms. Contreras to determine if she had a reasonable fear of return and if her daughter had a credible fear. *Id.* at 2, 15 & n.1. The following day, the Officer prepared summaries of the interviews, but the summaries were not verbatim transcripts of the interviews, were not read back to Ms. Contreras in full after the interviews, and were in English. *Id.* at 15 & n.1. The Asylum Officer determined that Ms. Contreras and her daughter had established reasonable and credible fear of return, respectively, and their cases were referred to an immigration judge for further proceedings. *Id.* at 2, 15

At her first immigration hearing, Ms. Contreras and her daughter were represented by an attorney. Tr. at 1. During the first hearing and all subsequent appearances before the court, they were detained and appeared by televideo. *Id.* Their attorney withdrew from the case at the start of the second hearing on February 20, 2015, and for the remainder of her court appearances, Ms. Contreras and her daughter were unrepresented. Tr. at 12-14. Throughout the next two months, they had a series of short hearings during which Ms. Contreras decided that she and her daughter would apply for withholding of removal and asylum, and submitted applications and supporting evidence. Tr. 12-41.

During these hearings, Ms. Contreras explained that she did not feel able to successfully navigate the asylum application process on her own, although she was very afraid to return to

Honduras. She described the application as "too difficult," indicated that she could not understand the English-language forms, and expressed concern about her daughter remaining in immigration detention during the long period of time necessary for a lawyer to look at her case. Tr. at 21-23. The IJ provided her with forms to apply for asylum and withholding, but minimal information explaining what she would be required to prove to qualify for relief. *See* Tr. at 15 ("[Y]ou can't actually apply for asylum. You can apply for what's called withholding of removal. They're similar."); Tr. at 18-19 ("So what I want you to do now is fill out the forms—the asylum forms for yourself and your child."); Tr. at 24 ("[At the hearing,] I'll just listen to you and see if you make sense and if what you say qualifies you for asylum."); Tr. at 35 ("[A]t your final hearing, you have to testify, and you have to provide evidence to show that you're afraid to return to Honduras."). The IJ told Ms. Contreras to submit evidence to support the applications to the court and to opposing counsel, noted some examples of the types of evidence she might have, stated that it would be "a good idea to collect all that evidence if you have it," and explained that she would need to have documents translated and could submit documents that had been emailed to her. *See* Tr. at 24, 29, 35-6, 40-41. The IJ did not provide other guidance about the type of information or evidence Ms. Contreras should submit.

On April 20, 2015, the IJ held a merits hearing for Ms. Contreras and her daughter. First, the IJ discussed the evidence that would be a part of the record. The IJ admitted into evidence the Asylum Officer's Reasonable Fear Interview worksheet and summary, but did not confirm that Ms. Contreras understood or even had a copy of the document. Tr. at 44-45. The IJ admitted the government's documentary evidence into the record, after confirming that Ms. Contreras had received a copy of it, although there is no indication that she was aware of what it contained. Tr. at 45. Then, the IJ turned to the supporting evidence that Ms. Contreras had offered. The

Department of Homeland Security (DHS) attorney objected to a portion of that evidence, because "a number of articles . . . [did] not name the source of the articles." The IJ determined that he would give no weight to the articles without attribution, but that the remaining evidence submitted by Ms. Contreras would become part of the record. Tr. at 45-46. The IJ did not ask Ms. Contreras if she understood his decision with regard to the evidence she had submitted, did not identify what evidence was being excluded, and did not seek any information from Ms. Contreras about the information that she had attempted to enter into the record.

The IJ briefly questioned Ms. Contreras, including about her fear of persecution by Gerardo Jovani Betanco, the father of her child, and by the M-18 gang that had targeted her because she was a single female head of household. He asked no more than two questions that directly addressed any of the issues that would become a basis for his decision.[1] *See* Tr. at 47-56. He asked no questions about the evidence she had attempted to submit. Then, the DHS attorney conducted a more lengthy examination, which included several questions about statements Ms. Contreras allegedly had made to the Asylum Officer during her reasonable fear interview (i.e, that she had never reported Mr. Betanco to the police because she did not want to testify against him). *See* Tr. at 57-72. Ms. Contreras repeatedly and clearly denied making those statements. Tr. at 68-69 ("No, I haven't said any of that, Madam Prosecutor." "No. I didn't say anything like

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[1] With regard to whether she had reported the abuse she suffered at the hands of Mr. Betanco, the IJ twice asked if she had gone to the police, but did not pursue whether Ms. Contreras' responses conflicted with other evidence in the record. Tr. at 52-53. With regard to whether the Honduran government was unwilling or unable to protect her, he asked no additional specific questions. With regard to the nexus between persecution by gang members and a protected ground, the IJ asked only, "Did they ever bother you?" and "What trouble did you have, if any?" In response to both questions, Ms. Contreras noted that she was targeted by gang members because she was "alone," Tr. 54, consistent with the particular social group of single female Honduran heads of household.

that." "No. I didn't say that. What I said was that over there, they – the police doesn't help the community.").

Even though the IJ apparently—and incorrectly—believed that Ms. Contreras had failed to offer any explanation for her allegedly inconsistent statements to the asylum officer and to the Immigration Court about whether she had reported Mr. Betanco to the police,[2] the IJ did not ask her any specific questions about that issue. In fact, he did not ask any additional specific questions. The IJ merely inquired whether she had "anything more to say." Tr. at 72; *see also* Tr. at 75 ("[Is there anything else you want to say?"). After a closing statement from Ms. Contreras, which did not suggest she understood any of the remaining issues that the IJ might have had with her applications, and from the DHS attorney, the IJ ended the hearing. Tr. at 72-75. The next day, the IJ denied the applications for asylum or withholding for both Ms. Contreras and her daughter. Tr. at 77; I.J. at 5-7.

## III. Argument

The case of Ms. Contreras and her daughter exemplifies the importance of the Immigration Judge's duty to fully develop the record and the particular need for compliance with this duty in pro se cases. Unrepresented noncitizens seeking asylum and related forms of relief from removal face unique difficulties in removal proceedings, especially if they are detained. As a result, in order to establish a complete record in pro se cases, IJs must (1) adequately advise noncitizens in advance of their hearings about the types of information they should provide to the court in order to prove eligibility for the relief that they are seeking, and (2) ensure that noncitizens provide relevant testimony during their merits hearings.

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[2] The IJ's decision stated, in error, that Ms. Contreras "acknowledged that she did give those answers" to the Asylum Officer. I.J. at 4.

A. Immigration Judges have an affirmative duty to develop the record.

The Board has recognized that IJs have a "duty to fully develop the record." *Matter of E-F-H-L-*, 26 I&N Dec. 319, 323-24 (2014); *see also Matter of J-F-F-*, 23 I&N Dec. 912, 922 (AG 2006); *Matter of M-A-M-*, 25 I&N Dec. 474, 482 (BIA 2011).[3] This affirmative duty stems from IJs' wide ranging statutory and regulatory responsibilities in removal proceedings. *See* INA § 240(b)(1) (requiring IJs to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses"); *see also* 8 C.F.R. § 1003.10(b) (same and requiring IJs to take other actions that are "appropriate and necessary for the disposition of" an individual case); 8 C.F.R. § 1240.10(a) (requiring IJs to, *inter alia*, advise noncitizens of certain rights in proceedings and explain factual allegations and charges in non-technical language); 8 C.F.R. § 1240.1(c) (requiring IJs to "receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing"); 8 C.F.R. § 1240.11(a)(2) (requiring IJs to inform noncitizens of "apparent eligibility to apply for any of the benefits enumerated in this chapter"); 8 C.F.R. § 1240.1(a)(1)(iv) (providing "the authority to . . . take any other action consistent with applicable law and regulations as may be appropriate"). To develop the record in a given case, an IJ will not only consider relevant evidence and ensure the individual appearing before her is adequately informed about the proceedings and apparent

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[3] *See also Tabaku v. Gonzales*, 425 F.3d 417, 422 (7th Cir. 2005); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464-65 (8th Cir. 2004); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 130 n.14 (1st Cir. 2004); *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002); *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002); *Zheng v. Holder*, 507 Fed. Appx. 755, 762 (10th Cir. 2013) (unpublished); *Louis v. Att'y Gen.*, 271 Fed. Appx. 985, 991 n.3 (11th Cir. 2008) (unpublished); *cf. Toure v. Att'y Gen.*, 443 F.3d 310, 325 (3d Cir. 2006) ("[A]n IJ has a duty to develop an applicant's testimony, especially regarding an issue that she may find dispositive.") (citing *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997)); *Abdurakhmanov v. Holder*, 735 F.3d 341, 346 n.4 (6th Cir. 2012) ("An IJ has . . . an obligation to ask questions of the [noncitizen] during the hearing to establish a full record.. . . . [The questioning] should be designed to elicit testimony relevant to the fair resolution of the alien's applications.").

eligibility for relief, but also question the individual and any witnesses to draw out relevant information and take other necessary actions.

This duty differentiates IJs from Article III judges, *see Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002), but is common in other types of administrative proceedings. *See, e.g.*, *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (recognizing that an adjudicator in administrative proceedings "acts as an examiner charged with developing the facts"). As the Ninth Circuit has recognized, the unique features of immigration court and certain other administrative proceedings require IJs to take on this role in order to ensure fair and accurate adjudications. *Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000); *see also Al Khouri*, 362 F.3d at 465. Immigration proceedings often involve pro se individuals who lack familiarity with the setting, legal knowledge, and proficiency in English; yet, they must ensure a detailed and accurate accounting of relevant facts if claims raised in the proceedings are to be properly adjudicated. Thus, an IJ is often in the best position to "to draw out those facts that are relevant to the final determination." *Jacinto*, 208 F.3d at 733. Absent development of the record by the IJ, "information crucial to [a noncitizen's] future" will "remain[] undisclosed." *Id.* This is especially true in asylum-related cases. Active fact-finding is inherent in the Office of the United Nations High Commissioner for Refugees' (UNHCR) understanding of an asylum adjudicator's role. *See* UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status at ¶196 (Geneva, 1979) ("[T]he duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application."); *id.* at

¶205(b)(i) ("The examiner should . . . ensure that the applicant presents his case as fully as possible and with all available evidence.").[4]

IJs' unique record-building role does not interfere with their duty to remain impartial arbiters in the cases before them. The need for IJs to establish a record and elicit testimony does not alter the burdens of proof applicable in proceedings, and, as the Board has recognized, an IJ should not become an "advocate" for either party. *Matter of J-F-F-*, 23 I&N Dec. at 922; *see also Abulashvili v. Att'y Gen.*, 663 F.3d 197, 207 (3d Cir. 2011) (noting that "[t]he Due Process Clause cannot tolerate a situation where a supposedly neutral fact finder interjects herself into the proceedings to the extent of assuming the role of opposing counsel"). The IJ must ensure that an individual in removal proceedings is adequately informed of her rights and can meaningfully participate in her hearing. Then, once the individual presents a claim, the IJ can seek "clarification" and "fill[] in the interstices of . . . testimony." *Galicia v. Gonzales*, 422 F.3d 529, 539 (7th Cir. 2005); *see also Abdurakhmanov*, 735 F.3d at 346 n.4 (noting that an IJ's questioning "should be designed to elicit testimony relevant to the fair resolution of [a noncitizen]'s applications"). But impartiality does not require an IJ to ignore the imbalance in legal training and information available to the two parties to a case. Since the opposing party, DHS, is always represented by an attorney in removal proceedings, pursuit of a fully developed record regularly will require IJs to affirmatively seek testimony that more fully explains the claims that noncitizens, especially those who are pro se, make for relief.

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[4] While the Handbook is not binding, the Supreme Court recognized that it "provides significant guidance in construing the [United Nations Protocol Relating to the Status of Refugees], to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

B. IJs must take special care to develop the record in pro se cases.

Individuals without legal representation enter removal proceedings at a disadvantage. They must navigate an extraordinarily complex area of law which can be unintelligible to those without legal training. *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.") (citation omitted). Successfully navigating a removal proceeding requires an understanding of statutes, regulations, and years of sometimes conflicting federal court and administrative decisions interpreting those laws, most of which involve legal terminology unfamiliar to a layperson. Furthermore, pro se litigants must face off against trained DHS attorneys arguing for their deportation.

According to one study, individuals in removal proceedings with attorneys were five times more likely to be permitted to remain in the United States than those without legal representation. *See* New York Immigrant Representation Study, Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings 1 (2012), http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf (analyzing data from the New York immigration courts); *see also* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007) (finding that "whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case" and that the grant rate for asylum seekers with legal representation was almost three times as high as the rate for unrepresented asylum seekers). For detained respondents, the prospect of proceeding pro se is even more daunting. Their problems are compounded by limited access to legal resources and severe restrictions on their ability to communicate with friends and

family members who could help them prepare their cases. *See, e.g.*, Mark Noferi, *Cascading Constitutional Deprivation*, 18 Mich. J. Race & L. 63, 78-80 (2012).

As a result, IJs must play a special role in pro se litigants' cases. The Fifth Amendment requires due process and a meaningful opportunity to be heard for noncitizens in removal proceedings. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 306 (1993). However, absent intervention by an IJ, pro se litigants frequently cannot meaningfully participate in their removal proceedings. As the Second Circuit noted, "our removal system relies on IJs to explain the law accurately to pro se [noncitizens]. Otherwise, [they] would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal." *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004); *see also Higgs v. Att'y Gen.*, 655 F.3d 333, 340 (3d Cir. 2011) (noting that "the immigration system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes.") (quotation omitted).

Similarly, IJs must be especially rigorous in complying with their duty to develop the record in pro se cases in order to ensure that unrepresented individuals have a meaningful opportunity to present their cases to the court. As the Board recognizes, IJ assistance in developing the record is "particularly" appropriate "where [a noncitizen] appears pro se and may be unschooled in the deportation process." *Matter of J-F-F-*, 23 I&N Dec. at 922. In these cases, "it is critical that the IJ 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" *Agyeman*, 296 F.3d at 877 (quoting *Jacinto*, 208 F.3d at 733); *Al Khouri*, 362 F.3d at 465 (same). Complying with their duty to fully develop the record in pro se cases requires IJs to examine respondents and any other witnesses during the hearing to obtain relevant testimony. Moreover, as discussed further below, because the record is developed through

evidence submitted by the parties, IJs' development of the record also requires them to fully advise respondents of their rights and provide relevant information about the relief respondents are seeking, such that the respondents themselves can provide the necessary information.

C. In order to develop the record in pro se cases, IJs should provide information in advance about the types of relief being sought and, at the merits hearing, elicit testimony on relevant issues.

The precise steps that an IJ should take to develop the record will vary by case. But generally, development of the record must take into account that individuals appearing without representation "may not possess the legal knowledge to fully appreciate which facts are relevant." *Jacinto*, 208 F.3d at 733. The responsibilities of IJs in pro se cases are twofold: they should ensure that respondents have sufficient information about the relief that they are seeking in advance of their hearings, to facilitate production of the necessary evidence, and they should actively elicit all relevant information that supports respondents' claims during merits hearings.

First, IJs should discuss with pro se noncitizens in advance what they need to prove in order to demonstrate their eligibility for relief from removal and the types of information that they may need to present. *See Agyeman*, 296 F.3d at 883-84 (noting "the importance of explaining to [noncitizens] what evidence will demonstrate their eligibility for relief from deportation"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 521 n.3 (BIA 2015) (noting that it is "good practice," especially in pro se cases, to "remind an applicant for asylum or withholding of removal of his burden to establish his claim and to provide corroborating evidence where it is reasonable to do so" and that "it is beneficial for the Immigration Judge to remind the applicant at the master calendar hearing of the general type of evidence needed to corroborate a claim"). In asylum cases, this will allow the IJ to "ensure that the applicant presents his case as fully as possible and with all available evidence." UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status at ¶ 205(b)(i); *see also Mekhoukh*, 358 F.3d at 130 n.14; *Yang*, 277

F.3d at 162; *Zheng*, 507 Fed. Appx. at 762. Where a pro se applicant attempts to submit evidence that is technically deficient in some way, the IJ should explore whether that information may nonetheless be made part of the record. *Cf. Abassi v. INS*, 305 F.3d 1028, 1031 (9th Cir. 2002) (holding that a pro se litigant had sufficiently referenced a particular document, where it was cited but not attached).

Second, when pro se respondents testify, IJs should actively elicit relevant information that will support their claims. An IJ should be especially concerned with "develop[ing] an applicant's testimony" regarding any issue that the IJ "may find dispositive." *Toure*, 443 F.3d at 325. While noncitizens should be provided with an opportunity to testify freely on relevant issues, *see, e.g.*, *Jacinto*, 208 F.3d at 728-29, an IJ does not fulfill his duty to develop testimony on a particular issue "by simply asking the [noncitizen] whether he has 'anything to add in support of his claim.'" *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (quoting *Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000)). Additionally, where adverse information or inconsistencies emerge during, for example, cross-examination by the DHS attorney, the IJ may need to further develop the witness' testimony to determine if there is additional, relevant information that should be made part of the record. *Cf. Ming Shi Xue v. BIA*, 439 F.3d 111, 125 (2d Cir. 2006) (holding that an IJ has an obligation to allow a noncitizen to provide an "explanation for any non-'dramatic' discrepancies" in his testimony). Even where it may be obvious to a trained legal observer that potentially troubling issues arose during examination by the DHS attorney, an IJ may need to request additional, specific clarifications from a pro se respondent. *Cf. Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320, 1322-23 (BIA 2000) (noting that pro se respondents may misconstrue the meaning of certain terms that are easily understandable to those with legal training, especially when communicating through a translator).

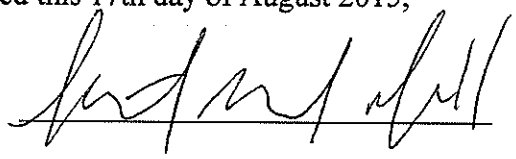
In this case, the IJ should have provided additional guidance related to the standards for obtaining asylum and related forms of relief. His statements that, for example, Ms. Contreras had "to testify, and . . . to provide evidence to show that [she was] afraid to return to Honduras," Tr. at 35, were insufficient to put her on notice of the types of information necessary to obtain relief (for example, information related to the Honduran government's unwillingness or inability to protect her from domestic violence). *See* I.J. at 6; *see also* Respondents' Brief at 14. Although some additional information is available on the I-589 and instructions, the substantive questions on the English-language form are complex and difficult to parse, and Ms. Contreras made clear that she had trouble with the application process. Tr. at 21-23. Furthermore, the IJ should not have simply announced that he was giving no weight to unidentified documents that Ms. Contreras attempted to submit. Tr. at 45-46. Finally, the IJ should have affirmatively sought more information where there were potentially dispositive issues about which Ms. Contreras provided little affirmative testimony or where were alleged unexplained inconsistencies in the evidence. While the burden of establishing eligibility for relief remained with Ms. Contreras and her daughter, the IJ did not meet his obligation to ensure that the record was developed such that he could fairly adjudicate the claims Ms. Contreras raised.

## IV. CONCLUSION

By failing to elicit or acknowledge relevant documentary and testimonial evidence from Ms. Contreras, a pro se respondent seeking withholding of removal while in detention with her young daughter, the Immigration Judge failed to comply with his duty to fully develop the record in this case. Were the record fully developed before the IJ, Ms. Contreras would have established that she and her daughter had a well-founded fear or clear probability of persecution on account of membership in a particular social group. *See* Pet. Br. at 26-32. As a result, *Amicus* respectfully

urges the Board to reverse the decision of the Immigration Judge and grant Ms. Contreras and her daughter the relief they seek.

Respectfully submitted this 17th day of August 2015,



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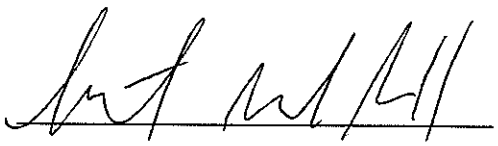

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