UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MATTER OF A-M-R-C-,
Respondent.

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Interim Decision #3986
28 I&N Dec. 7 (A.G. 2020)

BRIEF OF AMERICAN IMMIGRATION COUNCIL, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, BRONX DEFENDERS, CATHOLIC LEGAL IMMIGRATION NETWORK INC., IMMIGRANT DEFENSE PROJECT, IMMIGRANT JUSTICE IDAHO, LAS AMERICAS, LEGAL AID SOCIETY, NATIONAL IMMIGRATION LITIGATION ALLIANCE, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NEW MEXICO IMMIGRANT LAW CENTER, NORTHWEST IMMIGRANT RIGHTS PROJECT, AND ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK AS AMICI CURIAE URGING AFFIRMANCE

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QUESTIONS PRESENTED

In 1996, Respondent A-M-R-C-, a citizen of Bangladesh, arrived in the United States with his wife and eventually sought asylum from political persecution in his homeland. In 2004, an Immigration Judge granted A-M-R-C- asylum, and in 2006 the Board of Immigration Appeals (the "Board") upheld that decision. IJ Decision dated March 31, 2004 ("IJ Dec."), at 30; Board Decision dated March 29, 2006 ("Board Dec."), at 15. The Board remanded the case to the Immigration Judge to allow additional proceedings in which the parties could submit evidence concerning whether A-M-R-C- could reasonably be regarded as a danger to the security of the United States and barred from asylum on that basis. The Department of Homeland Security informed the Immigration Judge it had no evidence to submit, and the Immigration Judge granted A-M-R-C- asylum again. Oral Decision of the IJ, dated July 27, 2007, at 2-3. The Department of Homeland Security did not appeal that decision, and the asylum grant thereafter became final.

For nearly thirteen years, from July 27, 2007 until June 17, 2020, that was the end of the matter. But on June 17, 2020 the Attorney General directed the Board to refer "this case to [the Attorney General] for review of its decision" "[p]ursuant to 8 C.F.R. § 1003.1(h)(1)(i)." The Attorney General invited the parties to this proceeding and interested *amici* to submit briefs on "points relevant to the disposition of this case," including four specifically enumerated questions. This Brief addresses three "points relevant to the disposition of this case":

1. Whether the Attorney General lacks the statutory and regulatory authority to reopen a case, including where, as here, the issues are *res judicata*, and no exception applies.

2. Whether reopening this case on these facts violates the Due Process Clause of the Fifth Amendment.

3. Whether reopening this case could be detrimental to the interests of the United States in foreign affairs.

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INTRODUCTION AND SUMMARY OF ARGUMENT[1]

For the sixteenth time in the four years since the administration took office, the Attorney General has invoked a Department of Justice ("DOJ") regulation, 8 C.F.R. § 1003.1(h)(1)(i), to refer an immigration matter to himself. That regulation requires the Board of Immigration Appeals ("Board") to refer to the Attorney General "for review" any case in which "[t]he Attorney General directs the Board to refer to him." *Id.* In each of those cases, the proceedings had not yet become final. By contrast, in the referral order here, the Attorney General seeks to "review" the grant of asylum in Respondent A-M-R-C-'s case, which became final in 2007. But any such "review" is contingent upon first reopening A-M-R-C-'s removal proceedings, an action the Attorney General cannot lawfully take.

Amici, immigrants' rights organizations,[2] submit that the Attorney General cannot "review" this case because it became final thirteen years ago, and even if he could review it, he should decline to do so because establishing a precedent that the United States will overturn final, decades-old asylum

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person (other than amici curiae, their counsel, or their members) contributed money that was intended to fund the preparation or submission of this brief.

[2] A detailed description of amici organizations is included in the Appendix.

determinations at the urging of a foreign government would harm the foreign policy interests of the United States.

First, the Attorney General simply lacks the power to move to reopen this case under federal law. By statute, Congress granted the authority to reopen exclusively to noncitizens, not the Attorney General. *See* 8 U.S.C. § 1229a(c)(7). Moreover, basic principles of *res judicata* compel this conclusion. *Res judicata* is the ancient principle that once a decision has become "final" in an adjudicatory proceeding the case is over and the decision is no longer open to collateral attack. The principle applies to immigration proceedings, and it applies here. Applying basic and well-established principles of finality to this case, the Attorney General has no statutory or regulatory authority to reopen it.

Second, reopening this case—on these facts—thirteen years after it has become final violates the Due Process Clause of the Fifth Amendment. A-M-R-C- is entitled to due process before he is removed from this country, even absent a showing of prejudice. A-M-R-C- need not show "prejudice" to establish a violation of due process because reopening this case "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998). "For the

state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest." *Falter v. United States*, 23 F.2d 420, 426 (2d Cir. 1928) (Hand, J.). In any event, reopening this case would undoubtedly prejudice A-M-R-C-because excessive pre-trial delay is presumptively prejudicial. The circumstances here, involving *post-finality* delay (as a prelude to a *sua sponte* reopening no one ever contemplated), are orders of magnitude more prejudicial than pre-trial delay.

Third, and finally, reopening this case would harm the foreign policy interests of the United States. The United States has chosen to grant asylum through adjudication by immigration *judges* who adjudicate asylum cases according to fixed principles and established standards. And like all decisions by judges, eventually those decisions become *final*. Reopening asylum cases at the urging of the very foreign powers from whose persecution an individual has sought asylum, when those cases have long since closed, would set a dangerous precedent that would turn asylees into chips to be bargained over. This precedent would strip the Attorney General of the ability to claim he has no control over the status of asylees due to principles of finality and due process.

The Attorney General cannot lawfully reopen the asylum determination in this matter, and even if he could, he should decline to do so to avoid setting a precedent that would harm national interests. The Attorney General should vacate the referral order.

STATEMENT

A-M-R-C- and his wife were born in Pakistan. In 1971, Bangladesh gained its independence from Pakistan, and A-M-R-C- and his wife became citizens of Bangladesh. They traveled to the United States on visitor visas on July 7, 1996. Board Dec. at 4. On August 19, 1996, A-M-R-C- applied for asylum from Bangladesh, listing his wife and their son on his application. IJ Dec. at 1. That application was referred to the immigration judge, and on April 24, 1998, the former Immigration and Naturalization Service ("INS") placed A-M-R-C- and his wife into removal proceedings. IJ. Dec. at 1. A-M-R-C-'s wife and son each subsequently filed separate asylum applications before the immigration judge. On March 31, 2004, the immigration judge issued three decisions (separate decisions for A-M-R-C-, his wife, and their son) granting asylum. IJ Dec. at 30. The INS appealed those decisions to the Board of

Immigration Appeals (the "Board" or "BIA").[3] Board Dec. at 1. On March 29, 2006, the Board affirmed the grants of asylum for A-M-R-C-'s wife and son but remanded their cases to allow the then newly-created Department of Homeland Security ("DHS") to conduct a background check before asylum could be finally granted. Board Dec. at 4-13, 15.

A-M-R-C-'s case was also remanded to the immigration judge. The Board affirmed the immigration judge's factual findings and legal conclusions but remanded the case for further fact finding and ruling on one aspect of the asylum case. *Id.* at 15. The Board also instructed the immigration judge to consider additional evidence, if necessary, and rule on A-M-R-C-'s applications for withholding of removal and protection under the United Nations Convention Against Torture. *Id.* DHS filed a motion to reconsider the Board's decision. The Board denied that motion on September 11, 2006, and the record was remanded to the immigration judge.

The immigration judge thereafter reaffirmed A-M-R-C-'s grant of asylum, as well as the determination that A-M-R-C- was not subject to any bar

[3] INS ceased to exist on Feb. 28, 2003 pursuant to the Homeland Security Act of 2002 (Pub. L. No. 107–296, 116 Stat. 2135). The Department of Homeland Security ("DHS") took over on Mar. 1, 2003.

based on persecution of others, participation in terrorist activity, or commission of a serious non-political crime, as well as the determination that he did not present any danger to the United States. Oral Decision of the IJ, dated July 27, 2007, at 2-3. DHS did not appeal, and the case became final.

A-M-R-C-'s case file demonstrates that the Justice Department made a final determination that he had a well-founded fear of persecution based on his political opinion. IJ Dec. at 30; Board Dec. at 13-14. A-M-R-C-'s asylum claim stems from an *in absentia* Bangladeshi conviction related to his very limited role in the August 1975 coup, which overthrew a dictatorial president who converted Bangladesh into a repressive, single-party state. A-M-R-C- took no part in planning the coup, nor did he know that it would occur. Board Dec. at 3; IJ Dec. at 5. He was tasked only with commandeering a radio station, which he did without violence. Board Dec. at 3; IJ Dec. at 11. He played no part in, and had no knowledge of, any killings that occurred during the coup. IJ Dec. at 11-12. He only learned of the killings after the coup had succeeded. *Id.*

In 1996, the overthrown dictator's daughter, Sheikh Hasina, came to power and set out to punish all those involved in the coup. Sheikh Hasina first rescinded an amnesty law that had protected the coup participants for decades. Board Dec. at 4; IJ Dec. at 3, 7. She then charged all coup

participants, regardless of their role, for the deaths that occurred during the coup. *Id.* The criminal trial, conducted *in absentia*, suffered from exceptional procedural infirmities, including a significant amount of witness testimony that was coerced through torture and later recanted. IJ Dec. at 4, 7-9, 17, 19; Addendum to the IJ Decision ("Add") at 6-8.

Twenty-four years after first assuming power, Sheikh Hasina continues to seek A-M-R-C-'s extradition. If extradited, A-M-R-C- will likely face torture and will certainly be hung. IJ Dec. at 7-8 (documenting torture of other alleged coup participants before execution).

A-M-R-C- has been an exemplary member of his community since he arrived in the United States. After filing his asylum application, A-M-R-C- obtained employment authorization and worked without interruption until he retired in 2010. He has paid taxes each year since entering the country. He currently gardens, raises chickens, and acts as a caregiver for his wife—a U.S. citizen who is in poor health—as well as a babysitter for his grandchildren, all of whom are U.S. citizens. A-M-R-C- has two sons, one of whom is a U.S. citizen; the other is a lawful permanent resident.

A-M-R-C- co-owns the home in which he and his wife reside. He also owns a small rental property. A-M-R-C- and his wife are religious and attend mosque together.

ARGUMENT

I. The Attorney General Has No Statutory or Regulatory Authority to "Review" the Present Case

The Attorney General lacks authority to reopen a closed case. In addition, this case has been final for thirteen years. Therefore, even the most elementary principles of *res judicata* bar the Attorney General from reopening it.

In the immigration context, "reopening" and "review" are distinct terms, reflecting distinct concepts. Through 8 U.S.C. § 1229a(c)(7), Congress provided noncitizens in removal proceedings with the statutory right to file one motion to reopen. Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), in which Congress codified these motions, requests for reopening were regulatory in nature. *See* 8 C.F.R. § 3.2(c)(2) (1997). Significantly, since Congress codified the right to seek reopening, it has become an integral vehicle *for noncitizens* to protect against unlawful removal orders. The Supreme Court repeatedly has held that statutory motions to reopen provide

noncitizens with an "important safeguard" in removal proceedings and admonished against any interpretation of the motion to reopen statute that would "nullify a procedure so intrinsic a part of the legislative scheme." *Dada v. Mukasey*, 554 U.S. 1, 18-19 (2008) (internal quotation omitted); *see also id.* at 18 (describing "[t]he purpose of a motion to reopen" as "ensur[ing] a proper and lawful disposition" of removal proceedings); *Kucana v. Holder*, 558 U.S. 233, 242, 249-51 (2010) (protecting judicial review of motions to reopen in light of their importance); *Reyes Mata v. Lynch,* 576 U.S. 143, 145 (2015) (quoting *Dada*, 554 U.S., at 4-5, to recognize that each noncitizen ordered removed "'has *a right* to file one motion' with the IJ or Board to 'reopen his or her removal proceedings.'") (emphasis added).

By statute, only noncitizens can move to reopen immigration proceedings. *See* 8 U.S.C. § 1229a(c)(7)(A). In contrast, the statute that provides for Attorney General review does *not* contemplate the possibility of reopening proceedings. *See* 8 U.S.C. § 1103(g)(2). Where Congress intends for the Attorney General to have authority to make a type of determination, statutes clearly provide such authority.[4] Courts do not "not lightly assume

[4] *See, e.g.*, 8 U.S.C. §§ 1182(d)(5)(A) (permitting the Attorney General to parole certain individuals into the United States, "in his discretion"),

that Congress has omitted from its adopted text requirements that it nonetheless intends to apply," especially if "Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. ICE*, 543 U.S. 335, 341 (2005); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."). Omission of statutory language expressly authorizing the Attorney General to reopen long final proceedings is evidence of Congress' intent to foreclose such an overreach of authority.

Moreover, even if the Attorney General had authority to reopen and review, he cannot do so in this case. A basic prerequisite for "review" of a case—rooted in literally centuries of English and American law, *see Lynce v. Mathis*, 519 U.S. 433, 439-41 (1997)—is that it must still be open at the time it is reviewed. This prerequisite reflects basic principles of *res judicata*, under

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1225(a)(4) ("[A noncitizen] applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States."), 1227(a)(7)(B) ("The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.").

which the Board cannot refer a decision that has long since become final to the Attorney General for further review.

Despite a historically "confusing lexicon" encompassing various terms (including collateral estoppel, merger, claim preclusion and direct estoppel), *res judicata* is simply a general term for the preclusive effects of prior judgments. *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008). The Supreme Court defines *res judicata* as a collective term for two distinct judge-made doctrines: issue preclusion and claim preclusion.[5] *Id.* at 892. The Supreme Court recognizes that *res judicata* applies to administrative adjudicatory proceedings. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148-49 (2015); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) ("When an administrative agency is acting in a judicial capacity and resolve[s] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.").

Principles of *res judicata* apply to the present case because they are presumptively incorporated into the statutes and regulations governing the

[5] Some courts use the term "res judicata" to apply exclusively to claim preclusion and "collateral estoppel" to issue preclusion.

Attorney General's authority to review Board decisions. "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). "Thus, where a common-law principle is well established, *as are the rules of preclusion* . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Id.* (emphasis added).

The Board and the Courts have thus long recognized that the doctrine of *res judicata*, through issue preclusion or claim preclusion, specifically applies to immigration proceedings. *See*, *e.g.*, *Matter of Fedorenko*, 19 I. & N. Dec. 57, 64 (BIA 1984) (finding that issue preclusion prevents an individual from relitigating issues in a deportation proceeding that were decided in a prior denaturalization action); *Dalombo Fontes v. Gonzales*, 498 F.3d 1, 3 (1st Cir. 2007) (affirming the BIA's application of issue preclusion); *Paulo v. Holder*, 669 F.3d 911, 917, 919-20 (9th Cir. 2011) (finding that a District Court's decision in a habeas holding that petitioner was eligible for relief from deportation was binding on the BIA and that "[r]es judicata bars relitigation of issues in immigration courts already litigated in Article III courts."); *Arangure v. Whitaker*, 911 F.3d 333, 344-45 (6th Cir. 2018) (Thapar, J.)

(holding that *res judicata* applies to immigration proceedings and noting that immigration proceedings are "plainly adjudicatory in nature"); *Ramon-Sepulveda v. I.N.S.*, 824 F.2d 749, 750 (9th Cir. 1987) (holding that an immigration's judge's initial decision in a deportation proceeding that INS failed to prove petitioner was a noncitizen is *res judicata* at a later deportation proceeding).

Moreover, the statutes and regulations that govern decisions by immigration judges, review by the Board of Immigration Appeals, and further "review" by the Attorney General, contemplate adherence to principles of *res judicata*. The Department of Justice's regulations provide that "[t]he Board shall refer to the Attorney General for *review* of its decision all cases that . . . [t]he Attorney General directs the Board to refer to him." 8 C.F.R. § 1003.1(h)(1)(i) (emphasis added). That authority stems from a statutory provision that authorizes the Attorney General to "*review*" "administrative determinations in immigration proceedings." 8 U.S.C. § 1103(g)(2) (emphasis added). Both the statute and the regulation authorize the Attorney General to "review" a Board decision before the case is remanded, not to reopen a case decades after it became final.

Both the governing statute and the Department's own regulations reflect this understanding. Under 8 U.S.C. § 1101(a)(47), an immigration judgment "shall become final upon the earlier of: (i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." Likewise, the regulations provide that "the decision of the Immigration Judge becomes final. . . upon expiration of the time to appeal." 8 C.F.R. § 1003.39; *see also id.* § 1240.52. The use of the word "final" in the Department's regulation is no accident, and it carries a distinct meaning in the law. It means the matter is "concluded" and has "[t]he quality of being complete and unchangeable." Final, Finality, *Black's Law Dictionary* (11th ed. 2019). The Department employed that term of art—which carries with it centuries of history in the law—"know[ing] and adopt[ing] the cluster of ideas that were attached to [the] borrowed word." *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014). The Supreme Court has "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained *finality*." *Astoria*, 501 U.S., at 107 (emphasis added).

The structure of the immigration system in particular supports this point. Everything about immigration proceedings borrows explicitly from longstanding common-law adjudication concepts. The Immigration and Nationality Act ("INA") established a framework that Congress intended to be "plainly adjudicatory in character," *Arangure*, 911 F.3d at 344 (quoting *Duvall v. Attorney Gen. of U.S.*, 436 F.3d 382, 390 (3d Cir. 2006)), and the core adversarial, adjudicatory features of this framework have remained in place since 1952. *See generally Marcello v. Bonds*, 349 U.S. 302, 307-09 (1955) (discussing deportation proceedings under former section 242 of the INA). Immigration *judges* tasked with "resolving the questions before them in a timely and impartial manner" preside over immigration proceedings. 8 C.F.R. § 1003.10(b). The Department has expressly represented in federal court that the Board is not a policymaking body but rather solely "an adjudicatory body." *Ren v. Gonzales*, 440 F.3d 446, 448 (7th Cir. 2006). The Board functions as an "appellate body," 8 C.F.R. § 1003.1(d)(1) and exercises an "[a]ppellate jurisdiction," *id.* § 1003.1(b). And the Department's regulations set forth rules about how and when the Board can reopen cases on its own motion. *See* 8 C.F.R. § 1003.2(a). There simply can be no doubt that both the statutes governing immigration proceedings and the Department's *own* regulations,

which delimit its authority (including the Attorney General's authority), *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954); *see Service v. Dulles*, 354 U.S. 363, 372-73, 388 (1957), explicitly incorporate common law precepts of adjudication, including the common law doctrine of *res judicata*.

The Board has repeatedly made clear that its reopening authority "is not meant to be used … to otherwise circumvent the regulations, where enforcing them might result in hardship." *Matter of J-J-*, 21 I. & N. Dec. 976, 984 (BIA 1997); *see also Matter of G-D-*, 22 I. & N. Dec. 1132, 1133-34 (BIA 1999) (explaining that the Board's discretion to reconsider a case *sua sponte* is "an extraordinary remedy reserved for truly exceptional situations"); *Matter of O-S-*G, 24 I&N Dec. 56, 56-59 (BIA 2006) (similar). The Board has further emphasized the importance of ensuring the finality of immigration proceedings and of not utilizing its *sua sponte* authority to circumvent those considerations. *In re Beckford*, 22 I. & N. Dec. 1216, 1221 (BIA 2000) (en banc). The Department's own actions thus make clear beyond peradventure that the doctrine of *res judicata* applies to "final" asylum decisions.

That *res judicata* bars the Attorney General from reopening this case is not a close question. Any "review" in this case necessarily entails "reopening"

a final decision, something Congress did not authorize the Attorney General to do and *res judicata* forbids. Absent such statutory or regulatory authority to reopen the case, basic and well-established principles of finality preclude the Attorney General from doing so.

The courts of appeals agree. In *Guevara*, the Fifth Circuit held that the Board cannot grant a motion to reopen a case that has already become final where the Department of Homeland Security could have raised an issue on direct appeal. *See Guevara v. Gonzales*, 450 F.3d 173, 175-76 (5th Cir. 2006) (explaining that reopening is appropriate only where an FRCP 60(b) motion would be appropriate); *see also Al Mutarreb v. Holder*, 561 F.3d 1023, 1031 (9th Cir. 2009) (finding that *res judicata* bars DHS from initiating a second deportation case on the basis of a charge that it could have brought in the first deportation case); *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007) (holding the same); *Medina v. INS*, 993 F.2d 499 (5th Cir. 1993) (per curiam) (holding that *res judicata* applies with full force to final decisions in immigration proceedings). *Guevara* stands for the basic (and unassailable) proposition that *res judicata* bars the Board from reopening a case that has become final solely to decide a legal issue that it could have decided (or indeed, did consider and decide) on direct review. *James B. Beam Distilling Co. v.*

Georgia, 501 U.S. 529, 541 (1991) (Souter, J.) ("[O]nce suit is barred by res judicata … a new rule cannot reopen the door already closed."); *Utah Constr. & Mining Co.*, 384 U.S., at 422 ("When an administrative agency is acting in a judicial capacity and resolved disputed issues … before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."); *accord Medina*, 993 F.2d at 503-04 (per curiam).

Finally, were there any doubt, the rule of common sense cements this conclusion. Reopening a case on a court's own accord thirteen years after it was decided is not a form of appellate "review" the law now recognizes or has ever recognized. It thus falls far outside the four corners of the statute authorizing the Attorney General to "*review*" "administrative determinations in immigration proceedings." 8 U.S.C. § 1103(g)(2) (emphasis added). Simply put, unless the narrow grounds for reopening long recognized at common law—and embodied in the jurisprudence interpretation Federal Rule of Civil Procedure 60(b)—are present in this case, the Attorney General lacks statutory and regulatory authority to reopen and review it. No such grounds being present in this case, the Attorney General simply cannot reopen it.

II. Due Process Bars the Attorney General from Reopening a Case More Than a Decade After It Has Become Final Where, As Here, Such Reopening "Shocks the Conscience"

Reopening this case, on these facts, thirteen years after it has become final, violates the Due Process Clause, which stands as an independent barrier to review. Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, it "is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The Supreme Court has long held that the Due Process Clause is violated where "executive action … 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense,'" *Cty. of Sacramento*, 523 U.S., at 846-47, or "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions … and which define the community sense of fair play and decency." *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (citations omitted). "While the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'poin[t] the way.'" *Cty. of Sacramento*, 523 U.S., at 847 (quoting *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir. 1973)).

A-M-R-C- is entitled to due process before he is removed from this country because "[noncitizens] who have established connections in this country have due process rights in deportation proceedings." *Dept. Homeland Security v. Thuraissigiam*, 140 S.Ct. 1959, 1963-63 (2020). A-M-R-C- has lived here for nearly a quarter century with his wife and son and thus has the requisite "established connections" to this country.

And even if A-M-R-C-'s "established connections" to this country did not trigger his entitlement to due process, the attempt to extinguish his vested right to asylum would. *See William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633, 637 (1925) (holding the government cannot revive liability once extinguished without running afoul of due process of law). Like other intangible rights, *see Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1011-12 (1984), a final decision in favor of an asylum seeker vests him with the right to remain in this country. *Pennsylvania v. The Wheeling & Belmont Bridge Co.,* 59 U.S. (18 How.) 421, 431 (1855); *see also* 8 U.S.C. § 1158(c)(2). This right is especially valuable for a person like A-M-R-C-, who has established that he faces execution if he is extradited to his homeland.

Among the most important interests the Due Process Clause protects are a person's "interests in fair notice and repose." *Landgraf v. USI Film*

Prod., 511 U.S. 244, 266 (1994). The Due Process Clause exists to prevent the "sweep[ing] away [of] settled expectations suddenly and without individualized consideration" as a result of "political pressures" or the desire for "retribution against unpopular groups or individuals." *Id.*; *see Richmond v. J. A. Croson Co.*, 488 U.S. 469, 513–514 (1989) ("The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens.") (Stevens, J. concurring). The Supreme Court "has [thus] stated from its first due process cases . . . [that] traditional practice provides a touchstone for constitutional analysis," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994), and has recognized that a party may not be deprived of an important interest protected by the Due Process Clause "without the safeguards of common law procedure." *Id.* The Court has regarded certain "basic" and "well-established" "procedural protections of the common law" to be "so fundamental" that the failure to provide those protections in an adjudication constitutes a violation of the Due Process Clause. *Id.* The "very object" for which adjudicatory bodies like the immigration courts are established "is to secure the peace and repose of society by the settlement of matters capable of judicial

determination." *Southern Pacific R.R. Co. v. United States,* 168 U.S. 1, 48-49 (1897). Moreover, appellate courts have found that due process requires administrative agencies to apply principles of *res judicata*. *Duvall v. Attorney General*, 436 F.3d 382, 387 n.5 (3d Cir. 2006) (noting that "[s]ubstantive due process may offer some protection against repeated relitigation of the same issue by an administrative agency."); *Babcock & Wilcox Co. v. Marshall*, 610 F.2d 1128, 1138 (3d Cir. 1979) (noting that an "administrative procedure violates due process by . . . subjecting a party to vexatious and harassing prosecutions by refusing to apply collateral estoppel") (quotations omitted); *Cont'l Can Co., U.S.A. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979) (holding that in the context of relitigating issues in an administrative proceeding it is a "basic tenet of due process" and "rather fundamental" that "the Government cannot, without violating due process, needlessly require a party to undergo the burdens of litigation").

Reopening this case—thirteen years after it became final—"can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998). No "prejudice" to A-M-R-C- need be shown to establish that its reopening violates due process—the very act of reopening is sufficient to establish the

violation. Reopening in circumstances like these is fraught with all of the dangers of arbitrariness and excessiveness that characterize the acts closest to it in kind—bills of attainder and *ex post facto* laws. *See James v. United States*, 366 U.S. 213, 247, n. 3 (1961) (retroactive measures often reflect "a purpose not to prevent dangerous conduct generally but to impose … a penalty against specific persons"). Reopening also bears striking similarities to double jeopardy—requiring A-M-R-C- to suffer all the fear and anguish of a proceeding in which his very *life* is at stake to prove his entitlement *again* to a right he already finally established *thirteen years ago*. It violates the government's promise—made by virtue of having a formal process for adjudicating A-M-R-C-'s asylum application in the first instance—that A-M-R-C- would not again be subjected to jeopardy for the same conduct. And reopening unsettles the expectations of every person who has ever received asylum in this country to rely on the finality of that decision and build a life here.

Moreover, there is reason to believe that the case's reopening is not driven by any relevant factual or legal developments, but rather as a result of "political pressures" and the desire for "retribution against," *Landgraf*, 511 U.S., at 266, A-M-R-C- from the Government of Bangladesh, which seeks his

extradition to execute him. That appearance is unavoidable given the widespread media reports of political pressure from the Government of that country, the long delay in reopening this case, and the total absence of new factual or legal developments that would justify reopening here. Reopening this case as a result of "political pressures" would squarely contravene the core tenets of due process and "shock the conscience" indeed.

Where, as here, a matter has been final for thirteen years, where denying asylum would result in the certain execution of the asylee, and where reopening would carry the appearance of resulting from a "political pressure" from the country seeking the asylee's extradition, reopening the matter "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions … and which define the community sense of fair play and decency," *Lovasco*, 431 U.S., at 790 (citations omitted), and thus violates the Due Process Clause.

Additionally, reopening this case would surely prejudice A-M-R-C-. The Supreme Court has held that a pre-trial delay longer than eight and a half years—far shorter than the delay in this case—"presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify," *Doggett v. United States*, 505 U.S. 647, 655 (1992). That presumption

"intensifies over time," *id.* at 652, because "time's erosion of exculpatory evidence and testimony can rarely be shown," *id.* at 655. The circumstances here, involving post-finality delay, are *orders of magnitude* more prejudicial than pre-trial delay because in addition to compromising A-M-R-C-'s ability to gather witnesses and evidence, it renders prejudicial to him any decision he has made to discard evidence, sever ties with witnesses, or otherwise act in reliance on the finality that winning asylum brought him. There are innumerable circumstances that prejudice A-M-R-C-'s ability to contest a reopened case, circumstances that, because of the long passage of time, "neither party can prove or, for that matter, identify." *Id.* Where the delay is excessive and the government's reasons for the delay are weak, the presumption of prejudice suffices and a respondent "need not demonstrate actual prejudice." *United States v. Ingram*, 446 F.3d 1332, 1340 (11th Cir. 2006). Prejudice in this case is a foregone conclusion.

III. Reopening This Case Would Set a Dangerous Precedent That Could Transform Asylees Into Bargaining Chips and Compromise the United States' Human Rights Obligations

Senior Bangladeshi officials have repeatedly asked the United States to extradite A-M-R-C- for execution.[6] It appears that these requests are the driving force behind the Attorney General's interest in reopening A-M-R-C's case. The requests have been so numerous that Secretary Pompeo, immediately upon meeting Bangladesh's foreign minister, correctly surmised that the minister wished to speak about A-M-R-C-.[7]

Moreover, Bangladesh has tethered the A-M-R-C- case to wholly unrelated U.S. interests in order to exercise leverage over the United States

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[6] *See* Porimol Palma & Ashutosh Sarkar, *Little Progress in Bringing Six Fugitive Killers Back*, Daily Star, (Aug. 15, 2019), https://www.thedailystar.net/frontpage/news/little-progress-bringing-six-fugitive-killers-back-1785544 (discussing a meeting between Secretary Pompeo and Bangladesh's Foreign Minister); *Canada, US Keep Decisions on Fugitive Mujib Killers Pending*, New Age, (Aug. 15, 2019), https://www.newagebd.net/print/article/81460 ("Prime minister Sheikh Hasina wrote to US president Donald Trump in September 2018 seeking his interventions for extraditing [A-M-R-C] to Bangladesh"); *US Asks for Trial Documents of Bangabandhu Killer [A-M-R-C]*, BDNews24, (Nov. 5, 2019), https://bdnews24.com/bangladesh/2019/11/05/us-asks-for-trial-documents-of-bangabandhu-killer-rashed-chowdhury; *Bangladesh Asks US to Deport Mujib Killer [A-M-R-C]*, New Age, (Apr. 28, 2020), https://www.newagebd.net/print/article/105304.

[7] Palma & Sarkar, *supra*.

and its asylum program. To wit, Bangladeshi officials have intimated that A-M-R-C-'s extradition would animate Bangladesh to pursue rule-of-law and governance reforms.[8] The United States considers such reforms a priority for Bangladesh, particularly with respect to U.S. interests in counterterrorism and anti-money laundering.[9] With that knowledge, Bangladesh seeks to use A-

[8] Daily Star, *supra* (Minister Momen told Secretary Pompeo: "'You speak of rule of law. If I cannot implement the court order of my country, how can we do that?' The US secretary of state replied that he would look into the matter."); BDNews24, *supra* ("'I said we want to establish the rule of law and governance but we have a problem. Rashed Chowdury is hiding in your country, we want him back,' [Minister Momen] said. 'Then [Acting Assistant Secretary of State Wells] replied 'give us the papers of the trial. We will examine and then let you know.'").

[9] U.S. Embassy to Bangladesh, *USAID Deputy Administrator Bonnie Glick and Acting Assistant Secretary of State Alice G. Wells Visit Bangladesh*, Press Release, (Nov. 7, 2019), https://bd.usembassy.gov/usaid-deputy-administrator-bonnie-glick-and-acting-assistant-secretary-of-state-alice-g-wells-visit-bangladesh/ ("Acting Assistant Secretary Wells met with Foreign Minister Dr. A. K. Abdul Momen, Foreign Secretary Shahidul Haque, and the Prime Minister's Advisor for International Affairs Dr. Gowher Rizvi to review the U.S.-Bangladesh relationship; supporting the response to the Rohingya crisis; enhancing defense cooperation; strengthening governance and rule of law; and highlighting the U.S. Indo-Pacific Strategy's opportunities for further U.S.-Bangladesh partnership"; Daily Excelsior, *US & Bangladesh committed to tackle money laundering, says Earl Miller*, Daily Excelsior, (Sept. 21, 2019), https://www.dailyexcelsior.com/us-bangladesh-committed-to-tackle-money-laundering-says-earl-miller/ ("[Ambassador] Miller said the US and Bangladesh have been working together to build strong legal institutions that respect the rule of law and are, in turn, respected by fellow citizens. It's what they expect, what they deserve, he said. He, however, said it is not

M-R-C- as a bargaining chip for its cooperation with the United States' counterterrorism and anti-money laundering objectives.

Setting a precedent that the United States will reopen final and long-since-closed asylum cases at the urging of foreign nations could seriously interfere with the ability of the United States to conduct its foreign relations by incentivizing foreign nations to seek extradition of individuals who were previously beyond their reach. There can be no doubt that the decision to grant asylum constitutes the exercise of one of the Attorney General's "especially sensitive political functions that implicate questions of foreign relations." *INS v. Abudu*, 485 U.S. 94, 110 (1988). But for decades—indeed as far back as *amici* have been able to go—it has been accepted that asylum decisions, once final, are not thereafter reopened at the urging of foreign states.

This unbroken policy is particularly crucial when it comes to *asylum*. Opening up asylum decisions to collateral attack long after they are made has the potential to seriously interfere with the nation's foreign relations. The

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enough to adopt strong laws prohibiting money laundering and terrorism financing. The laws must be enforced by trained investigators, prosecutors, and analysts such as you, the ambassador said.").

grant of asylum constitutes an implicit judgment by an agency or organ of the U.S. that the government of the applicant's home country either commits outrageous human rights violations or is unable or unwilling to prevent the commission of such violations within its borders. These are not decisions lightly made. Once they are made and final, it is a tremendous benefit to the United States that other countries know that they will not change and there is no use in seeking to bargain over them.

If the Attorney General reopens this case—and thereby sets a precedent that such reopenings can happen, even more than a decade after the grant of asylum has been finally made—it will make hewing to the United States' policy against reversing asylum decisions at the urging of foreign governments much more challenging. "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting). Foreign governments will pressure the United States to reopen and reverse asylum decisions as part of negotiations the world over. Asylees will become, in essence, bargaining chips.

Such an outcome would jeopardize the United States' ability to adhere to its human rights obligations, particularly its *non-refoulment* obligations

under the United Nations Convention Against Torture[10] and the International Covenant on Civil and Political Rights.[11] By eschewing these international obligations, the United States risks damaging its credibility as a rule-abiding nation and its reputation as a global champion of human rights.

To *amici*'s knowledge, no Attorney General has ever decided to return an individual granted asylum to a country where the individual is likely to be killed based solely on the Attorney General's decision to reopen the case long after it became final. This Attorney General should not be the first.

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[10] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988). Under Article 3 of the CAT, no State shall expel, return or extradite a person "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *Id.*

[11] *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 999 UNTS 171; S. Treaty Doc. 95-20 (1967). Under Article 7 of the ICCPR, "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement." UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 9 (Mar. 10, 1992); *see also*, UN Human Rights Committee (HRC), General comment No. 31 [80] (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 12 (May 26, 2004).

CONCLUSION

For the foregoing reasons, the Attorney General should vacate the referral order.

September 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated June 17, 2020 because the brief contains 6,514 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificate of Service.

s/ *John Bellinger*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 29, 2020, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via First-Class Mail to:

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APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The **American Immigration Council** was established to increase public understanding of immigration law and policy, advocate for the just and fair 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 a direct interest in ensuring non-citizens have access to the immigration courts and an ability to assert their rights.

American Immigration Lawyers Association (AILA) is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security, immigration courts, and the Board of Immigration

Appeals, as well as before the United States District Courts, Courts of Appeals, and Supreme Court.

The **Bronx Defenders** is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 20,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents non-detained immigrants in removal proceedings. The Bronx Defenders' removal defense practice extends to motions to reopen, appeals and motions before the BIA, and petitions for review.

The **Catholic Legal Immigration Network Inc.** (CLINIC) is the nation's largest network of nonprofit immigration legal services providers, with more than 370 programs in 49 states and the District of Columbia. CLINIC and its affiliates provide direct representation in asylum matters before the immigration court, the Board of Immigration Appeals, and federal courts of appeals. CLINIC attorneys are recognized national experts on

asylum-related issues and CLINIC has a significant interest in the outcome of this case because the decision could jeopardize the finality of grants of relief for the thousands of asylees our affiliates have represented.

Immigrant Defense Project (IDP) is a not-for-profit organization dedicated to secure fundamental fairness for immigrants through advocacy, litigation, community defense, and strategic communications. IDP provides criminal defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights.

Immigrant Justice Idaho (IJI) is a statewide non-profit law firm that provides free and low-cost removal defense services to individuals appearing before Idaho's immigration court and education on immigration law and policy to the public, affected communities and lawyers. In carrying our mission, IJI has a direct interest in the fair and lawful administration of immigration laws that determine the course of our clients' lives.

Las Americas is a non-profit organization based in El Paso, Texas. Our primary mission is to provide legal services to low-income migrants in West Texas and New Mexico and to engage in advocacy for migrant rights across the country. For the past 32 years, we have served over 36,000 individuals, from over 80 countries. Las Americas is one of only two organizations in the El Paso area that provides professional legal aid to immigrants who otherwise cannot afford it

The **Legal Aid Society** is the oldest and largest program in the nation providing direct legal services to low-income families and individuals. The Society's legal program operates three major practices — Civil, Criminal and Juvenile Rights — and receives volunteer help from law firms, corporate law departments and expert consultants that is coordinated by the Society's Pro Bono program. The Civil Practice maintains an Immigration Law Unit which has represented thousands of individuals in removal proceedings over the years, including several hundred involving asylum claims. The Legal Aid Society is deeply concerned about the finality of those proceedings being called into question by the Attorney General's actions in this matter.

The **National Immigration Litigation Alliance** (NILA) seeks to realize systemic change in the immigrants' rights arena by engaging in impact litigation,

building the capacity of social justice attorneys to litigate in federal court through co-counseling individual cases, and providing strategic advice and assistance to its members. NILA has a direct interest in ensuring that immigration laws are administered in accordance with regulatory, statutory, and constitutional requirements, and are shielded from political influence.

The **National Immigration Project of the National Lawyers Guild** (NIPNLG) is a non-profit organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. NIPNLG provides technical assistance to the bench and bar, hosts continuing legal education seminars on the rights of noncitizens, and is the author of numerous practice advisories and legal treatises. NIPNLG has a direct interest in ensuring that the rules governing removal proceedings comport with due process.

The **New Mexico Immigrant Law Center** (NMILC) is a non-profit, social justice organization with a mission to advance justice and equity by empowering low-income immigrant communities through collaborative legal services, advocacy, and education. NMILC provides free legal services to low-income and detained immigrants throughout New Mexico. We provide free

legal services to asylum seekers through direct representation, pro se workshops, and legal orientation services at Cibola County Correctional Center and Torrance County Detention Facility.

The **Northwest Immigrant Rights Project** (NWIRP) is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants placed in removal proceedings.

The **Rocky Mountain Immigrant Advocacy Network** (RMIAN) is a nonprofit legal advocacy organization that serves two of the most vulnerable immigrant populations in Colorado: adults in immigration detention, and immigrant children and families who experienced abuse, neglect, or violence in their home countries. RMIAN regularly provides legal representation and social service support to clients seeking fear-based protection including asylum, withholding of removal, and under the Convention Against Torture. RMIAN has a deep interest in ensuring that noncitizens fearful of harm in their home countries benefit from the right to due process including fair immigration adjudication with robust access to timely judicial review.