No. 24-777

In the Supreme Court of the United States

DOUGLAS HUMBERTO URIAS-ORELLANA, ET AL.,
Petitioners,

v.

PAMELA BONDI, ATTORNEY GENERAL

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF IMMIGRATION LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

MINH NGUYEN-DANG
Counsel of Record
NATASHA HARNWELL-DAVIS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mnguyen-dang@mayerbrown.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page(s)**

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page(s)**

Statutes, Regulations, and Rules

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Other Authorities (continued) **Page(s)**

TABLE OF AUTHORITIES
(continued)

Other Authorities (continued) **Page(s)**

TABLE OF AUTHORITIES
(continued)

Other Authorities (continued) **Page(s)**

INTEREST OF THE *AMICI CURIAE*

Amici curiae are law professors with expertise in asylum law.[1] Jaya Ramji-Nogales is the Sheller Family Professor in Public Interest Law at Temple University Beasley School of Law. Andrew I. Schoenholtz is a Professor from Practice at Georgetown Law, where he co-directs the Center for Applied Legal Studies, the asylum clinic in which students represent asylum seekers. Philip G. Schrag is the Delaney Family Professor of Public Interest Law at Georgetown Law and previously co-directed the Center for Applied Legal Studies. *Amici* have taught immigration law and written numerous books and law review articles about asylum, including *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007), which is the most comprehensive empirical academic study to date of outcome disparities in asylum cases.

The question in this case is whether federal courts of appeals should defer to the Board of Immigration Appeals (BIA) on whether the legal standard for "persecution" is met in asylum cases. *Amici* have a significant interest in this issue because, as both practitioners and scholars of asylum law, they have a unique insight into how the asylum adjudication process operates. *Amici* submit this brief to explain that courts of appeals should not defer to the BIA's legal determinations, including its application of law to facts, because deficiencies in the BIA's structure and procedures lead to the BIA inconsistently applying asylum law. Courts of appeals thus should review *de novo* the BIA's legal determinations, including its application

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

of law to facts, to promote consistency and reduce disparities in outcomes in asylum proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Few areas of law carry higher stakes than asylum adjudication. Incorrectly denying an asylum application can have deadly consequences: Asylum seekers who had their claims denied and were deported have been arrested, imprisoned, assaulted, tortured, and killed. Given the stakes, it is critically important for the asylum adjudication system to produce accurate and consistent outcomes. As then-Attorney General Robert H. Jackson explained, arbitrariness is "obviously repugnant to one's sense of justice." Annual Report of the Attorney General of the United States, H.R. Doc. No. 9, 77th Cong., 1st Sess. 5-6 (1941). The integrity – and legitimacy – of the asylum system depends on treating like cases alike.

But for decades, federal courts of appeals, the federal government, practitioners, and scholars all have agreed: The asylum system produces arbitrary and inconsistent outcomes. The problems stem largely from the structure and procedures of the asylum adjudication process. In particular, the BIA's review process lacks the basic features of appellate review that the federal courts possess to ensure consistent and evenhanded application of the law: multimember adjudication, published written opinions, and a robust system of precedent.

Instead, in the vast majority of asylum cases, a single member of the BIA reviews an immigration judge's decision. In many of those cases, the BIA issues a two-sentence disposition that (by regulation) does not explain the BIA's reasoning. Even when the BIA issues a written decision, only an infinitesimal

number are precedential and binding on future BIA appeals. And the BIA's vast workload (well over 40,000 appeals a year) compared to the number of members (currently 15 positions) means that it is functionally unable to consistently provide effective appellate review.

In light of these structural deficiencies, it is not surprising that the asylum adjudication process in general – and the BIA in particular – has been resoundingly criticized. Twenty years ago, one court of appeals wrote that "the adjudication of [immigration] cases at the [BIA] has fallen below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). Just this year, the federal government publicly acknowledged that the BIA produces inconsistent decisions. And *amici*'s landmark study on asylum outcomes confirmed that outcomes are arbitrary and inconsistent. *Amici* found that immigration judges have wildly disparate adjudication rates, even among judges in the same building, and that the BIA's abbreviated review of those decisions is by all accounts inadequate to correct the disparities. See Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 372-378 (2007). The empirical evidence that has come out since that study gives no reason to believe that things have gotten better.

The bottom line is that the BIA is not set up to apply the law consistently in asylum cases, and it does not do so. It thus would be inappropriate for the courts of appeals to defer to the BIA's legal determinations – including its determinations as to whether the facts of a particular case rise to the legal standard for persecution. *De novo* review of BIA decisions by

the courts of appeals represents the last, and best, opportunity for reducing disparities and restoring consistency to the asylum adjudication process. *Amici* urge this Court to reverse.

ARGUMENT

THE COURTS OF APPEALS SHOULD NOT DEFER TO THE BIA'S LEGAL DETERMINATIONS, INCLUDING ITS APPLICATION OF LAW TO FACTS

A. The BIA Lacks the Structure and Processes to Apply the Law Consistently

The BIA is the "single most important decision maker in the asylum adjudication system." Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 349 (2007). It reviews the decisions of immigration judges and sets administrative precedents that immigration judges and asylum officers must follow. *Ibid.*; see 8 C.F.R. 1003.1. The BIA's appellate-review function is critical to ensuring consistency in the agency's asylum adjudications; as this Court has explained, "meaningful appellate review * * * promotes reliability and consistency." *Clemons* v. *Mississippi*, 494 U.S. 738, 749 (1990).

Yet the BIA's structure and processes are not designed to lead to consistent applications of the law. In most cases, a single member of the BIA decides the case, often without explanation. Of the cases in which the BIA issues a decision, only a tiny handful are precedential and binding on future cases within the agency. Until recently most of the rest of its decisions were unavailable to the public. All of this makes it virtually impossible to enforce consistency across cases. Compounding these problems, the BIA's

workload is vast and the decisions that it reviews often are poorly reasoned.[2]

1. The BIA is responsible for ensuring the agency consistently applies the law

The BIA is an executive body within the Department of Justice's Executive Office for Immigration Review (EOIR). 8 C.F.R. 1003.1(a)(1); Dep't of Just., EOIR, *Board of Immigration Appeals* (July 8, 2025), https://perma.cc/VY5U-GCNF. It consists of 15 members (down from 28 in 2024), appointed by the Attorney General. 90 Fed. Reg. 15,525, 15,526 (Apr. 14, 2025). Its members do not have life tenure and answer to the Attorney General. Alison Peck, *The Accidental History of the U.S. Immigration Courts* 5-6 (2021) (*Accidental History*).

The BIA is tasked with "fairly and uniformly interpreting and administering immigration law" at the agency level. 90 Fed. Reg. at 15,526. It reviews the decisions of immigration judges, including in asylum cases, and its precedential decisions bind all immigration judges and asylum officers, unless the Attorney General or a federal court of appeals modifies the decision. 8 C.F.R. 1003.1(b), (d), (g); see *Accidental History* 5. The BIA describes itself as a "[f]ederal administrative court[] that perform[s] quasi-judicial

---

[2] It is worth noting that the adjudication of this case is not representative of the mine-run of asylum cases. Here, petitioners were represented by counsel (unlike the vast majority of asylum applicants), Pet. App. 25a, and the BIA issued a substantial written decision (again, unlike in the vast majority of BIA appeals), *id.* at 18a-24a. Then, when petitioners appealed to the First Circuit, that court issued a published decision. *Id.* at 1a-17a. In *amici*'s experience, this relatively robust process – which permits this Court to meaningfully review the issue presented – is far from typical in asylum cases.

functions but [is] separate and apart from the Federal judiciary system." *Matter of R-T-P-*, 28 I. & N. Dec. 828, 832 n.4 (BIA 2024). It is not an Article III or Article I court but instead is created entirely by regulation. *Accidental History* 5-6.

Although the BIA is tasked with ensuring consistent decisionmaking at the agency level, its authority is constrained in important ways. After the BIA issues a decision, the BIA, the Attorney General, or designated Department of Homeland Security (DHS) officials may refer the case to the Attorney General. 8 C.F.R. 1003.1(h). The Attorney General has broad authority to modify any decision referred to her for review. See, *e.g.*, *Matter of A-B-*, 28 I. & N. Dec. 307 (A.G. 2019). In addition, asylum applicants may petition a court of appeals to review a BIA decision. See 8 U.S.C. 1252(a)(2)(D), (a)(5), (b)(4). The court of appeals' review is particularly deferential to "findings of fact," which "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4). But nothing in the INA compels deference to the agency's interpretation of the law or its application of the law to the facts of a case.

2. The BIA's decisions lack consistency because most are decided by a single member, often without a written decision

The way that the BIA decides cases does not lend itself to consistency. Historically, the BIA – like the courts of appeals – considered cases in three-member panels and issued written decisions in all cases. *Refugee Roulette* 350-351. But, as "a regulatory creature of the Attorney General," the Attorney General can change the BIA's structure and procedures by regulation. *INS* v. *Doherty*, 502 U.S. 314, 327 (1992).

In 1999, the Attorney General did just that, publishing a final rule that authorized a single BIA member to affirm an immigration judge's decision for certain categories of cases (that did not include asylum cases). See 64 Fed. Reg. 56,135, 56,139 (Oct. 18, 1999). Further, instead of providing a written explanation, the BIA member could affirm the immigration judge's decision in a two-sentence order that states, "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination." 8 C.F.R. 1003.1(e)(4)(ii). The regulation emphasizes that a summary affirmance "*shall not* include further explanation or reasoning." *Ibid.* (emphasis added). In other words, the BIA could choose to do away with providing a reasoned explanation.

In 2002, the Attorney General promulgated additional procedures to further "streamlin[e]" the BIA's review process. Press Release, Dep't of Just., *Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures*, (Aug. 23, 2002), https://perma.cc/53VC-JKYS; see 67 Fed. Reg. 54,878, 54,881 (Aug. 26, 2002). Under the 1999 reforms, the BIA was permitted to use single-member adjudication, but under the 2002 reforms it now was *required* to do so except in certain limited categories of cases. 67 Fed. Reg. at 54,888-54,891.[3] Also in 2002, the Attorney

[3] Those exceptions are cases for which there is a need to (1) settle inconsistencies between the rulings of different immigration judges; (2) establish precedent construing the meaning of ambiguous laws, regulations, and procedures; (3) review a decision by an immigration judge or DHS that is not in conformity with the law or applicable precedents; (4) resolve a case or controversy of major national import; (5) review a clearly erroneous factual determination by an immigration judge; or (6) reverse the decision

General expanded the BIA's use of single-member review to all cases, including asylum cases. See *Refugee Roulette* 352 & n.101. Consequently, the vast majority of cases in the immigration system are reviewed by a single member of the BIA – who can (and often do) affirm by issuing a two-sentence decision devoid of analysis or reasoning. *Accidental History* 151.

This stands in stark contrast to appellate review in the federal courts of appeals. To begin, courts of appeals decide all cases in three-member panels (except in rare occasions when a court of appeals hears an appeal *en banc* in the first instance). See 28 U.S.C. 46(c). Further, courts of appeals typically issue written opinions explaining their decisions, and often hold oral argument. See *Rita* v. *United States*, 551 U.S. 338, 356 (2007).[4]

Both of these features – multimember panels and written opinions – are critical to ensuring consistency in appellate decisionmaking. Having multiple perspectives on each case mitigates individual bias, encourages balanced reasoning, and helps ensure that decisions reflect a broader consensus. See *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 232 (1991) (explaining that multimember panels "permit collective dialogue and collective judgment"). And the process of writing itself promotes consistency and reasoned decisionmaking: Writing "test[s] * * * the thinking that underlies it," helping to spotlight flaws in the analysis. Fed. Jud. Ctr., *Judicial Writing Manual* at

---

of an immigration judge or DHS, other than reversal under 8 C.F.R. 1003.1(e)(5). See 8 C.F.R. 1003.1(e)(6).

[4] The Federal Circuit is the only court of appeals that regularly issues summary affirmances, see Fed. Cir. R. 36(a), although usually only in cases with oral argument.

vii (2d. ed. 2013). Further, written opinions help future litigants and judges understand how the law applies to particular fact patterns. Chad Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 Geo. L. J. 1283, 1290 (2008). The typical BIA decision now lacks these critical features, greatly diminishing the BIA's ability to ensure that the agency is consistent in applying asylum law.

3. The BIA lacks the body of precedents needed for consistent decisionmaking

The BIA's decisionmaking also suffers because it lacks a robust system of precedents and, until very recently, its unpublished decisions were not publicly available. Of the cases in which the BIA issues a written decision (as opposed to issuing an affirmance without opinion), only a tiny handful are precedential and thus binding on immigration judges and in future BIA appeals. Only those BIA decisions "issued by a three-member panel or by the Board en banc" and voted on by the majority of the permanent BIA members are precedential and published. 8 C.F.R. 1003.1(g)(3). Accordingly, unpublished decisions "constitute the vast majority of the final decisions issued by the BIA each year." *New York Legal Assistance Grp.* v. *BIA*, 987 F.3d 207, 208-209 (2d Cir. 2021).

The number of precedential, published BIA decisions is vanishingly small. Between 2012 and 2016, the BIA decided approximately 30,000 decisions each year. *New York Legal Assistance Grp.*, 987 F.3d at 210. Yet only "about 30 decisions" per year were precedential. *Ibid.* That already small number decreased further in later years; in 2024, the BIA issued only *14* precedential decisions, 90 Fed. Reg. at 15,527, even as the number of appeals it decided grew to over 40,000, Dep't of Just., *Executive Office for Immigration*

Review Adjudication Statistics (July 31, 2025), https://perma.cc/7VKU-N78H (*EOIR Adjudication Statistics*).

The paucity of precedential decisions undermines the BIA's ability to consistently apply the law. As this Court has explained, *stare decisis* "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991); see *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986) (*stare decisis* permits "society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals"). But for *stare decisis* to have its beneficial effects, there must be enough binding precedent to create a sufficiently robust framework for courts to reach consistent results. See Faiza W. Sayed, *The Immigration Shadow Docket*, 117 Nw. U. L. Rev. 893, 921-926 (2023) (*Immigration Shadow Docket*); Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. Cal. L. Rev. 755, 761-767 (2003) (*Case Against Non-Precedential Opinions*).

Following the BIA's shift to single-member decision-making, it is unlikely that the BIA now issues enough precedential decisions to produce consistent results. *Immigration Shadow Docket* 933-939. While it may not be possible to pinpoint exactly how many precedential decisions is enough, 14 decisions out of over 40,000 (0.03 percent) surely is too few. Notably, the BIA, immigration judges, and government lawyers in immigration proceedings often resort to citing the BIA's unpublished decisions, which suggests that the BIA does not issue enough precedential decisions.

New York Legal Assistance Grp., 987 F.3d at 209, 211.[5]

Here again, the comparison to federal courts of appeals is instructive. On average, 14 percent of federal appellate decisions are published. Admin. Off. of the U.S. Courts, *Table B-12: U.S. Courts of Appeals – Type of Opinion or Order Filed in Cases Terminated on the Merits, by Circuit During the 12-Month Period Ending September 30, 2024* (2025), https://perma.cc/GPF8-9YV5. Some scholars have expressed concern that the federal courts of appeals publish too few decisions, see, *e.g.*, *Case Against Non-Precedential Opinions*, yet the courts do so nearly 500 times more often than the BIA does.

Although the BIA's unpublished decisions can partially fill the gap, until recently those decisions were not publicly available. The BIA historically made only a "handful" of its unpublished decisions available on its website or at the EOIR law library. *New York Legal Assistance Grp.*, 987 F.3d at 210, 211 n.5. In 2022, following a lawsuit brought by a legal aid organization under the Freedom of Information Act, 5 U.S.C. 552, the BIA began to make its unpublished decisions systematically available online. See Stipulation of Settlement at 3, *New York Legal Assistance Grp.* v. *BIA*, No. 18-cv-9495 (S.D.N.Y. Feb. 9, 2022), Dkt. No. 72. But the BIA committed to making available only decisions from April 2016 onward, see *ibid.*, so the vast majority of its decisions will remain functionally inaccessible to the public.

---

[5] The EOIR "discourage[s]" parties from citing unpublished BIA decisions but does not prohibit them from doing so. EOIR, *Board of Immigration Appeals Practice Manual* § 4.6(d) (2025).

In any event, relying on unpublished decisions can hinder consistency. Because they are by definition not precedential, see 8 C.F.R. 1003.1(g)(1), immigration judges and the BIA can pick and choose which unpublished decisions to cite, see *Gatimi* v. *Holder*, 578 F.3d 611, 615 (7th Cir. 2009). That can lead to the development of parallel and conflicting strands of unpublished decisions, all nominally consistent with binding precedent, particularly where the unpublished decisions are not generally accessible. See *ibid.*; cf. Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Calif. L. Rev. 541, 555 n.65 (1997).[6]

The bottom line is that the BIA issues too few precedential decisions to provide uniform guidance, which again hampers consistency in asylum adjudication.

4. The BIA's caseload inhibits consistent decisionmaking

The sheer volume of the BIA's caseload also severely limits its ability to apply the law consistently. Between 1996 to 2021, the BIA decided more than 750,000 appeals. *New York Legal Assistance Grp.*, 987 F.3d at 225. In 2024 alone, the BIA received 50,419 appeals, decided 44,785 appeals, and had a backlog of 138,680 pending appeals. *EOIR Adjudication Statistics*. That same year, the number of BIA members

[6] Notably, Federal Rule of Appellate Procedure 32.1 prohibits courts from restricting the citation of unpublished federal appellate decisions, which are widely available. Fed. R. App. P. 32.1(a). That helps to ensure transparency and consistency in federal appellate decisionmaking. See *Immigration Shadow Docket* 900.

increased from 23 to 28. 89 Fed. Reg. 22, 631, 22,631 (Apr. 2, 2024). Each member thus handled, on average, somewhere between 1,600 to 1,950 appeals (assuming that each appeal was decided by a single member). That works out to approximately 7 appeals per day.

That workload is going to get worse, for two reasons. First, while the petition in this case was pending, the Attorney General eliminated 13 positions from the BIA, reducing the BIA to just 15 members. 90 Fed. Reg. at 15,527. As of the filing of this brief, only 13 of those positions were filled. Dep't of Just., *EOIR Announces 3 Appellate Immigration Judges*, (Aug. 29, 2025), https://perma.cc/2V24-CSSU. To help manage the caseload, the EOIR intends to rely on temporary BIA members who "do not have the authority to vote on any matter decided by the Board en banc, including whether a decision should be designated as precedent." 90 Fed. Reg. at 15,527. This means that more decisions will be decided by a single member with limited authority.

Second, the number of appeals is increasing. During the nine months between October 2024 and July 2025, the BIA received 72,200 appeals. *EOIR Adjudication Statistics*. If that rate holds through to October 2025, the BIA will receive over 96,000 appeals – nearly double the number it received in 2024. *Ibid.* And the number of appeals shows no sign of abating; in 2024, there were approximately 3.6 million pending cases before immigration judges, including approximately 1.5 million asylum cases. Holly Straut-Eppsteiner, *FY2024 EOIR Immigration Courts Data: Caseloads and the Pending Cases Backlog*, Cong. Rsch. Ctr. (Jan. 24, 2025), https://perma.cc/7U2E-3R26.

The BIA's caseload is many times greater than that of the federal courts of appeals. In 2024, the courts decided 40,326 appeals (4,000 fewer than the BIA). Admin. Off. of the U.S. Courts, *U.S. Courts of Appeals – Judicial Caseload Profile* 1 (Mar. 31, 2025), https://perma.cc/Y6NA-6Q82. That same year, there were 179 active judges on the courts of appeals and 106 sitting senior judges. *Id.* at 2; Admin. Off. of U.S. Courts, *The Federal Bench – Annual Report 2024*, https://perma.cc/QUU8-LURC. That worked out to an average of 424 cases per judge (assuming that each case was decided by a three-member panel) – an average of 1.6 appeals per day, or one-quarter the average caseload of a BIA member in the same year.

The BIA's job is made all the more difficult by the fact that the decisions it reviews often are inadequately or poorly explained. These problems are well-documented in the court of appeals. To take three examples, all from 2021:

- In *Quintero* v. *Garland*, 998 F.3d 612 (4th Cir. 2021), the Fourth Circuit observed that the immigration judge had "fail[ed] to fully develop the record" relevant to the key legal issues. *Id.* at 643. The BIA then failed to recognize the deficiencies in the record, resulting in its misapplication of the governing legal standards. *Id.* at 645-646.
- In *Portillo Flores* v. *Garland*, 3 F.4th 615 (4th Cir. 2021), the Fourth Circuit described the immigration judge's decision as "nonsensical" and "barely * * * coherent." *Id.* at 629-630. In particular, the immigration judge had conflated two of the prongs of an asylum claim – an error the BIA repeated. *Id.* at 630.

- And in *Pando Aucay* v. *Attorney General United States*, 841 F. App'x 479 (3d Cir. 2021) (unpublished) "the [immigration judge] provided no explanation for her decision" and the court of appeals had only a "literally[] blank page to review." *Id.* at 479, 481.

In other cases, the BIA did not receive a complete record of the proceedings in the immigration court. For decades, the courts of appeals have lamented "[t]he problem of inaccurate or incomplete transcription of immigration proceedings." *Kheireddine* v. *Gonzalez*, 427 F.3d 80, 85 (1st Cir. 2005); see, *e.g.*, *Witjaksono* v. *Holder*, 573 F.3d 968, 974 (10th Cir. 2009) (collecting cases). Indeed, over thirty years ago, this Court recognized (in the context of a federal amnesty program) the problems with developing and maintaining "adequate records" of immigration proceedings. *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). So this is a longstanding and recurring problem. Yet the BIA can hardly fulfill its role of ensuring consistency in agency decisionmaking when it lacks a "complete or meaningful basis upon which to review" the immigration judges' decisions. *Ibid.*

B. The BIA Does Not in Fact Produce Reasoned, Consistent Decisions

Given the BIA's structure, processes, and caseload, it is unsurprising that the BIA, in fact, fails to consistently apply the law. Federal judges, the government itself, and immigration scholars have all documented the problem.

1. Courts have long recognized the problems with the BIA's decisionmaking process

For decades, federal courts of appeals have criticized the quality of the BIA's decisions. Twenty years

ago, the Seventh Circuit lamented that "the adjudication of [immigration] cases at the [BIA] has fallen below the minimum standards of legal justice" and observed that, even then, the "problem [wa]s not of recent origin." *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). That same year, the Ninth Circuit was faced with a "literally incomprehensible opinion by an immigration judge" that the BIA then affirmed without explanation. *Recinos De Leon* v. *Gonzales*, 400 F.3d 1185, 1187 (9th Cir. 2005). The Ninth Circuit remanded the case because it could "not substantively review [the case] without violating basic principles of judicial review." *Ibid.* Other examples abound in the federal reports. *E.g.*, *Argueta-Hernandez* v. *Garland*, 87 F.4th 698, 703 (5th Cir. 2023) (concluding that the BIA "misapplied prevailing case law, disregarded crucial evidence, and failed to adequately support its decisions"), *abrogated on other grounds by Riley* v. *Bondi*, 145 S. Ct. 2190 (2025); *Temu* v. *Holder*, 740 F.3d 887, 891 (4th Cir. 2014) (holding that the BIA's conclusion was "impossible to square" with the "undisputed facts"); *Norani* v. *Gonzales*, 451 F.3d 292, 293 (2d Cir. 2006) (per curiam) (reversing a BIA decision for being "devoid of any reasoning" (internal quotation marks omitted)).

The courts of appeals specifically have observed that the BIA's poor decisionmaking process leads to inconsistent application of the law. For example, in 2020, the Sixth Circuit remanded a case because the BIA "failed to account for * * * prior decisions, involving nearly identical factual circumstances," in which it had reached the opposite outcome. *Kada* v. *Barr*, 946 F.3d 960, 966 (6th Cir. 2020). In 2009, the Seventh Circuit remanded a case because the BIA's articulation of whether the petitioner belonged to a cognizable social group for asylum purposes could not "be

squared" with an earlier, precedential BIA decision. *Gatimi*, 578 F.3d at 615. Again, these cases are not outliers. See, *e.g.*, *Diaz-Valdez* v. *Garland*, 122 F.4th 436, 439-440 (1st Cir. 2024) (remanding the case because the BIA had "departed from its precedent" without explanation); *Andrews* v. *Barr*, 799 F. App'x 26, 27 (2d Cir. 2020) (remanding the case because the BIA failed to explain "its inconsistent decisions in apparently similar cases"); *Valdiviezo-Galdamez* v. *Attorney Gen.*, 663 F.3d 582, 604, 606-607 (3d Cir. 2011) (remanding the case because the BIA's reasoning was "inconsistent with past BIA decisions," and expressing doubt as to "whether the BIA understands the difference" between its positions).

The case statistics confirm the courts' qualitative assessment of the problems at the BIA. In 2005, the Seventh Circuit reversed the BIA in 40 percent of cases. *Benslimane*, 430 F.3d at 829. That rate was more than twice as high as the reversal rate in other civil cases where the government was the appellee (18 percent) – strongly suggesting that the BIA is particularly error-prone or inconsistent. *Ibid.*

The massive increase in the number of petitions from the BIA in the federal court of appeals since its move to unreasoned, single-member adjudication also suggests that the shift led to increased arbitrariness in asylum outcomes. Before 2002, when most cases were decided by three-member panels, petitions from the BIA accounted for only 3 percent of agency appeals in federal court. Lindsey R. Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 Wm. & Mary L. Rev. 1011, 1023 (2007). In 2004, after the BIA required single-member review for most cases, the BIA's share of agency appeals was 25 percent. *Ibid.*

In the decade that followed, the BIA's share of agency appeals skyrocketed. By 2015, petitions from the BIA represented a whopping *84 percent* of all agency appeals – some 6,000 petitions in all. Admin. Off. of the U.S. Courts, *Federal Judicial Caseload Statistics 2015*, https://perma.cc/CN74-U692 (last visited July 30, 2025). Indeed, petitions from the BIA "constituted the largest category of administrative agency appeals in each circuit" except the D.C. and Federal Circuits. *Ibid.* The BIA's share of federal appellate dockets has remained at those levels since then. In 2022, it was 87 percent; and last year, it was 80 percent. Admin. Off. of the U.S. Courts, *Federal Judicial Caseload Statistics 2022*, https://perma.cc/6BVR-5B7M (last visited July 30, 2025); Admin. Off. of the U.S. Courts, *Federal Judicial Caseload Statistics 2024*, https://perma.cc/2RH4-LKQ5 (last visited July 30, 2025).

The sheer volume of petitions in the courts of appeals – and the dramatic increase in that volume since the BIA implemented its streamlining processes – strongly suggest that those processes do not result in consistent application of the law.

2. The government has acknowledged that the BIA's decisions are inconsistent

The government also has recognized that the BIA issues inconsistent decisions. In April 2025, while the petition in this case was pending, the Department of Justice provided notice that it was reducing the number of BIA members. 90 Fed. Reg. at 15,526. One of the reasons the agency gave for the reduction was that a larger board size had "resulted in greater inconsistency in the [BIA]'s non-precedent decisions." *Ibid.* And in 2019, the Justice Department explained that it had reviewed BIA procedures "in response to

concerns about the quality of the decisions" and found that improvements were needed. 84 Fed. Reg. 31,463, 31,463 (July 2, 2019). The government thus is well aware that the BIA's decisions are inconsistent.

It is not difficult to find examples of inconsistencies. Take the case of Joshim Uddin, who was a member of the Bangladesh Nationalist Party (BNP), one of the two major political parties in Bangladesh. *Uddin* v. *Attorney Gen.*, 870 F.3d 282, 285 (3d Cir. 2017); see *Immigration Shadow Docket* 895-896. After being severely beaten by supporters of the other major political party, he fled to the United States, and was placed in removal proceedings. *Uddin*, 870 F.3d at 285. Uddin requested withholding of removal based on his affiliation with the BNP. *Id.* at 285-286. The immigration judge denied Uddin relief after concluding that the BNP was a "terrorist organization" under the Immigration and Nationality Act (INA) and therefore that Uddin was ineligible for withholding of removal. *Id.* at 286. The BIA affirmed. *Id.* at 287-288.

But in several other unpublished decisions, the BIA had come to the opposite conclusion. It had held the BNP was not a terrorist organization and therefore that party membership did not bar immigration relief. *Uddin*, 870 F.3d at 291. The BIA entirely failed to acknowledge those decisions in its decision in Uddin's case. See *ibid.* And in other unpublished decisions, the BIA had set out a new rule for determining whether an organization qualified as a terrorist organization (under which the BNP would not qualify). *Id.* at 290. The BIA did not acknowledge those decisions in Uddin's case, either. *Ibid.*

The Third Circuit, concerned about the agency's decisionmaking process, asked the government to submit all unpublished decisions addressing whether the

BNP was a terrorist organization. *Uddin*, 870 F.3d at 291. The results "did not bolster [the court's] confidence in the Board's adjudication of th[o]se cases." *Ibid.* The court found that the BIA had affirmed an immigration judge's determination that the BNP was a terrorist organization in six cases, but that in ten cases, the BIA had concluded that the BNP was not a terrorist organization. *Ibid.* In five other cases, the immigration judge had determined that the BNP was not a terrorist organization, and the government had not challenged that determination before the BIA. *Ibid.* As the court noted, there was no conceivable factual reason for the "radically different results," because the cases all involved the same organization "during the same time periods." *Ibid.*[7] The Third Circuit concluded, with palpable understatement, that this was "a troubling state of affairs." *Ibid.*

On occasion, the government has agreed with that sentiment. At oral argument in one case in the Sixth Circuit, counsel for the government "readily acknowledged that '[y]ou certainly never want to have situations * * * where there's government inconsistencies.'" *Hanna* v. *Mukasey*, 290 F. App'x 867, 873 (6th Cir. 2008). But counsel nonetheless suggested "that inconsistencies are 'going to happen sometimes just because of the nature of asylum proceedings.'" *Ibid.* The court rejected that view and remanded the case

---

[7] "Even more concerning," the court observed, was that the immigration judge in Uddin's case had stated that "he was aware of no BIA or circuit decision to date which has considered whether the BNP constitutes a terrorist organization." *Uddin*, 870 F.3d at 291 (internal quotation marks omitted). In fact, "there were several such decisions," *ibid.* – demonstrating the harm that can result when the BIA depends on unpublished decisions and then does not make those decisions publicly available. See pp. 9-12, *supra*.

because the BIA "neglect[ed] to give an adequate articulation of why it granted a motion to reopen in two cases, but denied it in a third that appears to be indistinguishable from the prior two." *Ibid.* The equal administration of justice demands no less; as the Seventh Circuit put it, courts cannot "condone arbitrariness." *Gatimi*, 578 F.3d at 616.

3. The empirical evidence confirms that asylum outcomes are inconsistent

Empirical research confirms that the immigration system produces inconsistent results in asylum cases. In 2007, *amici* published the most comprehensive academic study to date of outcome disparities in asylum adjudication. *Refugee Roulette* 302-305. In particular, *amici* analyzed over 78,000 immigration judge decisions issued between 2000 and 2004. *Id.* at 327. To ensure sufficiently large sample sizes, *amici* focused on fifteen countries that had produced at least 500 asylum claims per year and that had an overall asylum grant rate of at least 30 percent. *Id.* at 312. *Amici* found a wide disparity between immigration courts in grant rates for asylum seekers from those countries. *Id.* at 329-332. For example, asylum seekers from Albania had a 17 percent chance of success in Detroit, compared to a 65 percent chance of success in New York – nearly four times higher. *Id.* at 329-330. For asylum seekers from China, the disparity was even higher: They had a 7 percent chance of success in Atlanta, compared to a 76 percent chance of success in Orlando – over *ten* times higher. *Ibid.*

Amici then examined asylum grant rates by individual immigration judges within immigration courts. *Refugee Roulette* 332-336. Again, *amici* found a wide range of outcomes. See *ibid.* The 31 immigration judges in New York, for example, had an overall grant

rate of 52 percent. *Id.* at 334 & fig.22. But one immigration judge had a grant rate of just 6 percent; another had a grant rate of 91 percent. *Ibid.* In all, 9 of the 31 immigration judges had grant rates more than 50 percent higher or lower than their court's average. *Ibid.* Similarly, the grant rate in Miami ranged from 3 to 75 percent, with 8 of the 24 immigration judges granting asylum at rates 50 percent above or below their court's average. *Id.* at 335 & fig.24. Given that virtually all asylum cases are randomly assigned, see *id.* at 326 & n.52, these discrepancies cannot be entirely explained by differences in the merits of the cases.

Amici refined their findings by looking at the grant rate by immigration judge within a court for asylum seekers from the same country. *Refugee Roulette* 336-339. Restricting cases to those from just a single country should, in the aggregate, eliminate an important source of differences in the merits of individual cases. Yet here again, *amici* found significant disparities. See *ibid.* Looking at the 18 immigration judges in San Francisco and how they handled cases involving asylum seekers from India, for example, *amici* found that the immigration judges' grant rates ranged from 3 percent to 84 percent. *Id.* at 337 fig.26. For the 24 immigration judges in Miami adjudicating cases from Colombia, the grant rates ranged from 5 to 88 percent. *Id.* at 338 fig.28.

As *amici* noted, some of the disparities undoubtedly were due to differences in the cases. In particular, asylum applicants represented by counsel had far higher grant rates than those who were unrepresented. *Refugee Roulette* 340-341 & fig.29. Given the random assignment of cases among immigration judges, some naturally would have a larger share of

represented asylum seekers. But differences in cases can explain only so much. *Amici* also found that some personal characteristics of individual immigration judges were strongly correlated with different grant rates. *Id.* at 342-349. For example, immigration judges who previously worked in the Immigration and Naturalization Service, DHS, or military had significantly lower grant rates than those who did not, whereas the opposite was true for immigration judges who previously worked for nongovernmental organizations or in academia. *Id.* at 346 & fig.33.

Amici concluded that asylum adjudication at the immigration judge level was largely arbitrary. *Refugee Roulette* 378. Asylum seekers with substantively identical claims are not being treated the same; instead, whether they are granted asylum or deported "is very seriously influenced * * * by a clerk's random assignment of [the] applicant's case to * * * one immigration judge rather than another." *Ibid.* There simply was no empirical reason why so many immigration judges had grant rates that were so far out of the norms of their own courts, when they all heard cases from the same pool. *Ibid.*

In 2008, in response to *amici* and other scholars' research, the Government Accountability Office (GAO) conducted its own analysis of the consistency of agency asylum decisions between 1994 and 2007. U.S. Gov't Accountability Off., GAO-08-940, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges* 22, 23 n.31 (2008) (GAO Report). The GAO's findings were entirely consistent with *amici*'s. Like *amici*, the GAO found that there were "[s]izeable" differences across immigration courts, *id.* at 23, and "[i]mmigration judges varied considerably in the asylum

decisions they rendered, both across and within immigration courts," *id.* at 32.

In particular, like *amici*, the GAO found significant disparities in grant rates among immigration judges. The GAO found that "[g]rant rates for the immigration judges * * * ranged between 2 percent and 93 percent for affirmative cases, and between 2 percent and 72 percent for defensive cases." GAO Report 32. The GAO also found that there was a wide range of grant rates within the same immigration court. For example, the GAO found that "grant rates for affirmative cases ranged between 19 percent and 61 percent in Arlington, Va., 8 percent and 55 percent in Boston, 2 percent and 72 percent in Miami, and 3 percent and 93 percent in New York City." *Id.* at 33. These findings confirmed that asylum outcomes at the immigration judge level are often arbitrary.

More recent research has confirmed that the situation has not improved, and that immigration judges' adjudication remains hopelessly inconsistent. One study, from 2016, found that "the arbitrary assignment of a judge can increase or decrease an immigrant's chance of being deported by up to forty percentage points." David Hausman, *The Failure of Immigration Appeals*, 164 U. Penn. L. Rev. 1177, 1178 (2016).

Also in 2016, the GAO issued a follow-up report analyzing consistency in asylum outcomes between 2008 and 2014. U.S. Gov't Accountability Off., GAO-17-72, *Asylum: Variation Exists in Outcomes of Applications Across Immigration Courts and Judges* (2016). The GAO continued to find that wide discrepancies among the grant rates of immigration judges; it concluded that the asylum grant rate for the average applicant varied by between 47 and 57 percentage points

based solely on which immigration judge was assigned to the case. *Id.* at 34-35.

And statistics compiled by the Transactional Records Access Clearinghouse (TRAC), a nonpartisan organization that compiles data from federal government sources, suggest that significant levels of inconsistency at the immigration judge level remain to this day. See TRAC Immigr., *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2019-2024* (Nov. 7, 2024), https://perma.cc/Z6YL-XLG9. For example, it reported that, between 2019 and 2024, immigration judges in Arlington, Virginia had asylum grant rates ranging from 4 to 86 percent. *Ibid.*

Amici also concluded that the BIA is not capable of remedying the vast disparities among immigration judges. *Refugee Roulette* 377-378. *Amici* attempted to study the decisionmaking of individual members, but the BIA did not keep the necessary statistical records. *Id.* at 354. In particular, the BIA's records did not permit it to ascertain "which members made or participated in which decisions," or at what rate individual members granted or remanded appeals. *Ibid.* Indeed, for two of the years at issue, the BIA could not even reliably tell whether a BIA appeal had been handled by a three-member panel or a by a single member. *Ibid.* As a result, *amici* could not directly explore the extent of disparities among members of the BIA. *Ibid.*

But the data that *amici* were able to obtain for the BIA as a whole strongly suggested that "in many asylum cases, the BIA ha[d] ceased to function as an effective appellate body." *Refugee Roulette* 378. The data showed that, following the Attorney General's streamlining reforms, the rate at which the BIA granted relief on appeal plummeted, from 37 percent

of cases to just 11 percent. *See id.* at 355-359 & fig.41. In light of the enormous disparities *amici* observed in immigration judge level outcomes, the large and sustained drop in BIA reversals strongly suggested that the BIA became *less* effective at resolving those disparities. *Id.* at 377-378.

The bottom line is that the data confirms what courts had observed and what the government had admitted: The immigration system as a whole, and the BIA in particular, does not produce consistent, evenhanded outcomes in asylum cases.

C. *De Novo* Review Is Warranted In Light of the BIA's Deficiencies

All this confirms that federal courts of appeals should not defer to the BIA's legal determinations – including, in particular, its determinations as to whether the legal standards for asylum are met based on the facts of the case. As the foregoing demonstrates, the asylum adjudication system has consistently demonstrated that it cannot, and does not, produce evenhanded and consistent results.

The BIA's level of inconsistency would be intolerable in any area of the law. It is particularly intolerable in asylum cases, given the potential for "death or persecution" if an asylum seeker is incorrectly "forced to return to his or her home country." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); see, *e.g.*, Eunice Lee, *Immigration in the Shadow of Death*, 26 U. Pa. J. Const. L. 126, 157-158 (2024) (documenting instances of deportees being killed after their asylum claims were denied). Reasonable minds may differ as to how much protection U.S. asylum law provides – for example, what kinds and levels of harm amount to "persecution" that entitles an asylum seeker to protection. 8 U.S.C. 1101(a)(42), 1158(b)(1)(A). But a "basic

principle of justice" is that "like cases should be decided alike." *Martin* v. *Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005). Accordingly, whatever the legal standards for asylum are, they should be fairly and consistently applied.

Yet the BIA does not fairly or consistently apply asylum standards and has not for over two decades. See pp. 15-26, *supra*. As a result, "[t]he opportunity for meaningful administrative review" at the BIA "has deteriorated to the point where the circuit courts now represent the first line of defense against mistaken or biased immigration judge decisions." *Bias on the Bench* 1024. Given that reality – that the courts of appeals are now the last and best hope for achieving consistency in asylum adjudication – it would be singularly inappropriate for courts to defer to the BIA's legal determinations.

Instead, the courts of appeals should review the BIA's legal determinations, including its application of law to facts, *de novo*. That not only will help to ensure that asylum law is applied fairly and consistently across the cases that reach judicial review, it also will allow the courts to set clear and consistent precedents that will guide immigration judges and the BIA. That, in turn, should help to improve the agency's decisionmaking process, reducing both the BIA's own workload as well as the need for error-correction in the courts of appeals. (As noted, the increase in immigration appeals came about after the streamlining reforms that reduced the BIA's ability to consistently apply the law.) Having clear and consistent legal rules also would help facilitate judicial review of the BIA's decisions, which could further reduce the burden on the federal courts.

For these reasons, the Court should hold that courts of appeals should review the BIA's application of law to facts *de novo*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MINH NGUYEN-DANG
Counsel of Record
NATASHA HARNWELL-DAVIS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mnguyen-dang@mayerbrown.com

SEPTEMBER 2025