No. 12-70361

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Fidel (Lucia) Mondragon-Alday
Petitioner,

v.

Eric H. Holder, Jr.,
Attorney General of the United States
Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals
No. A 079 620 077

BRIEF BY *AMICUS CURIAE* NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF FIDEL (LUCIA) MONDRAGON-ALDAY'S PETITION FOR REVIEW

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Appellate Court No: 12-70361
Short Caption: Mondragon-Alday v. Holder

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The National Immigrant Justice Center

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None.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Immigrant Justice Center (NIJC) is a Chicago-based non-profit organization that provides legal services to immigrants and asylum seekers. With collaboration from more than 1,000 *pro bono* attorneys, NIJC represents more than 200 asylum seekers at any given time and also handles detained immigration cases involving various applications for relief from removal. NIJC also advises pro se individuals. Each year NIJC conducts or coordinates "Know Your Rights" presentations to more than 4,000 immigrants detained in county jails in Illinois, Wisconsin, and Kentucky and also receives requests for information and representation from more than 200 lesbian, gay, bisexual, or transgender (LGBT) immigrants who are detained nationwide. NIJC informs these individuals of their rights, but most continue without representation. NIJC often receives post-hearing information from these individuals; some report the outcome of their case while others seek appellate counsel. Through its work in immigration court and communication with pro se applicants, NIJC has identified numerous systemic problems in the handling of immigration cases, particularly those involving applicants who are detained and/or pro se before the immigration judge. Because some of these problems are at issue in Petitioner's case, NIJC is well positioned to assist the Court in its assessment of this petition for review.

SUMMARY OF ARGUMENT

Petitioner Lucia Mondragon-Alday was denied protection in the United States, not because she failed to prove that she meets the definition of a refugee, but because the immigration judge (IJ) failed to adequately consider her claim for withholding of removal, a non-discretionary form of relief. Lucia was detained at the time of her merits hearing, and she proceeded without a lawyer. Yet, instead of relying on these factors as a reason to exercise extra diligence, the IJ became a second prosecutor. In doing so, she denied Lucia her right to a fair hearing and made an irrational adverse credibility finding.

The National Immigrant Justice Center (NIJC) receives thousands of requests for representation each year. Many are from individuals who have been denied protection by the IJ and are in need of appellate counsel. In its review of these cases, NIJC has observed that the problems with the IJ's handling of Lucia's case are systemic, and they affect detained, pro se applicants nationwide. In light of this experience, NIJC offers this brief as *amicus curiae* to make two points. First, in the context of detained, pro se applicants seeking protection, IJs must do a better job of eliciting adequate testimony and ensuring that applicants are afforded a fair opportunity to be heard. Expecting detained, pro se, litigants to know and independently assert the facts that prove their eligibility for protection is unfair.

This Court should remind this (and every) IJ of the duty to elicit testimony from pro se applicants and should offer additional instructions to guide that inquiry.

Second, although NIJC recognizes that this Court's review of an adverse credibility finding must be deferential, it cannot tolerate credibility findings that are divorced from the applicants past experience or that are non-responsive to the claims presented. Expecting an applicant to be able to describe such minutiae as the weather or exact time of day of a traumatic event is irrational. And when an applicant presents independent but overlapping grounds for relief, IJs must assess credibility as to each independent claim. Lucia meets the definition of a refugee based on her past persecution *and separately* because transgender women in Mexico face a pattern and practice of abuse. These two claims are distinct, but the IJ collapsed her credibility assessment into one. NIJC urges this Court to instruct IJs to acknowledge that, when applicants present multiple grounds for protection, their credibility must be evaluated as to each ground.

These modifications are straightforward and would help ensure the fairness of immigration proceedings, particularly for pro se applicants. Thus, the Court should grant Lucia's petition with instructions guiding further proceedings.

ARGUMENT

Immigration Judge Lorraine Munoz denied withholding of removal to Lucia Mondragon-Alday, a transgender woman who had been raped, imprisoned, and

burned alive, all on account of her gender identity. The IJ did not doubt Lucia's status as a transgender woman, nor could she have credibly done so. Instead, the IJ (1) disregarded Lucia's status as a pro se applicant and shirked the corresponding duty to develop the record and (2) fixated on minor inconsistencies in Lucia's testimony to support an adverse credibility finding. The IJ's assessment of Lucia's case illustrates two persistent and growing problems in the Agency's treatment of cases involving pro se applicants. First, IJs routinely deny pro se applicants their right to a fair hearing. Second, IJs often make credibility findings that are irrational and disconnected from the applicant's claim. NIJC offers this brief as *amicus curiae* to explain the consequences of these errors, illustrate the pervasiveness of the problem, and offer this Court meaningful standards that it could impose in an effort to address these issues.

I. The Judge Disregarded Lucia's Status as an Unrepresented, Detained Applicant and Deprived Her of Her Right to a Fair Hearing.

Non-citizens in removal proceedings have both a constitutional and statutory right to a "full and fair hearing," which includes a "reasonable opportunity to present evidence." 8 U.S.C. § 1229a(b)(4); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005). When an applicant appears before the IJ without representation—as Lucia did—the responsibility to safeguard this right is heightened, and the judge must be "especially diligent" in his or her efforts to inquire as to relevant facts. *Jacinto v. INS*, 208 F.3d 725, 734-35 (9th Cir. 2000)

(citing *Richardson v. Perales*, 402 U.S. 389 (1971)). In this case the IJ disregarded her obligation to ensure the fairness of Lucia's proceedings and instead effectively assumed the role of a second prosecutor. This behavior is all-too-common among IJs, and this Court should offer the Agency guidance aimed at curbing the problem.

A. Lack of Access to Counsel Is a Significant Hurdle for Immigrants in Removal Proceedings, and when an IJ Fails to Fill that Gap and Elicit Sufficient Testimony, the Hearing is Unfair.

In cases involving pro se applicants the responsibility for eliciting testimony is *the* central component of the required "diligent" inquiry. *See* 8 U.S.C. § 1229a(b)(1); *Jacinto*, 208 F.3d at 733 (holding that the IJ failed to afford applicants a fair hearing by failing to sufficiently question them regarding their asylum claims)*; see also Abdurakhmanov v. Holder*, 666 F.3d 978, 983 n.4 (6th Cir. 2012) (noting that an IJ has "an obligation, to ask questions of the alien during the hearing to establish a full record"); *Ming Shi Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 118 (2d Cir. 2006) (explaining that IJs "play an affirmative role in developing, along with the parties, a complete and accurate record"); *Giday v. Gonzales*, 434 F.3d 543, 549-50 (7th Cir. 2006) (commenting that an IJ "has an obligation to establish the record"). This principle goes hand in hand with the notion that, even though immigration court proceedings are adversarial, the *judges* are not the adversaries, and it is necessary that they cooperate with applicants. *See*

Deborah E. Anker, LAW OF ASYLUM IN THE UNITED STATES 167 (3d ed. 1999) (citing *In re S-M-J*, 21 I. & N. Dec. 722, 724 (BIA 1997)).

There are significant reasons to insist upon collaboration between judges and applicants and to require the IJs to take an active role in the adjudication of cases involving pro se individuals. First, unrepresented immigrants frequently lack a sufficient command of the English language to meaningfully develop a record on their own, even though they are provided with an interpreter. *See Kin v. Holder*, 595 F.3d 1050, 1056 (9th Cir. 2010); Appleseed, *Assembly line Injustice*, 29 (2009).[1] Second, as is evident by the numerous circuit splits on issues of immigration law and by the frequency with which this Court hears an immigration case en banc, immigration law is complicated. Expecting a pro se litigant, especially one like Lucia with a junior high education, to understand the nuances of the law and to know what testimony is relevant is untenable.

For detained immigrants, the role of the IJ becomes even more important. Immigrant detainees are housed in 250 county jails spread across the country, and procedural and technical difficulties make the challenges of mounting an effective case even more insurmountable. For example, many detention centers are in remote locations where there is a very limited legal community. One of the primary facilities in NIJC's service area is in Boone County, Kentucky, and

[1] *Available at* http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf.

another is in Ullin, Illinois. Respectively, these facilities are 300 and 350 miles from Chicago. *See* National Immigrant Justice Center, *Not Too Late for Reform* (2011).[2] Detainees in these facilities are more than six hours from the court, from their largest pool of potential lawyers, and often from their families. *See Id.* NIJC has managed this distance by advocating for phone access to detainees in these facilities, but others are not so lucky. The facility in Santa Ana, California, where Lucia was detained at the time of her immigration hearing is a good example. Even though detainees in this facility are served by strong non-profit organizations and pro bono attorneys, resources are insufficient to meet demand. *See* National Immigrant Justice Center, *Isolated in Detention* (September 2010).[3] Moreover, the facility does not allow attorneys to schedule calls with clients, and there are numerous restrictions on the time, manner, and recipient of outbound calls from detainees. *Id.* at 25. These circumstances make communication with the outside world difficult and effectively eliminate a pro se applicant's ability to rely on anyone *other than the judge* to ensure the fairness of the proceedings.

The number of unrepresented immigrant detainees affected by the lack of access to counsel is staggering, especially given the implications of proceeding pro

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[2] *Available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC-MCHR%20Not%20Too%20Late%20for%20Reform%20Report%202011%20FINAL.pdf.

[3] *Available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf.

se. Although individuals in immigration proceedings have a statutory right to representation, it must be "at no expense to the government." 8 U.S.C. § 1362. According to the BIA, appointed counsel is thus uncalled for under the statute even for those suffering from substantial trauma (as one would imagine Lucia was after being burned alive) and even for individuals in detention. *See Matter of Gutierrez*, 16 I. & N. Dec. 226, 228-29 (BIA 1977). The result is that nearly 85 percent of immigrant detainees are pro se, and immigrants without representation are more than six times less likely to receive an immigration benefit than those who have counsel. *See* Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, 30-32 (2009);[4] Donald Kerwin, Migration Policy Institute, *Revisiting the Need for Appointed Counsel*, 5 (April 2005).[5] In total, from 2005 to 2010 approximately 886,000 immigrants faced removal proceedings without the aid of legal representation. *See* Executive Office for Immigration Review, FY 2010 STATISTICAL YEAR BOOK, G1, Fig. 9 (2011).[6]

This Court can avoid exacerbating the challenges posed by lack of access to counsel by insisting that IJs take seriously their obligation to develop a full record in cases involving pro se applicants.

[4] *Available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.
[5] *Available at* http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.
[6] *Available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf.

B. Lucia's Case Illustrates the Consequences of an IJ's Decision to Ignore Her Responsibility to Elicit Complete Testimony.

As Lucia describes in her opening brief, instead of adhering to the obligation to develop the record as described above, IJ Munoz turned the principle on its head and effectively converted the process of eliciting testimony into a perverse game of "gotcha." (Pet'r Opening Br. 15-21; 30-33.) Specifically, the IJ faulted Lucia for focusing on the incident where she was *burned alive* mere months before fleeing to the United States to the exclusion of testimony regarding experiences of sexual abuse at the hands of the Mexican police, which had occurred earlier in Lucia's life. (A.R. 225.) As Lucia explains, there is no indication in the record that she was hiding the ball with regard to this aspect of her testimony nor is there any indication that she was lying about it when she explained it to the Asylum Officer during the reasonable fear process. (Pet'r Br. 16-17.) To the contrary, Lucia offered information in her reasonable fear interview that was directly responsive to the questions posed to her, and when the IJ asked more open-ended questions she received less complete answers. When the IJ confronted Lucia with her past testimony, in an effort to call attention to a supposed inconsistency, Lucia tried to explain but the IJ cut her off. (Id. at 17; A.R. 225.) What Lucia might have said if she had been given a chance and hadn't been focused on trying to be polite is that she didn't mention the police abuse because the IJ didn't ask her about it. This reliance on Lucia's reasonable fear testimony as part of a game of "gotcha" is

contrary to the IJ's obligation to elicit testimony and develop the record, it is counterproductive, and it results in adverse credibility findings that cannot be trusted. *See Sankoh v. Mukasey*, 539 F.3d 456, 470 (7th Cir. 2008) ("Basing an adverse credibility finding on [immaterial points and omissions] appears to be more of a game of 'gotcha' than an effort to critically evaluate the applicant's claims.") Moreover, such behavior illustrates the IJ's unreasonable assumption that an unrepresented, detained refugee with a junior high education would understand that abuse by the police would be more important than the more recent experience of being burned alive and left for dead.

C. Lucia's Case is not an Anomaly; NIJC's Own Clients Have Been Denied Their Right to a Fair Hearing in Similar Circumstances.

Unfortunately, NIJC's experience in other cases suggests that IJ Munoz is not alone in her failure to elicit sufficient testimony to ensure that an applicant's right to a fair hearing has been preserved. Indeed, NIJC currently represents clients on appeal who were unrepresented before their respective IJs and who suffered from the same mistreatment in immigration court.

One of NIJC's current clients, Alba, is a lesbian woman from El Salvador who was forced to marry a 68 year-old man when she was a teen because her

parents thought it would "cure" her of her sexuality.[7] As in Lucia's case, Alba was placed in reinstatement proceedings and her reasonable fear transcript contains critical testimony that the IJ failed to elicit during the merits hearing. Alba explained to the Asylum Officer that she was forced to have sex with her husband and that, as a result, she now has two children. She even explained that one of these children was conceived after her husband drugged her and raped her while she was unconscious. None of this information is in the hearing transcript before the IJ, though, because at no point during the hearing did the judge ask Alba how she felt about being married to a man (much less one 54 years her senior), about being forced to have sex with him (i.e. raped), or about her parent's beliefs that this marriage would "cure" her of her sexual orientation.

Another of NIJC's current clients, Maria, is a transgender woman from Mexico who was gang raped by a group of men who targeted her because of her sexuality. Maria—who was also in reinstatement proceedings—mentioned during her reasonable fear interview that an individual in her hometown paid to have her gang raped to punish her for her sexual orientation and gender identity. Once again, though, the IJ failed to inquire about the circumstances surrounding the abuse and instead presumed that the person had targeted Maria in response to a

[7] In this brief NIJC offers four of its own clients as examples. Each appeared before a different IJ and contacted NIJC for assistance with an appeal. NIJC has used pseudonyms to refer to these clients in order to preserve their anonymity.

personal vendetta that was unrelated to her sexuality. The IJ did not ask Maria why she believed the rape had been on account of her sexual orientation; he did not inquire as to the timing of events; he did not explore the motives of the other participants; and he did not consider the brutal facts of the rape, which included having dirt, a banana, and hot sauce inserted into Maria's anus.

Like Lucia, both Alba and Maria were denied protection in this country because the IJ's in their respective cases relied on incomplete information to identify "defects" in their testimony. In both of these cases, the respective IJs had in their possession significant testimony and information that was gathered as part of the reasonable fear process. In Lucia's case the IJ used that information as a weapon to undermine her case, and in both Alba and Maria's cases the IJs completely ignored it. In each case, the result was the denial of a fair hearing to individuals who met the definition of a refugee and who are entitled to protection.

D. This Court Should Decide this Case in a Way that Offers IJs Additional Guidance for the Questioning of Pro Se Applicants.

Lucia's case and the stories of NIJC's clients point to a fundamental, yet uncomplicated problem with the handling of cases involving pro se applicants, particularly those who are detained: Without a full assessment of the facts of an applicant's case, IJs cannot ensure that the proceedings are fair, and they are more likely to reach an incorrect decision. This Court should remand Lucia's case and provide guidance that would reduce the prevalence of this problem.

A common theme for Lucia, Alba, and Maria, and for many detainees seeking to prove that they meet the definition of a refugee is that they are all in "reinstatement" proceedings. *See* 8 C.F.R. § 1241.8(a). This distinction stems from the fact that many other asylum seekers are released from detention on parole or are entitled to a bond. And one of the byproducts of the reinstatement process is that every applicant must demonstrate to an Asylum Officer that she has a "reasonable fear" of being removed to her country of origin. *See Id.* § 1241.8(e).

The interview by the Asylum Officer is transcribed—albeit in an informal fashion—and that transcript is submitted to the judge along with an assessment of the applicant's case. This Court should require IJs to use these hearing transcripts productively. IJs should look to reasonable fear transcripts as a starting point for eliciting testimony in a removal hearing. They should not rely on them to create inconsistencies (as in Lucia's case) or ignore them altogether (as in Alba's and Maria's case). This approach would increase the likelihood that an IJ would learn about the more significant aspects of an individual's case. NIJC is not advocating that these transcripts become the *only* guide to an IJ's assessment, but they should be used as a productive starting point, especially in cases involving unrepresented detainees who have not submitted an affidavit in support of their claims.

In cases where the reasonable fear transcript is insufficient or where it does not exist, there are several other simple steps that this Court can recommend to

better ensure that IJs are eliciting the necessary testimony from applicants. For example, it should go without saying that an IJ must read the asylum applications submitted by pro se applicants carefully and in light of the context of an applicant's claim. Additionally, this Court should instruct IJs to ask more meaningful questions in hearings involving pro se litigants. The Federal Rules of Evidence do not apply in immigration court, *see Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983), so IJs should not worry about "leading" a witness by asking direct questions or by proving context to a particular inquiry. Direct and specific questions are much more likely to yield meaningful information than questions like "Is there anything else that you want to tell me" that were posed to Lucia. (A.R. 225.) These are just some of many practical steps that this Court can recommend to make sure that IJs are diligent about their duty to provide a fair hearing. These sorts of questions were not asked in Lucia's case, so the Court should grant the petition for review and offer guidance aimed at correcting these errors.

II. The IJ's Unrealistic Expectations of Lucia as a Pro Se Litigant Resulted in an Improper Adverse Credibility Finding.

Lucia's case also illustrates some of the arbitrary and irrational logic that IJs frequently employ to support an adverse credibility finding. Although pro se and counseled litigants alike can fall prey to these problems, NIJC's experience shows that unrepresented applicants, particularly those in detention, are most vulnerable to an unreasonable adverse credibility finding. In particular, Lucia's case illustrates

two prominent flaws in credibility assessments: (1) IJs expect too much from applicants either in terms of their ability to recall details or produce corroboration, and (2) in cases involving separate grounds for relief, IJs fail to offer independent credibility assessments.

A. This Court Should Insist that the IJ Appropriately Consider an Lucia's Past Experience and the Nature of Her Claims.

Although this court must undertake deferential review of the Agency's credibility assessment, the IJ and BIA must nonetheless offer "specific, cogent reasons" for an adverse credibility finding. *Singh v. Gonzales*, 439 F.3d 1100, 1104 (9th Cir. 2006). As Lucia states in her opening brief, this Court requires an IJ to "take into consideration the individual circumstances of the applicant." *Shrestha v. Holder*, 590 F.3d 1034, 1041 (9th Cir. 2010). (Pet'r Br. 15.) And it has offered ample instruction as to what that individualized consideration must look like. For example, it has warned IJs that they should not:

- Rely on minor or immaterial inconsistencies, *see, e.g.*, *Li v. Holder*, 629 F.3d 1154, 1158 (9th Cir. 2011) ("A minor inconsistency or incidental misstatement that does not go to the heart of an applicant's claim does not support an adverse credibility determination.");

- Fault an applicant for an inability to remember trivial details, *see, e.g.*, *Kaur v. Gonzales*, 418 F.3d 1061, 1064 (9th Cir. 2005) ("The concern underlying each of our decisions in this arena has been to avoid premising an adverse credibility finding on an applicant's failure to remember non-material, trivial details that were only incidentally related to her claim of persecution.");

- Base a decision on selective pieces of information, *see, e.g.*, *Shrestha v. Holder*, 590 F.3d at 1040 ("[A]n IJ [can]not cherry pick solely facts favoring

an adverse credibility determination while ignoring facts that undermine that result."); or

- Fault an applicant, particularly one who is unrepresented, for omitting details, *see, e.g.*, *Kin*, 595 F.3d at 1056 ("Omissions are not given much significance because applicants usually do not speak English and are not represented by counsel.").

Yet, despite these and numerous other instructions, IJs continue to make credibility findings that are not supported by "substantial evidence."

Two types of errors are particularly concerning to NIJC. First, IJs frequently exhibit a lack of sensitivity to the trauma that an asylum seeker has endured and are unsympathetic to the tolls that the trauma itself can take on the applicant's ability to recall specific details, particularly if the individual is detained. The problem is particularly prominent in cases involving rape or other sexual abuse. Indeed, this Court has warned that it is not uncommon for a woman who has suffered sexual abuse to refrain from spontaneously or independently mentioning it. *See Mousa v. Mukasey*, 530 F.3d 1025, 1027-29 (9th Cir. 2008); *Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052-53 (9th Cir. 2002). NIJC's experience suggests that it frequently requires many meetings with a client before he or she will reveal a sexual assault. And for clients who are both in detention for the duration of their immigration experience and were detained as a form of persecution abroad, the very fact of the detention can make it difficult to disclose sensitive information. And perhaps most

significantly, many of NIJC's clients who are victims of sexual abuse never reveal this fact about themselves before they are forced to do so as part of an asylum application. Applicants hide this information for many reasons. They may be ashamed or embarrassed, or they may have spent most of their lives trying to forget the very details that the asylum process requires them to recount.

In addition, NIJC is also concerned by the way in which IJs handle credibility assessments involving more than one basis for relief. Many asylum applicants are eligible for asylum on more than one basis. For example, an applicant might apply for asylum based on a fear of female genital mutilation and on her participation in a democracy movement in her home country. These claims are independently viable and could potentially be based on completely distinct sets of facts. Yet, when it comes to credibility, it is NIJC's experience that many IJs fail to differentiate. Even though REAL ID no longer requires an IJ to make a credibility assessment that goes to the "heart" of a claim, *see Shrestha*, 590 F.3d at 1046-47, to deny protection to an applicant with two independent bases because of her credibility as to only one of them is illogical. The same reasoning applies when an applicant has a claim based on past persecution *and* a claim based on a pattern and practice of future persecution. The facts supporting the claims are admittedly much more overlapping than in the example offered above, but the reasoning holds. These claims are distinct, and should be evaluated separately.

B. The Adverse Credibility Finding in Lucia's Case Illustrates Both a Lack of Sensitivity to the Harm She Experienced and a Failure to Evaluate Her Claims Independently.

Both of the problems that NIJC identified above tainted the IJ's assessment of Lucia's credibility. As she pointed out in her opening brief, the IJ found her incredible because she could not describe the weather at the moment when she returned home to find her friend being attacked and killed, because she misunderstood a question and misspoke as to whether two or three people were involved in the murder of her friend, and because she was unclear about the amount of time that elapsed between when her friend was killed and when she herself was burned alive by the same men. (Pet'r Br. 19-20.) The IJ's decision to single out these bits of minutiae illustrates a common insensitivity to the horrific experiences refugees endure. At no point in her credibility assessment does the IJ acknowledge the fact that being burned alive and witnessing your friend and roommate being murdered are traumatic events, and no point does she acknowledge that Lucia's nerves, her lack of education, her isolation in the immigration process, or her inability to understand what is happening could hinder her ability answer with precision every question that she was asked.

The IJ also failed to contemplate the fact that Lucia has two separate claims, one premised on past persecution and one based on the patter of persecution of transgender women in Mexico. As an initial matter, the IJ's reliance on *Castro-*

Martinez v. Holder, 641 F.3d 1103 (9th Cir. 2011), a case that addresses country conditions for *gay men* and not *transgender women* illustrates that the IJ failed to even consider whether Lucia might have a claim based on a possible pattern of abuse to her as a transgender women. And from a credibility standpoint, the IJ did not address whether Lucia credibly established her identity as a transgender woman. Indeed the IJ's decision seems to reflect some overall discomfort with the notion of gender nonconformity. The IJ initially refers to Lucia as male and then goes through great lengths in the remainder of the opinion to avoid referring to her by any pronoun, instead simply saying "the Respondent" at every turn. (A.R. 164-74.) As such, the IJ denied Lucia protection without even considering the pattern of abuse faced by transgender women in Mexico much less evaluating whether or not Lucia could credibly state such a claim.

C. NIJC's Clients Have Been Victims of Similarly Problematic Adverse Credibility Findings.

Just as it is common for NIJC to receive requests for assistance from applicants who were denied a fair hearing, so too is it common to hear from individuals who receive unsupported and irrational adverse credibility findings that are unresponsive to the applicant's underlying claims.

For example, NIJC currently represents Carlos a gay man from Honduras. Carlos was sexually abused, repeatedly assaulted, and the victim of an attempted murder, all stemming from his identity as an effeminate gay man. The IJ explicitly

stated that she did not doubt Carlos's sexual orientation, the fact that he was raped in Honduras, or his desire to dress in women's clothing. The IJ nonetheless denied withholding, concluding that Carlos lacked credibility because he made a mistake about the date of the attempted murder and that he failed to corroborate his testimony that two of his transgender friends were murdered. On appeal to the BIA (where NIJC began its representation), Carlos challenged the factual basis for the adverse credibility finding and made an additional point. He argued that, even if the BIA disregarded any instance of past harm that the IJ found either incredible or uncorroborated, he should have nonetheless prevailed. The IJ agreed that Carlos is a gay man who dresses in women's clothing, and the country-conditions evidence in the record indicated a pattern and practice of persecution of sexual minorities in Honduras. Those two factors standing alone, Carlos argued, should have been enough to acknowledge his status as a refugee. The BIA ignored this point and affirmed the decision of the IJ.

NIJC is also considering an appeal for Marie, a lesbian from the Democratic Republic of Congo (DRC). In this case, the IJ rejected nearly every aspect of the applicant's testimony based on arbitrary reasoning. For example, even though Marie lived with her girlfriend before she was detained and even though the girlfriend testified about the nature of their relationship, the IJ refused to acknowledge Marie's sexual orientation because she did not produce evidence

such as a joint bank-account between them. And when it came to Marie's persecution abroad—much of which happened at the hands of her uncle—the IJ refused to acknowledge that the events occurred or that the persecutor even existed. Indeed, the IJ expected the applicant, who like Lucia was pro se and in detention, to be able to obtain property and medical records from the DRC to corroborate her claim.

Like Lucia, both of these cases illustrate some of the arbitrary and irrational logic that IJs employ to support adverse credibility findings. While the precise reasons offered by the IJs in these cases differ, each imposed unreasonable expectations on the respective applicant, revealing a lack of sensitivity to the kinds of limitations detained applicants have when it comes to gathering evidence and explaining the different parts of their claims.

D. This Court Should Require IJs to Make Credibility Findings that Respond to an Applicant's Distinct Requests for Relief.

As discussed above in the context of fair hearings, this Court can impose modest requirements to address the problems with adverse credibility findings identified by NIJC.

First, when an applicant has multiple claims for relief, this Court should insist that IJs address credibility as to each claim separately. This Court should also instruct IJs to acknowledge that, like claims for protection stemming from two different protected grounds, claims stemming from past persecution and a fear of

future persecution are distinct. When an IJ acknowledges that an applicant is a member of a particular social group and when the country-conditions evidence supports a finding that members of that group are routinely persecuted, the only relevant credibility question should be whether or not the person actually belongs to the relevant group. So for Carlos, once the IJ decided that he was a gay man who preferred to dress in women's clothing there should have been nothing left to assess with respect to credibility as to a claim based on a pattern and practice of abuse. The only question should have been whether the country-conditions evidence supported such a finding. The same should have been true in Lucia's case. The IJ did not even ponder this sort of reasoning, but if she had, she would have been forced to conclude that Lucia is transgender and would have then had to give more careful consideration of the country conditions evidence regarding the treatment of transgender individuals in Mexico. This step-by-step approach is the best way to ensure that IJs provide honest reasons for their decisions. NIJC is not suggesting that Lucia (or Carlos for that matter) should *automatically* prevail on a claim based on a pattern or practice of persecution. Instead is suggesting that this Court should insist that IJs consider these claims separately.

The importance of this approach is especially apparent in cases involving sexual minorities. It is illegal to engage in same-sex sexual conduct in more than 70 countries in the world, and in even more countries, sexual minorities are

actively persecuted. *See* International Lesbian, Gay, Bisexual, Trans and Intersex Association, *State Sponsored Homophobia* (2012).[8] To acknowledge an applicant's identity as an LGBT person and deny protection based on credibility as to an event abroad without considering the likelihood that the applicant will be persecuted based on the pattern of abuse places an inappropriate amount of emphasis on the credibility determination.

Additionally, this Court can address some of the credibility problems that stem from insensitivity to trauma or unfair expectation of pro se applicants (especially in detention) simply by calling out the IJ for failing to consider these factors as part of her assessment. IJs must consider the totality of the circumstances when evaluating an applicant's credibility. *See* 8 U.S.C. §§ 1158(b)(1)(B)(iii); 1231(b)(3)(C). This Court should issue a decision that acknowledges that the obstacles created by immigration detention and the struggles involved in recalling and recounting a painful experience are part of this totality.

CONCLUSION

As Lucia correctly argues in her opening brief, she meets the definition of a refugee based on her status as a transgender woman from Mexico, and she is entitled to withholding of removal. The IJ denied her a fair hearing and reached an irrational adverse credibility finding, and these errors resulted in the denial of

[8] Available at http://ilga.org/ilga/en/article/nxFKFCd1iE.

protection. For the reasons stated in this brief and in support of the reasons offered in Petitioner's opening brief, NIJC respectfully requests that this Court grant the petition for review and issue additional guidance to the Agency to address the fair hearing and credibility concerns identified in this brief.

October 18, 2012

Respectfully submitted,

s/ Keren Zwick

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing Brief complies with the Circuit's type and volume limitations. This brief contains 5766 words, excluding the parts of the brief that are exempt. Amicus curiae's brief has been prepared using Microsoft Word, and it uses 14-point proportional font (Times New Roman).

Pursuant to Federal Rule of Appellate Procedure 29, I certify that I authored this brief in its entirety, without assistance from Petitioner's counsel. I further certify that no person contributed money to the preparation of this brief.

October 18, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 18, 2012. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

October 18, 2012

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