

No. 19-1620

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

CRISTIAN JOSUE DIAZ ORTIZ,
Petitioner,

v.

WILLIAM P. BARR, U.S. Attorney General,
Respondent.

**ON PETITION FOR REVIEW OF AN ORDER
BY THE BOARD OF IMMIGRATION APPEALS**

**BRIEF OF *AMICI CURIAE*
CONSTITUTIONAL AND IMMIGRATION LAW PROFESSORS
IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING AND
REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I, Sameer Ahmed as counsel for *amici curiae*, state that the Constitutional and Immigration Law Professors do not have parent corporations, nor do they issue stock, and thus no publicly held corporation owns 10% or more of their stock.

DATED: July 6, 2020

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INTEREST OF *AMICI CURIAE*

Amici curiae are law professors who teach, practice, and engage in scholarship in constitutional and immigration law. *Amici* have an interest in the development of the constitutional doctrine guiding immigration law and hold expert views on the important question presented by Petitioner and addressed by this Court. *Amici* submit this brief to supplement Petitioner’s arguments without repeating them.¹

INTRODUCTION

Being erroneously labeled a gang member can have catastrophic consequences for a young person’s life, including being targeted for surveillance and police stops, facing harsher criminal justice outcomes, and—for noncitizens—being detained and deported. The Due Process Clause was created “to guard against the risk of erroneous deprivation” of these significant liberty interests, including deportation to countries where individuals face persecution or death. *Allen v. Illinois*, 478 U.S. 364, 374 (1986). Due process, thus, requires that

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that: (1) no party’s counsel authored this brief in whole or in part; (2) no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and (3) no person other than *amici*, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief.

evidence in removal proceedings “be reliable and ... fundamentally fair.” *Chen v. Holder*, 703 F.3d 17, 23 (1st Cir. 2012).

The Immigration Judge’s (“IJ’s”) reliance on the flawed Boston Regional Intelligence Center (“BRIC”) Gang Assessment Database to deny Petitioner’s asylum claim was fundamentally unfair. Like other problematic gang databases, the Gang Assessment Database’s overbroad criteria allows police to label young persons as gang members based on entirely lawful activity, including the clothing they wear and the classmates they are with. Public auditors, civil rights organizations, and scholars have uniformly criticized these databases because they are riddled with inaccuracies and lack adequate safeguards. Courts have recognized that the Government’s use of unsubstantiated gang allegations against noncitizen youth raise serious due process concerns. *See Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1142 (9th Cir. 2018); *Medina v. DHS*, 313 F. Supp. 3d 1237, 1250 (W.D. Wash. 2018).

This case demonstrates why using unreliable gang database information in removal proceedings violates due process. Petitioner was listed as a gang member based on a flawed point system where none of his points were tied to criminal activity but rather were for “quintessential teenage behavior—hanging out with friends, who unsurprisingly were also young Hispanic men.” *Diaz Ortiz v. Barr*, 959 F.3d 10, 28 (1st Cir. 2020) (Lipez, J., dissenting).

Petitioner was also never provided a meaningful opportunity to rebut the gang allegations. The Government failed to proffer any witnesses to support the allegations or even explain the reliability of the database itself. Moreover, the BRIC provides no mechanism for individuals to challenge their inclusion in the database. This failure to provide “additional or substitute safeguards” to address the significant “risk of an erroneous deprivation” caused by false gang allegations violates due process. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Court should grant the petition and hold that the inclusion of unreliable information from the Gang Assessment Database in Petitioner’s removal proceedings violates due process.

ARGUMENT

I. PETITIONER’S REMOVAL PROCEEDINGS VIOLATED DUE PROCESS BECAUSE THE IMMIGRATION JUDGE RELIED ON THE FLAWED GANG ASSESMENT DATABASE.

A. The Use of Unreliable Government Reports in Removal Proceedings Violates Due Process.

The stakes in removal proceedings are grave. Individuals face life sentences of banishment from their families and livelihoods in the United States and are sent to countries where they face persecution or death. *See Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (“[D]eportation may result in the loss of all that makes life worth living.”). Because of the gravity of the liberty deprivation at issue, “[i]t is well established that the Fifth Amendment entitles [noncitizens] to due process of law

in deportation hearings.” *Reno v. Flores*, 507 U.S. 292, 306 (1993). Noncitizens “who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

Due process requires a “full and fair hearing,” which allows a noncitizen a reasonable opportunity to present and rebut evidence and to cross-examine witnesses. *Morales v. INS*, 208 F.3d 323, 326–27 (1st Cir. 2000); *see also* 8 U.S.C. § 1229a(b)(4)(B) (noncitizens “shall have a reasonable opportunity to examine the evidence against [them], to present evidence on [their] own behalf, and to cross-examine witnesses presented by the Government”).² Evidence in removal proceedings must “be reliable and ... fundamentally fair.” *Chen*, 703 F.3d at 23; *see Felzcerek v. INS*, 75 F.3d 112, 115 (2d Cir. 1996) (“[F]airness is closely related to the reliability and trustworthiness of the evidence.”) “Highly unreliable hearsay ... raise[s] due process problems.” *Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004).

Courts of appeal have consistently held that unreliable government reports used in removal proceedings violate due process. *See Grigoryan v. Barr*, 959 F.3d 1233, 1240 (9th Cir. 2020) (“IJ’s admission of, and reliance on, [DHS report] was

² For the reasons stated in this brief, the Government’s use of unreliable gang allegations also violates § 1229a(b)(4)(B).

fundamentally unfair.”); *Banat v. Holder*, 557 F.3d 886, 891 (8th Cir. 2009) (report violated due process because it was “nearly impossible for the immigration court to assess [its] probative value”); *Anim v. Mukasey*, 535 F.3d 243, 258 (4th Cir. 2008) (“IJ’s consideration of the [government] letter violated Anim’s right to a fundamentally fair proceeding.”); *Alexandrov v. Gonzales*, 442 F.3d 395, 407 (6th Cir. 2006) (reports violated due process because “[t]here is not much that we do know aside from the apparent conclusions of the mysterious investigation”); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 408 (3d Cir. 2003) (“[T]he complete dearth of information about the investigator or the investigation undermines the [government report] as not only untrustworthy, but also unhelpful.”); *cf. Balachova v. Mukasey*, 547 F.3d 374, 383 (2d Cir. 2008) (“[T]he consular report is unreliable and cannot contribute to a finding of substantial evidence.”); *Lin v. DOJ*, 459 F.3d 255, 269 (2d Cir. 2006) (same).

B. The Use of Unreliable Gang Databases Violates Due Process.

The BRIC Gang Assessment Database is one of many across the United States that have been criticized for using unreliable criteria for gang membership. “Determining whether an individual is an active gang member presents a considerable risk of error. The informal structure of gangs, the often fleeting nature of gang membership, and the lack of objective criteria in making the assessment all heighten the need for careful factfinding.” *Vasquez v. Rackauckas*, 734 F.3d 1025,

1046 (9th Cir. 2013). Instead of careful factfinding, the criteria for inclusion in many gang databases “are almost entirely unrelated to criminal conduct or even to active participation in gang activities” and “rely on criteria that are predominantly non-criminal and relate to how a person looks, acts, who he is seen with, and what he wears.”³

Because of their overbroad criteria, many reports have “detail[ed] the inaccuracies of gang databases”⁴ and government audits “have uniformly found massive errors.” Beau Baumann & Stephen Yale-Loehr, *How to Challenge Gang Designations in Asylum Cases*, 24-19 *Bender’s Immigr. Bull.* 01 (2019); *see id.* (“The rise of gang designations in asylum and withholding cases is troubling because of a reoccurring fact in the literature: gang designations and gang

³ Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 *St. Thomas L. Rev.* 620, 649 (2011).

⁴ *See* NYCLU, *Stuck with Suspicion: How Vague Gang Allegations Impact Relief and Bond for Immigrant New Yorkers* (2019), <https://thenycic.pi.bypronto.com/2/wp-content/uploads/sites/2/2019/02/020819-NYCLU-NYIC-Report.pdf>; Immigrant Legal Resource Center, *Deportation by Any Means Necessary: How Immigration Officials are Labeling Immigrant Youth as Gang Members* (2018), https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf; National Immigration Law Center, *Untangling the Immigration Enforcement Web* (Sep. 2017), <https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf>; Jennifer Medina, *Gang Database Criticized for Denying Due Process May Be Used for Deportations*, *N.Y. Times* (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/us/gang-database-criticized-for-denying-due-process-may-be-used-for-deportations.html>.

databases are fundamentally unreliable [and] riddled with errors.”). For example, an audit of California’s gang database found that 23% of designations had no support and hundreds were improperly maintained.⁵ And, a review by Chicago’s Office of Inspector General found that over 15,000 individuals had “no reason provided for why the individual was listed as a gang member.”⁶ Scholars have explained that gang databases are unreliable due to their use of inconsistent definitions, improper documentation procedures, lack of supervision, inadequate review, and police misconduct.⁷

For these reasons, courts have recognized that unsubstantiated gang allegations raise serious due process concerns. *See Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1199 (N.D. Cal. 2017), *aff’d*, 905 F.3d at 1137 (DHS violates due process when detaining noncitizen minors “on the basis of insufficiently substantial allegations of gang affiliation” as “DHS sometimes makes an inference of gang membership from conduct, clothing, or associations that are far from

⁵ California State Auditor, *The CalGang Criminal Intelligence System* 2, 4 (2016), <https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf>.

⁶ City of Chicago Office of Inspector General, *Review of the Chicago Police Department’s “Gang Database”* 2 (2019), <https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf>.

⁷ *See* Katherine Conway, *Fundamentally Unfair: Databases, Deportations, and the Criminal Gang Member*, 67 *Am. U. L. Rev.* 269 (2017); Kevin Lapp, *Databasing Delinquency*, 67 *Hastings L.J.* 195 (2015); Rebecca A. Hufstader, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 *N.Y.U. L. Rev.* 671 (2015); Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 *Stan. J. C.R. & C.L.* 115 (2005).

unequivocal evidence of that conclusion.”); *Medina*, 313 F. Supp. 3d at 1250 (DHS’s “continued assertion that Plaintiff is a gang member or gang-affiliated is arbitrary and capricious” and likely violates due process); *Medrano v. Salazar*, No. 5:19-CV-00549-JKP, 2020 WL 589537, at *6-7 (W.D. Tex. Feb. 5, 2020) (improper inclusion in a gang database “is tied to a host of unfortunate implications such as involvement in criminal conduct” raising due process concerns); *Apodaca-Fisk v. Allen*, No. EP-19-CV-00259-DCG, 2020 WL 156585, at *6 (W.D. Tex. Jan. 13, 2020) (same); *Baumann & Yale-Loehr, supra* (recognizing that “the use of hearsay to support a gang designation could be . . . fundamentally unfair and thus violate due process”); *see also Millender v. County of Los Angeles*, 620 F.3d 1016, 1029 n.7 (9th Cir. 2010), *rev’d on other grounds*, 565 U.S. 535 (2012) (a gang database “is not designed to provide users with information upon which official action may be taken”).

C. The Gang Assessment Database’s Use in Removal Proceedings Violates Due Process.

In this case, the IJ’s reliance on unfounded gang allegations taken from the Gang Assessment Database was fundamentally unfair. Using overbroad criteria, the database criminalizes lawful activity popular among noncitizen youth and unfairly labels many as gang members. The database relies upon “field interrogation observations” (“FIOs”) where a police officer “identifies an individual and finds out that person’s business for being in a particular area.”

Commonwealth v. Warren, 58 N.E.3d 333, 337 n.5 (Mass. 2016). FIOs include “encounter[s] without any information indicating that the individual has been or is presently engaged in criminal activity.” *Commonwealth v. Narcisse*, 927 N.E.2d 439, 443 (Mass. 2010). FIOs are entered into the database, which uses a point system based on alleged markers of gang involvement. *See* Rule 335 - Gang Assessment Database, Boston Police Department Rules and Procedures, 4 (Mar. 23, 2017), <https://bpdnews.com/rules-and-procedures>.

The point system designates individuals as gang members without any allegation that they are engaged in criminal activity. Individuals receive points for wearing articles of clothing, having tattoos, being victims of alleged gang violence, posting on social media, making hand gestures, and “[w]alking, eating, recreating, communicating, or otherwise associating with” an alleged gang member, even if that person is a classmate, neighbor, or family member. *Id.* at 3, 6.

For example, although Petitioner was never seen engaging in criminal activity, he was labeled a gang member “based solely on associations with his peers in the East Boston community where he lived.” *Diaz Ortiz*, 959 F.3d at 27. While the majority found Petitioner’s FIOs “sufficiently reliable” because they allegedly “document [his] increasingly frequent associations with MS-13 gang members,” *id.* at 18, it is likely that Petitioner’s acquaintances were also erroneously labeled as gang members “using the same problematic point system.”

Id. at 27. Therefore, the IJ’s reliance on a DHS report containing uncorroborated FIOs failing to identify any criminal activity—multiple levels of hearsay—was fundamentally unfair. *See Anim*, 535 F.3d at 257 (“Multiple hearsay ... is particularly problematic because the declarant in all likelihood has been unable to evaluate the trustworthiness of the original speaker.”).

To ensure unreliable database information is not shared among government agencies “in violation of the privacy and constitutional rights of individuals,” federal regulations only permit interjurisdictional intelligence systems like the BRIC to collect information if “there is reasonable suspicion that the individual is involved in criminal conduct or activity.” 28 C.F.R. § 23.20(a); Criminal Intelligence Systems Operating Policies, 45 Fed. Reg. 40,156, 40,156 (June 13, 1980). By collecting information that fails to provide such “reasonable suspicion,” the Gang Assessment Database violates § 23.20(a), further demonstrating its use was fundamentally unfair.

Reliance on the Gang Assessment Database also violated due process because Petitioner was “not allowed a meaningful opportunity to rebut the [gang] allegations.” *Banat*, 557 F.3d at 891. The Government had the burden to demonstrate that the database was reliable but failed to “present supporting evidence to explain” its reliability “or proffer any government witnesses about the alleged” gang membership. *Grigoryan*, 959 F.3d at 1240. By putting the onus on

Petitioner to “ask that the government produce testimony to support the assertions in the database,” the majority erroneously flipped the proper due process inquiry on its head. *See Banat*, 557 F.3d at 891.⁸

Finally, “[t]here is no mechanism through which a person can challenge his designation as a gang member and inclusion in the BRIC Gang Assessment Database.” *Diaz Ortiz*, 959 F.3d at 26. Due process requires “additional or substitute procedural safeguards” when “the risk of an erroneous deprivation” of a liberty interest is high, such as inclusion in a gang database. *Mathews*, 424 U.S. at 335. To address these concerns, California has instituted procedural safeguards to their gang database, including a review and appeal process, audits and purging of incorrect records, and a prohibition on sharing information with DHS. *See Cal. Penal Code* § 186.36; *see also Castillo v. County of Los Angeles*, 959 F. Supp. 2d 1255, 1264 (C.D. Cal. 2013) (“[T]he risk of including false positives in the CWS/CMS database and distributing that information to other agencies ... is too great for the County to deny the individuals included in the database their constitutional right to due process.”). Because individuals have no meaningful opportunity to challenge inclusion in the Gang Assessment Database, its use in removal proceedings violates due process. *Vasquez*, 734 F.3d at 1030 (“[D]ue

⁸ By requiring Petitioner to disprove the gang allegations, the majority also improperly required him to prove a negative. *See Vasquez*, 734 F.3d at 1050 (“the alleged gang member is left in a factual vacuum, to prove a negative”).

process requires that [individuals] be afforded an adequate opportunity to contest whether they are active gang members.”).

CONCLUSION

This Court should grant the petition and hold that the inclusion of unreliable information from the Gang Assessment Database in Petitioner’s removal proceedings violated his rights under the Due Process Clause.

DATED: July 6, 2020

Respectfully submitted,

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This brief complies with Federal Rule of Appellate Procedure 29(b)(4) as it contains 2,552 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f). Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word, using Times New Roman in 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2020, I electronically filed the foregoing, Brief of *Amici Curiae* in Support of Petitioners’ Petition for Rehearing and Rehearing En Banc, with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that the following counsel of record for Petitioners and Respondent in this case are registered CM/ECF users and will therefore be served by the appellate CM/ECF system:

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