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"You Should Have Known:" The Need for Evidentiary Notice Requirements in Immigration Court

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"YOU SHOULD HAVE KNOWN": THE NEED FOR EVIDENTIARY NOTICE REQUIREMENTS IN IMMIGRATION COURT

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I. INTRODUCTION

Under United States immigration law, immigrants subject to removal proceedings may apply for asylum if they face severe threats of violence or harm in their home countries.[1] When applicants are successful, they are considered legal refugees and are protected from deportation.[2] Additionally, these immigrants are authorized to work in the U.S., provided a more direct path to citizenship, and granted rights to petition for family members abroad to join them.[3] Obtaining asylum, however, is often difficult for immigrants.

Every year in the U.S., increasingly more individuals facing deportation seek asylum.[4] In April 2020, United States immigration court dockets reached an all-time high, reporting over 1.17 million open removal cases.[5] These cases had been pending for an average of 734 days and were not yet resolved.[6] The significant backlog in immigration courts—in addition to the high-stakes nature of asylum cases—places immeasurable strain on applicants and their families. Unlike the criminal justice system where the government appoints a lawyer for indigent defendants, asylum and removal proceedings require immigrants to either retain private counsel or proceed *pro se*.[7] In 2016, the American Immigration Council reported that just under two-thirds of immigrants involved in removal proceedings chose the latter.[8]

Immigrants choosing to appear alone before an Immigration Judge

1. Florence Immigrant & Refugee Rights Project, *I'm Afraid to Go Back: A Guide to Asylum, Withholding of Removal, and the Convention Against Torture*, IMMIGRANT JUSTICE *(*May 2013), https://immigrantjustice.org/sites/default/files/FIRRP%20Asylum_WOR_CAT-Guide-2013_modified.pdf.

2. *Id.*

3. *Asylum in the United States*, AMERICAN IMMIGRATION COUNCIL (Jun. 2020), https://www.americanimmigrationcouncil.org/research/asylum-united-states.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AMERICAN IMMIGRATION COUNCIL (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court. Approximately 37 percent of all U.S. immigrants secured legal representation in their removal cases. Whereas two-thirds of non-detained immigrants acquired legal counsel, only 14 percent of detained immigrants were able to do so. *Id.*

("IJ") often fail to achieve their desired legal outcome.[9] The length and complexity of U.S. immigration proceedings, language barriers, and remote locations of many immigrant detention facilities make it difficult for asylum-seekers to effectively present their case to a judge, even if they have access to persuasive evidence that supports their claims.[10] One common challenge arises when an IJ identifies a need for corroborating evidence during asylum proceedings. Although the Third and Ninth Circuits have held that an immigrant must be given notice of the need for corroborating evidence and an opportunity to provide it before a judge renders a final decision, the Board of Immigration Appeals ("BIA"), joined by the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, does not require notice.[11] The minority circuits argue that an immigrant's due process rights are undermined when notice of the need for corroboration is not provided. The majority circuits and BIA, however, argue that preserving efficiency in an already backlogged court system is more important.

This Casenote considers the Fourth Circuit's recent decision in *Wambura v. Barr*,[12] which expands upon the majority circuits' position that notice of the need for corroborating evidence is not required.[13] Part II of this Article contextualizes the process for defensive asylum within the U.S. and reviews the legislative history and case law upon which the majority and minority circuit positions are built. Part II also summarizes *Wambura*. Finally, Part III weighs the merits of both circuit positions through the lens of *Wambura* and concludes that the minority approach adopted by the Third and Ninth Circuits is preferable but should be construed narrowly.

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9. *Id.*

10. *Id.*; Cristobal Ramón & Lucas Reyes, *Language Access in the Immigration System: A Primer*, BIPARTISAN POLICY CENTER (Sep. 18, 2020), https://bipartisanpolicy.org/blog/language-access-in-the-immigration-system-a-primer/.

11. *See* Matter of L-A-C-, 26 I&N Dec. 516 (B.I.A. 2015); Wambura v. Barr, 980 F.3d 365, 376 (4th Cir. 2020); Ren v. Holder, 648 F.3d 1079, 1082 (9th Cir. 2011); Saravia v. Atty. Gen. U.S., 905 F.3d 729, 731 (3d Cir. 2018); Liu v. Holder, 575 F.3d 193, 198 (2d Cir. 2009); Avelar-Oliva v. Barr, 954 F.3d 757 (5th Cir. 2020); Gaye v. Lynch, 788 F.3d 519 (6th Cir. 2015); Rapheal v. Mukasey, 533 F.3d 521 (7th Cir. 2008); Uzodinma v. Barr, 951 F.3d 960, 966 (8th Cir. 2020).

The B.I.A. is an important part of the Department of Justice and "is the highest administrative body for interpreting and applying United States immigration laws." *Board of Immigration Appeals*, THE UNITED STATES DEPARTMENT OF JUSTICE (Sept. 14, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals. The B.I.A. is primarily tasked with reviewing certain decisions of IJs and district directors of the Department of Homeland Security ("DHS"). *Id.* Its decisions are binding on all IJs and DHS officials, unless a decision is overruled by a federal court or attorney general. *Id.* The vast majority of B.I.A. decisions are reviewable by federal circuits and the Supreme Court of the United States. *Id.*

12. 980 F.3d 365 (4th Cir. 2020).

13. *Wambura*, 980 F.3d at 376.

II. BACKGROUND

This Part will first provide an overview of the various processes for asylum and other legal defenses available to immigrants subject to removal proceedings. Next, it will consider the legislative history of 8 U.S.C.A. § 1158 (b)(1)(B)(ii), which is the present statutory authority regarding whether notice of the need for corroboration must be provided to an immigrant before an IJ renders a final decision on asylum. Finally, this Part will discuss how U.S. circuit courts reached competing understandings of 8 U.S.C.A 1158(b)(1)(B)(ii) with respect to the need for corroboration.

A. The U.S. Process for Asylum

There are two main processes for immigrants within the U.S. to obtain asylum.[14] First, an immigrant may affirmatively apply through the U.S. Citizenship and Immigration Services, a division of the Department of Homeland Security, within one year of her most recent arrival to the United States.[15] Second, when an immigrant is subject to ongoing removal proceedings, she must defensively apply by filing an application for asylum with an IJ at the Executive Office for Immigration Review in the Department of Justice.[16]

In order to qualify for affirmative or defensive asylum, an applicant must first demonstrate that she meets the legal definition of a refugee under the Immigration and Nationality Act ("INA").[17] The INA provides that one is considered a "refugee" when there is a serious threat of harm preventing her from returning home that stems from her race, religion, nationality, political opinion, or membership in a particular social group.[18]

An applicant must then prove that her fear of persecution in her home country is "well- founded."[19] In *Immigration and Naturalization Service v. Cardoza-Fonseca*, the Supreme Court of the United States clarified this standard by explaining that an immigrant must demonstrate there is at least a ten percent chance that she will be harmed if she returns home.[20] Two other forms of protection in addition to defensive asylum

14. *Asylum in the United States*, *supra* note 3.

15. *Id.*

16. *Id.*

17. Victoria Neilson et al., *Asylum Manual*, IMMIGRATION EQUALITY (2007), https://immigrationequality.org/asylum/asylum-manual/asylum-law-basics-2/asylum-law-basics-elements-of-asylum-law/.

18. *Id.*

19. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).

20. *Id.* at 421.

may be sought from an IJ: withholding of removal or protection under the United Nations Convention Against Torture ("CAT").[21] These processes, however, place even stricter requirements on the applicant. In order to prevail on a claim for withholding of removal, one must show that the threat of substantial harm is more likely than not or more than fifty percent likely.[22] A successful invocation of CAT is reserved for the most serious cases. To prevail on a CAT claim, an immigrant must show that it is more likely than not she will be tortured or killed if returned to her home country.[23] Therefore, the threshold requirement of harm is much greater under CAT compared to asylum or withholding of removal.[24]

Although many attributes of these defenses to removal are the same, they each harbor unique requirements and provide the applicant with different benefits. For example, if one has a criminal history or a previous deportation order, she may be disqualified from applying for asylum, which is the most favorable form of protection for immigrants. Nevertheless, she could still qualify for withholding of removal or protection under CAT.[25] Furthermore, unlike asylum or withholding of removal, one does not have to demonstrate that the likelihood of harm is related to one's race, religion, nationality, political opinion, or social group in order to prevail under CAT.[26] Instead, one only needs to demonstrate the perpetrator is a government official.[27] Generally, applicants apply pursuant to all statutes under which they might qualify to have the best chance of avoiding deportation or refoulement.[28]

B. Corroboration Under the REAL ID Act of 2005

Adverse credibility and corroboration standards relating to pleas for asylum, withholding of removal, and protection under CAT are set forth in 8 U.S.C.A. 1158(b)(1)(B)(ii), which falls under the REAL ID Act of 2005 (the "REAL ID Act"). Prior to its passage, there was no explicit statutory authority regarding how an asylum applicant's credibility should be weighed or whether an IJ could require corroborating evidence of credible testimony.[29] The Ninth Circuit had previously held that an applicant's testimony must be deemed credible unless an adjudicator

21. Florence Immigrant & Refugee Rights Project, *supra* note 1.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*; *Asylum in the United States*, *supra* note 3.

26. Florence Immigrant & Refugee Rights Project, *supra* note 1.

27. *Id.*

28. *See, e.g.*, Wambura v. Barr, where an immigrant applied for asylum, withholding of removal, and protection under CAT to maximize his chances against deportation. 980 F.3d 365, 376 (4th Cir. 2020).

29. Matter of L-A-C-, 26 I&N Dec. 516, 519 n.2 (B.I.A. 2015).

identified explicit reasons for an adverse credibility finding.[30] Other circuits, however, held that an adverse credibility finding could be based on factors such as an applicant's demeanor, inconsistencies between or among witnesses and evidence, or a testimony's lack of specificity.[31]

The REAL ID Act narrowly settled this debate by codifying that an applicant could meet her burden of proof through testimony alone, but only if an IJ determines that the testimony "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."[32] Moreover, an IJ may require corroborating evidence for otherwise credible testimony, unless the evidence is not readily obtainable by the applicant.[33] However, circuit courts now disagree on whether the REAL ID Act requires an IJ to notify an applicant of the need for corroboration and afford her an opportunity to provide it before rendering a final decision.[34] In relevant part, the REAL ID Act states:

> In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. *Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence*.[35]

According to Congress, the purpose of the Real ID Act was to "respond to terrorist abuse of [U.S.] asylum laws by amending the INA to limit fraud."[36] As a consequence, the Act made it harder for those seeking asylum to satisfy burden of proof requirements. Congress also noted, however, that many immigrants may be incapable of corroborating their otherwise credible testimonies through no fault of their own.[37] To address this concern, Congress specified that a lack of corroborating evidence should not disqualify an applicant for asylum when the evidence itself is not reasonably available to the applicant.[38]

In the Real ID Act's corroboration provision, Congress further noted that the standard was based on the BIA's decision in *Matter of S-M-J-*, where the BIA held:

> An applicant [for asylum] should provide supporting evidence, both of

30. *See* Kaur v. Ashcroft, 379 F.3d 876, 884 (9th Cir. 2004).

31. Michael J. Garcia et al., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, U.S. CONG. RES. SERV. (May 25, 2005), https://fas.org/sgp/crs/homesec/RL32754.pdf.

32. 8 U.S.C. § 1158(b)(1)(B)(ii).

33. *Id.*

34. *See* Wambura v. Barr, 980 F.3d 365, 373 (4th Cir. 2020).

35. 8 U.S.C.A. § 1158(b)(1)(B)(ii) (emphasis added).

36. H.R. Rep. No. 109-72, at 161 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 290-91.

37. H.R. Rep. No. 109-72 at 165.

38. *Id.*

> general country conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available. If such evidence is unavailable, the applicant must explain its unavailability and the Immigration Judge must ensure that the applicant's explanation is included in the record.[39]

Because *Matter of S-M-J-* does not explicitly mention that an IJ must provide advance notice of the need for corroboration, many circuit courts concluded that Congress did not intend to place this requirement on an IJ.[40] Additionally, in 2015, the BIA adopted this understanding of the REAL ID Act's corroboration provision in *Matter of L-A-C-*.[41] Recently, the Fourth Circuit heavily relied upon *Matter of L-A-C-* when deciding in line with the majority circuits.[42] Other circuits accord less weight to the BIA's decision and instead reason that the REAL ID Act's statutory construction and practical implications suggest that Congress intended for IJs to provide applicants with notice of the need for corroboration.[43]

1. The Minority Interpretation

In *Ren v. Holder*, the Ninth Circuit held that the REAL ID Act unambiguously requires that an IJ not only provide immigrants with notice of the need for corroboration but also the opportunity to provide evidence of corroboration.[44] Ren was a Chinese immigrant who entered the U.S. on a temporary, non-immigrant visa after he was allegedly tortured by the Chinese government for practicing Christianity.[45] Once in the U.S., he applied for asylum, and an asylum officer subsequently initiated removal proceedings against him.[46] After Ren testified to the court, the IJ continued the case so that Ren could obtain the following corroborating evidence: a bail receipt to prove his arrest in China, testimony from his pastor regarding the authenticity of his faith, and a certificate documenting his baptism in the U.S.[47] At the next hearing, Ren failed to provide any of the requested evidence.[48] The IJ therefore denied

39. *Id.* at 166; In Re S-M-J-, 21 I&N Dec. 722, 724 (B.I.A. 1997).

40. *See Wambura*, 980 F.3d at 376; Avelar-Oliva v. Barr, 954 F.3d 757 (5th Cir. 2020); Gaye v. Lynch, 788 F.3d 519 (6th Cir. 2015); Rapheal v. Mukasey, 533 F.3d 521 (7th Cir. 2008); Uzodinma v. Barr, 951 F.3d 960, 966 (8th Cir. 2020).

41. 26 I&N Dec. at 527.

42. *See Wambura*, 980 F.3d at 374.

43. *See* Ren v. Holder, 648 F.3d 1079, 1093 (9th Cir. 2011); Saravia v. Atty. Gen. U.S., 905 F.3d 729, 737 (3d Cir. 2018).

44. 648 F.3d at 1091-92.

45. *Id.* at 1081-82.

46. *Id.* at 1083.

47. *Id.* at 1090.

48. *Id.*

his plea for asylum, and Ren appealed.[49]

The Ninth Circuit held that "a plain reading of the statute's text makes clear that an [IJ] must provide an applicant with notice and an opportunity to either produce the evidence or explain why it is unavailable" before rendering a final decision.[50] To support this interpretation, the court emphasized the statute's use of future-oriented and imperative language. For example, the statute says "should provide" instead of "should have provided" and "must be provided" instead of "must have been provided."[51] According to the Ninth Circuit, this language does not suggest retroaction.[52] Rather, it evinces Congress's clear intent to give applicants for asylum notice and a *future* opportunity to provide corroborating evidence.[53] As a practical concern, the Ninth Circuit further wrote that "it would make no sense to ask whether the applicant can obtain the [corroborating evidence] unless he is to be given the chance to do so."[54] In other words, the REAL ID Act's directive for immigrants who fail to corroborate their testimony to explain themselves would lack substance if they were not first given notice and an opportunity to provide the evidence.

Based on this interpretation of the REAL ID Act's corroboration provision, the Ninth Circuit held that Ren was afforded proper notice and opportunity.[55] The IJ requested specific pieces of evidence from him.[56] In order to give Ren enough time to collect the evidence, the IJ continued the case for approximately five months.[57] Because these steps were taken, the Ninth Circuit affirmed the IJ's ruling that Ren failed to meet his burden of proof and denied his petition for asylum.[58]

The Third Circuit has since re-emphasized the due process concerns brought out by *Ren*'s interpretation of the REAL ID Act.[59] In *Saravia v. Attorney General of the United States*,[60] the court wrote that the opportunity "to supply evidence or explain why it is not available can only occur before the IJ rules on the applicant's petition," and "to decide otherwise is illogical temporally and would allow for 'gotcha'

49. *Id.*
50. *Id.*
51. *Id.* at 1091.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 1093.
56. *Id.*
57. *Id.*
58. *Id.*
59. *See* Saravia v. Atty. Gen. U.S., 905 F.3d 729, 738 (3d Cir. 2018).
60. *Id.*

conclusions in IJ opinions."[61] Furthermore, the Third Circuit argued that meaningful judicial review can only occur when an IJ gives notice of the need for corroboration and an opportunity to provide it.[62]

Although the Third and Ninth Circuits interpret the REAL ID Act as providing asylum applicants with added protection in Immigration Court, the majority circuits and BIA disagree. The Fourth Circuit recently confronted the issue.

2. The Majority Interpretation

Ten years after the passage of the REAL ID Act, in *Matter of L-A-C-*, the BIA concluded that the REAL ID Act did not require an IJ to provide an immigrant with notice of the need for corroborating evidence and an opportunity to provide such evidence before rendering a final decision.[63] *Matter of L-A-C-* involved a Guatemalan immigrant who entered the U.S. in 2004 without following proper immigration procedures.[64] Four years later, he was deported.[65] In 2008, he again entered the U.S. without authorization, leading to his second deportation in 2012.[66] Less than a year later, he returned to the U.S., and the Department of Homeland Security brought removal proceedings against him for a third time.[67] Because his prior deportations disqualified him from asylum, he applied for withholding of removal and protection under CAT.[68] He alleged that his political opinions and membership with the Democratic Christian Union political party made him vulnerable to governmental persecution.[69] Specifically, he testified that two different mayors of his hometown threatened and persecuted him between 2004 and 2012 because of his political activities as a teacher and financial support for his father's political endeavors.[70]

Despite having obtained counsel, the applicant did not provide corroborating evidence that he was an active member of the Democratic Christian Union, worked as a teacher in Guatemala, or sent money to his father.[71] When asked why, he claimed that the evidence was either

61. *Id.*
62. *Id.* at 737-38.
63. Matter of L-A-C-, 26 I&N Dec. at 527.
64. *Id.* at 517.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 524.
70. *Id.*
71. *Id.* at 525.

unavailable or he did not realize such evidence would help his claim.[72] He maintained that he had evidence of some details, such as sending money to his father, but did not explain why he failed to provide it to the court.[73] Following the hearing, the IJ denied the applicant's application for withholding of removal and protection under CAT.[74]

Relying on the Ninth Circuit's opinion in *Ren*,[75] the applicant appealed, arguing that the IJ should have automatically continued the hearing so that he could obtain the necessary corroborating evidence before the final judgment was issued.[76] The BIA rejected this position based on its interpretation of its earlier opinion, *Matter of S-M-J-*.[77] According to the *L-A-C-* court, *S-M-J-* did not explicitly state that an IJ must notify an applicant of the need for corroboration before rendering a decision.[78] Instead, *S-M-J-* held that the burden was on the applicant to corroborate any evidence that could reasonably be expected, even if her claim was otherwise credible.[79]

Furthermore, the BIA reasoned in *L-A-C-* that Congress's purpose in enacting the REAL ID Act was to "allow Immigration Judges to follow commonsense standards in assessing asylum claims without undue restrictions."[80] The Board reasoned that surely Congress could not have intended to create even more procedural requirements for courts to follow.[81] Although the BIA conceded that it was "good practice" for an IJ to give notice, especially in cases involving *pro se* applicants, the BIA was unwilling to extend application of the REAL ID Act's corroboration provision any further.[82] Therefore, the BIA upheld the IJ's decision not to continue proceedings and to deport the applicant based on his failure to produce corroborating evidence.[83]

C. Wambura v. Barr

In *Wambura v. Barr*, the Fourth Circuit held that advance notice of the need for corroborating evidence is not required before an IJ renders a final

72. *Id.*
73. *Id.*
74. *Id.*
75. Yaogang Ren v. Holder, 648 F.3d 1079 (9th Cir. 2011).
76. Matter of L-A-C-, 26 I&N Dec. at 517*; See Ren*, 648 F.3d at 1079.
77. Matter of L-A-C-, 26 I&N Dec. at 519; In Re S-M-J-, 21 I&N Dec. at 724.
78. Matter of L-A-C-, 26 I&N Dec. at 519.
79. *Id.*
80. *Id.* at 520.
81. *Id.*
82. *Id.* at 521 n. 3
83. *Id.* at 527.

decision on asylum,[84] siding with the BIA and Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits. Wambura was an immigrant from Tanzania who became a lawful permanent resident of the U.S. in 2005. Less than a decade later, he pled guilty to "conspiracy to commit wire fraud, aggravated identity theft and conspiracy to commit wire and mail fraud."[85] The Department of Homeland Security then initiated removal proceedings against him pursuant to the Immigration Naturalization Act ("INA").[86] The INA provided that lawful permanent residents may be removed when convicted of such crimes.[87] To avoid deportation, Wambura applied for asylum, withholding of removal, and protection under CAT.[88]

Wambura testified that he would likely be tortured if he re-entered Tanzania because he was a known and active member of Chadema, an opposition political party in the country.[89] While in the U.S., he alleged that he served as a leader in Chadema USA and organized protests which criticized the results of various Tanzanian elections.[90] Additionally, he alleged that he wrote letters to the United Nations and maintained a blog about human rights issues in the country.[91] He acknowledged that his participation ended five years ago when he went to prison for the crimes permitting his deportation.[92] However, he asserted that his father had recently told him that secret police officers were following him in Tanzania.[93] Therefore, Wambura maintained that his prior activities made him a likely target for Tanzanian authorities.[94]

At a preliminary hearing, the IJ asked Wambura if he could corroborate his testimony.[95] Wambura said he was unable to provide corroborating evidence because he was unable to access his email account while in detention.[96] The IJ denied all of his claims for being "totally and

84. Wambura v. Barr, 980 F.3d 365, 374 (4th Cir. 2020).

85. *Id.* at 367.

86. *Id.*

87. *Id.*

88. *Id.* Due to the nature of his convictions and their corresponding sentences, an IJ later determined that Wambura was disqualified from seeking asylum, withholding of removal, and withholding of removal under CAT. Therefore, the only relief he could pursue was a deferral of removal under CAT. Deferral of removal is "a more temporary form of relief" than withholding of removal under CAT because this "status can be terminated more quickly and easily than withholding of removal if the individual is no longer likely to be tortured […] in their home country." Neilson et al., *supra* note 18.

89. *Wambura*, 980 F.3d at 367-68.

90. *Id.* at 367.

91. *Id.*

92. *Id.* at 368.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 376.

completely based on speculation."[97] Specifically, the IJ noted that Wambura failed to provide a letter or any other evidence of being tracked by the secret police.[98] Additionally, the IJ noted that no Chadema members in the U.S. offered statements that the immigrant was actively a part of the group.[99] Wambura appealed the IJ's decision. However, the BIA agreed with the IJ and dismissed his claims, finding him ineligible for asylum, withholding of removal, or protection under CAT.[100] He then petitioned for judicial review of the BIA's decision and argued that the IJ should have given him notice of the need for corroborating evidence prior to rendering the final decision on his claims.[101]

The Fourth Circuit ultimately held that the IJ was under no such obligation.[102] Instead, it argued that the REAL ID Act was silent on the issue of whether notice of the need for corroboration must be given.[103] The court then applied *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, where the Supreme Court instructed courts to:

> Initially examine the statute's plain language; if Congress has spoken clearly on the precise question at issue, the statutory language controls. If, however, the statute is silent or ambiguous, [courts should] defer to the agency's interpretation if it is reasonable.[104]

Because the BIA, an important subset of the Department of Justice, previously interpreted the REAL ID Act's corroboration provision in *Matter of L-A-C-*, the Fourth Circuit concluded that this interpretation controlled so long as it was reasonable.[105]

In determining that the BIA's interpretation was reasonable, the court first examined the BIA's reasoning in *Matter of L-A-C-*, where it held that Congress's intent behind the REAL ID Act was to codify the standards set forth by the BIA in *Matter of S-M-J-*.[106] According to the Fourth Circuit, *Matter of S-M-J-* did not require an IJ to provide advance notice of the need for corroborating evidence or grant an automatic continuance for the immigrant to obtain the necessary evidence. Rather, it interpreted the opinion to merely direct that IJs give immigrants an opportunity to explain why the relevant evidence was not initially obtained and include

97. *Id.* at 368.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 374.
103. *Id.* at 372.
104. *Id.* at 372 (quoting Midi v. Holder, 566 F.3d 132, 137 (4th Cir. 2009)); Chevron. v. NRDC, 467 U.S. 837 (1984).
105. *Wambura*, 980 F.3d at 372.
106. *Id.*; In Re S-M-J-, 21 I&N Dec. 722 (B.I.A. 1997).

this explanation in the record.[107] Ultimately, it was within the IJ's discretion to extend the immigrant an opportunity to corroborate his testimony or not.[108]

Agreeing with the BIA and the majority of other circuits, the Fourth Circuit found allowing IJs such discretion to be reasonable because immigrants "already had notice about the potential need for corroborating evidence."[109] This notice came in the form of the instructions on the Form 1-589 application for asylum and withholding of removal, which directs immigrants to "provide evidence of general conditions in the country from which the applicant is seeking asylum or other protection and specific facts to support the claim."[110] Additionally, the Fourth Circuit argued that The REAL ID Act itself, with the inclusion of a corroboration provision, provided immigrants with notice of the potential need for corroborating evidence.[111] Although the Fourth Circuit conceded that it remained good practice for IJs to notify immigrants of the need for corroboration before denying their pleas for asylum, the court ultimately dismissed the notion that the IJ was under a strict obligation to do so.[112]

In rejecting the Third and Ninth Circuits' conclusions that IJs are required to provide notice of the need and opportunity to provide corroborating evidence before rendering a decision, the Fourth Circuit drew from prior circuit-majority opinions on the issue.[113] The court borrowed language from the Sixth Circuit's opinion in *Gaye v. Lynch* and asserted that "[e]ven if it could be said that the statute is silent on the issue, and thus possibly could allow for such a construction… it is plainly erroneous to say that the statute unambiguously mandates such notice."[114] Moreover, the Fourth Circuit endorsed the Second Circuit's reasoning in *Liu v. Holder*, where the Second Circuit argued that "an IJ may not determine that corroboration is necessary until all the evidence is in, and the IJ has had an opportunity to weigh the evidence and prepare an opinion…"[115] Relying on these arguments, the Fourth Circuit held that the BIA's interpretation of the corroboration provision was reasonable and should be upheld.[116]

Although the Fourth Circuit affirmed that the IJ did not err by failing to provide Wambura with advance notice of the need for corroboration,

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 372-73.
113. *Id.* at 373.
114. *Id.* (quoting Gaye v. Lynch, 788 F.3d 519, 530 (6th Cir. 2015)).
115. *Id.* (quoting Liu v. Holder, 575 F.3d 193, 198 (2d Cir. 2009)).
116. *Id.* at 374.

the Fourth Circuit found that the IJ failed to make the requisite finding on whether the evidence was reasonably available to him.[117] Consequently, the Fourth Circuit remanded the case for further proceedings consistent with its opinion, ultimately delaying Wambura's removal from the U.S.[118]

Judge Harris wrote a concurrence in which she agreed with the majority's conclusion that "the IJ was required to—but did not—determine whether [Wambura] had given 'otherwise credible testimony,' and, if so, whether he could 'reasonably obtain' the corroborating evidence…" She argued, however, that the majority should have stopped there.[119] Judge Harris explained that the circuit split at issue in the majority opinion was never implicated because the immigrant failed to specifically request a continuance to obtain the missing evidence identified by the judge.[120] Instead, the immigrant merely explained that he could not obtain the evidence when the IJ pressed him on its absence.[121] In so doing, he did not imply that the evidence was forthcoming.[122] Based on these facts, Judge Harris asserted that the IJ's decision whether to issue a continuance was "beside the point."[123] All the IJ needed to do was evaluate the immigrant's explanation for why the evidence was missing.[124] Therefore, she would have avoided "deepening the circuit split" in the majority's opinion by side-stepping the issue.[125]

III. DISCUSSION

Federal circuit courts agree that it is good practice for IJs to give immigrants notice of the need for corroboration and an opportunity to provide corroborating evidence before rendering a final decision on asylum.[126] The remaining question, however, is whether they should be required to do so. This Part argues that even if the congressional intent behind the language of the REAL ID Act's corroboration provision is ambiguous, the provision is meaningless unless immigrants are first given proper notice and a meaningful opportunity to present the corroboration requested by the IJ. Furthermore, it demonstrates that the Fourth Circuit's recent interpretation of this provision in *Wambura* is not practical or reasonable given the present dynamics of U.S. immigration courts.

117. *Id.* at 375.
118. *Id.* at 375-76.
119. *Id.* at 376.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *See Id.* at 372.; *Ren*, 648 F.3d 1079, 1093 (9th Cir. 2011).

Section A of this Part considers the challenging circumstances that *pro se* applicants for asylum encounter, which make the Fourth Circuit's holding in *Wambura* particularly unreasonable. Section B weighs immigrants' need for added procedural safeguards during the asylum process against the court's interests in expediently resolving cases and explains how courts may account for both of these interests. Finally, Section C argues that, although the Ninth Circuit's interpretation of the REAL ID Act has merit, other circuits and ultimately the Supreme Court of the United States, should endorse the narrower arguments made by the Third Circuit in *Saravia*. That approach provides the best counterargument to the Fourth Circuit's assertion that an immigrant is not entitled to notice of the need for corroboration or an opportunity to provide corroborating evidence before her plea for asylum is rejected.

A. Difficulties Experienced by Pro Se Applicants During the Process for Asylum

Whether immigrants obtain or forego assistance of counsel strongly influences the outcomes of cases in removal proceedings.[127] Immigrants with counsel are more likely to prevail on their claims in the end and pursue defenses such as asylum in the first place.[128] In 2016, the National Immigration Counsel reported that detained immigrants who retained counsel were eleven times more likely to apply for asylum than their *pro se* counterparts.[129] Moreover, non-detained immigrants with counsel were five times more likely to apply for asylum.[130] These statistics may suggest that a significant number of *pro se* immigrants with meritorious asylum claims fail to raise such claims. This is likely because some immigrants do not understand how to raise the asylum defense or are unaware of the defense altogether.

Unfortunately, the odds are stacked against *pro se* immigrants even when they do raise a claim for asylum.[131] Few immigrants are native English speakers and, as a result, language barriers often add a layer of complexity for them when representing their interests.[132] Although having an interpreter present throughout the case helps alleviate this issue, it does not entirely diminish the risk of miscommunication or oversight.[133] For

127. Eagly & Shafer, *supra* note 8.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Ramón & Reyes, *supra* note 10; National Immigrant Justice Center, *Access to Counsel*, https://immigrantjustice.org/issues/access-counsel, (last visited Oct. 15, 2021).

133. *Id.*

example, consider an interpreter who assists an immigrant with the Form 1-589 application for asylum, which must be completed in English.[134] The interpreter is neither responsible nor likely to know which parts of the Form 1-589 are most important for the immigrant to understand. Therefore, even though this form briefly mentions that applicants may need to provide corroborating evidence before winning their case, it is entirely possible that the interpreter could rush through or neglect this language when explaining the form to the immigrant.

In addition to arguing that the Form 1-589 provides immigrants subject to removal proceedings with sufficient notice of the need for corroboration, the Fourth Circuit in *Wambura* also argued that the REAL ID Act provides immigrants with this advance notice.[135] However, few individuals—aside from legal professionals and politicians—know that the REAL ID Act exists, and even fewer know what information the Act contains. Especially with regard to immigrants who demonstrate a limited proficiency in English, it is unreasonable to expect them to seek out this Act, know which provision is relevant to their case, and then translate it. As a result, the Form 1-589, REAL ID Act, and other government texts likely fail to deliver actual notice of important requirements, such as the need for corroboration, in a number of asylum cases.

Approximately fifty-six percent of immigrants subject to removal proceedings also struggle to defend their interests because they were detained by the government in prisons, jails, and detention centers for their entire case.[136] Obtaining counsel from behind bars is extremely difficult for many individuals because they cannot freely travel to meet with an attorney and, even when they can find an attorney, must often rely on telephone calls in lieu of in-person meetings.[137] Furthermore, unlike the U.S. criminal justice system, which requires defendants to be tried in the location of the offense, immigrants are often transported to detention facilities hundreds of miles away from their homes and families where they are forced to undergo court proceedings in new locations alone.[138] Because hiring an immigration attorney is costly, the distance between a detained immigrant and her family further complicates her ability to obtain counsel because detainees are generally inhibited from earning wages.[139] Detained immigrants also struggle to collect evidence to

134. *I-589, Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/i-589, (last visited Oct. 15, 2021).

135. Wambura v. Barr, 980 F.3d 365, 372 (4th Cir. 2020).

136. Another 10% of immigrants spent some time behind bars during their case but were released prior to their final hearing. Eagly & Shafer, *supra* note 8.

137. *Id.*

138. *Id.*

139. *Id.*

corroborate their claims because of their inability to participate in the outside world.[140] *Wambura* provides a helpful example: Wambura alleged that his detention precluded him from accessing his email account to obtain the requested corroborating evidence.[141] It is possible that Wambura's inability to access this evidence substantially harmed his chances against deportation.

Adopting the Third and Ninth Circuit's application of the REAL ID Act's corroboration provision does not alone solve the challenges immigrants must overcome to achieve asylum. However, it is a small, yet important step towards ensuring that immigrants are given a meaningful opportunity to defend their case against well-prepared government lawyers. In addition to the problems created by language barriers and immigrants' likelihood of being detained, few immigrants comprehend how the asylum process works and what is expected of them.[142] Although IJs may view it as an obvious expectation that immigrants should be prepared to corroborate their testimony, this expectation is not always clear to immigrants unfamiliar with the U.S. immigration system. Most immigrants do not have legal training and therefore cannot anticipate when they will need corroborating evidence to back up their testimonies. Moreover, when IJs fail to specify the additional evidence needed, immigrants may innocently believe that the evidence is not important to their case.[143] Not only can such misunderstandings be disastrous to an immigrant's plea for asylum, but they undermine an immigration court's ability to fairly adjudicate claims. A notice requirement will ultimately lead to more immigrants providing relevant and persuasive evidence to support their pleas for asylum, allowing IJs to make more informed decisions regarding whether an immigrant should be granted asylum.

Immigrants with counsel should also be afforded notice of the need for corroboration and an opportunity to provide the evidence before an IJ rules on their pleas for asylum. A recent survey of judges conducted by Richard Posner and Albert Yoon reported that immigration law was the practice area in which the quality of legal services was the lowest.[144] Another survey of IJs in New York reported that approximately 50% of the lawyers appearing before them provided their clients with "either

140. *Id.*

141. *Wambura*, 980 F.3d at 376.

142. Eagly & Shafer, *supra* note 8.

143. For example, the immigrant in *Saravia v. Attorney General of the United States* alleged that a primary reason the corroboration identified by the judge was not introduced was because he was not told to do so and therefore did not realize the evidence needed to be introduced. 905 F.3d 729, 732 (3d Cir. 2018).

144. Benjamin Edwards & Brian L. Frye, *It's Hard out there for an immigrant; lemon lawyers make it harder*, THE HILL (Jan. 19, 2018), https://thehill.com/opinion/immigration/369702-its-hard-out-there-for-an-immigrant-lemon-lawyers-make-it-harder.

inadequate or grossly inadequate representation, and the worst lawyers actually make their clients worse off."[145] Substantiating these findings, a 2015 study on asylum cases reported that the bottom 10% of immigration lawyers "actually reduced the chance of relief so much that the applicant would have been better off without a lawyer."[146]

Immigrants who hire attorneys rarely have the legal knowledge to evaluate whether an attorney's services are benefitting their case. Steps such as requiring IJs to provide immigrants with notice of the need for corroboration ultimately bridge this gap by allowing immigrants to become more involved in their cases. Therefore, with notice of the need for corroboration, immigrants may be less dependent on their attorneys and able to rectify their attorneys' mistakes by producing their own corroborating evidence.

Requiring IJs to provide such notice and opportunity will help address inequities within the U.S. immigration system. Notice and opportunity requirements would afford immigrants, especially *pro se* immigrants, an added procedural safeguard to ensure a fair opportunity to present their best cases for asylum. In the U.S. criminal justice system, all defendants have the right to a government-appointed attorney because of the severity of the charges and corresponding sentences brought against them. Although the right to appointed counsel is not recognized within the U.S. immigration system, it is important to note that the consequences faced by asylum-seekers can be just as, if not more, severe than the consequences faced by defendants in criminal proceedings. Many immigrants who apply for asylum sincerely believe they will be harmed by returning to their home countries. Moreover, being indefinitely separated from one's home and family is an emotionally painful situation for anyone to endure. Given these factors, IJs should take reasonable steps, such as providing notice of the need for corroboration, to ensure that immigrants are not unduly disadvantaged in the courtroom.

B. Weighing the Interests of Immigrants and the Courts

Although it is clear that immigrants applying for asylum would benefit from additional procedural safeguards, the BIA in *Matter of L-A-C-* argued that IJs should be able to follow commonsense standards without undue restrictions.[147] Ultimately, the majority circuits are weary about

145. *Id.*

146. *Id.*; *See* Banks Miller et al., *Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability*, 49 LAW & SOC'Y. REV. 209 (2015), https://onlinelibrary.wiley.com/doi/pdf/10.1111/lasr.12123?casa_token=gzfdjQuj2aEAAAAA:oKc-uE4WN5RWVhCiEsNeAbkZGu5im6hqHlUhnFy7K67hYGX1Acec-utb_kqcYUrb7utJIfE8xQdycWkP.

147. 26 I&N Dec. 516, 520 (B.I.A. 2015).

overburdening IJs with additional procedural requirements, which could delay asylum cases on already crowded dockets.[148] In fact, some IJs are so overwhelmed by their caseload that they reported "seven minutes on average to decide a case, if they decided each case schedule for a hearing before them that day."[149] Although expediency is a legitimate concern given the hundreds of thousands of cases pending in U.S. immigration courts, the legitimacy of the system is severely undermined when rushed processes lead to unjust results. Not only are IJs more likely to make significant errors when they are forced to quickly deliver complex legal decisions, but they risk failing to fully develop the record in the process.[150] This causes more complications in the appeals that inevitably follow.[151]

Furthermore, the objective to expediently resolve asylum cases gained traction under the Trump Administration, under which the Department of Justice "imposed case-completion quotas" and tied IJs' "individual performance reviews to the number of cases they complete."[152] These schemes deter IJs from carefully reviewing asylum claims before rendering what could be the most consequential decision in an immigrant's life. Although the Biden Administration pledged to roll back many of Trump's policies targeting asylum-seekers, such policies take significant time to replace and run the risk of being reinstated by later administrations.[153] Therefore, unless the political landscape shifts, immigration courts arguably prioritize expediency to the detriment of the court system's integrity.

Requiring IJs to pause in their analysis of a case to provide notice of the need for corroboration and an opportunity to provide corroborating evidence should be a priority because it will naturally lead to the introduction of more evidence in removal proceedings, allowing IJs to make more informed decisions regarding asylum. The present dynamics of the U.S. immigration courts already pressure IJs to rush through every stage of an asylum case to reach a verdict. Although collecting evidence is time-consuming, notice requirements would allow immigrants to understand what evidence an IJ needs and plan accordingly. Moreover, it

148. *See Id.*

149. *Empty Benches: Underfunding of Immigration Courts Undermines Justice*, AMERICAN IMMIGRATION COUNCIL (Jun 17, 2016), https://www.americanimmigrationcouncil.org /research/empty-benches-underfunding-immigration-courts-undermines-justice.

150. *Id.*

151. *Id.*

152. *Over 50 Rights Groups Call on Congress to Establish an Independent Immigration Court*, HUMAN RIGHTS WATCH (Feb. 18, 2020), https://www.hrw.org/news/2020/02/18/over-50-rights-groups-call-congress-establish-independent-immigration-court#.

153. Rebecca Beitsch, *Biden Struggles to Unravel Web of Trump Immigration Rules*, THE HILL (Mar. 14, 2021), https://thehill.com/homenews/administration/543041-biden-officials-struggle-to-unravel-web-of-trump-immigration-rules?rl=1.

would reduce the risk of "gotcha" moments, which were identified by the Third Circuit in *Saravia*, when an IJ hands down a final judgment denying asylum.[154] Due process mandates that immigrants who have access to evidence determinative to their case be able to provide such evidence. However, if immigrants are not put on notice of the need to produce it, they may not understand that the evidence is even desired by the court. Therefore, a notice requirement will ultimately benefit both immigrants and the courts because it would encourage informed decision-making in light of the hardships faced by immigrants during the asylum process.

Requiring IJs to provide notice of the need for corroboration would begin to balance the scales between immigrants and the government. Therefore, this step is not only good practice but necessary to ensure that immigrants have a genuine opportunity to plead their case. This does not mean, however, that the U.S. immigration system's need for expediency should be forgotten altogether. In her *Wambura* concurrence, Judge Harris argued that, because Wambura never asked for a continuance, the IJ only needed to evaluate Wambura's explanation for why the evidence was missing.[155] Unlike the majority, she would not have entertained the idea of issuing a continuance for him to obtain the missing evidence.[156] Although Wambura implied that some requested evidence was previously beyond his reach, he never said that he would be unable to corroborate his claims if the case were continued.[157] In fact, Wambura may not have known that a continuance allowing him to collect the evidence was even an option. For these reasons, Judge Harris's approach is somewhat unforgiving to immigrants who do not understand the innerworkings of immigration courts.

However, Judge Harris's concurrence raises a compelling point. If an immigrant testifies that the corroborating evidence requested by the IJ was unavailable prior to the hearing and would not, under any circumstances, become available in the future, then it makes no sense for an IJ to continue the case for the sole purpose of allowing the immigrant to obtain the evidence. Instead, the IJ should merely consider the immigrant's explanation for why the evidence is unavailable and include it in the record before issuing a final decision. This approach echoes the instruction of *Matter of S-M-J-*: when corroborating evidence is unavailable, "the applicant must explain its unavailability and the [IJ] must ensure that the applicant's explanation is included in the record."[158] IJs could then more efficiently manage their dockets by only continuing

154. *Saravia*, 905 F.3d 729, 738 (3d Cir. 2018).

155. Wambura v. Barr, 980 F.3d 365, 376 (4th Cir. 2020).

156. *Id.*

157. *Id.* at 374.

158. In Re S-M-J-, 21 I&N Dec. 722, 724 (B.I.A. 1997).

the cases that would truly benefit from it. Although affording immigrants more time to collect evidence often outweighs concerns regarding expedience, there are times when the opposite is true. When an immigrant testifies that the evidence in question will never become available, the IJ should be permitted to issue a decision without delay, so long as the immigrant's explanation for why the evidence is unobtainable is carefully considered.

C. The Statutory Text of the REAL ID Act and the Practical Effects of the Majority Interpretation

The Third and Ninth Circuits both argue that IJs should be required to give notice of the need for corroboration and an opportunity to provide corroborating evidence before rendering a final decision on asylum. However, the Ninth Circuit's justification for this policy is much broader. In *Ren*, the court first explained that a plain reading of the REAL ID Act's statutory text mandates this notice.[159] Next, the court explained that the REAL ID Act's requirement that IJs detail in the record why the immigrant is missing corroborating evidence lacks substance if immigrants are not first affirmatively given an opportunity to provide such evidence.[160] Though the Third Circuit agreed with the Ninth Circuit's second argument, it declined to adopt the Ninth Circuit's view that the REAL ID Act unambiguously required IJs to provide immigrants with this notice and opportunity.[161]

The Ninth Circuit's textual interpretation of the REAL ID Act's corroboration provision is not unreasonable. Notably, it pointed out that Congress chose to use future-directed and imperative language when instructing immigrants to provide the evidence in question.[162] For example, the REAL ID Act states that immigrants "should provide" corroborating evidence when requested by an IJ and that evidence "must be provided" unless it is unobtainable.[163] This implies a much different meaning than if the statute had instead been written to retroactively clarify that immigrants "should have" provided corroborating evidence when requested by an IJ, and such evidence "must have been provided" unless it was unobtainable. If Congress wanted to avoid requiring IJs to provide notice, this past-tense language would more clearly establish its intent. By using future-oriented language, however, Congress arguably suggested a future opportunity for immigrants to present evidence to the IJ.

159. Yaogang Ren v. Holder, 648 F.3d 1079, 1090 (9th Cir. 2011).

160. *Id.* at 1092.

161. *Saravia*, 905 F.3d at 738.

162. *Ren*, 648 F.3d at 1091.

163. *Id.*

Consequently, the Ninth Circuit concluded that Congress unambiguously expressed its intent that immigrants be given a future opportunity to produce corroborating evidence.[164]

But the mere existence of the circuit split regarding the REAL ID Act's corroboration provision indicates its ambiguity. The Fourth Circuit, joined by five other circuits and the BIA, argued that Congress's intent cannot be ascertained from the language itself.[165] Moreover, the Third Circuit declined to take up the issue when it rejected the majority circuit approach.[166] To further evince the statute's ambiguity, consider a reader who interprets the statute to mean that immigrants should provide corroboration during the same hearing the evidence was requested by the IJ. Although this interpretation does not make sense in terms of facilitating judicial review, the statutory text, taken at face value, does not unambiguously contradict such an understanding. Therefore, other circuits as well as the Supreme Court should instead adopt the Third Circuit's narrower arguments focused on judicial review concerns regarding when notice of the need for corroboration is not given. Many of these arguments are also endorsed by the Ninth Circuit in *Ren*.[167]

In *Saravia*, the Third Circuit argued that applying the BIA's interpretation that the REAL ID Act did not require IJs to provide notice and opportunity would severely undermine appellate review of their decisions.[168] According to 8 U.S.C. § 1252(b)(4), appellate courts may not reverse "a determination made by a trier of fact with respect to the availability of corroborating evidence… unless the court finds [. . .] that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable."[169] However, in order to determine whether the IJ's conclusion was reasonable, the record must be sufficiently developed. This not only requires an IJ to consider whether the evidence in question was introduced to the court but whether the immigrant could have obtained the evidence.

The BIA and majority circuit approach ultimately fails to recognize the significance and application of the second question. If an IJ only introduces into the record that an immigrant failed to provide the corroborating evidence and does not ask her if the evidence was available to her, an appellate court cannot meet the requirements of 8 U.S.C. §

164. *Id.* at 1091-92.

165. *See Ren*, 648 F.3d at 1082; *Saravia*, 905 F.3d at 731; Liu v. Holder, 575 F.3d 193, 198 (2d Cir. 2009); *Wambura*, 980 F.3d at 376; Avelar-Oliva v. Barr, 954 F.3d 757 (5th Cir. 2020); Gaye v. Lynch, 788 F.3d 519 (6th Cir. 2015); Rapheal v. Mukasey, 533 F.3d 521 (7th Cir. 2008); Uzodinma v. Barr, 951 F.3d 960, 966 (8th Cir. 2020).

166. *Saravia*, 905 F.3d at 738.

167. *See Ren*, 648 F.3d at 1092-93.

168. *Saravia*, 905 F.3d at 737-38.

169. *Id.* at 736.

1252(b)(4). In *Wambura*, the Fourth Circuit ultimately agreed that lower immigration courts were subject to this duty.[170] Even though the court held that IJs were under no obligation to provide advance notice and an opportunity to produce corroborating evidence before rendering its final decision, it remanded the case because, on appeal, the IJ and BIA failed to inquire as to whether the evidence was even available in the first place.[171] However, it would not have made sense to ask Wambura whether or why the evidence was unavailable to him if he was not even notified that he needed to provide it. This begs the question of how the immigration court system would benefit from appellate courts learning that corroborating evidence was available even though IJs were purportedly under no obligation to continue the case for immigrants to obtain it.

To highlight this point, consider the immigrant in *Saravia*, who was asked by the IJ why his mother had not yet testified in his favor.[172] He responded that he never knew that his mother needed to testify and was constrained by time and resources to further corroborate his testimony.[173] However, his mother was waiting outside of the courtroom when this exchange occurred.[174] This explanation, combined with the circumstances, clarifies that the evidence sought by the IJ could be introduced so long as the immigrant was given a future opportunity to do so. Given the high stakes in asylum cases, it would have been unjust for the Third Circuit to hold that the lower court was not required to give the immigrant an opportunity to provide corroborating evidence now that he was aware of its influence on the outcome of his case.

Ultimately, IJs must provide notice and an opportunity for immigrants to produce corroborating evidence to ensure that immigrants with legitimate asylum claims are not deported and put in harm's way. U.S. circuit courts and the Supreme Court should therefore adopt the Third Circuit's argument that the majority circuit approach impedes judicial review in an already overburdened system where errors are bound to occur. Based on this argument, the majority's interpretation of the REAL ID Act's corroboration provision is unreasonable, and future courts need not rely on the questionable idea that the REAL ID Act was unambiguously written to produce such an unjust result.

170. Wambura v. Barr, 980 F.3d 365, 375 (4th Cir. 2020).

171. *Id.* at 375-76.

172. *Saravia*, 905 F.3d at 738.

173. *Id.* at 738-39.

174. *Id.*

IV. CONCLUSION

Today, immigrants subject to deportation proceedings face numerous obstacles when raising the asylum defense. Most notably, many immigrants are unable to obtain competent legal representation because of their financial insecurities or detainments in remote locations. Furthermore, the various complexities embedded in the asylum process, in addition to language barriers, often exacerbate immigrants' troubling circumstances. Requiring that IJs provide immigrants notice of the need for corroboration and an opportunity to provide corroborating evidence affords immigrants an additional procedural safeguard that ultimately begins to reduce the present inequities in the U.S. immigration system. Additionally, notice and opportunity requirements facilitate the introduction of persuasive evidence, allowing IJs to make more informed decisions less likely to be disturbed on appeal. Therefore, the U.S. Supreme Court and other circuit courts should adopt the Third Circuit's argument that requiring IJs to provide notice and opportunity not only promotes fairness but is imperative for meaningful judicial review.