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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NAPANOCH, NEW YORK

In the Matter of:	
[redacted]	**File No.:** [redacted]
In removal proceedings	

BRIEF OF PROPOSED AMICUS CURIAE IMMIGRANT DEFENSE PROJECT IN SUPPORT OF TERMINATION OF REMOVAL PROCEEDINGS AGAINST THE RESPONDENT UNDER THE "FINALITY" RULE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes, Rules and Regulations

Miscellaneous

INTRODUCTION

The Immigrant Defense Project ("IDP") respectfully submits this brief as proposed amicus curiae in support of termination of the removal proceedings against the Respondent under the "finality" rule. Specifically, IDP submits this brief asking this Court to hold that the "finality" rule established in Pino v. Landon, 349 U.S. 901 (1955) and Matter of Ozkok, 19 I. & N. Dec. 546 (BIA 1988) continues to require that a criminal conviction arising from a formal judgment of guilt become "final" through exhaustion or waiver of direct appellate remedies before that conviction may sustain an order of removal or bar relief from removal.

STATEMENT OF INTEREST

IDP is a not-for-profit legal resource and training center that supports, trains, and advises criminal defense, family defense, and immigration lawyers, immigrants themselves, as well as judges and policymakers on issues that involve the intersection of immigration law and criminal law. Through a program of the New York State Office of Indigent Legal Services, IDP has been designated the Regional Immigration Assistance Center for New York City charged with advising public appellate defenders, pursuant to the U.S. Supreme Court's mandate in Padilla v. Kentucky, 559 U.S. 356 (2010), about the rights of noncitizens in the state criminal appellate process.

IDP has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizen defendants the benefit of their constitutional right to due process in criminal and immigration proceedings. IDP frequently appears as amicus curiae[1] in cases involving immigration law and criminal law, and has filed briefs in numerous cases before the Immigration Courts and Board of Immigration Appeals ("Board" or "BIA") (see, e.g., Matter of Carachuri-

[1] See IDP's Request to Appear as Amicus Curiae, submitted herewith (citing cases).

Rosendo, 24 I. & N. Dec. 382 (BIA 2007)), the U.S. Courts of Appeals (see, e.g., Orabi v. Attorney Gen. of the U.S., 738 F.3d 535 (3d Cir. 2014); Planes v. Holder, 686 F.3d 1033 (9th Cir. 2012)), the U.S. Supreme Court (see, e.g., Mellouli v. Lynch, 135 S. Ct. 1980 (2015); Padilla v. Kentucky, 555 U.S. 1169 (2010)), and New York State courts (see, e.g., People v. Baret, 23 N.Y.3d 777 (N.Y. 2014)) involving the "finality" rule at issue here and other important criminal and immigration matters. IDP has recently filed briefs as amicus curiae before the Board on this issue in In re. C-K-, AXXXXXX350 (BIA May 13, 2015) and In re. W-M-L-, AXXXXXX788 (filed Feb. 15, 2016), and regularly provides support to noncitizens and their counsel in cases where the Department of Homeland Security ("DHS") seeks removal of a noncitizen based on a conviction that remains pending direct appellate review as of right.

IDP submits this brief to apprise this Court of important legal, due process and fairness considerations that support continued recognition of the "finality" rule for convictions arising from formal adjudications, like the Respondent's. Absent express recognition of the "finality" rule, DHS may continue to improperly pursue deportation of noncitizens on the basis of non-final criminal convictions that remain under direct appellate review, subjecting many immigrants to removal on the basis of potentially wrongful or flawed convictions and eroding enshrined appellate rights. Failure to recognize the "finality" rule would thus seriously impact the lives of many immigrants and their families and communities whose interests IDP represents, and impair confidence in the fair and just application of our Nation's criminal and immigration laws.

SUMMARY OF THE ARGUMENT

The long-standing "finality" rule provides that a conviction is not deemed "final" so as to trigger removal consequences or bar relief from removal unless and until the individual's direct appeals of that conviction have been exhausted or waived. Pino, 349 U.S. at 901; Ozkok, 19 I. & N. Dec. at 552 n.7. Codification of the definition of "conviction" in the Illegal Immigration

Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 ("IIRIRA"), in no way disturbed the "finality" rule with respect to convictions arising from formal adjudications, like the Respondent's. As discussed in greater detail infra, applicable canons of statutory construction compel the conclusion that the requirement of finality has been preserved in IIRIRA with respect to convictions arising from formal judgments of guilt, a result consistent with the views expressed by a vast majority of the Board in the precedent decision Matter of Cardenas-Abreu, 24 I. & N. Dec. 794 (BIA 2009). In addition, important policy considerations relating to protecting the rights of immigrants and instilling confidence in the fairness of the Nation's justice system support affirmation of the "finality" rule.

Section I demonstrates how a proper consideration of the backdrop from which the definition of "conviction" in IIRIRA arose, as confirmed by the accompanying legislative history, mandates the conclusion that IIRIRA preserved the requirement of finality for convictions arising from formal judgments of guilt. This interpretation was recently adopted by the Third Circuit Court of Appeals in Orabi v. Attorney Gen. of the U.S., 738 F.3d 535 (3d Cir. 2014), in which that Court concluded that the finality rule is "alive and well" post-IIRIRA. Id. at 543. It is also consistent with the reasoning of various other federal judges, including seven judges of the Ninth Circuit Court of Appeals in Planes v. Holder, 686 F.3d 1033 (9th Cir. 2012) (Reinhardt, J. dissenting from denial of rehearing en banc); and as noted, with the previously expressed views of a majority of the Board in Cardenas-Abreu.

Section II discusses the important due process and fairness interests the "finality" rule protects. It presents the law that establishes the right to appeal a criminal conviction enshrined in the federal legal system and almost every state's legal system, the severe and sometimes insurmountable barriers to maintaining a criminal appeal and/or contesting a removal order after

deportation, and the additional barriers to returning to the United States post-deportation after prevailing in an immigration-determinative appeal of a removal order or criminal conviction.

Section III explores the important error-correcting and legitimizing functions of criminal appeals, which attain even greater importance in light of the severe strains under which the American criminal justice and indigent defense systems currently operate. Additionally, this section presents the detailed stories of individual immigrant appellants who prevailed in direct appeals of their criminal convictions, thus altering their vulnerability to deportation.

Finally, Section IV addresses the Board's decision in Matter of Montiel, 26 I. & N. Dec. 555 (BIA 2015), which functions to protect the due process rights of immigrants in the one jurisdiction, the Ninth Circuit, that does not recognize the continued existence of the "finality" rule. Section IV clarifies that Montiel does not displace the requirement of finality in jurisdictions outside of the Ninth Circuit.

ARGUMENT

I. THE "FINALITY" RULE REMAINS IN FULL FORCE AFTER IIRIRA WITH RESPECT TO FORMAL JUDGMENTS OF GUILT, AS SHOWN IN THE LANGUAGE, STRUCTURE, AND HISTORY OF THE LAW

Since the promulgation of the "finality" rule by the U.S. Supreme Court in 1955 in Pino, and the Board's express affirmation of that rule in 1988 in Ozkok,[2] the Immigration and Nationality Act (the "INA") has precluded the removal of a non-citizen based on an underlying conviction unless and until his or her direct appeals of that conviction have been exhausted or

[2] In articulating this "finality" requirement, the Board cited approvingly to the Supreme Court's decision in Pino, and to a spate of case law from the various Courts of Appeals, including the Second Circuit. See id. (citing, inter alia, Marino v. INS, 537 F.2d 686 (2d Cir. 1976) (a person is not deemed to have been "convicted" of a crime under the INA until his conviction has attained a substantial degree of finality, and such finality occurs only when direct appellate review of the conviction "has been exhausted or waived") (citing Pino, 349 U.S. at 901); Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); Will v. INS, 447 F.2d 529 (7th Cir. 1971)).

waived. The Government, which for decades accepted that the "finality" rule is deeply entrenched in immigration law, now argues that IIRIRA abrogated the enshrined "finality" rule. But given IIRIRA's text, structure, and legislative history, this proposed interpretation cannot be reconciled with governing rules of statutory construction.

A. The Text And Legislative History Of IIRIRA Show That The 1996 Congress Modified The "Finality" Rule Only With Respect To Deferred Adjudications And Not With Respect To Formal Judgments Of Guilt

At the time Congress enacted IIRIRA in 1996, the "finality" rule was "well established in immigration law." Cardenas Abreu, 24 I. & N. Dec. at 798. Indeed, in codifying a definition of "conviction" in IIRIRA, Congress largely adopted the administrative definition the BIA set forth in its opinion in Ozkok in 1988 which, by its own terms[3] and as interpreted by the BIA and federal courts for nearly a decade afterward,[4] required that a conviction attain a requisite degree of finality—through exhaustion or waiver of direct appeals—before it could sustain immigration consequences.

When congressional legislation adopts language from decisional law, courts presume that Congress also intends to import the judicial and administrative interpretations of that language, absent a clear indication to the contrary. See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85-86 (2006) ("when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates . . . the intent to incorporate its . . . judicial interpretations as well"); Williams v. Taylor, 529 U.S. 420,

[3] "It is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived." Ozkok, 191 I. & N. Dec. at 553 n.7.

[4] See Montilla v. INS, 926 F.2d 162, 164 (2d Cir. 1991) (observing, post-Ozkok, that a "drug conviction is considered final and a basis for deportation when appellate review of the judgment—not including collateral attacks—has become final"); accord Wilson v. INS, 43 F.3d 211, 216-17 (5th Cir. 1995); White v. INS, 17 F.3d 475, 479 (1st Cir. 1994); Matter of Thomas, 21 I. & N. Dec. 20, 26 n.1 (BIA 1995).

434 (2000) ("When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary."); see also Saxbe v. Bustos, 419 U.S. 65, 74-76 (1974) (holding a "longstanding administrative construction [of the INA] is entitled to great weight" and cannot be "repealed sub silentio" by Congress).[5] Because Congress imported the specific language of its definition of a conviction arising from a formal adjudication "virtually verbatim" from the BIA's decision in Ozkok,[6] these customary interpretive presumptions govern. See Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 530-31 (1998) (Congress implicitly adopted the Supreme Court's well-established definition of terms regarding what constitutes "Indian country" when it used language "taken virtually verbatim from" prior case law).

In Ozkok, the BIA defined convictions arising from formal judgments of guilt like Respondent's here, and promulgated a separate three-pronged test for determining whether a "deferred adjudication" disposition—which is not at issue in the Respondent's case—constitutes a conviction for immigration purposes. With respect to formal adjudications, the BIA held that a conviction will be found if a "court has adjudicated [the person] guilty or has entered a formal judgment of guilt." Ozkok, 19 I. & N. Dec. at 551. With respect to deferred adjudications, which are dispositions in which a defendant typically avoids a formal judgment of guilt in

[5] See also Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 338 (1988) ("[W]e have recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that Congress at least acquiesces in, and apparently affirms, that [interpretation].") (internal quotation omitted); Lorillard v. Pons, 434 U.S. 575, 580-83 (1978) (Congress in adopting a new law normally can be presumed to have had knowledge of interpretation given to incorporated law, at least insofar as it affects the new statute).

[6] See Ozkok, 19 I. & N. Dec. at 551-52.

exchange for agreeing to certain probationary or diversionary conditions,[7] the BIA held that a conviction will be found only if three requirements are met:

> 1) a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
>
> (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service); and
>
> (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.

Id. at 551-52.

With respect to formal adjudications of guilt like Respondent's, straightforward comparison between the text of section 322 of IIRIRA (codified at INA § 101(a)(48)(A)) and Ozkok reveals that Congress adopted Ozkok's definition of conviction essentially verbatim. Compare Ozkok, 19 I. & N. Dec. at 551 ("[W]e shall consider a person convicted if the court has adjudicated him guilty or has entered a formal judgment of guilt.") with INA § 101(A)(48)(a) ("a formal judgment of guilt of the alien entered by a court").

Congress's only material modifications to Ozkok's definition of conviction pertain to deferred adjudication dispositions, and not to formal judgments of guilt. In legislating the test for whether a deferred adjudication is a conviction under the INA, Congress took Ozkok's

[7] See, e.g., Md. Code, Crim. Proc. Law § 6-220 (2012) ("Probation before judgment"); Fla. Stat. Ann. § 948.01 (West 2014) ("the court, in its discretion, may…stay and withhold the adjudication of guilt").

conviction definition for deferred adjudications as its starting point and then made the following changes: Congress 1) adopted the first element word-for-word; 2) omitted the parenthetical in the second element, which had enumerated examples of punishment, penalty and restraints on liberty; and 3) excised the third element entirely, which had required that an immediate judgment could be entered if the defendant violated the terms of his deferred adjudication deal "without the availability of further proceedings regarding the person's guilt or innocence of the original charge." Ozkok, 19 I. & N. Dec. at 551-52. It is clear that the lone portion of the Ozkok definition of conviction that IIRIRA did not adopt is the test for deferred adjudications. And thus, employing the applicable norms of statutory construction discussed above, it is apparent that in leaving the definition of a conviction arising from a formal judgment intact and undisturbed, Congress signaled its intent to preserve the associated requirement of finality, which had been long-recognized by both the Board and the federal courts of appeal. Indeed, as the Third Circuit observed in Orabi:

> Nothing in IIRIRA or its legislative history suggests Congress intended the phrase 'formal judgment of guilt' to be interpreted any differently from how it always had been interpreted prior to enactment of the statute. . . . The elimination of the finality provision for deferred adjudications, along with the failure to make any change in the language regarding direct appeals as of right . . . demonstrates Congress' intent to retain the finality rule for the latter category of appeals.

Orabi, 738 F.3d at 541 (citing Planes, 686 F.3d at 1039-40 (Reinhardt, J. dissenting from denial of rehearing en banc); Williams, 529 U.S. at 434)).

DHS's briefs advocating for the position that IIRIRA abolished the finality rule ignore these well-established norms of statutory construction in favor of an overly-literalistic application of the plain language rule—essentially arguing that because Congress does not expressly mention a finality requirement, it should be assumed that Congress intended to

vanquish it. Yet, the Board rejects such a simplistic plain language analysis, see Matter of C-T-L-, 25 I. & N. Dec. 341, 344 (BIA 2010) (whether the language is plain and unambiguous is "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"), and so does the Supreme Court. See Merrill Lynch, 547 U.S. at 85-86; Williams, 529 U.S. at 434. Thus, while DHS argues that Congress' silence with respect to finality implies that the finality requirement is extinguished, the converse is actually true—given the absence of any express indication of intent to eliminate the finality requirement, Congress is presumed to have carried it forward for convictions arising from formal adjudications.[8]

As the Third Circuit emphasized in Orabi[9], IIRIRA's legislative history confirms this interpretation that finality has been preserved. As the legislative history reveals, in deciding to codify a definition of "conviction," Congress in 1996 was concerned only that immigrants who had received deferred adjudication dispositions in their state criminal proceedings were experiencing different immigration consequences depending on the law of the state that imposed the disposition; specifically, immigrants were being spared the immigration consequences of a

[8] DHS's argument that that Congress used the allegedly limiting term "means" when defining "conviction" within the INA is also misguided, as use of the term "means" has no bearing on whether Congress imported the separate, well-established finality requirement. IDP does not argue that the definition of the term conviction should be broadened to include other forms of convictions—but instead, that for reasons discussed herein, Congress cannot be presumed to have excised the separate, overarching finality requirement, sub silentio. DHS's argument that Congress's use of the term "formal judgment of guilt," as opposed to "final judgment of guilt" evidences a Congressional intent to eliminate finality is also without merit. As shown herein, the phrase "formal judgment of guilt" was imported verbatim from the BIA's opinion in Ozkok, and thus necessarily carries with it its well-established administrative and judicial interpretations mandating that a conviction arising from a formal judgment attain finality before triggering adverse immigration consequences.

[9] "[T]he Congressional Conference Committee Report accompanying IIRIRA refers only to a modification of the treatment of deferred adjudications," Orabi, 738 F.3d at 541 (citing H.R. Rep. No. 104-828, at 224 (1996) (emphasis added), and therefore "does not disturb the longstanding 'finality rule' for direct appeals recognized in Ozkok." Id. at 542.

conviction in states whose criminal procedure laws required additional proceedings before entry of conviction after violation of the terms of a deferred adjudication, whereas immigrants suffered the immigration consequences of a conviction in states where such violations resulted in immediate entry of conviction. Thus, Congress sought to promulgate one uniform national standard that would apply across the board to all deferred adjudications. See H.R. Conf. Rep. No. 104-828, at 224 (1996) ("Joint Explanatory Statement"); H.R. Rep. No. 104-879, at 123 (1997) ("This will make it easier to remove criminal aliens, regardless of specific procedures in States for deferred adjudication or suspension of sentence.") (emphasis added). By eliminating only the third prong of Ozkok's test for deferred adjudication dispositions in the codification of a long-standing definition of "conviction" in IIRIRA, Congress signaled its specific intent to modify the immigration enforcement regime only so that "in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws." H.R. Rep. No. 104-828, at 224 (1996) (Conf. Rep.); see also H.R. Rep. No. 104-879, at 123 (1997).

Nowhere in the language Congress employed to define "conviction" in IIRIRA, however, is there a hint that Congress intended to upset the "finality" rule as it applies to formal adjudications of guilt. Ozkok's definition of "conviction" had clearly incorporated the "finality" rule as an essential requirement for a formal adjudication disposition to trigger negative immigration consequences. With IIRIRA's sole focus on Ozkok's deferred adjudication prong of the definition of "conviction," and with no alteration to the formal adjudication prong or any reference to the concept of finality, there can be no plausible inference that Congress intended to extinguish the finality requirement, which had been long-recognized by the Board and the federal courts. See Orabi, 738 F.3d at 541-42.

B. Congress Knows How To Extinguish Appellate Rights When It Intends To

Further, Congress has demonstrated that, in comparable situations, it is capable of expressly defining "conviction" in a manner that extinguishes appellate rights. For example, in enacting the Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, 101 Stat. 680, Congress defined the term "convicted" to include situations in which "a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending." 42 U.S.C. § 1320a-7(i)(1) (emphasis added). Likewise, in designating certain classes of people for whom debarment under the Federal Food, Drug, and Cosmetic Act (enacted in 1992) is mandatory, Congress provided that a person is convicted "when a judgment of conviction has been entered against the person by a Federal or State court, regardless of whether there is an appeal pending." 21 U.S.C.A. § 335a (l)(1)(A), P.L. 102–282, 106 Stat 149, 158 (emphasis added). Given that Congress had such clear language for foreclosing appellate review at its disposal when enacting IIRIRA, the absence of such language in Section 322's definition of "conviction" strengthens the conclusion that Congress did not intend to abrogate the "finality" rule.[10]

[10] Proposed amicus curiae IDP has recently seen DHS argue that interpreting the statutory term "conviction" to include the finality requirement will introduce unwanted delays in the removal process and conflict with an alleged purpose of IIRIRA to expedite certain categories of "undesirable" immigrants. This argument is both offensive and legally flawed, for several reasons. There are myriad motivating purposes behind the immigration laws, including family unity, see Nwozuzu v. Holder, 726 F.3d 323, 329 (2d Cir. 2013), protection from persecution, see INA § 208(a)(1) ("[a]ny alien who is physically present in the United States…may apply for asylum"), and provision of adequate due process to immigrants facing removal, see INA § 240(a)-(e) (establishing an extensive process for removal proceedings); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (affirming the due process rights of immigrants in the United States), Lora v. Shanahan, 804 F.3d 601, 606 (2d Cir. 2015) (same). Moreover, even to the extent DHS can identify certain sections of the INA that might be interpreted as evidencing a desire to streamline certain removal procedures, the existence of such provisions does not abrogate well-established norms of statutory construction discussed herein that make clear that the "finality" rule remains in force after IIRIRA, or subsume the protective immigration scheme that Congress has built over years, which includes the requirement of finality. Furthermore, a complaint by DHS that

C. BIA Precedent Strongly Supports The Conclusion That The Finality Rule Remains In Full Force After IIRIRA

Interpreting the finality requirement to persist is also consistent with the BIA's prior reasoning and decisions. A majority of BIA members in Cardenas-Abreu acknowledged the rule's continued viability either indirectly or expressly, in thoughtfully reasoned majority, concurring, and dissenting opinions. 24 I. & N. Dec. 795 (BIA 2009), vacated on other grounds, Abreu v. Holder, 241 F. App'x 59 (2d Cir. 2010).[11]

The lead majority in Cardenas-Abreu observed that the legislative history of IIRIRA by which Congress adopted the definition of the term "conviction" for immigration purposes gives "no indication of an intent to disturb" the well-established principle codified in Ozkok and traced to the U.S. Supreme Court in Pino that a person must waive or exhaust his or her direct appeal rights to have a final conviction. Cardenas-Abreu, 24 I. & N. Dec. at 798. Thus, the Board majority recognized that, taking into consideration this backdrop against which Congress was legislating, "a forceful argument can be made that Congress intended to preserve the long-standing requirement of finality for direct appeals as of right in immigration law." Id. (Malphrus, for the lead majority, joined by Osuna, Holmes, Filppu and Mullane).

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the "finality" rule at times delays the institution of removal proceedings ignores the centrality of the finality requirement in protecting individuals against removal for convictions that are legally unsound (see infra Part III). To the extent DHS specifically complains of delays related to immigrants who may have sought leave to pursue late-filed appeals, such complaints likewise ignore the express instruction of the Second Circuit Court of Appeals—the jurisdiction in which Respondent's appeal arises—that there is no difference in timely-filed and accepted late-filed appeals of criminal convictions. Abreu v. Holder, 378 F. App'x 59, 61-62 (2d Cir. 2010). DHS's complaints about appeals that have not been perfected similarly ignore the "finality" rule's comprehensive prohibition on deportation based on direct appeals of formal adjudications of guilt.

[11] Because there was a discrete issue in dispute in Cardenas-Abreu as to the effect of a late-reinstated appeal under New York law, 24 I. & N. Dec. at 798, the majority did not need to expressly reach the underlying question as to the viability of the "finality" rule, but nevertheless signaled their strongly held view that the "finality" rule remains in effect after IIRIRA.

Concurring in the result, Board Member Grant wrote separately to emphasize that the finality rule remained viable in the wake of IIRIRA with respect to formal judgments of guilt that did not involve late filed appeals. Id. at 802-03 (Grant, concurring) ("For the reasons cogently stated in the dissent, I would find that the 'finality' requirement does still apply to cases where a direct appeal is pending or direct appeal rights have not been exhausted.").

Further, writing for herself and five other members of the Board, Member Greer provided a thorough treatment of the origin and history of the finality rule as well as the judicial opinions interpreting the definition of the term conviction as codified in IIRIRA, and concluded that the finality rule remains in effect. Id. at 814 (Greer, dissenting, joined by Neal, Miller, Hess, Adkins-Blanch and Wendtland) ("Given that Congress chose to adopt Ozkok, except for its third prong addressing a specific category of deferred adjudications, I conclude that Congress was aware of and accepted the decisions of the Supreme Court, the United States courts of appeals, and this Board underlying and affirming Ozkok, with regard to finality.").[12] Only two members

[12] Additionally, as Board Member Greer explained in the dissenting opinion in Cardenas-Abreu, if Congress had wished in IIRIRA to eliminate the general requirement of "finality" for removal purposes, "it presumably would have done so uniformly throughout the Act, rather than leaving finality intact in other provisions." Id. at 820 (Greer, dissenting) (citing examples of provisions of the INA that demonstrate Congress' intent to preserve the "finality" requirement throughout: INA § 237(a)(2)(D) (prescribing removal of foreign nationals convicted of certain national security crimes, including espionage, sabotage, and political assassinations, but requiring finality); INA § 238(c)(3)(A)(iii) (empowering federal district courts to enter judicial orders of removal for certain aggravated felony convictions concurrent with criminal sentencing, but staying execution of such orders pending completion of direct appellate review of the convictions); INA § 241(a)(4)(B) (authorizing the removal of individuals convicted of nonviolent offenses prior to completion of their criminal sentences, but requiring finality)). As Board Member Greer recognized, because it is a "fundamental canon of statutory interpretation" that a statute must be read as an integrated and coherent whole," FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), interpreting IIRIRA to have eliminated finality in INA § 101(a)(48), despite its persistence elsewhere, would be "impermissible." Cardenas-Abreu, 24 I. & N. Dec. at 820-21 (Greer, dissenting).

of the Board held that IIRIRA eliminated the finality rule. See id. at 803-810 (Pauley, concurring, joined by Cole).

A conclusion that the finality rule has survived IIRIRA is also consistent with post-IIRIRA Board precedent regarding vacated convictions. In a long line of cases extending post-IIRIRA, both the Board and numerous federal Courts of Appeals have consistently recognized that convictions that have been overturned for substantive or procedural reasons should not serve as a basis for removal. See Matter of Pickering, 23 I. & N. Dec. 621, 624 (BIA 2003) ("[I]f court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a 'conviction' within the meaning of section 101(a)(48)(A)."), rev'd on other grounds sub nom. Pickering v. Gonzales, 454 F.3d 525 (6th Cir.), opinion amended and superseded, 465 F.3d 263 (6th Cir. 2006); Matter of Adamiak, 23 I. & N. Dec. 878, 881 (BIA 2006); In re Rodriguez-Ruiz, 22 I. & N. Dec. 1378, 1379-80 (BIA 2000); see also Saleh v. Gonzales, 495 F.3d 17, 24 (2d Cir. 2007). A holding here that the "finality" rule has been abolished would effectively prevent immigrants like Respondent from pursuing efforts to overturn erroneous convictions through the direct appellate process[13] and simply cannot be reconciled with the case law that firmly establishes that a conviction that has been vacated on the merits—often as a result of that same direct appellate process—defeats deportation.

D. The Most Recent Federal Circuit Court To Address This Issue Decisively Held That The "Finality" Rule Still Applies, And The Only Federal Circuit To Have Abandoned The "Finality" Rule Did So Over Vigorous Dissent

Recent Circuit Court jurisprudence likewise strongly supports interpreting IIRIRA to have preserved the "finality" requirement for convictions arising from formal judgments, like Respondent's. As noted supra, the Third Circuit expressly held in a precedential decision in

[13] See Sections II, III, infra (describing difficulties faced by immigrants seeking to overturn wrongful convictions and obtain reentry after being removed from the United States).

2014 that the "finality" rule for direct appeals from formal judgments is in full force after IIRIRA's codification of the definition of "conviction," Orabi, 738 F.3d at 543.[14]

The Orabi court examined IIRIRA's text and legislative history at length and reasoned that in importing Ozkok's definition of a conviction arising from a formal judgment nearly verbatim, while making changes solely to the definition of convictions arising from deferred adjudications, Congress intended to retain the well-established "finality" rule for appeals from formal judgments. Orabi, 738 F.3d at 540-43. Additionally, proposed amicus curiae IDP has seen DHS consistently mischaracterize a group of decisions of the federal Courts of Appeals as having abandoned the "finality" rule; the Orabi court methodically reviewed these cases and rejected DHS' characterization. Id. at 542-43. The Orabi court observed that none of these cases addressed the "finality" rule with respect to formal judgments of guilt, as they either arise in the deferred adjudication context (and thus do not pertain to finality in the formal judgment setting), involve collateral attacks on judgment which historically have not been viewed to suspend the finality of conviction, or are otherwise inapposite or reference finality in "dicta." Id. at 542-43 (distinguishing cases). For instance, contrary to DHS's representations, neither the Seventh nor the Tenth Circuit has dispensed with the "finality" rule for direct appeals as of right. In Montenegro v. Ashcroft, 355 F.3d 1035 (7th Cir. 2004), the respondent did not have a pending direct appeal at the time the Immigration Judge entered the removal order. Id. at 1035 (noting there were a certiorari petition and a collateral petition pending). Likewise, United States v. Saenz-Gomez, 472 F.3d 791 (10th Cir. 2007) arose in the context of a sentencing enhancement proceding rather than an immigration removal proceeding, and at the time of the court's decision the appellant's direct appeals had already been denied by New Mexico's highest court. Id. at

[14] As DHS has admitted, the Sixth Circuit has also strongly hinted that the finality rule remains in effect. United States v. Garcia-Echaverria, 374 F.3d 440, 445-46 (6th Cir. 2004).

794. See also Waugh v. Holder, 642 F.3d 1279, 1284 (10th Cir. 2011) (involving instances of collateral attacks on judgment, which historically have not been viewed to suspend the finality of a conviction); United States v. Adame-Orozco, 607 F.3d 647, 649-50 (10th Cir. 2010) (same); Moosa v. INS, 171 F.3d 994, 1009 (5th Cir. 2009) (holding only that the "finality" rule has been eliminated as to deferred adjudications); Griffiths v. INS, 243 F.3d 45, 52-54 (1st Cir. 2001) (finding that finality was not required for a deferred adjudication but expressly leaving open the possibility that Congress intended to preserve the finality requirement for convictions arising from formal adjudications).

The Second Circuit's discussion of "finality" in Puello v. Bureau of Citizenship & Immigration Servs., 511 F.3d 324 (2d Cir. 2007), which DHS often cites in an effort to portray the Second Circuit as interpreting IIRIRA to have eliminated the finality requirement, was likewise at most plainly "dicta," as the Second Circuit itself, the Third Circuit, and the Board have recognized. Ramirez v. Holder, 447 F. App'x 249, 251 n.1 (2d Cir. 2011) (noting that Puello is not binding)[15]; Orabi, 738 F.3d at 542 (observing that statements regarding finality in Puello were dicta); Cardenas-Abreu, 24 I. & N. Dec. at 797 n.3 (noting that Puello related to the effective date of a conviction and did not involve a challenge based on the appeal of a conviction). Indeed, in decisions more recent than Puello, the Second Circuit has effectively assumed that the "finality" rule remains in effect. See, e.g., Walcott v. Chertoff, 517 F.3d 149, 155 (2d Cir. 2008) (noting that "conviction was not deemed final for immigration purposes until . . . direct appellate review of it was exhausted") (citing Marino, 537 F.2d at 691–92).

[15] In the decision that was the subject of judicial review in Ramirez, the Board itself followed the "finality" rule and expressly agreed that a criminal conviction "is final . . . once a party has exhausted all direct appeals of right." 447 F. App'x at 251. The issue before the Board and the Second Circuit was whether the foreign national had established that a direct appeal was actually pending. Id.

To date, the Ninth Circuit stands alone in its precedent decision eliminating the "finality" rule for direct appeals from formal adjudications. Planes v. Holder, 652 F.3d 991, 995 (9th Cir. 2011). Yet, Planes was a deeply fractured decision. Seven judges, including Chief Judge Kozinski, dissented from the denial of the petition for rehearing en banc. 686 F.3d at 1036-41 (Reinhardt, J., dissenting) (abrogation of the finality rule was "not what the law requires, and not what Congress intended"; rather, a proper examination of the language, legislative history and structure of IIRIRA shows that Congress "clearly expressed its intent to preserve the longstanding rule that a conviction is not final for immigration purposes until the immigrant has exhausted or waived his direct appeal as of right.").

II. THE "FINALITY" RULE PROTECTS ESTABLISHED APPELLATE REMEDIES AND AVOIDS POTENTIALLY SERIOUS DUE PROCESS AND FAIRNESS PROBLEMS

Interpreting IIRIRA to have eliminated the "finality" rule would threaten established due process protections and raise serious concerns about the fair administration of this Nation's criminal and immigration laws. Permitting deportations based on convictions that are still pending direct appellate review would: 1) effectively deprive many immigrants of their ability to meaningfully contest wrongful convictions, in derogation of established appellate rights; and 2) exacerbate the serious legal and practical hurdles deported immigrants face in trying to return to the United States after prevailing in immigration-determinative legal challenges.

A. Federal Law And The Laws Of Almost Every State, Including New York, Enshrine The Right To An Appeal Of A Criminal Conviction

Under longstanding Supreme Court precedent, a rule that effectively frustrates a person's ability to pursue a direct appeal that is safeguarded by law may itself constitute a violation of due process. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 429-30 & n.5 (1982) (as access to the courts is an entitlement, deprivation of that access may violate due process). Further, due

process requires that appellate procedures, once established, be implemented in a fair and non-discriminatory fashion. See, e.g., Douglas v. California, 372 U.S. 353, 356-58 (1963) (equal protection required indigent defendants be granted right to counsel on appeals of right).[16]

"Forty-seven states and the federal government provide for at least one direct appeal as-of-right to all those convicted under a criminal statute." Ashwin Gokhale, Finality of Conviction, the Right to Appeal, and Deportation Under *Montenegro v. Ashcroft:* The Case of the Dog that Did Not Bark, 40 U.S.F. L. Rev. 241, 263 (2005) (citing U.S. Dep't of Justice, Bureau of Justice Statistics, State Court Organization 1998, at 173-75 (2000)). This includes the law of New York, where this case arises. See N.Y. Crim. Proc. Law § 450.10; People v. Hernandez, 711 N.E.2d 972, 975 (N.Y. 1999) ("A defendant may appeal to an intermediate appellate court as of right from a judgment") (internal quotation omitted). This commitment to the appellate process has withstood the "tough on crime" trends of recent decades, and represents an "enduring consensus on the part of state legislatures that providing a right of direct appeal is essential in determining who is guilty and who is innocent, an interest that cuts to the foundation of criminal law and procedure." Gokhale, supra, at 264. Moreover, indigent criminal defendants pursuing direct appeals are typically entitled to appointed counsel on appeal as a matter of both federal and state law. See, e.g., Douglas, 372 U.S. at 353; People v. Gonzalez, 47 N.Y.2d 606, 610 (N.Y. 1979) ("The right of an indigent criminal defendant to the services of counsel on appeal is established by a long line of decisions of the Supreme Court and of this court").

As shown herein, permitting deportations before immigrants have had the opportunity to waive or exhaust direct appeals that are guaranteed to them as of right can substantially frustrate,

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[16] These due process protections apply equally to immigrants upon their entry into this country. See Zadvydas, 533 U.S. at 693 ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the [U.S.], including aliens, whether their presence here is lawful, unlawful, temporary, or permanent . . ..").

or in some instances, effectively extinguish, their ability to exercise these established rights. Elimination of the finality rule would thus present serious due process problems and would frustrate important justice and legitimacy interests undergirding the appellate process.

B. Deportation Substantially Impairs, And In Some Instances Eviscerates, The Ability of Immigrants To Maintain Criminal Appeals

As courts have recognized, there are instances where an immigrant's criminal appeal will be dismissed by sheer virtue of his or her deportation. For example, a New York intermediate appellate court dismissed the appeal of an immigrant defendant in People v. Serrano because, in that court's view, his appellate remedy would have been a remand to the trial court, and the "defendant's continued legal participation would be necessary, which is not possible because he has been deported." 45 Misc.3d 69, 72 (App Term, 2nd Dep't 2014), perm. app. granted, 25 N.Y.3d 953 (N.Y. 2015).[17] The Fifth Circuit also dismissed the appeal of the immigrant defendant in U.S. v. Rosenbaum-Alanis because his deportation precluded him from appearing in court for a resentencing proceeding. 483 F.3d 381, 383 (5th Cir. 2007).

Even where an immigrant is permitted to maintain a criminal appeal from outside the United States following deportation, his or her ability to litigate from abroad is likely to be substantially impaired, as courts have recognized. See, e.g., Thapa v. Gonzales, 460 F.3d 323, 331 (2d Cir. 2006) (recognizing the significant difficulties in pursuing an effective appeal from abroad). For instance, a noncitizen who has been deported may well lose the ability to pay counsel to continue pursuing criminal or immigration appeals and may face insurmountable logistical obstacles in attempting to appear pro se from abroad. Among other hurdles, indigent

[17] IDP submits that the intermediate appellate court's decision in Serrano, which is under review by New York State's highest court, should be overturned, but also notes that the decision highlights the risk that deported immigrants will not be able to pursue their criminal appeals if the "finality" rule is not maintained.

defendants seeking to pursue criminal appeals pro se after deportation would likely find it exceptionally hard to navigate the U.S. court system, obtain timely notice of docket entries, meet filing deadlines and comply with complex filing procedures, let alone appear for oral argument. Cf., Lopez-Chavez v. Ashcroft, 383 F.3d 650, 651 (7th Cir. 2004) (noting the "serious or fatal difficulty" in pressing immigration appeals from outside the United States); Dorelien v. U.S. Att'y Gen., 317 F.3d 1314, 1325 (11th Cir. 2003) (commenting on the "Herculean" task faced by immigrants seeking to pursue appeals after removal).

Because the mere fact of deportation can substantially impair or extinguish the ability of immigrants to exercise established appellate rights, it would present serious due process problems to interpret IIRIRA to allow for deportations before immigrants have had a chance to exhaust or waive direct appeals. See Logan, 455 U.S. at 429-30 & n.5. The doctrine of constitutional avoidance commands that such a course should be avoided both as a matter of fairness and of statutory interpretation. Zadvydas, 533 U.S. at 699 (construing an immigration statute in a manner that "avoid[ed] a serious constitutional threat"); Lora, 804 F.3d at 614 (noting the INA must be construed in a manner that "avoid[s] serious constitutional concerns."). See also Empire Health Choice Assurance, Inc. v. McVeigh, 396 F.3d 136, 144 (2d Cir. 2005), aff'd, 547 U.S. 677 (2006) ("we assume [Congress] legislates in the light of constitutional limitations") (citations omitted). Administrative law judges are bound by the same obligation to avoid constitutional issues where feasible. See Matter of Abdelghany, 26 I. & N. Dec. 254, 364 (BIA 2014).

C. Deported Immigrants Face Tremendous Barriers To Returning To The United States Even After Prevailing In Immigration-Determinative Legal Challenges

Even where a deported immigrant prevails in the appeal of a predicate conviction, there remain steep—often insurmountable—obstacles to reentering the United States. The regulatory

bars to post-removal motions to reopen removal proceedings will categorically bar many immigrants from returning to the United States. Given present Circuit splits, the application of these bars will be impermissibly arbitrary, as it will depend on the law of the jurisdiction where the individual immigrant's removal proceedings happened to take place. Even where the regulatory bars are inapplicable, the Government has not created a reliable, navigable process for deported immigrants to return to the United States, and so deportation, de facto, becomes permanent.

Two regulatory provisions impose limits on the BIA's jurisdiction to adjudicate motions to reopen removal proceedings for individuals who have been deported from the United States. See 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1).[18] And the INA imposes further time, number, and content requirements on motions to reopen. See INA §§ 240(c)(7)(A)-(C), 240(b)(5)(C)(ii). Where these requirements are not and/or cannot be met, the ability of a deported individual to reopen removal proceedings and return to the United States will depend on idiosyncratic factors that vary highly depending on the law of the Circuit in which the immigrant originally faced removal proceedings. For example, exceptions to the statutory limitations on motions to reopen depend on the availability of equitable tolling, which varies across the federal Courts of Appeals. Compare Pervaiz v. Gonzales, 405 F.3d 488, 490 (7th Cir. 2005) with Abdi v. U.S. Atty. Gen., 430 F.3d 1148, 1150 (11th Cir. 2005). While individuals can argue the regulatory bars to post-deportation motions to reopen are invalid, the fate of such motions likewise differs widely across jurisdictions.[19] Further, judicial review of the BIA's discretionary judgments of sua sponte

[18] See also Matter of Armendarez-Mendez, 24 I. & N. Dec. 646, 648 (BIA 2008) ("We have reiterated… in an unbroken string of precedents extending over 50 years…that reopening is unavailable to any alien who departs the United States after being ordered removed.").

[19] Compare Perez-Santana v. Holder, 731 F.3d 50 (1st Cir. 2013) (abrogating regulatory bar) with Zhang v. Holder, 617 F.3d 650 (2d Cir. 2010) (upholding regulatory bar in part).

motions to reopen is generally unavailable, leaving deported immigrants without recourse in federal court.[20] In effect, many immigrants who are removed find their individual reopening decisions impermissibly subject to the whims of geography and chance. Judulang v. Holder, 132 S.Ct. 476, 487 (2011) ("[D]eportation decisions cannot be made a '"sport of chance."' (quoting Di Pasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947) (Learned Hand, J.)).

And even where the post-departure bar cannot be used to categorically deny motions to reopen removal proceedings following deportation, the recent DHS procedures designed to enable the return of successful litigants suffer from serious flaws. See Nancy Morawetz, Convenient Facts: *Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts, 88 N.Y.U. L. Rev. 1600, 1643 & n.226 (2013) (citing U.S. Immigration & Customs Enforcement, Policy Directive 11061.1 (Feb. 24, 2012)). Indeed, as the Solicitor General was forced to acknowledge to the Supreme Court, the Executive Branch has not had an effective mechanism to return a removed immigrant to the U.S. if that immigrant subsequently prevails in his or her petition for judicial review of the removal order. See id. at 1641-44.

DHS's publicly released guidance regarding the return of deported immigrants to the United States makes clear that deported immigrants have no automatic right to reentry even where they have overcome substantial odds to overturn an erroneous removal order, and instead must face a long, burdensome and highly discretionary process.[21] A deported immigrant's return

[20] See, e.g., Luis v. INS, 196 F.3d 36 (1st Cir. 1999).

[21] Attached at Exhibit A is a copy of a declaration prepared by the National Immigration Project of the National Lawyers Guild and New York University Immigrant Rights Clinic regarding the return of deported immigrants who have prevailed in immigration-determinative legal challenges. The Declaration was prepared after review of documents obtained through Freedom of Information Act ("FOIA") litigation and background materials. See Ex. A, Copy of Declaration in Support of Motions for Stays of Removal ¶ 10 (hereinafter "Declaration"). The declaration is also available at

to the United States requires that he first reach out to ICE, that ICE make a discretionary decision as to whether to authorize travel, that the Department of State ("DOS") through local embassies issue travel papers, and that Customs and Border Patrol ("CBP") make the discretionary decision to grant parole and admit the person into the country.[22] Within this matrix of agencies spread between the United States and country of deportation, there is tremendous opportunity for the complex machinery necessary to facilitate successful return to break down. See Ex. A, Declaration ¶ 17, n. 23 (for example, successful return to the United States depends on coordinated action between ICE and the DOS's embassies, and yet the DOS's Foreign Affairs Manual contains no formal policy whatsoever regarding the return of deportees, and the only formal guidance issued by DOS to immigrants seeking return directs them to contact the ICE Public Advocate which is a position that no longer exists).

The DHS procedures lodge unbounded discretion in administrative officers to determine whether the government deems the noncitizen's return necessary;[23] create no enforceable rights

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https://nationalimmigrationproject.org/PDFs/practitioners/our_lit/foia_dhs_return/2015_25Nov_Dec_Supp_of_Stay_Motions.pdf (last visited Feb. 24, 2016).

Attached at Exhibit B are select excerpts of an appendix of documents in support of the Declaration. The Appendix contains documents obtained through FOIA litigation, publicly available documents, letters and e-mails from immigration advocates representing immigrants seeking to return to the United States after deportation, and relevant cases from the immigration agencies and federal courts. See Ex. B, Selected Excerpts of Copy of Appendix to Declaration in Support of Motions for Stays of Removal (hereinafter "Appendix"). The full appendix is available at https://nationalimmigrationproject.org/PDFs/practitioners/our_lit/foia_dhs_return/2015_15Nov_Dec_Supp_of_Stay_Motions_Append.pdf (last visited Feb. 24, 2016).

[22] See U.S. Immigration and Customs Enforcement, Directive 11061.1: Facilitating the Return to the United States of Certain Lawfully Removed Aliens (February 24, 2012) (hereinafter "ICE Directive 11061.1"), available at https://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf (last visited Feb. 2, 2016).

[23] Ex. A, Declaration ¶ 20, n. 27-28; see also, e.g., ICE Directive 11061.1.

for the removed noncitizen wrongly denied return;[24] paradoxically require such noncitizens to obtain a valid passport prior to return and preclude using the travel documents that facilitated deportation to facilitate return;[25] and do not purport to cover the costs of return.[26] As one court has found, "[f]or many indigent aliens, the financial burden of removal may, as a practical matter, preclude effective relief." Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., No. 11-CV-3235, 2014 WL 6850977, at *5 (S.D.N.Y. Dec. 3, 2014). The procedures utterly disregard the risks faced by those who fear persecution in the country of deportation and face substantial danger while they wait for their appeals to resolve. Ex. A, Declaration ¶¶ 24-25 and infra Part III.B.iii (detailing the case of a man who had been severely persecuted in Jamaica, and for whom deportation while his ultimately successful criminal appeal was pending could have resulted in further persecution or even death).

Finally, the Government has not expressly agreed that a foreign citizen is legally entitled to pursue relief at the Immigration Court while physically located abroad. See Tianyin Luo and Sean Lai McMahon, Victory Denied: After Winning On Appeal, An Inadequate Return Policy Leaves Immigrants Stranded Abroad, 19 Bender's Immigration Bulletin 1061, 1065-66 (2014).[27] As a matter of practice, many Immigration Judges refuse to entertain an application for relief

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[24] Ex. A, Declaration ¶ 21, n. 29; see also, e.g., ICE Directive 11061.1.

[25] Ex. A, Declaration ¶ 16, n. 21.

[26] Ex. A, Declaration ¶ 12, n. 12-14; see also, e.g., Ex. B, Appendix, Transmittal Letter from Thuylieu T. Kazaizan, U.S. Immigration and Customs Enforcement Associate Legal Advisor (January 27, 2012) (internal citations omitted).

[27] For instance, one lawful permanent resident who had lived in the United States for more than 30 years and served honorably in Vietnam was removed as an alleged aggravated felon. Subsequent to his removal to Haiti, the Ninth Circuit held that he was not subject to removal. Unemployed, he could not afford a plane ticket to return home. DHS contested the jurisdiction of the Immigration Court to grant relief while he was abroad. It took six years and "extraordinary advocacy by pro bono lawyers" before he was flown back to the United States and had his former immigration status restored. Id. at 1066.

from an applicant who is outside the United States. Id. at 1068-69 (providing real life examples). Thus, even an immigrant who surmounts the significant hurdles to litigating an appeal from abroad and ultimately demonstrates his or her innocence on the underlying criminal charges may still find it difficult or impossible to undo the erroneous deportation order and return to the United States.

IIRIRA should not be construed to allow for the removal of potentially innocent persons in a manner that infringes upon established criminal appellate rights, and which may frustrate or entirely vitiate an immigrant's opportunity to reverse improper removal orders and obtain reentry to the United States. Courts have traditionally interpreted this Nation's immigration laws to avoid visiting the harsh penalty of deportation in the absence of express statutory command, and this principle remains firmly in place after IIRIRA. See, e,g., INS v. St. Cyr, 533 U.S. 289, 320 (2001); Padilla, 559 U.S. at 365-68 (describing deportation as a "particularly severe" and "drastic" penalty, and acknowledging that, in many instances, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence"). There is no reason to deviate from this principle here. The "finality" rule properly preserves the Government's ability to remove individuals convicted of crimes, because individuals whose convictions are ultimately affirmed on appeal are still subject to removal. But without the "finality" rule, potentially innocent persons are unnecessarily exposed to the harsh, and, as a practical matter, potentially irreversible, fate of removal. Such a process and harsh result not only threatens established due process protections, but is at odds with our Nation's cherished traditions of fair judicial administration.

III. CONTINUED RECOGNITION OF THE "FINALITY" RULE PROMOTES THE IMPORTANT ERROR-CORRECTING AND LEGITIMIZING FUNCTIONS OF THE APPELLATE PROCESS

The appellate process plays a critical function in the criminal justice system, both as a check on faulty convictions, and as a means of promoting individual and societal confidence in the system's fairness and integrity. These error-correction and legitimizing functions are especially critical in this era in which the criminal courts and the indigent representation system —to which many immigrants facing deportation are subject—are operating under severe strains. To permit deportations before the appellate process has run its course will result in deportations based on defective convictions and deny constitutionally protected equal access to justice for immigrants in the criminal justice system.

A. The Appellate Process Provides Needed Oversight In The Criminal Justice System

Leaders across the federal government recognize the need for oversight and reform within the criminal justice system. President Obama has noted that the system "remains particularly skewed by race and by wealth" and is in dire need of reform.[28] Attorneys General Loretta Lynch [29] and Eric Holder[30] have spoken about the millions of people whose

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[28] See President Obama: "Our Criminal Justice System Isn't as Smart as It Should Be" available at https://www.whitehouse.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be (last visited Jan. 27, 2016).

[29] "It was strikingly sad that on the 50th anniversary of Gideon, we were talking about cuts to legal aid services, we were talking about cuts to essential services at both the federal and state levels that would have meant more people of poverty did not have the ability to have their essential rights vindicated." Attorney General Loretta E. Lynch Delivers Remarks at White House Convening on Incarceration and Poverty, available at http://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and (last visited Jan. 27, 2016).

[30] "Across the country, public defender offices and other indigent defense providers are underfunded and understaffed. Too often, when legal representation is available to the poor, it's rendered less effective by insufficient resources, overwhelming caseloads, and inadequate oversight…. Millions of Americans still struggle to access the legal services that they need and

constitutional rights are routinely violated due to the poor quality of the Nation's indigent defense system. For years the DOJ has actively participated in lawsuits in state and federal courts advocating for improvements in indigent defense in the criminal justice system. See Matt Apuzo, Justice Dept. Pushes Civil Rights Agenda in Local Courts, N. Y. Times, Aug. 19, 2015.

Congress also recognizes the problems that plague the criminal justice and indigent defense systems, and the need for enhanced oversight and representation. The prepared statement issued by Senator Richard Grassley, Chairman of the Committee on the Judiciary—a bipartisan entity—at the May 13, 2015 committee meeting, "Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors," is illustrative:

> [M]any states are not providing counsel as the Constitution requires. It is a widespread problem. In reality, the Supreme Court's Sixth Amendment decisions regarding misdemeanor defendants are violated thousands of times every day. No Supreme Court decisions in our history have been violated so widely, so frequently, and for so long. Misdemeanor convictions give rise to other collateral consequences…. In many instances, misdemeanor defendants are unaware of those consequences when they enter into guilty pleas.[31]

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deserve—and to which they are constitutionally entitled." Attorney General Eric Holder, Remarks at the American Bar Association's National Summit on Indigent Defense, available at http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html (last visited Jan. 27, 2016).

[31] Prepared Statement by Senator Richard Grassley of Iowa, Chairman, Senate Judiciary Committee, Hearing on "Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors," May 13, 2015, available at http://www.judiciary.senate.gov/imo/media/doc/05-13-15%20Grassley%20Statement1.pdf (last visited Jan. 27, 2016). It is well-established that misdemeanor convictions may trigger deportability. See, e.g, Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2009).

Senator Patrick Leahy, Ranking Member of the Committee on the Judiciary, echoed, "The consequences of . . . convictions can be life altering. . . . The dominos continue to fall and what was once a stable life is upended."[32]

Courts across the country are fielding lawsuits against states and localities for constitutional deficiencies in provision of indigent defense services. See, e.g., Yarls et al. v. Bunton et al., No. 3:16-cv-31, [Dkt. No. 1] (M.D.L.A. Jan. 14, 2016) (class action lawsuit filed by indigent criminal defendants against Orleans Parish Public Defenders Office and Louisiana Public Defender Board alleging violations of Sixth and Fourteenth Amendments for their refusal to provide representation).[33] And studies have routinely chronicled the mounting pressures on, and failings of, indigent defense systems throughout the country.[34] In 2009, for example, the National Right to Counsel Committee concluded a nationwide investigation into the adequacy of assigned counsel in criminal and juvenile delinquency cases, and found that indigent defense systems throughout the country were struggling, and in many instances, "truly failing," due to funding shortfalls, excessive caseloads, and other problems, resulting in many defendants

[32] Prepared Statement by Senator Patrick Leahy (D-Vt.), Ranking Member, Senate Judiciary Committee, Hearing on "Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors," May 13, 2015, available at http://www.judiciary.senate.gov/imo/media/doc/05-13-15LeahyStatement.pdf (last visited Jan. 27, 2016).

[33] See also Philips et al. v. State of California et al., No. 15 CE CG 02201, [Dkt. No. 1] (Cal. Super. Ct. Fresno Cnty. Jul. 14, 2015) (complaint against state and county officials for failure to maintain an effective indigent defense system).

[34] See, e.g., Report of the National Right to Counsel Committee, Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel, at 2, and Chapter 2 (2009), available at http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf (last visited Jan. 27, 2016).

pleading guilty to or being convicted of crimes without constitutionally-mandated effective representation of counsel.[35]

In light of these significant pressures on the criminal justice and indigent defense systems at the trial court level, the appellate process assumes an especially vital role—both as a mechanism for correcting errors, and as a means of instilling confidence in the fairness and integrity of the system. The "finality" rule protects the opportunity of immigrants to seek to challenge wrongful convictions that would otherwise lead to erroneous and potentially irreversible deportation, and does so without compromising the Government's ability to remove individuals whose convictions ultimately withstand appellate scrutiny. In so doing, the "finality" rule serves an additional important salutary function by providing individual and societal assurance that the legal process has been fair. This is especially important where due process and legal representation at the trial court level is unreliable and often poor.

B. The "Finality" Rule Prevents The Unjust Deportation Of Individuals Based On Invalid Convictions And Sentences, As Illustrated By The Stories Of Individual Immigrants Who Prevailed In The Direct Appeals Of Their Criminal Convictions

By speaking with appellate defenders throughout New York, IDP gathered stories about individual immigrants whose convictions or sentences were reversed by criminal appellate courts after thorough review. The appellate victories in these cases were immigration-determinative, preventing two individuals from mandatory deportation, and preventing a third individual from categorical ineligibility from protected status in this country. IDP respectfully submits these

[35] Id. See also National Association of Criminal Defense Lawyers, *Gideon* at 50: A Three-Part Examination of Indigent Defense In America (March 2014), available at https://www.nacdl.org (last visited Jan. 27, 2016) (Revealing myriad problems such as states using unrealistic and arbitrary guidelines to determine financial eligibility for assigned counsel, a practice of impermissibly requiring eligible defendants to pay fees, and "staggeringly low" pay for assigned counsel that substantially reduces the number of attorneys willing to represent indigent defendants and diminishes the overall quality of representation).

individuals' stories to illuminate for this Court both the "finality" rule's vitality toward guarding against deportation consequences based on legally infirm criminal dispositions, and the deep flaws with DHS's mischaracterization of the appellate process as a mere tool employed by immigrants to delay and evade removability

i. Mr. J-G[36]

Mr. J-G spent 11 years in New York State prison before an appellate court sustained the direct appeal of his criminal conviction and dramatically changed the course of his life. Mr. J-G, a longtime lawful permanent resident, came to the United States when he was three years old. At the time of his arrest in New York City—his home of many years—he was 40 years old, operated a small business and was living with his U.S. citizen wife and children. Mr. J-G was charged in New York County with money laundering, criminal possession of a controlled substance in the first degree, and criminal possession of a controlled substance in the third degree. It was alleged that he constructively possessed cocaine.

A first jury acquitted Mr. J-G of money laundering but could not reach a verdict on the counts charging possession of cocaine. He was re-tried, and a second jury convicted Mr. J-G of both drug possession counts. He was sentenced to an aggregate prison term of 25 years to life. The Criminal Appeals Bureau of The Legal Aid Society of New York City represented Mr. J-G in his direct appeal to the New York Appellate Division, First Judicial Department.

The appellate court determined that the trial court judge had infringed upon Mr. J-G's constitutional rights to present a defense and to confront the witnesses against him and ordered a

[36] Information about Mr. J-G's case is available at the office of his defense counsel, The Legal Aid Society of New York City, and was obtained by IDP through communication with his defense counsel. "Mr. J-G" is a pseudonym and is used here to protect this individual's privacy.

new trial. At his third trial, the jury acquitted Mr. J-G of all charges. He was released from prison with no criminal record. The acquittal extinguished any basis for removal.

ii. Mr. K-A[37]

Mr. K-A immigrated to the United States from Nigeria and became a lawful permanent resident in his early twenties. When he was arrested in Kings County, New York in 2006, he was husband to a U.S. citizen wife and step-father to a U.S. citizen step-son. He was arrested and charged with grand larceny for using a credit card that was not his to purchase a mattress. This was Mr. K-A's first and only arrest.

Mr. K-A pleaded guilty to grand larceny in the fourth degree with a sentence of probation, and was then re-sentenced to one year in prison after he was found to have violated the terms of his probation. DHS routinely argues that a sentence of one year or longer renders a New York grand larceny conviction a theft offense aggravated felony. See INA § 101(a)(43)(G). With an aggravated felony conviction, Mr. K-A would be ineligible to apply for discretionary cancellation of removal, despite his close ties to the United States. See INA § 240A(a)(3).

On direct appeal to the New York Appellate Division, Second Department, Mr. K-A was assigned a public defender from Appellate Advocates who argued, inter alia, that Mr. K-A's resentencing proceeding was constitutionally defective because he did not knowingly, intelligently, and voluntarily waive his right to appeal the sentence imposed, and that even though Mr. K-A had already completed his 365 day sentence, the issues in his direct criminal appeal were not purely academic because of the collateral immigration consequence he might

[37] Information about Mr. K-A's case is available at the office of his defense counsel, Appellate Advocates, and was obtained by IDP through communication with his defense counsel. "Mr. K-A" is a pseudonym and is used here to protect this individual's privacy.

suffer. The three judge panel of the appellate court sustained Mr. K-A's appeal and re-sentenced him to 364 days in prison, thereby precluding application of the aggravated felony bar to relief.

iii. Mr. K-W[38]

Mr. K-W was born in Jamaica and endured severe abuse by caretakers, schoolmates, and people who lived in his neighborhood because he was gay. He was attacked brutally and repeatedly. The police refused to protect him. He was beaten, stabbed, shot, and on one occasion left for dead by a gang until friends found him and took him to a hospital. He fled to the United States when he was 21 years old.

After arriving in the United States, Mr. K-W entered into a relationship with a U.S. citizen man who abused him physically, sexually, and emotionally. He threatened to report him to immigration authorities for overstaying his tourist visa. He infected Mr. K-W with HIV without telling him of his HIV+ status.

One night, Mr. K-W and his partner fought. They both called the police, but his partner did so first. Mr. K-W pleaded guilty to assault in the second degree with a promised sentence of probation and financial restitution for, in self-defense, assaulting his partner with a bottle. While on probation, Mr. K-W attended counseling sessions to help with marijuana use, and complied with all terms of probation. Financially destitute, he fell behind in his restitution payments and was resentenced to a prison term of two and a half years.

In prison, Mr. K-W's physical and mental health deteriorated. He was treated for HIV Infection Category AIDS, Depressive Disorder, Post-Traumatic Stress Disorder, and Hyperlipidemia. DHS initiated removal proceedings against him, where he sought asylum, but

[38] Information about Mr. K-W's case is available at the office of his defense counsel, Appellate Advocates, and was obtained by IDP through communication with his defense counsel. "Mr. K-W" is a pseudonym and is used here to protect this individual's privacy.

his conviction categorically barred him from asylum relief. While his removal proceedings were pending, the criminal appellate court sustained his direct appeal and amended his sentence to 364 days. The court found that his waiver of his right to his appeal was invalid, and that as a first felony offender, a reduced sentence was required by law. As a result, Mr. K-W was legally eligible to pursue the asylum status he needed to protect him from further persecution in Jamaica. Had Mr. K-W been removed before his appeal was sustained he likely would have faced serious obstacles to prosecuting his appeal and pursuing asylum, and may well have again faced grave persecution in Jamaica.

***

These individuals illustrate the crucial role the "finality" rule plays in preventing the "severe penalty" of deportation based on wrongful convictions. Padilla, 559 U.S. at 365. See also Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 127 (1967) (Douglas, J. and Fortas, J., dissenting).

IV. MATTER OF MONTIEL DOES NOT ABROGATE THE "FINALITY" RULE IN THE SECOND (OR ANY) CIRCUIT, AND ITS PRESCRIBED REMEDY OF ADMINISTRATIVE CLOSURE IS AN INADEQUATE SUBSTITUTION FOR TERMINATION IN THE JURISDICTIONS THAT STILL HONOR THE "FINALITY" RULE

The Board's recent decision in Matter of Montiel does not in any way abrogate the "finality" rule or preclude an IJ from terminating removal proceedings. IDP is aware that in other cases within this judicial circuit, DHS has argued that Montiel vitiates an immigrant's ability to move for termination of removal proceedings under the "finality rule," which severely misinterprets Montiel and its limited scope.

The Montiel decision was issued in a case arising from the Ninth Circuit, the lone jurisdiction that no longer recognizes the "finality" rule. See Planes, 652 F.3d at 996. Montiel established administrative closure—which temporarily removes a case from an Immigration

Judge's active calendar or from the Board's docket but does not terminate the removal case—as a protective measure for immigrants within the Ninth Circuit to ensure their criminal appellate rights are not universally denied by virtue of removal during the pendency of a potentially immigration-determinative criminal appeal. 26 I. & N. Dec. at 557-58. But any suggestion that Montiel bars an IJ from terminating removal proceedings under the "finality" rule, and permits at most a suspension of such proceedings, and only if certain factors are met—is incorrect as a matter of law. See supra Section I (explaining that the "finality" rule remains in effect outside of the Ninth Circuit, post-IIRIRA).

Montiel's scope is limited to protecting the due process rights of immigrants facing removal proceedings under the jurisdiction of the Ninth Circuit. Cf. Zadvydas, 533 U.S. at 693. It means that immigrants, like Mr. Montiel, whose convictions are pending appellate review, may have an opportunity to vindicate those appellate rights before being subjected to immigration detention or deportation. Because termination is not an available remedy for immigration adjudicators in the jurisdiction of the Ninth Circuit, administrative closure based on a calculus of factors from Matter of Avestisyan, 25 I & N Dec. 688 (BIA 2012) substitutes as a necessary and protective option for immigrants. Id. at 697. But for those immigrants undergoing removal proceedings in the rest of the United States—where the "finality" rule remains in effect—administrative closure is an inadequate replacement for termination.

The replacement of termination relief with case-specific administrative closure—which DHS has recommended in other litigations related to the finality issue—is ill-suited for proceedings before Immigration Judges who are inexpert in state and federal criminal laws. The published decisions regarding administrative closure that are cited in Montiel affirm this basic premise that the Board and Immigration Judges are equipped for a fact-intensive analysis

for administrative closure where the factors are rooted in immigration law, not criminal law. See Avetisyan, 25 I. & N. Dec. at 691, 694-97 (discussing, at length, administrative closure where relief from removal depends on adjudication of an affirmative immigration application by U.S. Citizenship and Immigration Services); Matter of Sanchez Sosa, 25 I. & N. Dec. 807 (BIA 2012) (implementing a process for continuing removal proceedings pending application for U-nonimmigrant status).

The U.S. Supreme Court, the Second Circuit and ten other U.S. Courts of Appeals, and the Board unanimously agree that the immigration agencies do not hold expertise in the interpretation of criminal law. See Holder v. Martinez Gutierrez, 132 S.Ct. 2011, 2017 (2012); Kuhali v. Reno, 266 F.3d 93, 102 (2d Cir. 2001) ("[W]e owe no deference to the Board in its interpretation of criminal statutes that it does not administer." (citing INS v. Aguirre–Aguirre, 526 U.S. 415, 424 (1999); Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 842 (1984)); Matter of Carachuri-Rosendo, 24 I. & N. Dec. 382, 385 (BIA 2007) ("Our interpretation of criminal statutes is not entitled to deference.").[39]

It would betray the immigration agency's mandate to interpret the immigration laws and do a disservice to individual immigrants to broadly require Immigration Judges or the Board to undertake case-specific, subjective determinations as to the merits of an immigrant's pending criminal appeal, where the entire factual and legal basis for such an analysis depends on the content of a criminal court process that is unresolved and exclusively involves state or federal

[39] See also Da Silva Neto v. Holder, 680 F.3d 25, 31 n.3 (1st Cir. 2012); Hernandez-Cruz v. Attorney General of U.S., 754 F.3d 281, 284 (3d Cir. 2014); Garcia v. Gonzales, 455 F.3d 465, 467 (4th Cir. 2006); Sarmientos v. Holder, 742 F.3d 624, 627 (5th Cir. 2014); Garcia v. Holder, 538 F.3d 511, 514 (6th Cir. 2011) abrogated on other grounds by Moncrieffe v. Holder, 133 S.Ct. 1678 (2013); Flores v. Ashcroft, 350 F.3d 666, 671 (7th Cir. 2003); Tostado v. Carlson, 481 F.3d 1012, 1014 (8th Cir. 2007); Marmolejo-Campos v. Holder, 558 F.3d 903, 907 (9th Cir. 2009) (en banc); Efagene v. Holder, 642 F.3d 918, 921 (10th Cir. 2011); Ramos v. U.S. Atty. Gen., 709 F.3d 1066, 1072 n.2 (11th Cir. 2013).

criminal law in which the immigration agencies lack expertise. The Montiel decision serves a necessary purpose within the Ninth Circuit, as it creates a process for immigration adjudicators to seek to ensure that the due process rights of immigrants challenging wrongful convictions within the Ninth Circuit are not ignored. But, where a state or criminal conviction remains pending direct appellate review outside of the Ninth Circuit, termination of any removal proceedings under the "finality" rule —not a subjective suspension inquiry—is required.

CONCLUSION

For the foregoing reasons, IDP respectfully requests that this Court hold that a conviction arising from a formal judgment of guilt does not trigger removal or bar relief from removal unless and until the immigrant has exhausted or waived direct appeals.

Dated: [redacted]

Respectfully submitted,

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Andrew Wachtenheim

EXHIBIT A

DECLARATION IN SUPPORT OF MOTIONS FOR STAYS OF REMOVAL

Frances Hartmann and Zahrah Devji, hereby declare under penalty of perjury:

1. We are legal interns at New York University Immigrant Rights Clinic ("IRC") working under the supervision of Nancy Morawetz, Esq. We submit this declaration in support of motions for stays of removal. In preparing this declaration, we reviewed documents obtained through Freedom of Information Act ("FOIA") litigation as well as other background materials. The documents reveal what the government means by its policy of "facilitating" the return of prevailing petitioners who have been deported, including whose return is facilitated, and what happens to petitioners who are deported while their petitions for review are pending.

2. The National Immigration Project of the National Lawyers Guild ("NIPNLG") has worked with IRC since 2009 on stay advocacy. NIPNLG, along with other advocacy groups, filed FOIA requests with the Department of Justice ("DOJ"), Department of Homeland Security ("DHS"), and the Department of State ("DOS") to determine what the government's policy was for facilitating the return of removed petitioners.[1]

3. This declaration addresses the following main points:
   - Motions for stays of removal are urgent since a petitioner without a stay can be deported any time after the Board of Immigration Appeals ("BIA") issues a decision.
   - Immigration and Customs Enforcement's ("ICE") policy of "facilitation" of return presents the following obstacles:
     1) Deported petitioners who wish to return must contact ICE.
     2) ICE then decides whether to authorize travel and contacts the DOS, who may issue travel papers through their embassies.
     3) ICE policy requires petitioners to pay for their return and obtain a passport in their country of origin.
     4) Travel papers give petitioners a very short window of time, often seven days, to buy a one-way ticket to a specific port of entry.
     5) U.S. Customs and Border Patrol ("CBP") may, in its discretion, grant or deny the petitioner parole or admission into the country.

[1] *See generally* Nat'l Immigration Proj. of Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720, 722 (S.D.N.Y. 2012).

- ICE will not facilitate return for non-lawful permanent residents ("LPRs") unless ICE deems a non-LPR's return to be "necessary" for continued proceedings. ICE has the discretion to block the return of any petitioner, including LPRs.
- If petitioners are deported while their petitions for review are pending and they ultimately prevail on their petitions for review, their cases may subsequently be administratively closed, terminated because they are in absentia, or denied. In this way prevailing petitioners are denied effective relief.
- Prevailing petitioners often cannot be located once they have been deported.

4. The government has stated that these obstacles are appropriately brought to the attention of the Court during the adjudication of a stay motion:

> [I]f a person like [the petitioner] or any alien who is in litigation over a stay believes that they will be unable to pay for their own return, they're certainly free to raise that in their stay motion to the courts, and the courts could fully vet that.[2]

5. The Supreme Court reaffirmed the standard for stays in *Nken v. Holder*.[3] At that time, the Supreme Court accepted the government's representation that "[a]liens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return."[4] The Supreme Court has not issued a decision on the adequacy of these procedures and how the obstacles to return bear on the issuance of stays.

6. Emails obtained through the FOIA litigation show that prior to *Nken*, the policy for returning removed petitioners was not memorialized in any formal directive. At the time, the government limited return in the same way as the current directive. An email dated January 16, 2009 describes

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[2] Transcript of Oral Argument at 19, Nat'l Immigration Project of Nat. Lawyers Guild v. U.S. Dep't of Homeland Sec. (hereinafter "FOIA Oral Argument"), No. 11-CV-3235, 2014 WL 6850977 (S.D.N.Y. Dec. 3, 2014), ECF No. 87 (Exhibit A).

[3] Nken v. Holder, 556 U.S. 418 (2009).

[4] *Id.* at 420.

DHS's "latest answer on the issue of returning aliens who are removed while a PFR [(Petition for Review)] is pending":

> If the alien was lawfully residing in the US, or the alien's presence is required for continued proceedings, then yes, DHS will facilitate the alien's return to the US. But, where cases can be resolved without the alien's return, then we don't facilitate the alien's return . . . The alien is responsible for paying his way back if the removal was proper at the time it occurred. As a matter of internal institutional convenience, DHS paroles the alien back into the US.[5]

These limitations on return were not presented to the Supreme Court in *Nken*.

I. Urgency of Motions for Stays of Removal

7. The petitioner's motion for a stay of removal is necessarily an urgent one and an important one. As soon as the BIA makes a decision on a removal case, ICE has the discretion to remove a petitioner. ICE often receives notice of BIA decisions immediately, while petitioners must wait to receive the decision by mail. As a result, ICE may deport the petitioner prior to the petitioner even receiving notice of the BIA's decision.[6]

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[5] Transmittal Letter from Preet Bharara, U.S. Att'y for the S.D.N.Y (April 24, 2012) regarding document production in *Nat'l Immigration Project of Nat. Lawyers Guild v. U.S. Dep't of Homeland Sec.*, attachment p. 17 (Exhibit E-1).

[6] *See, e.g.* Campbell v. Att'y Gen. U.S., No. 15-1276 (3d Cir. filed Jan. 30, 2015) (docket pictured).

Court of Appeals Docket #: 15-1276 Dalton Leon Campbell v. Attorney General United States Appeal From: Board of Immigration Fee Status: Due	Docketed: 01/30/2015 Termed: 03/04/2015
01/30/2015 0 pg, 0 KB	MOTION filed by Petitioner Dalton Leon Campbell to Stay Removal. Response due on 02/06/2015. Certificate of Service dated 01/24/2015. (MLR)
02/02/2015 1 pg, 5.84 KB	ORDER (Clerk) It is noted that the petition for review and emergency motion to stay removal by Petitioner Dalton Leon Campbell were received by the Court on January 30, 2015. It appears that Petitioner was removed from the United States on January 29, 2015. Accordingly, the emergence motion is denied as moot, filed. (MLR)

8. Courts may issue a temporary stay while the motion for a stay is pending. In recognizing the urgency of stay applications, some circuits have implemented temporary automatic stay policies or forbearance policies. The Third and Ninth Circuits have automatic stay policies, while the Second Circuit has a forbearance policy where removals are not effectuated until an application for a stay has been adjudicated.[7] Some courts have issued temporary stays in individual cases so that they can consider the stay motions more carefully.[8]

II. What does the government mean by "facilitation" of return?

9. Under ICE's Directive, those who are deported and later prevail on their petitions for review must contact ICE to "facilitate" their return.[9]

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[7] Standing Order Regarding Immigration Cases (3d Cir. Aug. 5, 2015), *available at* http://www.ca3.uscourts.gov/sites/ca3/files/BIA%20Standing%20Order%20final.pdf; In the Matter of Immigration Petitions for Review Pending in the U.S. Ct. App. 2d Cir., No. 12-4096 (2d Cir. Oct. 16, 2012), *available at* http://www.ca2.uscourts.gov/docs/12-4096_opn.pdf; U.S. Ct. App. 9th Cir. General Orders, "Motions for Stay of Deportation or Removal in Petitions for Review" at 66 (9th Cir. Nov. 1, 2011), *available at* http://cdn.ca9.uscourts.gov/datastore/uploads/rules/general_orders/general_orders11_11.pdf.

[8] *See, e.g. V.L. R-P v. Att'y Gen. U.S.*, No. 14-4083 (3d Cir. filed Oct. 17, 2014).

[9] Immigration and Customs Enforcement FAQs on Facilitating Return for Certain Lawfully Removed Aliens (hereinafter "ICE FAQs"), *available at*

10. ICE Directive 11061.1 and the ICE FAQs show that facilitating return is a multistep process that involves many different agencies: first, a deportee must reach out to ICE; ICE then has the discretion to authorize travel; the DOS, through local embassies, may issue travel papers; and finally CBP has the discretion to grant parole and admit a person into the country.[10]

11. The FOIA litigation revealed examples of the parole documents that permit reentry. ICE will assist with physical reentry by issuing a memorandum to DOS or ICE officials located in foreign embassies who then issue a travel document allowing the petitioner to travel to a specific port of entry within a short period of time, often seven days.[11]

12. On several occasions, the government has made it clear that "facilitation" does not include paying for the return of prevailing indigent petitioners. The government has made the following statements regarding payment:

    - DHS email regarding return policy from 2005, prior to *Nken*: "Our position here is identical to what it was in [redacted] and countless other cases—we will facilitate his return by clearing records or asking CBP to facilitate his entry. But we will not pay for his return."[12]

    - ICE FAQs: "In cases involving removal of an individual from the United States who was subject to an administratively final order and

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https://www.ice.gov/ero/faq-return-certain-lawfully-removed-aliens (Exhibit C) ("Is it my responsibility to contact DHS once I learn that a court has reversed or vacated my removal order? Yes. ICE will initiate efforts to facilitate your return only after you have communicated with the agency to request that we do so.").

[10] *See* U.S. Immigration and Customs Enforcement, Directive 11061.1: Facilitating the Return to the United States of Certain Lawfully Removed Aliens (February 24, 2012) (hereinafter "ICE Directive 11061.1") (Exhibit B); ICE FAQs, *supra* note 9 (Exhibit C).

[11] *See* Sample Documents Providing Parole and Authorizing Travel Documents, produced Oct. 31, 2012, *available at* http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/Sample%20Parole%20Documents.pdf (Exhibit D).

[12] Transmittal Letter from Thuylieu T, Kazaizan, U.S. Immigration and Customs Enforcement Associate Legal Advisor (January 27, 2012), attachment 2010FOIA1959.001267 (Exhibit E-2).

for whom there was no stay of removal in effect at time of his or her removal, that individual will be responsible for incurring the costs for returning to the United States[.]"[13]

- FOIA Litigation Oral Argument: "[T]he government has been consistent in saying, when a person is removed . . . making the travel arrangements and paying for the ticket, [are] not the government's responsibility."[14]

As Judge Rakoff of the U.S. District Court for the Southern District of New York has recognized, "[f]or many indigent aliens, the financial burden of removal may, as a practical matter, preclude effective relief."[15]

13. When petitioners cannot pay for their return, they can be stranded abroad. For example, Jo Desiré came to the United States in 1967 at the age of 14, served honorably in Vietnam, and was deported to Haiti in 2007 following a drug conviction.[16] After prevailing on his Petition for Review, Mr. Desiré was stranded in Haiti from 2007 to 2013 because he was unable to pay for his own return. As his attorney explained in an email to DHS officials:

> I spoke to my client. Although he will continue to try and procure funds to obtain travel, he has very little means of doing so. Your departments' insistence that my indigent client pay for his own travel to defend himself effectively denies him his due process rights to appear and defend himself at the removal proceeding. Your department removed my client to one of the poorest countries on the planet. He has no means of supporting himself, he is currently having trouble even buying food let alone procuring international travel. On the other hand, the cost to your department would be miniscule.[17]

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[13] ICE FAQs, *supra* note 9 (Exhibit C).
[14] FOIA Litigation Oral Argument, *supra* note 2 (Exhibit A).
[15] Nat'l Immigration Project of Nat. Lawyers Guild v. U.S. Dep't of Homeland Sec., No. 11-CV-3235, 2014 WL 6850977, at *5 (S.D.N.Y. Dec 3, 2014).
[16] *See* App. Opening Brief at 2, *Desiré v. Holder*, No. 11-15199 (9th Cir. May 4, 2011).
[17] Email from Joshua Zimmerman to Robert C. Bartlemay, Dep't of Homeland Sec. (Dec. 11, 2009, 02:18 MST) (Exhibit F-1).

14. The FOIA litigation revealed that the Office of Immigration Litigation ("OIL") did not know whether Mr. Desiré could litigate his case if he could not afford to return. The email correspondence between OIL, ICE, and EOIR shows that ICE reserved its right to contest the immigration court's jurisdiction, and OIL was considering how to move forward in light of its representations to courts.[18] The case was only settled after vigorous advocacy from Mr. Desiré's attorney, a habeas filing after a successful petition for review, an appeal to the Ninth Circuit, and an order from the Ninth Circuit requesting clarification from the government on jurisdictional issues.[19] Instead of responding to these questions, ICE paid for Mr. Desiré's return, and the issue of whether immigrants can pursue their cases from abroad was never answered. It took six years from the time Mr. Desiré was deported for him to finally return to the U.S.

15. The FOIA litigation revealed emails and parole documents showing that ICE usually gives petitioners seven days, and sometimes less time, to book travel directly to a specified port of entry, which can result in increased travel costs for petitioners. The petitioner will only be allowed entry if they enter at a specific port of entry and on a direct flight.[20]

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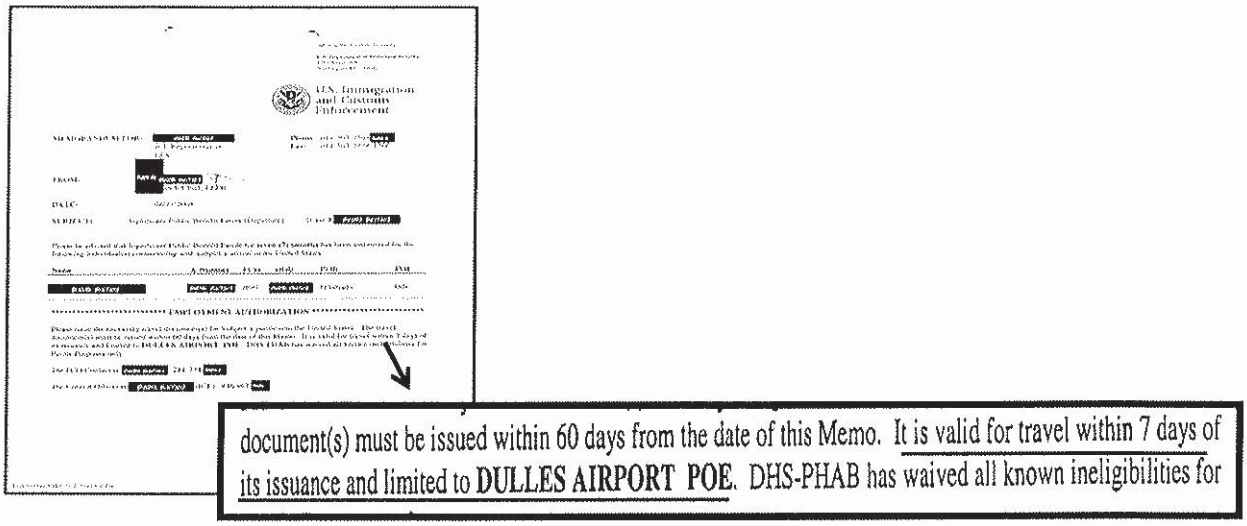
[18] *See* Transmittal Letter from James M. Kovakas, Attorney In Charge, FOI/PA Unit, Civil Division (February 21, 2014), attachment DOJ-Civil0002081 - DOJ-Civil0002083 (Exhibit F-2); Transmittal Letter from James M. Kovakas, Attorney In Charge, FOI/PA Unit, Civil Division (March 20, 2014), attachment DOJ-Civil0002659 - DOJ-Civil0002665 (Exhibit F-3) (asking for a meeting including OIL, the Office of the Solicitor General and EOIR to "discuss the issues regarding how cases are handled at EOIR in circumstances – like those presented in the Desire case – where an alien is removed while a petition for review is pending; the alien prevails on the petition for review; and there are further immigration proceedings on remand?").

[19] Ninth Circuit PACER Docket, *Desiré v. Holder*, No. 11-15199 (9th Cir. filed Jan. 24, 2011), ECF No. 39, 42 (Exhibit F-4).

[20] *See* Sample Parole Documents, *supra* note 11 (Exhibit D).



16. It is ICE's position that petitioners cannot return to the U.S. without a valid passport or other travel documentation, and ICE does not assist petitioners in obtaining these documents. ICE gives the local embassy a short period of time to issue a removed petitioner's travel document and provides the removed petitioner an even shorter amount of time to obtain travel documents. Petitioners may have trouble obtaining a passport or acceptable documentation in their country of origin, especially if they fear persecution from the government in that country. Although ICE will seek travel documents from other countries' embassies in order to effectuate deportations, they will not do the same to facilitate return. [21]

What do I need to return to the United States?

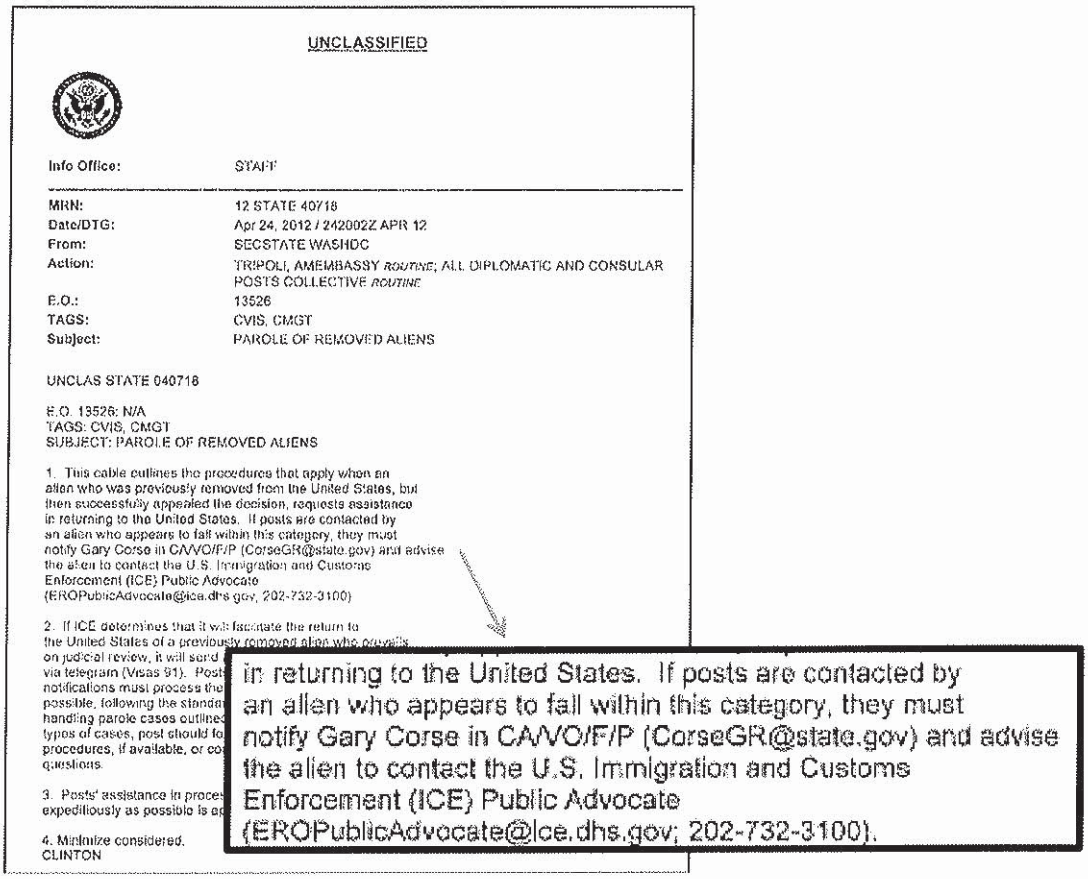
In order to return to the United States by air or sea, you must have with you a valid passport or equivalent documentation and either a valid immigrant/nonimmigrant visa or a transportation/boarding letter authorizing your return to the United States for purposes of participating in your immigration case. If returning by land, you must have with you appropriate identity documentation, which could include a passport or other government-issued documents.

What if my country will not issue me a passport?

You will not be able to return to the United States via commercial air carrier or maritime vessel without a valid passport or equivalent travel document, and the United States Government cannot compel another country to issue such documentation. The U.S. Embassy/Consulate will not issue a transportation/boarding letter authorizing your admission without a valid passport or equivalent travel document.

[21] ICE FAQs, *supra* note 9 (pictured) (Exhibit C).

17. Petitioners also have to navigate the American Embassies in the countries to which they are deported. Despite the central role that DOS plays in the return process, no current policies about working with ICE to return noncitizens exists as is evidenced by the lack of a formal policy in the Foreign Affairs Manual.[22] The only guidance issued by DOS was in 2012, directing aliens to contact the ICE Public Advocate; however, Congress defunded the position of the Public Advocate in 2013 and the position no longer exists.[23]



UNCLASSIFIED

Info Office: STAFF

MRN: 12 STATE 40718
Date/DTG: Apr 24, 2012 / 242002Z APR 12
From: SECSTATE WASHDC
Action: TRIPOLI, AMEMBASSY *ROUTINE*; ALL DIPLOMATIC AND CONSULAR POSTS COLLECTIVE *ROUTINE*
E.O.: 13526
TAGS: CVIS, CMGT
Subject: PAROLE OF REMOVED ALIENS

UNCLAS STATE 040718

E.O. 13526: N/A
TAGS: CVIS, CMGT
SUBJECT: PAROLE OF REMOVED ALIENS

1. This cable outlines the procedures that apply when an alien who was previously removed from the United States, but then successfully appealed the decision, requests assistance in returning to the United States. If posts are contacted by an alien who appears to fall within this category, they must notify Gary Corse in CA/VO/F/P (CorseGR@state.gov) and advise the alien to contact the U.S. Immigration and Customs Enforcement (ICE) Public Advocate (EROPublicAdvocate@ice.dhs.gov; 202-732-3100)

2. If ICE determines that it will facilitate the return to the United States of a previously removed alien who prevails on judicial review, it will send [illegible] via telegram (Visas 91). Post notifications must process the possible, following the standar handling parole cases outline types of cases, post should fo procedures, if available, or co questions.

3. Posts' assistance in proce expeditiously as possible is ap

4. Minimize considered.
CLINTON

in returning to the United States. If posts are contacted by an alien who appears to fall within this category, they must notify Gary Corse in CA/VO/F/P (CorseGR@state.gov) and advise the alien to contact the U.S. Immigration and Customs Enforcement (ICE) Public Advocate (EROPublicAdvocate@ice.dhs.gov; 202-732-3100).

18. Getting to an embassy and obtaining the right documents can be difficult. For example, a transportation memo from ICE authorizing the petitioner's return sat in the mailroom of an embassy for days before staff discovered

[22] *See generally Foreign Affairs Manual* (FAM), *available at* https://fam.state.gov/Fam/FAM.aspx (no guidance has been published in the FAM, which explains the responsibilities, functions and authorities of the DOS).
[23] *See* H.R. 3732, 113th Cong. § 1 (2013), 2013 CONG US HR 3732 (Westlaw).

that the noncitizen was authorized by ICE to return. The petitioner, who later was granted cancellation of removal under the Violence Against Women Act, a type of relief for victims of domestic violence, was scheduled to return to the U.S. after winning her case before a circuit court. A local ICE officer mailed the transportation letter to the embassy eleven days before the petitioner was scheduled to return. It was only through the attorney's follow-up calls and pressure that the embassy attaché found the letter on the day that the petitioner was scheduled to leave. The petitioner's hearing in immigration court in the U.S. was the next day. Had she missed her hearing, she could have faced serious consequences, including removal in absentia—losing her removal case.[24]

19. Finally, once a petitioner obtains a passport, permission to travel, a one-way ticket to particular port of entry in a short window of time, ICE's policy states that CBP is responsible for paroling the petitioner into the United States.[25] CBP then has the discretion to permit or deny the petitioner's entry into the U.S., and "[g]enerally, cases requiring parole authorization will present more complex circumstances than those in which a waiver would be considered . . . Parole is not regarded as an "admission"".[26]

III. Whose return is facilitated under the government's return policy?

20. ICE reserves the right to decide whether they will facilitate the return of petitioners.[27] For those petitioners who were not LPRs at the time of their removal, their return will only be facilitated if such return is "necessary" for

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[24] *See* T. Luo and S. McMahon, "Victory Denied: After Winning on Appeal, An Inadequate Return Policy Leaves Immigrants Stranded Abroad," 19 *Bender's Immigr. Bull.* 1062, 1070 (Oct. 1, 2014); Email from Bruce Nestor, Criminal Defense Attorney, De Leon & Nestor, LLC, to Trina Realmuto, Litigation Director at the National Immigration Project (June 6, 2012, 12:16 CST) (Exhibit K).

[25] *See* ICE Directive 11061.1, *supra* note 10 (Exhibit B); CBP Directive 3340-043 (partially redacted) (Sept. 3, 2008), *available at* http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/CBP%20Parole%20Directive%20(Partially%20Redacted)%20-%20Sept%203%202008.pdf.

[26] CBP Directive 3340-043, *supra* note 25, at ¶ 8.2.1.

[27] *See* ICE Directive 11061.1, *supra* note 10 (Exhibit B); ICE FAQs, *supra* note 9 (Exhibit C).

the continuation of their administrative proceedings, at the discretion of ICE.[28]

21. ICE, the very agency that removed the petitioner, has final discretion whether to facilitate an alien's return or not, and has discretion to block the return of an LPR under "extraordinary circumstances."[29]

IV. What happens if a petitioner's return is not facilitated?

22. Even if a petitioner prevails on his or her petition for review, in most instances, the case is remanded to the BIA or the immigration court for further proceedings.[30] At that stage, immigration courts often rule that they no longer have jurisdiction to hear the case if the individual is outside the country. Removal proceedings are often administratively closed or the proceedings are terminated in absentia.

23. In some cases the BIA precludes petitioners who have been deported from continuing with their cases at all. For example, one petitioner with a Convention Against Torture ("CAT") claim requested a stay, his stay was denied, and he was deported. Although the BIA reopened his case, it subsequently vacated its decision to reopen on the ground that the petitioner was not eligible for relief because he had been removed. As the BIA stated in its unpublished decision: "[P]ursuing CAT protection requires presence in the United States, because that relief precludes removing an alien to another country."[31]

24. Petitioners who are deported despite seeking asylum, withholding of removal, and CAT relief may be in hiding or in harm's way when they are deported. For example, the Fifth Circuit granted a petition for review for a

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[28] ICE Directive 11061.1, *supra* note 10, at ¶ 2 ("Absent extraordinary circumstances, if an alien who prevails before the U.S. Supreme Court or a U.S. court of appeals was removed while his or her PFR was pending, ICE will facilitate the alien's return to the United States *if either the court's decision restores the alien to lawful permanent resident (LPR) status, or the alien's presence is necessary for continued administrative removal proceedings*." (emphasis added)) (Exhibit B).

[29] *See* ICE Directive 11061.1, *supra* note 10 (Exhibit B).

[30] *See* ICE FAQs, *supra* note 9 (Exhibit C).

[31] Dawel Rafael Lantigua, A058 491 837 (BIA Sept. 29, 2015) (Exhibit G); *see also* In re Linton (redacted decision) (BIA June 26, 2015) (Exhibit H).

man from El Salvador seeking Convention Against Torture relief.[32] The man feared being killed because he had previously been threatened at gunpoint and brutally beaten by individuals posing as government officials who were tracking him and demanding money.[33] Nevertheless, he was deported to El Salvador while his case was pending. Although he prevailed before the circuit, he was never heard from again.

25. In *Matter of Idowu*, an asylum-seeker was removed to Nigeria where he feared threats and persecution. He prevailed on his petition for review, but when the case was remanded to the immigration court, the Immigration Judge stated, "as the Court is without authority to order Respondent returned to the United States, the Court will not set another hearing as it appears that would be futile. Rather, the Court finds the best course of action is to administratively close Respondent's proceedings."[34] The petitioner was able to return to the U.S. to continue his asylum case only after vigorous advocacy by his attorney.[35]

26. Many petitioners whose motions for a stay of removal are denied ultimately go on to prevail on their petitions for review. A recent empirical study of 937 petitions for review found that courts denied stays in about half (48%) of the appeals that were ultimately granted.[36]

27. Many petitioners who are removed cannot be located, especially if they are pro se. For those petitioners who are deported and pro se, "there is no one to represent [their] interests, and no one knows where [they are]."[37] For example, the FOIA litigation revealed that for three petitioners who won

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[32] Garcia v. Holder, 756 F.3d 885, 893 (5th Cir. 2014).
[33] *Id.* at 888.
[34] Matter of Idowu, A70 904 015 (EOIR Apr. 1, 2013) (Exhibit I).
[35] Email from Jessica Chicco, Supervising Attorney at the Boston College Post-Deportation Human Rights Project, to Sean McMahon & Tianyin Luo, authors of "Victory Denied," (May 16, 2014, 10:23 EST) (Exhibit J).
[36] Fatma Marouf et al., *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337, 382 (2014).
[37] Geoffrey A. Hoffman et al., *Immigration Appellate Litigation Post-Deportation: A Humanitarian Conundrum*, 5 HOUS. L. REV. 143, 148 (2015).

their cases after being deported, none had been returned a year after their cases had been remanded to the courts.[38]

28. During the *Nken* litigation, the government stated: "[b]y policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, inter alia, facilitating the aliens' return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal."[39] At that time, the government was well aware that there were severe limitations to their ability to return deported petitioners but did not reveal those limitations to the Supreme Court.[40] The same policy and the severe barriers to return are in place today.

29. We declare under penalty of perjury that this declaration is true and correct to the best of our knowledge.

Dated: November 25, 2015
New York, NY

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[38] Transmittal Letter from Thuylieu T, Kazaizan, U.S. Immigration and Customs Enforcement Associate Legal Advisor (January 27, 2012), attachment ICEFOIA10-1959.000351 (Exhibit E-3).
[39] Brief for Respondent at 44, Nken v. Holder, 129 S. Ct. 1749 (2009) (No. 08-681), 2009 WL 45980 at *44.
[40] Transmittal Letter from James M. Kovakas (March 20, 2014), *supra* note 18. (Exhibit F-3).

EXHIBIT B

Appendix to Declaration in Support of Motions for Stays of Removal

Ex. A	Cited Pages from Transcript of Oral Argument at 19, *Nat'l Immigration Project of Nat. Lawyers Guild v. U.S. Dep't of Homeland Sec.* No. 11-CV-3235, 2014 WL 6850977 (S.D.N.Y. Dec. 3, 2014), ECF No. 87.
Ex. B	U.S. Immigration and Customs Enforcement, Directive 11061.1: Facilitating the Return to the United States of Certain Lawfully Removed Aliens (February 24, 2012), *available at* https://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf (last visited Nov. 10, 2015).
Ex. C	Immigration and Customs Enforcement FAQs on Facilitating Return for Certain Lawfully Removed Aliens (hereinafter "ICE FAQs"), *available at* https://www.ice.gov/ero/faq-return-certain-lawfully-removed-aliens.
Ex. D	Sample Documents Providing Parole and Authorizing Travel Documents, produced Oct. 31, 2012, *available at* http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/Sample%20Parole%20Documents.pdf.
Ex. E	Documents Produced in *Nat'l Immigration Project of Nat. Lawyers Guild v. U.S. Dep't of Homeland Sec.*,11 Civ. 3235 (S.D.N.Y. 2012):
E-1	Transmittal Letter from Preet Bharara, U.S. Att'y for the S.D.N.Y (April 24, 2012), attachment p. 17.
E-2	Transmittal Letter from Thuylieu T, Kazaizan, U.S. Immigration and Customs Enforcement Associate Legal Advisor (January 27, 2012), attachment 2010FOIA1959.001267.
E-3	Transmittal Letter from Thuylieu T, Kazaizan, U.S. Immigration and Customs Enforcement Associate Legal Advisor (January 27, 2012), attachment ICEFOIA10-1959.000351.
E-4	Transmittal Letter from Thuylieu T, Kazaizan, U.S. Immigration and Customs Enforcement Associate Legal Advisor (January 27, 2012), attachment 2010FOIA1959.001835.
Ex. F	Documents relating to *Desiré v. Holder*, No. 11-15199 (9th Cir., 2011).
F-1	Email from Joshua Zimmerman to Robert C. Bartlemay, Dep't of Homeland Sec. (Dec. 11, 2009, 02:18 MST).

Office of the Principal Legal Advisor

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20024

U.S. Immigration and Customs Enforcement

January 27, 2012

VIA Electronic-mail

Nancy Morawetz, Esq.
Immigration Rights Clinic
Washington Square Legal Services, Inc.
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawtz@nyu.edu

Re: NLG et al. v. DHS et al., SDNY 11 Civ. 3235

Dear Ms. Morawetz:

Pursuant to the agreement to provide you with a Vaughn Index corresponding to the list of documents identified in the attachment to your January 6, 2012 letter, please find enclosed U.S. Immigration and Customs Enforcement's (ICE) Vaughn Index.

In the course of reviewing the documents at issue, ICE determined that it had inadvertently withheld non-exempt information. These inadvertent withholdings appear as "white-outs" on the produced pages. These pages have been identified in the Vaughn Index and ICE has reprocessed these "white-out" pages and is re leasing all non-exempt information. The previously "white-out" pages are enclosed. Additionally, ICE has determined to discretionarily release additional information that it had previously withheld pursuant to FOIA exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). Those pages are also enclosed.

Further, ICE has determined that it had inadvertently released documents that post-date ICE's search cut-off date of January 5, 2010. This search cut-off date is the date that ICE initiated its search in response to the FOIA request at the administrative level. To the extent that ICE has inadvertently released documents that post-date the search cut-off date, ICE has provided a corresponding explanation in the attached Vaughn Index. ICE does not consider these inadvertent releases to be a waiver or an extension of the January 5, 2010 search cut-off date.

ICE has also determined that with the exception of ICE officers, ICE had released the names of all governmental employees in its production to Plaintiffs at the administrative level. However, since this administrative level production, ICE has changed its policy to conform to the privacy interests expressed within the FOIA exemptions (b)(6) and (b)(7)(C) as pertaining to all lower level government employees. In light of ICE's current practice of applying these exemptions to all lower level government employees, ICE considers the release of this information at the administrative level improper. Such release is not a waiver of the privacy interests embodied in these exemptions as applied to the personnel identified within the documents released at the administrative level.

Lastly, although your FOIA request was made on behalf of Messrs. David Gerbier and Luis Gutierrez, ICE has not received signed written authorization by these individuals authorizing ICE to disclose any information pertaining to them to you, as required by the U.S. Department of Homeland Security regulations at 6 C.F.R. §5.3(a). Therefore, ICE is prohibited from disclosing any information about these individuals to you until receipt of the required signed, written authorizations. Once ICE receives the signed, written authorizations from Messrs. Gerbier and Gutierrez , ICE will release such records to you.

Please contact Assistant United States Attorneys Ms. Buchanan, at 212.637.3247, or Mr. Cargo, at 212.637.2711, if you have any questions about the contents of the Vaughn Index or the information contained in this letter.

Sincerely,

Thuylieu T. Kazaizan
Associate Legal Advisor

Enclosures:

1. Vaughn Index

2. Reprocessed "white-out" documents: 2010FOIA1959.00675-676, 695-696, 700, 701, 702,1050, 1051, 1052,1211, 1223, 1224, 1226, 1227, 1229, 1230, 1232, 1233, 1234, 1235, 1237, 1241, 1242, 1246, 1247, 1248, 1249, 1250, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1271, 1272, 1306, 1307, 1340, 1341, 1343, 1344, 1345, 1346, 1347, 1353, 1354, 1521, 1524, 1528, 1531, 1532, 1534, 1536, 1835, and 1836

3. Discretionary Disclosures: (Attorney Worksheets) 2010FOIA1959.001430-1145, 2148-2154, 2156-2151, and 2265-2270; (Other) 351, 353, 354, 774-778, 1055-1056, 1187-1190, and 3181, and 3182

but not pay for -- his return (which had been our position when the discussions began in Nov-Dec 2004). There was, however, some kind of motion before the Board, and I am copying b6, b7C counsel in KC) in the hope that he can clarify why someone is apparently now saying we should return b6, b7C

b6, b7C

-----Original Message-----
From: b6, b7C
Sent: Friday, March 04, 2005 3:32 PM
To: b6, b7C
Cc: b6, b7C
Subject: RE: b6, b7C Motion To Return Him To U.S.

b6, b7C

Our position here is identical to what it was in b6, b7C and countless other cases -- we will facilitate his return by clearing records or asking CBP to facilitate his entry (this was referred to our field office back in mid-December). But we will not pay for his return. This case has the added complication that it was EOIR's service error that led to the loss, so if there were an EAJA claim we would likely be pointing to EOIR as on the hook for payment. It would be odd for them to pay for his return, but I guess if that could be done in lieu of any fee claim it might be something for everyone to consider.

I see this pleading is before the Board. I guess the attorney is trying to get you to weigh in -- is he threatening some sort of federal court action?

b6, b7C

-----Original Message-----
From: b6, b7C
Sent: Monday, April 25, 2005 12:46 PM
To: b6, b7C
Cc: b6, b7C
Subject: FW: b6, b7C
Importance: High

I have a request from STL to approve the return of this alien to the U.S. He was deported in Sep 2003 and the 8th circuit remanded the case in Aug 2004. I have several questions on this---was the Court notified that the alien was removed, after the stay was denied by the 8h Circuit in Aug 2003? is there an order instructing the Govt to return the alien? is the alien eligible for any relief? If he does return, does he know that he will be detained? why is OIL pushing for his return?

Please let me know.

Thanks

b6, b7C