23-6142

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[redacted]

Petitioner,

v.

Merrick B. Garland, United States Attorney General,

Respondent.

On Petition for Review of a Board of Immigration Appeals Decision

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BRIEF OF THE NATIONAL IMMIGRATION LITIGATION ALLIANCE AND IMMIGRANT DEFENSE PROJECT AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I, Trina Realmuto, attorney for amici curiae, the National Immigration Litigation Alliance and the Immigration Defense Project, state that:

The National Immigration Litigation Alliance is a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock; and

The Immigrant Defense Project is a non-profit organization and its parent corporation is the Fund for the City of New York (FCNY), a nonprofit corporation that issues no stock, and no publicly held corporation owns 10% or more of FCNY's stock.

Dated: July 17, 2023

s/ *Trina Realmuto*
Trina Realmuto

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I. INTRODUCTION[1]

The Immigration and Nationality Act (INA) unambiguously provides that a noncitizen who faces persecution if removed cannot be categorically precluded from eligibility for withholding of removal, under 8 U.S.C. § 1231(b)(3), without a reasonable opportunity to establish that a coerced, non-violent drug conviction does not qualify as a "particularly serious crime" (PSC). In 2002, former Attorney General (AG) John Ashcroft interpreted the withholding statute to include a rebuttable presumption that drug-distribution offenses are PSCs that preclude eligibility for withholding. *See Matter of Y-L-*, *A-G-*, *R-S-R-*, 23 I. & N. Dec. 270 (AG 2002) (*Y-L-*). Pursuant to Federal Rule of Appellate Procedure 29(a), Amici Curiae—organizations dedicated to the protection of immigrants' rights—urge this Court not to follow *Y-L-*, which underpins both the Immigration Judge (IJ) and Board of Immigration Appeals (BIA) decisions to bar Petitioner from withholding of removal. *Y-L-* conflicts with the plain language of § 1231(b)(3)(B) and congressional intent, and unreasonably interprets the statute.

Y-L- creates a rebuttable presumption that noncitizens convicted of drug-distribution offenses have been convicted of a PSC unless they demonstrate

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amici state that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than Amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

"extenuating circumstances" that are "*both* extraordinary and compelling" by meeting two tests: first, by meeting every criterion in a stringent six-factor test, and second, by demonstrating "other, more unusual circumstances." *Id*. at 274, 276-77 (emphasis added). Satisfying these criteria is impossible. Time has proven that the presumption is not rebuttable, it is insurmountable.

In the over 20 years that *Y-L-* has been on the books, Respondent has not pointed to a single case in which a noncitizen overcame the presumption. Nor can Amici independently ascertain whether a noncitizen has ever overcome the presumption, because the Executive Office for Immigration Review (EOIR), housing the immigration courts and BIA, does not track this data. Because the presumption has not been, and effectively cannot be, overcome, drug-distribution convictions are per se PSCs.

By statute, there is only *one* category of per se PSCs that bars eligibility for withholding of removal: aggravated felony conviction(s) for which the individual is sentenced to an aggregate term of imprisonment of at least five years. *See* 8 U.S.C. § 1231(b)(3) (B). Because *Y-L-* impermissibly creates a de facto second per se PSC category, it conflicts with the plain language of § 1231(b)(3)(B).

Y-L- is also an unreasonable interpretation of the withholding statute. In addition to being insurmountable, the *Y-L-* test precludes consideration of highly relevant factors, including traditional PSC and immigration-relief factors where a

person has a conviction (such as age, cooperation with law enforcement, sentence, evidence of rehabilitation), as well as coercion, duress, and mental health. Furthermore, AG Ashcroft's justifications in *Y-L-* are inaccurate, unmoored from the statutory and treaty-based principle of *nonrefoulement*, and premised on false and discriminatory assumptions about drug convictions.

II. STATEMENT OF AMICI CURIAE

The National Immigration Litigation Alliance is a non-profit membership organization that seeks to realize systemic change in the immigrants' rights arena by engaging in impact litigation and building the capacity of attorneys to litigate by co-counseling individual federal-court cases and providing strategic assistance. The Immigrant Defense Project is a non-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes.

Both organizations have a direct interest in ensuring that noncitizens have an equal and fair opportunity to apply for protection, and that noncitizens convicted of drug-distribution offenses are not unlawfully denied this opportunity.

III. BACKGROUND

A. Withholding of Removal

Withholding of removal is a vital form of statutory refugee protection. In 1952, Congress created a statutory provision authorizing the Attorney General "to

withhold deportation . . . to any country in which in his opinion the [noncitizen] would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214 (1952) (enacting former 8 U.S.C. § 1253(h)). Through the Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (1980), Congress amended this provision to *require* withholding an individual's deportation if the individual's "life or freedom would be threatened in [the country of deportation] on account of race, religion, nationality, membership in a particular social group, or political opinion."

Withholding of removal must be granted if the individual demonstrates that it is more likely than not that they would be *persecuted* on account of a protected ground if deported to the designated country of removal. 8 C.F.R. § 208.16(b); *see also* 8 U.S.C. § 1231(b)(3). It is a mandatory form of protection over which the agency has no discretion. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).

An individual who is not eligible for withholding of removal may apply for protection under the United Nations Convention Against Torture (CAT). However, the evidentiary standard to prevail on a CAT application is significantly higher; a CAT applicant must demonstrate that it is more like than not they would be *tortured* if deported to the designated country of removal. 8 C.F.R. § 208.16(c).

Demonstrating a probability of torture, as that term has been defined and interpreted, is difficult, even in seemingly compelling cases. *See*, *e.g.*, *Pierre v. Gonzales*, 502 F.3d 109, 111 (2d Cir. 2007) (holding that indefinite imprisonment under harsh conditions does not amount to torture). For noncitizens who cannot demonstrate that potential future harm meets the legal definition of torture, withholding of removal is their only chance to remain safely in the United States.

B. Particularly Serious Crimes

An individual who has been convicted of a PSC is not eligible for withholding of removal. 8 U.S.C. § 1231(b)(3)(B)(ii). There are two categories of PSCs: (1) per se particularly serious crimes as defined in the Immigration and Nationality Act (INA); and (2) offenses determined to be PSCs on a case-by-case basis. The INA defines per se PSCs as one or more aggravated felony convictions for which the individual is sentenced to an aggregate term of imprisonment of at least five years. 8 U.S.C. § 1231(b)(3)(B).

For offenses that are not per se PSCs, IJs conduct a case-by-case analysis of the individual facts and circumstances underlying the conviction to determine whether the offense constitutes a PSC. *See Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007) (holding that in a PSC determination, "consideration of the individual facts and circumstances is appropriate"); *Matter of Frentescu*, 18 I. & N. Dec. 244, 246-47 (BIA 1982) (holding that PSC analysis generally must be done

"on a case-by-case basis"); *see also Matter of B-Z-R-*, 28 I. & N. Dec. 563, 563 (A.G. 2022) (citing cases).

Outside the *Y-L-* context, the BIA long has applied this broad multi-factor test that considers "such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the [noncitizen] will be a danger to the community." *Matter of Frentescu*, 18 I. & N. Dec. at 247. Just last year, Respondent Attorney General Garland held that a noncitizen's mental health is relevant to the PSC analysis, overruling a 2014 BIA decision that had precluded its consideration. *See Matter of B-Z-R-*, 28 I & N. Dec. at 565 (overruling *Matter of G-G-S-*, 26 I. & N. Dec. 339 (BIA 2014)).

In stark contrast to the traditional individualized test, *Y-L-* creates a presumption that drug-distribution offenses are PSCs; this presumption only can be rebutted in "the most extenuating circumstances that are both extraordinary and compelling." 23 I. & N. Dec. at 274. The test requires a noncitizen to meet two separate criteria. First, the person must prove all six of the following factors:

> (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the [noncitizen] in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity;

> and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.

Id. at 276-77. Second, if, and only if, all six criteria are met, the IJ must further find that "other, more unusual circumstances . . . justify departure from the default interpretation that drug trafficking felonies are 'particularly serious crimes.'" *Id*. at 277. According to AG Ashcroft, "commonplace circumstances" such "as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence" cannot satisfy the "other, more unusual circumstances" requirement. *Id*.

Y-L- is a "one strike and you're out" test. If any one of the six factors is not met or the person cannot show "other, more unusual circumstances," the individual is barred from applying for withholding of removal. *See, e.g.*, *Park v. Garland*, _ F.4th _, 2023 WL 4243695, *8 (9th Cir. 2023) ("[I]f [a noncitizen] fails to satisfy even one of the *Matter of Y-L-* criteria, he cannot overcome the presumption . . . and the inquiry may cease."). When issuing *Y-L-*, AG Ashcroft overturned *Matter of S-S-*, 22 I. & N. Dec. 458 (BIA 1999) (en banc), a unanimous en banc decision issued by fifteen BIA members, all of whom interpreted the withholding statute to leave the individualized multi-factor PSC balancing test intact. *Y-L-*, 23 I. & N. Dec. at 272.

III. ARGUMENT

Relying on *Y-L-*, the BIA erroneously concluded that Petitioner's conviction under 21 U.S.C. §§ 952(a), 960(a), and 960(b), is a PSC. *See* Corrected Special Appendix (Special Appendix) at 852. When reviewing an agency's statutory interpretation, a court must determine whether Congress has made its intent clear by examining the statute's plain meaning and, if necessary, employing traditional rules of statutory construction. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984). If Congress's intent is clear, this intent governs. *Id.* at 842-43. If it cannot be discerned, a court must consider whether the agency's interpretation is a reasonable statutory construction. *Id*. at 843-44.

Because the presumption in *Y-L-* has been proven to be insurmountable, the decision de facto renders drug-distribution offenses a second category of per se PSCs. *Y-L-* therefore conflicts with Congress's intent in 8 U.S.C. § 1231(b)(3)(B)(ii) to prescribe only one category of per se PSCs and, thus, fails at *Chevron* step one. Even if Congress's intent were unclear, the decision is unreasonable at *Chevron* step two because the presumption has proven irrebuttable, the test precludes consideration of longstanding, relevant factors and is unmoored from the principle of *non-refoulement*, and AG Ashcroft's justifications are inaccurate and predicated on false, outdated, and discriminatory assumptions.[2]

[2] Once an AG decides a case, that decision "shall be controlling," 8 U.S.C.

A. *Matter of Y-L-* Conflicts with Congressional Intent.

1. Congress established a single category of per se particularly serious crimes.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc*., 447 U.S. 102, 108 (1980). Congress created only one per se category of PSCs. Specifically, Congress mandated that any noncitizen "who has been convicted of an aggravated felony (or felonies) for which" they received an aggregate sentence of five years or more "shall be considered to have committed a [PSC]." 8 U.S.C. § 1231(b)(3)(B). In all other instances, i.e., when the sentence is less than five years, Congress authorized the agency to determine "that, notwithstanding the length of sentence imposed, [a noncitizen] has been convicted of a [PSC]." *Id*.; *see also Blandino-Medina v. Holder*, 712 F.3d 1338, 1346-47 (9th Cir. 2013) (holding that § 1231(b)(3)(B) "unambiguously provides one category of particularly serious crimes *per se*, precluding the agency's interpretation of the statute as allowing it to create additional categories of facially particularly serious crimes").

Here, the statutory text makes clear that Congress defined the universe of individuals with per se PSCs and intended the agency to make individualized PSC

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§ 1103(a)(1), unless and until a reviewing court disagrees. Thus, the BIA is not free to revisit the validity of *Y-L-* and apply the multi-factor test that its earlier en banc panel had adopted in *Matter of S-S-*. Only this Court can disagree with the decision and restore the PSC analysis in this circuit.

determinations in all other cases. Indeed, Congress authorized the agency to "determine[e] that, notwithstanding the length of sentence imposed, *an* alien has been convicted of a PSC," *not* whether *all* similarly situated noncitizens have been or whether certain *crimes* are PSCs. 8 U.S.C. § 1231(b)(3) (B), (b)(3)(B)(ii) (emphasis added). Yet, *Y-L-* creates an irrebuttable presumption that applies across the board to all drug-distribution offenses.

2. *Y-L-* renders drug-distribution offenses a second category of per se PSCs because there is no evidence that the presumption has ever been rebutted in the 21 years since *Y-L-*.

AG Ashcroft issued *Y-L-* on March 2, 2002, over 21 years ago. Since then, there is no evidence that the default presumption that drug-distribution offenses are PSCs has ever been overcome. As such, *Y-L-* de facto renders all drug-distribution offenses per se PSCs.

This is not surprising given that the decision states that such offenses are presumptively PSCs except in "the very rare case" where the person satisfies the rigid six-factor test *and* then also demonstrates "other, more unusual circumstances." *Y-L-*, 23 I. & N. Dec. at 276–77. Indeed, following *Y-L-*, relatively minor drug-distribution offenses have been found to be PSCs. *See, e.g.*, *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 943 (9th Cir. 2007) (granting petition on retroactivity grounds where agency applied *Y-L-* to conviction for selling $20 of cocaine); *Luambano v. Holder*, 565 F. App'x 410, 411-14 (6th Cir. 2014)

(marijuana-distribution conviction for which petitioner received only probation).

Absurdly, even where a person overwhelmingly demonstrates one, two, or even five of the factors, the presumption cannot be rebutted because all six factors must be met.[3] Consider, for instance, a graduate student who is placed in removal proceedings based on a conviction for possession with intent to distribute after sharing prescription Adderall with her roommate who is struggling to focus on exams. Under *Y-L-*'s stringent standard, the IJ could not find that the student rebutted the PSC presumption because, under the third factor, she was more than peripherally involved.

Though *Y-L-* gave lip service to "the very rare case" in which drug distribution is not a PSC, 23 I. & N. Dec. at 276, it is beyond question that its presumption is insurmountably high. This is perhaps best evidenced by the fact that, in the 21 years since *Y-L-*, there is not a single petition for review *in any circuit* involving a petitioner who overcame the presumption. *See, e.g.*, *DeCarvalho v. Garland*, 18 F.4th 66, 70-71 & n.2 (1st Cir. 2021) (agreeing with petitioner's claim that "the government does not point to even a single instance in

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[3] *Cf. Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations . . . which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Western & Atl. R.R. v. Henderson*, 279 U.S. 639, 642 (1929) ("A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment.").

which the so-called presumption has been overcome"); *cf. Brathwaite v. Garland*, 3 F.4th 542, 544 (2d Cir. 2021) (finding "manifestly impossible" and, therefore, unreasonable the BIA's expectation that noncitizens defendants with late filed-appeals challenging a conviction(s) underlying their removability charge rebut the agency's presumption that their conviction(s) is final by submitting their state-court appellate brief).[4]

To the extent that the Ninth Circuit (in 2007) has held that *Y-L-* did not create a per se PSC classification, that decision is not binding on this Court. *Miguel-Miguel*, 500 F.3d at 947.[5] More importantly, in so holding, the Ninth Circuit "presume[ed]" that "there will be some cases in which [the] exception applies." *Id.* But history has proven that presumption wrong. Moreover, the Ninth

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[4] Should Respondent attempt to rely on unpublished, out-of-circuit decisions allegedly upholding *Y-L-*'s rebuttable presumption, the Court should reject that effort. *See DeCarvalho*, 18 F.4th at 71 n.2 (explaining inapplicability of *Diaz v. Holder*, 501 F. App'x 734 (10th Cir. 2012), and *Lavira v. Atty Gen.*, 478 F.3d 158 (3d Cir. 2007)); *Music v. Att'y Gen.*, 591 F. App'x 97, 102 (3d Cir. 2014) (challenging only application of *Y-L-*, not its validity); *Fenelon v. Lynch*, 675 F. App'x 49, 51 (2d Cir. 2017) (involving pro se petitioner who raised only a "general challenge" and an "argument that the agency failed to sufficiently explain its application in his case"). Moreover, *Luambano*, 565 F. App'x 410, was decided without argument based on a pro se opening brief, government answering brief, and counseled reply brief. *See* Docket, *Luambano v. Holder*, No. 13-3881 (6th Cir.), ECF Nos. 35, 39, 46, 49, 51.

[5] Moreover, the court did not consider the arguments presented here; rather, the petitioner argued that the AG lacked authority to create a rebuttable presumption, the presumption violated the Fifth Amendment and the Administrative Procedure Act, and the BIA was barred from applying the presumption retroactively to his case. *Miguel-Miguel*, 500 F.3d at 944-53.

Circuit's recent decision in *Park v. Garland* makes it even more impossible to rebut the presumption, finding that the agency may not consider non-listed factors in favor of rebutting the presumption, but may consider any "unlisted factors or circumstances" in favor of applying the presumption. *Park*, 2023 WL 4243695 at *8.[6]

The lack of *any* case overcoming the *Y-L-* presumption is telling. But there is no independent way for Amici to ascertain if the presumption has ever been overcome. In *DeCarvalho*, the First Circuit reviewed a BIA decision applying *Y-L-* without giving the petitioner an opportunity to rebut the presumption. 18 F.4th at 71-72. As here, the petitioner argued that *Y-L-* rendered drug-distribution offenses per se PSCs. *Id*. at 70-71. In briefing and at oral argument, Respondent failed to cite even a single case in which the presumption was overcome, instead orally presenting vague assurances that such cases exist. *Id*. at 71 & n.4. The Court then remanded the case to allow the petitioner to try to rebut the *Y-L-* presumption and to give the government "the opportunity to supplement the record with any evidence that the presumption can be overcome." *Id*. at 71. The Court further noted that remand would "provide the Attorney General with an opportunity to consider whether, based on the experience of two decades and Congress's increasingly

[6] Unlike in this case, the petitioner in *Park* did not challenge the validity of the *Y-L-* test. Rather, he challenged only whether the agency "*mis*applied" it. *Park*, 2023 WL 4243695 at *9.

nuanced view of drug trafficking offenses, *Matter of Y-L-* may have turned out to over-shoot the mark." *Id*. (internal footnote omitted).

Following remand in *DeCarvalho*, nonprofit organizations filed a Freedom of Information Act (FOIA) request with EOIR seeking records regarding, inter alia, cases in which the *Y-L-* "presumption" was/was not overcome. *See* FOIA request (Mar. 24, 2023): https://immigrationlitigation.org/wp-content/uploads/2023/06/2023.03.24-Matter-of-Y-L-FOIA-Request.pdf. EOIR responded, stating: "Unfortunately, EOIR is not able to search the first two Parts of your request, because EOIR does not track this data." *See* Email from Joseph R. Schaaf, Supervisory Attorney Advisor (FOIA) to Counsel for Amici Trina Realmuto (May 3, 2023), https://immigrationlitigation.org/wp-content/uploads/2023/06/2023.05.03-Response-Email-Cover-Letter.pdf.

The *Y-L-* test's rigidity, as well as the absence of cases overcoming the presumption, demonstrate that AG Ashcroft de facto created a per se classification of drug-distribution offenses as PSCs.

3. Because Congress did not create a second category of per se PSCs, *Y-L-* conflicts with congressional intent.

Congress created a single category of per se PSCs, but *Y-L-* makes drug-distribution convictions a second category of per se PSCs. Because the creation of a second category of per se PSCs conflicts with the withholding statute, the Court should decline to follow *Y-L-* under step one of *Chevron*.

An agency cannot interpret a statute to cut off eligibility based on requirements that Congress did not impose. *See Cervantes-Ascencio v. INS,* 326 F.3d 83, 86 (2d Cir. 2003) ("[W]e are without authority [] to add terms or provisions where Congress has omitted them.") (citation omitted); *Nguyen v. Chertoff*, 501 F.3d 107, 115 (2d Cir. 2007) ("Because Congress placed no JRAD [Judicial Recommendation Against Deportation] limit on its retroactive definition of aggravated felony, neither the BIA nor this court may do so.").

In addition, *Y-L-* conflicts with statutory-construction rules that further demonstrate Congress's intent to make sentencing, not the type of offense, the determinative factor in classifying an offense as a per se PSC. A review of the INA as a whole evidences this intent. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.") (quotation marks and citation omitted).

Here, Congress's per se PSC definition requires the conviction(s) be for an aggravated felony (defined at 8 U.S.C. § 1101(a)(43) with at least a five-year (aggregated) sentence. *See* 8 U.S.C. § 1231(b)(3) (B). The aggravated-felony definition is comprehensive, listing dozens of specific categories offenses. *See* 8 U.S.C. § 1101(a)(43). "The extensive and detailed definition of the term 'aggravated felony' . . . demonstrates that Congress made specific decisions about

what sorts of crimes should qualify as facially particularly serious." *Blandino-Medina*, 712 F.3d at 1345. Thus, Congress's creation of a single category of per se PSCs in § 1231(b)(3)(B) evidences its intent to prohibit the agency from creating additional per se classifications. *See Jama v. ICE*, 543 U.S. 335, 341 (2005) (stating that courts should not "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply").

In addition, Congress delegated to the agency the authority to create per se PSC bars in the INA's asylum provisions, *see* 8 U.S.C. § 1158(b)(2)(B)(i), but did not do so in § 1231(b)(3)(B). *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (holding "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute"). For purposes of precluding eligibility for asylum, Congress provided that *all* aggravated felonies are per se PSCs, and further authorized the AG to "designate by regulation" additional "offenses that will be considered to be" per se PSCs. *See* 8 U.S.C. § 1158(b)(2)(B). "[T]he withholding of removal statute is notably missing an analogue provision permitting the Attorney General to designate crimes as categorically particularly serious even if they are not aggravated felonies for which the defendant has received a sentence of at least five years." *Blandino-Medina*, 712 F.3d at 1346. If Congress had intended to grant the AG similar authority to create per se classifications in the withholding context, its grant of regulatory authority in

§ 1158(b)(2)(B) would be redundant. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992) ("[A] statute must, if possible, be construed in such fashion that every word has some operative effect."). Given that Congress did codify authority to create per se PSC classifications in the asylum context, its decision not to confer such authority in the withholding context creates a strong inference that Congress intended to create a single per se classification for withholding. *See Blandino-Medina*, 712 F.3d at 1346; *Jama*, 543 U.S. at 341.

Finally, the rule of lenity compels interpreting § 1231(b)(3)(B) as limiting the universe of individuals with per se PSC convictions to Congress's express definition, which requires both an aggravated felony conviction and at least a five-year sentence. *See Cardoza-Fonseca*, 480 U.S. at 49 (affirming the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen].").

Congress's silence as to rebuttable presumptions says nothing about its intention to limit per se classifications. This is especially so because, in 1996, when Congress enacted the definition of per se PSCs, s*ee* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 241, 110 Stat. 3009, 3009-602 (1996), it was legislating against the backdrop that PSC determinations historically had been made on an individualized case-by-case analysis as required by *Matter of Frentescu*, 18 I. & N. Dec. at 246-47. *Cf.*

Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute . . . ."). Indeed, two en banc BIA panels interpreted IIRIRA's changes to the withholding statute to do just that. *See Matter of S-S-*, 22 I. & N. Dec. 458, 463-65 (BIA 1999) (en banc) (applying the *Frentescu* balancing test to post-IIRIRA PSC determinations); *Matter of L-S-*, 22 I. & N. Dec. 645, 649 (BIA 1999) (en banc) (same).

B. *Matter of Y-L-* Is Also an Unreasonable Interpretation of 8 U.S.C. § 1231(b)(3)(B).

This Court need not defer to *Y-L-* because the decision is an unreasonable construction of the statute. *Chevron*, 467 U.S. at 843-44. The decision is unreasonable because, as explained above, the presumption is not rebuttable. *See supra* Section IV.A.2. It is also unreasonable because it precludes consideration of highly relevant factors that long have informed the agency's PSC and relief determinations, including coercion, duress, and mental health. In addition, AG Ashcroft's justifications are inaccurate, unmoored from the principle of *nonrefoulement*, and premised on false, outdated, and discriminatory assumptions about drug convictions.

1. *Y-L-* precludes consideration of traditionally relevant factors.

Traditional factors are highly relevant to the PSC analysis and relief under the INA. They include the nature, circumstances, and underlying facts of the

conviction; age; the type of sentence imposed; cooperation with law-enforcement authorities; limited criminal histories; downward departures at sentencing; post-arrest claims of contrition or innocence; evidence of rehabilitation; and whether the crime's type and circumstances indicate dangerousness to the community.

Y-L- is unreasonable because it precludes consideration of any of these traditional factors. Indeed, IJs expressly are prohibited from considering so-called "commonplace circumstances [such] as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence." *Y-L-*, 23 I & N. Dec. at 277 (stating that these considerations "do not justify such a deviation"). This prohibition makes little sense, as these factors are indicative of a person's character (including dangerousness), and it is contrary to agency precedent for determining eligibility for immigration relief.

IJs routinely consider precisely these types of "commonplace circumstances"—including the nature, circumstances and severity of the offense; evidence of rehabilitation; and evidence of other immigration violations—in adjudicating, *inter alia*, relief under former INA § 212(c), *see*, *e.g.*, *Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978), and cancellation of removal, *see, e.g.*, *Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998). They are also considered under *N-A-M-* and *Frentescu* in analyzing whether offenses *other than* drug-

distribution offenses are PSCs. *See supra* Section III.B. (citing cases).

Structuring a test that prohibits an IJ from considering these factors and/or the impact of age or mental health of an individual also conflicts with Supreme Court precedent. In *Judulang v. Holder*, the Court rejected as arbitrary and capricious a rule that categorically excluded a group of individuals from eligibility for immigration relief where the BIA failed to consider "germane" factors. 565 U.S. 42, 55 (2011). The Court criticized the BIA for failing to consider how its interpretation of the statute at issue related to factors long identified by the agency as "germane," including an individual's "worth[iness] for relief," "prior offense," or "other attributes and circumstances," i.e., whether the person "merits the ability to seek a waiver." *Id*. at 55-56.

Similarly, here, this Court should reject AG Ashcroft's interpretation of the PSC statute as an unreasonable construction as applied to individuals with drug-distribution convictions. As in *Judulang*, *Y-L-* precludes consideration of factors the BIA has for decades identified as "germane" to the PSC analysis and relief, factors which IJs and the BIA consider when analyzing *all* other offenses that are not congressionally mandated per se PSCs. *See supra* Section III.B. (citing cases); *see also Brathwaite*, 3 F.4th at 552-55 (finding BIA's interpretation of the statutory definition of conviction was unreasonable because it was unmoored from the "statutory text or legislative history," "ignore[d]" relevant "realities," "creates

significant practical problems," and that it was "frequently impossible" to overcome the presumption of finality).

2. *Y-L-* precludes consideration of coercion and duress.

Furthermore, as a result of *Y-L-*, countless individuals have been denied the opportunity to apply for withholding protection, including individuals, like Petitioner here, whose drug-distribution offenses were the result of coercion and duress.

Duress and coercion have long been recognized to diminish individual responsibility to such a degree that, under certain circumstances, they provide a defense to civil or criminal liability. *See* Duress, Black's Law Dictionary (11th ed. 2019); *see also* Coercion, *id*. Their role in reducing culpability is so well-established in Anglo-Saxon common law that courts assume the availability of an affirmative defense based on coercion or duress without express statutory authorization. *See, e.g.*, *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980) (assuming without explicit statutory language that Congress contemplated a duress defense to escape from federal custody).

The unreasonableness of this exclusion is stark in cases where, for instance, an individual is told by a drug cartel that his family will be tortured and slaughtered if he does not help transport drugs, thus leaving him no choice but to comply. *See, e.g.*, *Sanabria Morales v. Barr*, 967 F.3d 15 (1st Cir. 2020) (finding

individual could not rebut presumption despite being forced to transport drugs into the United States after members of a Venezuelan drug cartel threatened to kill his wife and son if he did not cooperate). Recognizing the importance of coercion and duress, courts have particularly emphasized consideration of these factors in immigration matters. In *Negusie v. Holder*, 555 U.S. 511 (2009), for example, the Supreme Court rejected a BIA decision precluding consideration of duress when determining whether an individual is subject to the "persecutor bar" to asylum and withholding of removal. In remanding the issue for the agency to reconsider in the first instance, the Court pointed to the potential relevance of coercion under the Refugee Act of 1980. *See id*. at 520.

This Court itself, when reviewing a BIA decision that applied the presumption in *Y-L-* without considering evidence of coercion or duress, remanded for evaluation of whether excluding these factors was reasonable given that "[c]ourts have long recognized that the presence of coercion and duress vastly reduces the culpability of a person's conduct, and have therefore applied a presumption that legislators must have contemplated making allowance for conduct motivated by coercion and duress, even if such exceptions are not explicitly stated in the statutes." *Nderere v. Holder*, 467 F. App'x 56, 58-59 (2d Cir. 2012). On remand, rather than address the issue as instructed by this Court, the BIA remanded Ms. Ndere's case to the IJ for factual findings on "whether under

the totality of the circumstances, [Ms. Ndere's] offense is a particularly serious crime." *See In re: Jeannette Lois Nderere*, A029-853-242, 2 (BIA Apr. 29, 2013) (emphasis added), attached as Exhibit A. That remand, in turn, resulted in a stipulated grant of withholding of removal, on the same record, and without application of *Y-L-* criteria. *See* Department of Homeland Security (DHS) Submission, June 17, 2013, attached as Exhibit B; Order of the Hartford Immigration Court (granting withholding of removal), June 18, 2013, attached as Exhibit C.

Respondent may suggest that *Nderere* has no bearing on whether *Y-L-* is reasonable, because the BIA concluded that Petitioner here did not establish a duress defense. Special Appendix at 3-4. Amici dispute that conclusion for the reasons set forth in Petitioner's Opening Brief; however, even assuming arguendo that Petitioner did not establish a duress defense, because the inability to consider coercion or duress is unreasonable as applied to individuals with these defenses, it is unreasonable as applied to individuals without these defenses. *Cf. Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (explaining that if one interpretation of statute "would raise a multitude of constitutional problems, the other [interpretation] should prevail").

3. *Y-L-* precludes consideration of mental-health evidence.

In 2022, Respondent AG Garland held that immigration adjudicators may

consider mental-health evidence when determining whether a non-drug-distribution offense constitutes a PSC. *B-Z-R-*, 28 I. & N. Dec. at 567. In so holding, Respondent AG Garland agreed with decisions from the Eighth and Ninth Circuit Courts of Appeals and overruled the BIA's decision in *Matter of G-G-S-*, 26 I. & N. Dec. 339 (BIA 2014), which had prevented adjudicators from considering such evidence. *Id* at 564-65. Indeed, the Court may wish to consider whether *Matter of B-Z-R-* sub silentio overruled *Y-L-*'s presumption by stating without exception that "where the statute's per se rules do not apply, adjudicators must determine on *a case-by-case basis* whether a conviction is for a particularly serious crime." *B-Z-R-,* 28 I. & N. Dec. at 563 (emphasis added). At a minimum, however, because evidence of mental health also is equally relevant to PSC determinations in drug-distribution cases but *Y-L-* precludes its consideration, the Court should find that *Y-L-* is an unreasonable interpretation of the PSC statute.

Respondent AG Garland's decision in *Matter of B-Z-R-* undermines AG Ashcroft's rationale in *Y-L-* in two critical ways (perhaps tellingly, *Matter of B-Z-R-* does not mention *Y-L-*). First, *B-Z-R-* affirms that "'all reliable information may be considered in making a particularly serious crime determination.'" *B-Z-R*, 28 I. & N. Dec. at 564 (quoting *N-A-M-*, 24 I. & N. Dec. at 342). Second, *B-Z-R-* stressed that "[an individual's] mental health condition may bear directly on whether [they] pose[] a danger to the community." *Id.* at 566; *see also id*. at 563-64

(citing BIA and Ninth Circuit precedent finding that dangerousness is "the essential key" in determining whether an offense is particularly serious).

In sum, *Y-L-* is unreasonable because it precludes consideration of "reliable information" and evidence that is "essential" to assessing dangerousness.

4. *Y-L-* impermissibly flouts the principle of *non-refoulement.*

Furthermore, the universal principle of *non-refoulement* is not served by subjecting some individuals to a higher standard based on the type of offense committed, rather than circumstances underlying its commission. In *Judulang*, the Supreme Court instructed the BIA to consider whether its decisions are tied "to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang*, 565 U.S. at 55. Here, the purpose of the immigration laws is served only by adherence to the principle of *non-refoulement*, i.e., not deporting a person to a country where they face a threat to life or freedom unless the person truly has been convicted of a PSC and is, in fact, a danger to the community. No purpose is served by denying noncitizens with persecution claims eligibility for withholding of removal categorically, without any evidence of dangerousness.

5. *Y-L-* is predicated on inapposite, overly broad, and false assumptions about drug laws.

In *Y-L-*, AG Ashcroft rejected prior BIA interpretations requiring an individualized multi-factor PSC balancing test for drug-distribution offenses. 23 I. & N. Dec. at 272 (noting that BIA panels "emphasized such factors as the

[noncitizens'] cooperation with federal authorities in collateral investigations, their limited criminal history records, and the fact that they were sentenced at the low-end of the applicable sentencing guideline ranges"). In so doing, AG Ashcroft crafted justifications for his decision that are inapposite, overly broad, and predicated on false assumptions. *See DeCarvalho*, 18 F.4th at 71 (noting "Congress's increasingly nuanced view of drug trafficking offenses").

First, AG Ashcroft asserted that "the courts and the BIA have long recognized that drug trafficking felonies equate to" PSCs. *Y-L-*, 23 I. & N. Dec. at 274. In so doing, however, he relied on *Mahini v. INS*, where the court conducted an *individualized* analysis *without* any background presumptions. 779 F.2d 1419, 1421 (9th Cir. 1986). AG Ashcroft also ignored BIA case law *rejecting* efforts to create a new category of per se PSC offenses for robbery. *Matter of S-S-*, 22 I. & N. Dec. at 464–65.

AG Ashcroft also relied on policy concerns about the effects of drug-distribution on "health and general welfare, [and] national security," *Y-L-*, 23 I. & N. Dec. at 276, but such arguments could be made for most criminal offenses against persons. *Accord Matter of S-S-*, 22 I. & N. Dec. at 462 ("[C]rimes against persons are more likely to be categorized as particularly serious."). Furthermore, as the Supreme Court aptly stated: "no matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the

Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000) (internal citations omitted). Here, Congress did not grant the AG authority in the withholding context to regulate PSC determinations based on the type of offense alone.

Furthermore, AG Ashcroft's underlying policy justifications are premised on false assumptions about drug crimes. Ashcroft cited to cases from the 1980s and early 1990s—the height of the "War on Drugs." *Y-L*, 23 I. & N. Dec. at 274-75 (citing *Mahini*, 779 F.2d 1419; *Matter of U-M-*, 20 I. & N. Dec. 327 (BIA 1991); *Matter of Gonzalez*, 19 I. & N. Dec. 682 (BIA 1988)). He also relied on strict congressional treatment of drug crimes as support for finding them to be PSCs. *Id*. at 275–76. However, AG Ashcroft did not interrogate the assumptions and motivations of Congress in this regard.

Congressional concern and animus towards drug crimes was premised largely on political considerations from the 1960s and 1970s to oppose racial reform and Black progress, and not on actual societal concerns. *See* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 54 (2010) ("The War on Drugs, cloaked in race-neutral language, offered whites opposed to racial reform a unique opportunity to express their hostility towards

blacks and black progress, without being exposed to the charge of racism."). The "War on Drugs," which underpins the policies Ashcroft cites, was not about crime or violence or terrorism; it was about political control. *Id*.

AG Ashcroft's secondary contention that "substantial violence is present at all levels of the [drug] distribution chain" is also unfounded, *Y-L-*, 23 I. & N. Dec. at 276, and "ignores . . . realities" in a manner pertinent to reasonableness analysis. *Brathwaite*, 3 F.4th at 554. Studies have shown that the vast majority of drug offenders in state prisons have no relationship to violence. *See* Marc Mauer and Ryan S. King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, THE SENTENCING PROJECT, 13 (Sept. 2007) ("A 2002 report found that the criminal history of three-quarters of drug offenders in state prison consists of only drug or non-violent offenses and 58% overall have no history of violence or high-level drug selling activity.").[7] Moreover, this reasoning is overbroad, as it applies to all crimes of violence.

The rise of the opioid epidemic over the last decade, primarily within white communities in the United States, has dramatically shifted the way the government and society understand drug offenses. *See* Betsy Pearl and Maritza Perez, *Ending The War On Drugs*, CENTER FOR AMERICAN PROGRESS (June 27, 2018)[8]; *see also*

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[7] https://search.issuelab.org/resource/25-year-quagmire-the-war-on-drugs-and-its-impact-on-american-society.html

[8] https://www.americanprogress.org/article/ending-war-drugs/.

Altaf Rahamatulla, *The War on Drugs Has Failed. What's Next?*, FORD FOUNDATION (Mar. 23, 2017).[9] Yet, while much of the country is now engaging in a dialogue around addiction as a public-health crisis and the need to reverse the consequences of a failed "War on Drugs," immigration adjudication remains stalled in the past. The fact that *Y-L-*'s PSC analysis holds onto this outdated idea of drug crimes as a singular scourge on our country is a remnant of racialized political efforts to stall the Black community's progress. This idea has no bearing in the reality of actual crimes. The justifications for invariably treating drug-distribution offenses as PSCs are incorrect and, therefore, an unreasonable interpretation of the statute.

* * * * *

In sum, *Y-L-* conflicts with congressional intent to establish a single category of per se PSCs for withholding purposes, and also is an unreasonable interpretation of § 1231(b)(3)(B). Respondent has no legitimate interest in maintaining and applying an invalid PSC presumption and test to noncitizens within this Court's jurisdiction, nor in subjecting Petitioner to that invalid presumption. *Matter of S-M-J-*, 21 I. & N. Dec. 722, 727 (BIA 1997) ("[A]s has been said, the government wins when justice is done.").

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[9] https://www.fordfoundation.org/just-matters/equals-change-blog/posts/the-war-on-drugs-has-failed-what-s-next/.

IV. CONCLUSION

The Court should grant the petition, hold that *Y-L-*'s statutory construction is incorrect or unreasonable, and remand for a new assessment of whether Petitioner has been convicted of a PSC.

Respectfully submitted,

s/ Trina Realmuto
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Counsel for Amici Curiae

Dated: July 17, 2023

File: A029 853 242 - Hartford, CT Date: APR 29 2013

In re: JEANNETTE LOIS NDERERE a.k.a. Jeanette Preston

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jon Bauer, Esquire

ON BEHALF OF DHS: Amit Patel
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Asylum, withholding of removal, Convention Against Torture

This case was last before the Board on August 14, 2009, when we dismissed the respondent's appeal of the Immigration Judge's March 12, 2009, decision denying the respondent's application for asylum and withholding of removal pursuant to sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§1158(a) and 1231(b)(3). Presently, the case is before us pursuant to the March 2012, decision of the United States Court of Appeals for the Second Circuit.

The Second Circuit agreed with the Board's determination that the respondent is ineligible for asylum based on her aggravated felony conviction. However, the Second Circuit determined that the Board erred when it did not consider whether coercion and duress were relevant factors in determining whether the respondent's conviction was a particularly serious crime for purposes of determining her eligibility for withholding of removal. In light of this finding, the Second Circuit remanded for the Board to determine in the first instance whether *Matter of Y-L-, A-G-, and R-S-R-*, 23 I&N Dec. 270 (A.G. 2002), applies to the respondent's case and also to determine whether it is reasonable to exclude factors of coercion and duress in determining whether a crime is particularly serious. The respondent and the Department of Homeland Security (the "DHS") have filed briefs in response to the Second Circuit's decision. The record will be remanded to the Immigration Judge for further proceedings.

In its brief, the DHS asserts that the Immigration Judge erred in failing to issue an order of removal when he granted the respondent's application for CAT relief. In view of this, the DHS seeks to remand proceedings in order for the Immigration Judge to issue an order of removal. The DHS does not address the issues raised in the Second Circuit's decision.

EXHIBIT A

In her brief, the respondent claims that the coercion and duress that she experienced by her former boyfriend must be considered in assessing whether her drug trafficking crime is particularly serious. Also, the respondent asserts that the Board must find that her crime was not particularly serious and that she therefore is not barred from withholding of removal. Further, the respondent argues that the Board must find that the persecution and torture she faces in Zimbabwe are on account of a protected ground and that she is entitled to withholding of removal in addition to protection under CAT. Finally, the respondent claims that the DHS' motion to remand in order to obtain a removal order should be denied.

The Second Circuit observed in its decision in this case that none of the cases that were before the Attorney General in *Matter of Y-L-, A-G- & R-S-R-*, involved circumstances such as the respondent's where duress or coercion clearly played a role in the commission of the crime. Rather, all of the applicants who were seeking relief in *Matter of Y-L-, A-G- & R-S-R-* involved persons who had committed voluntary criminal acts. The Second Circuit went on to state that courts "have long recognized that the presence of coercion and duress vastly reduces the culpability of a person's conduct, and have therefore applied a presumption that legislators must have contemplated making allowance for conduct motivated by coercion and duress, even if such exceptions are not explicitly stated in the statutes."

Given our limited fact finding authority, we find that a remand is warranted for the Immigration Judge to conduct fact finding as to coercion and duress in this case, including how such factors related to the respondent's conviction. The Immigration Judge should also determine whether under the totality of the circumstances, the respondent's offense is a particularly serious crime. If the Immigration Judge determines that the respondent's crime is not a particularly serious crime and that the respondent is not barred from applying for withholding of removal, the Immigration Judge should also consider whether the respondent has met her burden of establishing that she more likely than not will be persecuted in Zimbabwe on account of a protected ground. Finally, if the Immigration Judge continues to find the respondent ineligible for withholding of removal, he should issue an order of removal. *See I-S- & C-S-*, 24 I&N Dec. 32 (BIA 2008).

Accordingly, the following order will be entered.

ORDER: The record will be remanded for further proceedings consistent with the decision of the Second Circuit and with the foregoing opinion.

FOR THE BOARD

Amit Patel
Assistant Chief Counsel
DHS/ICE/OCC – Room 483
450 Main Street
Hartford Connecticut 06103

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HARTFORD, CONNECTICUT

IN THE MATTER OF:	)	
Jeannette NDERERE	)	A 029 853 242
In Removal Proceedings	)	

Immigration Judge: Michael W. Straus Next Hearing: 6-18-13

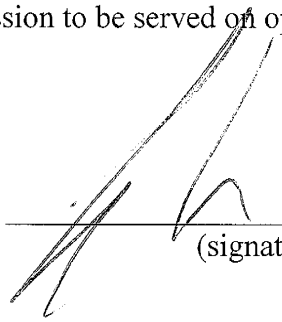
Department of Homeland Security (DHS) Submission

EXHIBIT B

Per 8 C.F.R. 1208.16(d)(2), and based on objective documentation present in the record, uncontested at prior hearings, DHS respectfully stipulates to an order withholding the removal of the respondent to Zimbabwe pursuant to Section 241(b)(3) of the Act.

PROOF OF SERVICE

On June 17, 2013, I, Amit Patel, Assistant Chief Counsel, caused a copy of this submission to be served on opposing counsel in open court on June 18, 2013.



(signature)

6/17/13

(date)

UNITED STATES IMMIGRATION COURT
450 MAIN ST., ROOM 628
HARTFORD, CT 06103

IN THE REMOVAL CASE OF
NDERERE, JEANNETTE LOIS
RESPONDENT

CASE NO.: A029-853-242

ORDERS

[ ] This is a memorandum of the Court's Decision and Orders entered on _____. This memorandum is solely for the convenience of the parties. The oral or written Findings, Decision and Orders is the official opinion in this case. ( ) Both parties waived issuance of a formal oral decision in the case.

[ ] The respondent was ordered REMOVED from the United States to _____ ( ) in absentia.

[ ] Respondent's application for VOLUNTARY DEPARTURE was DENIED and respondent was ordered removed to _____, in the alternative to _____.

[ ] Respondent's application for VOLUNTARY DEPARTURE was GRANTED until _____, upon posting a voluntary departure bond in the amount of $_____ to DHS within five business days from the date of this Order, with an alternate Order of removal to _____ or _____. Respondent shall present to DHS within ( ) thirty days ( ) sixty days from the date of this Order, all necessary travel documents for voluntary departure.

[ ] Respondent's application for ASYLUM was ( ) granted ( ) denied ( ) withdrawn with prejudice.
( ) subject to the ANNUAL CAP under the INA section 207(a)(5).
( ) Respondent knowingly filed a FRIVOLOUS asylum application.

[ ] Respondent's application for WITHHOLDING of removal under INA section 241(b)(3) was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for WITHHOLDING of removal under the Torture Convention was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for DEFERRAL of removal under the Torture Convention was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for CANCELLATION of removal under section ( ) 203(b) of NACARA, ( ) 240A(a) ( ) 240A(b)(1) ( ) 240A(b)(2) of the INA, was ( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that the DHS issue all appropriate documents necessary to give effect to this Order. Respondent ( ) is ( ) is not subject to the ANNUAL CAP under INA section 240A(e).

[ ] Respondent's application for a WAIVER under the INA section _____ was ( ) granted ( ) denied ( ) withdrawn or ( ) other _____. ( ) The conditions imposed by INA section 216 on the repondent's permanent resident status were removed.

[ ] Respondent's application for ADJUSTMENT of status under section _____ of the ( ) INA ( ) NACARA ( ) _____ was ( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that DHS issue all appropriate documents necessary to give effect to this Order.

[ ] Respondent's status was RESCINDED pursuant to the INA section 246.

EXHIBIT C

[ ] Respondent's motion to WITHDRAW his application for admission was ( ) granted ( ) denied. If the respondent fails to abide by any of the conditions directed by the district director of DHS, then the alternate Order of removal shall become immediately effective without further notice or proceedings: the respondent shall be removed from the United States to _____.

[ ] Respondent was ADMITTED as a _____ until _____ . As a condition of admission, the respondent was ordered to post a $ _____ bond.

[ ] Case was ( ) TERMINATED ( ) with ( ) without prejudice ( ) ADMINISTRATIVELY CLOSED.

[ ] Respondent was orally advised of the LIMITATION on discretionary relief and consequences for failure to depart as ordered.
[ ] If you fail to voluntarily depart when and as required, you shall be subject to civil money penalty of at least $1,000, but not more than $5,000, and be ineligible for a period of 10 years for any further relief under INA sections 240A, 240B, 245, and 248 (INA Section 240B(d)).
[ ] If you are under a final order of removal, and if you willfully fail or refuse to 1) depart when and as required, 2) make timely application in good faith for any documents necessary for departure, or 3) present yourself for removal at the time and place required, or, if you conspire to or take any action designed to prevent or hamper your departure, you shall be subject to civil money penalty of up to $500 for each day under such violation. (INA section 274D(a)). If you are removable pursuant to INA 237(a), then you shall further be fined and/or imprisoned for up to 10 years. (INA section 243(a)(1)).

[ ] Other:

Date: Jun 18, 2013

MICHAEL W. STRAUS, Judge

APPEAL: ( ) waived ( ) reserved by ( ) Respondent ( ) DHS ( ) Both

DUE BY:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: [ ] MAIL [ ] PERSONAL SERVICE
TO: [ ] DHS [ ] ALIEN [ ] Alien's ATT/REP [ ] ALIEN c/o Custodial Officer
DATE: _____ BY: [ ] COURT STAFF [ ] JUDGE _____

Y2

CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 6,903 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f). Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font.

s/ Trina Realmuto
Trina Realmuto
National Immigration Litigation Alliance

CERTIFICATE OF SERVICE

I, Trina Realmuto, hereby certify that on July 17, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants in the case, including counsel for Petitioner and Respondent, are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Trina Realmuto
Trina Realmuto
National Immigration Litigation Alliance

Dated: July 17, 2023