15-3996-ag

United States Court of Appeals

for the

Second Circuit

NASEER MOHAMED,

Petitioner,

– v. –

JEFFERSON B. SESSIONS III, United States Attorney General,

Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS
AGENCY NO. A056-184-338

BRIEF OF AMICUS CURIAE IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER NASEER MOHAMED AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae, the Immigrant Defense Project, states that it is a not-for-profit corporation that has no parent companies, subsidiaries, or affiliates which have issued shares to the public.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae, the Immigrant Defense Project ("IDP"), is one of the nation's leading non-profit organizations with specialized expertise in the interrelationship of immigration and criminal law. IDP specializes in advising and training criminal defense and immigration lawyers nationwide, as well as immigrants themselves, on issues involving the immigration consequences of criminal convictions. By contract with the New York State Office of Indigent Legal Services, IDP serves as the designated Regional Immigration Assistance Center for New York City, charged, pursuant to the Supreme Court's mandate in Padilla v. Kentucky, 559 U.S. 356 (2010), with providing expert immigration advice to public defenders in New York State who represent noncitizens in appeals of convictions entered at plea or trial.

IDP regularly appears as amicus curiae before the U.S. Supreme Court, various U.S. Courts of Appeals, including this Court, the Board of Immigration Appeals (the "BIA" or the "Board"), and New York State courts in cases regarding the immigration consequences of criminal convictions and the rights of noncitizens in criminal proceedings. See, e.g., Lee v. United States, 137 S. Ct. 1958 (2017); Mathis v. United States, 136 S. Ct. 2243 (2016); Mellouli v. Lynch, 135 S. Ct.

[1] Pursuant to F.R.A.P. 29(a)(4)(E), amicus curiae states that no counsel for a party authored this amicus brief in whole or in part, and that no party, party's counsel, or person or entity other than amicus curiae and its counsel contributed money that was intended to fund preparing or submitting this amicus brief.

1980 (2015); Padilla, supra; Abreu v. Holder, 378 F. App'x 59 (2d Cir. 2010); Planes v. Holder, 686 F.3d 1033 (9th Cir. 2012); People v. Baret, 23 N.Y.3d 777 (N.Y. 2014); People v. Peque, 22 N.Y.3d 168 (N.Y. 2013); People v. Ventura, 17 N.Y.3d 675 (N.Y. 2011).

IDP has a longstanding interest in one of the specific issues raised by the underlying petition for review—whether the "finality" rule enunciated in Pino v. Landon, 349 U.S. 901 (1955), and recognized by this Court in Marino v. INS, 537 F.2d 686, 691-92 (2d Cir. 1976) and by the BIA in Matter of Ozkok, 19 I. & N. Dec. 546, 553 n.7 (BIA 1988), which for decades has required that a criminal conviction become "final" through exhaustion or waiver of direct appellate remedies before it may sustain an order of removal—remains in effect after the passage of the Illegal Immigration Reform Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 ("IIRIRA"). IDP has addressed this issue in amicus submissions before three federal Courts of Appeals, including this Court in Abreu, as well as before the BIA on multiple occasions.

IDP submits this brief in support of Petitioner, Naseer Mohamed. Before the BIA, Petitioner had sought to terminate removal proceedings and remand to the Immigration Judge on the basis that his predicate criminal conviction is pending direct appellate review in New York State Court and therefore is not final and could not sustain an order of removal. The BIA, in an unpublished, single-member

decision, denied that motion, and erroneously found that the definition of "conviction" in IIRIRA eliminated the "finality" requirement. A.R. 6. That interpretation is not accorded Chevron deference by this Court. See Rotimi v. Gonzales, 473 F.3d 55, 57-58 (2d Cir. 2007).

IDP respectfully submits that IIRIRA did not eliminate the longstanding "finality" rule for convictions arising from formal adjudications and offers this brief to apprise this Court of important legal, due process and fairness considerations that support continued recognition of this vital rule. Absent express recognition by this Court that the "finality" rule is intact, the Department of Homeland Security ("DHS") and the Department of Justice will continue to improperly seek to remove noncitizens on the basis of non-final criminal convictions that are still pending direct appellate review, threatening to deprive many of them of the opportunity to meaningfully contest wrongful or flawed convictions or to challenge erroneous deportation orders, in derogation of enshrined appellate rights and in violation of due process. Failure to recognize the "finality" rule would thus seriously impact the lives of many immigrants and their families and communities, and pose serious fairness and legitimacy concerns.

SUMMARY OF THE ARGUMENT

The long-standing "finality" rule provides that a conviction is not "final" so as to trigger removal under the Immigration and Nationality Act, 8 U.S.C. § 1101

et seq. (the "INA") until the immigrant has had the opportunity to exhaust or waive direct appeals as of right. Marino, 537 F.2d at 691-92 (citing Pino, 349 U.S. at 901). For decades, this Court, other Courts of Appeals, and the BIA, all recognized that a conviction must attain the requisite "finality" before it could sustain an order of removal.

In codifying a definition for "conviction" in IIRIRA (see 8 U.S.C. § 1101(a)(48)) Congress did not disturb this long-standing rule for criminal convictions that arise from ***formal judgments of guilt***. Instead, Congress, dissatisfied that the immigration law consequences of ***deferred adjudications*** differed depending on the particulars of a state's criminal procedure law, altered ***only*** the requirements for convictions arising from ***that context*** in order to achieve a uniform national standard. Applying the relevant rules of construction to the statutory term "conviction" compels the conclusion that Congress intended to preserve the "finality" requirement for convictions arising from formal adjudications. This interpretation was adopted by the Third Circuit in Orabi v. Att'y Gen. of the U.S., 738 F.3d 535, 540-43 (3d Cir. 2014), is not foreclosed by Second Circuit law, and is consistent with the views expressed by the vast majority of the Board in Matter of Cardenas-Abreu, 24 I. & N. Dec. 794 (BIA 2009), where the Board, sitting en banc, discussed the "finality" rule at length.

Furthermore, important due process and fairness considerations support affirmation of the "finality" rule. For a variety of legal and practical reasons, it is exceedingly difficult, often impossible, for deported immigrants to meaningfully pursue criminal appeals from abroad and to seek return to the United States after overturning a flawed criminal conviction. The right to an appeal, once conferred by statute, is protected by the Due Process Clause from arbitrary deprivation. By postponing removal proceedings until an immigrant has had the opportunity to exhaust or waive the right to direct appeals afforded under applicable law, the "finality" rule helps avoid the serious constitutional and justice concerns associated with impairing or eliminating the ability of immigrants to pursue established appellate remedies and undo erroneous deportation orders. The "finality" rule also helps to sustain confidence in the fairness of the criminal and immigration systems by providing assurance that the drastic consequences of deportation—including the serious impact on family members of deportees who are American citizens—are imposed only after a conviction has withstood appellate review.

ARGUMENT

I. THE LANGUAGE, STRUCTURE, AND LEGISLATIVE HISTORY OF IIRIRA SHOW THAT THE "FINALITY" RULE HAS BEEN PRESERVED

For decades following the Supreme Court's 1955 decision in Pino, the INA was consistently interpreted to preclude the removal of a noncitizen on the basis of

a criminal conviction that was still pending direct appellate review. See Marino, 537 F.2d at 691; Ozkok, 191 I. & N. Dec. at 553 n.7. The Government argues here that in codifying a definition of "conviction" in IIRIRA in 1996, Congress eliminated the "finality" rule. But neither IIRIRA's text, structure, or legislative history supports this reading with respect to convictions arising from formal judgments of guilt.

A. Congress Preserved The "Finality" Rule With Respect To Convictions Arising From Formal Judgments Of Guilt

In codifying a definition of "conviction" in IIRIRA, Congress largely adopted the definition the BIA set forth in Ozkok, which by its own terms, and as interpreted by the federal courts and the BIA for nearly a decade thereafter, had uniformly been understood to have required exhaustion or waiver of direct appeals. Ozkok, 191 I&N Dec. at 553 n.7 ("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."); 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). Thus, by the time

IIRIRA was adopted in 1996, the "finality" rule was "well established in immigration law." Cardenas Abreu, 24 I. & N. Dec. at 798.

When Congress adopts language from decisional law, courts presume that Congress also intends to import the judicial and administrative interpretations of that language, unless there is a clear indication to the contrary. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85-86 (2006) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.") (internal citations omitted); Williams v. Taylor, 529 U.S. 420, 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.") (citing Lorillard v. Pons, 434 U.S. 575, 581 (1978)). See also Saxbe v. Bustos, 419 U.S. 65, 74-76 (1974) ("longstanding administrative construction [of an INA provision] is entitled to great weight" and was not "repealed sub silentio" by Congress). Because Congress imported the specific language of the definition of "conviction" arising from formal adjudications "virtually verbatim" from Ozkok, these governing interpretive presumptions compel the conclusion that Congress intended to preserve the associated well-established "finality" requirement. See Alaska v. Native Village of

Venetie Tribal Gov't, 522 U.S. 520, 530-31 (1998) (Congress implicitly adopted the well-established definitions of terms regarding what constitutes "Indian country" when it used language "taken virtually verbatim from" prior case law).

In Ozkok, the BIA reiterated the long-standing rule that a conviction arising from formal adjudications exists for immigration purposes if a "court has adjudicated [the person] guilty or has entered a formal judgment of guilt." 19 I. & N. Dec. at 551. For cases where "adjudication of guilt has been withheld" (also known as "deferred adjudication" procedures), the BIA departed from its prior definition and promulgated a new three-pronged test for determining whether a conviction existed under the INA.[2] Id. at 551-52. Under this test, a conviction would be found if (1) there was a guilty verdict, a plea of guilt or nolo contendere, or an admission of sufficient facts to warrant a finding of guilty; (2) there was an imposition of punishment, penalty, or restraint; and (3) a judgment or adjudication would be entered if the person violated the terms of his or her probation without further proceedings regarding the person's guilt of the original charge. Id.

[2] By the time Ozkok was decided, many states had adopted processes for deferring adjudication or similar methods of "ameliorating the consequences of a conviction." 19 I. & N. Dec. at 550. Generally speaking, deferred adjudication procedures afford defendant the opportunity to avoid traditional adjudication, sentencing, and incarceration, in exchange for agreement to certain probationary conditions. But the precise procedures vary from state to state. Id. In deferred adjudications, there is usually "no entitlement to an immediate direct appeal." Planes, 686 F.3d at 1040 (Reinhardt, J. dissenting from denial of rehearing en banc).

With respect to formal adjudications of guilt, straightforward comparison reveals that Congress adopted Ozkok's definition of conviction "***virtually verbatim***," Alaska, 522 U.S. at 530-31 (emphasis added). Compare Ozkok, 19 I. & N. Dec. at 551 ("[W]e shall consider a person convicted if the court has adjudicated him [or her] guilty or has entered ***a formal judgment of guilt***.") with 8 U.S.C. § 1101(a)(48)(A) ("***a formal judgment of guilt*** of the alien entered by a court") (emphasis added). Congress's ***only*** material modifications to Ozkok's definition of conviction pertain to situations where adjudication has been deferred. For these cases, Congress took Ozkok's three-pronged definition, but omitted the specific illustrative examples of punishment in the second element and excised the third element entirely. Compare Ozkok, 19 I. & N. Dec. at 551-52 with 8 U.S.C. §§ 1101(a)(48)(A)(i) and (ii). Thus, applying the applicable norms of construction discussed above, it can be inferred that by leaving the definition of conviction arising from a formal judgment of guilt intact, Congress intended preserve the associated requirement of "finality," which had long been recognized by the federal Courts of Appeals and the Board. Indeed, as the Third Circuit observed, "[n]othing 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 the enactment of the statute." Orabi, 728 F.3d

at 541 (quoting Planes, 686 F.3d at 1039-40 (Reinhardt, J., dissenting from the denial of rehearing en banc)).

Further, IIRIRA's legislative history confirms that "finality" has been preserved for formal judgments of guilt. In codifying a definition of "conviction," Congress was concerned that non-citizens whose criminal cases had been resolved through deferred adjudications were receiving differential immigration treatment depending on the law of the state that imposed the disposition. Specifically, immigrants were being arbitrarily either spared from or exposed to immigration consequences of a conviction depending on state criminal procedure laws governing entry of convictions after violations of the terms of a deferred adjudication. In response, Congress legislated one uniform national standard for a "conviction" arising from ***deferred adjudication***. See H.R. Conf. Rep. No. 104-828, at 224 (1996) (faulting Ozkok for not going "far enough" to address the "myriad of [different state] provisions for ameliorating the effects of a conviction," and stating a Congressional intent to eliminate the third prong of Ozkok such that a deferred adjudication of guilt should always be considered a "conviction" for immigration purposes).

Nowhere in the language Congress employed to define "conviction" in IIRIRA or the associated legislative history, however, is there discussion of any intent to upset the "finality" rule as it applies to ***formal adjudications of guilt***. As

a result, there can be no plausible inference that Congress intended to extinguish the long-standing status quo for convictions arising from formal adjudications. Orabi, 738 F.3d at 541-42 ("[T]he Congressional Conference Committee Report accompanying IIRIRA refers ***only*** to a modification of the treatment of ***deferred adjudications***" and therefore IIRIRA "does not disturb the longstanding 'finality rule' for ***direct appeals*** recognized in Ozkok") (emphasis added); see also Williams, 529 U.S. at 434 (applying canon).

B. The Reasoning Of The Third Circuit In Orabi And That Of A Vast Majority Of The BIA In Cardenas-Abreu Regarding "Finality" Is Persuasive

A finding that the "finality" requirement is intact for convictions arising from formal adjudications is also consistent with the most recent appellate Court jurisprudence and the views expressed by an overwhelming majority of the members of the BIA in Cardenas-Abreu.

The Third Circuit expressly held in 2014 that the "finality" rule for direct appeals from formal judgments is "alive and well" post-IIRIRA. Orabi, 738 F.3d at 543.[3] As noted supra, the Orabi court examined IIRIRA's text and legislative history and reasoned that in importing Ozkok's definition of convictions arising from a formal judgment nearly verbatim, while making changes solely to the

[3] The Sixth Circuit has also strongly suggested that the "finality" rule remains in effect. United States v. Garcia-Echaverria, 374 F.3d 440, 445-46 (6th Cir. 2004) ("To support an order of deportation, a conviction must be final. Finality requires the defendant to have exhausted or waived his rights to direct appeal.") (citing, inter alia, to Pino).

definition of convictions arising from deferred adjudications, Congress intended to retain the well-established "finality" rule for convictions in the former category. Id. at 540-43.

Additionally, the Orabi court distinguished a series of decisions purportedly supporting the view that the "finality" rule has been abrogated for convictions from formal judgments, correctly concluding that none of those cases are actually on point because they (1) arose in the deferred adjudication context, (2) involved collateral attacks on judgments (which, unlike direct appeals, historically have not suspended the "finality" of convictions, see Marino, 926 F.2d at 164 (excluding collateral attacks from the scope of the "finality" rule)), or (3) were otherwise inapposite or referenced "finality" only in dicta. Orabi, 738 F.3d at 542-43.[4]

The discussion of "finality" in Puello v. Bureau of Citizenship & Immigration Servs., 511 F.3d 324 (2d Cir. 2007), which is the sole authority cited by the single Board member below, A.R. 6, is likewise ***at most*** dicta. Orabi, 738

[4] For instance, as the Orabi court observed, Waugh v. Holder, 642 F.3d 1279, 1284 (10th Cir. 2011) involved a collateral attack. In Montenegro v. Ashcroft, 355 F.3d 1035 (7th Cir. 2004), the petitioner did not have a pending direct appeal when the removal order was entered. In Moosa v. INS, 171 F.3d 994, 1009 (5th Cir. 2009), the court held only that the "finality" rule had been eliminated as to deferred adjudications. Griffiths v. INS, 243 F.3d 45, 54 (1st Cir. 2001) only addressed a deferred adjudication situation and expressly left open the possibility that the "finality" requirement in the formal judgment context had been preserved. Further, United States v. Saenz-Gomez, 472 F.3d 791, 794 (10th Cir. 2007) arose in the context of a sentencing enhancement proceedings after direct appeals had been exhausted. The additional out-of-Circuit cases the Government cites here are also distinguishable. United States v. Adame-Orozco, 607 F.3d 647, 649-50 (10th Cir. 2010) involved a collateral attack on judgment and in Abiodun v. Gonzales, 461 F.3d 1210, 1213-14 (10th Cir. 2006), the petitioner's direct appeal had already been rejected when his motion to terminate removal proceedings was decided against him.

F.3d at 542 (observing that this Court recognized in Ramirez v. Holder, 447 Fed. App'x 249, 251 n.1 (2d Cir. 2011) that the 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 direct appeal from a conviction).

Indeed, in several decisions post-dating Puello, this Court has suggested that the "finality" rule remains in effect. 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); Adams v. Holder, 692 F.3d 91, 94 (2d Cir. 2012) (noting that DHS withdrew its charging document after realizing that a direct appeal of conviction was pending, and citing to Marino and Walcott); Abreu, 378 Fed. App'x at 61-62 ("[a]ssuming arguendo that the finality requirement remains in effect after the passage of the IIRIRA" and instructing the BIA to address the issue on remand); see also Griffith v. Board of Immigration Appeals, 2011 WL 5357826, at *3, n.4 (E.D.N.Y. Nov. 7, 2011) (observing that Puello's discussion of finality was "in dictum" and that the "more recent Abreu decision makes it clear that [survival of the 'finality' rule] is not foreclosed by existing [Second Circuit] law and may in fact be meritorious").[5]

[5] The other cases cited by the Government likewise do not support a finding that the "finality" rule has been eliminated in this Circuit. For example, Saleh v. Gonzales, 495 F. 3d 17 (2d Cir. 2007) did not address a pending direct appeal. Rather, it held, consistent with BIA precedent,

While the Ninth Circuit has held that IIRIRA eliminated the "finality" rule for direct appeals from formal adjudications, Planes v. Holder, 652 F.3d 991, 995 (9th Cir. 2011), seven judges dissented from the denial of the petition for rehearing en banc. 686 F.3d at 1036-41 (Reinhardt, J., dissenting from denial of rehearing en banc, joined inter alia, by C.J. Kozinski). The dissent concluded that abrogation of the "finality" rule was "not what the law requires, and not what Congress intended." Id. at 1038. Instead, the dissent observed that by adopting "almost verbatim" the Ozkok definition of conviction in the formal adjudication context, Congress "expressed its intent to preserve the longstanding requirement of finality for direct appeals as of right." Id. at 1039 (citing Williams, 529 U.S. at 534 and Alaska, 522 U.S. at 530-31).[6]

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that a non-citizen remains convicted of a removable offense when the predicate conviction has been vacated simply to aid him or her in avoiding adverse immigration consequences. Id. at 19-20. Francis v. Gonzales, 442 F.3d 131, 141 (2d Cir. 2006), is likewise inapposite as it addressed how under the pre-IIRIRA standard the Government could prove the existence of a foreign conviction through a foreign national's own admissions and a faxed copy of a police report. The Francis court's discussion of the definition of the term "conviction" confirms that Congress was concerned when enacting IIRIRA with only deferred adjudications. Id. at 140-41. See also Alejo v. Mukasey, 292 Fed App'x 128, 129 (2d Cir. 2008) (unpublished summary order relying solely on Puello's dicta without further analysis).

[6] A conclusion that the "finality" rule is intact is also consistent with precedent regarding vacated convictions. It has been consistently recognized that convictions that have been overturned for substantive or procedural reasons cannot serve as a basis for removal. Saleh, 495 F.3d 17 at 25-26 (convictions vacated on the merit cannot serve as a predicate for removal); 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'"), rev'd on other grounds, 465 F.3d 263 (6th Cir. 2006).

Additionally, while the Board has not yet directly decided the continued viability of the "finality" rule in a precedent decision,[7] a vast majority of its members in Cardenas-Abreu expressed, either indirectly or expressly, the view that the "finality" rule remains intact for formal adjudications.[8]

The plurality in Cardenas-Abreu observed that in enacting a definition for "conviction," Congress gave "no indication of an intent to disturb" the well-established principle "that an alien must waive or exhaust his direct appeal rights to have a final conviction." 24 I. & N. Dec. at 798 (Malphrus, for plurality, joined by four other Members). The plurality thus recognized that "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. The dissent affirmatively concluded that the "finality" rule remains in effect. Id. at 814 (Greer, dissenting, joined by five other Members) ("Given that Congress chose to adopt Ozkok, except for its third prong addressing a specific category of deferred

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[7] Matter of Roldan, cited by the Government, did not address the viability of the "finality" rule in the formal adjudication context. Rather, Roldan addressed only the operation of a state rehabilitative statute in a deferred adjudication setting. See 22 I. & N. Dec. 512, 518-23 (BIA 2009).

[8] Because there was a discrete dispute in Cardenas-Abreu as to the effect of a late-reinstated appeal under New York law, the majority did not need to expressly reach the underlying question as to the viability of the "finality" rule. 24 I. & N. Dec. at 798. On appeal, this Court likewise limited its decision to the effect of Mr. Cardenas' late-filed appeal, holding that there is no difference in timely-filed appeals brought under N.Y. Crim. Proc. Law § 460.10 and accepted late-filed appeals brought under N.Y. Crim. Proc. Law § 460.30, like Petitioner's here. Abreu, 378 F. App'x at 61-62. This Court instructed the BIA to address the impact of IIRIRA on the "finality" requirement on remand. Id. at 62. However, IDP understands the BIA's adjudication of the issue was mooted when Mr. Abreu's criminal conviction was upheld on appeal.

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."). One of the two concurring opinions likewise concluded that the "finality" rule remains valid. See 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.").[9]

II. THE "FINALITY" RULE PROTECTS ESTABLISHED APPELLATE REMEDIES AND AVOIDS POTENTIALLY SERIOUS CONSTITUTIONAL AND FAIRNESS CONCERNS

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. Like most states and the federal system, New York enshrines the right to a direct appeal from a criminal conviction. See N.Y. Crim. Proc. Law § 450.10; People v. Hernandez, 93

[9] Only two members of the Board concluded that the "finality" rule was eliminated. See id. at 803-810 (Pauley, concurring, joined by Cole). Additionally, the BIA has continued to recognize the "finality" rule in unpublished decisions post-dating Cardenas-Abreu. See, e.g., Ramirez, 447 F. App'x at 251 (observing that the BIA in the decision below "determined that a non-final conviction cannot 'trigger a statutory bar to relief' and stated that '[a] conviction is final . . . once a party has exhausted all direct appeals of right.'"); Matter of Michael Jackson Ofori, 2011 WL 7071042, at *2 (BIA Dec. 23, 2011) ("The conviction became final for immigration purposes when the respondent failed to appeal his conviction, allowed the appeal period to lapse, waived his right to a direct appeal, or exhausted the direct appeal of his conviction."). However, given that, as with the single Board Member's decision below, there are also unpublished BIA decisions failing to apply the "finality" requirement, this Court should issue a precedential decision confirming that the "finality" rule remains intact.

N.Y.2d 261, 267 (1999) ("A defendant may appeal to an intermediate appellate court as of right.") (internal quotation omitted).[10] New York law also ensures assistance of counsel on that appeal. People v. Gonzalez, 47 N.Y.2d 606, 610 (1979) ("The right of an indigent criminal defendant to the services of counsel on appeal is established by a long line of decisions ") (citing inter alia, Douglas v. California, 372 U.S. 353, 356-58 (1963)).

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, 372 U.S. at 356-58; Griffin v. Illinois, 351 U.S. 12, 18 (1956) (once appellate procedures are established, the Due Process and Equal Protection Clauses protect against "invidious discrimination" in those proceedings).[11] Despite court decisions limiting outright dismissal of an appeal as moot based exclusively on the

[10] Most other states likewise recognize the right to an appeal of a criminal conviction. See 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) ("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.").

[11] The Due Process Clause protects immigrants upon their entry into this country. See Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

appellant's deportation, e.g., Ventura, 17 N.Y.3d at 678,[12] deportation can still in several respects substantially interfere with, and in some instances effectively extinguish, both the ability of immigrants to meaningfully exercise appellate rights and to obtain readmission to the United States following a successful appeal. By postponing the harsh and often irreversible consequences of removal until an immigrant has had the opportunity to waive or exhaust his direct appeals as of right, the "finality" rule thus helps safeguard enshrined appellate rights and avoids serious due process and justice concerns.

First, as this Court has recognized, there are substantial "difficulties of pursuing an effective appeal while abroad." Thapa v. Gonzales, 460 F.3d 323, 331 (2d Cir. 2006). For instance, defendants residing abroad (especially indigent defendants) can find it exceptionally difficult 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 abroad); Dorelien v. U.S. Att'y Gen., 317 F.3d 1314, 1325 (11th Cir. 2003) (Barkett, J., dissenting from denial of

[12] But see People v. Diaz, 7 N.Y.3d 831 (2006) (permitting dismissal of discretionary appeals by the highest court of New York State); People v. Harrison, 27 N.Y.3d 281 (2016) (permitting dismissal by an intermediate New York State court of permissive appeals).

petition for rehearing en banc) (commenting on the "Herculean" task faced by immigrants seeking to pursue appeals after deportation).

Second, even if a deported immigrant prevails on his or her criminal appeal from abroad, there remain steep—often insurmountable—legal hurdles to reentering the United States. Despite widespread rejection by the Courts of Appeals, the BIA maintains the position "that reopening is unavailable to any alien who departs the United States after being ordered removed." Matter of Armendarez-Mendez, 24 I. &. N Dec. 646, 648 (BIA 2008). See also 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) (post-departure bar regulations). And while this Court has rejected the post-departure bar as applied to statutory motions to reopen, see Luna v. Holder, 637 F.3d 85 (2d Cir. 2011), it has upheld the bar as applied to sua sponte motions to reopen. See Zhang v. Holder, 617 F.3d 650 (2d Cir. 2010).

Third, the DHS procedures purportedly 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) (assessing 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 simply has not had a consistently effective mechanism to return deportees who won their cases to the United States. Id. at 1641-44. DHS

makes clear that, in its view, such an immigrant has no automatic right to reentry, and instead must face a long, burdensome and highly discretionary process.[13] Unbounded discretion is lodged in administrative officers spread across multiple agencies to determine whether his or her return is warranted.[14] Moreover, to the extent the Government refuses to pay for the return of indigent immigrants, "the financial burden of removal may, as a practical matter, preclude effective relief." National Immigration Project of Nat. Lawyers Guild v. U.S. Dept. of Homeland Sec., 2014 WL 6850977, at *5 (S.D.N.Y. Dec. 3, 2014).

Fourth, the Government has not expressly agreed that a foreign citizen is legally entitled to pursue relief at the Immigration Court from outside the United States. 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).[15] As a matter of practice,

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[13] National Immigration Project of the National Lawyers Guild, Declaration in Support of Motions for Stays of Removal, at ¶¶ 9-21, available at https://nationalimmigrationproject.org/PDFs/practitioners/our_lit/foia_dhs_return/2015_25Nov_Dec_Supp_of_Stay_Motions.pdf (last visited Aug. 22, 2017). The National Immigration Project of the National Lawyers Guild, with the assistance of the New York University Immigrant Rights Clinic, prepared this declaration, based on a review of documents obtained, inter alia, through Freedom of Information Act litigation, regarding the return of deported immigrants who have prevailed in immigration-determinative legal challenges.

[14] Id. at ¶10.

[15] 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 on the basis of a drug conviction. The Ninth Circuit subsequently vacated his removal order. But DHS did not agree that he could apply for relief from the Immigration Judge while outside the United States. It took ***six years***

many Immigration Judges refuse to entertain an application for relief from an applicant who is not physically present in the United States. Id. at 1068-69 (providing 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, if not 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 an improper removal order and obtain reentry to the United States. While Congress's intent to preserve the "finality" rule in the formal adjudications context is clear from the text, structure, and legislative history of IIRIRA (see Section I, supra), even if the statute were susceptible to a different construction, this Court should reject an interpretation that would jeopardize established due process protections. Where a statute "is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." Jones v. United States, 529 U.S. 848, 857 (2000) (internal citations and quotation marks omitted); see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades

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and "extraordinary advocacy by pro bono lawyers" before he was permitted to return. Id. at 1065-66.

Council, 485 U.S. 568, 575 (1988) (where "construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). The Supreme Court has followed this avoidance doctrine when interpreting IIRIRA. See, e.g., INS v. St. Cyr, 533 U.S. 289, 305 (2001) (rejecting an interpretation of IIRIRA that would raise constitutional concerns in the absence of "a clear and unambiguous statement of congressional intent" for the Government's proposed constitutionally dubious result); Davis, 533 U.S. at 690 (construing IIRIRA to avoid infringing the "heart of the liberty that [the Due Process] Clause protects").

Courts also recognize that deportation carries harsh repercussions[16] and whenever possible interpret the INA to avoid inflicting that severe penalty. Lennon v. INS, 527 F.2d 187, 193 (2d Cir. 1975) (given the "stakes [of deportation] are considerable for the individual," deportation provisions must be given the "narrowest of several possible meanings of the words used"). This principle remains firmly in place after IIRIRA. Chrzanoski v. Ashcroft, 327 F.3d 188, 197 (2d Cir. 2003) (stating post IIRIRA as deportation "is a drastic measure and at times the equivalent of banishment or exile . . . we will not assume that

[16] For long-term residents of the United States, "[p]reserving the . . . right to remain in the United States may be more important to the client than any potential jail sentence." Lee, 137 S. Ct. at 1968 (quoting, inter alia, Padilla, 599 U.S. at 365-68); see also Ng Fung Ho v. White, 259 U. S. 276, 284 (1922) (deportation results in "loss of . . . all that makes life worth living").

Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used") (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

Application of these long-settled principles further militates in favor of the continued viability of the "finality" rule. 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 potentially irreversible, fate of removal and permanent separation from family member, many of whom are U.S. citizens. Congress did not in the text of IIRIRA or its legislative history provide anything remotely resembling a clear statement that it intended to abolish the long settled "finality" rule. Settled canons of construction therefore foreclose reading IIRIRA to have, sub silentio, imposed such a draconian and constitutionally suspect result.

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

Lastly, the "finality" rule helps protect and promote the critical function played by appeals in the criminal justice system, both as a check on faulty convictions, and as a means of promoting individual and societal confidence in the fairness and integrity of the legal system. These error-correction and legitimizing

functions are especially critical in light of the severe strains on the indigent representation system—which serves as the primary line of defense for large numbers of immigrant defendants facing criminal charges that could give rise to removal.

New York's state court and indigent defense systems are under significant pressure. In 2015, criminal case filings statewide (excluding parking tickets) totaled more than 1,300,000,[17] placing a heavy burden on the state's judges and administrative personnel, and on New York's indigent defense system. For public defenders in New York City, a law enacted in 2009 capped individual caseloads to 400 misdemeanors or 150 felonies per year, with no allowances for cases that will require a trial.[18] In other counties throughout the state where no cap applies, workloads remain "unconscionably high."[19] Governor Andrew Cuomo recently signed legislation aimed at addressing the serious flaws in the indigent defense

[17] New York State Unified Court System, 2015 Annual Report, at 24, available at http://nycourts.gov/reports/annual/pdfs/15_UCS-Annual_Report.pdf (last visited August 22, 2017).

[18] See Rules of the Chief Administrative Judge §127.7, Workload of Attorneys and Law Offices Providing Representation to Indigent Clients in Criminal Matters in New York City, available at http://www.nycourts.gov/rules/chiefadmin/127.shtml#07 (last visited August 22, 2017).

[19] See Geoff Burkhart, Public Defense, The New York Story, at 28, available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_nystory.authcheckdam.pdf (last visited August 22, 2017).

system over the next six years.[20] While this legislation signifies potential progress, it also reveals the well-recognized flaws in New York's criminal justice system, and highlights the importance of appellate review.

This state of affairs is not unique to New York. Across the country, court systems are falling far short of the constitutional mandate of providing effective counsel to indigent defendants.[21] The Supreme Court has openly questioned whether "overworked and underpaid public defenders" are capable of rendering effective legal advice. Luis v. U.S., 136 S. Ct. 1083, 1095 (2016) (noting less than one third of public defender offices nationwide have staffing to meet recommended caseload standards). As former Attorney General Eric Holder publicly lamented,

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[20] Advocates Celebrate Criminal Justice Legislative Victories, available at http://raisetheageny.com/newitem/advocates-celebrate-criminal-justice-legislative-victories (last visited August 22, 2017).

[21] Matt, Ford, A "Constitutional Crisis" in Missouri, available at https://www.theatlantic.com/politics/archive/2017/03/missouri-public-defender-crisis/519444/ (noting a crisis in indigent defense in Missouri and nationally) (last visited August 22, 2017); see also National Association of Criminal Defense Lawyers, Gideon at 50: A Three-Part Examination of Indigent Defense In America, available at https://www.nacdl.org/reports/gideonat50/rationingjustice/ (last visited August 22, 2017) (documenting severe deficiencies in indigent defense systems); National Right to Counsel Committee, Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel, at 2, and Chapter 2, available at http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf (last visited August 22, 2017) (observing that indigent defense systems throughout the country are "truly failing" due to funding shortfalls, excessive caseloads, and other problems, resulting in many defendants pleading guilty to or being convicted of crimes without constitutionally-mandated effective representation of counsel).

"millions of Americans still struggle to access the legal services that they need and deserve—and to which they are constitutionally entitled."[22]

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 those systems. The "finality" rule promotes this important error-correcting function by protecting the opportunity of noncitizens to challenge wrongful convictions that would otherwise lead to erroneous and potentially irreversible deportation and separation from American family members, and does so without compromising the Government's ability to remove individuals whose convictions ultimately withstand appellate scrutiny. In so doing, the "finality" rule also provides individual and societal assurances that the legal process has been fair. Cf. Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1666 (2015) (noting that "justice must satisfy the appearance of justice" and public confidence in the judiciary is "a state interest of the highest order") (internal citations omitted).

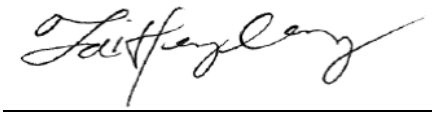
[22] Attorney General Eric Holder, Remarks at the American Bar Association's National Summit on Indigent Defense, available at http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html (last visited August 22, 2017).

CONCLUSION

For the foregoing reasons, IDP respectfully requests that this Court reverse the BIA and hold that the long-standing "finality" rule remains intact.

Dated: August 22, 2017
New York, New York

Respectfully submitted,

By: 

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