No. 14-2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDDY ETIENNE, Petitioner,

v.

ERIC H. HOLDER, JR., U.S. Attorney General, Respondent

ON PETITION FOR REVIEW OF A
FINAL ADMINISTRATIVE REMOVAL ORDER

BRIEF OF *AMICI CURIAE* CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONER EDDY ETIENNE

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* the Capital Area Immigrants' Rights (CAIR) Coalition and the National Immigration Project of the National Lawyers Guild state that they are nonprofit corporations, and no publicly held corporation owns 10% or more of their stock. *Amici* are unaware of any publicly held corporation that has an interest in the outcome of this litigation.

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no counsel for any party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *amici* and their counsel contributed money that was intended to fund preparing or submitting the brief.

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INTRODUCTION

At issue in this case lies a question of fundamental fairness—whether the courthouse may be closed to an unrepresented noncitizen who was wrongly put into summary removal proceedings and who timely appealed. The Department of Homeland Security (DHS) ordered Petitioner Eddy Etienne deported through "administrative removal" under 8 U.S.C. § 1228(b), a fast-track procedure that allows DHS to expeditiously remove certain noncitizens convicted of aggravated felonies without a formal hearing before an immigration judge and corresponding procedural protections. As is part and parcel of administrative removal, DHS officers both prosecuted Mr. Etienne and made the decision to deport him, all within the span of 14 days. In section II below, *amici* explain how this process fundamentally compromises the ability of noncitizens like Mr. Etienne to obtain meaningful and expeditious access to legal resources or assistance.

This 14-day process did not allow for any challenge whatsoever to the legal conclusion that triggered summary removal in the first instance—the conclusion that Mr. Etienne's almost-twenty-year old misdemeanor drug conviction qualifies as an aggravated felony. A non-attorney immigration officer made that erroneous determination, which is not surprising given agency officers' lack of legal training in this highly technical area of the law.

Despite the lack of procedural protections and the potential for agency error, the government has contended that Mr. Etienne failed to exhaust administrative remedies—a necessary condition of judicial review under 8 U.S.C. § 1252(d)(1)—by not challenging the legal basis for his aggravated felony charge before DHS. The government contends that Mr. Etienne should have raised this challenge within a 10-day period set out by the regulations as the period to respond.

The opportunity to rebut the charges before DHS during this 10-day window cannot qualify as an "administrative remedy" requiring exhaustion because of the exceedingly limited process involved in the fast-track proceeding, particularly as compared to conventional removal proceedings before an immigration judge. Moreover, the process afforded by DHS in administrative removal provides no meaningful opportunity for a person in Mr. Etienne's position to challenge the legal, as opposed to factual, basis for the government's decision to issue an administrative removal order. That limitation is clear from both the charging form itself and the governing regulations.

Furthermore, as a practical matter, an unrepresented individual placed in administrative removal is generally in no position to make a legal argument, even if the regulations could be read to require him to do so. Noncitizens placed in administrative removal are subject to mandatory, no-bond immigration detention. The 10-day response window coupled with the barriers to meaningful access to

legal resources and legal assistance create an insurmountable hurdle for a detainee attempting to make a legal challenge. This is particularly so given the highly technical nature of the law governing the analysis of whether a particular crime constitutes an aggravated felony. *Amicus* CAIR Coalition frequently receives complaints from detained noncitizens who are unable to secure legal representation or even access paper to print documents at their facility's law library. Requiring such individuals, on their own, to develop and assert a legal challenge in the context of the 10-day window would be highly impracticable and fundamentally unfair.

Amici thus urge this Court to hold that no exhaustion requirement bars Mr. Etienne from raising his legal claims at his first opportunity to do so—to a circuit court.

INTEREST OF *AMICI CURIAE*

Amici are non-profit organizations dedicated to promoting fundamental fairness for noncitizens accused of crimes, and thus have a strong interest in ensuring that immigration law is correctly interpreted to give noncitizens convicted of criminal offenses the full benefit of their constitutional and statutory rights. CAIR Coalition is a nonprofit organization that provides legal assistance to detained indigent noncitizens facing removal and is the only organization dedicated to working with individuals detained by the Department of Homeland

Security (DHS) throughout Virginia and Maryland. The National Immigration Project of the National Lawyers Guild is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws.

ARGUMENT

I. There are No Administrative Remedies to Exhaust in the Administrative Removal Process

This case arises through the fast-track process known as "administrative removal," through which the Department of Homeland Security (DHS) can expeditiously remove certain non-permanent residents from the United States. *See* 8 U.S.C. § 1228(b). This process is triggered when a non-lawyer DHS official serves a Notice of Intent to Issue a Final Administrative Order (NOI) on a noncitizen. The NOI is a check-the-box form that states the respondent has 10 days[1] to challenge the order.

In the course of its unsuccessful effort to oppose Mr. Etienne's application for a stay of removal, the government contended that this Court lacks jurisdiction to consider Mr. Etienne's argument that the agency improperly classified his misdemeanor drug offense as an aggravated felony because he "did not present this argument to DHS" and thereby "failed to exhaust the claim." Dkt. 16 at 5. The

[1] A noncitizen is given 13 days to respond if service is by mail.

immigration statute conditions judicial review on a petitioner's having "exhausted all administrative remedies available to the alien as of right," 8 U.S.C. § 1252(d)(1). This exhaustion requirement, however, does not apply where, as here, there are *no* administrative remedies to exhaust. Thus, the statutory exhaustion requirement in 8 U.S.C. § 1252(d)(1) does not pose any obstacle to this Court's review of Mr. Etienne's case.

A. The Limited Opportunity to Contest Removal in Expedited Proceedings Does Not Qualify as an Administrative Remedy

A limited and perfunctory opportunity to contest removal in fast-track proceedings does not constitute a true administrative remedy requiring exhaustion.

The Tenth Circuit expressly adopted this argument in *Aguilar-Aguilar v. Napolitano*, 700 F.3d 1238, 1243-44 n.5 (10th Cir. 2012). As in this case, the government in *Aguilar-Aguilar* argued that the opportunity to inspect the evidence and rebut the charges put forward in the NOI constitutes an administrative remedy that the petitioner failed to exhaust. *Id*. Yet the court summarily disposed of this argument, clarifying that "an opportunity for an alien, in the capacity of a *respondent*, to 'rebut the charges' contained in an NOI" does not qualify as an administrative remedy in the removal context. *Id*. In contrast, the court explained, an administrative remedy "denotes a means by which an alien, in the capacity of a *petitioner*, may seek redress from an adverse agency decision." *Id*. Thus, *Aguilar–Aguilar* confirms that contesting the charges contained in a NOI before DHS *does*

not qualify as an "administrative remedy" that a noncitizen must exhaust under 8 U.S.C. § 1252(d)(1) to obtain judicial review.

The Tenth Circuit's rationale is correct, and that is borne out by a closer look at the fast-track process under 8 U.S.C. § 1228(b), which stands in stark contrast to "conventional" removal proceedings under 8 U.S.C. § 1229a. The fast-track process is a paper process initiated by a non-lawyer immigration official who serves the NOI on the noncitizen respondent. The NOI is a check-the-box form asking the noncitizen whether or not he would like to contest removal or request withholding of removal. 8 C.F.R. § 238.1(b). The form indicates that he has 10 days to challenge the order, during which period he will remain detained. 8 U.S.C. § 1226(c).

In conventional removal proceedings, detainees are afforded more robust procedural rights. A noncitizen in conventional removal proceedings is issued a Notice to Appear, notifying him of the government's charges and when and where to appear in immigration court. 8 U.S.C. § 1229(a)(1). There, he will appear before an impartial arbiter –an Immigration Judge under the auspices of the Department of Justice. 8 U.S.C. § 1229a(a)(1). If unrepresented, he may request additional time to hire an attorney to represent him.[2] 8 U.S.C. § 1229(a)(1)(E).

[2] Although noncitizens have a right to an attorney in removal proceedings, they must bear the cost of counsel. No counsel is provided at government expense for noncitizens facing removal. 8 U.S.C. § 1362. One narrow exception exists for

The Immigration Judge in a conventional removal proceeding will ask a noncitizen how he pleads and whether he admits to removability. If charged with being deportable, the court will require DHS to satisfy its burden of proof and demonstrate through clear and convincing evidence that the noncitizen is in fact deportable. 8 U.S.C. § 1229a(c)(3). During the hearing, the noncitizen will have the opportunity to present evidence, including witnesses and testimony, and to challenge the government's evidence through cross-examination and motions to exclude and suppress. 8 U.S.C. § 1229a(b)(4). If found deportable, the judge will inform him of any possible relief from removal and allow him time to apply for such relief and document through exhibits and evidence his eligibility and that he merits a favorable exercise of discretion. 8 C.F.R. § 240.11(a)(2). A complete record is kept of all the testimony and evidence submitted at the hearing. 8 U.S.C. § 1229a(b)(4)(C). If he loses, the noncitizen has the right to seek an administrative appeal before the Board of Immigration Appeals. 8 C.F.R. § 1003.38. The average length of a removal hearing in 2014 was 500 days.[3]

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certain detained individuals who have a mental illness or disability rendering them incapable of representing themselves in detention or removal proceedings. *Franco-Gonzalez v. Holder*, --F.Supp.2d--, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

[3] *See* TRAC Immigration, *Immigration Court Processing Time by Outcome Tool*, available at http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php.

By contrast, in administrative removal, there is neither a court hearing nor an impartial adjudicator. Accordingly the noncitizen does not have a right to call witnesses, cross-examine the government's witnesses, or make any sort of in-person argument. 8 U.S.C. §1228(b); 8 C.F.R. § 238.1. Instead a non-lawyer immigration officer decides that the noncitizen's conviction qualifies as an aggravated felony based on documentary evidence. Significantly, the noncitizen has no opportunity to apply for any type of discretionary relief from removal, such as asylum or adjustment of status, despite compelling equities that may be present. 8 U.S.C. § 1228(b)(5). Once DHS issues the Final Administrative Removal Order, he has no statutory right to take an administrative appeal. 8 U.S.C. § 1228(b)(3).

In the context of expedited proceedings similar to administrative removal, other courts have more broadly held that a limited opportunity to contest removal does not qualify as an administrative remedy. The Tenth Circuit recognized this principle in *Schmitt v. Maurer*, 451 F.3d 1092 (10th Cir. 2006), where a noncitizen who had been admitted to the United States through the Visa Waiver Program and had overstayed his visa alleged that DHS erred in issuing a removal order against him in light of a pending petition for change of status. *Id.* at 1095-96. The government argued that the court lacked jurisdiction to entertain the noncitizen's claim because he had not exhausted his administrative remedies by presenting the petition and associated claims to the agency. *Id.* at 1095. In rejecting the

government's claim, the Tenth Circuit noted that, as a condition of entry without a visa under the Visa Waiver Program, the noncitizen had waived his right to challenge his removability other than on the basis of an asylum request, and that the governing regulation provided for removal without a hearing by an immigration judge. *Id.* at 1096 (citing 8 C.F.R. § 217.4(b)(1)). Accordingly, the Tenth Circuit held that section 1252(d)(1) was inapplicable "[b]ecause there were no administrative remedies for [the alien] to exhaust . . . " *Id.*

The Ninth Circuit made a similar determination in *Castro-Cortez v. INS*, 239 F.3d 1037, 1045 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 (2006), in the context of reinstatement of removal. In practice, reinstatement very closely resembles administrative removal; both are fast-track removal processes which strip away most of the procedural protections afforded in conventional removal proceedings and allow respondents to apply only for the mandatory relief of withholding or deferral of removal. In *Castro-Cortez*, the government argued that because the petitioners either had failed to check a box indicating that they intended to make a statement contesting the reinstatement determination or checked the box but failed to provide such a statement, they had not exhausted administrative remedies, and the court lacked jurisdiction to review the petitioners' challenges. *Castro-Cortez*, 239 F.3d at 1044-45. In rebuffing the government's argument, the court concluded that the "limited

opportunity for the alien 'to make a statement contesting this determination,' simply does not qualify as an administrative remedy." *Id*. at 1045. Thus, the court reviewed the noncitizens' challenges to the reinstatement orders despite the failure to check the required box or make a statement contesting the determination.

The same logic applies here. The opportunity to rebut the charges contained in a NOI involves exceedingly limited process. This "process" is a world away from conventional removal proceedings, where the parties have an opportunity to present evidence and cross-examine witnesses, and the immigration judge conducts a formal hearing, reviews the evidence, and renders a decision. In contrast, in administrative removal, as with reinstatement in *Castro* and the Visa Waiver Program in *Schmitt*, there is no hearing, no right to file an administrative appeal, and the DHS officer plays the roles of both prosecutor and judge. 8 C.F.R. § 238.1(d); 1003.1(b). Under these circumstances, where the parties cannot be reasonably expected to develop the issues and where there is no hearing before an impartial arbiter, the opportunity to offer a rebuttal before DHS falls far short of a true "administrative remedy."

In sum, these cases demonstrate that the limited opportunity "to rebut the charges" in a NOI is not an "administrative remedy" requiring exhaustion under section 1252(d)(1).

B. Exhaustion Is Not Required Because the Statute and Governing Regulations Do Not Provide an Avenue to Raise Purely Legal Claims

Should this Court find that the opportunity to rebut the charges before DHS in fast-track proceedings does qualify as a true "administrative remedy," it should do so only in the context of factual challenges.

1. The Regulations Governing a Noncitizen's Response to the Notice of Intent Contemplate Only Factual Challenges

Amici agree with Mr. Etienne that the relevant statute and corresponding regulations, when considered in their entirety, neither contemplate nor provide an avenue to challenge DHS's *legal* determination that the noncitizen's conviction is for an aggravated felony. *See* Pet'r Opening Br. 16-34.

The regulations governing administrative removal are found in 8 C.F.R. § 238.1. There, the relevant regulation entitled "Alien's response" provides that a noncitizen may only:

> submit a written response rebutting *the allegations supporting the charge* and/or requesting the opportunity to review the Government's *evidence*…. If an alien chooses to *rebut the allegations* contained in the Notice of Intent, the alien's written response must indicate which finding(s) are being challenged and *should* be accompanied *by affidavit(s), documentary information, or other specific evidence* supporting the challenge.

8 C.F.R. § 238.1(c) (emphasis added). Significantly, that regulation specifies that a noncitizen may rebut only the *allegations*. The *allegations*, however, are *facts* that support the charge of deportability, such as "You are not a citizen or national of the

United States" and "You were on [x date], convicted of …" *See, e.g.*, A.R. 1. Importantly, the allegations do not contain any legal conclusions. Thus, a written response "rebutting the *allegations*" is necessarily limited to factual challenges, such as contesting whether the individual is not a U.S. citizen or whether he was convicted under the alleged criminal statute.

The regulations further *require* any rebuttal to "be accompanied by affidavit(s), documentary information, or other specific evidence supporting the challenge." 8 C.F.R. § 238.1(c)(2)(i). These documentary requirements also relate only to factual challenges. A noncitizen, for instance, would submit documentary information such as a birth certificate if he were claiming U.S. citizenship, or evidence demonstrating the conviction had been vacated if challenging the fact of conviction. Someone making a purely legal challenge would have no evidence or documentary information to submit.

The exhaustion requirement in 8 U.S.C. § 1252(d)(1) consequently does not affect the Court's statutory jurisdiction to address the legal challenges that Mr. Etienne raises in his petition for review.

2. The Regulations Governing the Immigration Officer's Determination of Removal Also Contemplate Only Factual Challenges

The regulations governing the DHS officer's determination as to whether a noncitizen is deportable further highlight that the only grounds for challenging a

NOI are factual. 8 C.F.R. § 238.1(d). Where a noncitizen timely submits a rebuttal, the regulation directs the officer to take specific actions, contemplating one of three possible scenarios and responses: 1) where a noncitizen makes an insufficient challenge to the *allegations*, the deciding officer shall order him removed; 2) where the officer finds that the rebuttal does raise a genuine issue of *material fact*, he may obtain additional *evidence*; and 3) where the deciding officer finds that the noncitizen "is not amenable to administrative removal," the officer shall terminate the proceedings. 8 C.F.R. §§ 238.1(d)(2)(i) (insufficient rebuttal; no genuine issue of material fact), (ii) (additional evidence required), (iii) (conversion to proceedings under section 240 of the Act).

The first two options unambiguously contemplate factual challenges. Although the Eleventh Circuit recently read the third subdivision to apply to a noncitizen's successful factual *or* legal challenge, the court's reasoning in that regard is erroneous. *Malu v. U.S. Attorney General*, 764 F.3d 1282, 1288 (11th Cir. 2014). The flaw in this reading is asymmetry: the regulations offer absolutely no counterpart guidance for when a *legal* challenge is *not* successful. *See* 8 C.F.R. § 238.1(d)(2)(i) (dealing only with an insufficient rebuttal to the *allegations*). Thus, when the regulations are read in conjunction with 8 C.F.R. § 238.1(c), and considered as a whole, the logical meaning is that the third subdivision deals only with a successful challenge to the *allegations*—a fact-based challenge. *See*

generally United States v. Ashford, 718 F.3d 377, 382 (4th Cir. 2013) (in determining the proper interpretation of a statutory provision, looking not only to the language, but also "the specific context in which that language is used, and the broader context of the statute as a whole"). In other words, the regulations contemplate that DHS officers consider challenges to only the factual, as opposed to the legal, basis for the decision to issue an administrative removal order.

The Fifth Circuit has agreed, holding that "the relevant regulations indicate that the response process is geared toward resolving only issues of fact." *Valdiviez–Hernandez v. Holder*, 739 F.3d 184, 187 (5th Cir. 2013). Because "[t]he relevant statutes and corresponding regulations therefore did not provide [Petitioner] with an avenue to challenge the legal conclusion that he does not meet the definition of an alien subject to [administrative] removal," the court found that petitioner did not fail to exhaust his administrative remedies and reviewed his claim. *Id*. Similarly, the Seventh Circuit did not bar a noncitizen's purely legal claim that he should not have been subject to an administrative removal order merely because he did not raise it before DHS. *Eke v. Mukasey*, 512 F.3d 372, 378 (7th Cir. 2008) (concluding that it was "authorized to consider the question whether DHS correctly determined that Eke's state court convictions were 'aggravated felonies'" even though he did not contest the characterization of his offenses before DHS).

Here, the government's regulations and form make clear there were no available remedies to exhaust purely legal claims, and that Mr. Etienne raised those claims at the first reasonable opportunity—his appeal in this Court.

3. Where the Regulations Governing Administrative Removal and the Charging Form Are Ambiguous, this Court Should Not Close the Courthouse Doors

Even if the Court does not agree that the statute, regulations, and charging form clearly fail to provide an administrative remedy, they are, at least, ambiguous as to whether they provide Mr. Etienne with an avenue to challenge the legal determination that his conviction is for an aggravated felony. When coupled with Congress's desire to ensure judicial review, this ambiguity means that noncitizens like Mr. Etienne should not be stripped of the opportunity to make that challenge on appeal.

Noncitizens are entitled to favorable constructions of ambiguous provisions. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (applying the "long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (same); *Costello v. INS*, 376 U.S. 120, 127–28 (1964) (counseling long hesitation "before adopting a construction of [the statute] which would, with respect to an entire class of aliens, completely nullify a procedure so intrinsic a part of the legislative scheme"). Moreover, the "government should not be allowed to take advantage of

ambiguities created by its own regulations." *Griffin v. Carlin*, 755 F.2d 1516, 1531 (11th Cir. 1985).

Additionally, Congress took steps to ensure that noncitizens ordered deported through administrative removal had a meaningful opportunity to seek judicial review. The text of 8 U.S.C. § 1228(b)(3) provides that DHS may not execute a Final Administrative Removal Order for 14 days after the order was issued "in order that the alien has an opportunity to apply for judicial review." In contrast, the default rule is that when a conventional order of removal becomes administratively final, the DHS immediately may remove the individual; there is no automatic stay of removal during the 30-day period for filing a petition for review. 8 U.S.C. § 1231(a)(1)(A),(B). The statutory exhaustion requirement applicable to these proceedings should be construed in light of this automatic stay provision in order to effectuate the expressed intent of Congress.

Accordingly, the Court should grant the petition and find that noncitizens like Mr. Etienne are not required to rebut DHS's legal conclusions to have their day in court, particularly where they were wrongly placed in administrative removal in violation of federal law.

II. Detained Noncitizens in Fast-Track Proceedings Do Not Have Access to Sufficient Legal Resources or Assistance to Enable Them to Make a Legal Challenge in 10 Days

Like Mr. Etienne, noncitizens placed into administrative removal proceedings are jailed at an immigration detention facility and do not have any right to appointed counsel.[4] A close look at the severe restrictions on access to legal resources for detained noncitizens demonstrates that it would be highly impracticable and fundamentally unfair to require noncitizens in such circumstances to take the numerous steps necessary to make a legal challenge to a NOI. During the 10-day response period set out in the NOI, indigent detained noncitizens have little chance of obtaining *any* form of legal assistance or legal resources, even for those attempting to represent themselves on a *pro se* basis. Particularly given the technical nature of the aggravated felony classification that underlies the issuance of a NOI, it would border on absurd to require noncitizens to make a legal challenge to the NOI in order to preserve their ability to bring that issue before a federal circuit court.

A. Detained Noncitizens in Fast-Track Proceedings Cannot Be Expected to Understand the Technical and Multi-faceted Legal Concepts Required to Make a Legal Challenge to an Aggravated Felony Charge

With no right to appointed counsel in removal proceedings, approximately three-quarters of noncitizens in detention are unrepresented. *See* Peter L.

[4] *See* n.2, *supra.*

Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 542 (2009). It is, therefore, the rule and not the exception that noncitizens placed in administrative removal must navigate the process on their own. Moreover, according to *amicus* CAIR Coalition's internal data, less than 20% of noncitizens facing administrative removal speak English, making it demonstrably more difficult for them to understand the intricacies of a fast-track removal process without legal counsel.

Yet even for a well-educated noncitizen with English language proficiency, it would be challenging, if not impossible, to adequately research the primary legal issue at stake in the administrative removal process—whether his criminal conviction is properly categorized as an aggravated felony. This legal analysis is a technical one, requiring a multi-step inquiry involving both state and federal statutory law and judicial precedent.

To raise any form of legal challenge to a NOI, a detainee would first need to understand the meaning of an "aggravated felony"—that term is defined at 8 U.S.C. § 1101(a) to include one of twenty-one different categories of enumerated offenses. 8 U.S.C. § 1101(a)(43)(A) – (U). Many of these twenty-one sub-categories have subheadings of their own, and fourteen of the twenty-one cross-reference other sections of the U.S. Code. *Id.* Without access to a computer or an

updated copy of the U.S. Code, it is not possible to even begin formulating an objection to an aggravated felony charge.

Even if a detainee understood generally the concept of aggravated felonies in immigration law, he would next need to make a determination as to whether his conviction actually constitutes an aggravated felony, an analysis that often requires an ability to engage in sophisticated legal research. For example, and relevant to Mr. Etienne's case, under the "plain language" of 8 U.S.C. § 1101, a state misdemeanor conviction can be considered a felony for immigration purposes. *See Wireko v. Reno*, 211 F.3d 833, 835 (4th Cir. 2000). Moreover, the law is constantly changing in this area in ways that a non-lawyer is unlikely to appreciate. Just recently, this Court held that a Virginia conviction of grand larceny does not constitute a theft aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(G). *Omargharib v. Holder*, --- F.3d ---, 2014 WL 7272786 (4th Cir. Dec. 23, 2014). Yet, in the experience of *amici*, ICE regularly charged the offense as an aggravated felony—and immigration courts erroneously upheld that determination—up to the date of the court's decision.

Moreover, in the past *two years alone*, this Court has issued published decisions analyzing whether a state conviction is properly categorized as an aggravated felony as defined by 8 U.S.C. §1101(a) in six cases. *See Espinal-Andrades v. Holder*, --- F.3d ---, 2015 WL 268528 (4th Cir. Jan. 22, 2015);

Castillo v. Holder, --- F.3d ---, 2015 WL 161952 (4th Cir. Jan. 14, 2015) *Omargharib v. Holder*, --- F.3d ---, 2014 WL 7272786 (4th Cir. Dec. 23, 2014); *U.S. v. Avila*, 770 F.3d 1100 (4th Cir. 2014); *Karimi v. Holder*, 715 F.3d 561 (4th Cir. 2013); and *Mondragon v. Holder*, 706 F.3d 535 (4th Cir. 2013). The Supreme Court has also found these issues of sufficient complexity and import to grant *certiorari* to, and issue published decisions in seven cases analyzing the aggravated felony designation in the immigration context over the past decade. *See Moncrieffe v. Holder*, 133 S.Ct. 1678, --- U.S. --- (2013); *Kawashima v. Holder*, 132 S.Ct. 1166, --- U.S. --- (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Gonzales v. Duenas-Alvarez*, 549 US 183 (2007); *Lopez v. Gonzales*, 549 U.S. 47 (2006); and *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

As these recent court decisions show, in order to contemplate a viable legal challenge to an aggravated felony charge, a detained noncitizen would need to engage in a multi-step analysis accounting for recent legal precedent. In that analysis, a noncitizen would often need to start with the question of whether his statute of conviction is "divisible," thereby rendering the record of conviction relevant to the analysis. *See Descamps*, --- U.S. ---, 133 S.Ct. 2276, 2285 (2013). Pursuant to *Descamps* and the Board of Immigration Appeals' jurisprudence applying it, divisibility is based on an analysis of whether the statute of conviction

can be divided into more than one element for which jury unanimity is required. *Id*; *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 355 (BIA 2014). Determining when jury unanimity is or is not required would, in all likelihood, demand that a noncitizen have access to state case law and, if possible, model or actual jury instructions.

After determining whether or not the statute is divisible, a noncitizen would then need to ascertain whether the elements of his offense of conviction match the generic aggravated felony ground of removal. This inquiry requires an analysis of the text of the statute itself and, in some cases, a review of the way in which the statute is prosecuted. In *Castillo v. Holder*, for example, this Court undertook "[a] review of the decisions in Virginia addressing unauthorized use"—the state offense at issue—to determine the range of circumstances giving rise to convictions. *Castillo*, 2015 WL 161952 at *4. In that case, this Court reviewed no less than six different cases arising out of Virginia's appellate courts. *Id.*

A detained noncitizen facing an aggravated felony charge might also be required to submit evidence of the breadth of application of his statute of conviction. In *Matter of Ferreira*, for example, the Board remanded to the Immigration Court, requiring the respondent to point to an "actual prosecution" in which the court had applied the relevant statute in the "special (nongeneric) manner for which he argues." 26 I&N Dec. 415, 422 (BIA 2014). Given the small

percentage of state criminal prosecutions that result in published court decisions, this inquiry can be logistically quite burdensome.[5]

In sum, unrepresented noncitizens seeking to understand and make a challenge to an aggravated felony charge must, at a minimum, understand several nuanced and highly technical areas of the law. In the experience of *amicus* CAIR Coalition, detainees are neither able to conduct this type of analysis nor access the required resources to assist them in doing so.

Indeed, the most recent non-binding detention standards implemented by ICE require detainees to have "meaningful" access to a law library, but, at the same time, the standards contemplate that such access can be limited to "five hours per week." *See* U.S. Immigration and Customs Enforcement, 2011 Operations Manual ICE Performance-Based National Detention Standards (as modified by Feb. 2013 Errata) at 401 [hereinafter National Detention Standards]. But even five hours likely would not be enough for a *pro se* detainee to understand what expedited administrative removal means. Notably, while the National Detention

[5] One commentator, for example, has imagined that litigants might seek to satisfy the realistic probability test by recruiting a defense attorney, prosecutor, defendant, victim, or witness to testify to the facts of a case where the prosecution sought to criminalize non-generic conduct. *See* Doug Keller, *Causing Mischief for Taylor's Categorical Approach: Applying "Legal Imagination" to Duenas-Alvarez*, 18 Geo. Mason L. Rev. 625, 662 (2011). *Amici* maintain that the reasoning behind *Ferreira* is incorrect and, in fact, the plain text of a statute of conviction should be sufficient to satisfy the realistic probability test where that text covers conduct outside of the generic crime of removability.

Standards provide a list of materials that must be made available to detainees through a law library, this list does not include access to state case law, a necessary component of the aggravated felony determination, as discussed above. See *id.* App'x 6.3A.

Moreover, CAIR Coalition frequently receives complaints from noncitizens regarding the limitations on the utility of law library access, even when it is provided. These complaints include: that it takes two or three days to gain access to a law library; that there is no assistance provided for conducting online research; and that paper is unavailable for detainees who wish to print legal documents or briefs. One detainee recently informed CAIR Coalition that it would be faster to send him materials through Federal Express than for him to access those same materials in the law library at his place of detention.[6]

Placing the 10-day response period in this context, it is clear that adopting a rule that requires detained, *pro se* and non-English speaking respondents in administrative removal to make complex legal challenges—in response to a form that, on its face, gives them no opportunity to present such a claim—would be fundamentally unfair.

[6] The complaints CAIR Coalition receives are unsurprising given a 2009 study reporting that "29 [immigration] detention facilities lacked an actual law library" and "27 facilities inappropriately limited detainees' access to their law libraries." National Immigration Law Center., *et al.*, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* 33 (2009), *available at* www.nilc.org.

B. The Primary Government-Funded Assistance Program for Detained Noncitizens Is Insufficient to Meet the Legal Needs of Detainees Facing Administrative Removal

Amicus CAIR Coalition receives government funding to provide an assistance and legal orientation program to detained noncitizens facing removal in Virginia. CAIR Coalition's services provide invaluable help to detained noncitizens facing removal and are frequently the only legal assistance those individuals receive. Nonetheless, these limited services are often insufficient to meet the needs of the vast number of unrepresented detainees in conventional removal proceedings. Moreover, they are not designed to address the immediate needs of individuals in a fast-track process. The inadequacy of this basic resource further illustrates the fundamentally unfair and impracticable nature of any rule that would require unrepresented detained noncitizens to make a complex legal challenge within a 10-day window.

Nationwide, there are more than 250 detention facilities that house immigrants placed in various forms of removal proceedings, including those in the administrative removal process.[7] In 30 of these facilities, the Department of Justice's Executive Office for Immigration Review funds nonprofit organizations to provide limited and temporary legal services to immigrant detainees through a

[7] *See* U.S. Immigration and Customs Enforcement, *Detention Management*, *available at* http://www.ice.gov/factsheets/detention-management.

"Legal Orientation Program" (LOP).[8] CAIR Coalition is an LOP provider, meaning that the limited services it provides to detained noncitizens are illustrative of the *most expansive* assistance that a detained noncitizen facing deportation can expect to receive.

In compliance with contractual obligations, CAIR Coalition's LOP programming includes group legal orientations, one-on-one individual orientations, and limited *pro se* assistance. CAIR Coalition staff conducts at least two visits per month to each LOP-designated facility. On each visit, CAIR Coalition staff meets with between 50-100 detainees who have recently arrived at the facility and provides 20-40 follow-up visits with detainees CAIR Coalition staff met on an earlier visit. Because of long commute times and financial constraints, when on a site visit, the CAIR Coalition staff generally spends no more than 25 minutes providing group orientations and generally no more than 10 minutes conducting any one individual conversation.

Given the purpose of the LOP program and associated constraints, CAIR Coalition and other LOP providers have little practical ability to provide targeted legal services to meet the unique needs of detained noncitizens facing fast-track administrative removal. As an immigration court-based program, the primary focus

[8] *See* VERA Institute of Justice, *Legal Orientation Program*, *available at* http://www.vera.org/project/legal-orientation-program?qt-projects_legal_orientation_progr=5#qt-projects_legal_orientation_progr.

of LOP is those in conventional removal proceedings.[9] Additionally, the schedule of LOP visits creates a major practical impediment to LOP services helping those in administrative removal. CAIR Coalition site visits occur on a 15-day cycle, meaning that many noncitizens placed in the fast-track process could well go the full 10-day response period without seeing an LOP provider. In fact, CAIR Coalition estimates that of the detained population it serves, only approximately 14% of individuals would be seen within a 10-day period from their initial booking date.

Moreover, in CAIR Coalition's experience, LOP providers nationally are often the exclusive route to finding *pro bono* representation for detained noncitizens. It is CAIR Coalition's experience that few if any indigent detained noncitizens successfully locate and retain *pro bono* counsel in time to obtain meaningful assistance during the 10-day response period in fast-track proceedings.[10] In fact, the *pro bono* placement process at *amicus* CAIR Coalition,

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[9] *See* VERA Institute of Justice, *Evaluation and Performance and Outcome Measurement Report, Phase II*, *available at* http://www.vera.org/sites/default/files/resources/downloads/LOP_evalution_updated_5-20-08.pdf.

[10] Two studies, conducted in California and New York, found that a majority of detained immigrants proceed unrepresented. In 2011, the Study Group of Immigrant Representation found that 60% of detained immigrants did not have counsel by the time their cases were completed. New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* 3 (Dec. 2011), *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf

through which detained noncitizens are matched with *pro bono* attorneys at area law firms, usually takes anywhere from several weeks to several months.

For those noncitizens detained in a facility that does not receive services from an LOP provider, the ability to retain private counsel or secure *pro bono* representation during the 10-day window rises and falls on regular access to the mail and telephone. Yet even basic access to phones is frequently limited throughout immigration detention facilities. *See* National Immigrant Law Center, *et al.*, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* 28 (2009), *available at* www.nilc.org (hereinafter, "NILC Report"). Reports show that facilities frequently lack sufficient numbers of phones and restrict the number and duration of calls, in violation of the National Detention Standards. Although the National Detention Standards require facilities to take and deliver the type of "emergency" messages that would be necessary for a noncitizen to communicate effectively with counsel during the 10-day response period, *see*

[hereinafter *Accessing Justice*]. A 2014 report published by Stanford Law School studied legal representation of detained immigrants in Northern California and found, unsurprisingly, that "[r]oughly 2/3 of detained immigrants had no legal representation at any point in their removal proceedings." Northern California Collaborative for Immigrant Justice, *Access to Justice for Immigrant Families and Communities Study of Legal Representation of Detained Immigrants in Northern California* 9 (Oct. 2014), *available at* https://media.law.stanford.edu/organizations/clinics/immigrant-rights-clinic/11-4-14-Access-to-Justice-Report-FINAL.pdf. While there is no data on the percentage of immigrants in administrative removal proceedings who are represented, "anecdotal evidence suggests that almost none [do], despite the likelihood that some ha[ve] valid legal claims." *See Accessing Justice* at 40.

National Detention Standards at 362-363, it is the experience of *amici* that many detention facilities refuse to take or deliver such messages. Frequently imposed restrictions on the number of items that a detainee may mail per week for free also impede noncitizens' ability to access outside assistance during the administrative removal process. NILC Report at 41.

Accordingly, immigrant detainees facing administrative removal have a very low probability of ever interacting with a lawyer (or anyone familiar with the law) prior to the issuance of a final administrative removal order.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant Mr. Etienne's petition for review and vacate the final order of removal that has been entered against him.

January 30, 2015 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because it contains 6,435 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

On January 30, 2015, I, Morgan Macdonald, served a copy of this Brief of *Amici Curiae* on Respondent via the CM/ECF system.

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