No. 14-2318

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

LIZABETH PATRICIA VELERIO-RAMIREZ,
Petitioner,

v.

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

ON PETITION FOR REVIEW FROM AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

CONSENTED TO BRIEF OF THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND THE IMMIGRANT DEFENSE PROJECT AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

Manny D. Vargas
Immigration Defense Project
28 W 39th St #501
New York, NY 10018
(212) 725-6422
mvargas@immigrantdefenseproject.org

Trina Realmuto
Khaled Alrabe, Law Fellow
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
trina@nipnlg.org

STATEMENT OF PARTY CONSENT TO *AMICI* BRIEF FILING

Pursuant to Federal Rule of 29(a), I, Trina Realmuto, attorney for *amici curiae*, the National Immigration Project of the National Lawyers Guild and the Immigration Defense Project, state that I informed counsel for Petitioner, Mary Holper, and counsel for Respondent, Kate D. Balaban, of the instant *amici* brief and that both Ms. Holper and Ms. Balaban gave consent to file this *amici* brief.

s/ *Trina Realmuto*
Trina Realmuto
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
trina@nipnlg.org

Dated: March 9, 2015

CORPORATE DISCLOSURE STATEMENT

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

The National Immigration Project of the National Lawyers Guild 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 that no publicly held corporation owns 10% or more of FCNY's stock.

/s/ *Trina Realmuto*
Trina Realmuto
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
trina@nipnlg.org

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I. INTRODUCTION AND STATEMENT OF *AMICI CURIAE*[1]

The Board of Immigration Appeals (BIA) – the agency that is supposed to have expertise in immigration law – committed three serious errors in this case that not only affect Petitioner's ability to remain with her U.S. citizen children in the United States but cast doubt on the BIA's adjudicatory expertise. The BIA held that the statute under which Petitioner asked the immigration judge to withhold her deportation simply did not matter. But it *did* matter and it *does* matter. Petitioner is one of a fortunate few immigrants for whom Congress expressly provided that – *even if* she has been convicted of a particularly serious crime (PSC) under domestic law—the agency is *statutorily obligated* to review whether deportation for such a crime comports with international law.

This Court can only affirm an agency decision based on the rationale invoked by the agency itself. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947). Here, the Court cannot affirm the BIA's decision because the BIA analyzed the case under the wrong statutory framework. The BIA recognized *sua sponte* that the immigration judge's decision analyzed Petitioner's relief application under the

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[1] *Amici curiae* state pursuant to Fed. R. App. P. 29(c)(5) that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amici curiae*, their members, and their counsel contributed money that was intended to fund preparing or submitting the brief. *Amici curiae* also state pursuant to Fed. R. App. P. 29(a) that all parties have consented to the filing of this brief.

current withholding of removal statute, 8 U.S.C. § 1231(b)(3), when in fact Petitioner applied for withholding of deportation under its predecessor statute, former 8 U.S.C. § 1253(h) *as amended by* § 413(f) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

Instead of correcting this error, however, the BIA summarily concluded that the statutory basis for withholding, a mandatory form of relief, was irrelevant because the outcome would be the same whether she was applying for withholding of removal or withholding of deportation. This conclusion is remarkable given that the BIA is the agency that interprets the Immigration and Nationality Act and is acutely aware that Congress's amendment to the withholding statute, through AEDPA § 413(f), altered its prior interpretations. Indeed, the BIA issued a lengthy precedent decision, *Matter of Q-T-M-T-*, 21 I&N Dec. 639 (BIA 1996), after AEDPA's enactment to reconcile its prior withholding law with Congress's mandate in AEDPA § 413(f) to conduct a discretionary analysis "to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees." This BIA precedent, however, only applies to individuals who have been convicted of an aggravated felony.

Significantly, here, Petitioner has *not* been charged with or found deportable for an aggravated felony so the test set forth in *Matter of Q-T-M-T-* does not apply

to her.[2] The BIA's prior PSC test in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) also does not apply because that test interpreted the original withholding statute, which does not govern this case. Even assuming arguendo that *Matter of Frentescu* were applicable, however, the BIA nevertheless still was obligated to address AEDPA § 413(f)'s discretionary requirement of international law compliance, which it did not do.

In sum, the Court should vacate and remand this case to allow the BIA to create a test that governs withholding applications under former § 1253(h) as amended by AEDPA § 413(f) where the individual, like Petitioner here, has not been charged with or found deportable for an aggravated felony conviction. Upon creation of that test, the BIA should remand the case to the immigration judge to apply it to determine, in the first instance, whether Petitioner has been convicted of a PSC, and if so, whether withholding her deportation is "necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees" as mandated by AEDPA § 413(f).

The National Immigration Project 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

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[2] The Department of Homeland Security (DHS) previously charged Petitioner with having an aggravated felony conviction, but subsequently withdrew that charge. Administrative Record (AR) at 6, 687-88.

and nationality laws. 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 the BIA applies the correct law and administrative interpretations to applications for immigration relief and in narrowing the scope of any decision in Petitioner's case to withholding of deportation applications governed by former 8 U.S.C. § 1253(h) as amended by AEDPA § 413(f).

II. STATUTORY AND ADMINISTRATIVE BACKGROUND

This case requires an understanding of the interplay of the statutory provisions governing withholding of deportation (now withholding of removal) applications, as well as the BIA, First Circuit and Supreme Court case law governing those applications. This section sets forth an overview of former 8 U.S.C. § 1253(h), from its creation in 1952 to its present form (8 U.S.C. § 1231(b)(3)), and related administrative and judicial decisions relevant to the interpretation of each of these provisions. The text of each of the withholding statutes and relevant effective dates discussed are attached hereto for the Court's convenience in an Addendum.

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A. Congress's Amendment of Former 8 U.S.C. § 1253(h) Through the 1980 Refugee Act.

In 1952, Congress first created a statutory provision authorizing the Attorney General "to withhold deportation to any country in which in his opinion the alien 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, 66 Stat. 212 enacting former 8 U.S.C. § 1253(h) (1952). Through the Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102 (1980), Congress amended this provision to require immigration judges to withhold 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."[3] Relevant here, Congress also instituted a "particularly serious crime" (PSC) bar to withholding of deportation which applied to an individual who "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1253(h)(2)(B) (1981).

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[3] The Supreme Court has noted that the purpose of the 1980 Refugee Act was to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968." *Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987); *see also Negusie v. Holder*, 555 U.S. 511, 518-22 (2009). The 1967 Protocol required signatory states to conform to the obligations of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (the Convention), and

Following its enactment, the BIA interpreted the term PSC in former § 1253(h)(2)(B) to require an assessment of whether a crime is particularly serious based on four factors: (1) the nature of the conviction; (2) the circumstances and underlying facts of the conviction; (3) the type of sentence imposed; and, "most importantly," (4) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982). Four years later, in *Matter of Carballe*, 19 I&N Dec. 357, 359-60 (BIA 1986), the BIA held that the statutory requirement that the individual "constitutes a danger to the community" is subsumed by the *Matter of Frentescu* test, holding that once the agency determines a crime is "particularly serious," it necessarily follows that the individual is a "danger to the community."[4] This Court upheld the BIA's rationale in *Mosquera-Perez v. INS*, 3 F.3d 553, 557-58 (1st Cir. 1993).

The 1980 version of § 1253(h)(2)(B) remained in effect until November 29, 1990, when Congress amended the withholding of deportation statute.

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extended states' obligations under the Convention to persons who became refugees after 1951. Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, 19 U.S.T. 6223, 606 U.N.T.S. 267 (the Protocol).

[4] In so holding, the BIA relied on a single sentence in a report issued by the House Judiciary Committee, which states that the bar applies to "aliens . . . who have been convicted of particularly serious crimes which make them a danger to the community of the United States . . . ." *See Matter of Carballe*, 19 I&N Dec. at 359-60 *citing* H.R. Rep. No. 96-608, at 17 (1979).

B. Former § 1253(h) as Amended by the Immigration Act of 1990.

Through the Immigration Act of 1990 (IMMACT90),[5] Congress amended the withholding statute to categorically designate all aggravated felonies as particularly serious crimes. Specifically, IMMACT90 § 515(a)(2) added the following sentence to former § 1253(h)(2):

> For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.

Congress did not include an effective date for IMMACT90 § 515(a)(2). The BIA nevertheless determined that "in the absence of an express provision to the contrary, the effective date of the revised language of section 243(h)(2) [8 U.S.C. § 1253(h)(2)] was the date of enactment of the 1990 Act." *Matter of A- A-*, 20 I&N Dec. 492, 493 (BIA 1992).

Following IMMACT90, the BIA continued to apply *Matter of Frentescu* and *Matter of Carballe* in determining whether a conviction was a PSC. *See*, *e.g.*, *Matter of B-*, 20 I&N Dec. 427 (BIA 1991).

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[5] Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

C. AEDPA's Amendments to Former § 1253(h).

1. Mandatory discretionary review of Protocol compliance.

On April 24, 1996, through the enactment of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 413(f), 110 Stat. 1214 (Apr. 24, 1996) Congress again amended the withholding statute. Although Congress retained the PSC bar to withholding of deportation, including the automatic classification of an aggravated felony as a PSC, Congress added the following important statutory language to the withholding statute:

> (h) Withholding of deportation or return.
> . . .
> (3) Notwithstanding any other provision of law, paragraph (1) shall apply to any alien if the Attorney General determines, in the discretion of the Attorney General, that—
> (A) such alien's life or freedom would be threatened, in the country to which such alien would be deported or returned, on account of race, religion, nationality, membership in a particular social group, or political opinion; and
> (B) the application of paragraph (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.

AEDPA § 413(f). This language was created as a separate, third subsection in the withholding statute, evidencing Congress's intent to apply it to all withholding applicants.

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2. AEDPA § 413(g)'s effective and applicability dates and the Supreme Court's interpretation of AEDPA § 413(g).

Section 413(g) of AEDPA provided both an effective date and a date of applicability for § 413(f)'s amendments to former § 1253(h). That statute provides:

> (g) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act [April 24, 1996] and shall apply to applications filed before, on, or after such date if final action has not been taken on them before such date.

In *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), the Supreme Court specifically decided what constitutes a "final action" for purposes of this provision, which this Court expressly declined to interpret in *Choeum v. INS*, 129 F.3d 29, 41 n.11 (1st Cir. 1997) ("We need not decide whether INS's interpretation of 'final action' is the correct one.").

In *Aguirre-Aguirre*, the Supreme Court interpreted a different bar to withholding of deportation for "serious nonpolitical crimes." In that case, former § 1253(h) (pre-AEDPA) governed Mr. Aguirre-Aguirre's withholding application. The Court went out of its way, calling it an "incidental point," to explain why AEDPA (and IIRIRA's) amendments to the withholding statute did not apply to Mr. Aguirre-Aguirre. 526 U.S. at 420. The Court noted that AEDPA § 413(g) precludes the application of the amendments made by AEDPA § 413(f) because such amendments apply only to withholding "applications filed before, on, or after" April 24, 1996 "*if* final action has *not* been taken on them before such date."

Id. Emphasis added. The Court determined that "[t]he BIA's final decision constituted final action" and, because the BIA issued its decision nearly two months *before* AEDPA's enactment [on March 5, 1996], AEDPA § 413(f) "was not applicable" to his case.

Thus, *Aguirre-Aguirre* answers the question this Court reserved in *Choeum* and requires this Court to construe AEDPA § 413(g) as requiring that "[t]he amendments made by this section [namely AEDPA § 413(f)] shall take effect on [April 24, 1996] and shall apply to [withholding of deportation] applications filed before, on, or after such date if [the BIA's decision did not issue] before such date." In other words, in every BIA decision on a withholding of deportation application issued *after* April 24, 1996, AEDPA § 413(f) "shall apply."

Significantly, *Aguirre-Aguirre*'s interpretation of AEDPA § 413(g) conclusively demonstrates that AEDPA § 413(f) did *not* apply to the petitioner in *Choeum* whose BIA decision ("final action") was issued on February 9, 1996, two months *before* April 24, 1996. Thus, under *Aguirre-Aguirre*, the Court's discussion of AEDPA § 413(f) is *dicta* in that the statute was not at all applicable to the petitioner. Moreover, and even if it were not *dicta*, to the extent that the *Choeum* Court's discussion purports to give deference to the BIA's interpretation of AEDPA § 413(f) in *Matter of Q-T-M-T-*, 21 I&N Dec. 639 (BIA 1996), such deference is limited to the single issue of whether a separate dangerousness

determination is required and, as to that issue, only would apply to individuals who have been charged with and found deportable for an aggravated felony.

3. The BIA's application of former § 1253(h) as amended by AEDPA § 413(f) to noncitizens found deportable for an aggravated felony.

Following the enactment of AEDPA § 413(f), the Board of Immigration Appeals was faced with interpreting the meaning of former § 1253(h)(3) (added by AEDPA § 413(f)) mandating discretionary compliance with 1967 United Nations Protocol Relating to the Status of Refugees (the Protocol). The BIA's former PSC test, set forth in *Fretescu* and *Carballe*, was not adequate because it did not provide for consideration of the Protocol as required by § 1253(h)(3). Therefore, the BIA was obligated to change its PSC test for affected individuals to avoid rendering meaningless former § 1253(h)(3). Thus, in *Matter of Q-T-M-T-*, 21 I&N Dec. 639 (BIA 1996), the BIA issued a precedential decision providing a test for how immigration judges should apply former § 1253(h)(3) to ascertain whether the deportation of *an individual convicted of an aggravated felony* (who therefore automatically has a PSC conviction) should be withheld. The BIA fashioned two separate tests with respect to these individuals; one for individuals convicted of an aggravated felony sentenced to less than five years' imprisonment, and another for those sentenced to five years or more. The BIA held that the former group are subject to a rebuttable presumption that the conviction was for a PSC that can only

be overcome if "there is any unusual aspect of the alien's particular aggravated felony conviction that convincingly evidences that the crime cannot rationally be deemed 'particularly serious' in light of treaty obligations under the Protocol" while the latter group are deemed conclusively barred. *See Matter of Q-T-M-T-*, 21 I&N Dec. at 654; *see also Matter of L-S-J-*, 21 I&N Dec. 973 (BIA 1997) (citing *Matter of Q-T-M-T-* and holding that aggravated felony conviction for robbery with a deadly weapon is a PSC).

To date, the BIA has not issued a precedential decision providing a test for how immigration judges should apply former § 1253(h)(3) as amended by AEDPA § 413(f) to ascertain whether the deportation of *an individual whose conviction was not an aggravated felony* should be withheld.

D. IIRIRA's Amendment to and Redesignation of Former § 1253(h) – Presently Codified at 8 U.S.C. § 1231(b)(3) – And Transitional Rules.

Through the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), Congress adopted numerous substantive and procedural changes to the immigration laws. Relevant here are the following changes:

- Congress abolished the distinction between deportation and exclusion procedures and established "removal" proceedings as the only proceeding to adjudicate issues of deportability and inadmissibility. IIRIRA § 304 enacting 8 U.S.C. § 1229a(a)(1), (3) and (e)(2).

- Congress replaced former § 1253(h) and redesignated it as 8 U.S.C. § 1231(b)(3). IIRIRA §§ 305, 308 (located within title III, subtitle A). Congress specifically defined per se particularly serious crimes by the length of the sentence imposed, and further authorizing the agency, "notwithstanding the length of the sentence imposed," to determine that a noncitizen has been convicted of a particularly serious crime. IIRIRA § 305(a).

- Congress created "Transitional Rules for Aliens in Proceedings," exempting an individual "who is in exclusion or deportation proceedings before[6] the title III-A effective date" from the "amendments made by [subtitle III-A] and providing that "the proceedings (and judicial review thereof) shall continue to be conducted without regard to such amendments." IIRIRA § 309(c)(1); *see also* IIRIRA § 309(c)(4) (governing judicial review of transitional cases).

These changes took effect on April 1, 1997. IIRIRA § 309(a). *See also Prado v. Reno*, 198 F.3d 286, 288 n.2 (1st Cir. 1999) ("IIRIRA's transitional rules, such as IIRIRA § 309(c)(4)(E), apply to cases in which deportation proceedings commenced before April 1, 1997, and in which a final order of deportation issued after October 30, 1996.").

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[6] IIRIRA § 309(c)(1) originally contained the phrase "who is in exclusion or deportation proceedings *as of* the title III-A effective date." However, days after IIRIRA's enactment, Congress passed a technical amendment to IIRIRA § 309(c)(1) that substitutes the word "before" in place of the phrase "as of." *See* Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3656, 3657 (enacted Oct. 11, 1996). This technical amendments was made "[e]ffective on September 30, 1996." *Id*.

III. ARGUMENT

A. The BIA Addressed the Immigration Judge's Application of the Wrong Withholding Statute and Wrong PSC Test and Incorrectly Concluded It Did Not Affect Petitioner's Withholding Application.

1. Former 8 U.S.C. § 1253(h) as amended by AEDPA § 413(f) governs Petitioner's application for withholding of deportation.

The applicable statute in this case is former 8 U.S.C. § 1253(h), as amended by § 413(f) of AEDPA. In this case, DHS' predecessor agency, the Immigration and Naturalization Service, placed Petitioner in deportation proceedings through the issuance and filing of an Order to Show Cause in 1991. AR 749-750.[7] The immigration judge later administratively closed the case, which had the effect of temporarily removing it from the court's docket until a party filed a motion to place the case back on the docket. *See generally Matter of Avetisyan*, 25 I&N Dec. 688, 692 (BIA 2012) (discussing administrative closure). On April 24, 1996, Congress enacted AEDPA § 413; subsection (f) amended the withholding statute to incorporate the Protocol and subsection (g) governed the effective date and applicability date of that amendment. *See* Addendum, Part C.

As explained above, the Supreme Court's decision *Aguirre-Aguirre*, *supra*, requires this Court to construe AEDPA § 413(f) to apply to withholding of deportation applications filed "before, on, or after" April 24, 1996 if the BIA

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[7] At the time Petitioner's deportation proceeding commenced, the 1990 version of the withholding statute was in effect. *See* Addendum, Part B.

issued its decision after April 24, 1996. *See* § II.C.2, *supra*. Here, Petitioner filed her withholding of deportation application on May 5, 2011 (AR 603-16) and the BIA issued its decision on November 17, 2014 (AR 1). Thus, AEDPA § 413(f) governs Petitioner's withholding application.

In addition, IIRIRA § 305(a)'s subsequent amendments to the withholding statute (now called withholding of removal and codified at 8 U.S.C. § 1231(b)(3)) also *do not apply* to Petitioner. Congress expressly provided that this change did not apply to an individual in deportation proceedings before April 1, 1997. *See* IIRIRA § 309(c)(1); *see also* Addendum, Part D. As mentioned, Petitioner was in deportation proceedings before April 1, 1997. AR 749-750.

2. The Immigration Judge committed serious legal error in adjudicating Petitioner's withholding of deportation application under the wrong statute and wrong legal standard, and the BIA compounded this error when it recognized the mistake but failed to correct it.

Notwithstanding the plain language of AEDPA § 413(g) and IIRIRA § 309(c)(1), the immigration judge (IJ) reviewed Petitioner's withholding application under the post-IIRIRA withholding of removal standard and corresponding agency case law. AR 62 (applying current § 1253(b)(3) and assessing application under *Matter of N-A-M-*, 24 I&N Dec 336, 338 (BIA 2007)).

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Raising the issue *sua sponte*,[8] the BIA recognized that the immigration judge mistakenly analyzed the Petitioner's withholding application under the wrong statute and incorrectly stated Petitioner was applying for withholding of removal under current 8 U.S.C. § 1231(b)(3), *see* AR 4 (footnote 2). As explained above, Petitioner was applying for withholding under *former 8 U.S.C. § 1253(h) as amended by AEDPA § 413(f).* The BIA compounded the IJ's error by summarily concluding that "the particularly serious crime analysis is the same under both provisions." AR 4; *see also* AR 5 ("In the current deportation proceedings, *as would also be the case in removal proceedings*, the Immigration Judge correctly found the respondent to have been convicted of a particularly serious crime.") (emphasis added). In so doing, the BIA conflated the PSC analysis for *withholding of deportation as amended by AEDPA § 413(f)* with the PSC analysis for *withholding of removal under 8 U.S.C. § 1231(b)(3)*, even though different statutes and different tests govern those analyses.

Application of the wrong statutory provision and wrong legal standard warrants reversal and remand. *See*, *e.g.*, *Baystate Alt. Staffing v. Herman*, 163 F.3d 668, 679 (1st Cir. 1998) ("When an agency makes an error of law in its

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[8] *Mazariegos-Paiz v. Holder*, 734 F.3d 57, 63 (1st Cir. 2013) ("We hold, therefore, that an issue is exhausted when it has been squarely presented to and squarely addressed by the agency, regardless of which party raised the issue (or, indeed, even if the agency raised it sua sponte").

administrative proceedings, a reviewing court may remand the case to the agency so that the agency may take further action consistent with the correct legal standards."); *Griffiths v. INS*, 243 F.3d 45, 55 (1st Cir. 2001) ("Where a reviewing court cannot sustain an agency decision because it has failed to offer a legally sufficient basis for that decision, the appropriate remedy is remand to the agency for further consideration"); *Rizal v. Gonzales*, 442 F.3d 84, 89 (2d Cir. 2006) ("This Court will similarly vacate and remand BIA decisions that result from flawed reasoning or the application of improper legal standards.").

This Court can only affirm the decision in this case on the grounds invoked by the BIA. As the Supreme Court aptly stated:

> That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947); *see also Gailius v. INS*, 147 F.3d 34, 44 (1st Cir. 1998) (holding that "the INS may not seek to have the BIA opinion upheld on the grounds that there was no reasonable fear of persecution because the letters were not authentic; the agency simply has not ruled on the authenticity issue, either implicitly or explicitly."); *De Rivera v. Ashcroft*, 394 F.3d 37, 40 (1st Cir. 2005) ("Since the agency action, under *Succar*, cannot be sustained on the

stated grounds, the appropriate remedy is to remand to the BIA for further proceedings consistent with the holding in *Succar*.").

In sum, because the IJ applied the wrong statute and wrong legal standard to Petitioner's withholding application and the BIA failed to correct that error, the Court should vacate the BIA's decision in this case.

B. The BIA Has Not Adopted a PSC Test That Governs Withholding Applications Under 8 U.S.C. § 1253(h) as Amended by AEDPA § 413(f) for Individuals, Like Petitioner, Who Have Not Been Charged With or Found Deportable for an Aggravated Felony.

In *Matter of Q-T-M-T-*, the BIA set forth standards for exercising discretion in cases involving withholding applicants *with aggravated felony convictions* who, *as a matter of law*—namely former 8 U.S.C. § 1253(h)(2)— were deemed to have PSCs. *Matter of Q-T-M-T-,* 21 I&N Dec. at 653-54. Thus, there was no need for the BIA to determine whether these individuals were convicted of PSCs. The only issue was whether, notwithstanding the existence of a PSC under domestic law, the agency should exercise discretion to withhold the deportation of an individual with an aggravated felony conviction to ensure compliance with the Protocol pursuant to AEDPA § 413(f).

In contrast, Petitioner does not have a conviction for a PSC as a matter of law; she is neither charged with, nor has an immigration judge found, that she has

been convicted of an aggravated felony.[9] Thus, the test established in *Matter of Q-T-M-T-* setting forth standards for the exercise of the discretion mandated by AEDPA § 413(f) to individuals with aggravated felony convictions does not apply to her.

To date, the BIA has not issued any precedent decision that sets forth a test for determining whether a non-aggravated felony conviction is a PSC under 8 U.S.C. § 1253(h) as amended by AEDPA § 413(f) and, if it is, setting forth standards governing the mandatory exercise of agency discretion. Presumably, the BIA has not had occasion to address these issues for at least two reasons; first, because applicants without aggravated felony convictions generally are not barred from applying for and receiving asylum; and, second, because immigration judges may find that non-aggravated felony convictions are not PSCs.

For these reasons, this Court should remand this case to the BIA with instructions to adopt a PSC test that governs withholding of deportation applications under 8 U.S.C. § 1253(h) as amended by AEDPA § 413(f) for individuals, like Petitioner, who have not been charged with or found deportable

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[9] While DHS previously charged Petitioner with an aggravated felony, the agency withdrew that charge. AR at 6, 687-88. The *Chenery* doctrine also precludes this Court from considering whether Petitioner's convictions constitute aggravated felony offenses.

for an aggravated felony, and to remand the case to the IJ to apply the test in the first instance.[10]

C. The BIA's Decision Is Devoid of Any Application of Discretionary Standards to "Ensure Compliance With" the 1967 Protocol.

Given that Petitioner's withholding application was controlled by former 8 U.S.C. § 1253(h) as amended by AEDPA § 413(f), the IJ and BIA were obligated to acknowledge and exercise the discretion mandated in AEDPA § 413(f). Of course, the IJ and BIA could exercise that discretion favorably or unfavorably, but in this case, they simply failed to acknowledge or exercise that discretion at all. In so doing, the agency nullified its statutory obligation under AEDPA § 413(f) (formerly codified at 8 U.S.C. § 1253(h)(3), *see* Addendum, Part C). That statute provides:

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[10] The BIA's earlier PSC test in *Matter of Frentescu,* interpreted the 1980 version of the withholding statute, *see* Addendum, Part A. *Amici* do not believe that test is adequate in light of the subsequent statutory amendments to the withholding provision at issue in *Frentecu*, *see* Addendum, Parts B and C, and because the test does not contain standards to address AEDPA § 413(f)'s requirement of international law compliance.

(3) Notwithstanding *any other provision of law*, paragraph (1) shall apply to any alien *if the Attorney General determines, in the discretion of the Attorney General*, that—
(A) such alien's life or freedom would be threatened, in the country to which such alien would be deported or returned, on account of race, religion, nationality, membership in a particular social group, or political opinion; and
(B) *the application of paragraph (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.*

Emphasis added. Under its plain language, the statute mandates a discretionary analysis to consider withholding deportation "to ensure compliance with" the 1967 Protocol for *all* withholding of deportation applications governed by AEDPA § 413(f). *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("The starting point for interpreting a statute is the language of the statute itself").

The statutory text of AEDPA § 413(f) is plain insofar as it grants the agency authority to withhold the deportation of someone otherwise ineligible for such relief. Likewise, the statute guarantees all withholding applicants an opportunity to convince the agency to exercise that discretion in their favor.

Even the BIA agrees with the need for standards governing the statutorily mandated discretion with respect to individuals with aggravated felony convictions, as this need prompted its decision in *Matter of Q-T-M-T-*.[11] In that

[11] In promulgating discretionary standards governing withholding applicants with aggravated felony convictions, the BIA sought to make the discretionary

case, the BIA designated an aggravated felony convictions with a sentence of 5 years or more as per se PSCs and those with less than 5 year sentences presumptively a PSC unless "there is any unusual aspect of the alien's particular aggravated felony conviction that convincingly evidences that the crime cannot rationally be deemed 'particularly serious' in light of treaty obligations under the Protocol." *Matter of Q-T-M-T-*, 21 I&N Dec. at 654. For this latter group of individuals—those with less than 5 year sentences for aggravated felonies—the BIA explained that IJs should "look to the conviction records and sentencing information" as well as "the nature and circumstances of the crime" to determine whether the individual "can be said to represent a danger to the community of the United States." *Id*. at 654. Judges also "must give significant weight to the decision of Congress to include that particular category of crime in the aggravated felony definition." *Id*.[12]

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standards consistent with IIRIRA. *Matter of Q-T-M-T-,* 21 I&N Dec. at 653. The BIA did this because three months before the BIA decided *Matter of Q-T-M-T-* in December 1996, Congress had enacted IIRIRA § 305(a), which again amended the withholding statute with respect to applicants with aggravated felony convictions. IIRIRA § 305(a) designated only an aggravated felony or felonies with an aggregate of at least a 5 year sentence as per se PSCs, and conferred discretion on the Attorney General to make individualized PSC determinations in all other cases. Even though IIRIRA § 305(a) did not become effective until April 1, 1997 (*see* IIRIRA § 309(c)(1)), the BIA promulgated discretionary standards implementing AEDPA § 413(f) that mirrored that provision.

[12] The regulation at 8 C.F.R. § 206.16(d)(3) restates the two PSC tests the BIA created in *Matter of Q-T-M-T-* and that the statutory text of former 8 U.S.C. §§ 1253(h)(1)&(h)(2)(A)-(D) complies with the Protocol. The regulation does not

Logically, it follows that the test for individuals who are *not* charged with or found deportable for an aggravated felony conviction should be more generous than the rebuttable presumption applicable to individuals with aggravated felony convictions. After all, the agency need not give *any* weight, let alone "significant weight" to a decision of Congress to designate the crime an aggravated felony, because the crime is not an aggravated felony for purposes of the mandatory discretionary analysis.[13]

Thus, the BIA's decision in this case warrants reversal and remand because, contrary to the plain language of AEDPA § 413(f), it is devoid of any discretionary analysis to "ensure compliance with" the 1967 Protocol.

IV. CONCLUSION

The Court should grant the petition for review, vacate the Board's decision, and remand the case to the Board with instructions to: (1) create a test that governs withholding applications under former § 1253(h) as amended by AEDPA § 413(f) where the individual does not have an aggravated felony conviction; and (2) upon doing so, to remand the case to the immigration judge to determine, in the first instance, whether Petitioner has been convicted of a PSC under this test, and if so,

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speak to either the PSC test or the standards for exercising the discretion mandated in AEDPA § 413(f) for non-aggravated felons.

[13] This is true in every case where there is no aggravated felony charge and finding.

whether withholding her deportation is "necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees" as mandated by AEDPA § 413(f).[14]

Respectfully submitted,

s/ *Trina Realmuto*
Trina Realmuto
Khaled Alrabe, Law Fellow
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
(617) 227-5495 (fax)
trina@nipnlg.org

Manny D. Vargas
Immigrant Defense Project
28 W. 39th Street, #501
New York, NY 10018
(212) 725-6422
mvargas@immigrantdefenseproject.org

Attorneys for *Amici Curiae*

Dated: March 9, 2015

[14] A circuit court ordinarily must order remand when the BIA has not spoken on "a matter that statutes place primarily in agency hands." *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam); *see also Gonzales v. Thomas*, 547 U.S. 183, 187 (2006) (per curiam). Without endorsing it, *amici* recognize this remand rule applies in this case.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,619 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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 in Microsoft Word, using Times New Roman in 14 point font.

/s/ *Trina Realmuto*
Trina Realmuto
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
trina@nipnlg.org

Dated: March 9, 2015

ADDENDUM

Table of Contents

Part A

1980 Withholding of Deportation Statute

Enacted by the Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102 (Mar. 17, 1980) *codified at* former 8 U.S.C. § 1253(h)

(h) (1) The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(19)) [8 U.S.C. § 1251] to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—,

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

Part B

1990 Withholding of Deportation Statute

Former 8 U.S.C. § 1253(h) *as amended by* the Immigration Act of 1990, Pub. L. No. 101-649, § 515(a)(2), 104 Stat. 4970 (Nov. 29, 1990)

(h) Withholding of Deportation or Return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(19)) [8 U.S.C. § 1251] to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—,

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.

Part C

1996 Withholding of Deportation Statute and Effective Date Provision

Former 8 U.S.C. § 1253(h) (1995) *as amended by* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 413(f), 110 Stat. 1214 (April 24, 1996)

(h) Withholding of Deportation or Return.

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(4)(D)) [8 USCS § 1251(a)(4)(D)] to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime. For purposes of subparagraph (D), an alien who is described in section 241(a)(4)(B) shall be considered to be an alien for whom there are reasonable grounds for regarding as a danger to the security of the United States

(3) Notwithstanding any other provision of law, paragraph (1) shall apply to any alien if the Attorney General determines, in the discretion of the Attorney General, that—

(A) such alien's life or freedom would be threatened, in the country to which such alien would be deported or returned, on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) the application of paragraph (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.

AEDPA § 413(g)

(g) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to applications filed before, on, or after such date if final action has not been taken on them before such date.

Part D

2015 Withholding of Removal Statute and Effective Dates/Transitional Rules

Former 8 U.S.C. § 1253(h) (1996) *re-designated and amended by*
Illegal Immigration Reform and Immigrant Responsibility Act of 1996,
Pub. L. No. 104-208, § 305(a), 110 Stat. 3009 (Sept. 30, 1996)
codified at 8 U.S.C. § 1231(b)(3)

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

> Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

> In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

IIRIRA §§ 309(a) and 309(c)(1)

SEC. 309. EFFECTIVE DATES; TRANSITION.
(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the ‘‘title III–A effective date’’) [April 1, 1997]s.

. . .

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—
(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings ~~as of~~ before the title III–A effective date—
(A) the amendments made by this subtitle shall not apply, and
(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

CERTIFICATE OF SERVICE FORM FOR ELECTRONIC FILINGS

I hereby certify that on March 9, 2015, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Mary Holper, Counsel for Petitioner
Kate D. Balaban and LaTia N. Bing, Counsel for Respondent

/s/ *Trina Realmuto*
Trina Realmuto
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
trina@nipnlg.org

Dated: March 9, 2015