UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OMAR OBD GOMAA ORABI a/k/a OMAR GOMMA ORABI, *Petitioner*, v. ATTORNEY GENERAL OF THE UNITED STATES, *Respondent*.	No. 12-4025 (A072-759-091)

MOTION OF THE IMMIGRANT DEFENSE PROJECT FOR LEAVE TO PROCEED AS *AMICUS CURIAE*

The Immigrant Defense Project ("IDP") respectfully seeks leave to proceed as amicus curiae in order to request this Court's permission in accordance with Federal Rule of Appellate Procedure ("FRAP") 40 to file an answer in opposition to Petitioner's Petition for Panel Rehearing of the Panel's decision in Orabi v. Att'y Gen. of the U.S., 738 F.3d 535, 543 (3d Cir. 2014) (the "Decision"). If rehearing is granted, IDP would also seek leave to submit a brief as amicus curiae, in accordance with Local Appellate Rule 29.1 and FRAP 29(2). IDP's proposed request for permission to file an answer opposing the Petition for rehearing is attached hereto as Exhibit A.

1. Respondent's Petition for Panel rehearing, in which Respondent seeks vacatur of the Decision, raises a question that is central to the work of proposed amicus curiae, i.e, whether this Court's precedential Decision – holding that the "finality" rule, which requires that a criminal conviction become "final" through exhaustion or waiver of direct appellate remedies

before that conviction may sustain an order of removal, remains intact within the Third Circuit – will remain intact.

2. Ensuring continued recognition of the finality rule, including through precedential opinions like the Decision, is an issue of vital importance to IDP, and to the many thousands of immigrants, their families, and their advocates that IDP counsels. While the Decision observed that this Court has already "subscribed to the position" that the finality rule prevents removal based on criminal convictions until any direct appeals from such convictions have been resolved (Orabi, 738 F.3d at 540, citing Paredes v. Att'y Gen., 528 F.3d 196, 198 (3d Cir. 2008)), in this case, the DHS, the BIA and the Immigration Judge all failed to heed the Paredes directive in authorizing Petitioner's removal before he had exhausted his Second Circuit criminal appeal. Thus, there is every reason to believe that if Respondent's request for vacatur of this Decision is granted, the government (which openly "disagrees" with the Court's Decision on finality (Petition at 4)) will continue to disregard the finality requirement and continue to wrongfully pursue deportation of non-citizens on the basis of criminal convictions that remain subject to direct appeals of right.[1] If the Decision is vacated, many immigrants may thus be removed on the basis of wrongful convictions.

3. In addition, if the Decision is vacated, future litigants will face serious obstacles in securing a precedential ruling upholding the finality rule. For instance, criminal appeals often run their course before a litigant has the opportunity to obtain a precedential ruling from the BIA

[1] The BIA's position on this critical issue has vacillated in the absence of explicit, binding precedent from this Court. Compare, e.g., In re Laigo, No. A092-781-201, 2010 WL 4972447 (BIA Nov. 16, 2010) (holding, in a case arising in ths Circuit, that a conviction subject to direct appeal does not trigger mandatory detention and citing Paredes) with In re Ayesh, No. A201-112-633, 2012 WL 3911774 (BIA Aug. 14, 2012) (holding, in a case arising in this Circuit, that a conviction is "final" notwithstanding a pending direct appeal, citing the Ninth Circuit's decision in Planes and failing to mention Paredes).

or the federal Courts of Appeal as to whether the finality rule should have operated to postpone removal while those criminal appeals were being resolved. And in some states, courts will dismiss the appeals of deportees on grounds of mootness – effectively eliminating any further opportunity to challenge a wrongful conviction upon removal. See, e.g., Lindsay v. State, No. 200,1996, 704 A.2d 844, 1997 WL 794514 (Del. 1997) (criminal appeal vacated as moot upon deportation order). Even where a particular litigant's conviction is ultimately affirmed on appeal, these structural impediments to obtaining a precedential ruling on the finality rule hurt countless other immigrants who may have viable grounds for appellate reversal.

4. Vacatur would therefore seriously impact the lives of many individual immigrants whose interests IDP represents. Permitting DHS continued license to remove immigrants – including legal permanent residents with long and deep roots in this country – in a manner in which they may be deprived access to appeals of right, would also, in IDP's view, do serious violence to societal confidence in the fair and just application of the nation's criminal and immigration laws.

5. Proposed amicus curiae is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. A national expert on the intersection of criminal and immigration law, IDP supports, trains, and advises both criminal defense and immigration lawyers, as well as immigrants themselves, on issues that involve the immigration consequences of criminal convictions.

6. IDP was involved as amicus curiae in several of the cases involving the finality rule discussed by the Panel in the Decision. *See* Brief of Amici Curiae IDP et al. in support of Petitioner in Planes v. Holder, 686 F.3d 1033 (9th Cir. 2012) (No. 07-70730); Brief of Amici Curiae IDP et al. in Support of Petitioner in Abreu v. Holder, 378 F. App'x 59 (2d Cir. 2010)

(No. 09-2349). And numerous federal courts, including the United States Supreme Court, and this Court, have accepted and relied on amicus curiae briefs prepared and submitted by IDP on various other issues at the intersection of immigration and criminal law. See, e.g., Brief of Amici Curiae IDP et al. in Support of Petitioner, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211); Brief of Amici Curiae IDP et al. in Support of Petitioner, Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) (No. 09-60), 2010 WL 565219; Brief of Amici Curiae IDP et al. in support of Petitioner, Padilla v. Kentucky, 555 U.S. 1169 (2009) (No. 08-651), 2009 WL 1567356; Briefs of Amici Curiae IDP et al. in support of Petitioner in Nijhawan v. Holder, 557 U.S. 39 (2009) (No. 08-495), 2009 WL 583799, 2009 WL 583797; Brief of Amicus Curiae IDP in Syblis v. Att'y Gen. (3d Cir.) (No. 11-4478); Brief of Amici Curiae IDP et al. in Desrosiers v. Hendricks (3d Cir. 2013) (No. 12-2053); Brief of Amici Curiae New York State Defenders Association (including IDP) et al. in Ponnapula v. Ashcroft, 373 F.3d 480 (3d Cir. 2004) (No. 03-1255).

7. It is proposed amicus' understanding that, in that the government has deported Petitioner to Egypt (*Orabi*, 738 F.3d at 538), and according to Respondent's March 14, 2014 letter to this Court, his "current address is unknown to the government," Petitioner is therefore presently unavailable to give consent to this motion. Accordingly, proposed amicus is seeking the Court's permission for leave to appear as amicus rather than proceeding by consent of the parties.

For the foregoing reasons, proposed amicus respectfully moves to proceed as amicus curiae.

Dated: March 14, 2014
New York, New York

Respectfully submitted,

By: /s/ Julia J. Peck
Julia J. Peck

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EXHIBIT A

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March 14, 2014

VIA ECF
The Honorable Brooks Smith
The Honorable Leonard I. Garth
The Honorable Dolores Sloviter
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse, 601 Market Street
Philadelphia, PA 19106

Re: Omar Gomaa Orabi v. Attorney General of the United States, Case No. 12-4025

Dear Judges Smith, Garth and Sloviter:

Pursuant to FRAP 40, the Immigrant Defense Project ("IDP") respectfully seeks leave to submit an answer as *amicus curiae* opposing Respondent's Petition for Panel Rehearing, filed March 7, 2014, in the above-captioned matter (the "Petition"), should the Court deem a response needed.

In its Petition, Respondent asks this Court to vacate its published, precedential decision of January 2, 2014, in which the Court recognized that the "finality rule" articulated by the BIA in *In re Ozkok*, 19 I. & N. Dec. 546, 552 n.7 (BIA 1988), remains "alive and well" within the Third Circuit. *Orabi v. Att'y Gen. of the U.S.*, 738 F.3d 535, 543 (3d Cir. 2014) (the "Decision"). The finality rule provides that "a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived." *Id.*

Although Respondent formerly conceded this Court's jurisdiction to decide this appeal (*Orabi*, 738 F.3d at 538, 540 n.4), it now argues that the Decision should be vacated on jurisdictional grounds because, over one month *after* the Court issued its Decision, on February 10, 2014, the Second Circuit affirmed Petitioner's predicate criminal conviction, arguably rendering that conviction "final" for removal purposes. If given leave to answer, IDP would use the opportunity to demonstrate that, contrary to Respondent's contention, this post-Decision development does not undermine the jurisdictional basis for the Decision and that, in fact, this Court's precedent strongly supports leaving this important Decision – which provides authoritative guidance to the government in future removal proceedings and much needed protection to countless immigrants facing removal based on potentially wrongful convictions – intact. IDP respectfully submits that there may be a heightened interest in soliciting the perspective of IDP as *amicus* in this matter in light of the fact

that it is not clear whether Petitioner – whom the government previously deported to Egypt (*Orabi*, 738 F.3d at 538), yet whom the Government nevertheless purported to serve with this Petition at his "last known address" at the Moshannon Valley Correctional Center in Philipsburg, PA - even has notice of the Government's Petition for vacatur, let alone the ability to meaningfully respond.

IDP is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. A national expert on the intersection of criminal and immigration law, IDP supports, trains, and advises both criminal defense and immigration lawyers, as well as immigrants themselves, on issues that involve the immigration consequences of criminal convictions. Its briefs have been accepted in many key cases involving the finality rule and other important criminal and immigration matters before this Court, the U.S. Supreme Court and other Courts of Appeals.[1]

The Decision concerns an issue of vital importance to IDP, and to the many thousands of immigrants, their families, and their advocates that IDP counsels. While this Court previously "subscribed to the position" that the finality rule prevents removal based on criminal convictions until direct appeals from such convictions have been resolved (*Orabi*, 738 F.3d at 540, citing *Paredes v. Att'y Gen*., 528 F.3d 196, 198 (3d Cir. 2008)), in this very case, DHS, the BIA and the Immigration Judge all disregarded *Paredes*' guidance on the finality rule, suggesting that they will continue to reject the finality rule - and continue to improperly pursue deportation of non-citizens on the basis of criminal convictions that remain subject to direct appeals of right – in the absence of the explicit direction that this Decision provides. If vacated, many immigrants may thus be removed on the basis of wrongful convictions. And if permitted leave to answer, IDP would further show that, once removed, immigrants often face severe, if not insurmountable obstacles in continuing to prosecute criminal appeals and seeking reversal of erroneous removal orders from abroad.[2] Vacatur would thus seriously impact the lives of many individual immigrants whose interests IDP represents and impair confidence in the fair and just application of the criminal and immigration laws.

Further, if granted permission to answer, IDP would show that Respondent's Petition for vacatur ignores directly applicable Third Circuit precedent which provides that where, as here, a decision arguably becomes moot *after* the decision has been filed, but before mandate has issued, vacatur is *not* required. *Humphreys v. Drug Enforcement Admin.*, 105 F.3d 112, 114-16 (3d Cir. 1996) (vacatur of an *issued* decision on grounds of post-decision mootness is a prudential question and *not* a question of jurisdiction implicating Article III of the United States Constitution, and

[1] *See, e.g.,* Brief of Amici Curiae IDP et al. in Support of Petitioner in *Abreu v. Holder*, 378 F. App'x 59 (2d Cir. 2010) (No. 09-2349); Brief of Amici Curiae IDP et al. in Support of Petitioner, *Vartelas v. Holder*, 132 S. Ct. 1479 (2012) (No. 10-1211); Brief of Amicus Curiae IDP in Support of Petitioner in *Syblis v. Att'y Gen.* (3d Cir.) (No. 11-4478).

[2] Moreover, given that criminal appeals often run their course before appeals of removal proceedings reach their way to the BIA or federal appeals courts, future litigants will likely face serious obstacles in securing a precedential ruling upholding the finality rule.

observing that this Court is well within its discretion to decline to vacate a previously issued decision where important public policies support allowing it to stand). [3]

In light of IDP's strong interest in this matter and what IDP perceives to be the Government's baseless request to expunge this important precedent, IDP therefore respectfully requests the Court's permission to formally oppose Respondent's Petition for rehearing and vacatur. Additionally, to the extent the Court were to order rehearing in this matter, IDP respectfully advises that it will seek to submit a brief as *amicus curiae*, in accordance with LAR 29.1 and FRAP 29(2).

Respectfully submitted,

/s/ Julia J. Peck
Julia J. Peck

Pro Bono Counsel for IDP

[3] Much like the situation presented here, the Court in *Humphreys* concluded that its previously-issued opinion had "carefully analyzed" the government's interpretation of a controlling statute and concluded that the government had been wrongfully interpreting and applying it – and that the government would "likely continue to apply its erroneous interpretation absent a binding contrary interpretation." *Id.* Thus, the Court's decision "declaring and clarifying the law that the [government] must apply . . . [was] of utmost importance," and withdrawing it would be imprudent. *Id.* In addition, the Court noted that the government had "a full and fair opportunity to present its case," so allowing the decision to stand was not unfair. *Id.* at 116.

Certificate of Service

I hereby certify that on March 14, 2014, I electronically filed: (i) a MOTION OF THE IMMIGRANT DEFENSE PROJECT FOR LEAVE TO PROCEED AS *AMICUS CURIAE*, which attached as Exhibit A, a proposed letter to the Panel requesting permission to file an answer opposing Respondent's Petition for rehearing; and (ii) a NOTICE OF APPEARANCE with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that not all participants in the case are registered CM/ECF users and that I therefore caused a copy of the above documents to be served by sending via U.S. Mail, first-class post-age prepaid, to Petitioner Omar Orabi at his last known address as follows:

Omar Obd Gomaa Orabi
Moshannon Valley Correctional Center
555 Geo Drive
Philipsburg, PA 16866

Dated: New York, New York
March 14, 2014

/s/Julia Peck

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