No. 21-6042

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BEREKET ARAYA BERHE,

Petitioner,

v.

ROBERT M. WILKINSON, Acting United States Attorney General,

Respondent.

On Petition for Review from the Board of Immigration Appeals

[PROPOSED] BRIEF OF AMERICAN IMMIGRATION LAWYERS ASSOCIATON ET AL. IN OPPOSITION TO THE MOTION TO TRANSFER VENUE

BROOKLYN DEFENDER SERVICES
Andrea A. Sáenz
Jesse Rockoff
156 Pierrepont Street
Brooklyn, NY 11201
(718) 254-0700 x434

THE BRONX DEFENDERS
Zoe Levine
360 E. 161st Street
Bronx, NY 10451
(718) 838-7808

THE LEGAL AID SOCIETY
Aadhithi Padmanabhan
Julie Dona
199 Water Street, 3rd Floor
New York, NY 10038
(646) 574-2761

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative History

Regulations

Other Authorities

INTEREST OF AMICI CURIAE

Amici curiae are not-for-profit organizations and associations that represent, support, and advocate for noncitizens detained by the Department of Homeland Security ("DHS"). Amici regularly represent noncitizens in petitions for review before the Second Circuit, advise on appellate matters, and appear as amici curiae in Second Circuit immigration cases.[1] Amici are comprised of the American Immigration Lawyers Association, The Bronx Defenders, Brooklyn Defender Services, the Immigrant Defense Project, the Immigrant Rights Clinic of Washington Square Legal Services, Inc., the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law, The Legal Aid Society, Make the Road New York, New York Legal Assistance Group, Rapid Defense Network, and UnLocal, Inc. Detailed interest statements are added at Appendix A.

INTRODUCTION

For decades, the law of this Circuit has applied in removal proceedings taking place at the Varick Street Immigration Court and other immigration courts located in this Circuit. In 2018, however, Immigration and Customs Enforcement ("ICE") ended its long-standing practice of producing detained noncitizens for their immigration hearings at Varick Street in person. *See* Exhibit B, Declaration of Hasan

[1] Pursuant to Fed. R. App. P. 29(a)(4), amici state that none of amici are corporations, no party counsel authored any part of the brief, and no person or entity other than amici contributed money to prepare or file it.

Shafiqullah ("Shafiqullah Decl.") ¶ 9.[2] Almost every detained individual now appears at Varick Street by video from jails in upstate New York and New Jersey. *See id.* ¶¶ 10-11. And a small minority of people, like the petitioner in this case, appear by video from a county jail in Mississippi. *See id.*

As an apparent result of this practice, amici are beginning to see limited examples of the Board of Immigration Appeals ("BIA") applying Third Circuit law to removal proceedings conducted at Varick Street, on the ground that the noncitizen was detained just across the Hudson River in New Jersey. *See* Shafiqullah Dec. ¶ 21. And periodically, hearing notices are appearing which state that Varick Street cases are to be decided at the Bergen County Jail in Hackensack, New Jersey, or the Hudson County Jail in Kearny, New Jersey, despite the fact that no immigration judge, clerk, file, attorney, or so much as a piece of immigration court letterhead has ever appeared in these locations. *See id.* ¶ 22.

In this case, the government has moved to transfer the petition to the Fifth Circuit, where Fifth Circuit law can be applied, to proceedings conducted at the

[2] Although the term "noncitizen" is used for convenience, amici note that a small proportion of individuals in removal proceedings are actually United States citizens whom ICE has improperly deemed to be noncitizens. *See, e.g.*, *Jaen v. Sessions*, 889 F.3d 182 (2018) (holding that a Brooklyn Defender Services client detained at the direction of ICE's New York Field Office for two years was, in fact, a U.S. citizen); *Watson v. United States*, 865 F.3d 123 (2d Cir. 2017) (discussing case of New York resident and U.S. citizen held in immigration detention for over three years).

Varick Street Immigration Court for a petitioner detained in Natchez, Mississippi. *See* Gov't Motion to Transfer at 2-3 (ECF No. 8.01). And, in a precedent decision, the BIA has *already* applied Fifth Circuit law to proceedings conducted from the Batavia, New York immigration court for a similar noncitizen detained in Louisiana, albeit in footnoted dicta. *See Matter of R-C-R-*, 28 I&N Dec. 74-75 n.1 (BIA 2020).

The BIA's decision in *Matter of R-C-R* and the government's apparent position in this case—that the venue for a petition for review depends on a noncitizen's detention location, *see* Gov't Motion to Transfer at 2—contravenes the Immigration and Nationality Act ("INA") and its implementing regulations. The government's position will also create enormous waste, litigation, and confusion, and could leave detained noncitizens without notice of which Circuit's law will govern until late in their proceedings.

This Court should thus deny the government's motion to transfer in this case and instead adopt the rule the petitioner proposes: venue remains unchanged from a case's initiation through completion unless the parties litigate, and an immigration judge grants, a change-of-venue motion. *See* Pet'r's Opposition to Motion to Transfer at 1, 8 (ECF No. 15). Moreover, for the reasons discussed in the petitioner's brief and given the significance of this issue to potentially hundreds of cases, amici respectfully submits that this Court should consider issuing a precedent decision clarifying that Second Circuit law applies in removal proceedings venued with this

Circuit's immigration courts, even where noncitizens are produced by video from detention locations outside this Circuit.

SUMMARY OF ARGUMENT

This Court should reject the apparent rule proposed by the Government and deny its motion to transfer for the reasons explained in Petitioner's opposition, and to avoid significant and unwarranted disruption in practice for noncitizens, attorneys, and adjudicators. Tying venue—and the circuit law that governs a particular case—to a respondent's detention location is both incorrect as a matter of law and inappropriate as a matter of practice.

Amici represent clients at the Varick Street Immigration Court in New York who are detained by DHS in jails in the territorial jurisdiction of three different circuits (Second, Third, Fifth) and who, since 2018, generally appear via video teleconference from their detention locations. DHS determines where to detain a noncitizen, and frequently exercises its authority to transfer noncitizens from one detention center to another while their proceedings are pending. As such, linking venue to detention location will lead to unfair and inefficient results. It would cause immigration judges at Varick to apply the complex and varying immigration precedents of three different circuits over the course of a single day, leading to confusion and legal error. It would also frustrate noncitizens and their counsel in pursuing sound strategy when the applicable law can shift during the course of

proceedings and the noncitizen is unable to predict with certainty which court of appeals will hear any future petition for review. The government's apparent rule is also subject to manipulation by DHS, which controls detention decisions. The existing rule—that all removal proceedings venued at an immigration court in this Circuit are governed by the law of this Circuit—avoids these pitfalls and ensures that venue remains stable unless a change of venue motion is litigated and granted, with notice and an opportunity to be heard for both parties.

The Government's rule also contravenes the relevant statutory language and persuasive authority on venue rules in the immigration context. Under the INA, "[t]he petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings," 8 U.S.C. § 1252(b)(2), and the relevant place for "completion" is the immigration court, where orders are "prepared and entered," *Ramos v. Ashcroft*, 371 F.3d 948, 949 (7th Cir. 2004); *see also Georcely v. Ashcroft*, 375 F.3d 45, 48 (1st Cir. 2004). For amici's clients in removal proceedings, it is the Varick Street Immigration Court—not the jail location—where orders are prepared and entered, where files and video equipment are maintained, and where judges, staff, counsel, and witnesses appear in person or by phone. Therefore, proceedings are completed at Varick within the meaning of § 1252(b)(2), and venue for petitions for review lies in this Circuit. This also squares with the regulations on venue, which make no reference to detention

location. *See* 8 C.F.R. §§ 1003.14(a), 1003.20(a), (b) Yet the BIA, in dicta in a footnote in *Matter of R-C-R-*, 28 I&N Dec. 74 (BIA 2020), ignored all of this, and relied on the novel phrase "docketed hearing location" instead of the relevant statutes, regulations, or circuit decisions. It should be given no deference.

Both the applicable law and the practical realities point firmly in the same direction: this Court should find that all removal proceedings venued at an immigration court in this Circuit are governed by the law of this Circuit, and the location of the immigration court, rather than the detention location, controls choice of law and venue in petitions for review.

ARGUMENT

Petitions for Review of Decisions Rendered in Removal Proceedings Venued in This Circuit's Immigration Courts Should Be Filed in This Circuit, Not in the Circuit Where a Detained Person Happens to Be Held

I. This Court Should Not Endorse the Government's Apparent Rule Which Creates Confusion, Litigation, and Waste by Upending Long-Settled Practice

Since the passage of the REAL ID Act of 2005, this Court has been the default venue for review of orders entered in removal proceedings in this Circuit's immigration courts. *See*, *e.g.*, *Gittens v. Menifree*, 428 F.3d 382, 383 (2d Cir. 2005) (noting that REAL ID made petitions for review in the Courts of Appeals the exclusive method of challenging decisions in removal proceedings). A holding that the appropriate Court of Appeals for a petition for review is instead governed by the

petitioner's detention location would upend years of settled practice, creating enormous and unnecessary inefficiencies and confusion for petitioners, practitioners, and adjudicators alike.

Currently, the Varick Street Immigration Court in New York handles removal proceedings for detained people held by DHS in at least four locations: Orange County, New York; Bergen County, New Jersey; Hudson County, New Jersey; and, Adams County, Mississippi.[3] *See* Shafiqullah Dec. ¶¶ 12-13. Since the summer of 2018, hearings at Varick Street have generally taken place with a detained person physically at one of these county jails while only present in the courtroom by video. *See id.* ¶¶ 10-11. And prior to the COVID-19 pandemic, detained people were still occasionally produced in person, for example, when a video link to a jail was broken or a detainee had severe mental health problems which made a video appearance impracticable. *See id.* ¶ 11.

Detained people in removal proceedings at Varick Street are routinely transferred between county jails in the New York area, e.g., from Orange to Hudson, due to reasons which are often opaque to amici curiae. *See id*. ¶¶ 15-17. Sometimes individuals with cases pending at Varick are transferred even further afield, for

[3] The website of the Executive Office of Immigration Review ("EOIR") at https://www.justice.gov/eoir/immigration-court-administrative-control-list#Varick (last accessed February 10, 2021) contains a historical, non-exclusive list of the detention centers from which detainees have appeared at the Varick Street Immigration Court.

example to the Columbia Regional Care Center in Columbia, South Carolina or the Krome Detention Center in Florida for mental health treatment which DHS states cannot be provided in New York area facilities. *See id.* ¶ 18.

When a detained person is transferred across a state border, e.g., from Orange in New York to Hudson in New Jersey, or to and from South Carolina or Florida for treatment, their cases do not automatically move venue to different immigration courts, even if other courts are closer to the person's geographic location. *See* 8 C.F.R. § 1003.20(b) (change of venue between immigration courts can only happen on party's motion). And in general, neither detained persons nor DHS move to change venue in these circumstances. *See* Shafiqullah Decl. ¶ 19.

This is for good reason. Were venue to follow physical location of the detained person, cases would have to be transferred between courts each time detainees were moved. For example, a case could move from the Varick Street court to the Elizabeth, NJ court when a detainee is transferred from Orange to Hudson, then to the Charlotte, NC court should that detainee require mental health treatment at Columbia Care, then potentially back to Varick Street if that detainee is once again held at Orange. This would unnecessarily prolong removal proceedings while the individual is detained at taxpayer expense. *See* Office of the Chief Immigration Judge ("OCIJ"), Operating Policies and Procedures Memorandum ("OPPM") 18-01,

"Changes of Venue," at 2 ("[C]hanges of venue necessarily delay case adjudications. . . .").[4]

Accordingly, there is no requirement that a change of venue follow a change in detention center. *See id.*, at 5 (". . . DHS sometimes relocates detained aliens . . . . The Immigration Court does not automatically change venue, however. . . ."). As the Seventh Circuit has noted, "Federal judges often conduct hearings by teleconference between the court and a prison, so that prisoners need not be transported (with attendant cost and escape risks). That does not mean that an appeal would lie to the circuit in which the prison is located." *Ramos*, 371 F.3d at 949. This issue is particularly concerning for amici curiae, who include many New York-based attorneys and legal service providers who represent noncitizens pro bono; settled venue rules allow amici to continue representation on Varick cases without disruption even when DHS transfers individuals to other facilities outside their catchment areas.

Additionally, the rule the government proposes, where venue follows a detainee's physical location, creates vexing choice of law issues. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 478, 481-82 (BIA 2015) (noting that immigration judges must apply the law of the circuit court in which they sit, and acknowledging

[4] *Available at* https://www.justice.gov/eoir/page/file/1026726/download (last accessed February 10, 2021).

circuit splits). For example, Varick Street immigration judges frequently hear cases for noncitizens held in Orange, New York; the New Jersey detention centers; and Adams, Mississippi in the *same* day or busy court session. *See* Shafiqullah Decl. ¶ 26. Requiring Varick judges to apply the respective law of the Second, Third, or Fifth Circuit depending on where DHS happens to hold a noncitizen on a given day would promote confusion and lead to legal errors.

The rule the government proposes is also unfair to detained persons. The government retains broad and virtually unreviewable discretion to transfer individuals between detention centers in various jurisdictions at any point during their removal proceedings. And indeed, it is *amici's* experience that our detained clients are transferred between jurisdictions at all stages of proceedings including, for instance, after a case is initiated but before pretrial motion practice, between motion practice and trial, between continued trial dates, during appeal, and between appeal and remand. *See* Shafiqullah Decl. ¶ 27. It is also a reality of removal practice that immigration law can vary substantially from one Circuit to another, and that trial and appeal strategy may change depending on which Circuit's law will ultimately govern. *See id.* ¶ 24.

Under the government's apparent rule, venue and choice of law would not be fixed, but instead would change based on a detainee's location (which the government controls) without any prior notice to the detained person. *See* Gov't

Motion to Transfer at 2–3. By contrast, under the rule proposed by the petitioner, venue remains unchanged from a case's initiation through completion unless the parties litigate, and an immigration judge grants, a change-of-venue motion. *See* Pet'r's Opposition to Motion to Transfer at 8–11. The petitioner's rule promotes both fairness and stability by ensuring that the parties to a removal proceeding are on equal footing when it comes to changing venue and that the party opposing transfer has notice and an opportunity to be heard. *See* 8 C.F.R. § 1003.20(b) (explaining that a change-of-venue motion should only be granted for "good cause" and "after the other party has been given notice and an opportunity to respond to the motion to change venue").

Ultimately, the government's apparent rule would encourage gamesmanship. Were both venue and choice of law to follow a detainee's location, DHS could arbitrarily adjust the applicable law at any point before or during the Immigration Court proceedings, or even while on remand, simply by moving a detainee. *Cf. Judulang v. Holder*, 565 U.S. 42, 57-59 (2011) (invaliding immigration rule based on the "fortuity of an individual official's decision" which resulted in differing results for "identically situated alien[s]").[5] This would force endless rounds of

[5] It is also worth noting that the Executive Office of Immigration Review ("EOIR") is not a disinterested party when it comes to venue and choice of law in petitions for review. This is because EOIR, through its management by the Attorney General, is a party at the petition for review stage. EOIR thus has an interest in ensuring that the circuit law most favorable to its position on appeal applies at the agency level.

briefing and re-analysis. And choice of law cannot possibly depend on whether a video link is functioning, requiring that a detained person be brought to court in person on a particular day, or on whether a global pandemic prevents in-person appearances. *Id.* at 59 ("[D]eportation decisions cannot be made a 'sport of chance.'" (citing *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947) (Hand, J.)).

To avoid the problems set out above, adjudications in this Circuit's immigration courts have historically relied on a simple, settled rule: all removal proceedings venued at an immigration court in this Circuit are governed by the law of this Circuit. This should continue to be the rule, regardless of from which detention center a respondent is produced, and whether production is by video or in person. *See, e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals [and] encourage gamesmanship. . . . Judicial resources too are at stake." (internal citations omitted)).

II. The Statute and Regulations Require that Petitions for Review Be Filed in the Circuit Where Immigration Court Venue Lies at the Time of Decision

Analysis of the relevant provisions of the INA and related regulations shows that the circuit for a petition for review is determined the location of the *immigration court* where a case is venued at the time of decision, not the location of a detained

person. The day-to-day realities of cases at the Varick Street Immigration Court, where most amici practice, help demonstrate the rationale for this rule.

The INA has a venue provision for petitions of review, 8 U.S.C. § 1252(b)(2), which states, "The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." In *Ramos*, Judge Easterbrook considered 8 U.S.C. § 1252(b)(2) as a matter of first impression and found that it "ensures that the alien may petition for review in the circuit where *the immigration court* is located." *Ramos*, 371 F.3d at 949 (emphasis added); *see also Chavez-Vazquez v. Mukasey*, 548 F.3d 1115, 1118 n.1 (7th Cir. 2008) ("Venue is determined by the location of the immigration court. . . .").

Ramos conceptualized the immigration "court" as "where . . . orders were prepared and entered." *Ramos*, 371 F.3d . at 949; *see also Georcely*, 375 F.3d at 48 (noting in dicta that the most likely place that proceedings are "completed" within the meaning of 8 U.S.C. § 1252(b)(2) is where a "judicial order" is "filed and docketed"). Importantly, conceiving of "completing proceedings" under 8 U.S.C. § 1252(b)(2) as the process of "preparing and entering" dispositive orders, and "filing and docketing" them, is the only view consistent with the legislative history of this provision. *See* H.R. Conf. Rep. No. 104-828 (1996), at 219 ("[8 U.S.C. § 1252(b)] provides that a petition for review must be filed . . . in the Federal court of appeals for the circuit in which the final order of removal . . . was *entered*." (emphasis

added)). Orders of removal are simply not "entered" by or in a jail where a detained person is held. *See, e.g.*, *Marquez-Almanzar v. INS*, 418 F.3d 210, 215 n.6 (2d Cir. 2005) ("Because Marquez-Almanzar's removal proceedings were completed in New York, a petition for review would have been properly filed in our court." (citing 8 U.S.C. § 1252(b)(2)).

For detained removal proceedings venued in the New York City area, it is the Varick Street Immigration Court where all relevant "orders [are] prepared and entered," *Ramos*, 371 F.3d at 949, and where EOIR case files are maintained. *See* Shafiqullah Decl. ¶¶ 5-7, 14. It is where the necessary video equipment for hearings is operated by judges and court staff. *See id.* ¶ 10. Defense attorneys, DHS counsel, and the detained person's family members and witnesses also routinely appear and observe hearings at Varick Street or appear telephonically by calling a phone line that is broadcasted in the Varick courtroom. *See id.* ¶¶ 7-8.

By contrast, the jails that detain people whose cases are handled in the Varick court do not "prepare[] and enter[] orders." *Ramos*, 371 F.3d at 949. There are no courtrooms in which immigration attorneys can appear. *See* Shafiqullah Decl. ¶ 14. There are no court clerks, computers, or office machinery to ensure that "orders [are] prepared and entered." *Ramos*, 371 F.3d at 949. There are none of EOIR's physical files, and the jails do not receive court mail. *See* Shafiqullah Decl. ¶ 14. These detention facilities are not listed as "courts" on EOIR's own website. *See* EOIR,

"EOIR Immigration Court Listing," https://www.justice.gov/eoir/eoir-immigration-court-listing (last accessed February 11, 2021) (not showing the Orange, Bergen, Hudson, or Adams facilities as immigration courts).

The Varick court is thus the only place where Varick Street Immigration Court "proceedings" can be said to have been "completed" within the meaning of 8 U.S.C. § 1252(b)(2). As the Varick court is geographically located within the Second Circuit, it is in this Circuit that venue lies for petitions for review of Varick cases, regardless of a detained person's physical location. *See, e.g.*, *Attipoe v. Barr*, 945 F.3d 76 (2d Cir. 2019) (granting petition for review of removal order issued by New York immigration court for detained person held in New Jersey, Alabama, and Louisiana as detailed in *Kwasi A. v. Edwards*, 2019 WL 3219157, No. 18-15029 (SRC) (D.N.J. July 17, 2019), at *2); *Alexander v. Whitaker*, 758 F. App'x 159 (2d Cir. 2019) (summary order) (granting petition for review of removal order issued by New York immigration court for detained person held in New Jersey as discussed in *Erron A. v. Ahrendt*, 2019 WL 3453269, No. 18-1349 (JMV) (D.N.J. July 31, 2019), at *2 n.3). In fact, amici have been unable to find a decision of this Court transferring a petition for review of a New York immigration court decision simply because the respondent was detained outside New York.

Amici's (and the petitioner's) view is also consistent with EOIR's regulations. 8 C.F.R. § 1003.14(a) states that "jurisdiction vests, and proceedings before an

Immigration Judge commence, when a charging document is filed with the *Immigration Court*" (emphasis added). Regarding venue, 8 C.F.R. § 1003.20(a) states that "venue lies where jurisdiction vests pursuant to 8 C.F.R. § 1003.14." Nowhere do the regulations state that jurisdiction or venue has anything to do with where a person is detained. In fact, as discussed above, if either DHS or the person in removal proceedings wish proceedings to occur in a different geographic location, they must file a motion to change venue, even in a detained case. OPPM 18-01, at 5. Critically, requiring a motion to change venue before a transfer to another jurisdiction provides the opposing party with notice and opportunity to be heard, and preserves the issue for judicial review. *See* 8 C.F.R. § 1003.20(b) (requiring a showing of "good cause" for a change in venue); *see also, e.g.*, *Lovell v. INS*, 52 F.3d 458, 460 (2d Cir. 1995) (petition for review over change of venue decision).

All these realities of law and practice were ignored by the BIA's dicta in *Matter of R-C-R-*, 28 I&N Dec. 74 (BIA 2020), on which the government relies in its transfer motion in this case. In a footnote completely unrelated to its holdings, the BIA in *R-C-R-* applied Fifth Circuit law to a proceeding conducted at the Immigration Court in Batavia, New York, simply because the noncitizen was detained in Richwood, Louisiana. *R-C-R-*, 28 I&N Dec. 74-75 n.1. The BIA's rationale, presented with no citations or other support, was that the detention facility

in Richwood, where there is no immigration court, was the "docketed hearing location." *Id.* at 75 n.1.

As in the instant case, the BIA in *R-C-R-* did not explain what a "docketed hearing location" is. The phrase "docketed hearing location" does not appear in Title 8 of the U.S. Code, Title 8 of the Code of Federal Regulations, or anywhere else in the Administrative Decisions under the Immigration and Nationality Laws of the United States. The BIA's reliance on this *sui generis* phrase—whatever it was supposed to mean—is completely at odds with the plain text of the INA stating that the place where "the immigration judge completed the proceedings" is what controls. 8 U.S.C. § 1252(b)(2). Applying the plain text of the INA, Batavia was the location where the *R-C-R-* immigration judge's "orders were prepared and entered," *Ramos,* 371 F.3d at 949, not a detention center lacking clerks, files, or court staff. This Circuit's law thus should have controlled the decision in *R-C-R-*.

While the BIA acknowledged the Seventh Circuit's (correct) rules on venue and choice of law in its *R-C-R-* footnote, it misapprehended the import of the other Circuit cases it cited in support of its position. *See R-C-R-*, 27 I&N Dec. at 75 n.1. In discussing the Third Circuit's decision in *Luziga v. Att'y Gen of U.S.*, 937 F.3d 244, 250 (3d Cir. 2019), the BIA failed to note that there is an immigration *court* in York, PA at which immigration judges appear. *See* EOIR, "EOIR Immigration Court Listing," https://www.justice.gov/eoir/eoir-immigration-court-listing (last accessed

February 11, 2021) (showing York, PA immigration court); *see also Sholla v. Gonzales*, 492 F.3d 946, 948 (8th Cir. 2007) (petition for review correctly venued in Eighth Circuit where case was handled in St. Louis immigration court, even though IJ appeared by video from Louisiana). As for *Medina-Rosales v. Holder*, 778 F.3d 1140, 1143 (10th Cir. 2015), the BIA never mentioned that *Medina-Rosales* relied on unpublished, sub-regulatory guidance instead of analyzing the text and history of 8 U.S.C. § 1252(b)(2). *Medina-Rosales*, 778 F.3d at 1143.[6]

Finally, it is unclear, given that *R-C-R-*'s pronouncements on venue are footnoted dicta, that the parties in *R-C-R-* were given the opportunity to brief these issues before the BIA rendered its decision. *See* 8 C.F.R. 1003.20(b) (requiring that the parties be heard before venue is changed). Such a decision by fiat would contradict the agency's own precedents. *See Matter of A-B-*, 27 I&N Dec. 316, 334 (A.G. 2018) (finding that determinations as to legal issues not argued are not binding in future cases).

As the petitioner notes, because *Matter of R-C-R-* did not purport to interpret any statutory or regulatory provision, it is not a decision that triggers any deference doctrines. *See* Pet'r's Opposition to Motion to Transfer at 11. Moreover, the BIA

[6] Additionally, EOIR has now vacated the guidance on which *Medina-Rosales* relied. *See* OPPM 21-03, "Immigration Court Hearings Conducted by Telephone and Video Teleconferencing," *available at* https://www.justice.gov/eoir/eoir-policy-manual/OOD2103/download (last accessed Feb. 15, 2021), at 1 ("cancel[ling] and replac[ing] OPPM 04-06").

cannot be seen to have ruled reasonably on complex and wide-ranging issues of venue and choice of law in a cursory footnote which failed to interpret the INA and its legislative history, misread circuit law, and gave no indication that the parties were even provided the opportunity for discussion. *See, e.g., Gallina v. Wilkinson*, --- F.3d ---, 2021 WL 520651 (2d Cir. Feb. 12, 2021), at *6 (cautioning against finding that an "agency alter[ed] the fundamental details of its regulatory scheme" in an "ancillary" action) (internal citation omitted)). This Circuit should find instead, in accordance with Congressional intent and the practical necessities of the immigration and judicial systems, that the location of the immigration court at which venue lies at the time of decision controls choice of law and venue in petitions for review.[7]

CONCLUSION

For these reasons, amici curiae respectfully ask this Court to deny the motion to transfer this petition to the Fifth Circuit and hold that under 8 U.S.C. 1252(b)(2) the Second Circuit is the appropriate venue for cases completed in the immigration courts geographically located within this Circuit.

[7] It is also worth noting Congress's determination that, in general, a federal district court's geographic location is what controls venue for federal appeals. *See* 28 U.S.C. § 1294(1) (federal district court decisions are presumptively appealed "to the court of appeals for the circuit embracing the district").

Date: February 25, 2021

Respectfully submitted,

/s/ Andrea Sáenz

Andrea A. Sáenz
Jesse Rockoff
BROOKLYN DEFENDER SERVICES
156 Pierrepont Street
Brooklyn, NY 11201
(718) 254-0700 x434

Zoe Levine
THE BRONX DEFENDERS
360 E. 161st Street
Bronx, NY 10451
(718) 838-7808

Aadhithi Padmanabhan
Julie Dona
THE LEGAL AID SOCIETY
199 Water Street, 3rd Floor
New York, NY 10038
(646) 574-2761

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) and Local Rules 29.1(c) and 32.1(a)(4), because the brief contains 4,725 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 using Microsoft Word 2016 in 14-point Times New Roman.

/s/ Andrea Sáenz
Andrea Sáenz
Brooklyn Defender Services

Counsel for Amici Curiae

APPENDIX A

STATEMENTS OF INTEREST OF AMICI CURIAE

STATEMENTS OF INTEREST OF AMICI CURIAE

The American Immigration Lawyers Association ("AILA"), founded in 1946, is a non-partisan, nonprofit national association of more than 15,000 attorneys and law professors who practice and teach immigration law. AILA members represent U.S. families, businesses, foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis, as well as providing continuing legal education, professional services, and information to a wide variety of audiences. AILA has participated as amicus curiae in numerous cases before the U.S. Courts of Appeal and the U.S. Supreme Court.

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 30,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents nondetained immigrants in removal proceedings. The Bronx Defenders' representation extends to affirmative immigration applications, motions to reopen, appeals and motions before the BIA,

petitions for review, and federal petitions for writs of habeas corpus challenging unlawful immigration detention.

Brooklyn Defender Services ("BDS") is a public defender organization that represents nearly 35,000 people every year who cannot afford an attorney in criminal, family, and immigration proceedings. Since 2013, BDS has provided removal defense services through the New York Immigrant Family Unity Project, New York's first-in-the-nation assigned counsel program for detained New Yorkers facing deportation. BDS frequently represents detained and non-detained noncitizen clients in petitions for review before the U.S. Court of Appeals for the Second Circuit and has regularly appeared as amicus curiae before this Court.

Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. IDP provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants in the immigration detention, deportation, and criminal legal systems and therefore has a keen 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.

The Immigrant Rights Clinic ("IRC") of Washington Square Legal Services, Inc., has a longstanding interest in advancing and defending the rights of immigrants. IRC has been counsel of record or counsel for *amici curiae* in several cases before this Court and others, challenging the legality and constitutionality of the government's detention authority and its failure to provide immigrants in detention with due process of law.

The Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law ("IJC") is a law clinic that represents individuals facing deportation, as well as community-based organizations, in both public policy and litigation efforts. IJC has a long-established interest in fighting for the rights of immigrants pursuing their ability to remain in the U.S., including representing people who face detention pending removal proceedings.

The Legal Aid Society is the nation's oldest and largest not-for-profit provider of legal services to low-income clients. Its Immigration Law Unit (the "ILU") is a recognized leader in the delivery of free, comprehensive and high-caliber legal services to low-income immigrants in New York City and surrounding counties. Part of the ILU's work consists of representing detained individuals in removal proceedings before immigration judges, on appeals to the BIA and the United States Court of Appeals for the Second Circuit, and in habeas proceedings in the Southern District of New York and the District of New Jersey.

Make the Road New York ("MRNY") is a nonprofit, membership-based community organization that integrates adult and youth education, legal and survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY has over 200 staff, over 24,000 members, and five offices spread throughout New York City, Long Island, and Westchester. MRNY is at the forefront of numerous initiatives to analyze, develop, and improve civil and human rights for immigration communities, including issues related to detention and deportation of immigrant community members. Its attorneys and accredited representatives regularly represent both detained and nondetained clients in the greater New York City area in immigration matters.

The New York Legal Assistance Group ("NYLAG") is a leading not-for-profit civil legal services organization advocating for adults, children, and families that are experiencing poverty or have low income. NYLAG provides legal assistance in the areas of immigration, government benefits, family law, disability rights, housing law, special education, and consumer debt, among others. NYLAG's Immigrant Protection Unit (IPU) provides New York immigrant communities experiencing poverty with comprehensive legal services through consultation and direct representation. IPU represents detained and non-detained

immigrants in removal proceedings, as well as immigrants with final orders of removal who face imminent removal from the United States.

Rapid Defense Network ("RDN") is a New York State nonprofit legal services organization. RDN provides pro bono representation to noncitizens who are detained or on a fast-track to be deported before the Executive Office of Immigration Review (EOIR), federal district and circuit courts nationwide including the Second Circuit and the Varick Street Immigration Court. RDN monitors developments in immigration law nationwide that affect the rights of noncitizens, and partners with law firms and law school clinics to bring claims on behalf of noncitizens. RDN has experience litigating legal issues involving immigration laws before the federal courts and has a distinct interest in ensuring that the immigration laws are applied correctly and consistently.

UnLocal, Inc. is an immigration legal services and community education non-profit based in New York City. UnLocal provides presentations on immigration law, know your rights trainings, and legal consultations at community-based spaces including schools, workplaces, placed of worship and other immigrant-serving organizations. UnLocal clients and the membership of many of UnLocal's community-based partners include individuals who have faced detention during the pendency of their removal proceedings.

APPENDIX B

DECLARATION OF HASAN SHAFIQULLAH

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BEREKET ARAYA BERHE, Petitioner, v. ROBERT M. WILKINSON, Acting United States Attorney General, Respondent.	**Case No. 21-6042**

DECLARATION OF HASAN SHAFIQULLAH IN SUPPORT OF THE BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ET AL.

I, Hasan Shafiqullah, make the following declaration based on my personal knowledge and under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am the Attorney-in-Charge of the Immigration Law Unit of The Legal Aid Society of New York ("Legal Aid"). I have held this position since 2017. Prior to serving in this role and since I joined Legal Aid in 2001, I have served as both a Staff Attorney and the Deputy Attorney-in-Charge of the Immigration Law Unit. I also currently serve as the Chair of the New York State Bar Association's Committee on Immigration Representation, and I am a member of the New York City Bar Association's Immigration and Nationality Law

Committee and Judge Robert Katzmann's Second Circuit Study Group on Immigration Representation.

2. Legal Aid's Immigration Law Unit represents clients in over 3000 open cases, approximately 850 of which involve proceedings in immigration court. For proceedings in immigration court, Legal Aid attorneys represent both non-detained clients in the New York City's immigration courts, as well as detained clients before both the Varick Street Immigration Court in New York and the Elizabeth Immigration Court in New Jersey. One of the programs through which attorneys in my office represents detained individuals in removal proceedings is the New York Immigrant Family Unity Project ("NYIFUP"). The NYIFUP program is the focus of this declaration.

3. Funded by the New York City Council, NYIFUP offers free, high-quality legal representation to every low-income non-citizen facing removal proceedings on the detained docket at the Varick Street Immigration Court ("Varick") in New York City. NYIFUP is implemented by three public-defender organizations: The Bronx Defenders, Brooklyn Defender Services, and The Legal Aid Society. Through NYIFUP, these three providers ensure universal representation at Varick. All three providers also represent noncitizens in administrative appeals to the Board of Immigration Appeals and in petitions for review to the United States Court of Appeals for the Second Circuit.

Removal proceedings at Varick

4. The immigration court at Varick has both a detained and a non-detained docket.[1] Every removal case in New York City involving an adult non-citizen detained by Immigration and Customs Enforcement ("ICE") is heard at Varick.
5. For all detained cases venued at Varick, court filings are made with the clerk's office, which is located within the court at 201 Varick Street, New York, NY. The clerk's office also maintains case files for all cases venued at Varick.
6. Several immigration judges hear cases at Varick. These judges maintain their chambers at this court, and their orders are entered by the court staff with offices at Varick.
7. These immigration judges conduct hearings at courtrooms located at Varick, where attorneys (for both noncitizens and the government), interpreters, and witnesses appear. These courtrooms are generally open to the public, and family members, friends, and co-workers often sit in the gallery to observe proceedings.
8. Recently, during the COVID-19 pandemic, counsel, witnesses, and interpreters in NYIFUP cases have generally appeared telephonically rather than in person.

[1] New York has two other immigration courts—one is located at 26 Federal Plaza and the other is located at 290 Broadway. These two courts hear non-detained cases only. Non-detained cases are also heard at Varick.

When they appear telephonically, they call into a telephone line maintained by the immigration court.

9. Until the summer of 2018, detained noncitizens—referred to as "respondents" in agency proceedings—against whom removal proceedings were initiated at Varick usually appeared in person for every court date. In 2018, however, ICE ended its long-standing practice of producing these respondents in person for their hearings.

10. Pursuant to a new policy enacted in 2018, almost every detained respondent now appears from jail via video teleconference. The immigration court at Varick operates a video teleconference system through which detained respondents can participate in their court hearings.

11. Following the adoption of this video teleconference system, and prior to the COVID-19 pandemic, detained respondents were still occasionally produced in person when, for example, the respondent had severe mental health problems that made a video appearance impracticable or unfair. Often, respondents were produced by order of the Immigration Judge pursuant to a motion by respondent's counsel, when the Immigration Judge believed that in-person production was necessary to comply with due process. We expect that when the pandemic subsides, ICE will resume producing detained respondents under these circumstances.

Detention for noncitizens with removal cases venued at Varick

12. Currently, the immigration court at Varick handles removal proceedings for people detained by ICE in four county jails: Orange County, New York; Bergen County, New Jersey; Hudson County, New Jersey; and, Adams County, Mississippi.

13. The three NYIFUP providers have represented individuals detained at all four jails in removal or bond proceedings (or both).

14. As far as I am aware, none of these jails operates as an immigration court: There are no immigration clerks' offices with immigration clerks, computers, office machinery or immigration paper files at these jails; the jails do not accept immigration court mail or filings from parties; no immigration judges maintain their chambers or enter orders at these jails; and there are no immigration courtrooms within these jails.[2]

15. Noncitizens detained by ICE and with cases venued at Varick are routinely transferred from one ICE detention center to another during the course of their removal proceedings. They can be transferred at any point in their removal proceedings—for instance, after a case is initiated but before pretrial motion practice, between motion practice and trial, between continued trial dates,

[2] While at least one of these county jails has a courtroom within it, it is my understanding that the courtroom is used for local criminal matters and not any immigration-related matters.

during appeal, and between appeal and remand following a petition for review from this Court, if any.

16. I understand that ICE transfers individuals for a variety of reasons, including for bed space and/or medical needs. To my knowledge, ICE does not usually notify attorneys for respondents why their clients are being transferred from one jail to another. Advance notice is generally not provided, and attorneys usually learn of transfers only after the transfers are complete and clients are already detained at a new location.

17. It is very common for NYIFUP clients to be transferred between jails in New York and New Jersey during the pendency of their removal cases.

18. Although less frequent, NYIFUP clients with cases venued at Varick are also sometimes transferred farther away. In recent months, for example, NYIFUP providers have had clients transferred from the New York and New Jersey jails as far away as the Krome Detention Center in Florida and the Columbia Regional Care Center in Columbia, South Carolina.

19. When a detained person is transferred from one jail to another, their removal case does not automatically transfer venue to a different immigration court, even if another court may be closer to the person's new location. And generally in our experience, parties do not move to change venue when ICE moves a respondent from one detention location to another.

Venue and choice of law for removal proceedings at Varick

20. In my experience and in the NYIFUP program generally, until recently, Second Circuit law governed in removal proceedings venued at Varick. Every petition for review that I am aware of arising from removal orders entered at Varick was brought first to the Board of Immigration Appeals via an administrative appeal and later to the Second Circuit via a petition for review.

21. However, since the recent widespread use of video teleconferencing at Varick, the NYIFUP providers have begun to see a handful of examples of immigration judges and/or the Board of Immigration Appeals applying Third Circuit law in cases venued at Varick for individuals detained at New Jersey jails.

22. And I have seen a few instances where the agency has issued hearing notices stating that Varick Street cases are to occur at the Bergen County Jail in Hackensack, New Jersey or the Hudson County Jail in Kearny, New Jersey—despite the fact that no immigration judge, clerk, file, attorney, or even a document with immigration court letterhead has ever appeared in those locations.

23. It would be impractical and unfair for the happenstance of an individual's detention location to govern venue or the choice of which Circuit's law applies. One of the realities of removal cases is that detained respondents are frequently transferred between detention facilities located within the territorial

jurisdictions of different circuit courts. For example, a client might be transferred from the Bergen County Jail in New Jersey, within the Third Circuit, to the Orange County Jail in New York, within the Second Circuit. These transfers are conducted at the government's discretion and are largely insulated from administrative or judicial review.

24. Another reality of removal defense practice is that immigration law can vary substantially from one circuit to another. For instance, criminal offenses that are considered removable offenses in one circuit are not always removable offenses in another circuit. And the rules and standards for obtaining certain types of immigration relief can vary from circuit to circuit, including in particular asylum and related relief. As a consequence, respondents and their attorneys may choose a different strategy for trial, or preserve different arguments for appeal, depending on which Circuit's law applies.

25. I also believe it would also be impracticable for immigration judges at Varick to apply law from different circuits depending on each individual respondent's current detention location.

26. These judges frequently hear cases for respondents held in Orange, New York; the New Jersey jails; and Adams, Mississippi in the same day or busy court session. Having to change governing law in the same day or same court session could prove challenging.

27. Consider also cases involving individuals who are transferred between jurisdictions while their trial is ongoing or between pretrial motion practice and trial. Determining which circuit's law applies based on detention location would require complex analysis and could well lead to protracted litigation on venue and choice-of-law issues, which would slow down case adjudications and prolong immigration detention.

Dated: February 24, 2021
New York, New York

Hasan Shafiqullah