No. 16-71582, 17-70714

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Liliana Nohemi AMAYA,
Petitioner,

v.

Matthew WHITAKER, Acting Attorney General,
Respondent.

ON PETITIONS FOR REVIEW OF DECISIONS OF
THE BOARD OF IMMIGRATION APPEALS AND OF U.S.
IMMIGRATION AND CUSTOMS ENFORCEMENT
Agency No. A041-736-389

CONSENTED TO BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT UNDER FRAP 26.1

I, Trina Realmuto, attorney for amici certify that the American Immigration Council and American Immigration Lawyers Association are non-profit organizations that do not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

DATED: November 30, 2018

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I. INTRODUCTION[1]

Amici curiae the American Immigration Council and the American Immigration Lawyers Association proffer this brief in support of Petitioner Liliana Nohemi Amaya (Ms. Amaya) to assist the Court in reviewing the two cases currently before the Court on petitions for review. Case No. 17-70714 challenges the Board of Immigration Appeals' (BIA or Board) February 15, 2017 decision affirming the denial of Ms. Amaya's motion to reopen or reconsider her 2000 removal order. Case No. 16-71582 challenges the U.S. Immigration and Customs Enforcement (ICE) April 20, 2016 decision to reinstate the 2000 removal order under 8 U.S.C. § 1231(a)(5).

With respect to Case No. 17-70714, the Court should vacate the February 15, 2017 decision and remand this case to the Board for further adjudication of Ms. Amaya's motion to reopen or reconsider. In addition to the reasons set forth in Petitioner's opening brief, amici urge the Court to vacate the Board's decision for two reasons. First, the Board's decision improperly found that 8 U.S.C. § 1231(a)(5) barred Ms. Amaya's motion to reopen. *See infra* Section III.A.1.

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[1] Amici state 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. Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

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Second, the Board's decision entirely failed to address Ms. Amaya's motion to reconsider. *See infra* Section III.A.2.

With respect to Case No. 16-71582, if the 2000 removal order continues to exist, the Court should vacate the April 20, 2016 reinstatement order. As an initial matter, this Court has jurisdiction to review the constitutionality of the 2000 removal order in the context of a challenge to the 2016 reinstatement order. *See infra* Section III.B.1. Regardless of whether the Court reviews the 2000 order under a gross miscarriage of justice, as assumed by the Court in *de Rincon v. Dep't of Homeland Security*, 539 F.3d 1133 (9th Cir. 2008), or a de novo standard, as amici suggest, the 2000 removal order is unlawful because it stems from egregious circumstances, including an admission of removability by an infamous immigration attorney, a 1999 conviction that was erroneously classified as an aggravated felony, and the absence of notification of the right to file an administrative appeal. *See infra* Section III.B.2. Therefore, the 2000 order cannot sustain the 2016 reinstatement order. In the alternative, because ICE failed to consider the mischaracterization of the 1999 conviction and resulting appeal violations in the 2000 proceeding when it issued the 2016 reinstatement order, the Court should remand this case to ICE to allow the agency to consider the impact of these fundamental legal errors on its reinstatement determination. *See infra* Section III.C.

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II. STATEMENT OF AMICI

The American Immigration Council (the Council) is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act.

The American Immigration Lawyers Association (AILA) is a national association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's members practice regularly before the Department of Homeland Security, Executive Office for Immigration Review, and the federal courts.

Both organizations have a direct interest in ensuring that noncitizens who were previously deported based on unlawful removal orders are not prevented from reopening their prior proceedings and are not again deported based on the reinstatement of a legally defective order.

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III. ARGUMENT

A. Ms. Amaya Retained the Right to Seek Reopening or Reconsideration of Prior Removal Orders, Notwithstanding the Language of 8 U.S.C. § 1231(a)(5).

After ICE sought to reinstate her prior removal order and she learned that her 2000 removal order was based on the incorrect conclusion that she had been convicted of an aggravated felony, Ms. Amaya filed a motion to reopen or reconsider the 2000 order. *See* CAR 17-70714 at 220. Rather than address the merits of her motion, the IJ held that he lacked authority over the motion and the BIA affirmed that decision. *Id.* at 85, 7-8. The agency found that reopening was barred by 8 U.S.C. § 1231(a)(5) but failed to address its authority to reconsider the prior order. *Id.* The Court should vacate the BIA's decision because it did not account for Ms. Amaya's statutory right to file a motion to reopen and entirely failed to address her argument that the immigration judge nevertheless had authority to adjudicate her motion to reconsider.

1. Individuals Retain the Statutory Right to Pursue Reopening Notwithstanding the Purported Reopening Bar in § 1231(a)(5).

In dismissing Ms. Amaya's appeal of the immigration judge's decision to deny her motion to reopen, the BIA held that reopening was barred pursuant to 8 U.S.C. § 1231(a)(5). *Id.* at 7-8. However, individuals retain the statutory right to pursue reopening notwithstanding the purported bar to reopening in § 1231(a)(5). Applying the traditional rules of statutory construction, the BIA should have

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recognized that Congress established the availability of the statutory right to reopen notwithstanding the language of § 1231(a)(5).

a. The plain language of the statute vests every individual with the right to file one motion to reopen an order resulting from removal proceedings under 8 U.S.C § 1229a.

The regulations governing the immigration courts have long authorized individuals ordered deported to seek to reopen their cases. *See* 5 Fed. Reg. 3502, 3504 (September 4, 1940). In 1996, Congress codified the right to file a motion to reopen for the first time. *See* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009, § 304 (Sept. 30, 1996) (adding new 8 U.S.C. § 1229a(c)(6) (1997)). Since that time, the motion to reopen statute vests every individual ordered removed in proceedings under § 1229a with the statutory right to seek reopening. *See* 8 U.S.C. § 1229a(c)(7) (providing that a noncitizen "may file one motion to reopen proceedings under [§ 1229a]"); *see also Dada v. Mukasey*, 554 U.S. 1, 15 (2008) ("[T]he statutory text is plain insofar as it guarantees to each [noncitizen] the right to file 'one motion to reopen proceedings under this section.'") (quoting 8 U.S.C. § 1229a(c)(7)(A)).[2] This language is the clearest evidence of Congressional intent to

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[2] Congress subsequently modified the motion to reopen statute on several occasions without changing this underlying right to seek reopening. *See* Victims of Trafficking and Violence Protection Act of 2000 (VAWA 2000), 106 Pub. L. No. 386, § 1506(b), 114 Stat. 1464 (Oct. 28, 2000) (codified at 8 U.S.C. §

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provide *all* noncitizens ordered removed in § 1229a removal proceedings with the opportunity to seek reopening. *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.").

Concomitant with the right to *file* a motion to reopen comes the agency's obligation to adjudicate such motions. *See, e.g.*, *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67, 71 (2009) (prohibiting agencies from declining to exercise jurisdiction conferred upon them); *Pruidze v. Holder*, 632 F.3d 234, 239 (6th Cir. 2011) (providing that where immigration courts have jurisdiction over motions to reopen, "the agency is not required—by statute or by this decision—to grant [the motion]. But it is required—by both—to consider it."). In *Dada*, the Court found that the purpose of the motion to reopen is "to ensure a proper and lawful disposition" of removal proceedings and that the Court "must be reluctant" to adopt a limitation on the statute "when the plain text of the statute reveals no such limitation." *Dada*, 554 U.S. at 18; *see also Kucana v. Holder*, 558

1229a(c)(7)(C)(iv) (2001)) (creating a special rule, and exemption from filing deadlines, for certain victims of domestic violence); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825(a), 119 Stat. 2960, 3063-64 (Jan. 5, 2006) (VAWA 2005) (codified at 8 U.S.C. § 1229a(c)(7)(A), (C)(iv)(IV)) (amending the special rule for victims of domestic violence to require the individual's presence in the United States when filing); REAL ID Act of 2005, Pub. L. No. 109-13, § 101(d), 119 Stat. 231 (May 11, 2005) (codifying technical amendments).

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U.S. 233, 242 (2010) (reaffirming that a motion to reopen is an "important safeguard"); *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010) (declining to interpret regulations in such a way that would "eviscerate the statutory right to reopen provided by Congress"). This Court, among others, has specifically cautioned against limiting the ability of noncitizens who have been physically deported from (or otherwise departed) from seeking reopening. *See, e.g.*, *Toor v. Lynch*, 789 F.3d 1055, 1060 (9th Cir. 2015) ("[T]he text of IIRIRA makes clear that the statutory right to file a motion to reopen and a motion to reconsider is *not* limited by whether the individual has departed the United States."); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1076-77 (9th Cir. 2011).

Similarly, this Court should "be reluctant" to adopt an interpretation of the statute that would so completely "eviscerate" the "important safeguard" of a motion to reopen for individuals like Ms. Amaya. In this case, the Board suggested that 8 U.S.C. § 1231(a)(5) bars *any* motion to reopen a reinstated non-in absentia removal order, without addressing any of the case law surrounding the importance of the statutory right to seek reopening. Thus, even an individual like Ms. Amaya, who was unlawfully ordered removed in an abbreviated group hearing where she was "represented" by an attorney of the day disciplined, suspended, and sued for unethical conduct and ineffective assistance and who learned of the flaws in her proceedings only after the prior order is reinstated, would not have the opportunity

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to exercise her statutory right to seek reopening. *See* Petitioner's Opening Brief at 16-17 (outlining unlawfulness of prior removal order); *infra* n.7 (detailing history of discipline and suspensions, and state court proceedings against attorney in prior proceeding); *cf. Miller v. Sessions*, 889 F.3d 998, 1002-03 (9th Cir. 2018) (finding purported bar to reopening unlawful where noncitizen seeks reopening based on lack of notice in prior proceedings). *But see Rodriguez-Saragosa v. Sessions*, 904 F.3d 349, 354-55 (5th Cir. 2018) (upholding purported bar to reopening for individual seeking to apply for relief from removal). This Court should not affirm such a broad rule.

b. Congress' amendments to the motion to reopen statute without change to § 1231(a)(5) evidences its legislative ratification of the motion statue.

In this case, the BIA affirmed the immigration judge's holding that 8 U.S.C. § 1231(a)(5) barred any consideration of Ms. Amaya's motion to reopen. CAR 17-70714 at 2-3. In relevant part, that statute provides:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and *is not subject to being reopened or reviewed . . . .*

8 U.S.C. § 1231(a)(5) (emphasis added). As discussed *supra*, the decision failed to address the apparent conflict between this bar and noncitizens' statutory right to

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file a motion to reopen.[3] *See supra* Section III.A.1. Had the Board engaged in this analysis, several canons of statutory construction would have counseled against applying a blanket bar on reopening reinstated removal orders under 8 U.S.C. § 1229a(c)(7).

First, courts recognize that, where a later statute conflicts with an earlier one, the later enacted one will control. *See, e.g.*, *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024, 1029 (9th Cir. 2011) ("Where the directives of the two statutes create an apparent conflict, . . . [the] later enacted statutes take priority over older ones . . . ."). In VAWA 2000, VAWA 2005, and the REAL ID Act of 2005, Congress amended the motion to reopen statute without change to § 1231(a)(5)'s purported reopening bar, thereby repeatedly ratifying broad scope and purpose of motions to reopen after the codification of the alleged bar. *See supra* at n.2. Had Congress intended to preclude motions to reopen filed by all individuals subject to § 1231(a)(5), it could have done so explicitly in the motion to reopen statute. This is an especially relevant principle because VAWA 2005, one of the amendments to the motion to reopen statute, expressly dealt with motions to reopen by certain individuals who have been ordered removed but who are

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[3] The Board did briefly address whether § 1231(a)(5) could serve as a complete bar to reopening *in absentia* removal orders, but that involves a separate statutory basis for seeking reopening. *See* A.R. 17-70741 at 3 (discussing reopening pursuant to 8 U.S.C. § 1229a(b)(5)(C)).

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physically located in the United States—not the countries to which they had been or would be deported—without any limitation regarding whether the individual had been deported and then returned to the United States. *See* 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV).

Next, courts recognize that a specific statute will not be controlled by a more general one. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Here, 8 U.S.C. § 1229a(c)(7) provides detailed procedural requirements for seeking reopening, while 8 U.S.C. § 1231(a)(5) only provides general authorization for, and information regarding the consequences of, reinstating orders of removal. As this Court has recognized, the motion to reopen statue was enacted as part of legislation intended, in part, to ensure the accuracy of removal determinations. *Coyt*, 593 F.3d at 906 (recognizing that IIRIRA was intended to "expedite the physical removal of those [noncitizens] not entitled to admission to the United States, while at the same time increasing the accuracy of such determinations."). Construing § 1231(a)(5) to prevent Ms. Amaya, and others like her, from pursuing a motion to reopen would undermine "accuracy in determinations."

Finally, the motion to reopen statute is "remedial" in that it is intended to benefit persons with final removal orders and, therefore, must be "construed liberally, and not so as to withhold" the benefit of reopening in an overly broad swath of cases. *See Smith v. Heckler*, 820 F.2d 1093, 1095 (9th Cir. 1987) (holding

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that the Social Security Act "is remedial, to be construed liberally, and not so as to withhold benefits in marginal cases") (quotation omitted). Even where there is ambiguity, principles of lenity compel this result. In *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10 (1948), the Supreme Court articulated the rule of lenity as follows:

> We resolve the doubts in favor of [the narrow] construction because deportation is a drastic measure and at times the equivalent of banishment or exile . . . . since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Basic principles of fairness require that individuals face that "drastic measure" only if the removal proceedings which lead to their "banishment" reached "a proper and lawful disposition." *Dada*, 554 U.S. at 18. Because "[d]eportation is always a harsh measure," courts apply the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987); *see also INS v. St. Cyr,* 533 U.S. 289, 320 (2001).

Thus, the statutory scheme clarifies that § 1231(a)(5) should not be interpreted as a blanket bar on noncitizens' statutory right to seek reopening.

2. The BIA Failed to Address Whether Ms. Amaya Retains the Statutory Right to Pursue Reconsideration Notwithstanding the Reopening Language in § 1231(a)(5).

Although Ms. Amaya submitted and briefed a motion to reopen or reconsider her prior removal order, the immigration court and BIA only addressed

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their authority to consider a motion to reopen. *See* CAR 17-70741 at 220-26 (motion), 13-18 (BIA brief), 251 (IJ decision), 2-3 (BIA decision). Motions to reopen and motions to reconsider are separate procedural mechanisms, provided for by separate statutes, subject to different rules and deadlines, and intended for different purposes. *Compare* 8 U.S.C. §§ 1229a(c)(7) *with* 1229a(c)(6). The BIA's failure to address the alternate basis for Ms. Amaya's motion (i.e., reconsideration rather than reopening) is, by itself, a sufficient reason to remand this case for the agency to consider the argument in the first instance. *See, e.g.*, *Delgado v. Holder*, 648 F.3d 1095, 1107 (9th Cir. 2011) (requiring the Board to "provide a reasoned explanation for its actions" and "be clear enough that we need not speculate based on an incomplete analysis") (quotations omitted); *id.* at 1108 (remanding where the Board failed to provide a reasoned decision because, "[w]ithout knowing the basis of the Board's decision, we cannot conduct a meaningful review").

The Board's failure to address Ms. Amaya's motion to reconsider is especially troubling because the statute which it alleges deprives it of jurisdiction over the motion makes no mention of reconsideration. *See* 8 U.S.C. § 1231(a)(5) (referring only to the authority to "reopen[] or review[]" prior removal orders). Any attempt to suggest that the Board treated Ms. Amaya's motion as solely a motion to reopen does not avoid the problem. The motion properly presented "errors of law or fact in the previous order," as required for a motion to reconsider.

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8 U.S.C. § 1229a(c)(6); *see also* CAR 17-70741 at 14-17 (discussing the errors in Ms. Amaya's 2000 removal proceedings). An agency is not free to simply treat one type of filing as another where such reclassification would deprive it of authority to consider a litigant's arguments. As the Supreme Court has explained,

> True enough (and a good thing too) that courts sometimes construe one kind of filing as another: If a litigant misbrands a motion, but could get relief under a different label, a court will often make the requisite change. But that established practice does not entail sidestepping the judicial obligation to exercise jurisdiction.

Reyes Mata v. Lynch, 135 S. Ct. 2150, 2156 (2015) (citation omitted).[4] Thus, the Board's decision in this case offers no basis for failing to rule on Ms. Amaya's motion to reconsider. Given noncitizens' statutory right to seek reconsideration, *see* 8 U.S.C. § 1229a(c)(6)(A) ("The [noncitizen] may file one motion to reconsider a decision that the [noncitizen] is removable from the United States."), this Court should remand the case to the Board with instructions to address the merits of Ms. Amaya's motion to reconsider.[5]

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[4] The language regarding a purported bar on "review" also does not cover motions to reconsider. *See Rodriguez-Saragosa*, 904 F.3d at 354 n.4 (5th Cir. 2018) ("[Section] 1231(a)(5)'s directive that 'the prior order of removal . . . is not subject to being . . . reviewed' operates as a jurisdiction-stripping provision applicable to federal courts, and is therefore tempered by the REAL ID Act's savings provision for constitutional claims or questions of law.").

[5] Notably, if the Court instructs the Board to reopen Petitioner's 2000 removal proceedings, there will "no longer [be] a final decision" in that case. *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002). Therefore, the 2000 removal order

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B. The Court Should Vacate the Reinstatement Order Because the 2000 Removal Order Is Legally Infirm.

1. *This Court May Review Collateral Challenges.*

This Court's jurisdiction to review the 2000 removal order is predicated on the interplay of two statutory provisions: (1) 8 U.S.C. § 1252(a)(2)(D), which provides "*[n]othing* in [8 U.S.C. §§ 1252(a)(2)(B) or 1252(a)(2)(C)], or *in any other provision* of this Act (other than [8 U.S.C. § 1252]) *which limits or eliminates judicial review*, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review" (emphasis added); and (2) 8 U.S.C. § 1231(a)(5), which provides that, in a reinstatement determination, "the prior order of removal . . . is not subject to being . . . reviewed . . . ." In *Martinez-Merino v. Mukasey*, this Court addressed the issue for the first time, noting that "[a]ll other circuits that have considered § 1252(a)(2)(D) in conjunction with § 1231(a)(5) have concluded that § 1252(a)(2)(D) vests circuit courts with the ability to review reinstated removal orders." 525 F.3d 801, 804 (9th Cir. 2008) (citing *Lorenzo v. Mukasey*, 508 F.3d 1278, 1282 (10th Cir. 2007); *Debeato v. Att'y Gen.*, 505 F.3d 231, 235 (3d Cir. 2007); *Ramirez-Molina v.*

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cannot serve as a basis for the 2016 reinstatement order: if the removal order no longer exists, it follows that the 2016 reinstatement order (which is predicated on that order) also no longer exists. *See United States v. Arias-Ordonez*, 597 F.3d 972, 978 (9th Cir. 2010). However, if the Court does not instruct the Board to reopen the 2000 order, it should nonetheless vacate the 2016 reinstatement order. *See infra* Sections III.B, III.C.

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Ziglar, 436 F.3d 508, 513-14 (5th Cir. 2006)). Relying on those out of circuit cases and without conducting any independent analysis, the Court simply concluded that, to prevail on a collateral challenge, one must show a "gross miscarriage of justice," and because the petitioner had not done so, the Court did "not decide . . . the precise effect of § 1252(a)(2)(D) on our review of reinstated removal orders." *Martinez-Merino*, 525 F.3d at 804.

A few months later, the Court decided *de Rincon v. Dep't of Homeland Security*, 539 F.3d 1133 (9th Cir. 2008). In that case, the Court, again relying on decisions of the Third and Fifth Circuits, held that "§ 1252(a)(2)(D) re-vests courts with jurisdiction to review constitutional claims and questions of law otherwise barred by [8 U.S.C. § 1231(a)(5)]" upon a showing of a "gross miscarriage of justice" in the prior proceeding, subject to the limitations contained in § 1252(a)(2)(D) itself. 539 F.3d at 1138. Because the prior order at issue in that case was an expedited removal order, and § 1252(a)(2)(D) limited the scope of review of such orders, the Court again did not reach the merits of whether the prior order was constitutionally infirm. *Id.* at 1139. Thus, there is no question that this Court can review the constitutionality of the 2000 removal order for a gross miscarriage of justice. *See also Villa-Anguiano v. Holder*, 727 F.3d 873, 879 (9th Cir. 2013) ("Nor has [petitioner] asserted a gross miscarriage of justice in the underlying immigration hearing, which could justify this court's review of the constitutionality

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of the prior removal order.”).

Notably, this Court adopted the gross miscarriage of justice standard for collateral challenges based solely on out of circuit cases, which likewise adopted the standard without independent assessment of whether the plain language of § 1252(a)(2)(D) provides the correct standard of review for collateral challenges.[6] That is, § 1252(a)(2)(D) restores judicial review over legal and constitutional claims. It is well established and without question that the standard for judicial review over such claims is de novo. *See, e.g.*, *Chay Ixcot v. Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011) (“Pure questions of law raised in a petition for review are reviewed de novo.”); *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016) (noting that the Court “review[s] purely legal questions de novo”). As such, because no panel of this Court has “squarely addressed” or even considered this position, amici respectfully submit that this Court can and should assess the merits of Ms. Amaya’s collateral challenge de novo, not for gross miscarriage of justice. *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (stating that *stare decisis* is not applicable unless the issue was “squarely addressed” in the prior decision);

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[6] At least one court of appeals has recognized the availability of collateral challenges to the prior order on which a reinstatement is based without reference to the gross miscarriage of justice standard. *See Villegas de la Paz v. Holder*, 640 F.3d 650, 656 (6th Cir. 2010) (recognizing “that § 1252(a)(2)(D) re-vests the circuit courts with jurisdiction over constitutional claims or questions of law raised in the context of reinstatement proceedings”).

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Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*, 435 F.3d 1140, 1143 n.2 (9th Cir. 2006) (finding that a prior decision was not "controlling authority" on whether a particular rule governed a relevant issue, "[b]ecause we did not discuss the applicability of the rule in that case").

Nevertheless, as discussed below in Section III.B.2, under either a gross miscarriage of justice or de novo standard of review, Ms. Amaya's 2000 removal order is legally infirm.

2. Under Either a De Novo or Gross Miscarriage of Justice Standard, the 2000 Removal Order Cannot Serve as the Predicate Order to the 2016 Reinstatement Order.

The 2000 removal order is unlawful—under any standard—and, therefore, it cannot be reinstated, and Ms. Amaya cannot be deported again based on that unlawful order. In December 1999, Ms. Amaya, who was a Lawful Permanent Resident (LPR) for over ten years at the time, was charged with deportability based on a single conviction. CAR 17-70714 at 253. At a brief hearing on May 2, 2000, a subsequently discredited pro bono attorney-of-the-day, Martin Guajardo,

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represented Ms. Amaya along with another individual. CAR 17-70714 at 87-92.[7] At the outset of the hearing, Mr. Guajardo conceded proper service of the Notice to Appear, admitted all factual allegations, conceded Ms. Amaya's removability as an aggravated felon despite the absence of binding case law addressing the charged conviction, designated Guatemala as the country of removal, and indicated that she would not be requesting any relief from deportation. CAR 17-70714 at 87. Beyond those concessions, the entire hearing consisted of Mr. Guajardo asking Ms. Amaya an extremely short series of questions, like her age, when she received her green card, how long she was in state custody, and whether she wished to be deported. CAR 17-70714 at 90-91. Based on Mr. Guajardo's initial admission on Ms.

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7 Mr. Guajardo is an infamous immigration attorney known for defrauding hundreds of noncitizens. *See California v. Guajardo*, No. C 10-05658 WHA, 2011 U.S. Dist. LEXIS 3401 (N.D. Cal. Jan. 7, 2011) (remanding to state court action brought by the City of San Francisco against Guajardo and another attorney seeking civil penalties, injunctive relief, and damages for fraudulent business practices). "In 2007, Guajardo resigned from the bar of the court of appeals for the Ninth Circuit with disciplinary charges pending. The Executive Office of Immigration Review suspended Guajardo from practicing in immigration court in 2008. In the face of pending disciplinary charges and likely imminent disbarment, he resigned from the California State Bar in 2008." *Id.* at *3. *See also* Press Release, City Attorney of San Francisco, *Herrera settles with predatory immigration law partner, netting $268K for victims* (Dec. 16, 2013), https://tinyurl.com/y9ltqvjk; State Bar of California, Attorney Licensee Profile, Martin Resendez Guajardo #75605, http://members.calbar.ca.gov/fal/Licensee/Detail/75605 (indicating resignation, and prior disciplinary action and suspension) (last visited Nov. 30, 2018); *In re Guajardo*, No. 06-80011, Dkt. 3 (Apr. 19, 2006) (noting that Guajardo's conduct "raise[s] serious concerns about the quality of the legal services rendered").

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Amaya's behalf, the immigration judge ordered removal. CAR 17-70714 at 92; CAR 16-71582 at 2.

"Absent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission." *Matter of Velasquez,* 19 I&N Dec. 377, 382 (BIA 1986). Attorneys representing otherwise pro se individuals as part of the San Francisco Court's pro bono attorney-of-the-day program meet with respondents on the same day of their hearings in the San Francisco immigration court. *See generally* Justice and Diversity Center of the Bar Association of San Francisco, *Attorney of the Day Handbook for the Detained Dockets* (June 2018), https://www.sfbar.org/forms/aod/Detained%20Handbook_06-06-18.pdf. The attorneys simply review the respondent's charging document, speak with him or her briefly, provide advice about possible immigration options, and ask how he or she wishes to proceed.

Mr. Guajardo's well documented record of misconduct, *see supra* at 17-18 n.7, of which this Court may take judicial notice,[8] constitutes an "egregious

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[8] This Court has held it may take judicial notice of other court's orders and other records from court or government-run proceedings. *See Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) ("We may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts") (citation omitted); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (holding that "under Fed. R. Evid. 201, a court may take judicial notice of

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circumstance" which calls into question both the legal advice, if any, he provided to Ms. Amaya, a longtime LPR, in the minutes before he took on representation and conceded deportability on her behalf as well as the binding nature of the admissions he made on her behalf. Circumstances were particularly egregious because, at the time of the May 2, 2000 hearing, this Court had not yet ruled on whether a conviction under California Penal Code 487(a), the basis of the charge of removability in Ms. Amaya's case, constituted an aggravated felony.[9] As such, no attorney could have advised with a degree of certainty that Ms. Amaya was deportable. In fact, as this Court repeatedly has recognized, she was not. *See United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc); *Garcia v. Lynch*, 786 F.3d 789, 794-95 (9th Cir. 2015); *Lopez-Valencia v. Lynch*, 798 F.3d 863, 866-67 (9th Cir. 2015).

At the time of the hearing, Ms. Amaya had been an LPR for over ten years. *See* CAR 17-70741 at 253. Had Mr. Guajardo not conceded the aggravated felony removability charge, Ms. Amaya could have forced the government to prove the existence of the conviction and its classification as an aggravated felony. That is,

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'matters of public record'") (quoting *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)).

[9] This Court's decision in *United States v. Corona-Sanchez*, 234 F.3d 449, 455 (9th Cir. 2000), upholding the aggravated felony classification, was not decided until December 8, 2000. It was reversed in June 2002 by an en banc panel. *Corona-Sanchez*, 291 F.3d at 1213.

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the government would have bore the burden of proving, by clear and convincing evidence, the existence of a conviction (by producing the conviction documents) and that that the conviction rendered her deportable. *See* 8 U.S.C. § 1229a(c)(3); *see also Al Mutarreb v. Holder*, 561 F.3d 1023, 1030 (9th Cir. 2009). If the government failed to meet either of these burdens, termination of removal proceedings would have been appropriate.

Moreover, though neither the immigration judge nor Mr. Guajardo informed Ms. Amaya of the right to appeal the decision on the record, the removal order indicates that both parties waived appeal. CAR 16-71582 at 2. Ms. Amaya had a statutory right to appeal the immigration judge's decision to the Board of Immigration Appeals, and immigration judge was obligated to notify her of her right to do so. 8 U.S.C. § 1229a(c)(5). The waiver of this right rendered the immigration judge's decision final immediately. 8 C.F.R. § 1241.1(b); *see also Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320, 1322 (BIA 2000). Any waiver of appeal rights must be "considered" and "intelligent," *United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987); *United States v. Pallares-Galan*, 359 F.3d 1088, 1096 (9th Cir. 2004); *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005), and this Court has recognized that " [c]ourts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights," *United States v. Lopez-Vasquez*, 1 F.3d 751, 754 (9th Cir

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1993) (quotation omitted). Yet, in this case, the immigration judge recorded a waiver of appeal without any mention of even the availability of appeal.

In addition to being unlawful under a de novo standard of review, reinstating a prior order predicated on a legally defective proceeding and order and for which the alleged conviction could not serve as the statutory basis for removal also constitutes a gross miscarriage of justice. The Board long has recognized the ability to invalidate a prior order (in subsequent deportation proceedings) based on a "gross miscarriage of justice" standard. *See Matter of Malone*, 11 I&N Dec. 730, 731 (BIA 1966) (finding a gross miscarriage of justice where the finding of deportability was not in accord with the law as interpreted at the time and stating that "the error should not be perpetuated"); *Matter of Farinas,* 12 I&N Dec. 467, 472-73 (BIA 1967) (finding gross miscarriage of justice where unrepresented noncitizen deported although he "was not properly subject to deportation"); *see also McLeod v. Peterson,* 283 F.2d 180, 187 (3d Cir. 1960) (finding that prior order constituted a gross miscarriage of justice where the order "was promulgated only after an erroneous deprivation of the appellant's right to discretionary relief").

Thus, a removal order predicated on a defective removal proceeding and predicated on an erroneously classified conviction is unlawful – whether it is reviewed de novo or for a gross miscarriage of justice. Such an order cannot serve

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as the factual predicate to a reinstatement order. Accordingly, the Court should vacate the 2016 reinstatement order.

C. In the Alternative, the Court Should Remand Case No. 16-71582 to Allow ICE to Consider the Egregious Circumstances of Petitioner's Prior Proceeding and the Effect of this Court's Decisions Regarding Cal. Penal Code 487(a) on Its Reinstatement Determination.

As this Court has recognized, ICE officers have discretion to determine whether to charge a noncitizen with removability under 8 U.S.C. § 1231(a)(5) (resulting in reinstatement proceedings) or with removability under 8 U.S.C. §§ 1182 or 1227 (resulting in regular removal proceedings under 8 U.S.C. § 1229a). As this Court has explained:

> Particularly when there is any question about whether the requirements of [8 C.F.R.] § 241.8 have been satisfied, and even when they have been, an ICE officer may decide to forgo reinstatement of a prior order of removal in favor of initiating new removal proceedings, with the accompanying procedural rights to counsel and a hearing in immigration court.

Villa-Anguiano, 727 F.3d at 878; *see also Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 523 (BIA 2011) (finding "no reason to suppose that the broad discretion given to the Executive Branch regarding charging decisions in the criminal context does not also apply to charging decisions by the Executive Branch, that is, the DHS, in the immigration context").

This discretionary decision has life changing consequences. On one hand, if an ICE officer elects to place an individual in reinstatement proceedings, the

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noncitizen is immediately removable unless he articulates a reasonable fear of return to his country of origin, in which case he only can pursue withholding of removal or CAT protection, but not asylum or "any relief" from removal. *See* 8 U.S.C. § 1231(a)(5); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1082 (9th Cir. 2016). On the other hand, if the ICE officer elects to place the individual in removal proceedings, the noncitizen receives a hearing before an immigration judge in which he may apply for relief or protection from removal and can appeal to the BIA. *See* 8 U.S.C. § 1229a (removal proceedings); 8 U.S.C. §§ 1101(a)(47)(B), 1229a(c)(5) (appeal to the BIA).

In *Judulang v. Holder*, 565 U.S. 42, 55 (2011), the Supreme Court reviewed, under the Administrative Procedure Act, a BIA ruling that categorically prevented certain noncitizens from qualifying for relief under former 8 U.S.C. § 1182(c). In unanimously rejecting the rule, the Court required that the agency consider whether its decisions are tied to the "purposes of the immigration laws or the appropriate operation of the immigration system," rather than arbitrary charging decisions of individual immigration officers. *Judulang*, 565 U.S. at 55, 57-58. As the Court explained, "[a noncitizen] appearing before one official may suffer deportation; an identically situated [noncitizen] appearing before another may gain the right to stay in this country." *Id.* at 58. A policy that turns on the "fortuity of an individual officer's decision" is fundamentally flawed, the Court recognized, and

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rejected the BIA's decision because it failed to consider how the proposed construction of the statute at issue related to "germane" factors such as an individual's "worth[iness]," "prior offense," or "other attributes and circumstances." *Id*. at 55, 58.

Similarly, in *Villa-Anguiano v. Holder*, this Court vacated a reinstatement order and remanded the case to ICE where the reinstatement determination was made without consideration of all relevant information. The petitioner in that case challenged the legality of ICE's decision to reinstate a prior order that a district court judge "invalidated on constitutional grounds for purposes of criminal prosecution [under 8 U.S.C. § 1326]." 727 F.3d at 879. In that situation, as the government conceded, "the agency often exercises its discretion to initiate plenary removal proceedings . . . ." *Id*. In that case, however, ICE issued and executed a reinstatement order against the petitioner without providing him an opportunity to explain relevant developments in the case and without independently reconsidering its decision to reinstate in light of the constitutional infirmities identified in the district court's decision. *Id*. at 880.

The Court held that when a district court "finds constitutional infirmities in the prior removal proceedings that invalidate the prior removal for purposes of criminal prosecution, the agency cannot simply rely on a pre-prosecution determination to reinstate the prior removal order." *Id*. Rather, the Court required

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the agency to allow noncitizens to make a statement addressing relevant circumstances *after* related criminal proceedings are dismissed and then "independently reassess" whether to proceeding with reinstatement or place the person in removal proceedings before an immigration judge. *Id*.

In reaching this conclusion, the Court relied on the regulatory language at 8 C.F.R. § 241.8(a)(3) and (b), requiring ICE to consider "all relevant evidence" prior to making a reinstatement determination, including statements made by the noncitizen, and a noncitizen's due process rights "to be heard prior to removal" and "to consideration of issues relevant to the exercise of an immigration officer's discretion." *Id*. at 880-81 (citing cases). Failure to consider all such relevant evidence, the court said, amounts to an abuse of discretion. *Id*. at 881. Notably, the court found "somewhat analogous" a case in which the Third Circuit remanded a reinstatement case to ICE to consider the petitioner's assertions that a court had invalidated the prior order. *Id*. at 881-82 (citing *Ponta-Garcia v. Att'y Gen.*, 557 F.3d 158, 164-65 (3d Cir. 2009)).

Here, application of the rationale underlying *Judulang* and *Villa-Anguiano* demonstrates that ICE improperly failed to recognize, much less consider, a "germane" factor and that it did not have "all relevant evidence" at the time it made the reinstatement determination. ICE was not aware that 2000 proceeding was legally defective, including because Ms. Amaya was represented by predatory

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immigration counsel, *see supra* at 17-18 n.7, and because the 1999 conviction under Cal. Penal Code 487(a), which was the sole basis for Ms. Amaya's 2000 removal order, was misclassified as an aggravated felony and she was not informed of her right to appeal. Indeed, according to Ms. Amaya, her counsel filed a motion with ICE seeking reconsideration of the reinstatement order in May 2016 based on Ms. Amaya's lack of removability in the 2000 proceeding, and ICE has not responded. *See* Petitioner's Opening Brief at 10-11.

As such, ICE "cannot simply rely" on its prior determination "to reinstate the prior removal order." *Villa-Anguiano*, 727 F.3d at 880. Consistent with the Supreme Court's caution in *Judulang* against conditioning eligibility for relief on charging decisions, ICE's discretionary determination to place Petitioner in reinstatement proceedings, made without consideration of the "egregious circumstances" surrounding the prior proceeding, *see supra* Section III.B.2, and without consideration of this Court's case law rejecting classification of Cal. Penal Code 487(a) as an aggravated felony, has life changing consequences. Assuming her case were not reopened and her LPR status restored,[10] if ICE placed her in removal proceedings, Ms. Amaya could seek termination or other forms of relief from deportation. The failure of ICE to consider at least one factor germane to the

[10] *Matter of Lok*, 18 I&N Dec. 101, 105 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir. 1982) (holding that an LPR such status until the entry of a final administrative order of removal).

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exercise of its discretion and its decision to proceed without "all relevant evidence" was arbitrary and capricious, violated 8 C.F.R. § 241.8(a)(3) and (b), and violated Ms. Amaya's due process rights "to be heard prior to removal" and "to consideration of issues relevant to the exercise of an immigration officer's discretion." *Villa-Anguiano*, 727 F.3d at 880-81.

As such, consistent with *Judulang* and *Villa-Anguiano,* ICE must provide Petitioner with an opportunity—in light of this Court's findings that Cal. Penal Code 487(a) did not support the aggravated felony charge against Petitioner which Mr. Guajardo conceded—to contest the reinstatement determination and to "independently reassess whether to rely on the order issued in the prior proceedings as the basis for deportation or instead to instigate full removal proceedings." *Villa-Anguiano*, 727 F.3d at 880.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the petition for review in Case No. 17-70714 and vacate the Board's February 15, 2017 decision as set forth above. With respect to Case No. 16-71582, if this Court does not instruct the BIA to reopen the 2000 order and it continues to exist, the Court should vacate the 2016 reinstatement order or, in the alternative, remand the case to ICE to reconsider its reinstatement determination.

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CERTIFICATION OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and 29(a)(5) and Circuit Rule 32-1(a), because it contains 6,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). 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 using Microsoft Word 2016, is proportionately spaced, and has a typeface of 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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