No. 22-1767

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JEAN BAZILE

Petitioner,

v.

MERRICK B. GARLAND, Attorney General

Respondent.

BRIEF OF THE FIRST CIRCUIT BASED IMMIGRATION LAW PRACTITIONERS, NONPROFIT ORGANIZATIONS, LAW SCHOOL CLINICS, AND PUBLIC DEFENDER AGENCY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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

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CORPORATE DISCLOSURE STATEMENT

Amici curiae certify that no publicly traded company or corporation has an interest in the outcome of this case.

/s/ SangYeob Kim
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RULE 29 STATEMENTS

Pursuant to Rule 29(a)(2), counsel for *amici curiae* certify that all parties have consented to the filing of this brief. Pursuant to Rule 29(a)(4)(E), counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

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INTERESTS OF *AMICI CURIAE*

Amici curiae are the First Circuit based immigration law practitioners, nonprofit organizations, law school clinics, and the public defender agency.[1] They have dedicated their careers to improving the fairness and efficiency of removal proceedings. *Amici* have collectively represented thousands of noncitizens in removal proceedings, particularly before the Boston Immigration Court. *Amici* regularly share their views with the Boston Immigration Court, the BIA, and this Court to help ensure that removal proceedings are reasonable and fair to noncitizens and practitioners within the First Circuit.

Amici have a particular interest in this case because this Court issued an order to show cause why this case should not be transferred to the Fifth Circuit, and this judicial venue issue involving a video IJ has a direct impact on *amici* and their clients. *See* Order, No. 22-1767 (1st Cir. Oct. 18, 2022). Since the Fourth Circuit's *Herrera-Alcala v. Garland*, 39 F.4th 233 (4th Cir. June 30, 2022), Immigration Judges (IJs) from Richmond Immigration Adjudication Center in Virginia, who regularly appear by video for the Boston Immigration Court cases, started to apply the Fourth Circuit law instead of the First Circuit law. These IJs cite *Herrera-Alcala* for this position because the Fourth Circuit held that the location of the IJ controls the judicial venue for a petition for review. Because the

[1] See the Addendum for a list of *amici*.

Executive Office for Immigration Review (EOIR) constantly changes the assignment of IJs who are hearing Boston Immigration Court cases—including to locations outside this circuit where IJs appear via video, the current situation hampers the ability of *amici* to meaningfully advise noncitizens on the choice of law that applies in their removal cases. This Court's guidance on the judicial venue is vital to resolve this untenable situation.

QUESTION PRESENTED

In determining whether a petition is properly filed under 8 U.S.C. § 1252(b)(2), should the location of where "the immigration judge completed the proceedings" be based on (i) the Immigration Court location of where the charging document was filed and, thus, where the removal proceeding commenced, or (ii) the location of the immigration judge or noncitizen.

SUMMARY OF ARGUMENT

This case presents the question of whether the First Circuit's judicial venue over a petition for review under 8 U.S.C. § 1252(b)(2) should be based on either (i) the location of where the charging document was filed and, thus, where the removal proceeding commenced or, (ii) the physical location of the immigration judge or noncitizen. The answer is the former.

The question of how to assess this circuit's venue over a petition for review under Section 1252(b)(2) is not only vital to determining in which circuit a petition

should be filed, but it also potentially impacts the choice of law applied in removal proceedings before IJs and the BIA. This choice of law question—which is predicated on judicial venue—has recently become a significant concern given the Fourth Circuit's recent decision in *Herrera-Alcala v. Garland*, 39 F.4th 233 (4th Cir. June 30, 2022). *Herrera-Alcala* ruled that the location of the IJ controls the judicial venue for a petition for review. While this may seem inconsequential, it is not. The Fourth Circuit's *Herrera-Alcala* decision has created unprecedented challenges for *amici* in representing their clients in Boston Immigration Court where cases are regularly assigned to IJs from Richmond, Virginia Immigration Adjudication Center, who reside in the Fourth Circuit's jurisdiction and appear via video. Because the Fourth Circuit held that the location of the assigned IJ controls the judicial venue, the IJs hearing cases by video from Virginia have started to apply the Fourth Circuit law instead of the First Circuit law in these cases. This sudden change of the choice of law, and its resulting confusion, have been further aggravated due to the constant change of the assigned IJs within Boston Immigration Court, including cases being assigned to Boston-based IJs and then later—with little notice—being reassigned to Richmond, Virginia-based IJs for video hearings. For *amici*, the current situation significantly hampers their ability to advise their clients (including noncitizen criminal defendants who may face removal proceedings) meaningfully. Moreover, it raises significant concerns over

pro se noncitizens.

This Court should not follow *Herrera-Alcala*. Instead, this Court should follow the Second Circuit's decision in *Sarr v. Garland*, 50 F.4th 326 (2d Cir. 2022) and conclude that the First Circuit is an appropriate venue for any petition for review if the charging document was filed in any immigration court within this Court's jurisdiction, regardless of the IJ's or noncitizen's location.

Section 1252(b)(2)'s plain language and intent—as well as principles of fairness—support *Sarr*'s analysis. Section 1252(b)(2) states that "[t]he petition for review shall be filed with the court of appeals for the judicial circuit in which the [IJ] completed the proceedings." Section 1252(b)(2)'s statutory language focuses on where the IJ *completed* the proceedings. It is the Immigration Court processing the case, not the IJ, that accepts the charging document and effectuates any order that has "completed the proceedings." Congress also intended for Section 1252(b)(2) to require petitions for review to be filed in "the circuit in which the final order of removal under [8 U.S.C. § 1229a] was *entered*." H.R. Conf. Rep. No. 104-828 at 219 (1996) (emphasis added). This "entering" of the removal order does not immediately occur when the IJ renders a decision, but rather occurs by the Immigration Court (which where the charging document resides) after the IJ's order has been issued. This reading also minimizes the ability of the government to forum shop by being able to change judicial venue—and possibly even the

choice of law—without providing noncitizens notice and opportunity to be heard. To be sure, the Department of Homeland Security (DHS) still retains its discretion to choose the forum at the outset. Moreover, EOIR's use of internet-based hearings and video-IJs would not be affected by this Court ruling in this fashion. Regardless of whether the IJ was physically located within the administering court or was located elsewhere and hearing cases by video, a ruling consistent with this brief would simply hold that judicial venue applies where the charging document was filed.

Applying these principles, Petitioner properly filed his petition for review in First Circuit under 8 U.S.C. § 1252(b)(2) because—even though the IJ remotely appeared from Fort Worth, Texas—the Boston Immigration Court was the venue of Petitioner's removal proceedings under 8 C.F.R. § 1003.20(a). AR 845. This reading is consistent with the BIA's position in this case.[2] AR 3. To be sure, the caption of the IJ's decision does not correctly reflect the venue of removal proceedings. Instead, the caption merely indicates the IJ's physical location. AR 49. Indeed, the IJ's summary order correctly reflects the Boston Immigration Court. AR 60.

[2] This Court can provide such a ruling through this case. *See Reid v. Donelan*, 17 F.4th 1, 12 (1st Cir. 2021) (a clear ruling "might emerge like common law rules of precedential force, through case-by-case adjudication"); *H.H. v. Garland*, Nos. 21-1150, 21-1230, 2022 U.S. App. LEXIS 29411, at *18-19 (1st Cir. Oct. 21, 2022) (clarifying the meaning of acquiescence "[i]n the interest of judicial efficiency").

Noncitizens at the Boston Immigration Court are entitled to fair proceedings "without fear of deleterious side effects like a change in the circuit law applied." *Thiam v. Holder*, 677 F.3d 299, 302 (6th Cir. 2012). Providing this Court's view on judicial venue would likely resolve the choice of law question that is starting to become more prevalent in Boston Immigration Court proceedings. *Georcely v. Ashcroft*, 375 F.3d 45, 49 (1st Cir. 2004) ("uniform rules are highly desirable for both the courts and the litigants").[3]

RELEVANT BACKGROUND

A. EOIR Administrative System

The Executive Office for Immigration Review (EOIR) is a sub-agency of the Department of Justice, which manages and controls the Immigration Court and the BIA system. An "Immigration Court" is "where proceedings are held before immigration judges and where the records of those proceedings are created and maintained." 8 C.F.R. § 1003.9(d). These Immigration Courts are sitting in 30 states, including Boston, Massachusetts, and Guaynabo (San Juan), Puerto Rico.[4] The removal proceedings are commenced at these Immigration Courts once DHS files a charging document (Notice to Appear) at the Immigration Court identified on the charging document. 8 C.F.R. § 1003.20(a); 8 C.F.R. § 1003.14. If DHS

[3] *Amici* are concurrently filing a similar brief in *Fonjia v. Garland*, No. 22-1625 (1st Cir.).
[4] https://www.justice.gov/eoir/eoir-immigration-court-listing.

files the charging document at a different Immigration Court, EOIR rejects the charging document. *See Uniform Docketing System Manual*, EOIR, at *I-13[5] ("[i]f [the address of the immigration court] is not included on the NTA or if your court is not the administrative control office, return the NTA as improperly filed").

The Immigration Court where the charging document is filed is vested with the jurisdiction of removal proceedings. 8 C.F.R. § 1003.14. This Immigration Court also serves as the venue[6] of removal proceedings. The venue may change "only upon motion by one of the parties." 8 C.F.R. § 1003.20(a). This venue is almost always (if not always) the administrative control Immigration Court, which "creates and maintains Record of Proceedings." 8 C.F.R. § 1003.11; *cf.* 8 C.F.R. § 1003.9(d). Even though the regulation reflects that an administrative control Immigration Court can be theoretically different from the venue, they are the same under the current EOIR system. 8 C.F.R. § 1003.11 ("An administrative control Immigration Court is one that creates and maintains Records of Proceedings for Immigration Courts within an assigned geographical area."). Currently, no Immigration Court has the administrative control over another Immigration Court.[7]

[5] https://www.justice.gov/eoir/reference-materials/UDSM122020/download.
[6] In this brief, "judicial venue" refers to the judicial circuit under 8 U.S.C. § 1252(b)(2) and "venue" or "venue of removal proceedings" refers to the Immigration Court "where jurisdiction vests" under 8 C.F.R. § 1003.20(a).
[7] https://www.justice.gov/eoir/immigration-court-administrative-control-list.

The only exceptions are hearing locations[8] where there are no Immigration Courts. Some of these locations are in different judicial circuits than the venue of removal proceedings (e.g., the Guaynabo (San Juan) Immigration Court's control over the South Louisiana Processing Center).

EOIR has also created three Immigration Adjudication Centers (IACs) in Falls Church and Richmond, Virginia, and Fort Worth, Texas.[9] Unlike Immigration Courts, IACs do not serve as venues of removal proceedings because they do not accept the charging documents or control the Record of Proceedings. Instead, the IACs retain IJs who handle cases of Immigration Courts nationwide via video conference. The assignment of IAC-based IJs does not affect the venue of removal proceedings.

At least four IJs from the Fort Worth IAC (Texas), ten IJs from the Richmond IAC (Virginia), and one IJ from the Falls Church IAC (Virginia) have presided over the Boston Immigration Court cases via video conference. As of October 14, 2022, eight IJs from Richmond IAC regularly handle the Boston

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[8] EOIR uses this term for "cities or other hearing sites which may be served by the administrative control court." *Id*. These locations are not Immigration Courts because they do not create and maintain "the records of those proceedings." 8 C.F.R. § 1003.9(d).

[9] More information about IACs is available on the website of the American Immigration Council: https://www.americanimmigrationcouncil.org/litigation/government-faces-lawsuit-failing-disclose-information-expansion-immigration-courts.

Immigration Court cases via video conference, which is subject to change. *See* Add. at 27. Separately, the Boston Immigration Court has 12 in-person IJs who preside over the Boston Immigration Court cases. *See id*.

EOIR has allowed and encouraged all IJs to use the "Webex" video teleconference system to handle all hearings. This is (in part) to address the current backlog of removal cases. *See No Dark Courtrooms*, EOIR (Mar. 29, 2019) (attached as Add. at 24-26).[10] EOIR has also permitted IJs to use the "remote kits" to appear from non-courtroom such as their home for hearings. *See Limited-Scope Inspection and Review of Video Teleconference Use for Immigration Hearings*, Office of the Inspector General, Department of Justice, at *2 (June 2022).[11] Similarly, noncitizens and counsel do not always go to the Boston Immigration Court in person to appear for their hearings. Instead, "the [IJ] and both parties can all participate by video from outside the [Immigration] [C]ourt." *Internet-Based Hearings*, EOIR (Aug. 11, 2022)[12]; Add. at 55-56. "[G]oing forward, internet-based hearings will remain essential to EOIR's operations." *Id*.

[10] https://www.justice.gov/eoir/file/1149286/download.
[11] https://oig.justice.gov/sites/default/files/reports/22-084.pdf.
[12] https://www.justice.gov/eoir/page/file/1525691/download#:~:text=EOIR%20is%20authorized%20by%20law,(B)%20of%20the%20Act.

B. The Judicial Venue Statute

Prior to 1996, the predecessor judicial venue statute permitted petitions for review to be filed either in the judicial circuit in which noncitizens resided or "in which the administrative proceedings before [the IJ] were conducted in whole or in part." 8 U.S.C. § 1105a(a)(2) (1994). In 1996, Congress replaced this statute with 8 U.S.C. § 1252(b)(2), which provides that a petition for review is 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) (1996) (emphasis added).

This Court grappled with the statutory meaning of this venue statute in 2004. *See Georcely v. Ashcroft*, 375 F.3d 45 (1st Cir. 2004). But this Court ultimately did not resolve the venue questions presented in that case because the issue of venue was waived. Instead, the Court sent copies of the decision "to the appropriate congressional authorities and . . . to the Attorney General" for the clarification of Section 1252(b)(2)'s meaning. *Id*. at 45, 49. As noted below, there is currently no clarification from Congress or the Attorney General.

C. The Relationship Between the Choice of Law and Judicial Venue

The choice of law in a removal case is usually tied to the judicial venue. *See* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Mich. L. Rev. 703, 743 (1995) (noting that the prevailing view is that "the venue of appeal determines choice of law on federal issues"); *Id*. at 740 ("the common

agency practice is to apply the law of the appellate forum" if the venue is definite). The BIA has also construed judicial venue as the basis for the choice of law. *See Matter of U. Singh*, 25 I. & N. Dec. 670, 672 (BIA 2012) ("We apply the law of the circuit in cases arising in that jurisdiction, but we are not bound by a decision of a court of appeals in a different circuit."); *Matter of Fernandes*, 28 I. & N. Dec. 605 (BIA 2022) (finding that while the BIA was "bound by the Seventh Circuit's decisions in cases arising within that circuit," it declined to "apply th[e] [Seventh Circuit's] rule in cases arising outside the Seventh Circuit"); *Matter of Anselmo*, Interim Decision 3105, at 31 (Bureau of Immigration Appeals May 11, 1989), *reprinted in* 66 Interpreter Releases 598 (1989) (rejecting the nonacquiescence policy, and thus the BIA accepts a court of appeals' adverse ruling on a particular legal issue for all cases arising from that court of appeals' judicial circuit but not other judicial circuits). *See also* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 716 (1989) ("where review of agency action is vested exclusively in a particular court of appeals, the agencies reported that they would conform their internal proceedings to accord with the rulings of that court").

Circuit courts similarly have tied the choice of law to the judicial venue of the proceeding. *See, e.g., Sarr*, 50 F.4th at 335 (considering the Fifth Circuit law as part of its strong likelihood of success analysis since "venue is proper in the

Fifth Circuit"); *Njoka v. Garland*, No. 20-2018, 2022 U.S. App. LEXIS 24732 (4th Cir. Sept. 1, 2022) (unpublished) (concluding that the BIA "should have applied Fourth Circuit law"); *Borovsky v. Holder*, 612 F.3d 917, 920 (7th Cir. 2010) (finding that the BIA should not have applied the Eighth Circuit law since the proper venue was the Seventh Circuit); *Llapa-Sinchi v. Mukasey*, 520 F.3d 897, 901 (8th Cir. 2008) (rejecting the petitioner's reliance on the Ninth Circuit caselaw because in part the new venue statute "provides that venue is proper only in one circuit").

D. EOIR's Response to this Court's 2004 Referral in *Georcely* with Respect to the Scope of the Judicial Venue Statute

While there is no statute or regulation providing any guidance on the choice of law and judicial venue, EOIR previously attempted to fill the gap. In 2004—after this Court's decision in *Georcely*—the former Chief Immigration Judge issued a memorandum instructing IJs to apply the law of the circuit that governs the "hearing location" rather than the location of the administrative control Immigration Court. *See* Memorandum from the Office of Chief Immigration Judge, Interim Operating Policies & Procedures Memorandum 04-06, *Hearing Conducted through Telephone & Video Conference*, at *2 (Aug. 18, 2004)[13] (hereinafter 2004 CIJ OPPM) (attached as Add. at 4). However, the 2004 CIJ

[13] https://www.justice.gov/sites/default/files/eoir/legacy/2004/08/25/04-06.pdf

OPPM did not directly address the separate question of judicial venue for petitions for review. *Id*.

In 2007, EOIR proposed amendments to the regulation, which was consistent with the 2004 CIJ OPPM and in response to this Court's referral in *Georcely*. *See Jurisdiction and Venue in Removal Proceedings*, 72 Fed. Reg. 14494, 14495 (Mar. 28, 2007) (hereinafter 2007 Proposed Regulation) (attached as Add. at 15-18).[14] This proposed regulation was intended to separate the jurisdiction of Immigration Courts from the venue of removal proceedings by (i) creating a uniform jurisdiction at one location and (ii) treating each Immigration Court or non-Immigration Court hearing location as a venue. *Id*. at 14494. Under this proposed regulation, the venue of removal proceedings would "lie[] at the designated place for the hearing as identified by the Department of Homeland Security on the charging document." *Id*. at 14497. If not, the venue would "lie at the place of the hearing identified on the initial hearing notice . . . ." *Id*. This venue could only change with "a motion for change of venue" or the administrative transfers of proceedings by "the Office of the Chief Immigration Judge" but "with proper notice to the parties." *Id*. This venue would be unaffected by the location of IJs, litigants, legal representatives, and administrative control courts. This

[14] https://www.federalregister.gov/documents/2007/03/28/E7-5629/jurisdiction-and-venue-in-removal-proceedings.

venue would also serve as the basis for the judicial venue under 8 U.S.C. § 1252(b)(2). *Id*. However, the 2007 Proposed Regulation was never promulgated.

In 2020, the Director of EOIR issued a new memorandum, "cancel[ing] and replac[ing]" the 2004 CIJ OPPM. *See* EOIR Policy Memorandum 21-03, *Immigration Court Hearings Conducted By Telephone and Video Teleconferencing* at *1 (Nov. 6, 2020)[15] (hereinafter 2020 EOIR OPPM) (attached as Add. at 19-23). This memorandum stated that "hearings conducted by telephone or [video teleconference] may raise knotty choice of law issues regarding the body of circuit court law applicable to a particular case when the parties and the immigration judge are in different locations." *Id*. at *5. EOIR concluded that IJs "should continue to follow any applicable circuit precedent in resolving those issues." *Id*.

Currently, the First Circuit has no precedent meaningfully guiding the questions of judicial venue or choice of law.

ARGUMENT

I. THE FOURTH CIRCUIT'S *HERRERA-ALCALA* DECISION HAS CAUSED AN UNPRECEDENTED SITUATION AT THE BOSTON IMMIGRATION COURT AND RAISED SIGNIFICANT CONCERNS

The Fourth Circuit's decision in *Herrera-Alcala v. Garland*, 39 F.4th 233 (4th Cir. 2022), has caused an unprecedented situation at the Boston Immigration

[15] https://www.aila.org/infonet/eoir-releases-memo-telephone-video-teleconference.

Court. In *Herrera-Alcala*, the Fourth Circuit held that judicial "[v]enue under § 1252(b)(2) depends on the location of the [IJ]." *Id*. at 243. Prior to *Herrera-Alcala*, all parties, IJs, and the BIA had applied the First Circuit law over the Boston Immigration Court cases, even if the IJ was hearing a case by video while physically present outside the First Circuit. Now, this is no longer the case. IJs at the Virginia-based IACs have started to apply Fourth Circuit law instead of the First Circuit law in Boston Immigration Court cases being heard by video. Because IJs are randomly assigned with little notice before the hearings, *amici*—before the assignment is made—now must attempt on short notice to prepare their case with an understanding of either the law of the First Circuit or the law of the Fourth Circuit in the event an IJ from Virginia is assigned. *See* Add. at 29-30.

Even after confirming the assigned IJ, this assignment can quickly change, and can include having a case transferred from an IJ in Boston to a video-IJ in Virginia. *See* Add. at 29-30. In some cases, the assigned IJ changes right before to the merits hearing. *See id*. Because of this unpredictability, *amici* face significant challenges in advising noncitizens meaningfully, including noncitizen criminal defendants who may be placed in removal proceedings. *See* Add. at 28-54. Further, this uncertainty materially affects *pro se* indigent noncitizens and their access to *pro bono* counsel and student attorneys at the Boston Immigration Court. *See* Add. at 28-38; *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004)

("[T]he immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth."); *Lok v. Immigration & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1997) (the immigration law bears a "striking resemblance . . . [to] King Minos's labyrinth in ancient Crete").

Amici are also concerned about the potential expansion of *Herrera-Alcala*. Currently, Texas-based IJs no longer preside over the Boston Immigration Court cases. However, considering the Fifth Circuit's recent decision where the court considered the video IJ's location as a basis to retain its judicial venue, *see Adeeko v. Garland*, 3 F.4th 741, 745 (5th Cir. 2021), *amici* have a significant concern over the possibility of the Texas-based IJs applying the Fifth Circuit law at the Boston Immigration Court if they handle the Boston Immigration Court cases again in the future.[16]

[16] The BIA recently applied the Fifth Circuit law in dismissing a petitioner's appeal arising from the Boston Immigration Court. *See Ndowa v. Garland*, No. 22-1570 (1st Cir.). The IJ in *Ndowa* was a Texas-based video judge for the Boston Immigration Court case. *See* Add. at 63. Although the IJ did not apply the Fifth Circuit law, the BIA did so for unknown reasons. *See* Add. at 59-61. Perhaps, the BIA relied on the caption of the IJ's oral decision, which indicated Fort Worth, Texas (where there is an IAC, not an Immigration Court), as a basis for the application of the Fifth Circuit law. *See* Add. at 65.

II. THE FIRST CIRCUIT'S JUDICIAL VENUE OVER A PETITION FOR REVIEW UNDER 8 U.S.C. § 1252(B)(2) SHOULD BE BASED ON THE LOCATION OF WHERE THE CHARGING DOCUMENT WAS FILED AND, THUS, WHERE THE REMOVAL PROCEEDING COMMENCED

This Court should follow the holding of *Sarr v. Garland*, 50 F.4th 326 (2d Cir. 2022), and conclude that the First Circuit is an appropriate venue for any petition for review if the charging document was filed within the First Circuit's jurisdiction, regardless of the IJ's or noncitizen's location.

In *Sarr*, the Second Circuit held that "an IJ 'completes' proceedings and, thus, venue lies in the location where—absent evidence of a change of venue—proceedings commenced." *Id.* at 332. Rejecting *Herrera-Alcala*, the court "disagree[d] that the venue provision unambiguously refers to the *physical* location of the IJ," concluding that such a construction of Section 1252(b)(2) "could well defeat the participants' reasonable expectations as to where to seek review and what law applies." *Id.* at 333 (emphasis in original). In applying this holding, the *Sarr* Court relied on 8 C.F.R. § 1003.14, which states that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." *Id.* at 332; *see also* 8 C.F.R. § 1003.20(a) ("[v]enue shall lie at the Immigration Court where jurisdiction vests pursuant to § 1003.14"). The court concluded that, because "the charging document … identifies Jena, Louisiana as the '[a]ddress of [the] Immigration

Court,' …. jurisdiction vested and proceedings against Sarr commenced in an immigration court sitting in Louisiana." *Id.*

In the event this Court issues a ruling consistent with *Sarr*, *amici* believe that it would likely resolve the choice of law questions that have emerged since *Herrera-Alcala*. Further, this ruling would minimize any confusion on the question of this Court's venue over petitions for review, as this question has also emerged in this case.

A. The Plain Meaning of 8 U.S.C. § 1252(b)(2) Supports Amici's Conclusion

To determine the meaning of the statute, "[f]irst and foremost, this [Court] begin[s] with a textualist approach, as the 'plain meaning' of statutory language controls its construction." *Flock v. United States DOT*, 840 F.3d 49, 55 (1st Cir. 2016); *Penobscot Nation v. Frey*, 3 F.4th 484, 490 (1st Cir. 2021) ("the text itself"). Here, the judicial venue statute provides that noncitizens may file petitions for review "with the court of appeals for the judicial circuit in which the *immigration judge completed the proceedings*." 8 U.S.C. § 1252(b)(2) (emphasis added). Applying the statute's plain meaning, the question is whether the location of where the "immigration judge completed the proceedings" means (i) the location of the court where the charging document was filed and that administers the proceedings, or (ii) the location of the IJ or noncitizen, or even the place of the last hearing location.

In *amici*'s view, the plain meaning of Section 1252(b)(2) *focuses* on how and when the proceedings are actually *completed*. *See also Sarr*, 50 F.4th at 332 (focusing on 8 U.S.C. § 1252(b)(2)'s "completed" in determining judicial venue). It is the Immigration Court itself, not the IJ, that accepts the charging document and effectuates any order that has "completed the proceedings." A relevant question is whether the completion occurs at the moment an IJ renders a decision or at the moment the Immigration Court enters and dockets this decision. *See Georcely*, 375 F.3d at 48 (noting the questions of "where the ruling was made" or "where . . . the order was officially filed and docketed"). It is the latter. "Completion" occurs when the administering court that had accepted the charging document—regardless of the location of the judge, noncitizen, or hearing—enters and dockets the decision.

This is consistent with the current EOIR system. The case before an IJ is completed by the venue of removal proceedings (namely, the administrative control Immigration Court) after the following actions by the Immigration Court personnel: docketing the IJ's decision "for the [IJ's] signature," "[p]lac[ing] the original signed order" in the Record of Proceeding, serving "one copy of the order on the DHS [counsel]," and serving another copy on the noncitizen or his attorney. *Uniform Docketing System Manual*, EOIR at VII-2. Thus, the completion of the IJ's proceedings is when the decision is officially docketed. *See also Georcely*,

375 F.3d at 48 ("a judicial order is normally effective when filed and docketed"); *Willhauck v. Halpin*, 953 F.2d 689, 701 (1st Cir. 1991) ("the judgment be set forth as a separate document and that a corresponding entry be made in the court's docket").

B. *Amici*'s Reading is Consistent with Statutory Intent, Sensible, and Fair to All Parties

Amici acknowledge this Court's previous finding that the statutory language of Section 1252(b)(2) is "far from conclusive." *Georcely*, 375 F.3d at 48; *Sarr*, 50 F.4th at 332 (same). Despite this apparent ambiguity, no regulation or policy clarifies the judicial venue statute. *See Yang You Lee v. Lynch*, 791 F.3d 1261, 1266 (10th Cir. 2015) ("No existing regulation interprets § 1252(b)(2), the judicial-venue provision."); 2020 EOIR OPPM at *5 (deferring to courts of appeals for the choice of law question).

When this Court faces "the imprecision of the statute and the regulation and the absence of reliable guidance from the agency,"[17] "it is appropriate to resolve the ambiguous [where the IJ completed the proceedings] language in accordance

[17] While the BIA previously noted in a footnote of published decisions that the "hearing location" governs the choice of law, it is unclear whether this footnote has any force when the 2020 EOIR OPPM has explicitly deferred the choice of law question to this Court. *See Matter of R-C-R-*, 28 I. & N. Dec. 74, 75 n.1 (BIA 2020); *Matter of Nchifor*, 28 I. & N. Dec. 585, 585 n.1 (BIA 2022). Moreover, the BIA did not interpret the judicial venue statute in these footnotes. In any event, at least for *Nchifor*, it appears that the charging document in *Nchifor* was filed at the Lasalle Immigration Court in Louisiana. *See* Add. at 77.

with statutory intent." *Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia*, 524 F.3d 54, 60 (1st Cir. 2008).

The statutory intent of Section 1252(b)(2) is that judicial venue is proper where the IJ's decision was officially docketed and filed. In replacing the pre-1996 judicial review venue statute, Congress intended to focus on the judicial circuit "in which the final order of removal under [8 U.S.C. § 1229a] was *entered*." H.R. Conf. Rep. No. 104-828 at 219 (1996) (emphasis added). This "entering" of the removal order does not immediately occur when the IJ renders a decision, but rather occurs by the Immigration Court (which where the charging document resides) after the IJ's order has been issued. As *Sarr* held, this interpretation of Section 1252(b)(2) is also informed by the venue regulations governing removal proceedings. 8 C.F.R. § 1003.14 states that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, *when a charging document is filed* with the Immigration Court by the Service." (emphasis added). 8 C.F.R. § 1003.20(a) adds that "[v]enue shall lie at the Immigration Court where jurisdiction vests pursuant to § 1003.14." Because the location of official docketing of the charge (here, the Immigration Court) is the venue of removal proceedings under 8 C.F.R. § 1003.14 and 8 C.F.R. § 1003.20(a), the IJ "completes" the proceedings under Section 1252(b)(2) at this venue. *See Georcely*, 375 F.3d at 48 ("If the order was officially filed and docketed in Guaynabo, the most straightforward reading of the

language of section 1252(b)(2) would probably lead us to conclude that the removal proceedings were completed in Guaynabo."); *Sarr*, 50 F.4th at 332 (same). Thus, an interpretation of the statute concluding that noncitizens may seek judicial review at the circuit court where the venue of removal proceedings was within the First Circuit "fits most squarely with this intent."[18] *Morales*, 524 F.3d at 60; *Sarr*, 50 F.4th at 333 (focusing on the venue of removal proceedings "hews more closely to the law as written, absent any clarification from Congress that some have requested"). This reading is also harmonious with the regulations governing motions to reopen and reconsider. For the reopening or reconsideration of the IJ's earlier removal order, noncitizens must file their motions "with the immigration court having administrative control over the Record of Proceeding," which is always the venue of removal proceedings. 8 C.F.R. § 1003.23.

To be sure, this reading does not prevent DHS from exercising its power in determining the forum at the outset. *See Morales*, 524 F.3d at 60-61 (considering whether a reading of ambiguous statute would "encourage[] easy evasion of the statutory mandate and opens a gaping hole in the fabric of the remedial scheme");

[18] Congress was aware of the regulatory scheme of venue of removal proceedings when Congress enacted the judicial venue statute. *See* 8 C.F.R. § 3.20(a)-(b) (1996); *Executive Office for Immigration Review; Rules of Procedures*, 57 Fed. Reg. 11568, 11572 (Apr. 6, 1992). *See also Blue Cross & Blue Shield v. AstraZeneca Pharm, LP (In re Pharm. Indus. Average Wholesale Price Litig.)*, 582 F.3d 156 (1st Cir. 2009) (considering the timing of the government regulation for the assumption that Congress was aware of it at the time of enacting a statute).

Georcely, 375 F.3d at 48 ("policy concerns" should be considered since it could "weigh[] heavily on either side"). When DHS issues a charging document, DHS chooses the location of the Immigration Court and dockets the charging document at the same Immigration Court. In determining which venue is proper, DHS makes the ultimate decision after considering the place of residence or detention location. *Matter of Rahman*, 20 I. & N. Dec. 480, 483 (BIA 1992) ("The venue question is . . . entrusted in the first instance to the discretion of [DHS], who filed the charging document in the venue selected."). And should the noncitizen wish to change the venue, the noncitizen must file a motion with the assigned IJ. *See id*. at 484 (noting the balancing factors for the change of venue); 8 C.F.R. § 1003.20(a). At the same time, either EOIR or DHS cannot unilaterally change the judicial circuit by placing more video IJs at particular locations or assigning new hearing locations without properly changing the venue with a motion. *See id*.

Moreover, EOIR's use of internet-based hearings and video-IJs would not be affected by ruling in this fashion. Regardless of whether the IJ was physically located within the administering court or was located elsewhere and hearing cases by video, a ruling consistent with this brief would simply hold judicial venue applies where the charging document was filed.

Finally, the BIA agrees with *amici* in this case. AR 3 (treating that this case arises from the Boston Immigration Court and applying the First Circuit law).

C. Other Readings are Problematic and Unfair Based on the Current EOIR System

In contrast, other readings would be problematic and unfair. First, using the location of the assigned IJ as the basis for venue has already created an unprecedented situation and raised significant concerns over the choice of law in cases administered by the Boston Immigration Court. *See supra* Section I. As the *Sarr* Court correctly noted, construing Section 1252(b)(2) to create venue in the physical location of the IJ "could well defeat the participants' reasonable expectations as to where to seek review and what law applies." *Sarr*, 50 F.4th at 333.

Further, a hearing location that is not the Immigration Court-based approach to judicial venue under Section 1252(b)(2) is contrary to common sense and defies federal court practice. *See Morales*, 524 F.3d at 59 ("statutory construction . . . is not an exact science, and there are times when contortionistic strivings at seamless interpretation must yield to common sense"). By analogy, the fact that a federal judge is visiting another court and presiding over a case does not mean that the visiting federal judge applies the law of the judge's home judicial circuit. *See, e.g., Thant v. Karyopharm Therapeutics Inc.*, 43 F.4th 214 (1st Cir. 2022) (the application of the First Circuit law by Judge Katzmann of the Court of International Trade); *Muñoz v. United States Dep't*, No. 21-55365, 2022 U.S. App. LEXIS 27801 (9th Cir. Oct. 5, 2022) (the application of the Ninth Circuit law by

Judge Lipez of the First Circuit). *See also* 28 U.S.C. § 291 (circuit judges); 28 U.S.C. § 292 (district judges); 28 U.S.C. § 293 (judges from the U.S. Court of International Trade); 28 U.S.C. § 294 (retired Supreme Court Justices).

Moreover, given that EOIR has made efforts to allow IJs to "participate in hearings from a location other than a courtroom" such as "at [their] home," the IJ's "location based" approach to venue is unfair to noncitizens because of the unpredictability of governing choice of law and judicial venue. *See Limited-Scope Inspection and Review of Video Teleconference Use for Immigration Hearings*, at *2. Even assuming that this reading of Section 1252(b)(2) would be limited to the location of the remote IJ's duty station,[19] as explained above, the unpredictability issue is not resolved under the current EOIR system. *See supra* Section I; *Sarr*, 50 F.4th at 333 (rejecting the location of an IJ reading); *see also Luziga v. AG United States*, 937 F.3d 244, 250 (3d Cir. 2019) (the fact that the IJ was "sitting outside [the Third Circuit] appears by video conference" did not affect the conclusion that the judicial venue of Third Circuit was proper).

The "hearing location" approach to judicial venue under Section 1252(b)(2) is also unworkable and unfair under the current EOIR system. Recently, some IJs have permitted or required noncitizens to appear for their hearings at their

[19] The Fourth Circuit focused on the remote IJ's "assigned work location." *See Herrera-Alcala*, 39 F.4th at 241 n.5.

counsel's office and their residence. *Internet-Based Hearings*, EOIR; Add. at 55-56. Applying this "hearing location" approach would dictate circuit court venue simply based on the physical location of the noncitizens at the last hearing. And even assuming that this "hearing location" approach to venue would only be applicable to government facilities such as detention centers, this reading would be manifestly unfair to noncitizens who are detained during their proceedings.[20] The government retains virtually unreviewable discretion to transfer noncitizens between detention facilities at any point during removal proceedings and without properly changing the venue under the regulation. *See Rahman*, 20 I. & N. Dec. at 484 n.4 ("the place of detention is a separate question entrusted to the sound discretion of [DHS]").

III. PETITIONER PROPERLY FILED HIS PETITION FOR REVIEW WITH THIS COURT

This Court should find that Petitioner properly filed his petition for review with the First Circuit. Here, though the IJ was located in Fort Worth, Texas during the hearing, DHS filed Petitioner's charging document at the Boston Immigration Court, which is within the First Circuit. AR 845. The record is clear that no venue change occurred in this case. AR 63-326. Indeed, the BIA agrees with *amici* and applied the First Circuit law. AR 3.

[20] It appears that the 2020 EOIR OPPM uses the term "hearing location" for government facilities. *See* 2020 EOIR OPPM at 5.

To be sure, the IJ's decision's caption incorrectly indicate "Fort Worth, Texas" (AR 49). This caption has no legal effects on the venue of removal proceedings. Fort Worth, Texas, does not have an Immigration Court (but only IAC). Instead, this caption merely reflects the IJ's physical location. Indeed, the IJ's summary order correctly shows the Boston Immigration Court. AR 60.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that this Court should hold that a petition for review is properly filed under 8 U.S.C. § 1252(b)(2) when the location of where the charging document was filed was within this Court's judicial circuit. Accordingly, this Court should find that Petitioner properly filed his petition for review with the First Circuit because the charging document was filed in the Immigration Court in Boston, Massachusetts, which is within this circuit.

Dated: November 4, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) and the typeface requirement of Fed. R. App. P. 32(a)(5)(A) [proportionally spaced face 14-point or larger]. The Brief, containing 6,368 words, exclusive of those items that, under Fed. R. App. P. 32(f), are excluded from the word count, was prepared in proportionally spaced Times New Roman 14-point type.

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Dated: November 2, 2022

CERTIFICATE OF SERVICE

I certify that this Brief and Addendum are served to all counsel of record registered in ECF on November 2, 2022.

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Dated: November 2, 2022