No. 07-70730

United States Court of Appeals for the Ninth Circuit

MICHAEL ANGELO SAMONTE PLANES
(A 037-329-028),

Petitioner,

– v. –

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

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

BRIEF OF PROPOSED *AMICI CURIAE* CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, THE IMMIGRANT DEFENSE PROJECT, AND THE WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER'S MOTION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, proposed amici curiae, California Attorneys for Criminal Justice, the Immigrant Defense Project, and the Washington Defender Association state that they are not-for-profit corporations that have no parent companies, subsidiaries, or affiliates who have issued shares to the public.

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Pursuant to Federal Rules of Appellate Procedure 29 and Circuit Rule 29-2, the California Attorneys for Criminal Justice ("CACJ"), the Immigrant Defense Project ("IDP"), and the Washington Defender Association (the "WDA") submit this brief as proposed amici curiae in support of Petitioner's request for rehearing en banc of the Panel's decision in Planes v. Holder, No. 07-70730, 2011 WL 2619105 (9th Cir. July 5, 2011) (the "Panel's Decision").

STATEMENT OF INTEREST

CACJ is an organization of approximately 2,000 persons, most of whom practice criminal defense in California. According to its by-laws, one of CACJ's purposes is to defend the rights of individuals as guaranteed in the United States and California Constitutions. CACJ often appears as an amicus curiae in matters of importance to its membership.

IDP is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. A national expert on the intersection of criminal and immigration law, IDP supports, trains, and advises both criminal defense and immigration lawyers, as well as immigrants themselves, on issues that involve the immigration consequences of criminal convictions. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that

immigration law is correctly interpreted to give noncitizen defendants the benefit of their constitutional right to due process in state and federal criminal proceedings.

The **WDA** is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders and those who are working to improve the quality of indigent defense in Washington State. The purpose of WDA, as stated in its bylaws, is "to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights and to promote, assist, and encourage public defense systems to ensure that all accused persons receive effective assistance of counsel." In 1999, WDA created the Immigration Project to defend and advance the rights of noncitizens within the Washington State criminal justice system and noncitizens facing the immigration consequences of crimes.

Amici submit this brief to apprise the Court of important due process, fairness, practical and legal considerations that support continued recognition of the "finality" rule of Pino v. Landon, 349 U.S. 901 (1955) and Matter of Ozkok, 19 I&N Dec. 546, 552 n.7 (BIA 1988), which for decades has required that a criminal conviction become "final" through exhaustion or waiver of direct appellate remedies before that conviction may sustain an order of removal. As further developed below, amici respectfully submit that the Panel's Decision purporting to

abrogate the finality rule within the Ninth Circuit, incorrectly interprets the governing statute and if sustained, would have far-reaching and negative ramifications, threatening important fairness, due process and justice interests that amici are dedicated to protecting, further compromising the efficiency of the immigration and federal courts, as well as potentially personally impacting large numbers of individual immigrants that amici and their memberships represent and counsel.

SUMMARY OF THE ARGUMENT

In enacting a statutory definition of "conviction" within Section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), codified at 8 U.S.C. § 1101(a)(48)(A), Congress signaled no intent to disturb the long-standing finality rule which, for over forty years, had served to protect both the state's and individuals' interests in ensuring that the consequences of deportation are not visited upon immigrants on the basis of convictions that lack a sound legal basis. Amici thus concur in Petitioner's position that the Panel's Decision purporting to extinguish the finality rule was wrong as a matter of law and should be reconsidered.[1] As Petitioner and the brief of the other proposed

[1] Petitioner is seeking en banc rehearing solely on the question of whether his 2004 conviction under 18 U.S.C. § 1029(a)(3) may serve as a basis of removability.

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amici curiae Asian Law Caucus, et al. (being submitted concurrently) have ably explained, the Panel's decision misapplies governing rules of statutory interpretation. It also vastly exceeds the scope of the question the BIA decided; improperly failed to give the Board an opportunity to first express its interpretation of a statute it is charged with administering; ignores the fact that a majority of the Board appears to regard the finality rule as remaining intact; and misapprehends the decisions of sister circuits, which, contrary to the Panel's reading, do not in fact support the evisceration of the finality rule in contexts involving appeals from formal judgments of guilt.

Amici write separately, however, to call the Court's attention to additional considerations regarding the fair and efficient administration of justice implicated by the finality rule that further support this Court's en banc rehearing of this important matter. As shown below, the finality rule fulfills the government's interest in removing individuals convicted of certain crimes while at the same time upholding the interest in fair and efficient judicial administration and promoting a respect for the judicial process. By postponing the institution of removal proceedings until an immigrant has had the opportunity to waive or exhaust rights to direct appeal afforded under state law, the finality rule helps avoid serious due

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Amici express no opinion on the other aspects of the Panel's Decision which Petitioner is not currently contesting.

process problems associated with depriving immigrants of the ability to pursue established appellate rights.

The finality rule also helps to sustain confidence in the integrity and fairness of the immigration system by allowing immigrants an opportunity, through the appellate process, to seek to overturn wrongful convictions before those convictions may serve as a predicate to removal. As developed below, these important error-correcting and legitimizing functions are of acute importance today when, across the nation, the criminal justice and indigent defense systems are operating under severe strain.

Finally, in the absence of the finality rule, an increasing number of unripe immigration cases that may be affected by state or federal appellate process will unnecessarily burden the administrative and federal court systems. At a time in which the immigration courts, the Board, and the federal courts of appeal are already being challenged by an unprecedented surge in immigration proceedings, seeking to remove immigrants whose convictions may not withstand appellate scrutiny, and in a manner that presents serious due process and justice concerns, is not a wise use of administrative or judicial resources.

ARGUMENT

I. THE FINALITY RULE HELPS PROTECT ESTABLISHED APPELLATE REMEDIES AND AVOIDS POTENTIALLY SERIOUS DUE PROCESS AND FAIRNESS PROBLEMS

Elimination of the finality rule would effectively deprive many immigrants of their ability to contest erroneous convictions, in derogation of appellate rights enshrined under federal and state law. This would present significant due process problems and would raise serious concerns about the fair administration of the immigration laws.

California, where Petitioner's case arose, like nearly all U.S. states, provides criminal defendants with a right to take a direct appeal from a conviction, as well as various other procedural protections on that appeal, such as the right to indigent representation, a free transcript of the trial record for those who cannot afford it, oral argument, and a written opinion.[2] Under longstanding Supreme

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[2] See, e.g., California Penal Code §§ 1237(a) & 1466(2) (containing rights of appeal from felony and misdemeanor convictions); People v. Kelly, 40 Cal. 4th 106, n1(2006) ("Having provided criminal defendants with an appeal as a matter of right, the state must provide indigent defendants with the assistance of counsel on appeal . . . ."); Powers v. City of Richmond, 10 Cal. 4th 85, 91 n.1 (1995) (right to direct "appeal" affords right to oral argument and decision on the merits); People v. Serrato, 238 Cal. App. 2d 112, 115 (5th Dist. 1965) (noting the transcript requirement and further observing: "In California, the right to appeal is granted by law to every convicted person; it is one of the most important rights possessed by a convicted defendant, and every legitimate right should be exercised in its favor."). See also Ashwin Gokhale, Finality of Conviction, the Right to Appeal, and

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Court precedent, a rule that effectively frustrates a person's ability to pursue a direct appeal that is safeguarded by law may itself constitute a violation of due process. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 429-30 & n.5 (1982) (having made access to the courts an entitlement or necessity, a state's deprivation of that access threatens violating due process). Moreover, due process requires that appellate procedures, once established, may not be implemented in a discriminatory fashion. See Douglas v. California, 372 U.S. 353, 356-58 (1963); Griffin v. Illinois, 351 U.S. 12, 18 (1956). Thus, once a state grants a defendant a statutory right of appeal, due process compels the state to make certain that criminal defendants receive the careful advocacy and access to the appellate process needed to ensure that rights are not foregone.[3]

Continued recognition of the finality rule is necessary to protect these established appellate rights. In recent years, several states have begun routinely dismissing the appeals of deportees on the grounds of mootness – effectively

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Deportation Under *Montenegro v. Ashcroft*: The Case of the Dog that Did Not Bark, 40 U.S.F. L. Rev. 241, 263 (2005) (observing that "[f]orty-seven states and the federal government provide for at least one direct appeal as-of-right to all those convicted under a criminal statute."); id. at 264 ("Inherent in these facts is an enduring consensus on the part of state legislatures that providing a right of direct appeal is essential in determining who is guilty and who is innocent, an interest that cuts to the foundation of criminal law and procedure.").

[3] These due process protections apply equally to immigrants upon their entry into this country. See Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

eliminating any further opportunity to challenge a wrongful conviction upon removal.[4] Additionally, even if an immigrant is permitted to maintain an appeal from outside the United States, his ability to litigate from abroad is likely to be substantially compromised as a practical matter.[5] Interpreting IIRIRA to have

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[4] See, e.g., Labe M. Richman, Deported Defendants: Challenging Convictions From Outside U.S?, N.Y.L.J., June 14, 2006, at 4 (citing New York appellate decisions mooting criminal appeals following deportation); Gokhale, supra n.2, at 264 (collecting similar examples from other states). Although at least one California appellate decision has held that forcible ICE deportation will not necessarily moot a criminal appeal (see People v. Puluc-Sique, 182 Cal. App. 4th 894 (1st Dist. 2010)), the California Supreme Court has not yet spoken on this question. Courts in other Ninth Circuit states such as Idaho, Arizona, Alaska and Montana, have also yet to address this matter definitively, leaving open the question throughout much of this Circuit as to whether a deported defendant may maintain a criminal appeal from abroad. Additionally, given that California receives large numbers of ICE detainees transferred from detention facilities in other states (see, e.g., Human Rights Watch, Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States (Dec. 2, 2009), http://www.hrw.org/sites/default/files/reports/us1209webwcover_0.pdf), the Panel's holding abolishing the finality requirement could have ramifications extending far beyond the Ninth Circuit, as transferees to California from other states that do moot criminal appeals upon deportation could find themselves removed upon entry of conviction and any future avenues to challenge that conviction on appeal in their home state effectively vanquished. The prospect of such far-reaching impact further supports en banc rehearing on this important matter.

[5] See, e.g., Thapa v. Gonzales, 460 F.3d 323, 331 (2d Cir. 2006) (recognizing the significant logistical difficulties in pursuing appeals from abroad); Lopez-Chavez v. Ashcroft, 383 F.3d 650, 651 (7th Cir. 2004) (aliens who take voluntary departure may face "serious or fatal difficulty" in seeking to press their appeals from outside the U.S.); Dorelien v. U.S. Att'y Gen., 317 F.3d 1314, 1325 (11th Cir. 2003) (commenting on the "Herculean" task faced by immigrants seeking to pursue

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extinguished the finality rule is thus likely to seriously impair, if not entirely extinguish, many immigrants' ability to pursue established appellate remedies, in contravention of basic due process protections.

Further, even an immigrant who succeeds in avoiding a mootness holding upon removal, overcoming the significant obstacles to litigating an appeal from abroad and, ultimately, demonstrating his innocence on the underlying charges, may still find it impossible to ever undo the erroneous deportation order and return to the United States. Although the Panel suggested that a deportee could conceivably petition to have his case reopened from outside the United States,[6] the Board's power to entertain such appeals is discretionary, and not guaranteed,[7] as the Panel acknowledges.[8]

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appeals after removal). Although, as in the above, cases discussing the difficulties in pursuing appellate remedies from abroad most often arise in the context of immigration appeals, it stands to reason that criminal appellants would face similar practical and logistical challenges seeking to exercise criminal appellate rights from outside the United States.

[6] Under the applicable regulations, an individual is precluded from filing a motion to reopen as of right after certain time limits and after deportation. 8 C.F.R. § 1003.2(c)-(d). Thus, as described in footnote 7 below, the only authority to reopen a case after deportation comes under the Board's sua sponte discretion, which discretion is even more circumscribed than the Board's regular discretion to grant or deny a motion to reopen as of right.

[7] See 8 C.F.R. § 1003.2(a) ("The decision to grant or deny a motion to reopen or reconsider is *within the discretion of the Board* . . . . The Board has discretion to

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The Panel's broad ruling abrogating the finality rule also presents significant justice and fairness concerns. The appellate process plays a critical function in the criminal justice system, both as a check on faulty convictions, and as a means of promoting individual and societal confidence in the fairness and integrity of the system. These error-correction and legitimizing functions – which the finality rule promotes by deferring deportation until there has been an opportunity for the appellate system to review the legal validity of the underlying conviction – are especially critical in an era in which, across the nation, the criminal courts and the indigent representation system are operating under severe strain.

A number of recent studies have chronicled the mounting pressures on state court and indigent defense systems throughout the country. These studies,

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deny a motion to reopen even if the party moving has made out a prima facie case for relief.") (emphasis added). Moreover, the Board's decision not to exercise its sua sponte discretion to reopen a removal order is generally regarded as unrevieweable by the federal courts. See, e.g., Ekimian v. INS, 303 F.3d 1153, 1159 (9th Cir. 2002). Additionally, even the Ninth Circuit's holding in Coyt v. Holder, 593 F.3d 902, 907-08 (9th Cir. 2010), finding 8 C.F.R. § 1003.2(d)'s so-called "post-departure bar" on motions to reopen invalid when a non-citizen has been compelled to depart, is in tension with decisions from other circuits, and may not survive the inevitable certiorari review to the Supreme Court. See, e.g., Estalita v. Holder, Petition for Writ of Certiorari, dated Oct. 25, 2010 (certiorari denied, but detailing the circuit split that will likely give rise to similar certiorari petitions in the future) (on file with IDP).

[8] See Panel's Decision, at 8990-91 (citing 8 C.F.R. § 1003.2(a)).

which call into serious question the quality of justice being rendered at the trial court level, especially with regard to indigent defendants, serve to emphasize the vital role a robust appellate system plays, both in curing legal and constitutional errors, and in instilling a sense of fairness in the process by which convictions – many of which may serve as the predicate for removal – are wrought.

In April 2009, for instance, the National Right to Counsel Committee, a bipartisan effort consisting of state and federal judges, prosecutors, law enforcement leaders, policy makers, defense lawyers, and academics, published the product of a five-year nationwide investigation into the ability of the American justice system to provide adequate counsel to individuals in criminal and juvenile delinquency cases who cannot afford lawyers. The report found that 45 years after the Supreme Court's landmark decision regarding the right to court appointed counsel in Gideon v. Wainwright, 372 U.S. 335 (1963), due to funding shortfalls, excessive caseloads, and a host of other problems, indigent defense systems throughout the country are struggling, and in many instances, "truly failing," resulting in many defendants pleading guilty to or being convicted of crimes without constitutionally-mandated effective representation of counsel.[9]

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[9] See Report of the National Right to Counsel Committee, Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel, 2 and Chapter 2 (Apr. 2009), http://www.constitutionproject.org/manage/file/139.pdf.

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Recent studies of California's state court and indigent defense systems, of which Petitioner's conviction on review is a product, have documented similar strains. In 2009, statewide case filings in the California superior courts topped 10.2 million, with 8.36 million criminal filings, placing an extraordinarily heavy burden on the state's approximately 2,000 superior court judges, commissioners and referees.[10] Not surprisingly, given this extreme caseload, California's indigent defense system, which likely serves as the primary line of defense for the majority of immigrant defendants facing criminal charges that could give rise to removal, also operates under severe strain. A study by the bipartisan California Commission

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See also National Association of Criminal Defense Lawyers, Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts 21, 31 (Apr. 2009), http:www.nacdl.org/misdemeanor (noting that many low-level crimes that trigger removability are prosecuted with few procedural safeguards and are likely to be infected with error) ("Misdemeanor Crimes Report"); Written Testimony by Attorney General Eric Holder to Senate Judiciary Committee (Nov.18, 2009) (discussing the indigent defense "crisis" that exists throughout the nation, and noting that "[d]ue to lack of funding and oversight, many jurisdictions fall woefully short of the promise made in Gideon v. Wainwright more than 45 years ago"), http://www.ojp.usdoj.gov/BJA/topics/Speeches/Eric%20Holder%20Remarks%204.pdf.

[10] See 2010 California Court Statistics Report, 57 (2010), http://www.courts.ca.gov/documents/csr2010.pdf. To put matters into perspective, simply to attempt to keep pace with these 10+ million new filings on an annual basis, each California Superior Court judge would theoretically have to dispose of close to 14 cases each day of the year, independent of any backlog from prior years. Such a pace poses obvious challenges to careful adjudication.

on the Fair Administration of Justice, for instance, found indigent defense budgets to be "under-funded statewide by at least 300 million dollars," in 2007,[11] and with the recent economic downturn, these shortfalls are likely to be exacerbated.

This staggering volume of cases coupled with the limited resources of indigent defense providers, harbor the potential to significantly compromise the quality of justice rendered at the trial court level and raise serious questions about both the potential for wrongful convictions and whether constitutional mandates relating to the provision of counsel are being observed. Data suggests that criminal appeals result in a statistically significant number of reversals or other modifications.[12] The finality rule – by postponing the commencement of removal

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11 Systemic Factors Affecting the Quality of Criminal Defense Representation: Supplemental Report to the California Commission on the Fair Administration of Justice I (2007) (the "CCFAJ Report"), available at http://www.cpda.org/publicarea/CCFAJ/Professional-Responsibility-Das-and-Defenders/Professional-Responsibility-DAs-and-Defenders/Supplemental%20Report%20Benner.pdf.

12 For, instance, in 2008-09 (the last year for which full data has been published), 10% of appeals brought to California's Courts of Appeal were reversed, 4% of such appeals were dismissed, and an additional 16% of appeals were affirmed with some modification. See Judicial Council of California's 2010 Court Statistics Report, 26, (2010), http://www.courts.ca.gov/documents/csr2010.pdf. Although criminal appeals bore a lower average rate of outright reversal at 4%, 22% of such appeals were affirmed with modification. Id. Such modifications are often of pivotal importance in the immigration context, where even slight modifications in the number or grade of felony or misdemeanor criminal offenses sustained on

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proceedings until after an immigrant has had the opportunity to exhaust or waive his direct appeals – allows immigrants an opportunity to overturn wrongful convictions that, if left unchallenged, could otherwise lead to erroneous and potentially irreversible removal orders. However, even where the appellate process does not result in outright reversal or dispositive modification, the finality rule still serves an important salutary function in providing confidence both to individual immigrants and to society that the legal process has been fair. This last concern is especially important where, as shown above, due to the strains on the criminal justice and indigent defense systems, many immigrants facing removal may have received inadequate or no constitutionally-mandated process at the trial court level.[13]

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appeal, can spell the difference between a conviction that triggers removal and a conviction that bears no immigration consequence.

[13] Indeed, in addition to the challenges to the quality of representation posed by excessive case loads and limited resources, various studies have noted that in many states, including California, policies of classifying certain offenses (which bear low jail sentences but nevertheless may have significant immigration consequences) as "no counsel" offenses, result in countless individuals pleading guilty to or being convicted of removable offenses with no representation at all. See, e.g., Misdemeanor Crimes Report, at 16 (noting that in Riverside County, California, more than 12,000 people pled guilty to misdemeanor offenses without a lawyer in a single year). Other routine court and prosecutorial tactics, such as "exploding" plea offers, pressure to waive rights to appointed counsel, and bail policies that favor rapid and often uncounseled plea agreements (see, e.g., id., at 16, 32-24)

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II. UNDOING THE FINALITY RULE WOULD RESULT IN SIGNIFICANT AND UNNECESSARY BURDENS ON THE IMMIGRATION AND APPELLATE COURT SYSTEMS

En banc rehearing is further warranted in light of the impact the Panel's Decision could have on the dockets and resources of this and other federal courts. By any reasonable estimation the immigration court system is overburdened. The backlog of immigration cases awaiting disposal by immigration courts increased by 48% from the end of 2008 through early 2011, and has recently reached a new high of 275,316 pending cases, with the bulk of this backlog affecting states with high immigrant concentrations like California.[14] This tremendous volume of cases places extraordinary burdens on immigration judges. In 2008, for instance, a typical immigration judge was scheduled to

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further compromise the justice available to immigrants in criminal proceedings, and accentuate the need to closely guard appellate rights.

14 TRAC Reports, Inc., New Judge Hiring Fails to Stem Rising Immigration Backlog (June 7, 2011), http://trac.syr.edu/immigration/reports/250/ (observing that this backlog has continued to rise despite 44 new Immigration Judges being added to the bench in the past 12 months); see also TRAC Reports, Inc., Immigration Case Backlog Still Growing in FY 2011(Feb. 7, 2011), http://trac.syr.edu/immigration/reports/246/ and TRAC Reports, Inc., Immigration Court Decision Times Lengthen, http://trac.syr.edu/immigration/reports/257/ (average wait times and disposition times continue to be the longest in California's immigration courts, at 639 and 531 days, respectively).

preside over 69 hearings each week.[15] Similar strains are also experienced by the BIA and the federal courts of appeal.[16] As this Court is well aware, as a result of streamlining procedures and the increased use of summary orders implemented by the BIA in 2002 to reduce its own backlog, the number of petitions for review in federal court increased exponentially, and this surge has continued essentially unabated, with the brunt of the volume being absorbed by the Second and Ninth Circuits.[17]

Given the substantial burdens and challenges presented by the number of immigration cases, there is no reason why the efficiency of judicial administration should be further compromised by abrogating the finality rule. The finality rule serves to reduce the federal immigration courts' and judiciary's

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15 TRAC Reports, Inc., Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow (June 18, 2009), http://trac.syr.edu/immigration/reports/208/.

16 See, e.g., Office of Planning, Analysis, & Technology, FY 2010 Statistical Year Book, (Jan. 2011), http://www.justice.gov/eoir/statspub/fy10syb.pdf; Judge Robert A. Katzmann, U.S. Court of Appeals for the Second Circuit, The Legal Profession and the Unmet Needs of the Immigrant Poor, The Orison S. Marden Lecture of the Ass'n of the Bar of the City of N.Y. (Feb. 28, 2007), http://www.abanet.org/publicserv/immigration/katzmann_immigration_speech.pdf (the "Katzmann Lecture").

17 See, e.g., Katzmann Lecture, id.; see also Immigration Appeals Surge in Courts, Third Branch, (Admin. Office of the U.S Courts, Washington, D.C.) 5, 6 (Sept. 2003), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/B03Sep10.pdf (showing that as of 2010, BIA appeals comprised approximately one quarter of the 9th Circuit's annual new filings).

workload by keeping successful criminal appellants out of the immigration courts. These savings are tabulated not merely in reduced removal proceedings, but in saved appeals to the Board and federal courts therefrom, fewer requests for prosecutorial or administrative discretion, fewer applications for stays of removal, and fewer motions to reopen. It thus makes practical sense to maintain the finality rule and to initiate removal proceedings only after the necessary certainty with respect to the underlying conviction has been obtained.

CONCLUSION

For the foregoing reasons, amici curiae respectfully submits that the Court should grant full en banc rehearing to clarify the important question of whether the long-standing requirement that a conviction be final before triggering deportation consequences is preserved.

Dated: August 29, 2011
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Respectfully submitted,

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STATEMENT PURSUANT TO FRAP 29(c)(5)

Neither party's counsel authored the brief in whole or in part. A party or party's counsel did not contribute money that was intended to fund preparing or submitting the brief. No person – other than the amici curiae, their members, or their counsel — contributed money that was intended to fund preparing or submitting the brief.

Dated: August 29, 2011

s/Julia J. Peck

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 29-9(c)(2), I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,160 words.

Dated: August 29, 2011

s/Julia J. Peck

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AFFIDAVIT OF CM/ECF SERVICE

I, Cristina E. Stout, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On August 29, 2011

deponent served the within: **Brief of Proposed *Amici Curiae* California Attorneys for Criminal Justice, The Immigrant Defense Project and The Washington Defender Association**

upon:

SEE ATTACHED SERVICE LIST

via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

Sworn to before me on August 29, 2011

/s/ Maria Maisonet
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