No. 12-2798-AG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Manuel Pascual,

Petitioner,

v.

Eric H. Holder, Jr.,
Attorney General of the United States

Respondent,

PETITION FOR REHEARING EN BANC

BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, THE BRONX DEFENDERS, BROOKLYN DEFENDER SERVICES, THE LEGAL AID SOCIETY, NEIGHBORHOOD DEFENDER SERVICE HARLEM, NEW YORK COUNTY DEFENDER SERVICES, AND QUEENS LAW ASSOCIATES IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* hereby certify as follows:

Immigrant Defense Project's parent corporation is the Fund for the City of New York (FCNY), a nonprofit corporation that does not issue stock.

The Bronx Defenders does not have a parent corporation. It is a nonprofit corporation that does not issue stock.

Brooklyn Defender Services does not have a parent corporation. It is a nonprofit corporation that does not issue stock.

The Legal Aid Society does not have a parent corporation. It is a nonprofit corporation that does not issue stock.

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New York County Defender Services does not have a parent corporation. It is a nonprofit corporation that does not issue stock.

Queens Law Associates does not have a parent corporation. It is a nonprofit corporation that does not issue stock.

STATEMENT OF IDENTITY OF AMICI CURIAE, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amici are the six institutional public defender offices that represent indigent criminal defendants in New York City, as well as the Immigrant Defense Project ("IDP"), a New York-based nonprofit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused of or convicted of crimes. Collectively, *amici* represent or advise more than 320,000 criminal defendants each year, of whom a significant percentage are non-citizens. Each of the public defender *amici* employs in-house immigration attorneys who advise non-citizen clients on the immigration consequences of any contemplated plea bargain, and *amicus* IDP provides similar advice to criminal defense counsel and immigrants throughout the states in this Circuit. *Amici* therefore have a keen interest in the proper and predictable classification of state offenses under immigration law. *Amici* submit this brief to explain why, from the immigrant defense community's perspective, the panel's dismissal of Mr. Pascual's petition for review is likely to have broad and unwarranted negative implications for numerous other immigrants.

PRELIMINARY STATEMENT

Amici curiae respectfully urge this Court to grant Mr. Pascual's petition for rehearing en banc, following a substantively amended panel opinion, under Local Rule 35.1(d).[1] The panel's new ruling—which conflicts with *United States v. Delvecchio*, 816 F.2d 859 (2d Cir. 1987), and *United States v. Manley*, 632 F.2d 978 (2d Cir. 1980)—fails to alleviate the serious legal and policy concerns that *Amici* raised in response to the original opinion. Rehearing en banc should be granted to avoid these severe and unwarranted consequences for lawful immigrants.

ARGUMENT

I. The Second Panel Decision Conflicts with This Circuit's Binding Precedents.

The panel's amended opinion is in direct conflict with this Court's precedents. A state drug conviction is not *categorically* an aggravated felony unless even "the least of th[e] acts criminalized" under the state law are also punished as a felony under the Controlled Substances Act (CSA), 21 U.S.C. § 801, *et seq*. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (citations and internal quotation marks omitted). The panel erred in concluding that the least of all *bona*

[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, nor any person other than *Amici* or their counsel contributed money intended to fund the preparation or submission of this brief.

fide "offers" to sell drugs are also "attempts" to sell. New York's offer-to-sell violation is complete once a defendant proposes a sale of drugs with both the intent and the ability to complete the sale. But it is black letter law in this Circuit that *an attempt requires more* than intent and ability; the government must *also* prove that the defendant took a "substantial step" toward completion of the sale. *Manley*, 632 F.2d at 987–88 (requiring an "overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime" (internal quotation marks and citation omitted)).

This Court, in *Delvecchio*, applied the substantial step requirement to reverse a conviction for attempted possession of drugs with intent to distribute where defendants had sought out a known drug supplier and agreed to buy heroin (*i.e.*, an offer *and* an acceptance). 816 F.2d at 862. The Court held that, without more, the government "failed to establish . . . that appellants performed any overt act to carry out the agreed upon purchase." *Id*. (citing *Manley*, 632 F.2d at 988). If the panel's amended decision holds, the defendants in *Delvecchio* would have been lawfully convicted—not just of attempted possession of heroin with intent to distribute but of attempting to distribute (sell) that heroin. The conflict is real.

Moreover, "[w]hether conduct represents a substantial step towards the fulfillment of a criminal design"—*i.e.*, whether an offer matures into an attempt—"is a determination so dependent on the particular factual context of each case that,

of necessity, there can be no litmus test to guide the reviewing courts." *Id.* (quoting *Manley*, 632 F.2d at 988). And that dooms the panel's holding because, as noted, the categorical approach applies only if "offers" count as substantial steps toward a sale in *every* case. The fact that another circuit takes a different approach is no reason to tolerate an *intra*-circuit conflict. *See Pascual v. Holder*, 723 F.3d 156, 159 (2d Cir. 2013) (citing *United States v. Evans*, 699 F.3d 858, 868 (6th Cir. 2012)).

II. Treating Mere "Offers" to Sell as Aggravated Felonies Would Foreclose Discretionary Relief For Thousands of Immigrants.

The panel's erroneous amended ruling would turn thousands of non-citizens into aggravated felons, making them ineligible for discretionary relief from removal. *See Amici* Brief in Support of Original Petition, Dkt. 128 (May 6, 2013), at 8–10. This is because drug sale statutes in nearly 20 States, unlike the federal statute, reach broadly to criminalize making an "offer" to sell, and hundreds or even thousands each year are convicted under those statutes in New York alone.[2]

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[2] *See* Ariz. Rev. Stat. § 13-3405 (2010); Cal. Health & Safety Code § 11352(a) (2011); Colo. Rev. Stat. § 18-18-403(1) (2009); Fla. Stat. § 817.563 (2009); Haw. Rev. Stat. § 712-1240 (2009); Minn. Stat. 152.01(15a) (2011); Mont. Code Ann. § 45-9-101 (2013); Mo. Ann. Stat. § 195.010 (2011); Nev. Rev. Stat. § 372A.070 (2011); N.H. Rev. Stat. Ann. § 318-B:1 (2013); N.D. Cent. Code Ann. § 19-03.1-01 (West 2011); Ohio Rev. Code Ann. § 2925.03 (West 2012); 35 Pa. Stat. Ann. § 780-113 (West 2011); R.I. Gen. Laws Ann. § 21-28-1.02 (West 2012); Tex. Health and Safety Code § 481.002 (Vernon 2009); Utah

[Footnote continued on next page]

The panel downplays that concern, speculating that "non-citizens who sell drugs in the United States (or make bona fide offers to sell drugs) are unlikely to be strong candidates for discretionary relief." *Pascual*, 723 F.3d at 159. Why that would be so (and what percentage of immigrants are excluded by the word "unlikely") the panel does not say. *Amici* know from experience, though, that many immigrants have been prosecuted successfully for low-level drug offenses after building up a long and stable presence in this country. A good example is a case recently decided by this Court under *Pascual*, where an "offer-to-sell" issue was squarely presented under New York law. That petitioner was such a strong candidate for discretionary relief that the judge would have granted it in "15 seconds" had the offense not been classified as an aggravated felony. Certified Administrative Record in *Andrews v. Holder*, 534 Fed. App'x 32 (2013), at 415.[3] *Pascual* will almost certainly foreclose opportunities for many more similarly situated immigrants to avoid removal.

[Footnote continued from previous page]

Code Ann. § 58-37-8 (West 2013); Vt. Stat. Ann. tit. 18, § 4201(30) (West 2012); Wash. Rev. Code § 69.50.4012 (2013). *Amici*'s earlier brief explained the significant number convicted of such offenses in New York alone, a point Respondent does not contest. *See Amici* Brief at 8–9.

[3] Counsel for *Amici* also represented Petitioner Andrews in that proceeding, in which another panel of this Court ultimately dismissed a petition for review based on the ruling in *Pascual*.

III. *Pascual* Would Discourage Immigrants From Entering Guilty Pleas, Thus Placing a Substantial Burden on State Courts.

The panel's amended ruling would create a grave potential burden on state courts where immigrant defendants will be encouraged to go to trial in all drug "sale" cases (including those involving mere offers to sell), for fear of automatic removal if they plead guilty. *Amici* Brief at 10–12. "Preserving the . . . right to remain in the United States may be more important to the [immigrant] than any potential jail sentence," *INS v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (internal quotation marks and citation omitted), and "'preserving the possibility' of discretionary relief from deportation" is "'one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial,'" *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010) (quoting *St. Cyr*, 533 U.S. at 323). Plea bargaining is crucial for the efficiency of the courts, *see Santobello v. New York*, 404 U.S. 257, 260 (1971), and accounts for 90 to 95 percent of state and federal convictions, *see Plea Bargaining Research Summary*, Bureau of Justice Assistance, U.S. Dep't of Justice, *available at* https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

The panel's response to this concern rests on a false choice: it asserts that any burden on the state courts would be "offset" by "efficiencies inherent in a categorical approach." *Pascual*, 723 F.3d at 159. But there is no offset. *Amici* and Mr. Pascual *support* the categorical approach. Because the charging documents in

this case followed the routine in New York by alleging a sale (the statute's operative word), and because "to sell" is defined broadly to include conduct (offers) not criminal under the federal law, a correct ruling creates no inefficiencies. The panel's incorrect ruling, however, threatens to significantly reduce the number of guilty pleas at a time of limited criminal justice resources.

IV. *Pascual* Likely Would Dramatically Increase the Sentences of Many Federal Defendants Contrary to Current Law.

Finally, the panel's amended ruling would have a significant impact if applied to federal sentencing, where the statutory and guidelines provisions are largely the same.[4] *Amici* Brief at 12–15. For example, classifying "offers" as aggravated felonies would substantially enhance the sentence exposure of those charged with illegal reentry after removal.[5] Deeming offers to be attempts also would double the mandatory minimum for offerors who could then be categorically deemed convicted of a prior "felony drug offense," *see* 21 U.S.C. §§ 841(b)(1)(A), (B) & 851, with mandatory life imprisonment for those with two

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[4] Before *Pascual*, defendants convicted under "offer" statutes were able to avoid these enhancements in many cases. *Cf.* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. Davis L. Rev. 1135, 1190 & n.279 (2010).

[5] A prior "aggravated felony" conviction increases the maximum sentence for illegal reentry by a factor of ten. *See* 8 U.S.C.§§ 1326(a) & (b)(2) (two-year maximum for illegal reentry increases to twenty for aliens previously convicted of an aggravated felony).

such prior offenses, *see id.* § 841(b)(1)(A).[6] Finally, *Pascual* would designate a greater number of defendants as "career offenders," who become subject to high minimum offense levels. *See* U.S.S.G. § 4B1.1(b).[7]

The panel failed to explain its statement that these serious consequences are "not unintended." *Pascual*, 723 F.3d at 159. It is far from obvious that Congress would have intended mere "offers" to have such a profound effect on sentencing. The Supreme Court has not seen it that way, repeatedly rejecting the government's efforts to turn "low-level drug offense[s]" into aggravated felonies. *See Moncrieffe*, 133 S. Ct. at 1693 (chastising the government for repeatedly characterizing "low-level drug offense[s]" as "aggravated felon[ies]" in defiance of the "commonsense conception"). Congress intended sentencing implications for *genuine* aggravated felonies, not crimes wrongly designated as such.

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[6] A "felony drug offense" is an "offense that is punishable by imprisonment for more than one year under any law of the United States that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances," 21 U.S.C. § 802, and the panel held that an "offer" to sell drugs under New York law necessarily constitutes a felony under the CSA, *Pascual*, 723 F.3d at 158.

[7] A "career offender" includes anyone with two or more "prior felony convictions of . . . a controlled substance offense," U.S.S.G. §§ 4B1.1(a), the definition of which includes state offenses much like those classified as "aggravated felonies," *see id.* § 4B1.2(b) & n.1.

CONCLUSION

Amici respectfully request that this Court grant the petition for rehearing en banc, vacate the order of dismissal, and set the case for briefing on the merits.

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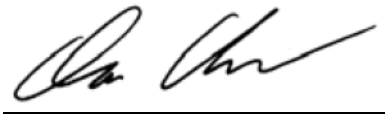
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type style requirements of Fed. R. App. P. Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and the Court has granted leave to file a proposed brief of this length.

Dated: April 7, 2014



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CERTIFICATE OF SERVICE

It is hereby certified that today, I caused to be served electronically a copy of the foregoing Brief for *Amici Curiae* In Support Of the Petition for Rehearing En Banc via the Court's CM/ECF system on the following parties:

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