IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case no. 07-70730

Michael Angelo Samonte PLANES

Petitioner,

v.

Eric H. HOLDER, Jr.

Respondent.

On Review from the Board of Immigration Appeals

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING EN BANC

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I. INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2, amici curiae file this brief in support of Petitioner's Petition for Rehearing En Banc of the panel's decision in Planes v. Holder, _ F.3d _, Case no. 07-70730, 2011 WL 2619105 (9th Cir. July 5, 2011) ("Decision").

This case should be reheard by an en banc Court because, as noted in the Petitioner's petition for rehearing, when a conviction is final for purposes of removal is an issue of exceptional importance in criminal and immigration proceedings that was improperly reached and incorrectly determined by the panel below. The panel's conclusion also conflicts with the case law in this Circuit and puts it in conflict with other Circuit Courts of Appeal.

Amici's brief specifically provides reasons in addition to those discussed in Petitioner's Petition for Rehearing. Specifically, amici shows that the panel overruled over 40 years of precedent in reaching the issue of finality, which was not the basis for the BIA's decision and was not raised by the parties. The panel's analysis of the issue also ignored fundamental precepts of statutory interpretation and case law from this Circuit, other circuits and the Board of Immigration Appeals ("BIA" or "Board"). The panel's analysis also incompletely considered the legal and practical barriers to filing motions to reopen after removal and

actually obtaining permission to return to the United States. Finally, amici also presents an alternative reason, separate from those of Petitioner, that an en banc panel should rehear the case to consider whether to narrow the panel's holding to the specific facts of this case.

II. STATEMENT OF INTEREST

As described in the accompanying motion, amici curiae are regional and national organizations committed to fair and humane administration of United States immigration laws and respect for the civil and constitutional rights of all persons. Many of their clients have suffered criminal convictions and will be significantly affected by this case. Thus, amici have a direct interest in this matter.

III. ADDITIONAL REASONS IN SUPPORT OF REHEARING *EN BANC*

A. THE PANEL EXCEEDED ITS AUTHORITY BY DECIDING AN ISSUE OF EXCEPTIONAL IMPORTANCE THAT THE BIA DID NOT ADDRESS AND THE PARTIES DID NOT DISPUTE.

The panel exceeded its authority in this case in at least two respects.

First, the panel decided an issue not raised or decided by the BIA. Therefore, the panel exceeded its jurisdiction. See SEC v. Chenery Corp., 332 U.S. 194, 196 (1947); Navas v. INS, 217 F.3d 646, 658 n.16 (9th Cir. 2000) ("[T]his court cannot affirm the BIA on a ground upon which it did not rely."). Before the BIA,

Petitioner argued that his conviction was not yet final because there was a pending appeal. See In re: Michael Angelo Samonte Planes, 2007 WL 416855 (BIA Jan. 24, 2007) (unpublished). However, the BIA dismissed this argument on the grounds that his pending appeal was a "collateral proceeding[]" that "relate[d] only to the proper contours of his sentence, not whether he stands 'convicted' of the crime." Id. The BIA therefore concluded that, regardless of the outcome of that appeal, Petitioner would be removable as charged. Notably, in support of its decision, it cited Grageda v. INS, 12 F.3d 919, 921 (9th Cir. 1993), and Morales-Alvarado v. INS, 655 F.2d 172, 174 (9th Cir. 1981), both of which uphold the finality rule for non-collateral proceedings. Id.

In contrast, the panel affirmed the BIA on an entirely different rationale: that the definition of "conviction" in 8 U.S.C. § 1101(a)(48)(A) did not by its plain language require that the petitioner have exhausted or waived all appeals, and that therefore Petitioner's conviction was final despite the fact that his case remained pending on appeal. Decision at *8989-91. However, if the panel believed that consideration of the finality rule was necessary for a decision in this case—which amici believes is not the case--it should have remanded the issue to the Board to decide the issue in the first instance.

Second, the issue of whether the new definition of "conviction" abrogated the finality rule was not raised by either party before the Board nor in briefing

before the panel. This Court has "squarely [held] that [8 U.S.C.] § 1252(d)(1) mandates exhaustion and therefore generally bars us, for lack of subject-matter jurisdiction, from reaching the merits of a legal claim not presented in administrative proceedings below." Barron v. Ashcroft, 358 F.3d 674, 678 (9th Cir. 2002).

Here, both parties before the Court and before the Board disputed only whether the statutory definition of "conviction" under 8 U.S.C. § 1101(a)(48)(A) ("formal judgment of guilt") required a formal finding of guilt and a sentence, or only a formal entry of guilt. See Pet. Op. Br. at *4-5 (arguing the former); Br. for Resp. at *18-19 (arguing the latter). Both parties cited with approval Grageda, supra, which supported the finality rule. Likewise, in the oral argument and in submissions filed under FRAP 28(j) after oral argument, the DHS did not request this court to rule on the finality rule. Thus, the panel had no jurisdiction to reach this issue.

Thus, the en banc panel should find that the panel below erred in reaching the finality issue in this case.

B. THE PANEL OVERTURNED WELL-ESTABLISHED PRECEDENT WITHOUT FOLLOWING FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION AND CIRCUIT AND BOARD PRECEDENT.

The panel's decision holding that the finality rule was extinguished by

Section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") – which was based primarily on the literal absence of the words "finality" in the text of Section 322 – overlooks fundamental principles of statutory interpretation and case law from this Circuit, other Circuits, and the Board, all of which counsel strongly in favor of a finding that the finality requirement persists.

It is a fundamental maxim of statutory interpretation that when Congress enacts new law that incorporates provisions of prior law, it is presumed that Congress was aware of the administrative and judicial interpretations of that former law that it adopts such interpretations. See, e.g., Lorillard v. Pons, 434 U.S. 575, 580-83 (1978); Lindahl v. Office of Personnel Mgmt., 470 U.S. 768, 782 n. 15 (1985) (and cases cited therein).[1] A corollary to this rule is that, "absent a

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[1] See also e.g., Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 528-31 (1998) (holding that the Court held that the term "dependent Indian communities," as used in a statute defining "Indian country," was to be interpreted consistently with judicial precedents issued prior to the statute's enactment.); Monessen Sw. Ry. v. Morgan, 486 U.S. 330, 336-39 (1988) ("We can discern a sufficiently clear indication of legislative intent with regard to prejudgment interest …when we consider Congress' silence on this matter in the appropriate historical context. … Congress did not deal at all with the equally well-established doctrine barring the recovery of prejudgment interest, and we are unpersuaded that Congress intended to abrogate that doctrine sub silentio.).

This Circuit has followed this same principle. See e.g., Zuress v. Donley, 606 F.3d 1249, 1253 (9th Cir. 2010), cert. denied, 10-374, 2011 WL 2518837 (U.S. June 27, 2011) ("When interpreting a statute, we look first to the plain language of the statute, construing the provisions of the entire law, including its

clearly expressed congressional intention, repeals by implication are not favored." Branch v. Smith, 538 U.S. 254, 273 (2003) (citations and quotations omitted).

Just this last term, the Supreme Court followed the fundamental maxim of statutory interpretation that enactment of a new law does not sub silentio overturn prior case law. In Kucana v. Holder, 558 U.S. ___ (2010), the Supreme Court reasoned: "From the Legislature's silence on the discretion of the Attorney General…over reopening motions,…we take it that Congress left the matter where it was pre-IIRIRA[.]" Kucana v. Holder, 558 U.S. ___ (2010). See also id. ("If Congress wanted the jurisdictional bar to encompass decisions specified as discretionary by regulation along with those made discretionary by statute, moreover, Congress could easily have said so.").[2]

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object and policy, to ascertain the intent of Congress. …We presume that Congress is familiar with controlling precedent and expects that its enactments will be interpreted accordingly."); Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676, 683-84 (9th Cir. 2006) ("Faced with statutory silence on the burden issue, we presume that Congress is aware of the legal context in which it is legislating. ….Given the care taken in CAFA to reverse certain established principles but not others, the usual presumption that Congress legislates against an understanding of pertinent legal principles has particular force."); Miranda B. v. Kitzhaber, 328 F.3d 1181, 1189 (9th Cir. 2003) (Congress is presumed to know the law and to have incorporated judicial interpretations when adopting a preexisting remedial scheme.).

[2] It is also worth noting that Congress has demonstrated that, in very comparable situations, it is capable of expressly defining "conviction" in a manner that disregards appellate rights. For example, in enacting the Medicare and Medicare Patient and Program Protection Act of 1987, Pub. L. No. 100-93,101

Likewise, here, prior to IIRIRA, the finality rule was firmly entrenched in case law with uniform decisions from the Supreme Court, Circuit Courts, and the BIA that the definition of conviction for immigration purposes included a requirement that direct appeals be exhausted. See Pino v. Landon, 349 U.S. 901 (1955) (finding that the record failed to show that the "conviction has attained such finality as to support an order of deportation"); Morales-Alvarado v. INS, 655 F.2d 172, 174-75 (9th Cir. 1981) (and cases cited therein); Matter of Ozkok, 19 I. & N. Dec. 546, 553 n.7 (BIA 1988) ("It is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.") (citations omitted).

When in 1996, Congress for the first time promulgated a statutory definition of conviction for immigration purposes, it adopted almost verbatim the BIA's prior administrative three-prong test for a conviction set forth in Ozkok, 19 I&N Dec. 546. Compare § 8 U.S.C. § 1101(a)(48)(A) to Ozkok, 19 I. & N. Dec. at 552. The legislative history shows that, in enacting § 1101(a)(48)(A), Congress was motivated by concerns that immigrants in some states who had received deferred adjudications were not subject to the definition of "conviction" for immigration

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Stat. 680, Congress defined the term "convicted" to include situations where "a judgment of conviction has been entered against the individual or entity…*regardless of whether there is an appeal pending*." 42 U.S.C. § 1320a-7(i)(1) (emphasis added).

purposes. See H.R. Rep. No. 104-828, 224 (1996) (Conf. Rep.); H.R. Rep. No. 104-879, 123 (1997)). Thus, with respect to Ozkok's three-part inquiry for deferred adjudications, Congress made several changes, including excising the former requirement that a "formal judgment" be entered before a deferred adjudication order would be recognized as a "conviction." It thereby promulgated a uniform standard that would apply to all deferred adjudications nationwide.

Neither the language employed by Congress nor the legislative history contain any evidence that Congress intended to upset the finality rule as it applied to a formal judgment of guilt. Ozkok had clearly acknowledged the validity of the finality rule as an additional and essential requirement for a conviction to trigger negative immigration consequences in the formal adjudication setting. With the focus of IIRIRA strictly on the deferred adjudication prong of the definition of "conviction," and with no alteration to the formal adjudication prong, there can be no inference that Congress intended to extinguish the judicially recognized finality requirement as it applied in the formal judgment of guilt setting.[3]

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[3] Although many provisions of IIRIRA were intended to strengthen the provisions for removal of noncitizens convicted of crimes, "no law pursues its purpose at all costs, and…the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." Rapanos v. United States, 547 U.S. 715, 752 (2006).

In addition, in employing a plain language analysis without further consideration of the context and history of the statute, the panel's decision is inconsistent with this Circuit's case law that the definition of conviction cannot be understood to apply to convictions that have been vacated for substantive or procedural reasons (as opposed to, e.g., rehabilitative or leniency purposes). See Lujan-Armendariz v. I.N.S., 222 F.3d 728, 750 (9th Cir. 2000) (finding that, in enacting § 1101(a)(48)(A), Congress was not concerned "with attempting to alter the longstanding rule that convictions that are subsequently overruled, vacated, or otherwise erased no longer have any effect for immigration …."), overruled on other grounds by Nunez-Reyes v. Holder, 631 F.3d 1295 (9th Cir. July 14, 2011) (en banc).

Similarly, the panel ignored that the Board and this Court have found that an implied exception to the definition of conviction for juvenile adjudications has been preserved under IIRIRA. See Matter of Devison, 22 I&N Dec. 1362, 1368-69 (BIA 2000) (en banc) ("To eliminate these distinctions and overrule our well-established precedents on these issues, we would require clearer direction from Congress that it intended juvenile adjudications to be treated as convictions for immigration purposes."); Matter of Salazar-Regino, 23 I. & N. Dec. 223, 228 n.2 (BIA 2002) (en banc) (same). See Vargas–Hernandez v. Gonzales, 497 F.3d 919, 922–23 (9th Cir. 2007) (applying Devison).

In its opinion, the Panel also erroneously cited to opinions from four of its sister circuits as allegedly supporting its holding that IIRIRA eliminated the finality requirement, see Petitioner's Petition for Rehearing § IV.2,[4] but failed to consider decisions from two Circuits upholding the finality rule. Decision at *8991-92. The Third Circuit issued a post-IIRIRA decision that 8 U.S.C. § 1101(a)(48)(A) still requires that direct appeals be exhausted or waived before being used to remove a noncitizen. Paredes v. Att'y Gen. of U.S., 528 F.3d 196, 198 (3d Cir. 2008) ("[A] conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.") (quoting Matter of Ozkok). The Sixth Circuit also issued a post-IIRIRA decision which assumes that the finality rule still applies. United

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[4] As Petitioner demonstrated in his brief, these cases either arose in the deferred adjudication context (and thus do not control the question of the existence of finality in the formal adjudication setting), involve collateral attacks, which were not sufficient to disturb finality even under pre-IIRIRA authority, and/or address the finality rule in dicta, and thus all fail to support a conclusion that finality has been extinguished in the formal judgment of guilt context.

The panel also overlooked two subsequent decisions of the Second Circuit which make abundantly clear that Puello's fleeting observation as to the elimination of the finality rule was dicta, and not the considered decision of that Court. See, e.g., Walcott v. Chertoff, 517 F.3d 149, 155 (2d Cir. 2008) ("The decision to appeal a conviction . . . suspends an alien's deportability . . . until the conviction becomes final . . .."); Abreu v. Holder, 378 Fed. Appx. 59 (2nd Cir. 2010) (unpublished) (remanding to permit the Board to decide in the first instance whether a conviction is sufficiently final to warrant removal when a petitioner has a direct appeal pending).

States v. Garcia-Echaverria, 374 F.3d 440, 446 (6th Cir. 2004) ("To support an order of deportation, a conviction must be final.") (citation omitted).

Likewise, the panel also overlooked the Board's most recent statements on this issue. In a recent case that was subsequently vacated, although not deciding the issue, the vast majority of the Board showed that it believed that the definition of "conviction" in IIRIRA does not abolish the finality rule. See Matter of Cardenas-Abreu, 24 I&N Dec. 795 (BIA May 4, 2009), vacated by Abreu v. Holder, 378 Fed. Appx. 59 (2nd Cir. 2010) (unpublished). A five-member majority noted in dicta that it found "forceful" the argument that "Congress intended [in IIRIRA] to preserve the long-standing requirement of finality for direct appeals as of right in immigration law." Id. at 798. An additional seven dissenting and concurring members concluded outright that the finality requirement has survived passage of IIRIRA, id. at 802, 813, 814-15, whereas only two of the fourteen then-Board members expressed a view that finality is no longer required. Id. at 803.

Thus, the en banc panel should find that the panel erred in its statutory construction analysis of 8 U.S.C. § 1101(a)(48)(A).

C. THE PANEL DECISION RELIES ON AN INCORRECT UNDERSTANDING OF THE LEGAL AND PRACTICAL BARRIERS TO RETURN AFTER REMOVAL

The panel further suggests that there is no need to delay removal while a direct appeal is pending because, if successful, a noncitizen can file a motion to reopen and be returned to the United States. But, the panel ignores the legal and practical barriers to return after removal.

Although the BIA has granted reopening in many cases involving vacated or reversed convictions, the availability of the remedy after an individual has already been removed from the United States remains difficult. The regulations include a bar to reopening after a person has departed the United States. See 8 C.F.R. §§ 1003.2, 1003.23. The Board has upheld this post-departure bar and interpreted the regulations narrowly. See Matter of Armendarez-Mendez, 24 I. & N. Dec. 646 (BIA 2008). The Board brooks only one exception to the regulations: if the noncitizen is deported in absentia because of a lack of notice, the post-departure bar is not applied. Matter of Bulnes-Nolasco, 25 I. & N. Dec. 57 (BIA 2009). The Board's post-departure bar is in dispute among the Circuits. The First, Second, Fifth, and Tenth Circuits have upheld the Board's interpretation.[5] The Third, Fourth, Sixth, and this Circuit have rejected it on various grounds.[6] Case law in the

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[5] See Pena-Muriel v. Gonzales, 489 F.3d 438 (1st Cir.2007); Zhang v. Holder, 617 F.3d 650, 658-665 (2d Cir. 2010); Navarro-Miranda v. Ashcroft, 330 F.3d 672, 676 (5th Cir. 2003); Rosillo-Puga v. Mukasey, 508 F.3d 1147 (10th Cir. 2009).

[6] See Prestol Espinal v. AG of US, _ F.3d_, Case no. 10-1473 (3d Cir. Aug.

Seventh calls it into serious question.[7] Because of the Circuit Court split, this issue is likely to be decided by the Supreme Court, but the outcome of the issue is not certain. If the Supreme Court upholds the Board's interpretation, the Ninth Circuit's precedent will be of little comfort to a person deported with a direct appeal pending trying to return to the United States.

Even if the Ninth Circuit's precedent remains intact allowing a post-departure motion to reopen, the deportee still must contend with the ninety-day time bar (8 C.F.R. §§1003.2(c)(2), 1003.23(b)(1)). If this bars applies, the noncitizen would have to request an immigration judge or the Board to reopen sua sponte on their own motion (8 CFR §1003.2(c)(2)). Reopening would then be entirely up to the discretion of the immigration judge or Board and a matter over which this Court and others would not have jurisdiction. See Mejia-Hernandez v. Holder, 633 F.3d 818, 823-24 (9th Cir. 2011) (declining to reconsider Ekimian v. INS, 303 F.3d 1153 (9th Cir.2002), in which this Court found that it could not review sua sponte motions to reopen). Thus, were the Board to deny such a motion, there would be no adequate remedy for an erroneous denial.

Likewise, as a practical matter, it is not so clear that individuals have been

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3, 2011); William v. Gonzales, 499 F.3d 329, 332-333 (4th Cir. 2007); Pruidze v. Holder, 632 F.3d 234, 237–38 (6th Cir.2011); Reyes–Torres v. Holder, 645 F.3d 1073, 1076-77 (9th Cir. 2011).

[7] See Marin-Rodriguez v. Holder, 612 F.3d 591, 594-95 (7th Cir. 2010).

able to come back after they have been deported, even if the agency allegedly permits them to do so. See generally, Rachel E. Rosenbloom, "Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure," 33 U. Haw. L. Rev. 139-192 (2011). On May 12, 2011, five organizations filed a complaint in district court seeking to obtain records under the Freedom of Information Act to support the government's claims that it facilitates the return of individuals who prevail in their immigration cases from outside the United States. See National Immigration Project v. DHS, No. 11-CV-3235 (S.D.N.Y., May 12, 2011). The complaint alleges that agencies repeatedly refuse to accept responsibility for arranging return requiring further litigation to compel the government to facilitate return, returning depends solely on the agency's discretion, and even if permitted to return, noncitizens are not returned to their former status but are instead considered "arriving aliens" and subject to grounds of inadmissibility.[8] Id.

Finally, even if the legal and practical barriers to return after deportation can be overcome, the most important reason to uphold the finality rule is to avoid the hardship caused by a wrongful deportation. As Judge Canby from this Circuit eloquently noted, the "limited delay [in waiting for a conviction to be final] avoids

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[8] The Complaint is also available on the internet at http://nationalimmigrationproject.org/news.htm#FOIAlitigation.paroleauthority.

grave injustice" since "[a] reopening of the deportation proceedings after deportation has occurred [citation omitted], does not undo the hardship caused by that drastic procedure." Morales-Alvarado, 655 F.2d at 175 (Canby, J. dissenting).

D. PETITIONER'S CASE PRESENTS AN UNUSUAL FACTUAL SITUATION THAT DOES NOT WARRANT OVERTURNING THE FINALITY RULE IN ALL APPEALS.

Amici also presents the alternative argument in this case, separate from the arguments raised by Petitioner, that the Court should rehear the case en banc to consider whether Planes presents an exceptional case that does not warrant overturning the finality rule in all appeals and whether the Boards decision, even if affirmed, should be limited to the facts of this case.

At the time that his immigration case was pending before the BIA, Petitioner's criminal appeal had been remanded by the Ninth Circuit to the district court for further proceedings consistent with United States v. Ameline, 409 F.3d 1078 (9th Cir. 2005). Decision at *8985. In cases involving Ameline remands, the Circuit Court issues its mandate without vacating the judgment while still remanding the case to the district court to conduct its own plain-error review. United States v. Ameline, 409 F.3d 1078, 1080 (9th Cir. 2005).

Thus, given that the Court closed the case with a mandate without vacating the judgment, it can be argued that Petitioner had exhausted his appeal on the

criminal matter as a ministerial matter and the further proceeding in the district court (pursuant to the Ameline remand) was a collateral proceeding.[9]

Under this reasoning, the Boards decision holding that the Ameline remand is a collateral proceeding was arguably correct. In Re: Michael Angelo Samonte Planes, 2007 WL 416855 (BIA 2007). The Board correctly cited Grageda, supra, for the well-established rule that [a] conviction subject to collateral attack or other modification is still final for immigration purposes.[10]

Thus, the Court should grant rehearing en banc to consider whether the Board's reason for dismissing the appeal is correct. This is what the panel was required to do in the first instance pursuant to Chenery, supra. Granting rehearing en banc to review the limited question presented by the Board's decision in this case will have the salutary effect of emphasizing the importance of this bedrock principle in the review of administrative decision.

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[9] To the best of undersigned counsels' knowledge, this may be the only type of remand in a criminal case where this type of procedure is used.

[10] At this point, amici curiae take no position as to the merits of this argument.

IV. CONCLUSION

For the aforementioned reasons and those in Petitioner's Petition for Rehearing En Banc, this Court should grant en banc hearing of this case.

Date: August 29, 2011

Respectfully submitted,

Michael Mehr

/s/ Avantika Shastri

Attorneys for Amici Curiae

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 amicus curiae, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief.

Date: August 29, 2011 s/ Avantika Shastri

CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 29(c)(5) AND CIRCUIT RULE 29-2 FOR CASE NUMBER 07-70730

I certify that:

Pursuant to Fed. R. App. 29(d) and Circuit Rule 29-2, the attached AMICUS BRIEF is proportionally spaced, has a type face of 14 points or more and contains 4200 words or less.

Date: August 29, 2011 s/Avantika Shastri

PROOF OF SERVICE BY ELECTRONIC FILING

I certify that on August 29, 2011, I electronically filed the foregoing with the Clerk of the Court of the United States court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case, including Ms. Elsa Martinez, counsel for Petitioner, and Ms. Liza Murcia and Mr. David Bernal, counsel for Respondent, are registered CM/ECF users and that services will be accomplished by the appellate CM/ECF system.

s/Avantika Shastri