Case No. 13-9531

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Enrique Garcia Mendoza,
Agency Case No. A200-582-682,

Petitioner,

v.

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

Respondent.

On Petition for Review of a Decision of a Non-Precedential Decision of the Board of Immigration Appeals

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Brief of *Amicus Curiae* American Immigration Lawyers Association in Support of Petition for Rehearing or Rehearing En Banc

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Maris J. Liss
33505 W. 14 Mile Rd.
Suite 20
Farmington Hills, MI 48331
PH: (248) 932-0990
FAX: (248) 932-4971
mliss@greencard-us.com

Aaron C. Hall
12203 E. 2nd Ave.
Aurora, CO 80011
PH: (303) 297-9171
FAX: (303) 733-4188
aaron@immigrationissues.com

Mark R. Barr
1601 Vine Street
Denver, CO 80206
PH: (303) 554-8400
FAX: (303) 554-8099
mbarr@lichterimmigration.com

Attorneys for *Amicus Curiae*

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II. TABLE OF AUTHORITIES

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III. INTRODUCTION

A. Reasons for Granting Panel Rehearing

The panel in Mr. Garcia Mendoza's case was tasked with analyzing the meaning of the phrase, "confined, as a result of conviction." 8 U.S.C. § 1101(f)(7). In its dissection of those terms the panel overlooked or misapprehended the definition of the term "conviction," as used in the Immigration and Nationality Act ("INA"). The panel treated the term narrowly, as referring solely to the determination of guilt, rather than its broader treatment in the INA, where it clearly refers to both a determination of guilt *and* a sentence. The panel mistakenly held that the phrase "does not reference the ordered term of imprisonment." *Garcia-Mendoza v. Holder*, 2014 U.S. App. LEXIS 10149, *7 (10th Cir., June 2, 2014). However, the term "conviction" is defined elsewhere in the INA to include both an adjudication of guilt *and* the imposition of a sentence.

Had the panel not overlooked or misapprehended the INA's definition of "conviction," it might have questioned, as did its sister circuit –two days after the instant case was decided--- "whether someone can be "confined, as a result of conviction" other than pursuant to a sentence?" *Trunov v. Holder*, 2014 U.S. App. LEXIS 10518 *4 (2nd Cir. June 4, 2014). Operating with the correct definition of

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"conviction," the panel might not have come to the same conclusion about the clarity of the phrase, "confined, as a result of conviction."

The panel might have determined, as urged by amicus, that the phrase unambiguously means that any calculation of a period of confinement under § 1110(f)(7) has to be limited to the single, legally valid sentence imposed by the criminal court. Alternatively, the panel might have concluded, like the Second Circuit, that the phrase was ambiguous and subject to different possible interpretations. *Trunov* at *4.

B. <u>Reasons for Granting Rehearing En Banc</u>

Amicus supports rehearing en banc because the case involves a question of exceptional importance, as shown by the following:

(1) The panel's holding that the phrase, "confined, as a result of conviction" unambiguously refers *only* to "the actual period of confinement" and is "not dependent on the formal language of the court's sentencing order" now conflicts with the decision of the Second Circuit, which found the phrase to be ambiguous. *Compare Garcia-Mendoza*, 2014 U.S. App. LEXIS 10149 at *7 *with Trunov*, 2014 U.S. App. LEXIS 10518 at *4.

(2) The Second Circuit has ordered the Board of Immigration Appeals to issue a published decision on its interpretation of the phrase, "confined, as a result

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of conviction." *Trunov*, 2014 U.S. App. LEXIS 10518 at *4. Should the Board, on remand, agree that § 1101(f)(7) is ambiguous and interpret the provision so as to give legal effect to state sentence modifications, as it has done in other contexts, then the court will find itself in an unresolvable conflict with the agency, since it could not defer to the Board's interpretation under *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U.S. 967, 982 (2005) (holding that a prior judicial construction of a statute will continue to trump a subsequent agency interpretation if the judicial decision was based on a lack of ambiguity in the statue).

(3) Because good moral character determinations are a part of numerous immigration applications, including, but not limited to those for naturalization, voluntary departure, and relief under the Nicaraguan Adjustment and Central American Relief Act (NACARA), the court's holding will have far-reaching implications.

C. Statement of Interest of Amicus Curiae

AILA is a national organization comprised of more than 13,000 lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to promote reforms in the laws; to

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facilitate the administration of justice; and to elevate the standard of integrity, honor, and courtesy of those appearing in representative capacity in immigration, nationality and naturalization matters.

AILA is committed to the fair and humane administration of United States immigration laws and respect for the civil and constitutional rights of all persons. Many of AILA's constituent lawyer-members represent foreign nationals who will be significantly affected by this case to the extent that they will be permanently barred from having certain sentence corrections impact their good moral character determinations.

IV. ARGUMENT

1. IN A DECISION ISSUED JUST TWO DAYS AFTER THIS PANEL'S RULING, *TRUNOV V. HOLDER*, 2014 U.S. APP. LEXIS 10518 (2ND CIR., JUNE 4, 2014), THE SECOND CIRCUIT FOUND THE SAME STATUTE TO BE AMBIGUOUS, REMANDING THE MATTER TO THE BOARD FOR THE ISSUANCE OF A MORE FULLY REASONED, PRECEDENTIAL DECISION.

Although it is unusual for this Court to rehear a case and withdraw its decision, in the instant case a "perfect storm" of three factors weigh in favor of rehearing.

First, the Second Circuit remanded a case with the same issue of statutory interpretation at stake in this case to the Board two days after this panel's ruling.

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Trunov at *4 ("When dealing with a non-precedential BIA decision, we have often remanded so "the BIA [can] by published opinion interpret a statute it is charged with enforcing."… We will do so here." (citations omitted)). The Second Circuit Court considered six factors before remanding the case to the Board for a precedent decision interpreting the statute. *Trunov* at 10518 citing factors by reference to *Yuanliang Liu v. U.S. Dep't of Justice*, 455 F.3d 106, 116-17 (2d Cir. 2006):

i. *Insufficient agency attention* – Here, both the Petitioner and the Respondent were actually in agreement that the Board's decision required further examination. In fact, on November 15, 2014, Respondent asked this Court to remand the case to the Board so that the Board may:

> (i) re-examine its holding in light of *Matter of Cota-Vargas*, 23 I. & N. Dec. 849 (BIA 2005)—and it's analysis of 8 U.S.C. § 1101(a)(48)(B)—and *Arreguin- Moreno v. Mukasey*, 511 F.3d 1229, 1233 (9th Cir. 2008); and (ii) make further findings on the effect of non-credited, pre-conviction confinement on the good moral character bar under 8 U.S.C. § 1101(f)(7), in light of the state court's order which expressly did not credit time served in the *nunc pro tunc* judgment.

ii. *National uniformity* – There is now a split in the circuits on this issue of national importance. Immigration law should have the same outcome in disparate circuits.

iii. *Statutory ambiguity* – The Second Circuit found that the statute is ambiguous, while this Court found it was clear. It is fitting to afford the Attorney General, in whom Congress has vested the authority to rule on legal questions arising from the immigration law, the opportunity to reconsider and construe the meaning of "conviction" consistent with the competing statutory, constitutional, and policy interests at stake.

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iv. *Dearth of circuit law* – The Tenth Circuit has no case law on this subject, save the instant case, making remand a desirable option for at least two reasons. This Court may send the case to the BIA without concern that its decision to do so (a) would countermand the approach taken in binding circuit precedent, or (b) would create needless conflict between circuit holdings and agency law.

v. *High volume* – There is a high volume of cases of persons applying for cancellation of removal. The volume may not be apparent to this Court because generally Circuit Courts of Appeal do not have jurisdiction to review denials of this discretionary form of relief. 8 U.S.C. § 1252(a)(2)(B)(i). Given the high volume of cases that may involve this issue, and because the BIA, in performing its appellate function, will review these decisions, there is great value in having the BIA develop standards as it addresses these cases. As an illustration of volume, two Circuit Courts of Appeals addressed this issue within two days.

vi. *Importance of the issue* -- A finding of ineligibility for cancellation of removal may leave a noncitizen with no options for legalizing their status and keeping his family intact. A person is only eligible for cancellation of removal if a U.S. citizen or Lawful Permanent Resident spouse, parent or child will suffer extreme and extraordinarily unusual hardship. Thus, the negative impact of ineligibility affects U.S. citizens and Lawful Permanent Residents who may suffer enormously.

Second, there is already a split in the Circuits over whether 8 U.S.C. § 1101(f)(7) is clear or ambiguous. Cf. *Trunov v. Holder*, 2014 U.S. App. LEXIS 10518 (2nd Cir. June 4, 2014).

Third, as set forth infra at Point 2, Petitioner submits that this honorable Court mistakenly found that the term "conviction" does not include the imposition of a sentence contrary to the Immigration and Nationality Act's widely accepted definition of "conviction."

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The Tenth Circuit favorably addressed the idea that when the Board issues a precedent decision contrary to this Court's on an issue, it may be an exception to the "law of the case" doctrine. *Padilla-Caldera v. Holder*, 637 F. 3d 1140 (10th Cir. 2011). "If a provision of the INA is ambiguous and the BIA's interpretation of it is reasonable, then the BIA is not bound to follow a contrary interpretation by this court." *Padilla-Caldera* citing *Brand X*, 545 U.S. at 982-83; *In re R-A-*, 24 I.&N. Dec. 629, 631 & n.4 (Att'y Gen. 2008) (recognizing that although BIA historically followed circuit court precedent within particular circuit even when it disagreed with it, *Brand X* makes clear that BIA is not bound by circuit court authority regarding interpretation of ambiguous statutory provisions).

The Second Circuit remanded *Trunov* so "the BIA [can] by published opinion interpret a statute it is charged with enforcing." *Trunov* at *4. The issue raised here is of national importance in an area of the law where uniformity is particularly important, i.e. what is a conviction under the INA.

Because there is great value in national uniformity, it would be prudent to rehear Petitioner’s case and remand it to the Board for consolidation with *Trunov*. In light of the foregoing, rehearing is warranted.

2. THE PANEL OVERLOOKED OR MISAPPREHENDED THE TERM, “CONVICTION,” IN THE PHRASE, “CONFINED, AS A RESULT OF CONVICTION

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The panel's decision overlooked or misapprehended a key term in the statutory provision at issue. Section 1101(f)(7) provides that an alien will be automatically barred from establishing good moral character if he was, during the relevant period, "confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more." The panel's decision correctly identified and quoted this language, stating, "In § 1101(f)(7), Congress intended to bar aliens from establishing good moral character when an alien was 'confined, as a result of [a] conviction,' for 180 days or more." *Garcia-Mendoza*, 2014 U.S. App. LEXIS 10149 at *7.

However, in the very next lines, and indeed in the rest of the decision, the court failed to consider what the phrase "as a result of [a] conviction" added to the analysis. Instead, the panel stated that the statutory language "does not reference the ordered term of imprisonment" and that the inquiry is "not dependent on the formal language of the court's sentencing order." *Id*.

Had the Court analyzed the full statutory phrase, "confined, *as a result of conviction*," it could have found that the clear language of § 1101(f)(7) precludes adjudicators from invoking the statutory bar to good moral character where a state court has reduced a criminal sentence below the 180 day threshold. This is because the INA defines "conviction" to include both an adjudication of guilt *and* a sentence. However, even if the court on rehearing found the phrase to be

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ambiguous, like the court in *Trunov* did, then remand to the agency would be appropriate, allowing the Board to prepare a more fully reasoned, published decision.

A. **The Statutorily Defined Meaning of "Conviction" Requires a Sentence**

The plain language of the INA indicates that the bar to good moral character is triggered only if a person is confined for 180 days or more "as a result of conviction." INA § 101(f)(7); 8 U.S.C. § 1101(f)(7). Congress has defined the term "conviction." It means, in those situations where an adjudication of guilt has been issued, "a formal judgment of guilt . . . entered by a court." INA § 101(a)(48)(A); 8 U.S.C. § 1101(a)(48)(A).

In Mr. Garcia Mendoza's case there was a judicial finding of guilt. Therefore, the definition in § 1101(a)(48)(A) applies to his situation. He would be barred from establishing good moral character if he was "confined, as a result of [a formal judgment of guilt . . . entered by a court]" for 180 days or more. 8 U.S.C. § 1101(f)(7); 8 U.S.C. § 1101(a)(48)(A).

That only begs the question, of course—what is the meaning of "formal judgment of guilt?" Using Federal Rule of Criminal Procedure 32(k)(i) as an interpretive guide, every Court of Appeals to consider the meaning of the phrase, "formal judgment of guilt" in the INA has agreed that the concept must include

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both an adjudication of guilt *and* the imposition of a sentence. *Rodriguez v. U.S. Department of Homeland Security*, 629 F.3d 1223, 1226-27 (11th Cir. 2011) ("[T]o establish a conviction for immigration purposes, a court must accept a guilty plea or jury verdict, make an adjudication, and impose a sentence."); *Singh v. Holder,* 568 F.3d 525, 531 (5th Cir. 2009) (for purposes of the INA, a defendant's date of conviction is the same as the date of sentencing); *Perez v. Elwood*, 294 F.3d 552, 562 (3rd Cir. 2002) (an alien's conviction was not entered until a state court imposed a criminal sentence); *Puello v. Bureau of Citizenship and Immigration Services*, 511 F.3d 324, 329 (2nd Cir. 2007).

The Board has also held that the definition of "conviction" in the INA must include a punishment. In *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008), the Board held that the imposition of costs and surcharges in the criminal sentencing context constituted a form of "punishment" or "penalty" for purposes of establishing that an alien has suffered a "conviction." Implicit in the Board's analysis was the understanding that without a penalty there could be no "conviction" within the meaning of § 1101(a)(48)(A).

Given the universal understanding that a "conviction" in the INA encompasses *both* a finding regarding guilt *and* an accompanying sentence, any modification of a criminal sentence necessarily modifies the "conviction." The question the becomes, where a sentence (and therefore a "conviction" for purposes

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of § 1101(f)(7)) has been corrected, which one counts for the § 1101(f)(7) calculus—the first, the last, or both?

When considering a "term of imprisonment," the Board has already held that confinement served under a voided sentence is not pursuant to a lawful sentence. *Matter of Martin*, 18 I&N Dec. 226, 227 (BIA 1982). In *Martin*, the Board considered the immigration consequences for a foreign national who had successfully pursued a sentence correction under C.R.C.P. 35(a). *Martin*, 18 I&N Dec. at 227. The Board acknowledged that the legal impact of the Colorado court's resentencing was to render the initial sentence "void and of no force and effect." *Id*. It held that in resentencing a defendant the trial court "reconsiders the imposition of sentence and sentences the defendant *anew*". *Id*. Accordingly, the "new, reduced sentence stands as the only valid and lawful sentence imposed upon the defendant." *Id*.

The Board came to a similar conclusion in *Matter of Cota-Vargas*, 23 I&N Dec. 849, 850-853 (BIA 2005), holding that a state court's sentence reduction is recognized as valid for immigration purposes. The panel rejected Mr. Garcia Mendoza's reliance on that decision, however, based on a conclusion that the immigration statute at issue in *Cota-Vargas* focused on the length of a "term of imprisonment," but that in § 1101(f)(7) the ordered term of imprisonment is not determinative. *Garcia-Mendoza*, 2014 U.S. App. LEXIS 10149 at *7.

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That conclusion—that the language of § 1101(f)(7) "does not reference the ordered term of imprisonment"—is clearly wrong, as demonstrated above. A "conviction," under the INA, refers to both a finding of guilt *and* a sentence. Accordingly, person is prevented from establishing good moral character if he has been "confined, as a result of" [a finding of guilt and a term of imprisonment] for 180 days or more. 8 U.S.C. § 1101(f)(7). In other words, the ordered term of imprisonment *is* determinative.

As the Second Circuit pithily summarized the issue, "There is a substantial question as to whether someone can be "confined, as a result of conviction" other than pursuant to a sentence. In other words, how is a sentence not a necessary component of § 1101(f)(7)?" *Trunov* at *4.

B. <u>On Rehearing, if the Court Finds the Phrase, "Confined as a Result of Conviction" to be Ambiguous, a Remand to the Board is Warranted</u>

Should this court find, after reanalyzing the statute with a correct understanding of the term "conviction," that §1101(f)(7) is ambiguous, then a remand to the Board for issuance of a published decision would be appropriate, allowing the agency to make a reasoned review of the provision. In subsequent litigation, the court can decide whether or not to defer to that interpretation under the second step of *Chevron*.

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This would be in accord with the reasoning of the court in *Trunov*, which remanded the exact same legal issue to the Board for the issuance of a published decision. *Trunov* at *4. Following the Second Circuit's lead would promote the development of a uniform understanding of the statute, and possibly prevent a future circuit split.

V. CONCLUSION

For the foregoing reasons, amicus respectfully supports both panel rehearing in this matter, as well as rehearing en banc.

Dated: August 1, 2014

Respectfully submitted:

s/ Maris J. Liss
Maris J. Liss
33505 W. 14 Mile Rd.
Suite 20
Farmington Hills, MI
48331
PH: (248) 932-0990
mliss@greencard-us.com

s/ Aaron C. Hall
Aaron C. Hall
12203 E. 2nd Ave.
Aurora, CO 80011
PH: (303) 297-9171
aaron@immigrationissues.com

s/ Mark R. Barr
Mark R. Barr
1601 Vine Street
Denver, CO 80206
PH: (303) 554-8400
mbarr@lichterimmigration.com

Attorneys for *Amicus Curiae*

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VII. CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Fed. R. App. P. 32(a)(7)(C) that this brief complies with the word limitation of 10th Cir. R. 29.1 because it contains 2,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

and that:

The digital submissions have been scanned for viruses with the most recent version of Norton Internet Security and, according to the program, are free of viruses.

and that:

Paper copies to be submitted to the court are exact copies of the version submitted electronically.

and that:

This submission is in compliance with the privacy and redaction requirements of Fed. R. App. P. 25(a)(5), as well as Fed. R. Civ. P. 5.2. The brief does not contain any social security numbers or tax identification numbers, birth dates, minors' names, or financial account numbers.

s/ Aaron C. Hall
Attorney for *Amicus Curiae*

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VIII. CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on August 1, 2014, I electronically filed the foregoing "Brief of *Amicus Curiae* American Immigration Lawyers Association in Support of Petition for Rehearing or Rehearing En Banc" with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Ingrid Jefferts DeFranco,
Sandra Saltrese-Miller,
Ben Winograd,
James A. Hurley,
John Longshore, and
Julie Saltman

s/ Aaron Hall
Attorney for Amicus Curiae

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