No. 05-74350

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Flavio Nunez-Reyes,

A#078-181-648,

Petitioner.

v.

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

Respondent.

On Petition For Review Of An Order Of The Board Of Immigration Appeals

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Brief of Amici Curiae, American Immigration Lawyers Association and the National Immigration Project of the National Lawyers Guild in Support of Petitioner

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NOT DETAINED

Calendared: Pasadena, December 14, 2010

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Introduction

An expungement under the Federal First Offender Act ("FFOA") prevents a first simple drug possession conviction in federal court from constituting a conviction "for any purpose under the law, or for any other purpose." 18 U.S.C. § 3607(b).

In 1974, the Board of Immigration Appeals adopted a similar rule for state convictions, holding that rehabilitative relief that eliminates a first drug possession conviction in state court also will eliminate the conviction for immigration purposes. The BIA's rule was based upon the policies underlying the FFOA as well as the former Federal Youth Corrections Act ("FYCA"). The BIA initially limited this relief to state provisions that exactly tracked the FFOA.

In *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994), this Court held that Equal Protection required the Attorney General to treat expungements under the various state schemes in the same manner, as long as the conviction would have qualified for FFOA treatment in federal court. In *Matter of Manrique*, 21 I. & N. Dec. 58 (BIA 1995), the Board decided to adopt the *Garberding* rule as a matter of policy, focusing on the individual's conduct. *Manrique*

accepted any state rehabilitative relief (which amici will refer to as "expungement") if the offense would have qualified for FFOA treatment had the case been held in federal court.

In a different line of cases, distinct but simultaneously evolving, the BIA developed a "definition of conviction" to determine when a disposition first attains sufficient finality to constitute a conviction. The BIA set out a three-pronged definition in *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988). The *Ozkok* definition, defining when a conviction first occurs, did not address the rule in *Manrique*, concerning expungement of an existing conviction based on policies underlying the FFOA.

In 1996 Congress codified the *Ozkok* "definition of conviction" at 8 USC § 1101(a)(48)(A), minus the third prong of the decision. Under the third prong, a particular deferred adjudication scheme in Texas had been held never to amount to a conviction.

In 1999 the Board held that in enacting § 1101(a)(48), Congress had legislatively overturned *Manrique*, forcing the BIA to abandon its policy of accepting state expungement of an FFOA-analogous first drug offense. *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

In 2000 this Court held that as a matter of Equal Protection, since the FFOA itself clearly remained existent to eliminate for "any" purpose -- including immigration -- an applicable conviction in federal court, then as in *Manrique* a person in state court who receives rehabilitative treatment for an offense that would have be eligible for FFOA treatment (or for a lesser included offense) must also be free of those immigration consequences. *Lujan-Armendariz v.INS*, 222 F.3d 728(9th Cir. 2000).

The Government urges this Court to withdraw from the rule in *Lujan-Armendariz*. The Government's position is incorrect. First, *Matter of Roldan* incorrectly interprets the statute. Second, *Lujan* was correct in holding that the FFOA was not repealed and Equal Protection is meaningless if equivalent state dispositions are not treated in the same way the FFOA would eliminate "any" consequence, including immigration. Third, reliance interests and all other relevant factors weigh heavily in favor of this Court not disturbing its long-held and consistently reaffirmed precedent.

Statement of Interest

The American Immigration Lawyers Association and the National Immigration Project of the National Lawyers Guild are organizations whose missions relate to the jurisprudence of the nation's immigration laws. The issues here relate directly to the core mission of both organizations.

Argument

I. Section 1101(a)(48) Did Not Overturn the Rule That State Rehabilitative Relief Eliminates a State Conviction for Immigration Purposes if the Conviction Met the Elements of the Federal First Offender Act.

Congress did not intend to overturn the *Manrique* rule when it enacted Section 1101(a)(48)(A). This Section defines the elements required for a criminal court disposition to attain sufficient finality to amount to a "conviction" in the first place. In defining when a conviction first occurs, Congress did not intend to control the effect of expungement of an FFOA-analogous conviction. This is clearly shown by the plain language of § 1101(a)(48) and the judicial history of the language codified there, as well as the legislative history.

Rules of statutory construction suggest that Congress was aware of and approved rather than overturned the rule in Manrique when it enacted § 101(a)(48)(A). At the very

least, the BIA is free to continue with this policy based upon the several reasons it cited in *Manrique*.

A. The Text of Section 1101(a)(48)

Traditional rules of statutory construction dictate that deportation statutes, because of their drastic consequences, must be strictly construed. See, e.g., *Barber v. Gonzales*, 347 U.S. 637, 642-643 (1954). This is especially true where, as here, the statute has an application in federal criminal proceedings as well.

The plain language of § 1101(a)(48) demonstrates that Congress intended the provision to define when a conviction first occurs, and did not intend to overturn the *Manrique* rule. The statute provides:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Section 1101(a)(48)(A) does not explicitly address the elements of the *Manrique* rule. It contains no reference to the FFOA, expungements, or vacation of judgment. "[E]xpungements do not fall under the plain language of the

conviction definition in the same way that deferred prosecutions do" and "[i]t thus makes sense to read the § 1101(a)(48)(a) definition to exclude expungements." *Batrez Gradiz v. Gonzales*, 490 F.3d 1206, 1208 (10th Cir. 2007).

In *Lujan-Armandariz*, the INS conceded that vacated convictions were an implied exception. *Lujan-Armandariz*, 222 F.3d at 746-47. In *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000), the BIA recognized another implied exception for juvenile delinquency proceedings. *Matter of Salazar-Regino*, 23 I. & N. Dec. 223, 248-249 (BIA 2002) (Rosenberg, Board Member, dissenting). This Court in *Lujan-Armandariz* recognized implied exceptions are inconsistent with the argument that § 1101(a)(48)(A) provides "an exhaustive, all-inclusive, inflexible definition of conviction." *Lujan-Armandariz*, 222 F.3d at 747.

The text of section 1101(a)(48) contains *no* language to support the proposition that a vacation of judgment eliminates immigration consequences but a FFOA-analogue expungement does not. The circuit courts addressing the question have skipped over this logical anomaly and, as a result, have given short shrift to the text of the statute. Given this inherent contradiction, as well as the lack of any language addressing the FFOA or expungement, the "plain

language" of the statute does not overturn the *Manrique* rule.

B. The Judicial History of Section 1101(a)(48)

In large part, the Government's argument and the court opinions on which it relies rests on a mistaken understanding of two related, but analytically distinct, lines of cases. Placed in context, it is clear that codification of an altered definition of conviction did not invalidate the *Manrique* rule.

1. The Development of Separate Lines of Immigration Case Law Regarding the Definition of Conviction and the Effect of Expungement of FFOA-Analogous Convictions.

The codification of the BIA's "definition of conviction" at § 1101(a)(48) did not overturn the *Manrique* rule, because the definition of when a conviction comes into being, and the policy governing the effect of expungement of an FFOA-analogous offense, are two separate and independent issues in immigration law with roots in two separate lines of cases. See discussion in *Lujan-Armendariz*, 222 F.3d at 734-43.

The two resolutions have very different immigration effects. A state expungement of an FFOA-analogous conviction is limited in that it will only eliminate a first minor drug conviction. Also, because the conviction

exists, in some cases the noncitizen will be vulnerable to removal until it is expunged. *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004). In contrast, if a disposition never amounts to a conviction, the noncitizen never is vulnerable to removal, and this will apply regardless of the type of offense, e.g. second possession, forgery. See, e.g., *Martinez-Montoya v. INS,* 904 F.2d 1018 (5th Cir. 1990).

The Supreme Court in *Pino v. Landon,* 349 U.S. 901 (1955) suggested that a case that was placed indefinitely "on file" following a guilty plea under a Massachusetts provision did not have sufficient finality to amount to a conviction for immigration purposes. In response, the BIA set out to create a nationally applicable "definition of conviction." See *Matter of O-*, 7 I&N Dec. 539 (BIA 1957) (a conviction results despite suspended imposition of sentence); *Matter of L-R-*, 8 I&N Dec. 269 (BIA 1959) (three-pronged test). In *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988) the Board created a new three-pronged definition of conviction, part of which was codified at § 1101(a)(48)(A). None of these "definition of conviction" cases suggested that the definition affected the rules governing expungement of FFOA-analogous convictions.

During the same time period, in a different series of cases, the Board addressed the different question of when post-conviction relief pursuant to a state rehabilitative statute eliminates an FFOA-analogous conviction for immigration purposes. The Attorney General first held that because of the severity with which Congress treated drug offenses, a state expungement would not eliminate a narcotics conviction for immigration purposes. *Matter of A-F-*, 8 I&N Dec. 429 (A.G. 1959). This position changed beginning with *Matter of Andrade*, 14 I&N Dec. 651 (BIA 1974), when then-Solicitor General Robert Bork urged immigration authorities to accept expungement of a state conviction for simple possession of marijuana that would have qualified under the FYCA in federal proceedings, based on leniency and the principle of adhering to a federal standard. *Id.* at 654-60. Thereon, the BIA held that a simple possession conviction that was eliminated under a state counterpart to the FFOA or FYCA would have no immigration effect. *Id.* at 652. At first the Board only recognized expungements under state schemes that were exact counterparts to the FFOA. *Matter of Werk*, 16 I&N Dec. 234 (BIA 1977); *Matter of Deris*, 20 I&N Dec. 5 (BIA 1989).

In *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994) this Court held that Equal Protection required the Attorney

General to treat expungements under the various state schemes in the same manner, as long as the conviction would have qualified for FFOA treatment in federal court. In *Matter of Manrique*, the Board decided to adopt this as a policy "[i]n the interest of uniform and fair application of the immigration laws and in accordance with the principles set forth by the Solicitor General and the courts." *Manrique*, 21 I&N Dec. at 64.

2. Congress Has Never Addressed or Overturned the *Manrique* Rule

In *Matter of Ozkok*, the BIA provided a new "definition of conviction" setting out the elements required for a conviction to occur. After publishing the definition in *Ozkok*, the BIA continued to apply and expand the rule accepting state expungement of FFOA-analogous expungements in precedent decisions. *See Matter of Deris*, 20 I&N Dec. at 5; *Matter of Manrique*, 21 I&N Dec. at 58.

Section 1101(a)(48)(A) codified nearly verbatim the definition of conviction in *Ozkok*, except for one change: *Ozkok* set forth a three-prong test for when a criminal disposition amounted to a conviction, and Congress used only the first two prongs. The *Ozkok* "third prong" had provided that the definition of conviction did not include a type of deferred adjudication that allowed for further

proceedings on the merits of guilt or innocence, following a guilty plea and violation of probation.

Congress' purpose in eliminating the *Ozkok* third prong in § 1101(a)(43)(A) was to define this particular type of disposition as a "conviction" for immigration purposes. *Compare Cf. Martinez-Montoya v. INS,* 904 F.2d 1018 (5th Cir. 1990) (Texas deferred adjudication is not a "conviction" under the third prong of the *Ozkok* definition) with *Matter of Punu*, 22 I&N Dec. 224, 228-229 (BIA 1998) (*Martinez-Montoya* no longer applies and the disposition now is a conviction under § 1101(a)(48)(A), because the *Ozkok* third prong was deleted.)

When it enacted Section 1101(a)(48) in 1996, Congress knew the twenty-year history of administrative decisions upholding the effectiveness of state expungement of FFOA-analogous convictions culminating in *Matter of Manrique.* See, e.g., *United States v. Hunter*, 101 F.3d 82, 85 (9th Cir. 1996) (Congressional intent must be determined assuming that Congress acted with full knowledge of appellate decisions construing the language Congress chose to use). See also *Matter of* Salazar-Regino, 23 I&N Dec. at 246; *Lujan-Armendariz,* 222 F.3d at 747.

Indeed, while the canon of construction sets out that a court may "presume" Congressional knowledge in certain

circumstances, it is evident from the statutory text that Congress *actually* knew the judicial interpretative background of its statutes because Congress enacted the *Ozkok* definition as to when a conviction first occurs and then intentionally *altered* it. *Lorillard v. Pons*, 434 U.S. 575, 581 (1977) (presumption that Congress acted with knowledge is particularly appropriate where Congress "exhibited both a detailed knowledge of the [incorporated] provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation."). Accordingly, § 1101(a)(48)'s definition of conviction speaks only to the moment when a conviction comes into existence and says nothing about how an expunged conviction is to be treated.

Moreover, Congress is presumed not to change well-established legal precedent by silence. *American Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606, 613-14 (1991) ("If this amendment had been intended to place the importation limitation on the scope of the Board's rulemaking powers ... we would expect to find some expression of that intent in the legislative history."). When § 1101(a)(48) was codified in 1996, the Board had recognized expungements for FFOA and FYCA-analogous convictions for over twenty years

in multiple decisions. *See, e.g., Matter of Andrade,* 14 I&N Dec. at 654 (adopting rule that marijuana convictions expunged under state laws similar to FYCA will not constitute convictions for immigration purposes); *Matter of Werk,* 16 I&N Dec. at 234, 236 (BIA 1977) (state convictions expunged under FFOA counterparts cannot be a basis for deportation).

None of the FFOA cases concerned when a conviction came into existence, and Congress' creation of a statutory definition of conviction did not address the separate issue of FFOA-analogous expungements. Silence, in this case, speaks volumes because given the specificity of Congressional action in undoing *Ozkok*, Congress logically would have been equally explicit in undoing the *Manrique* rule. *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 & accompanying text (1991) (explaining that judges, like detectives, should take note that a "watchdog did not bark in the night").

Though the text is plain on this point, so too is the legislative history. The Committee Report to § 1101(a)(48)(A) affirms that Congress' intent was to codify the *Ozkok* definition of conviction, absent the exception provided by the third prong:

> "This section deliberately broadens the scope of the definition of "conviction" beyond that adopted by the [BIA] in *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). As the Board noted in *Ozkok*, there exist in the various states a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered "convicted" have escaped the immigration consequences normally attendant upon a conviction. *Ozkok*, while making it more difficult for alien criminals to escape such consequences, does not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the alien's future good behavior.
>
> For example, the third prong of *Ozkok* requires that a judgment or adjudication of guilt may be entered if the alien violates a term or condition of probation, without the need for any further proceedings regarding guilt or innocence on the original charge. In some States, adjudication may be "deferred" upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the alien violates probation until there is an additional proceeding regarding the alien's guilt or innocence. In such cases, the third prong of the Ozkok definition prevents the original finding or confession of guilt to be considered a "conviction" for deportation purposes. ***This new provision, by removing the third prong of Ozkok, clarifies Congressional intent that even in cases where adjudication is "deferred" the original finding or confession of guilt is sufficient to establish a "conviction" for purposes of the immigration laws.*** In addition, this new definition clarifies that in cases where immigration consequences attach depending upon the length of a term of sentence, any court-ordered sentence is considered to be "actually imposed," including where the court has suspended the imposition of the sentence. The purpose of this provision is to overturn current administrative rulings holding that a sentence is not "actually imposed" in such cases. See Matter of Castro, 19 I&N Dec. 692 (BIA 1988); In re Esposito, Int. Dec. 3243 (BIA, March 30, 1995)."

H.R. Conf. Rep. No. 104-828. at 224 (1996) (emphasis added).

The Board in *Roldan* quoted the Committee Report out of context to hold that Congress intended to end *Manrique*. The Board selected language from the report that, without context, sounded as if Congress were dramatically expanding the definition. This includes the statement that "aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered 'convicted' have escaped the immigration consequences" of a conviction, and the statement that *Ozkok* "did not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the alien's future good behavior." *See Roldan*, 22 I. & N. Dec. at 519. With the careful and informed analysis that is appropriate to this high-stakes question, it is clear that these statements do not indicate a radical expansion of the definition. The first statement was taken verbatim from *Ozkok*, 19 I&N Dec. at 551, while the second statement refers specifically to the deletion of the third prong, described at length immediately thereafter in the Report. The accepted canons of statutory construction do not condone out-of-context quotation.

One more thing bears mention: the Board's use of the Committee Report is particularly disingenuous, because the

same report later explains why the committee enacted a "definition of sentence" at § 1101(a)(48)(B) and the language used there undermines *Roldan*'s reasoning entirely. In the last two sentences quoted above, the Committee Report states that the "purpose of this provision is to overturn current administrative rulings holding that a sentence is not 'actually imposed' in such cases," and names the two Board cases to be overturned. It is an incredible assumption that the members of Congress who drafted the report would explain their intent to *specifically* and *overtly* overrule two Board decisions relating to the definition of sentence, while at the same time *silently* and *implicitly* overruling the larger and more significant body of case law governing FFOA-analogous expungements.

II. Lujan was correctly decided.

Lujan held that a federal offense "expunged" under the FFOA is an exception to definition of a "conviction" for immigration purposes under 8 U.S.C. § 1101(a)(48)(A). In reaching this conclusion, *Lujan* applied "[s]traightforward principles of statutory construction" to find that the FFOA was not *explicitly* repealed given that the text of § 1101(a)(48)(A) does not on its face mention or repeal the

FFOA. *Lujan*, 222 F.3d at 743. This analysis has never been contradicted by any judicial decision or the BIA.

Lujan also held that the FFOA was not *implicitly* repealed given that there was neither an irreconcilable conflict between the two statutes nor an entire displacement of the FFOA by the INA and, most significantly, no evidence of a "clear and manifest" intent by Congress to repeal the FFOA. *Id.* at 744-48 (finding no irreconcilable conflict for three separate reasons, including the INS's concession that "conviction" definition contained *other* implied exceptions, such as convictions vacated on the merits).

Thus, "compelled to conclude that Congress did not intend its repeal," *id.* at 748, *Lujan* held that both statutes can be given effect by treating a disposition under the FFOA as a narrow exception that does not frustrate the broad purposes of the definition of a conviction under § 1101(a)(48)(A). *Id.* at 745.

This Court's equal protection analysis in *Lujan* is based on Congress's clear goal in the FFOA "to afford protection to first time drug possessors against the harsh consequences that follow from a drug conviction." *Lujan*, 222 F.3d at 737. *Lujan*'s rule was a restatement of the rule articulated 16 years ago in *Garberding*. There is no

reason to depart from these well-reasoned decisions in both *Garberding* and *Lujan*. Even under the minimal scrutiny test for equal protection violations, the government may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 446-447 (1985).[1]

The *Garberding* holding is correct and valid. In *Garberding*, the court properly found that the government's arguments for distinguishing among state rehabilitative statutes – which penalized the exact same conduct -- were "wholly irrational" because the scope of the state statute applied to an individual was a "fortuitous circumstance" not within the individual's control. 30 F.3d at 1191. It concluded that "distinguishing Garberding for deportation because of the breadth of Montana's expungement statute, not because of what she did, has no logical relation to the

[1] *See also Abebe v. Mukasey*, 554 F.3d 1203, 1210 (en banc), rehr'ng denied in *Abebe v. Holder*, 577 F.3d 1113 (9th Cir. 2009) (en banc) (Clifton, J., concurring) ("We must place some rational bounds on what survives rational basis review if the constitutional right of equal protection is to have any meaning whatsoever outside the context of suspect classifications."); *id.* at 1215 (Thomas, J., dissenting) ("While …we do not have to look to the actual rationale for the legislation, in order to be rational, the reason must be consistent.").

fair administration of the immigration laws or the so-called 'war on drugs.'" *Id.*

Likewise, in *Lujan*, the Court examined the legislative purpose underlying the FFOA and found that "the critical question is not the nature of the state's expungment statute but rather 'what [petitioner] did.'" *Lujan*, 222 F.3d at 738 n.18. In light of the underlying purposes of FFOA treatment, the Court concluded "there is no rational basis for a federal statute that treats persons adjudged guilty of a drug offense under state law more harshly than persons adjudged guilty of the identical offense under federal law." *Id.* at 749.

This reasoning has been repeated and affirmed by eight subsequent panels of this court. Other circuits have criticized the equal protection analysis posited in *Lujan* but those criticisms lack merit. And it is a poor principle to adopt the mistaken analysis of other courts for the mere sake of "national uniformity". A wrong rule is not any less wrong for being widely applied.

1. Denying relief to state offenders with identical offenses is inconsistent with Congress's goal to provide immigration relief to first-time controlled substance offenders.

The Third, Seventh, and Eighth Circuits have found a rational basis for limiting relief to federal defendants, reasoning that Congress may have been more familiar with federal laws and federal defendants, or may have felt that state statutes, courts, or criminal justice systems did not share the same objectives as the FFOA. *Ramos v. Gonzales*, 414 F.3d 800, 806 (7th Cir. 2005); *Acosta v. Ashcroft*, 341 F.3d 218, 227 (3d Cir. 2003); *Vasquez-Velezmoro v. US INS*, 281 F.3d 693, 698 (8th Cir. 2002). This reasoning is unpersuasive.

First, the Supreme Court has admonished the federal courts about creating rules that denigrate state court proceedings. In *Carachuri-Rosendo v. Holder*, 560 U.S. _, 130 S.Ct. 2577 (2010), the Court emphasized the importance of respecting the choices made in the state criminal system, noting that the prosecutor in Carachuri's case had chosen not to seek a recidivist enhancement under state law. The Supreme Court found that,

> [w]ere we to permit a federal immigration judge to apply his own recidivist enhancement after the fact so as to make the noncitizen's offense 'punishable' as a felony for immigration law purposes, we would denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns.

Carachuri-Rosendo, 130 S.Ct. at 2588.

Second, the assumption underlying this rationale that a federal defendant may be more meritorious for relief is counter to the reality of controlled substance prosecutions. Generally, it is the more serious controlled substance offenses that are prosecuted in federal court. It is therefore not "rational" to speculate that Congress intended to give preferential treatment to federal offenders.

Third, this reasoning is inconsistent with the underlying purpose of the FFOA. The FFOA was initially passed as part of the "Comprehensive Drug Abuse Prevention and Control Act of 1970" at 21 U.S.C. § 844(b) (1970). *Lujan*, 222 F.3d at 736; *id.* at 737 (FFOA is "a broad Congressional effort to afford protection to first time drug possessors against the harsh consequences that follow from a drug conviction."); *Matter of Deris*, 20 I. & N. Dec. at 9-10 ("[in the FFOA] Congress expressed its intent to rehabilitate the individual user of drugs. This policy has been considered to be of *equal importance* to the congressional policy to deport narcotics offenders.") (emphasis added). Thus, in light of this broad intent, it is irrational that Congress also could have intended to exclude state offenses, under which the majority of drug offenses are prosecuted. *See Lujan*, 222 F.3d at 743 n. 24.

Fourth, this reasoning is illogical in light of the text of the FFOA, which explicitly shows respect for state prosecutions. The FFOA itself treats prior federal and state controlled substance offenses *identically* as a disqualifying factor precluding FFOA treatment. *See* 18 U.S.C. § 3607(a)(1) (requiring that defendant "has not, prior to the commission of such [current qualifying] offense, been convicted of violating a Federal *or State law* relating to controlled substances . . . .") (emphasis added). In addition, Congress's use of the phrase "described in [21 U.S.C. § 844]" shows that it did not intend that only federal offenses under § 844 would be included under FFOA. *Matter of Salazar*, 23 I. & N. Dec. at 245 (Rosenberg, Board Member, dissenting). It is also contrary to the practice of the federal criminal statutes in other contexts, under which "sentences for expunged convictions are not counted." *See* United States Sentencing Guidelines § 4A1.2(j) (2010) (federal sentencing guidelines for criminal history categories).

Fifth, the reasoning is inconsistent with the rest of the INA, which consistently treats federal and state controlled substance convictions identically. 8 U.S.C. § 1101(a)(48)(A) (conviction definition applies to offenses under "Federal or State law"). State and federal

convictions relating to a controlled substance equally trigger removal proceedings from the United States. *See e.g.*, 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B). Thus, it would not be rational for Congress to carve out this single exception by treating rehabilitated federal offenders better than otherwise identical rehabilitated state offenders who have undergone equivalent treatment.

2. It is arbitrary to distinguish among state offenders.

The Fifth, Eighth and Eleventh Circuits have criticized the equal protection analysis because individuals in state proceedings are not "sufficiently similar" to those under the FFOA because of differences in the state sentences or the extent of relief afforded under the state rehabilitative statute. *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321 (5th Cir. 2004); *Vasquez-Velezmoro*, 281 F.3d at 697; *Fernandez-Bernal v. AG of the US*, 257 F.3d 1304, 1316-17 (11th Cir. 2001). The reasoning used in these cases is unconvincing.

First, the analysis fails to focus on the relevant question for equal protection: whether the individual "could have received relief under the [FFOA] and does receive relief under a state rehabilitative conduct." *Lujan*, 222 F.3d at 738 n. 18. It is irrational to distinguish between two possession offenses, simply on the

basis of the sentence, since the critical act is that of first-time simple possession (or lesser included offenses).

Second, to focus on the length of state sentence or other aspects of the state expungement statute is also incorrect because the one-year probation period is *not a prerequisite* to eligibility under the FFOA, it is part of the *consequences* of FFOA eligibility. FFOA eligibility is not based on the length of the sentence or whether jail time is imposed. The state sentence is irrelevant since, if the identical case had been prosecuted in federal court, there would be no state sentence and by law the maximum probationary period would have been one year.

Third, this Court has already recognized that state sentences and the scope of the rehabilitative statute are "fortuitous circumstance[s]" unrelated to the petitioner's conduct. *Garberding*, 30 F.3d at 1191.

Fourth, this Court has recognized that the *Manrique* test would not require the government to "honor any grant of rehabilitation showing greater leniency than would have been available under federal law." *Dillingham v. I.N.S.*, 267 F.3d 996, 1008 (9th Cir. 2001), *citing Rehman v. INS*, 544 F.2d 71, 75 (2d Cir. 1976) (no "fear of undermining enforcement of federal deportation laws" can exist where such recognition "would extend no further than where

Congress itself has gone for federal criminals"). Thus, state defendants are not being given "better treatment," they are simply being afforded equivalent treatment under the immigration laws.

3. Denying relief to state offenders with identical offenses does not promote uniformity.

The First Circuit refuses to apply equal protection principles, reasoning that to do so would violate the interests of uniformity because it will lead to disparate treatment of persons from different jurisdictions. *Herrera-Inirio v. INS*, 208 F.3d 299, 309 (1st Cir. 2000). With all due respect, the First Circuit's reasoning is entirely inconsistent with equal protection principles. Limiting FFOA relief *only* for federal offenses creates impermissible non-uniformity because it creates an unequal standard between federal and states laws that is inconsistent with equal protection, and it ignores that the principle focus of equal protection must be the individual's conduct, not the legal regime that adjudicates it.

The Supreme Court has been clear on this point. In *Lopez v. Gonzales*, 549 U.S. 47 (2006), and *Carachuri-Rosendo*, 560 U.S.__ , 130 S.Ct. 2577, the Supreme Court held that the immigration consequences of state convictions

must be applied consistently as if the offense had been prosecuted in federal court. The holdings of *Lopez* and *Carachuri-Rosendo* instruct that, for a state conviction to qualify as an aggravated felony it is necessary for the underlying conduct to be punishable as a federal felony. Similarly, because an FFOA disposition "shall not be considered a conviction . . . for any . . . purpose," 18 U.S.C. § 3607(b), neither should a state expunged drug possession offense be treated as a conviction "for any purpose."

The Board and this Court have previously held that uniformity interests also counsel in favor of treating offenses provided FFOA-type treatment in state courts differently from convictions. *See Matter of Werk*, 16 I. & N. Dec. at 235 (extending FFOA treatment to state counterpart following *Matter of Andrade*, *supra*); *Matter of Manrique*, 21 I. & N. Dec. at 63-64 (applying FFOA to state equivalents "[i]n the interest of uniform and fair application of the immigration laws"); *Matter of Devison*, 22 I. & N. Dec. 1362, 1371 (BIA 2000) (en banc) (uniformity meant "faith[ful]" application of the "new statutory definition in a manner that will be consistent across state lines. … We continue to apply a federal standard, analyzing state juvenile or youthful offender proceedings against the

provisions of the FJDA."); *Dillingham*, 267 F.3d at 1009 ("[I]t is only the differential treatment by the government … that gives rise both to the problem of uniformity and to the constitutional issue of equal protection.")

A proper application of the equivalency test in *Matter of Manrique* would limit the pool of state court defendants to those who are similarly situated to the federal defendants intended to benefit from the FFOA. That is what the Constitution mandates.

III. The Principles of *Stare Decisis* Counsel In Favor Of Upholding *Lujan*.

The principle of *stare decisis* is a fundamental rule of law that promotes "stability, predictability, and respect for judicial authority." *Hilton v. S.C. Pub. R.R. Comm'n*, 502 U.S. 197, 200 (1991). The rule counsels that precedent should not be disturbed absent a compelling justification. *Id* at 202. When asked to depart from established precedent, this Court has applied a four-prong test set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-855 (1992), which requires the Court to consider): 1) the practical workability of the rule; 2) the hardship that those who relied upon the rule would suffer if it were overturned; 3) the doctrine underlying the rule; and 4) whether the rule

enjoys active application or justification. *See, e.g., Rand v. Rowland*, 154 F.3d 952, 955 (9th Cir. 1988). Applying a similar approach, the Supreme Court recently explained:

> Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.

Citizens United v. Federal Election Comm'n, 556 U.S.___, 130 S.Ct. 876, 911-912 (2010), *quoting Montejo v. Louisiana*, 129 S.Ct. 2079, 2088-89 (2009). Each of the *Casey* and *Citizens United* factors weigh in favor of this Court continuing to follow *Lujan* as a matter of *stare decisis*.

A. Application Of The Four Casey Factors Supports Lujan's Viability.

First, the *Lujan* rule is eminently workable. It provides specific instruction to noncitizens making strategic decisions when faced with a controlled substance charge. This Court has affirmed or clarified *Lujan* in eight precedent decisions, creating a clear legal landscape wherein everyone understands the rule's applicability and interpretation in immigration law.

Second, overruling *Lujan* would cause immense hardship. For ten years, the *Lujan* rule has become a central tenant of competent defense practice. *See, e.g.,* Continuing

Education of the Bar, University of California, *California Criminal Law - Procedure and Practice*, yearly editions from 2001 – 2010, §§ 52.14, 52.32.

In accord with *Lujan*, defense counsel have appropriately advised their non-citizen clients that pleading guilty to a first, minor drug offense will avoid adverse consequences if they successfully complete probation and later withdraw the guilty plea. Barring *Lujan*, except in the case of a first possession for one's own use of 30 grams or less of marijuana, which is not a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i), non-citizens who suffer a conviction relating to a controlled substance would be subject to mandatory immigration detention under 8 U.S.C. § 1226(c), as well as to deportability and inadmissibility under 8 U.S.C. §§ 1182(a)(2)(i)(I) and 1227(a)(2)(B)(i), and may be precluded from seeking certain forms of relief from removal, such as asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), and cancellation of removal under 8 U.S.C. § 1229b. Overturning *Lujan* is certain to cause these individuals and their families significant hardship. *See Casey* at 854. Noncitizens have ordered their lives around the rule in *Lujan* and those expectations must be

respected. *Landgraf v. USI Film Products*, 511 U.S. 244, 264 (1994).

The third and forth considerations articulated in *Casey* address "[w]hether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. . . ." *Casey*, 505 U.S. at 854-55 (internal citations omitted). Here, the animating principles of *Lujan* have not changed; they remain valid and necessary. The *Lujan* holding is fundamentally an equal protection decision. There has been no change in equal protection rational basis analysis since *Lujan* that would merit revisiting this decision. Nor has there been a change in the factual premise of the prior decision.

B. Application of the Citizens United Factors Supports Upholding *Lujan*.

After ten years of active application, *Lujan* is seasoned precedent. Furthermore, its underlying principles date back to 1974. The holding has been thoroughly integrated into defense practice and specifically relied upon by thousands of people in this circuit. And as explained above, *Lujan* remains as correct and well-reasoned

today as when it was first penned. Accordingly, the quality of the reasoning, the interests at stake for thousands of people and their families, and the longevity of the decision strongly weigh against overruling *Lujan*. *Accord*, *Citizens United*, 130 S.Ct. at 911-912.

C. If Lujan Is Overruled, It Should Only Affect Cases Prospectively.

Repealing *Lujan* would materially change the positions of thousands of non-citizens with established lives and families in the United States who pled guilty in reliance upon it. Deportation is "a harsh measure" that separates parents from children and spouses from one another. *I.N.S. v Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Because most drug offenses create automatic deportability and permanent inadmissibility, deportation is like banishment or exile that "may result in loss of…all that makes life worth living." *See Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

The law of this Circuit has established for over ten years that the expungement of a first-time controlled substance offense remains valid for immigration purposes. Thousands of noncitizens have relied on *Lujan* and its progeny. Retrospective application would not advance the new holding. Therefore, if the Court decides to overturn *Lujan*, the new rule should not be applied to those who

plead guilty (or no contest), prior to the establishment of the new rule. [2]

Conclusion

The en banc court should affirm the rule in *Lujan*.[3]

[2] *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *George v. Camacho*, 119 F.3d 1391, 1396 (9th Cir. 1997) (en banc); *Glazner v. Glazner*, 347 F.3d 1212, 1215 (11th Cir. 2003); *In re Mersmann*, 505 F.3d 1033, 1038 (10th Cir. 2007). This Court applies a three part test to determine whether a civil judicial decision applies retrospectively, as opposed to prospectively. First, the Court considers whether a decision establishes a new principle of law. If so, it may be applied prospectively only (as opposed to retrospectively). *George v. Camacho*, 119 F.3d at 1401. Second, the Court examines whether retrospective application will advance the new holding. *Id.* Third, the Court looks to fundamental principles of fairness. *Id.*

[3] Counsel for amici American Immigration Lawyers Association and the National Immigration Project of the National Lawyers Guild acknowledge with appreciation and gratitude the significant contributions of Su Yon Yi, a Law Clerk at Immigrant Legal Resource Center, and an applicant for admission to the State Bar of California to this Brief.

CERTIFICATE OF COMPLIANCE

I, Stephen W. Manning, certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this brief is double spaced, using monofaced typeface of 10.5 characters or fewer per inch and contains 6,713 words (not including the table of contents, table of authorities, certificate of service, and corporate disclosure statement).

s/ Stephen W. Manning

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I, Stephen W. Manning, certify that, pursuant to Fed. R. App. P. 26.1 the American Immigration Lawyers Association and the National Immigration Project are a professional associations operated for the purpose of promoting the general professional interests of the membership. There are no shares or stock within the meaning of Rule 26.1.

s/ Stephen W. Manning

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CERTIFICATE OF SERVICE

I, Stephen W. Manning, certify that on November 6, 2010, I electronically filed the Brief of Amicus, American Immigration Lawyers Association and National Immigration Project with the Clerk of 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 this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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