

December 21, 2010

The Honorable Molly Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Nunez-Reyes v. Holder*, No. 05-74350 (en banc)
(argued Dec. 14, 2010)

Ms. Dwyer:

During last week's oral argument, the Court raised three points that were not adequately addressed by petitioner's counsel: (1) may the Court affirm the BIA based on its reasoning without reaching the viability of the *Lujan-Armendariz* rule; (2) is the Court required to reach the constitutional question; and (3) how should the court address the reliance and retroactivity concerns inherent in overruling *Lujan-Armendariz*? On behalf of amici, the American Immigration Lawyers Association and the National Immigration Project of the National Lawyers Guild, we write to provide some context for the Court to aid in reaching a decision on these three questions. We kindly ask that a copy of this letter be provided to the members of the en banc court. A copy of the same has been served on Respondent's counsel by mail and by the CM/ECF system.

(1) The en banc court may simply affirm the Board's opinion because addressing *Lujan-Armendariz* is not necessary to dispose of this case. Alternatively, the *en banc* Court could remand the case to the panel with such instructions to affirm the Board's opinion. It appears that en banc hearing was granted improvidently. *United States v. Zolin*, 842 F.2d 1135, 1136 (9th Cir. 1988); *Church of Scientology of California v. Foley*, 640 F.2d 1335, 1343 (D.C. Cir. 1981). An order taking a case en banc may be dismissed as improvidently granted if it was granted on a mistaken impression of the record, the case is an unsuitable one in which to issue an authoritative opinion or that the case is simply too unimportant to merit en banc attention. *Church of Scientology*, 640 F.2d at 1344 (describing Supreme Court's practice of dismissing writs of certiorari as useful guide for dismissing *en banc* orders). Importantly, "it is not clear that [the] resolution of the constitutional question will make any

difference even to these litigants.” *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 122 (1994) (dismissing writ of certiorari as improvidently granted).

Likewise, the statutory question (whether Congress, in enacting 8 U.S.C. § 1101(a)(48) in 1996, meant to codify, with one exception not relevant here, the BIA’s decision in *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995), excluding state-expunged first-time drug possession dispositions from the definition of “conviction”) need not be answered either because, here, the BIA’s decision did not ultimately rest on either point. Instead, as the Government conceded at oral argument, the BIA’s analysis in this case correctly distinguished *Lujan-Armendariz* and the petitioner would lose thereby. The *Chenery* doctrine directs that the court, no matter that it is sitting en banc, confine its analysis to the basis for the Board’s decision. *SEC v. Chenery*, 318 U.S. 80, 87 (1943). Accordingly, the en banc court should vacate the panel opinion and deny the petition for review.

(2) If the Court decides, nonetheless, to address the merits of whether state-expunged first-time drug possession dispositions can count as “convictions” under Federal law, it should avoid the constitutional equal protection question because, as Judges Fletcher and Wardlaw suggested, there are serious practical implications of addressing the constitutional question, and courts should avoid deciding cases on constitutional grounds when that can be avoided as it can be here. Rather, as described in the AILA-NIPNLG Amicus brief, the Court can leave the *Lujan-Armendariz* result in place based on a plain language statutory analysis without the need to address the equal protection analysis of *Lujan-Armendariz*. See *AILA-NIPNLG Amicus Br.* at 7-16. The constitutional holding of *Lujan-Armendariz* could be modified by the en banc court as unnecessary because the plain language of the statute achieves the same result. *Lujan-Armendariz*, 222 F.3d at 746 (“We do not believe, however, that Congress intended to eliminate the longstanding rule that when a conviction or finding of guilt has actually been expunged, it may not thereafter be used as the basis for removal. As we explained above, both the legislative history and the language of the statute, viewed in relation to the prior administrative case law, particularly *Ozkok*, make the interpretation we favor by far the most likely one.”)

(3) Lastly, if notwithstanding the above, the Court addresses and overturns *Lujan-Armendariz*, the Court should narrow the ruling because of the vast and unwieldy consequences of overruling such a powerful precedent. Overruling *Lujan-Armendariz* will engender very complex retroactivity questions that

have not been fully addressed in briefing to the Court. This letter addresses two points made during oral argument: (a) is there Ninth Circuit precedent for applying what would be a new interpretation, prospectively only and (b) what law applies regarding retroactivity if *Lujan* were overruled. A third point raised by the Court whether there is any mechanism by which the Board could consider the reliance question on a case-by-case basis in its administrative proceedings is beyond the scope of this letter and is not addressed (though it does merit briefing). However, the Court does not need to address the retroactivity issue *at all* assuming, as amici urge, the Court either avoids *Lujan-Armendariz* altogether by affirming the BIA's decision on the grounds the BIA set forth in its decision or avoids the constitutional issue by affirming the *Lujan-Armendariz* result based on the statutory construction analysis set forth in amici's brief to the Court.

(a) There is precedent establishing that a new case is to be applied prospectively, where prior precedent is overturned. In *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1171 (9th Cir. 2003), this Court noted the special retroactivity concerns that existed where noncitizens filed petitions for review in reliance on Ninth Circuit law, which was later abrogated by a change in statute. The *Zazueta-Carrillo* Court announced a new judicial rule regarding whether voluntary departure was stayed during a petition for review and overruled a rule from a prior decision *Contreras-Aragon v. INS*, 852 F.2d 1088 (9th Cir. 1988). *Id.* at 1171. The Court explained that its decision fundamentally altered the judicial rules governing prospective requests for voluntary departure and also recognized that applying those rules to Mr. Zazueta would be inherently unfair. *Id.* at 1174. It explained:

Our decision today makes clear that *Contreras-Aragon* is no longer the law of this circuit. At the time that Zazueta-Carrillo delayed his departure beyond the specified voluntary departure date, however, *Contreras-Aragon* still stood as the announced law of this circuit. Zazueta-Carrillo thus acted in the expectation that the pendency of his petition on the merits would result in the delay of the commencement of his period for voluntary departure. Under the Board's order, that reliance has cost him dearly.

Id. Thus, the Court remanded to the agency for reconsideration of its ruling with respect to Mr. Zazueta. *Id.*

(b) The Supreme Court established the test for civil retroactivity of a judicial decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and later modified by *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) and *Harper v. Va. Dept. of Tax.*, 509 U.S. 86, 97 (1993). The *Chevron Oil* rule is generally recognized to apply to civil cases where a judicial panel has overruled prior precedent. This Court addressed the issue in *George v. Camacho*, 119 F.3d 1391, 1399 n.9 (9th Cir. 1997) (*en banc*) setting forth the following test: First, the court considers whether a decision establishes a new principle of law. If so, it may be applied prospectively (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.*

Here, the overturning of *Lujan* would clearly establish a new principle of law. Retrospective application would not advance such a holding, but would only penalize those who acted in reliance on well-established case law. Lastly, it would be fundamentally unfair to subject thousands of noncitizens to removal and separation from their families, when they relied on *Lujan* when entering their plea bargains. Thus, if the Court decides to overturn *Lujan*, the new rule should not be applied to those who pled guilty prior to the establishment of the new rule.

The holding in *Lujan* is widely taught and is part of the background of immigration jurisprudence in the Ninth Circuit. *See, e.g.*, Katherine A. Brady, *Defending Immigrants in the Ninth Circuit*, 9th ed. (2007) (discussing validity of expungement for first offense simple possession in the Ninth Circuit); Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law & Crimes*, § 4:21 (2010) (same); Continuing Education of the Bar, University of California, *California Criminal Law – Procedure and Practice*, yearly editions from 2001-2010, §§ 52.14, 52.32 (same).

A whole body of law has developed around the reliance interests when developing a criminal defense based on then-prevailing law. In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court recognized the special reliance interests inherent in guilty pleas, and found that the repeal of 8 U.S.C. § 1182(c) did not apply retroactively to noncitizens with guilty pleas who would have been eligible for relief under the law in effect at the time.

In *Padilla v. Kentucky*, __ U.S. __ 130 S. Ct. 1473, 1486 (2010), the Supreme Court strongly affirmed that knowledge of the immigration law is critical to an informed plea bargain, and that “the severity of deportation-”the equivalent

of banishment or exile,' only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation. *Id.*

The Court need not and should not overturn the result reached in *Lujan-Armendariz*. It may deny the petition for review on the basis of the *Chenery* doctrine.

Sincerely,
AMERICAN IMMIGRATION LAWYERS ASSOCIATION &
NATIONAL IMMIGRATION PROJECT of the National Lawyers Guild,

/Stephen W Manning

STEPHEN W MANNING
IMMIGRANT LAW GROUP PC
PO BOX 40103
PORTLAND OR 97240
503.241.0035
smanning@ilgrp.com

Marc Van Der Hout
Zachary Nightingale
Avatinka Shastri
VAN DER HOUT BRIGAGLIANO & NIGHTINGALE LLP
180 Sutter Street, 5th Floor
San Francisco CA 94101
415.981.3000

Deborah Smith
LAW OFFICES OF DEBORAH SMITH
7 West Sixth Avenue #4M
Helena MT 59601
406.457.5345
deb@debsmithlaw.com

Maria Andrade
ANDRADE LEGAL
PO Box 2109
Boise ID 83701
208.342.5100

mandrade@andradelegal.com

Michael Mehr
LAW OFFICES OF MICHAEL MEHR
100 Doyle Street Suite A
Santa Cruz CA 95062
831.425.5757
mike@mehrlaw.com

Katherine Brady
IMMIGRANT LEGAL RESOURCE CENTER
1663 Mission Street #602
San Francisco CA 94103
415.255.9499
kbrady@ilrc.org

Stacy Tolchin
LAW OFFICES OF STACY TOLCHIN
634 S. Spring St. Suite 714
Los Angeles, CA 90014
213.622.7450
stacy@tolchinimmigration.com

CERTIFICATE OF SERVICE

I, Stephen W Manning, certify that on December 21, 2010, I electronically filed the letter of Amicus, American Immigration Lawyers Association and National Immigration Project 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 this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I mailed a copy of the same to Respondent's counsel as listed in the CM/ECF system.

s/ Stephen W Manning

STEPHEN W MANNING