No. 09-72059

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Maria Matilde CARRILLO de PALACIOS,

Petitioner,

v.

Eric H. HOLDER, Jr., Attorney General,

Respondent.

ON REVIEW OF A DECISION OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICI CURIAE* NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NORTHWEST IMMIGRANT RIGHTS PROJECT, AMERICAN IMMIGRATION COUNCIL, IN SUPPORT OF REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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I. INTRODUCTION AND STATEMENT OF AMICI

The decision in this case again demonstrates the undue hardship created where an individual, relying on a precedential holding of this Court, applied for lawful permanent resident status, only to end up being ordered to leave the country and face indefinite separation from her family. In this case, and others that have come before it, this Court has held the individual's opportunity to adjust status to a lawful permanent resident depends *not* on the law in effect at the time she applied, but on a *subsequent* change in law rendering her inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(I). *See Garfias-Rodriguez v. Holder*, No. 09-72603, __ F.3d __, 2011 WL 1346960 (9th Cir. Apr. 11, 2011) (applying § 1182(a)(9)(C)(i)(I) retroactively); *Morales-Izquierdo v. DHS*, 600 F.3d 1076, 1087-92 (9th Cir. 2010) (applying § 1182(a)(9)(C)(i)(II) retroactively).

The landscape of retroactivity analysis, however, has changed significantly in light of the *en banc* decision in *Nunez-Reyes v. Holder*, No. 05-74350, __ F.3d __, 2011 WL 2714159 * 4 (9th Cir. July 14, 2011), which requires a court announcing a "new rule" to apply the civil retroactivity test from *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to determine if the case is to be applied prospectively only. Thus, even if the panel were correct in concluding that an individual is inadmissible under § 1182(a)(9)(C)(i) for having accrued unlawful

presence prior to April 1, 1997 (the statute's effective date), the panel did not undertake the civil retroactivity test from *Chevron Oil Co., supra,* as is now required by *Nunez-Reyes*. Given this deficiency, the Court should vacate and hold this case pending the issuance of the mandate in *Garfias-Rodriguez,* which is currently considering the retroactivity issue involving § 1182(a)(9)(C)(i)(I) in light of *Nunez-Reyes v. Holder*, No. 05-74350, __ F.3d __, , 2011 WL 2714159 * 4.

Alternatively, the decision should be vacated and remanded to the Board of Immigration Appeals ("BIA" or "Board") for the agency to articulate whether it has intentionally determined that it disagrees with United Citizenship and Immigration Service ("USCIS") and former Immigration and Naturalization ("INS") policy that § 1182(a)(9)(C)(i)(I) operates prospectively only. To date, neither the agency nor any court (besides the panel in this case) has said that § 1182(a)(9)(C)(i)(I) applies to unlawful presence accrued before the April 1, 1997 effective date. This is an issue of exceptional importance in light of the 14 year old policy upon which countless numbers of noncitizens rely, and, at a minimum, the agency is required to articulate the basis for its decision-making.

As a second alternative, the Court should reconsider its decision and conclude that applying § 1182(a)(9)(C)(i)(I) to pre April 1, 1997 unlawful presence has an impermissible retroactive effect. In *Chew Heong v. United States*, 112 U.S. 536 (1884), a decision on which *Landgraf v. USI Film Products*, 511 U.S. 244, 271

(1994) relies, the Supreme Court refused to apply a new statute retroactively to an individual who departed the United States prior to the change in law, and who returned after the law went into effect. The panel erred in failing to consider this decision.

The National Immigration Project of the National Lawyers Guild is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws.

Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the legal rights of non-citizens in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants in removal proceedings and before the federal courts. NWIRP also provides representation, workshops and legal advice to low-income immigrants applying for family visas.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional and human rights in immigration law and administration.

All *Amici* have a direct interest in ensuring that immigrants who are otherwise eligible for adjustment of status have a fair opportunity to have their

applications for residency adjudicated with fair notice of the legal standards to be applied.

II. REASONS FOR GRANTING REHEARING

A. WITHDRAWING THE DECISION PENDING ISSUANCE OF THE MANDATE IN *GARFIAS-RODRIGUEZ v. HOLDER* IS NECESSARY TO AVOID FURTHER CONFUSION SURROUNDING THE APPLICATION OF 8 U.S.C. § 1182(a)(9)(C)(i)(I).[1]

Amici respectfully submit that in light of the Court's *en banc* decision in *Nunez-Reyes*, the panel should withdraw its decision pending resolution of *Garfias-Rodriguez v. Holder*, No. 09-72603, __F.3d __, 2011 WL 1346960, *5–6 (9th Cir. Apr.11, 2011). Since 1996, the law surrounding the application of 8 U.S.C. § 1182(a)(9)(C)(i)(I) repeatedly has changed; so much so that attorneys practicing within the Ninth Circuit have been unable to correctly advise their clients when counseling them about eligibility to adjust status. In 2006, this Court held that noncitizens *may* adjust their status under 8 U.S.C. § 1255(i) even if they are inadmissible under § 1182(a)(9)(C)(i)(I). *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). A year later, the BIA reversed course and held that noncitizens

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[1] *Amici* contend below in Arguments B and C, however, that contrary to the panel's finding, Petitioner is not inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(I) for having entered the United States without admission after being unlawfully present for more than one year, given that she did not accrue one year of unlawful presence after the effective date of the statute.

may not adjust their status under 8 U.S.C. § 1255(i) if they are inadmissible under § 1182(a)(9)(C)(i)(I). *Matter of Briones*, 24 I. & N. Dec. 355 (BIA 2007). However, the BIA explicitly declined to determine "whether to apply our holding in the Ninth and Tenth Circuits." *Matter of Briones*, I. & N. Dec. at 372 n.9. More recently, in April 2011, the Court abrogated its earlier decision in *Acosta*, affirmed the BIA's decision in *Matter of Briones* and held that the BIA's decision applies retroactively to persons who applied for adjustment before the court's decision. *See Garfias-Rodriguez*, 2011 WL 1346960 at *5-6.

Subsequently, in July 2011, an *en banc* panel of this Court called into question the validity of the retroactive analysis in *Garfias-Rodriguez*. *Nunez-Reyes v. Holder*, 05-74350, __ F.3d. __, 2011 WL 2714159, *4 (9th Cir. July 14, 2011). The *Nunez-Reyes* Court recognized that, although the default principle is that a court's decision applies retroactively to all cases pending before the courts, the court may depart from that "default principle" in certain circumstances, as outlined in the Supreme Court's decision in *Chevron Oil Co v. Huson*, *supra*. *See Nunez-Reyes*, 2011 WL 2714159 at *6. Specifically, the Court found that it must apply the three factor test provided in *Chevron Oil* whenever there is a new rule of law announced in a civil case that does not concern the Court's jurisdiction. *Nunez-Reyes*, 2011 WL 2714159 at *7.

In response to the *en banc* decision, on petition for rehearing, the *Garfias-*

Rodriguez panel (Fisher, Bybee, Shea), ordered supplemental briefing on the effect, if any, of *Nunez-Reyes v. Holder* on that panel's conclusion that *Matter of Briones*, *supra*, applies retroactively. No. 09-72603, Dkt # 35. Significantly, the *Garfias-Rodriguez* panel did not address *Chevron Oil's* retroactivity test in its April 2011 decision. In addition, in recognition of the significance of the Court's holding, this panel *sua sponte* issued an order staying the mandate in the instant case pending resolution of this question in *Garfias-Rodriguez*. No. 09-72059, Dkt # 39.

Amici respectfully request that the panel withdraw its decision pending issuance of the mandate in *Garfias-Rodriguez*. Like Mr. Garfias-Rodriguez, Petitioner Carillo applied for, and was granted, adjustment of status by an immigration judge based on this Court's decision in *Acosta*. On appeal, in an unpublished decision, the BIA reversed the immigration judge's grant of adjustment of status based on *Matter of Briones*, 24 I. & N. Dec. 355 (BIA 2007). On petition for review to this Court, the panel then relied on *Garfias-Rodriguez* in finding that Petitioner was ineligible for adjustment of status. 2011 WL 2450985 at *9 n 2. Although on July 28, 2011, the panel in this case stayed the mandate pending entry of the mandate in *Garfias-Rodriguez*, the panel's published decision nevertheless continues to serve as binding precedent. *Chambers v. United States*, 22 F.3d 939, 942 n. 3 (9th Cir.1994), *vacated on other grounds by* 47 F.3d 1015

(9th Cir.1995) (even where the mandate is stayed, "once a published opinion is filed, it becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an en banc court"). *See also United States v. Gomez-Lopez*, 62 F.3d 304, 306 (9th Cir. 1995) (precedent decision is the law of the circuit, even when the mandate has been stayed).

B. IF THE DECISION IS NOT WITHDRAWN PENDING GARFIAS-RODRIGUEZ, THE PANEL SHOULD VACATE THE DECISION AND REMAND FOR THE AGENCY TO CLARIFY ITS POSITION

1. Background

The panel concluded that the inadmissibility ground of 8 U.S.C. § 1182(a)(9)(C)(i)(I) applies to individuals whose one year of unlawful presence occurred prior to April 1, 1997, the provision's effective date. *See* the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") Pub. L. No. 104-208, 110 Stat. 3009, § 301(b)(1) (Sept. 30, 1996) (creating § 1182(a)(9)(C) and making it effective on April 1, 1997). However, this conclusion conflicts with the 14 year-old published memorandum issued by the former Immigration and Naturalization Service ("INS"), upon which thousands of non-citizens have relied on in successfully applying for lawful permanent residency. The panel's decision neglects to address this 14 year old policy. Moreover, the BIA's unpublished decision, failed to even address, let alone explain, why it was now choosing to depart from this longstanding policy.

Under 8 U.S.C. § 1182(a)(9)(C)(i)(I), a noncitizen who has been unlawfully present in the country for an aggregate of one year or more, departs the United States, and then reenters without admission is permanently inadmissible to the United States. Significantly, prior to April 1, 1997, no such provision existed in the Immigration and Nationality Act ("INA"). Assuming the applicant was otherwise eligible for adjustment of status pursuant to 8 U.S.C. § 1255(i), an applicant who was unlawfully present, departed the United States, and then entered the United States without admission, would have been eligible for adjustment of status.[2]

Even before IIRIRA went into effect on April 1, 1997, the Department of State ("DOS") issued a cable to diplomatic posts interpreting the statute to only apply to post-April 1, 1997 unlawful presence. *See* 73 Interpreter Releases 1692 (Dec. 9, 1996) ("[u]nlawful presence prior to the effective date of Title III-A of Pub. L. 104-208 (April 1, 1997) shall not be counted for purposes of this provision") (attached). INS initially indicated that it would count time accrued

[2] In general, persons who have unlawfully entered the United States are ineligible for adjustment of status to lawful permanent residency because they have not been "inspected and admitted or paroled" for purposes of 8 U.S.C. § 1255(a). However, Congress created exceptions. One limited exception, § 1255(i), allows for persons who are the beneficiaries of visa petitions filed on or before April 30, 2001 to file for adjustment of status notwithstanding their unlawful entry, provided they pay an additional penalty fee of $1,000.00. Thus, § 1255(i) affords an "exception" to the "general rule" that "aliens who entered the country without inspection are ineligible to seek adjustment to lawful permanent status." *Chan v. Reno*, 113 F.3d 1068, 1071 (9th Cir. 1997).

prior to the effective date, but then then switched course. 74 Interpreter Releases 562 (Apr. 7, 1997) (attached). Shortly after the effective date, on June 17, 1997, INS issued a formal statement of the agency's position regarding the accrual of unlawful presence: "[n]o period of unlawful presence in the United States prior to April 1, 1997, is considered for purposes of applying Section 212(a)(9)(C)(i)(I) of the Act [8 U.S.C. § 1182(a)(9)(C)(i)(I)]." *See* "Memorandum from Paul Virtue, Acting Executive Associate Commissioner of INS, dated June 17, 1997, entitled "Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)," 74 Interpreter Releases 1033 (Jul. 7, 1997) (attached). This position has been reaffirmed, most recently by USCIS in 2009, less than one month before the BIA's June 3, 2009 decision reaching a contrary conclusion in Petitioner's case. *See* 86 Interpreter Releases 1393 (May 18, 2009) at 29 (attached).[3] Further, the USCIS policy applies nationally, and no

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[3] The memorandum states,

> Only periods of unlawful presence spent in the United States after the April 1, 1997 effective date of [IIRIRA] count towards unlawful presence for purposes of … 212(a)(9)(C)(i)(I) of the Act … For purposes of 212(a)(9)(C)(i)(I) of the Act, one (1) full year of unlawful presence must have accrued. Therefore, the earliest an individual could have been subjected to this ground of inadmissibility was April 2, 1998.

Id.

other court has reached this Court's conclusion that unlawful presence accrues prior to April 1, 1997 for purposes of § 1182(a)(9)(C)(i)(I).

The Board of Immigration Appeals has never issued a published decision disagreeing with USCIS' interpretation of § 1182(a)(9)(C)(i)(I). Indeed, *subsequent* to the Board's unpublished decision in this case, it issued a published decision in *Matter of Diaz and Lopez*, 25 I. & N. Dec. 188 (BIA 2010), where the Board acknowledged that unlawful presence begins to accrue after April 1, 1997, the effective date of IIRIRA. In *Matter of Diaz and Lopez*, the Board found that the applicant was subject to the bar because: "[t]hey were in the United States unlawfully for more than 1 year after April 1, 1997" before departing and then unlawfully reentering. 25 I. & N. Dec. at 189.

2. Remand is Warranted for the BIA to Clarify Whether It Intended to Diverge from a Longstanding USCIS and DOS Interpretation on Unlawful Presence

In light of USCIS 14 year-long position that a person cannot accrue unlawful presence prior to April 1, 1997 and in the absence of a precedent BIA decision addressing this issue, the Court should vacate the panel's decision and remand to the BIA to clarify its position on whether it intended to reject DOS', INS' and USCIS' statutory interpretation that a person can accrue unlawful presence prior to April 1, 1997. *See, e.g.*, *INS v. Ventura*, 537 U.S. 12, 16-18 (2002) (per curiam) (remanding to the BIA to consider an issue in the first instance); *Gonzales v.*

Thomas, 547 U.S. 183, 187 (2006) (same); *Nevarez Nevarez v. Holder*, 572 F.3d 605, 610 (9th Cir. 2009) (same). As the USCIS policy was never briefed, nor even acknowledged in the BIA's June 3, 2009 unpublished decision, upon reconsideration the BIA should advise whether it sought to take a contrary interpretation. It is striking that the BIA would reject such an entrenched policy, one that thousands of individuals have successfully relied upon in seeking adjustment of status over the last fourteen years, without even acknowledging the contrary USCIS policy. Moreover, in reversing course on similar adjudications over the last decade it is remarkable that the BIA would do so with a detailed analysis in an unpublished decision. As noted, what is even more peculiar is that subsequent to the Board's unpublished decision in this case, it issued a published decision which clearly accepted the policy that the unlawful presence must accrue after April 1, 1997, in order for the bar to apply. *Matter of Diaz and Lopez*, 25 I. & N. Dec. 188 (BIA 2010).

The *post hoc* arguments made by counsel in briefing in this litigation may not in fact represent the legal position of the Board, once the issue is fully considered by the agency. *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008) ("Post hoc explanations of agency action by appellate counsel cannot substitute for the agency's own articulation of the basis for its decision"); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("[t]he

courts may not accept appellate counsel's post hoc rationalizations for agency action").

C THE PANEL ERRED IN CONCLUDING THAT UNLAWFUL PRESENCE ACCRUES PRIOR TO APRIL 1, 1997.

In the event that the Court were to conclude that the temporal scope of § 1182(a)(9)(C)(i)(I) is ambiguous, then the panel was correct to reach the second step of *Landraf's* retroactivity test.[4] 2011 WL 2450985 at *5. Under step two of *Landgraf*, courts must look to whether the statute's application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280.

The panel concluded that the act of departing the United States alone did not trigger § 1182(a)(9)(C)(i)(I) because it was not a "completed act." 2011 WL 2450985 at *6. Rather, the panel found that the act of entering or attempting to enter without admission triggered the statute. *Id*. Based on this finding, the panel upheld the retroactive application of § 1182(a)(9)(C)(i)(I) to pre-April 1, 1997 departures. *Id*.

The panel's rationale is incompatible with *Landgraf* as demonstrated by *Landgraf's* reliance on *Chew Heong v. United States*, 112 U.S. 536 (1884). *Chew*

[4] *Amici* concur with the arguments made in the *Amicus* brief submitted by the National Immigrant Justice Center and the American Immigration Lawyers Association that "unlawful presence" does not accrue prior to April 1, 1997.

Heong is an 1884 "Chinese Restriction Act" case, which involved a travel restriction barring "Chinese laborers from reentering the United States without a certificate prepared when they exited this country." *Landgraf*, 511 U.S. at 271 (citing *Chew Heong*, 112 U.S. at 559). The new travel restriction was enacted and took effect after the labor left the United States and, consequently, the government denied him admission to the country upon his return. *Chew Heong*, 112 U.S. at 538. The Court found "that the statute did not bar the reentry of a laborer *who had left the United States before the certification requirement was promulgated*." *Landgraf*, 511 U.S. 244 at 271 (*discussing Chew Heong*, 112 U.S. at 559) (emphasis added). In so finding, the Court "invoked the 'uniformly' accepted rule against 'giv[ing] to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.'" *Landgraf*, 511 U.S. at 271-72 (quoting *Chew Heong*, 112 U.S. at 559).[5]

[5] *See also INS v. St. Cyr*, 533 U.S. 289, 347 n. 55 (2001) *discussing Chew Heong*, 112 U.S. at 559 ("[a]pplying a statute barring Chinese nationals from reentering the country without a certificate prepared when they left to people who exited the country before the statute went into effect would have *retroactively unsettled their reliance on the state of the law when they departed*.") (emphasis added); *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007) ("[t]he Court in *Chew Heong* found the application of the Chinese Restriction Act impermissibly retroactive in part because of the laborers' justified reliance on *prior law in departing the country*") (emphasis added).

The panel's decision conflicts with *Chew Heong*, and by extension, with *Landgraf*, because, like the laborers in *Chew Heong*, individuals unlawfully present in the United States who traveled, and then reentered without admission were eligible for lawful status, i.e. to apply for lawful permanent residency under 8 U.S.C. § 1255(i). The original provisions of § 1255(i) were enacted in 1994, prior to IIRIRA. *See* Pub. L. No.103-317, tit. V, § 506(b), 108 Stat. 1724, 1765-66 (1994); *Landin-Molina v. Holder*, 580 F.3d 913, 916 (9th Cir. 2009). Prior to April 1, 1997, a noncitizen unlawfully in the United States who travelled and reentered without admission was able to apply for residency under § 1255(i). There was no bar for "unlawful presence" and nothing comparable to the § 1182(a)(9)(C) bar to admission. Accordingly, similar to the holding at issue in *Chew Heong*, it is the *departure* itself that triggers the impermissible retroactive effect given that there was no notice prior to the person's departure that their reentry to come back to their home or family would render them permanently inadmissible.

Further, this case is distinguishable from the Supreme Court's decision in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). That case involved a noncitizen who had been deported and unlawfully reentered the United States prior to September 30, 1996, the enactment date of IIRIRA. As a result, Mr. Fernandez-Vargas was subject to "reinstatement of removal" under 8 U.S.C. §1231(a)(5). In

upholding the retroactive application of § 1231(a)(5), the Supreme Court reasoned that Mr. Fernandez-Vargas' decision to remain in the United States constituted a continuing violation of the law, and he "could not only have chosen to end his continuing violation and his exposure to the less favorable law, he even had an ample warning that the new law could be applied to him and ample opportunity to avoid that very possibility...." *Fernandez-Vargas*, 548 U.S. at 45. As the Supreme Court went on to explain:

> the statute applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country. It is therefore the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.

548 U.S. at 44.

For immigrants like Petitioner Carillo who departed prior to September 30, 1996 and reentered after April 1, 1997, the rationale of *Fernandez-Vargas* does not apply. Section 1182(a)(9)(C)(i)(I) is not triggered by a continuing violation, but the *single act* of reentering the United States. Thus, unlike in *Fernandez-Vargas*, the act of reentry *cannot* be undone. Further, unlike in *Fernandez-Vargas*, individuals like Ms. Carillo, who left prior to the enactment of IIRIRA had no notice that they would be penalized for seeking to return to their home or family for their unlawful presence that had already occurred. Importantly, DOS, INS, and

subsequently USCIS all agreed to only count unlawful presence that occurred after the statute's effective date, April 1, 1997.

III. CONCLUSION

For the above reasons, the Court should withdraw the panel's decision pending issuance of the mandate in *Garfias-Rodriguez, supra*. Alternatively, the Court should vacate the decision and remand to the BIA to articulate its position regarding whether 8 U.S.C. §1182(a)(9)(C)(i)(I) applies to pre April 1, 1997 presence, in light of USCIS' 14 year policy of finding the statute to be prospective only. As a second alternative, if the Court declines to remand and in the event the Court reaches the second step of the *Landgraf* analysis, it should conclude that the application of § 1182(a)(9)(C)(i)(I) to pre-April 1, 1997 has an impermissible retroactive effect.

August 15, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 29-2(c)(2), I certify that the above document is **3,794** words, in compliance with the Circuit Rule that an amicus brief in support of rehearing not exceed 15 pages in length, unless it complies with the alternate length limitations of 4,200 words or 390 lines of monospaced text.

Dated: August 15, 2011

s/Stacy Tolchin
Stacy Tolchin

CERTIFICATE OF SERVICE

On August 15, 2011, I electronically filed the foregoing with the Clerk of the Court for 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 are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

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