No. 11-3052

In The United States Court of Appeals
For The Seventh Circuit

JOSE ANAYA-AGUILAR,

Petitioner,

v.

ERIC HOLDER, U.S. Attorney General,

Respondent.

On Appeal From The Board of Immigration Appeals

BRIEF *AMICUS CURIAE* OF THE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING

Charles Roth
NATIONAL IMMIGRANT
JUSTICE CENTER
208 S. LaSalle St., Suite 1818
Chicago, IL 60604
(312) 660-1613

Attorney for Amicus Curiae

August 1, 2012

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-3052
Short Caption: Anaya-Aguilar v. Holder

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The National Immigrant Justice Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

The National Immigrant Justice Center

(3) If the party or amicus is a corporation:

1) Identify all of its parent corporations, if any; and

The Heartland Alliance for Human Needs and Human Rights

2) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

Attorney's Signature /s Charles Roth Date: **August 1, 2012**

Attorney's Printed Name: **Charles Roth**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes**

Address: **National Immigrant Justice Center, 208 South LaSalle Street, Suite 1818, Chicago, IL 60604**
Phone Number: **(312) 660-1613**
Fax Number: **(312) 660-1505**
E-Mail Address: **croth@heartlandalliance.org**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (CONT'D)

Statutes

TABLE OF AUTHORITIES (CONT'D)

Other Authorities

INTEREST OF AMICUS CURIAE

Heartland Alliance's National Immigrant Justice Center ("NIJC") is a non-profit organization which provides legal education and representation to low-income immigrants and asylum seekers in removal proceedings.[1] In 2011, NIJC provided legal services to more than 10,000 non-citizens, including many individuals with final removal orders. NIJC works to ensure that the laws and policies affecting non-citizens in the United States are applied in an even-handed and humane manner. NIJC has a general interest in ensuring that the immigration laws are enforced in a lawful and reasonable manner.

SUMMARY OF ARGUMENT

The Panel decision was circulated to the full *en banc* Court because it overruled *Munoz De Real v. Holder*, 595 F.3d 747 (7th Cir. 2010), in which the Court reviewed a *sua sponte* Board decision for abuse of discretion. However, neither party appears to have alerted the Court to the fact that the decision is also inconsistent with *Cevilla v. Gonzales*, 446 F.3d 658, 660 (7th Cir. 2006) and *Vahora v. Holder*, 626 F.3d 907, 919 (7th Cir. 2010). *Cevilla* held that the jurisdiction-stripping provisions in the Immigration and Nationality Act (INA) supplanted the broader jurisdictional rules of the Administrative

[1] Amicus states pursuant to Fed.R.App.Pro. 29(c) that no party's counsel authored the brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the amicus curiae, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief

Procedures Act (APA); and *Vahora* confirmed that *Cevilla* had not been overturned by the Supreme Court's reference to the issue in *Kucana v. Holder*, 130 S.Ct. 827 (2010). The legal conclusion of *Cevilla* was correct, and need not be revisited; but if the Court is inclined to revisit the matter, it ought to do so *en banc*, after full briefing and argument.

This is particularly so because the Panel's logic extrapolates on the basis of the APA from agency discretion to insulation against review for legal or constitutional error. To the extent that the Panel's decision applies the approach of *Pilch v. Ashcroft*, 353 F.3d 585 (7th Cir. 2003), to bar the Court from reviewing *sua sponte* decisions even for legal and constitutional error, however plausible that result was in the context of the jurisdiction-stripping statute at issue therein, it is divorced from the no-law-to-apply rationale of the APA and is flatly contrary to Supreme Court precedent in that context. An agency has no discretion to commit legal or constitutional error.

If Anaya's claim doesn't involve a true legal or constitutional claim – or if Anaya's claims fail on the merits – the solution is to deny the petition, not to permit an easy case to make bad law. The Board's purported *sua sponte* authority (generally invoked at the instance of a party) is a catchall category which the Board uses to address various claims which are legal in nature or turn on constitutional avoidance. For instance, the Agency's case law generally requires that a removal order be lawful both at the time of entry and at the time of execution. The legality of removal orders may be undermined where a removal order is premised on a conviction which is vacated by a

criminal court on criminal grounds, or where it was premised on a legal conclusion rejected by the Supreme Court. The Board relies on its *sua sponte* authority in such cases. Where the Board denies *sua sponte* reopening based on a legal analysis, and where that legal analysis is statutorily or constitutionally flawed, it can implicate core judicial functions. The elimination of judicial review for all potential *sua sponte* cases is thus a grave step; the availability of some minimal judicial review should be presumed.

ARGUMENT

I. The Panel *Sub Silentio* Overruled Case Law Rejecting The Argument That The APA Governs Jurisdiction In The Immigration Context.

The Panel held – following other circuits – that while Congress had not barred the courthouse door to this matter in the INA, that more "fundamental" limitations on judicial review found within the APA achieved that result indirectly. *Anaya-Aguilar v. Holder*, 683 F.3d 369, 372 (7th Cir. 2012) (citing 5 U.S.C. § 701(a)(2)). Amicus believes that this logic is flawed on several levels; but apart from its merits, it makes no account of the Court's case law finding § 701(a)(2) irrelevant in the immigration context.

It is true that *Kucana* noted, but did not decide, jurisdiction over *sua sponte* decisions. 130 S.Ct. at 839 n. 18 (expressing no opinion on jurisdiction over *sua sponte* decisions); *cf. id*. at 839 ("[b]y defining the various jurisdictional bars by reference to *other provisions in the INA itself*, Congress ensured that it, and only it, would limit the federal courts' jurisdiction") (emphasis added). But as the Court recently noted, the Supreme Court's *caveat* only left in place this Court's prior case law on the matter.

Vahora, 626 F.3d at 919. And the Court had already rejected the thesis proffered by the government that the APA separately bars jurisdiction in immigration cases.

In *Cevilla*, the Court addressed its jurisdiction over a reopening denial, and held that "the general 'no law to apply' principle of judicial review of administrative action has been superseded in the immigration context by 8 U.S.C. § 1252(a)(2)." 446 F.3d at 660. That result is amply supported by textual references within the INA, which evince an intention to occupy the field. See, 8 U.S.C. § 1252(a)(2)(B) (its provisions govern "[n]otwithstanding any other provision of law (statutory or nonstatutory)"); § 1252(a)(5) ("a petition for review … in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter"); § 1252(b)(9) ("Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."). Congress stated, clearly and repeatedly, that the jurisdictional rules of § 1252 and other portions of the INA were exclusive. What the Supreme Court said in a different context 50 years ago is true here as well:

> From the Immigration Act's detailed coverage of the same subject matter …, it is clear that Congress was setting up a specialized administrative procedure applicable to deportation hearings, drawing liberally on the analogous provisions of the Administrative Procedure Act and adapting them to the particular needs of the deportation process…. Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative

> Procedure Act, we must hold that the present statute expressly supersedes … that Act.

Marcello v. Bonds, 349 U.S. 302 (1955). [2]

The Panel's decision in *Anaya-Aguilar* was circulated to the full *en banc* Court, 683 F.3d at 371 n.1, and its rule, being based on the APA's no-law-to-apply rationale, is clearly inconsistent with *Cevilla* and *Vahora*; yet if it overturns those decisions, it did so *sub silentio*. Neither case was cited in the Panel's decision.[3] It seems unlikely that the Court would have overruled *Cevilla* and *Vahora* in that way; yet the Panel's rule necessarily draws those cases into uncertainty, and the Panel had the authority to overrule those decisions after circulation to the full *en banc* Court. The Court ought to grant rehearing or rehearing *en banc* to clarify the matter.

II. Claims of Statutory And Constitutional Error Provide A Standard Against Which Discretionary Agency Action May Be Judged.

The Panel's decision is particularly problematic insofar as it precludes legal and constitutional claims from being addressed whenever they arise in the *sua sponte* context.

---

[2] Further counseling against application of the § 701(a)(2) test in this context – at least if read as here to preclude legal and constitutional arguments – is the Supreme Court's holding that review of questions of law even regarding discretionary relief is required by the Suspension Clause. *INS v. St. Cyr*, 533 U.S. 289, 307-08 (2001).

[3] The APA's applicability to immigration cases was not addressed by the parties, except that *Vahora* was cited by the Petitioner. See Brief and Required Short Appendix of Petitioner at 5 (filed Nov. 2, 2011).

The rationale for precluding review of agency decisions in the *sua sponte* context is the purported absence of judicially manageable standards. But where there are judicially manageable standards, such as in the context of legal or constitutional claims, there is no reason to bar jurisdiction simply because other *sua sponte* denials provide no such standards: *cessante ratione legis cessat ipse lex*. 1 E. Coke, Institutes *70b (cited in *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

Indeed, *Webster v. Doe*, 486 U.S. 592, 600 (1988), is flatly inconsistent with the Panel's opinion here. In that case, the majority found that § 701(a)(2) barred a claim that termination from the CIA was arbitrary and capricious, but the majority refused to apply § 701(a)(2) to bar colorable constitutional claims: "Subsection … (a)(2) of § 701… remove[s] from judicial review only those determinations … 'committed to agency discretion by law.' Nothing … persuades us that Congress meant to preclude consideration of colorable constitutional claims." 486 U.S. at 603. Justice Scalia would have found constitutional claims barred as well: "I do not see how a decision can, either practically or legally, be both unreviewable and yet reviewable for constitutional defect." *Id*. at 606 (Scalia, J., dissenting). Whatever the merits of Justice Scalia's dissent, it was just that: a dissent. The Court must follow the holding of the case, unless it is overturned. Under the majority, § 701(a)(2) cannot be read to bar constitutional claims.

The "committed to agency discretion" exception to judicial review is limited to "rare instances," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971),

and "requires careful examination of the statute on which the claim of agency illegality is based." *Webster*, 486 U.S. at 600. The Panel opinion is inconsistent with that careful, rarely triggered approach to § 702(a)(2). By importing *Pilch* to the § 702(a)(2) analysis, the Panel's opinion makes it *irrelevant* what kind of legal or constitutional claim is raised.[4] That holding, if left unrevised, will have substantial implications in various areas of agency law.

In the context of a claim that the Agency has misinterpreted a statute, the statute which is misinterpreted provides the standard against which the agency's actions may be judged. Where a claim is made that the Board misinterpreted a statute or regulation, the Court ought not ask whether the agency abused its discretion, but rather, whether it properly interpreted the law. *Alvarado de Rodriguez v. Holder*, 585 F.3d 227, 233 (5th Cir. 2009). Such legal interpretations are reviewed *de novo*. *Id*. Similarly, constitutional claims may fail or succeed; but the constitution provides the law against which they may be judged.

A. Other Courts Review Legal and Constitutional Claims In This Context

As noted by the Petitioner, other courts of appeals would not apply § 701(a)(2) to bar legal and constitutional claims in the *sua sponte* context. *See*, *e.g.*, *Pllumi v. Attorney*

---

[4] In *Pilch v. Ashcroft*, 353 F.3d 585 (7th Cir. 2003), the Court found legal claims barred by jurisdiction-stripping statutes. *Pilch* was not based on § 701(a)(2), but on a transitional rule not relevant here. Regardless of whether *Pilch* survived the Supreme Court's decision in *Kucana v. Holder*, 130 S.Ct. 827 (2010), it cannot bear the weight placed on it by the Panel, by being read to preclude review in this context.

General of the U.S., 642 F.3d 155, 160 (3rd Cir. 2011); *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (*en banc*) ("Although this court lacks jurisdiction over Tamenut's challenge to the BIA's decision not to reopen sua sponte, we generally do have jurisdiction over any colorable constitutional claim"); Petition for Rehearing at 6-7. The Panel's opinion appears to foreclose that approach.

B. The Government Has No Discretion To Commit Legal Error

It makes no sense to say that *sua sponte* matters are "committed to agency discretion by law," if they involve legal or constitutional error. To the extent that the agency's decision was legal in nature, the agency's discretion is implicitly limited, because an agency has no discretion to commit legal error.

In the context of congressionally-enacted bars to judicial review over discretionary agency actions, 8 U.S.C. § 1252(a)(2)(B), courts have rejected the argument that legal arguments are "discretionary." In *Mireles-Valdez v. Ashcroft*, a legal question was held to be "a nondiscretionary determination because it involves straightforward statutory interpretation and application of law to fact," 349 F.3d 213, 217 (5th Cir. 2003), and thus, to be within the Court's jurisdiction. This understanding of the interaction of discretion and legal error is consistent with the holdings of various other circuits. *See Sepulveda v. Gonzales*, 407 F.3d 59, 63 (2d Cir. 2005) (Sotomayor, J.) (collecting cases). Indeed, it is axiomatic that "[t]he BIA has no discretion to make a decision that is contrary to law." *Hernandez v. Ashcroft*, 345 F.3d 824, 846-47 (9th Cir. 2003) (citing *Frazar*

v. Gilbert, 300 F.3d 530, 551 n. 109 (5th Cir. 2002)); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (noting axiom that "federal officials do not possess discretion to violate ... federal statutes"). The government's argument would permit legal error to be hidden behind a shield designed to protect agency discretion.

That argument would also be inconsistent with the Supreme Court's understanding of discretion in *St. Cyr*, 533 U.S. at 307-08 (distinguishing between "[e]ligibility ... governed by specific statutory standard" and "the actual granting of relief [that is] not a matter of right under any circumstances, but rather is in all cases a matter of grace."); *see also*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443-44 (1987) (distinguishing between discretion as to the ultimate decision and the criteria for eligibility for relief)). In *St. Cyr*, the case turned on eligibility for discretionary relief; the Supreme Court reviewed the legal analysis undergirding that exercise of discretion.

C. Section 1252(a)(2)(D) Ought To Be Interpreted To Require Judicial Review Over Questions of Law In This Context.

The government seeks to avoid the clear intention of 8 U.S.C. § 1252(a)(2)(D), which generally permits the Courts of Appeals to consider "questions of law," arguing that § 1252(a)(2)(D) only applies to overcome bars to judicial review which are found within the INA, as opposed to bars which are imported from other statutes such as § 701(a)(2). Assuming that questions of law and constitutional questions could ever fall within the scope of § 701(a)(2), § 1252(a)(2)(D) ought to be applied so as to restore such jurisdiction.

Congress explained its intention with regard to § 1252(a)(2)(D) in a conference report at the time it enacted it: "[t]he purpose of [§1252(a)(2)(D)] is to permit judicial review over ... constitutional and statutory-construction questions." H.R.Rep. No. 109-72, at 175 (2005), reprinted at 2005 U.S.C.C.A.N. 240, 300 ("Conference Report"). "The report of a conference committee is one of the more reliable forms of legislative history," *Cevilla*, 446 F.3d at 661, because "the conference report represents the final statement of terms agreed to by both houses, [and] next to the statute itself it is the most persuasive evidence of congressional intent." *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C.Cir. 1981).

It is true that the text of § 1252(a)(2)(D) provides that "nothing in subparagraph (B) or (C), or in any other provision of this chapter... shall be construed as precluding review of ... questions of law." That is, § 1252(a)(2)(D) only expressly prohibits the statutory bars to judicial review in the INA from limiting judicial review. Still, it would be passing strange that as to forms of discretionary relief where Congress specifically legislated to limit judicial review, it permits review of questions of law and constitutional questions. Greater review is permitted where Congress specifically wished to limit judicial review than in this area, where it did not specifically legislated. Even if § 1252(a)(2)(D) does not expressly require that non-INA bars be construed to permit legal and constitutional review, neither does it prohibit a similar construction from being employed.

Amicus sees no reason why § 1252(a)(2)(D) ought not be understood to set forth a uniform jurisdictional rule, permitting review over statutory construction arguments and other questions of law throughout the immigration context. Such a rule would provide clarity to the law and avoid unnecessary litigation. Thus, the Court should rule alternately that § 1252(a)(2)(D) would require a construction of § 701(a)(2) which would permit legal questions such as the proper interpretation of statutes and constitutional questions to be addressed in this context.

III. Various Legal and Constitutional Claims Are Made In the Sua Sponte Context

The types of legal claims raised by the Petitioner, related to ineffective assistance of counsel, are only one of many types of claims which are commonly raised in the *sua sponte* context. The Agency's *sua sponte* authority – a misnomer, as it is almost always invoked at the request of a party – plays a substantial role in various contexts, many of which are more purely legal than the context of this case.

For instance, the BIA has a longstanding rule that an alien cannot be removed on the basis of an order the legal foundations of which have been undermined by intervening law. *See Matter of Farinas*, 12 I. & N. Dec. 467, 472 (BIA 1967). Thus, where the Board finds that a removal order is premised on a conviction which has been vacated, it finds it appropriate to reopen the matter. *See*, *e.g.*, *In re: Basilio Estevez, a.k.a., Edwin Rivera*, 2012 WL 371662 (BIA Jan. 18, 2012) (unpublished) (*sua sponte* reopening where conviction vacated for constitutional reasons); *In re: Cesar Gomez-Rivas, a.k.a.,*

Cesar Gomez, a.k.a., Cesar Rivas Gomez, 2011 WL 4730892 (BIA Sept. 27, 2011) (unpublished) (same).

Yet the contours of this rule are complex. The Board gives effect to state court vacaturs based on legal or procedural defects, but not to vacaturs issued for rehabilitative purposes. *Cf., Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (orders vacated for rehabilitative reasons remain valid for immigration purposes); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (convictions vacated on the basis of a procedural or legal defect in the underlying criminal proceedings do not remain convictions for immigration purposes). The Board places the burden on the non-citizen to prove the nature of the vacatur, i.e., that the conviction was not vacated solely for immigration purposes. *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007). It is foreseeable that legal issues related to vacated convictions will come to the Court in this context. *Cf., e.g., Rumierz v. Gonzales*, 456 F.3d 31 (1st Cir. 2006) (addressing vacated conviction in non-*sua sponte* context).

The Board's jurisdiction is another legal issue which arises in the context of vacated convictions. The Fifth Circuit has upheld the Board's view that *sua sponte* reopening is precluded if the non-citizen has already been removed; the Ninth Circuit permits *sua sponte* reopening in that context. *Cf. Ovalles v. Holder*, 577 F.3d 288 (5th Cir.

2009) with *Wiedersperg v. INS*, 896 F.2d 1179, 1181-82 (9th Cir. 1990).[5] If the Board refuses to reopen a case involving a conviction vacated on constitutional grounds, for the sole reason that the individual has been physically removed, The Board's authority to reopen *sua sponte* is a legal issue far removed from the heartland of no-law-to-apply matters. Jurisdiction should lie to answer such questions.

To be clear, not all legal issues in the sua sponte context relate to convictions. To give another example, in *Wu v. Holder*, 11-60286 (5th Cir.) (filed Apr. 22, 2011), the Board *sua sponte* reopened the cases of an immigrant's mother and father due to ineffective assistance of counsel, but then denied *sua sponte* reopening for their child. The Board's refusal turned on its interpretation of an ambiguous provision of the Child Status Protection Act, 8 U.S.C. § 1153(h)(3). *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). The Board's interpretation in *Matter of Wang* has split the circuits. It has been rejected by the Fifth Circuit, but upheld by the Second; the Ninth Circuit recently reheard the matter *en banc*. *Cf. Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011) (rejecting *Wang*); *Li v. Renaud*, 654 F.3d 376 (2d Cir. 2011); *Cuellar de Osorio v. Mayorkas*, 677 F.3d 921 (9th Cir. 2012). The *Wang* issue is complex, involved, debateable, and purely legal. Under the Panel's

---

[5] Applying these divergent tests, the Board grants *sua sponte* reopening for vacated convictions in cases arising in the Ninth Circuit but not the Fifth Circuit. *Cf. In re: Din Dyal Kaura*, 2011 WL 5111716 (BIA Sept. 30, 2011) (unpublished) (denying *sua sponte* reopening within Fifth Circuit); *In re: Cesar Gomez-Rivas, a.k.a., Cesar Gomez, a.k.a., Cesar Rivas Gomez*, 2011 WL 4730892 (BIA Sept. 27, 2011) (unpublished) (*sua sponte* reopening after vacatur of conviction within Ninth Circuit).

reasoning, Ms. Wu would have been barred from litigating the Board's error, though the sole reason for denial of *sua sponte* reopening was that legal analysis.

The Board's test for its *sua sponte* powers - "an extraordinary remedy reserved for truly exceptional situations," *In re G-D-*, 22 I. & N. Dec. 1132, 1134 (BIA 1999) – is in essence, "I know it when I see it." *Cf. Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This test is "not an operable standard." *cf. Del Marcelle v. Brown County Corp.*, 680 F.3d 887, 895 (7th Cir. 2012) (*en banc*) (Posner, J., concurring). Assuming that the Agency's non-standard violates neither the constitution nor the INA, *cf.* 8 U.S.C. § 1229a(b)(4)(B) – an argument not advanced by Petitioner – discretionary weighing decisions will rarely if ever be found an abuse of discretion. The Court ought to deny such claims on the merits, if they fail, rather than contracting its jurisdiction.

The same cannot be said of legal error. Where the Board states expressly that it is deciding a *sua sponte* case on the basis of reasoning which is legally wrong or constitutionally unsound, the nation's commitment to the rule of law calls for the availability of federal judicial review.

CONCLUSION

Amicus respectfully urges the Court to grant rehearing in the above-captioned matter. The issue is significant, and the Court's authoritative guidance is needed. The case is an adequate vehicle for addressing these issues, even if the Petitioner would lose on the merits of his legal and constitutional claim.

August 1 , 2012

Respectfully submitted,

/s/ Charles Roth

Charles Roth
NATIONAL IMMIGRANT
JUSTICE CENTER
208 S. LaSalle St., Suite 1818
Chicago, IL 60604
(312) 660-1613

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), this is to certify that the foregoing Opening Brief for Appellants complies with the type-volume limitation of Rule 32(a)(7)(B), because this brief contains 3750 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). Appellants' brief has been prepared using the Microsoft Word word processing program in 12-point proportional font (Palatino Linotype).

August 1 , 2012

Respectfully submitted,

/s/ Charles Roth

Charles Roth
NATIONAL IMMIGRANT
JUSTICE CENTER
208 S. LaSalle St., Suite 1818
Chicago, IL 60604
(312) 660-1613

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on August 1, 2012. 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.

/s/ Charles Roth

Charles Roth
NATIONAL IMMIGRANT
JUSTICE CENTER
208 S. LaSalle St., Suite 1818
Chicago, IL 60604
(312) 660-1613