UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-70543
Agency File No. 021-179-705

Manuel OLIVAS-MOTTA,
Petitioner,

v.

William P. BARR, Attorney General,
Respondent,

ON PETITION FOR REVIEW OF AN ORDER
BY THE BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING OR REHEARING EN BANC

Philip L. Torrey
Kaela Athay (Law Student)
Lyla Wasz-Piper (Law Student)
Harvard Immigration and Refugee Clinical Program
Harvard Law School
6 Everett Street, Suite 3105
Cambridge, MA 02138
Telephone: (617) 495-0638
ptorrey@law.harvard.edu

Andrew Wachtenheim
Immigrant Defense Project
40 West 39th Street, Fifth Floor
New York, NY 10018
Telephone: (646) 760-0588
andrew@immdefense.org

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I, Philip L. Torrey as counsel for *amici curiae*, state that the Immigrant Defense Project, Immigrant Legal Resource Center, and National Association of Criminal Defense Lawyers are not-for-profit corporations. They have no parent corporation and no publicly-held corporation owns 10% or more of their stock.

DATED: March 13, 2019

/s/ *Philip L. Torrey*
Philip L. Torrey
Harvard Immigration and
Refugee Clinical Program
Harvard Law School
6 Everett Street; Suite 3105
Cambridge, MA 02138
Telephone: (617) 495-0638
ptorrey@law.harvard.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Agency Decisions

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici curiae the Immigrant Defense Project, Immigrant Legal Resource Center, and the National Association of Criminal Defense Lawyers are not-for-profit organizations that provide criminal defense attorneys, immigration attorneys, and noncitizens with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. *Amici* have a particular interest in ensuring that laws relating to the immigration consequences of criminal convictions are interpreted clearly and correctly to allow *amici* and their members to provide reliable advice to noncitizens accused of crimes. *See Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). *Amici* regularly appear as *amici* before the U.S. Supreme Court and Courts of Appeals. Information regarding the individual *amici* is in the Appendix.

[1] Pursuant to Circuit Rule 29-2, all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and (3) no person other than *amici*, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

The majority in this case dismissed Mr. Olivas-Motta's petition for review, declining to properly apply the retroactivity analysis that this Court first announced nearly four decades ago in *Montgomery Ward & Co. v. F.T.C.*, 691 F.2d 1322 (9th Cir. 1982). Instead, the panel impermissibly allowed the Board of Immigration Appeals ("BIA" or "Board") to retroactively apply *Matter of Leal*, 26 I. & N. Dec. 20 (BIA 2012), an unforeseen general rule that Arizona reckless endangerment constitutes a crime involving moral turpitude ("CIMT"), to deport Mr. Olivas-Motta, a lawful permanent resident of 43 years who had pleaded guilty to an Arizona reckless endangerment offense five years before the BIA's about-face. The majority held that the Board's decision in *Matter of Leal* was not a "new rule" and thus did not require *Montgomery Ward*'s five-factor retroactivity analysis. But retroactive application here is contrary to settled law, and the consequences to Mr. Olivas-Motta are catastrophic.

Judge Watford dissented, stating that the Board and this Court on petition for review should have applied the *Montgomery Ward* factors to determine whether *Matter of Leal* could be applied retroactively. Judge Watford pointedly referred to defense counsel's obligation under *Padilla v. Kentucky* to provide an "assessment of the immigration consequences attending a guilty plea" and to the impossibility of satisfying that constitutional mandate if "there is an intervening change in law"

that "may be applied retroactively in subsequent removal proceedings." *Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1282 (9th Cir. 2018) (Watford, J., dissenting).

Judge Watford is correct. The majority's decision is a radical revision to longstanding precedent on retroactive application of new agency decisions, and creates serious and highly undesirable uncertainties for noncitizens—and counsel—in criminal proceedings. The panel has broken from well-established legal norms designed to strike an appropriate balance in determining when agency decisions should be applied retroactively—a balance that accounts for both the reliance interests of regulated persons and the statutory interest in uniform application.

Instead of applying the analysis embodied in *Montgomery Ward*, the majority tipped the balance sharply in favor of the government by imposing a new requirement, unprecedented in the law of this Court and all other Circuits. *See Olivas-Motta*, 910 F.3d at 1276. The majority's new threshold inquiry—whether a change in law has occurred—both fundamentally alters and profoundly hampers this Court's ability to appropriately evaluate retroactivity of new agency rulings. This distortion of the Court's retroactivity jurisprudence promises to irrevocably erode the ability of all regulated persons and entities to predict the legal consequences of their actions amid inevitable changes in agency rulings. And while the majority's opinion is by no means limited to immigration proceedings, its

impact will be particularly harsh in that context. Under the majority's new regime, noncitizens will no longer be able to receive accurate, reliable advice from their criminal defense counsel, while defense counsel will be thwarted in meeting their Sixth Amendment duty to advise noncitizen clients under *Padilla v. Kentucky*.

Amici agree with the arguments the Petitioner has raised in his petition for rehearing, and write separately to highlight for the Court that the majority opinion does not correctly understand or recite the state of the law on reckless endangerment offenses as CIMTs in this jurisdiction at the time of Mr. Oliva-Motta's plea or the effect of *Matter of Leal* on that determination, and that the majority opinion's new retroactivity standard is a dramatic change from the test in *Montgomery Ward* on which immigration and criminal defense lawyers have relied in advising noncitizen defendants. In Section I, we discuss the challenges to defense counsel's duty to advise noncitizen defendants pursuant to *Padilla* under the majority opinion's new standard. In Section II, we explain that *Matter of Leal* was a decision that requires *Montgomery Ward* retroactivity analysis. Finally, in Section III we show that under proper application of *Montgomery Ward*, *Matter of Leal* should not have been applied retroactively in Olivas-Motta's case. *Amici* respectfully urge this Court to grant rehearing or rehearing en banc in this case to restore longstanding Circuit Court precedent on the retroactive application of executive agency decisions.

ARGUMENT

I. THE MAJORITY'S NEW RETROACTIVITY STANDARD WILL MAKE IT VIRTUALLY IMPOSSIBLE FOR DEFENSE COUNSEL TO PROVIDE CONSTITUTIONALLY ADEQUATE ADVICE UNDER *PADILLA*.

Plea decisions, like Mr. Olivas-Motta's, often hinge on potential immigration consequences. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001). The Supreme Court has long recognized that for noncitizens, the decision whether to plead guilty or proceed to trial is uniquely tied to predicting the plea's immigration consequences. *See id.* "Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Id*. (quoting 3 Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)).

The Supreme Court likewise has established that defense counsel has a Sixth Amendment duty to advise their noncitizen clients on the potential immigration consequences of guilty pleas. *See Padilla*, 559 U.S. at 391. Given the seriousness of possible deportation, the accuracy of this advice is paramount. *See Dimaya v. Lynch*, 803 F.3d 1110, 1114 (9th Cir. 2015), *aff'd by Sessions v. Dimaya*, 128 S. Ct. 1204 (2018); *see also United States v. Rodriguez-Vega*, 797 F.3d 781, 790–91 (9th Cir. 2015) (finding that petitioner received ineffective assistance of counsel under *Padilla* because her attorney understated the likelihood of her removal during plea negotiations: "Warning of the possibility of a dire consequence is no substitute for warning of its virtual certainty."). By allowing for retroactive

application of new rules, the majority opinion frustrates this constitutional duty to provide "accurate legal advice for noncitizens accused of crimes." *Padilla*, 559 U.S. at 391.

There are powerful benefits that both the government and the noncitizen receive from "informed consideration of possible deportation," *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1111 (9th Cir. 2011) (quoting *Padilla*, 559 U.S. at 357). Both parties may be able to reach a mutually satisfactory agreement which results in a guilty plea but nevertheless avoids deportation for the noncitizen. *See id*.; *Tyson v. Holder*, 670 F.3d 1015, 1016 (9th Cir. 2012). But, prosecutors and defendants alike must be able to rely on the consequences of their plea agreements. *See Cabantac v. Holder*, 736 F.3d 787, 791 (9th Cir. 2013) (Murguia, J., dissenting). If the consequences of a guilty plea change after the plea has been entered, prosecutors will have already benefited from a plea; retroactive changes to the consequences of pleas disproportionately prejudice defendants. *See St. Cyr*, 533 U.S. at 292; *see also Maldonado-Galindo v. Gonzales*, 456 F.3d 1064, 1068–69 (9th Cir. 2006) (recognizing that prosecutors receive the benefits of a plea immediately once it is entered). And future defendants may decide not to plead guilty as a result.

This Court has precisely identified the problem retroactive application creates for attorneys who must give *Padilla* advice and noncitizens who rely on

that advice: "It would be manifestly unfair effectively to *hoodwink* [noncitizens] into waiving their constitutional rights [by engaging in plea negotiations to avoid certain consequences] . . . and, then, to hold retroactively that their convictions actually carried with them the 'particularly severe "penalty"' of removal." *Nunez-Reyes v. Holder*, 646 F.3d 684, 693 (9th Cir. 2011) (quoting *Padilla*, 559 U.S. at 365) (emphasis added).

Mr. Olivas-Motta's case is illustrative. At the time of his plea, all of the sources defense counsel should consult in providing an advisal under *Padilla* required evil intent or willfulness—or at least something more than recklessness alone—for a reckless endangerment offense to be a CIMT. *See, e.g.*, Norton Tooby & Joseph Rollin, *Criminal Defense of Immigrants* 1357 (Kerrin Staskawicz 2007) [hereinafter "Tooby"] ("The Ninth Circuit has recently made clear that it considers a mens rea of recklessness insufficient to demonstrate 'evil intent' necessary for an [sic] crime to involve moral turpitude."); *see also infra*, Section II (discussing the state of the law in 2007). *Matter of Leal* was a change. It is not reasonable to expect defense counsel to advise pursuant to unknown future changes in law, or for noncitizens to enter guilty pleas and make other case outcome decisions without the ability to understand what immigration consequences will follow. The *Montgomery Ward* test is designed to protect predictability and reliance interests threatened by retroactivity. *See Montgomery Ward*, 691 F.2d at 1333. *See also*

Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.").

II. THE PANEL AND THE BOARD SHOULD HAVE APPLIED THE *MONTGOMERY WARD* RETROACTIVITY TEST IN THE PETITIONER'S CASE.

As the Petitioner correctly argues, an en banc panel of this Court has already rejected this panel's approach that upends the *Montgomery Ward* five-factor retroactivity test and turns one of its core factors into a threshold requirement before applying the test at all. *See Garfias-Rodriguez v. Holder*, 702 F.3d 504, 516 (9th Cir. 2012) (rejecting the concurring opinion's suggested approach of applying "retroactivity principles to conclude that retroactivity analysis doesn't apply" because it "conflates the result of a retroactivity analysis with the process of conducting it"). Under this Court's precedent—and even under the majority's rule—*Matter of Leal* changed the law on whether reckless endangerment offenses can be CIMTs. *See Olivas-Motta*, 910 F.3d at 1282 (Watford, J., dissenting) (noting that *Matter of Leal* announced a new rule "under any definition of that term").

There are at least two ways a decision announces a new rule that triggers *Montgomery Ward* retroactivity analysis: "by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose

resolution was not clearly foreshadowed." *Olivas-Motta*, 910 F.3d at 1282 (Watford, J., dissenting) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971)). When the BIA newly determines that an offense qualifies as a CIMT, that decision is a new rule that weighs against its retroactive application, especially when prior BIA opinions and past practice did not clearly foreshadow the new rule. *See id.*

The rule established in *Matter of Leal*—that reckless endangerment under Ariz. Rev. Stat. § 13-1201 is a CIMT—was not clearly foreshadowed when Mr. Olivas-Motta pleaded guilty to that offense in 2007. *See id.* at 1282 (Watford, J., dissenting). Not only was there no prior BIA precedent on the issue, but the only two unpublished BIA decisions at the time of Mr. Olivas-Motta's plea held that an offense pursuant to Ariz. Rev. Stat. § 13-1201 was *not* a CIMT. *See id.*; *see also In re Marco Antonio Valles-Moreno*, 2006 WL 3922279 (BIA 2006) (holding that Arizona endangerment is *not* categorically a CIMT); *In re Carlos Mario Almeraz-Hernandez*, 2006 WL 3203649 (BIA 2006) (same).

This Court's precedent and immigration practice in 2007 also demonstrated that recklessness offenses would not be categorized as CIMTs. *See Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1167 (9th Cir. 2006) (holding that an Arizona law that required only reckless intent was not enough "without the additional element of willfulness" and the type of injury required for domestic assault to qualify

categorically as a CIMT); Tooby, at 1357 (collecting authorities for the proposition that the Ninth Circuit has disapproved of cases holding recklessness sufficient to establish a CIMT).

The majority's decision not to even apply the *Montgomery Ward* retroactivity test cuts against how this Court and the federal courts generally treat retroactivity questions. This Court's decision in *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007) illustrates this Court's approach to retroactivity until the majority opinion in this case. In *Miguel-Miguel*, this Court applied the *Montgomery Ward* test to decide whether the Board could retroactively apply a new rule for classifying drug offenses as particularly serious crimes. *See* 500 F.3d at 944. Here the panel should have followed suit, as Judge Watford would have, and looked at the five factors to decide whether the Board could retroactively apply *Matter of Leal* to deport Mr. Olivas-Motta. And this result would be consonant with the dominant approach of the Courts of Appeals with respect to adjudicative retroactivity.

"Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In the Seventh Circuit, agency adjudications "are presumed not to have retroactive effect" because they are "legislative and quasi-legislative," *Velasquez-Garcia v. Holder*, 760 F.3d 571, 579 (7th Cir. 2014). In the

Tenth Circuit, then-Judge Gorsuch adopted this same position with respect to retroactivity:

> [T]he more an agency acts like a legislator—announcing new rules of general applicability—the closer it comes to the norm of legislation and the stronger the case becomes for limiting application of the agency's decision to future conduct. The presumption of prospectivity attaches to Congress's own work unless it plainly indicates an intention to act retroactively. *That same presumption, we think, should attach when Congress's delegates seek to exercise delegated legislative policymaking authority: their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application*.

De Niz Robles v. Lynch, 803 F.3d 1165, 1172 (10th Cir. 2015) (Gorsuch, J.) (emphasis added). The Board and this Court were required to apply the *Montgomery Ward* framework to determine "whether retroactive application is permissible." *Olivas-Motta*, 910 F.3d at 1283 (Watford, J., dissenting). The decision not to do so breaks with decades of decisional law protecting against agency overreach.

III. UNDER THE *MONTGOMERY WARD* FACTORS, *MATTER OF LEAL* CANNOT BE APPLIED RETROACTIVELY TO MR. OLIVAS-MOTTA.

Immigration lawyers have long relied on *Montgomery Ward* and its progeny when advising noncitizens about immigration consequences of criminal convictions. *See* Ira J. Kurzban, *Immigration Law Sourcebook* 1814 (American Immigration Council 2016–2017); Ira J. Kurzban, *Immigration Law Sourcebook*

1507 (American Immigration Council 2012). Within its framework, counsel can ascertain the likely immigration consequences of an offense at the time of conviction, and advise their clients according to current law—as *Padilla* requires. Under *Montgomery Ward*, *Matter of Leal* could not be applied retroactively to Mr. Olivas-Motta or other similarly situated noncitizens, who pleaded guilty to a reckless endangerment offense that was not regarded as a CIMT under BIA law or Ninth Circuit law at the time of the plea. Before briefly discussing the five *Montgomery Ward* factors, we note that if the majority's decision becomes the law of this Circuit, it will have devastating consequences for regulated entities and their counsel.

Factor 1: *Matter of Leal* was a New Precedent Decision That Decided an Issue of First Impression.

In the immigration context specifically, this Court has held that the first factor in the *Montgomery Ward* test typically favors neither party. *See Garfias-Rodriguez*, 702 F.3d at 521. That is because the factor arose in relation to the regulation of labor disputes between private parties, and the question of first impression indicated whether a specific private party had previously convinced the National Labor Relations Board to change a rule. *See id*. This question is thus not well suited for the immigration context, where the government will always be a party. *See id.* So the first factor is often analyzed together with the second and third factors because of their interrelationship. *See, e.g., id.* ("[A]ny question of

unfairness in applying a new rule in cases of 'first impression' . . . is fully captured in the second and third *Montgomery Ward* factors."); *Montgomery Ward*, 691 F.2d at 1334–35 (considering the first three factors together as a single criterion).

Factor 2: *Matter of Leal* Represented an Abrupt Departure From the BIA's Prior Rulings and Well-Established Practice.

As explained *supra*, at the time of Mr. Olivas-Motta's guilty plea this Court's precedent suggested that recklessness alone—without a statutory aggravating factor—was insufficient to qualify as a CIMT. *See, e.g.*, *Hirsch v. INS*, 308 F.2d 562, 567 (9th Cir. 1962) (holding that making false statements to a federal agency "is not necessarily a crime involving moral turpitude" because it "does not necessarily involve evil intent"). *See also Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1259–60 (9th Cir. 2019) (Fletcher, J., concurring) (citing the panel's decision in *Olivas-Motta* as an example of the BIA "chang[ing] course" regarding reckless endangerment as a CIMT and "abandon[ing] the position taken in its two prior decisions").

At the time of the plea, two BIA decisions had also issued non-precedential decisions holding that Arizona reckless endangerment was not a CIMT. *See In re Valles-Moreno*, 2006 WL 3922279 (BIA 2006); *In re Almeraz-Hernandez*, 2006 WL 3203649 (BIA 2006). Additionally, decisions from this Court and practice guides suggested that offenses like Ariz. § 13-1201 that involve recklessness without an aggravating circumstance were not CIMTs in the Ninth Circuit. *See*,

e.g., *Fernandez-Ruiz*, 468 F.3d at 1166 (rejecting a conviction under an Arizona reckless assault statute as a CIMT because it penalized reckless conduct without any aggravating statutory factor); Tooby, at 1357 (advising that in the Ninth Circuit recklessness alone does not satisfy the evil intent requirement for a CIMT). Meanwhile, the BIA had not announced whether reckless endangerment qualified as a CIMT in a precedential opinion. *See Olivas-Motta*, 910 F.3d at 1284 (Watford, J., dissenting).

Outside the specific context of reckless endangerment, this Court and the BIA have also repeatedly held that willfulness or evil intent is necessary to satisfy the CIMT definition. *See, e.g.*, *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994) ("A crime involving the willful commission of a base or depraved act is a crime involving moral turpitude."); *In re Khourn*, 21 I. & N. Dec. 1041, 1046 (BIA 1997) ("The Board has held that 'evil intent' is a requisite element for a crime involving moral turpitude."); *Matter of Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980) (holding that an "evil or malicious intent is said to be the essence of moral turpitude."); *Matter of Abreu-Semino*, 12 I. & N. Dec. 775, 777 (BIA 1968) (finding that "crimes in which evil intent is not an element, no matter how serious the act or harmful the consequences, do not involve moral turpitude").

Arizona reckless endangerment includes no willfulness component and no comparable aggravating circumstance. Mr. Olivas-Motta could not foresee that an

Arizona reckless endangerment conviction would qualify as a CIMT at the time of his guilty plea.[2] *See* Brief of Petitioner at 3, *Olivas-Motta v. Barr*, No. 14-70543 (9th Cir. 2019); Ariz. Rev. Stat. § 13-1201. The second factor of *Montgomery Ward* thus weighs against retroactivity here.

Factor 3: Prior to *Matter of Leal*, Noncitizens Reasonably Relied on the BIA's Prior Rulings and Well-Established Practice that Reckless Offenses in this Circuit with the Elements of AZ § 13-1201 Were Not CIMTs.

"The third [factor] examines the extent to which the party against whom the new rule is applied may have relied on the former rule." *Velasquez-Garcia*, 760 F.3d at 582. "Importantly, the critical question is not whether a party actually relied on the old law, but whether such reliance would have been reasonable." *Id.* (citing *Vartelas v. Holder*, 566 U.S. 257, 273 (2012)). In pleading guilty to Arizona reckless endangerment in 2007, it was reasonable for Mr. Olivas-Motta to rely on advice that the relevant decisional law in his circumstances held the conviction was not for a CIMT. *Matter of Leal* changed things, and had its new rule been in place at the time of his guilty plea, Mr. Olivas-Motta may have pursued an alternative resolution to his charges in order to avoid removal. *See, e.g.*, *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (concluding that the petitioner "demonstrated a

[2] Notably, only a year before Mr. Olivas-Motta's plea, this Court sitting en banc explicitly recognized that reckless conduct under "Arizona law is not purposeful." *See Fernandez-Ruiz*, 466 F.3d at 1130.

reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation"); *Padilla*, 559 U.S. at 359 (recognizing that petitioner would not have forgone his right to a trial had he received accurate immigration advice from counsel).

The advice from Olivas-Motta's counsel was "eminently reasonable," *Olivas-Motta*, 910 F. 3d at 1285 (Watford, J., dissenting), based on the available law at the time of the guilty plea. *See* discussion *supra*, Section II.

Factor 4: Deportation Through Retroactive Application of *Matter of Leal* Imposes a Substantial Burden.

The Supreme Court has also "long recognized the obvious hardship imposed by removal." *Velasquez-Garcia*, 760 F.3d at 584; *see also Padilla*, 559 U.S. at 365 ("We have long recognized that deportation is a particularly severe 'penalty.'" quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)). The Court in *Padilla* described deportation as a "drastic measure." *Padilla*, 559 U.S. at 360 (quoting *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10 (1948)). In *Vartelas*, the Court again "recognized the severity of [the] sanction" of deportation. 566 U.S. at 267–68 (referring to deportation as "banishment"). In short, Mr. Olivas-Motta now faces deportation because of a plea he entered into more than ten years ago in the reasonable reliance that he would avoid just that result. It is hard to imagine a set of facts that more squarely implicate the central retroactivity principle recognized by the Supreme Court that new burdens should generally not be imposed on the

basis of completed acts. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 46 (2006).

And as the Court is well-aware, categorizing a conviction as a CIMT widely impacts vulnerability to deportation for whole categories of immigrants. If the Court allows the panel opinion to stand and allows for retroactive application of new CIMT determinations like *Matter of Leal*, lawful permanent residents will become deportable, and in some instances ineligible for cancellation of removal, *see* 8 U.S.C. §§ 1227(a)(2)(A)(i)–(ii), 1229b(a)(2), 1229b(d)(1)(B); parents, spouses, and children of U.S. citizens and lawful permanent residents will become ineligible for cancellation of removal, including individuals who have been battered, *see* 8 U.S.C. §§ 1229b(b)(2)(C), 1229b(b)(2)(A)(iv); and family members of U.S. citizens will become ineligible for adjustment of status without a discretionary waiver, *see* 8 U.S.C. § 1182(a)(2)(A)(i)(I). "[T]hat burden is immense." *Velasquez-Garcia*, 760 F.3d at 584; *accord Miguel–Miguel*, 500 F.3d at 952 ("[D]eportation alone is a substantial burden that weighs against retroactive application of an agency adjudication.").

Factor 5: The Government's Interest In Applying a New Rule Does Not Tip the *Montgomery Ward* Balance in Favor of Retroactivity.

The statutory interest in enforcing the Immigration and Nationality Act's ("INA") CIMT provisions would be "substantially served by prospective application." *Miguel-Miguel*, 500 F.3d at 952. "[C]ourts have not infrequently

declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests." *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (1972) (collecting cases from the First, Second, Sixth, and Eighth Circuits). Here there is no sufficiently significant statutory interest to mitigate the unfairness of applying *Matter of Leal* retroactively.

In *Miguel-Miguel*, for example, this Court found no sufficient statutory interest in the INA for retroactively applying an altered methodology for determining whether a drug offense is a "particularly serious crime" for purposes of barring withholding of removal. *Miguel-Miguel*, 500 F.3d at 952. Under this Court's case law, the outcome here should be the same.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for panel rehearing or rehearing en banc and restore the rule requiring application of the *Montgomery Ward* retroactivity test where an agency seeks to apply a new rule like in the Petitioner's case.

Dated: March 13, 2019

Respectfully submitted,

/s/ *Philip L. Torrey*
Philip L. Torrey
Kaela Athay (Law Student)
Lyla Wasz-Piper (Law Student)
Harvard Immigration and Refugee Clinical Program

Harvard Law School
6 Everett Street, Suite 3105
Cambridge, MA 02138
Telephone: (617) 495-0638
ptorrey@law.harvard.edu

Andrew Wachtenheim
Immigrant Defense Project
40 West 39th Street, Fifth Floor
New York, NY 10018
Telephone: (646) 760-0588
andrew@immdefense.org

Counsel for Amici Curiae

Robin Wechkin
SIDLEY AUSTIN LLP
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
Tel.: (415) 439-1799

Counsel for the National Association of Criminal Defense Lawyers

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 4,096 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). Additionally, this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word, using Times New Roman in 14 point font.

DATED: March 13, 2019

/s/ *Philip L. Torrey*
Philip L. Torrey
Harvard Immigration and Refugee
Clinical Program
Harvard Law School
6 Everett Street; Suite 3105
Cambridge, Massachusetts 02138
Telephone: (617) 495-0638
ptorrey@law.harvard.edu

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2019, I electronically filed the foregoing, Brief of *Amici Curiae* in Support of Petitioner's Petition for Review, with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that the following counsel of record for Petitioner and Respondent in this case are registered CM/ECF users and will therefore be served by the appellate CM/ECF system:

K. Lee Hartzler
2485 Island Ave.
San Diego, CA 92101
Attorney for Petitioner

Sarah Abigail Byrd
U.S. Department of Justice
Office of Immigration Litigation
PO Box 878
Ben Franklin Station
Washington, DC 20044
Attorney for Respondent

DATED: March 13, 2019

/s/ *Philip L. Torrey*

Philip L. Torrey
Harvard Immigration and Refugee
Clinical Program
Harvard Law School
6 Everett Street; Suite 3105
Cambridge, MA 02138
Telephone: (617) 495-0638
ptorrey@law.harvard.edu

APPENDIX

The **Immigrant Defense Project ("IDP")** is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact with the criminal legal and immigration detention and deportation systems. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights. IDP has submitted *amicus curiae* briefs in many key cases before the U.S. Supreme Court and Courts of Appeals involving the interplay between criminal and immigration law. *See, e.g.*, *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Vartelas*, 566 U.S. 257; *Padilla*, 559 U.S. 356; *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *St. Cyr*, 533 U.S. at 322–23 (2001) (citing IDP brief).

The **Immigrant Legal Resource Center ("ILRC")** is a national organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. For thirty years ILRC has had an "Attorney of the Day" service that offers consultations on immigration law and the immigration

consequences of convictions to attorneys, employees of non-profit organizations, public defenders, and others assisting immigrants. Public defender offices throughout California contract with ILRC to strategize about alternative immigration-safe dispositions in individual cases for noncitizen clients. ILRC has a number of publications specifically for defense attorneys. *See, e.g.*, Katherine Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2008, updated 2013); *California Criminal Defense – Procedure and Practice* (CEB 2016) (including chapter on defending noncitizens). ILRC also has a free online "quick reference" chart that analyzes the immigration consequences of more than 200 convictions in California, and helped create similar charts and materials analyzing offenses in Arizona, Nevada, and Washington. *See, e.g.*, ILRC, *Quick Reference Chart*, www.ilrc.org/chart.

The **National Association of Criminal Defense Lawyers ("NACDL")** is a nonprofit voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands, and up to 40,000 attorneys including affiliates' members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper

and efficient administration of justice and files numerous *amicus* briefs each year in federal and state courts addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.