Case No. 09-72603

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Francisco Javier GARFIAS RODRIGUEZ,

Petitioner,

vs.

Eric Holder, Attorney General of the United States,

Respondent

BRIEF *AMICUS CURIAE* OF THE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae submits the following corporate disclosure statement:

The National Immigrant Justice Center states that it is a program of The Heartland Alliance for Human Needs and Human Rights, an Illinois nonprofit corporation, which has no corporate parents. It is not publicly traded.

/s Charles Roth
Charles Roth

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Statement of Interest of *Amicus Curiae*

The National Immigrant Justice Center (NIJC), a program of the Heartland Alliance for Human Needs and Human Rights, is a non-profit organization that represents low-income immigrants, refugees and asylum seekers. Annually, NIJC assists hundreds of individuals whose ability to obtain status turns on the interpretation of 8 U.S.C. § 1182(a)(9)(C). NIJC's expertise can assist this Court in deciding this appeal.

Summary of Argument

The dispute between the parties stems from a misinterpretation of § 1182(a)(9)(C), which impacts thousands of people. The Agency concludes that 8 U.S.C. § 1182(a)(9)(C) should trump § 1255(i) while Garfias argues that the reverse is true. Amicus believes that the conflict is illusory and exists only because the Agency is ignoring the plain text of § 1182(a)(9)(C).

If given its plain meaning, § 1182(a)(9)(C) applies only when an individual is physically present in the United States following an entry or attempted entry without inspection. Thus, § 1182(a)(9)(C) targets precisely those individuals who might seek adjustment of status under § 1255(i). Because § 1182(a)(9)(C) and § 1255(i) are intended to apply to those seeking

adjustment of status after an entry without inspection, they should be read harmoniously. This reading would be possible but for the Agency's misinterpretation of § 1182(a)(9)(C)(ii). The correct interpretation of that section compels the conclusion that, when Congress imported language from § 1182(a)(9)(A), it intended for the Agency's prior interpretation of that provision to apply, allowing individuals applying for adjustment of status under § 1255(i) to obtain consent to reapply under § 1182(a)(9)(C). Constitutional avoidance also supports Amicus' view.

Finally, Amicus submits that the Voluntary Departure regulations under review exceed the Attorney General's authority, because they create a new, hybrid creature, neither removal order nor voluntary-departure order. Even if the regulations could survive plain meaning review, they are unreasonable, and contrary to legislative intent.

Argument

I. The Plain Text of 8 U.S.C. § 1182(a)(9)(C) Precludes the Government's Argument That it Trumps § 1255(i).

The Agency concludes that § 1182(a)(9)(C) should trump § 1255(i). If the statutes did conflict, the later-enacted statute (§ 1255(i)), should prevail.

But, the conflict is illusory, and exists only because the Agency is ignoring the plain text of § 1182(a)(9)(C).

Generally, an individual must be in lawful status to seek permanent residence within the United States. 8 U.S.C. § 1255(a), (c). However, 8 U.S.C. § 1255(i) permits certain noncitizens to seek adjustment of status, notwithstanding unlawful status.[1] Although section 1255(i) was due to sunset in 1997, it has been extended several times, most recently in 2000. *See Padilla–Caldera v. Holder*, 637 F.3d 1140, 1148 n. 7 (10th Cir. 2011). Section 1255(i) was in effect when § 1182(a)(9)(C) was enacted in 1996, and remains in effect now.

A. The Plain Meaning of § 1182(a)(9)(C) is that it applies to individuals unlawfully present at the time of application.

A separate statutory provision renders inadmissible immigrants who enter or attempt to enter[2] without admission after a removal order or after

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[1]Individuals ineligible to seek Adjustment of Status within the U.S. may request an immigrant visa at a United States consular post abroad. This process – known as consular processing – is controlled by the Department of State, though waivers of inadmissibility are adjudicated by the Department of Homeland Security. 8 U.S.C. § 1182.

[2] An "attempt to reenter… without being admitted," would include individuals caught attempting to enter the United States, *see*, *e.g., United States v. Munoz*, 412 F.3d 1043 (9th Cir. 2005), and then placed into removal proceedings.

accruing more than a year of unlawful presence. 8 U.S.C. § 1182(a)(9)(C)(i). The plain text of that statute, where inquiry should begin, *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004), demonstrates that it applies to adjustment applications, not to intending immigrants abroad.

1. Section 1182(a)(9)(C)(i) refers to unlawful presence in the present tense and is not tied to admission.

"Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992); *see also*, *Bonnichsen v. United States*, 367 F.3d 864, 875 & n. 15 (9th Cir. 2004) (citing RAYMOND W. PENCE & DONALD W. EMERY, A GRAMMAR OF PRESENT DAY ENGLISH 262 (2d ed. 1963)).

In § 1182, Congress used the past or present perfect tense when it wished to render a noncitizen inadmissible based on past actions.[3] *See, e.g.*, 8 U.S.C. § 1182(a)(2)(A)(I) ("any alien *convicted* of… a crime involving moral turpitude… is inadmissible."); *id.* 1182(a)(6)(E) ("Any alien who at any time knowingly *has encouraged*… abetted, or aided any other alien to enter … the United States"); *id.* § 1182(a)(3)(G) ("*has engaged* in the

[3] "The *present perfect* tense denotes an action that has been completed at some indefinite time before the present time." Margaret Schertzer, Elements of Grammar, 29 (MacMillen) (New York 1986)

recruitment or use of child soldiers"); *id.* § 1182(a)(10)(D)(" *has voted* in violation of any … statute") (emphasis added). Where Congress wishes to capture both present and past acts, it uses both tenses. *Id.* § 1182(a)(6)(C) ("Any alien who, by fraud … *seeks to procure* (or *has sought* to procure or *has procured*) a visa … is inadmissible.") (emphasis added). Congress often specifies the temporal reach of inadmissibility for past acts. *See, e.g.*, *id.* § 1182(a)(2)(D) ("Any alien who… procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure … prostitutes… is inadmissible."); *id.* § 1182(a)(6)(G) ("An alien who obtains [student nonimmigrant] status … and who violates a term or condition of such status … is inadmissible until the alien has been outside the United States for a continuous period of 5 years after the date of the violation.")

Here, Congress used the present perfect tense to refer to prior unlawful presence or prior removal, and the present tense as to the subsequent entry or reentry without inspection:

> (C) Aliens *unlawfully present* after previous immigration violations.-
> (i) In general.-Any alien who-
> (I) *has been unlawfully present* in the United States for an aggregate period of more than 1 year, or

> (II) *has been ordered removed* under section 235(b)(1) , section 240 , or any other provision of law, and who *enters or attempts to reenter* the United States without being admitted is inadmissible.

8 U.S.C. § 1182(a)(9)(C)(i) (emphasis added). The latter language is similar to inadmissibility sections that do not turn on past acts. *See*, *e.g.*, *id.* § 1182(a)(6)(A).[4] The section header – "Aliens *unlawfully present* after previous immigration violations" – is also similar to the section header of § 1182(a)(6)(A), "Aliens present without admission or parole."

In short, Congress knew how to write inadmissibility provisions to relate to past conduct, and did so numerous times. Yet in § 1182(a)(9)(C)(i), it used language akin to subsections directed at present conduct. The use of this language must be seen as intentional. NORMAN J. SINGER,

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[4] That provision reads as follows:

> (A) Aliens *present without admission or parole*
> (i) In general. An alien *present* in the United States *without being admitted or paroled*, or who arrives in the United States at any time or place other than as designated by the Attorney General, *is inadmissible*.

8 U.S.C. § 1182(a)(6)(A) (emphasis added). USCIS has determined that this provision "only applies to individuals who are present in the United States…. Inadmissibility does not continue after the alien has departed." Adjudicator's Field Manual at 40.6.2(a)(3)(ii), available at <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?CH=afm&vgnextchannel=fa7e539dc4bed010VgnVCM10000000ecd190aRCRD&vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD> (last accessed April 10, 2012).

SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:06, p. 194 (6th rev.ed. 2000) (hereinafter SINGER) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

It is particularly instructive to compare § 1182(a)(9)(C)(i) with the two paragraphs of § 1182(a)(9) immediately preceding it.

First, 8 U.S.C. § 1182(a)(9)(A) makes noncitizens inadmissible due to past removal orders: "Any alien … who— (I) *has been ordered removed* … and who *seeks admission* within 10 years of the date of such alien's departure or removal … is inadmissible." (Emphasis added). Amicus notes three points: (1) the past act triggering inadmissibility (the removal order) is specified; (2) the temporal period of inadmissibility triggered that activity is stated, and (3) the resulting inadmissibility is expressly applied in the present tense.

Similarly, 8 U.S.C. § 1182(a)(9)(B) makes inadmissible individuals who were previously unlawfully present. That provision says that an alien who "*was* unlawfully present" or "*has been*" unlawfully present for a specified period of time and "*again seeks* admission" following a departure or removal "*is* inadmissible." 8 U.S.C. § 1182(a)(9)(B) (emphasis added).

Again, Congress (1) specifies the past act triggering inadmissibility (prior unlawful presence); (2) states the duration of inadmissibility triggered by the past activity, and (3) applies that inadmissibility in the present tense when the alien "seeks admission."

By contrast, § 1182(a)(9)(C)(i) includes no language stating a period of inadmissibility, much less permanent inadmissibility. Moreover, it contains no language making this inadmissibility ground applicable during an attempt to be lawfully admitted in the future.

The latter omission is significant. The term "admission" is defined to mean "the lawful entry of the alien into the United States after inspection and authorization." 8 U.S.C. § 1101(a)(13)(A). This definition is "unambiguous." *Shivaraman v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004). And the circuits unanimously hold that "the statutory definition of 'admission' does not include adjustment of status." *Aremu v. Dep't of Homeland Sec.*, 450 F.3d 578, 581 (4th Cir. 2006); *see also*, *Martinez v. Mukasey*, 519 F.3d 532, 544 (5th Cir. 2008) ("'admission' is the lawful entry of an alien after inspection, something quite different, obviously, from post-entry adjustment of status"); *Lanier v. U.S. Att'y Gen.*, 631 F.3d 1363, 1366 (11th Cir. 2011) (same).

It is reasonable to "assume[that] different meanings [of these provisions] were intended," SINGER § 46:06, p. 194, particularly since § 1182 is the primary statute governing a noncitizen's eligibility to be "admitted to the United States." 8 U.S.C. § 1182(a). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). The non-inclusion of the admission language in § 1182(a)(9)(C)(i) supports Amicus' view that Congress intended § 1182(a)(9)(C)(i) to apply, as its plain text suggests, not to admission applications abroad, but to adjustment applications filed by individuals unlawfully present within the United States.

2. Section 1182(a)(9)(C)(ii) Is Consistent With This Interpretation.

The Board of Immigration Appeals holds that consent to reapply under § 1182(a)(9)(C)(ii) cannot be sought until the noncitizen has been outside the country for ten years. *In re Briones*, 24 I. & N. Dec. 355, 367 (BIA 2007). But this interpretation is premised on ignoring the plain meaning

explained above, and because it ignores the history of the phrase chosen by Congress.

This waiver provision is taken directly from § 1182(a)(9)(A)(iii),[5] which has existed in various forms for over 50 years. It has been consistently interpreted to permit consent to reapply to be given, *not only abroad*, but in the course of seeking adjustment *in the United States*. *See, e.g.*, *Matter of Ng* , 17 I. & N. Dec. 63 (BIA 1979); *Matter of Ducret*, 15 I. & N. Dec. 620 (BIA 1976). That understanding was, and remains, codified in regulation. 8 C.F.R. § 212.2(e).

The Board has implausibly distinguished regulations interpreting § 1182(a)(9)(A) from being sought within the United States, finding "the very

[5] A side-by-side comparison of the two provisions is instructive. The italicized language in § 1182(a)(9)(C)(ii) is found in § 1182(a)(9)(A)(iii); the italicized language in § 1182(a)(9)(A)(iii) is not found in § 1182(a)(9)(C)(ii).

Exception Clauses (i) *and (ii)* shall not apply to an alien seeking admission *within a period* if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the *Attorney General* has consented to the alien's reapplying for admission 8 U.S.C. § 1182(a)(9)(A)(iii).	*Exception Clause (i) shall not apply to an alien seeking admission* more than 10 years after the date of the alien's last departure from the United *States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the* Secretary of Homeland Security *has consented to the alien's reapplying for admission.* 8 U.S.C. § 1182(a)(9)(C)(ii)

concept of retroactive permission to reapply for admission … contradicts the clear language of section [1182](a)(9)(C)." *Torres-Garcia*, 23 I. & N. Dec. at 874-75. But in pertinent part, § 1182(a)(9)(A)(iii) is indistinguishable from § 1182(a)(9)(C)(ii); both require that consent to reapply be obtained "prior to… reembarkation." If § 212.2(e) is inconsistent with § 1182(a)(9)(A)(iii), it is just as inconsistent with § 1182(a)(9)(A); and the Board enunciated no rationale that would not invalidate § 212.2(e) as to § 1182(a)(9)(A), which it is powerless to do. *In re X-K-*, 23 I. & N. Dec. 731, 735 (BIA 2005).

More importantly, Congress is "presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Congress' use of the entire phrase at issue – a unique and archaic phrase– supports the proposition that Congress intended § 1182(a)(9)(C)(ii) to be interpreted as the same language was in § 1182(a)(9)(A).

The *Lorillard* presumption is "particularly appropriate here since … Congress exhibited both a detailed knowledge of the [laws] and their judicial interpretation and a willingness to depart from those provisions

regarded as undesirable or inappropriate for incorporation." 434 U.S. at 581. In the same conference report cited by the Board as expressing Congressional intent, Congress stated a clear intention to overrule various administrative and judicial decisions. Congress altered the test for finality of a conviction. H.R. Rep. No. 104-828, at 224 (1996) (amending *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988)). It overturned *Matter of Castro*, 19 I. & N. Dec. 692 (BIA 1988), and *Matter of Esposito*, 21 I. & N. Dec. 1 (BIA 1995), regarding jail sentences not formally imposed. H.R. Rep. No. 104-828, at 224 (1996). It changed the standards for relief under Suspension of Deportation (renamed Cancellation of Removal), expressly disagreeing with *Matter of O-J-O-*, Int. Dec. 3280 (BIA 1996). H.R. Rep. No. 104-828, at 213 (1996). It "specifically disapprove[d] of and intend[ed] to override" *Matter of Farias*, 21 I. & N. Dec. 269 (BIA 1996). H.R. Rep. No. 104-828, at 228 (1996). IIRIRA codified some, but not all, of the regulations governing motions to reopen. *Kucana v. Holder*, 130 S. Ct. 827, 838 (2010). It even – or so the Board held – overturned the Supreme Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). *In re Collado–Munoz*, 21 I. & N. Dec. 1061, 1065–1066 (BIA 1998).

The detailed and intentional overruling of various Board decisions in those contexts makes it more significant that Congress not only indicated no intention to overrule *Matter of Ng*, *Matter of Ducret*, and 8 C.F.R. § 212.2(e), but carefully repeated the same statutory formulation which the Agency had authoritatively interpreted over decades.

Once § 1182(a)(9)(C)(ii) is understood to govern a waiver process intended to be available within the United States, the error of the Board's analysis in *Matter of Briones*, *supra*, becomes more clear. Consent to reapply under § 1182(a)(9)(C)(ii) is available "more than 10 years after the date of the alien's last departure from the United States" to noncitizens unlawfully present within the United States. Every individual inadmissible under § 1182(a)(9)(C) necessarily departed the United States, after a removal order or after a period of inadmissibility; the "last departure" language is naturally read to refer to that exit.

Standing alone, this would not be the only possible view of § 1182(a)(9)(C)(ii). But the Agency is attempting to use § 1182(a)(9)(C)(ii) to avoid the plain meaning of § 1182(a)(9)(C)(i), and that is implausible.

On Amicus' reading, there is no direct or implicit conflict between § 1255(i) and § 1182(a)(9)(C), and § 1182(a)(9)(C)(ii) was never superfluous.[6] By statute, individuals may be eligible to adjust status under § 1255(i); and inadmissible under § 1182(a)(9)(C)(i); and eligible to seek consent to reapply under § 1182(a)(9)(C)(ii).

B. Any Other Interpretation Would Reach the Outer Limits of Congressional Authority.

The Board of Immigration Appeals interprets § 1182(a)(9)(C) to render an individual "*permanently* inadmissible." *Matter of Torres–Garcia*, 23 I. & N. Dec. 866, 873 (BIA 2006) (emphasis in original). By this, it means not only that the individual is inadmissible while within the United States pursuant to an unlawful entry, but that departure from the United States cannot cure the inadmissibility.

Under the Board's reading, § 1182(a)(9)(C) literally forbids an individual from obtaining legal status, notwithstanding a lawful, valid marriage to a United States citizen. The inadmissibility is permanent and

[6] Under the Board's interpretation, the consent to reapply process would have been entirely unused for at least 10 years after its enactment, because an individual would (a) have to trigger inadmissibility by entering or attempting to reenter without inspection, and then (b) have to wait abroad for 10 years, before seeking consent to reapply.

lifelong, though it may be waived, at the agency's discretion, after 10 years. This draconian penalty, which burdens family relations which obtain some level of constitutional solicitude, approaches the outward limits on Congressional civil authority. To interpret § 1182(a)(9)(C) in this manner would invite the claim that the provision is punitive in nature, and thus may not be imposed without a trial by jury.

It is well-established that an immigration provision which imposes "an infamous punishment" without presentment to a Grand Jury or a Trial by Jury, would conflict with the fifth and sixth amendments. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). The question would thus be presented whether the lifelong penalty imposed by § 1182(a)(9)(C) would fit within that category. Amicus does not doubt that Congress possesses broad powers in the context of admissions of noncitizens. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Nevertheless, that power must be exercised within constitutional limits. *INS v. Chadha*, 462 U.S. 919 (1983).

The Supreme Court enjoins a two-part inquiry to determine whether a purportedly civil statute is punitive:

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine

> whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"

Smith v. Doe, 538 U.S. 84, 92 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997), *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). Amicus submits that this provision would fail on both counts.

1. Punitive Intent

The Supreme Court has noted "two primary objectives of criminal punishment: retribution [and] deterrence." *Kansas*, 521 U.S. at 361-62. There is no suggestion that § 1182(a)(9)(C) accomplishes anything but these two goals. To the contrary, the Agency understands this provision to be aimed at deterrence and punishment, and to be based on culpability.

> [T]he countervailing purpose underlying section [1182](a)(9)(C)… is 'to compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted thereafter.' Indeed, one of the chief purposes of the IIRIRA amendments of 1996 was to overcome the problem of recidivist immigration violations by … escalating the **punitive consequences**, both civil and criminal, of illegal reentry. The enactment of these multifarious provisions to expedite the **detection, deterrence, and punishment** of recidivist immigration violators reflects a clear congressional judgment that such repeat offenses are a matter of special concern and that recidivist immigration violators are **more culpable, and less deserving of leniency**, than first-time offenders.

Briones, 24 I&N Dec. at 370-71 (emphasis added).

The Agency cannot defend its statute claiming that "[t]he Act's purpose is not retributive because it does not affix culpability for prior criminal conduct." *Hendricks*, 521 U.S at 361. As the Board acknowledges, this provision is premised on Congress's sense of the culpability of the affected parties.

Nor is this statute aimed at remedying an ongoing civil violation. *Cf. I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."). Here, under the Agency's reading, § 1182(a)(9)(C) applies after a noncitizen leaves the United States, and cannot be waived for ten years (and then, only at the Agency's discretion). Section 1182(a)(9)(C) does not purport to preclude eligibility for Cancellation of Removal, cf. 8 U.S.C. § 1229b(b)(1), or to deprive the noncitizen of the normal removal process, *cf*. 8 U.S.C. § 1229a(a); its only thrust would be punitive.

The fact that § 1182(a)(9)(C) is located within the INA does not suggest non-punitive intent. *Cf. Hendricks*, 521 U.S. at 361 (the "objective to create a civil proceeding is evidenced by its placement … within the [State's] probate code, instead of the criminal code"). The INA contains

various criminal penalties interspersed throughout, including the most commonly prosecuted federal crime, 8 U.S.C. § 1326.

Thus, despite its placement within § 1182, which generally governs which noncitizens are permitted to immigrate to the United States, § 1182(a)(9)(C) is fundamentally penal in character.

2. The Statute is Punitive in Purpose and Effect.

Even if this provision were found non-punitive in intent, the statutory scheme is so punitive in purpose and effect as to "negate Congress' intention to establish a civil remedial mechanism." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (citing *Ward*, 448 U.S. at 249). The Supreme Court has "set forth a list of considerations that has proved helpful in the past in making such determinations." *Id.*

- Whether the sanction involves an affirmative disability or restraint,
- whether it has historically been regarded as a punishment,
- whether it comes into play only on a finding of scienter,
- whether its operation will promote the traditional aims of punishment-retribution and deterrence,
- whether the behavior to which it applies is already a crime,
- whether an alternative purpose to which it may rationally be connected is assignable for it, and
- whether it appears excessive in relation to the alternative purpose assigned

> are all relevant to the inquiry, and may often point in differing directions.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted and formatting altered).

The statute as interpreted would implicate nearly all of these factors. It imposes an affirmative future disability, by preventing future immigration to the United States, notwithstanding close family ties. While deportation and exclusion were not historically recognized as punishment, banishment was so regarded. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963). The Agency concedes that its operation would promote, and was directly related to, the traditional aims of punishment, i.e., retribution and deterrence. The behavior triggering this inadmissibility ground (entering without inspection) is criminalized. 8 U.S.C. § 1325 and 1326. The agency has suggested no alternative purpose which might rationally be assigned to the bar; at least, no civil purpose which doesn't itself turn on retribution and deterrence.

The lifetime inadmissibility ground, which cannot be waived for ten years no matter what the hardship, is excessive and so draconian as to evidence punitive intent. It is triggered whenever an undocumented

resident leaves and reenters the country. Nor need the Court ignore that this rule implicates fundamental familial rights of United States citizen spouses, children, and parents.[7] *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (raising children); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (child-rearing); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (family associational rights). The forced relocation of a family member for no less than ten years puts U.S. citizen relatives to an impossible choice, either to live abroad , to live apart, or to commute between the U.S. and foreign countries.

The stakes are significant. There are 4,000,000 children living in "mixed-status" households in the United States. Jeffrey S. Passel, et al., *A Portrait of Unauthorized Immigrants in the United States,* PEW HISPANIC CENTER (April 14, 2009) (available at http://pewhispanic.org/files/reports/107.pdf). At Congress's command,

[7] The issue presented by § 1182(a)(9)(C) is distinguishable from the claim the Court addressed in *De Mercado v. Mukasey*, 566 F.3d 810, 816 n. 5 (9th Cir.2009). Amicus does not dispute the Government's authority to put an end to a noncitizen's unlawful presence; the issue here is a permanent bar to any future lawful status. Moreover, *De Mercado* involved a discretionary relief application; by contrast, the inadmissibility bar at § 1182(a)(9)(C)(i) is non-discretionary; as is the legal question of admissibility. 8 U.S.C. § 1201.

the government recently began tracking the deportation of parents of U.S. citizens, and reported that it had removed 46,486 in the first half of 2011. "Deportation of Parents of U.S.-Born Citizens," U.S. Immigration & Customs Enforcement, Fiscal Year 2011 Report to Congress, 4 (March 26, 2012). Over 5100 children are currently in foster care due to the detention or deportation of their parents. *See* Applied Research Center, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, Executive Summary at 4 (Nov. 2011).

Where doubts are raised about a statute's constitutionality, the court must "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *see Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The reading advanced by Amicus not only comports with the plain statutory language, it would avoid any doubts about the constitutionality of § 1182(a)(9)(C), since restricting relief eligibility in the face of a "continuing violation of the immigration laws," *Lopez-Mendoza*, 468 U.S. at 1039, would have a civil, non-punitive purpose, and would be proportional.[8]

[8] The Agency, *Briones*, 24 I. & N. Dec. at 366, places significant weight on the committee report. Legislative history is a relevant interpretative tool,

C. Any Abrogation of *Acosta* Should be Non-Retroactive.

The Petitioner argues, correctly, that the Court's recent decision in *Nunez–Reyes v. Holder*, 646 F.3d 684 (9th Cir.2011) (en banc), would call for a non-retroactive application of any change to *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006).

Amicus' interpretation of these statutes would leave the Petitioner eligible to seek consent to reapply from the Attorney General, since over 10 years have passed since Garfias' last departure from the United States. However, that claim was not pressed below, due to then-binding circuit precedent. And this Court has held that exhaustion of administrative remedies is a jurisdictional prerequisite, *Zara v. Ashcroft*, 383 F.3d 927, 931 (9th Cir. 2004); requiring the noncitizen to argue with specificity. *Cortez-Acosta v. INS*, 234 F.3d 476, 480 (9th Cir. 2000).

It is evident that many noncitizens like Garfias "have acted in reliance" on the Court's decisions. *Nunez–Reyes*, 646 F.3d at 692. That

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Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 610, n. 4 (1991), but only one among many; "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material…. legislative materials like committee reports … are not themselves subject to the requirements of Article I." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

reliance implicates liberty interests, loss of family unity, and application fees. It would be extremely inequitable to "mousetrap aliens" into failing to raise legal arguments based on circuit case law, and then to order removal based on that failure to exhaust. *Reyes-Hernandez v. INS*, 89 F.3d 490, 492 (7th Cir. 1996). Therefore, and for the reasons enunciated by Petitioner and other Amici, neither the statutory interpretation adopted by the panel, if adhered to, nor that urged by Amicus now, ought to be applied retroactively to the Petitioner.

II. The Agency's Voluntary Departure Regulations Are Unlawful.

The Court should apply the Chevron two-step approach to determine whether the regulations are valid. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The first step of the *Chevron* inquiry asks "whether Congress has directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842. At the second step, the Court asks "whether the agency's [regulation] is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. These regulations would fail under either step.

A. Statutory and Regulatory Background

Congress has created two types of voluntary departure: (a) that which is granted "in lieu of" or "prior to the conclusion of" removal proceedings, 8 U.S.C. § 1229c(a), and (b) that granted "at the conclusion of proceedings." 8 U.S.C. § 1229c(b). The former type of voluntary departure – because it must be granted "prior to the conclusion" of proceedings – inherently requires waiver of appeal rights and potential relief, and has been thus interpreted by regulation. 8 C.F.R. § 1240.26(b)(1)(i)(B), (D). The latter type of voluntary departure (which requires a heightened showing of good moral character, physical presence, the ability to depart) requires no waiver of appeal rights.[9] Garfias challenges regulations imposing new conditions on voluntary departure of the latter sort.

Prior to the enactment of the current immigration statute, voluntary departure was automatically stayed while a noncitizen pursued a petition for review before the Court. *Contreras-Aragon v. INS*, 852 F.2d 1088, 1091 (9th Cir. 1988) (en banc). With the enactment of § 1229c, the automatic stay

[9] Congress has imposed a 60 day limit on post-conclusional voluntary departure, 8 U.S.C. § 1229c(b)(2), but an administrative appeal stays the order. 8 C.F.R. § 1003.6(a) (2004); *In re A-M-*, 23 I. & N. Dec. 737, 744 (BIA 2005).

was eliminated. *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1172 (9th Cir. 2003). However, the Court had equitable ability to stay or toll voluntary departure, upon motion. *El Himri v. Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003); *Desta v. Ashcroft*, 365 F.3d 741 (9th Cir. 2004). The circuits agreed 8-1 on that authority. *Bocova v. Gonzales*, 412 F.3d 257 (1st Cir. 2005); *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006); *Obale v. Attorney General*, 453 F.3d 151 (3d Cir. 2006); *Vidal v. Gonzales*, 491 F.3d 250 (5th Cir. 2007); *Nwakanma v. Ashcroft*, 352 F.3d 325 (6th Cir. 2003); *Lopez-Chavez v. Ashcroft*, 383 F.3d 650 (7th Cir. 2004); *Rife v. Ashcroft*, 374 F.3d 606 (8th Cir. 2004); *cf. Ngarurih v. Ashcroft*, 371 F.3d 182 (4th Cir. 2004). In *Dada v. Mukasey*, the Supreme Court noted the lopsided split, but declined to resolve it. 128 S.Ct. 2307, 2314 (2008).

The Attorney General then enacted regulations purporting to overturn circuit majority by retracting voluntary departure in cases where the noncitizen files a federal appeal.

> If, prior to departing the United States, the alien files a petition for review … any grant of voluntary departure shall terminate automatically upon the filing of the petition … and the alternate order of removal entered pursuant to paragraph (d) of this section shall immediately take effect, except that an alien granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the alien

> departs the United States no later than 30 days following the filing of a petition for review, provides to DHS such evidence of his or her departure as the ICE Field Office Director may require, and provides evidence DHS deems sufficient that he or she remains outside of the United States. The Board shall advise the alien of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure. The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

8 C.F.R. § 1240.26(i). In comments explaining the new regulations, the Attorney General explained his view that circuit case law in all but the Fourth Circuit was wrong. 72 FED. REG. 67674, 67675 (Nov. 30, 2007) ("extensions of the voluntary departure period …run counter to the statutory purpose."); 73 FED.REG. 76927, 76938 (Dec. 18, 2009).

Under the rules now in effect, the noncitizen's exercise of her right to appeal to the federal courts triggers retroactive withdrawal of the voluntary departure grant.[10]

[10] The panel correctly concluded that it had jurisdiction to review the legal arguments raised re the VD, because 8 U.S.C. § 1252(a)(2)(D) grants jurisdiction over questions of law, notwithstanding other provisions like § 1229c(f), which would otherwise bar jurisdiction.

B. The Regulations Fail Under Step One of Chevron

The Petitioner challenges the novel "condition subsequent" whereby voluntary departure is granted, but automatically withdrawn if the noncitizen files an appeal. Amicus agrees with Petitioner that this is problematic, but the regulations fail for a more basic reason: the regulations create a new nonstatutory creature, neither removal nor voluntary departure, which the Agency lacked authority to create.

Under the new regulations, a noncitizen who obtains voluntary departure, files an appeal, and then departs the country within 30 days, "will not be deemed to have departed under an order of removal." 8 C.F.R. § 1240.26(i). The regulations do not purport to re-grant voluntary departure (which the noncitizen obtained and then lost by filing an appeal); to the contrary, the voluntary departure grant is clearly "terminated" upon the filing of an appeal. 8 C.F.R. § 1240.26(i).

It appears that the Attorney General is purporting to lift the removal order, without granting voluntary departure anew. That is problematic for various reasons. First, if the underlying removal order were vacated or rescinded, that would deprive the Court of Appeals of jurisdiction over an appeal. *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (BIA

reopening divested court of jurisdiction); *Timbreza v. Gonzales*, 410 F.3d 1082, 1083 (9th Cir. 2005) (same); *accord Yuan Gao v. Gonzales*, 464 F.3d 728, 730 (7th Cir. 2006) (where BIA reconsiders final order of removal, "there is nothing [for the appellate court] to retain jurisdiction of"). If the regulations preclude judicial review, that likely violates 8 U.S.C. § 1252, and would implicate the "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

Second, Congress has specified the procedures to be used in removal proceedings, 8 U.S.C. § 1229a(a)(1), and has made them "sole and exclusive." *Id.* § 1229a(a)(3). Congress has specified when removal orders become final. *Id*. § 1101(a)(47)(B). Both removal orders and voluntary departure, *id.* § 1229c, are creatures of statute. To the extent that the Attorney General claims authority to introduce a new, hybrid, regulatory creature, neither voluntary departure nor a removal order, he cites no language granting him that power.

The Petitioner's argument takes on a different light if the Court concludes that portions of the regulations overstepped the Attorney General's authority. Rather than considering in the first instance whether portions of these regulations survive if other portions are struck down, the

Court ought to find the regulations *ultra vires* and then permit the Agency to consider in the first instance how and whether to repromulgate these regulations. *See generally Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam); *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

C. The Regulations Also Fail Under Step Two of Chevron.

Even if the regulations were not facially violative of the statute, they would fail at step two of *Chevron*. The Agency failed to adequately account for the two types of voluntary departure authorized by Congress. None of the reasons given by the agency for the regulation can survive scrutiny.

"Even if the statute is ambiguous, and even if the Attorney General is empowered to issue regulations to fill in gaps in the statute, those regulations must be 'reasonable in light of the legislature's revealed design.'" *Zheng v. Gonzales*, 422 F.3d 98, 116 (3d Cir. 2005) (quoting *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995). The statute creates two types of voluntary departure, the second type being available to a limited class of individuals, conditioned on payment of a bond, long residence in the U.S., and good moral character. 8 U.S.C. § 1229c(b). There is no requirement that such individuals waive

relief; to the contrary, this second type of voluntary departure is applicable precisely to individuals seeking relief, and a bond is taken. Amicus believes that "Congress intended that [individuals eligible for § 1229c(b) voluntary departure] as a general class, be eligible" to seek that relief, *Zheng*, 422 at 118, notwithstanding the agency's perception that Voluntary Departure is susceptible to abuse.

The Agency never adequately addresses the statute's structure, and all of its reasons given for the rule are flawed. First, while an automatic tolling rule might "invite abuse by aliens who wish to stay in the country but whose cases are not likely to be [granted]," *Dada v. Mukasey*, 554 U.S. 1, 19 (2008), Dada has already rejected automatic tolling, and stays granted upon motion, after consideration of likelihood of success and irreparable harm are much less susceptible to abuse. The stringent standard for stay issuance in *Nken v. Holder*, 129 S.Ct. 1749 (2009), provides "some incentive to limit filings to nonfrivolous motions," *Dada*, 554 U.S. at 12; stay requests not meeting that standard would simply be denied.

Second, a voluntary departure is a "quid pro quo" arrangement, *id*. at 19, but the "deal" with the government requiring departure ought not be understood to require the noncitizen to depart the country even when a

Court finds the handling of the matter below likely violative of law, or where the Petitioner was deprived of fundamental fairness during the process. The quid pro quo nature of a voluntary departure order is part of the "different equitable and legal considerations" which differentiate stays of voluntary departure from stays of removal. *Cf. Alimi v. Ashcroft*, 391 F. 3d 888, 892 (7th Cir. 2004). There is no reason why courts cannot treat this as a factor in the course of adjudicating a motion. The policy concern does not support a global bar to staying voluntary departure orders, but rather, careful adjudication on the merits.

Third, the Agency's analysis is apparently based in part on the idea that *Dada* – in the course of rejecting a proposal for "automatic tolling" of voluntary departure – overruled appellate case law on staying voluntary departure order. 73 FED.REG. at 76929. ("As the Supreme Court recognized in Dada, there is no statutory authority for tolling…. [P]revious appellate decisions to the contrary… have now been overruled"). This is flatly inconsistent with the Supreme Court's decision itself, which stated that the authority to stay a voluntary departure order was an issue "not presented here, however, and we leave its resolution for another day." *Dada v. Mukasey*, 554 U.S. 1, 10-11 (2008). Granting a stay upon good cause shown,

particularly where the underlying agency decision is shown to likely be in error, is in no way inconsistent with *Dada*.

A stay of the voluntary departure period would have a nugatory impact on the Government's interests. The agency stays the voluntary departure order while the administrative appeal is pending, *Matter of A-M-*, 23 I. & N. Dec. 737, 744 (BIA 2005), so tolling seems compatible with the statute. The Board has stated as the principle behind this practice that "[t]hese provisions assure that the respondent's decision whether to appeal an Immigration Judge's decision will not be adversely affected by the potential loss of the opportunity to voluntarily depart in the event of an unsuccessful appeal." *Id.* at 744. The same considerations apply to judicial review, particularly where the Board's legal rulings are subject to reasonable dispute.

Moreover, Voluntary Departure benefits the Government by saving it the money it would otherwise spend to remove individuals from the United States. *See* 8 C.F.R. § 1240.26(c)(3). In the event Petitioner does not prevail on a federal appeal, voluntary departure creates an incentive to depart the country. *See Rife v. Ashcroft*, 374 F.3d 606, 616 (8th Cir. 2004) ("voluntary departure is most beneficial to the government as well as to the

alien when a removal order is finally effective."). The Government has little, if any, interest in immediately forcing individuals of good moral character, 8 U.S.C. § 1229c(b)(1)(B), like Garfias, either to depart (pursuing his appeal from abroad) or to allow his voluntary departure order to convert into a removal order. Any removal order would trigger the obligation to remove Petitioner within 90 days, barring a stay of removal, 8 U.S.C. § 1231(a)(1), and at any event, would be at taxpayer expense.

In short, these regulations are "unmoored from the purposes and concerns of the immigration laws," *Judulang v. Holder*, 132 S.Ct. 476, 490 (2011), and should be struck down.

CONCLUSION

The proper reading of 8 U.S.C. § 1182(a)(9)(C) would avoid any conflict between that and 8 U.S.C. § 1255(i); but Garfias' case should be considered under prior case law. The voluntary departure regulations should be stricken as contradicting the plain text of the statute and inconsistent with its intent.

Respectfully Submitted: April 11, 2012

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CERTIFICATE OF COMPLIANCE

I, Charles Roth, hereby certify that this Brief is proportionately spaced and is produced in 14 point Book Antiqua font. This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 29-2(c)(2) or (3) and contains 6882 words, excluding the material not counted under Fed. R. App. P. 32.

s/ Charles Roth
Charles Roth

CERTIFICATE OF SERVICE

I hereby certify that I served a true and complete copy of the attached BRIEF *AMICUS CURIAE* OF THE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF REHEARING, on the following individuals, by means of the Court's ECF System:

Stephen Manning
John Blakeley
Luis Perez
Stephen Tollafield

this 11th day of April, 2012

s/ Charles Roth
Charles Roth