No. 10-577

IN THE

Supreme Court of the United States

AKIO KAWASHIMA, ET UX.,

Petitioners,

—v.—

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE ASIAN AMERICAN JUSTICE CENTER; ASIAN LAW CAUCUS; ASIAN PACIFIC AMERICAN LABOR ALLIANCE; ASIAN PACIFIC AMERICAN LEGAL CENTER; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; DEFENDING DISSENT FOUNDATION; MUSLIM LEGAL FUND OF AMERICA; NATIONAL COUNCIL OF LA RAZA; NORTH AMERICAN SOUTH ASIAN BAR ASSOCIATION; SOUTH ASIAN AMERICANS LEADING TOGETHER; AND SOUTHEAST ASIA RESOURCE ACTION CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

An "aggravated felony" pursuant to the Immigration and Nationality Act ("INA") results in the most severe consequences possible under our nation's immigration laws. The disabilities that emanate from conviction of an aggravated felony include: (1) permanent removal; (2) ineligibility for asylum, withholding of removal, and temporary protected status; (3) an absolute bar to naturalization; (4) disqualification from discretionary cancellation of removal and various waivers of inadmissibility; (5) mandatory detention; (6) expedited removal; and (7) a bar to voluntary departure.

Some of the individuals who are most severely affected by the deportation of people deemed aggravated felons include the United States citizen parent who is left behind without economic provision, as well as United States citizen children. Moreover, longtime lawful permanent residents who barely remember their "country of origin" are separated from their support network here in the United States, the only nation they can properly call "home." Many of the children separated from their parents are United States citizens who have never stepped foot in their parents' native countries, nor even speak the native tongue. These children are forced to make the unenviable choice between deporting themselves to remain with their parents, or living a life of isolation here in the United States devoid of family.

Further, those deemed aggravated felons are eligible to be deported to nations facing civil war, famine, flooding, earthquakes, political revolution,

and economic depression after their applications for asylum and temporary protected status are rejected without consideration of their "humanitarian purpose." Immigrants convicted of aggravated felonies are imprisoned through mandatory detention as they await deportation proceedings, sometimes spending years locked away thousands of miles from their families, most often without counsel.

While Congress clearly believes certain crimes are deserving of such categorically disastrous punishment, the Court should not expand the aggravated felony statute to include crimes beyond the explicit direction of the legislature. In this brief, *amici curiae* demonstrate the severity of the consequences that would follow if minor tax crimes qualify as aggravated felonies.

Amici curiae, the Asian American Justice Center, Asian Law Caucus, Asian Pacific American Labor Alliance, Asian Pacific American Legal Center, Catholic Legal Immigration Network, Inc., Defending Dissent Foundation, Muslim Legal Fund of America, National Council of La Raza, North American South Asian Bar Association, South Asian Americans Leading Together, and Southeast Asia Resource Action Center respectfully submit this brief in support of petitioners Akio and Fusako Kawashima.[1]

The Asian American Justice Center ("AAJC"), a member of the Asian American Center for Advancing Justice, is a national non-profit, non-

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

partisan organization working to advance the human and civil rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991 and based in Washington, D.C., AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of issues, including immigration and immigrants' rights. AAJC is committed to defending the rights of all Americans, including immigrants, communities of color, and other minorities. AAJC joins this brief because the expansion of the definition of "aggravated felony" in recent years has devastating impacts on Asian American immigrants, often longtime lawful permanent residents, who face the real world consequences of being permanently separated from their families.

Founded in 1972, the Asian Law Caucus ("ALC") is the nation's oldest legal organization defending the legal and civil rights of Asian American and Pacific Islander communities. ALC is a member of the Asian American Center for Advancing Justice, whose other members include the Asian American Institute, Asian American Justice Center, and Asian Pacific American Legal Center. The Immigrants' Rights Project at the Asian Law Caucus provides direct representation to individuals facing detention and deportation before the Immigration Courts, the Board of Immigration Appeals and the United States Court of Appeals for the Ninth Circuit. We seek to uphold the rights of detainees and to protect those who face removal.

The Asian Pacific American Labor Alliance ("APALA"), AFL-CIO, is the first and only national organization of Asian Pacific American union members and allies. It organizes and works with

Asian Pacific American workers, many of them immigrants, to build the labor movement and address exploitative conditions in the workplace. APALA has a longstanding interest in protecting the rights of Asian Pacific Americans and has participated in a number of amicus briefs before the courts on these issues.

The Asian Pacific American Legal Center ("APALC"), a member of the Asian American Center for Advancing Justice, was founded in 1983 and is the nation's largest non-profit public interest law firm devoted to the Asian Pacific Islander community. APALC provides direct legal services and uses impact litigation, public advocacy, and community education to obtain, safeguard, and improve the civil rights of the Asian American and Pacific Islander (AAPI) communities. APALC serves 15,000 individuals and organizations each year through direct services, outreach, training, and technical assistance. Its primary areas of work span a range of issues from immigration, workers' rights, and health access to anti-discrimination, language rights and voting rights. APALC has long advocated for the fair and just administration of the nation's immigration laws, focusing particularly on the needs of AAPI immigrants.

The Catholic Legal Immigration Network, Inc. ("CLINIC"), a national religious organization created in 1988 by the United States Conference of Catholic Bishops, is the largest network of immigration legal service providers in the country, assisting more than 600,000 people annually. Concerned with justice, mercy, and redemption, we are alarmed by courts applying a wider interpretation of the term "aggravated felony" than Congress intended. Such

misinterpretations have severe consequences, including the penalizing of lawful permanent residents and their family members, many of whom are U.S. citizens and form the backbone of our economic, social, and religious communities.

The Defending Dissent Foundation ("DDF") was founded in 1960 to protect and defend the civil rights and civil liberties of citizens and non-citizens in the United States. As an advocacy organization, DDF seeks to promote the political and due process rights of immigrants, opposing legislation and policies that restrict those rights.

The Muslim Legal Fund of America ("MLFA") is a non-profit public cause charity that supports legal cases involving Muslims which impact civil rights and liberties in America. The Supreme Court's ruling in this case must not punish immigrants and their families in a disproportionate manner. Because the outcome will directly affect immigrant communities, MLFA members have a concerted interest in the fair resolution of the issues on appeal.

The National Council of La Raza ("NCLR") – the largest national Hispanic civil rights and advocacy organization in the United States – works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR works through two primary, complementary approaches: (1) Capacity-building assistance to support and strengthen Hispanic CBOs – especially those that serve low-income and disadvantaged Latinos; and (2) Applied research, policy analysis, and advocacy to encourage adoption of programs and

policies that equitably serve Hispanics. NCLR believes that the consequences of an aggravated felony conviction have a severe impact on many Latinos, including immediate relatives who are United States citizens and longtime lawful permanent residents.

The North American South Asian Bar Association ("NASABA") is the umbrella organization for 27 regional bar associations in North America representing the interests of over 6,000 attorneys of South Asian descent. Within the United States, NASABA takes an active interest in the legal rights of South Asian and other minority communities, including immigration rights.

South Asian Americans Leading Together ("SAALT") is a national nonpartisan non-profit organization whose mission is to elevate the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States. SAALT's strategies include conducting public policy analysis and advocacy; building partnerships with South Asian organizations and allies; mobilizing communities to take action; and developing leadership for social change. As a community that is predominantly foreign-born, South Asians are affected by the country's immigration policies, including the expansion of the definition of "aggravated felony" in recent years. SAALT joins this brief because we are concerned about many minor offenses that are included in its scope and the devastating impact that resulting deportation has on community members.

The Southeast Asia Resource Action Center ("SEARAC") is a national non-profit organization advancing the interests of Southeast Asian

Americans through leadership development, capacity building, and community empowerment. SEARAC has been a strong advocate on immigrant rights, particularly deportation and its impact on Southeast Asian American and refugee families. Immigration consequences resulting from criminal convictions, even minor ones, have been especially harmful as they can result in life-long removal. For many, the life-long consequence is disproportionate and takes no account of other life circumstances.

BACKGROUND

While *amici* do not believe tax reporting offenses should go unpunished, Petitioners have already been punished by the criminal courts. In considering whether he should be deported from the United States, the proportionality of the crime and punishment must be taken into account. As explicated below, the consequences of defining a crime as an aggravated felony are numerous and alarmingly severe. The question is not whether such activity should be illegal, but rather whether Congress mandated that this conduct receive the harshest, most destructive penalty permissible under the immigration laws.

8 U.S.C. § 1101(a)(43)(M) states:

> [An aggravated felony is] an offense that – (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in § 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which

the revenue loss to the Government exceeds $10,000.

Additionally, Petitioners were charged pursuant to 26 U.S.C. § 7206, which states:

> Any person who –
>
> (1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or
>
> (2) Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document….
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3

years, or both, together with the costs of prosecution.

Petitioners pled guilty under section (1) of this statute for the false filing of his tax returns, namely underreporting income. While section (2) explicitly establishes the intent elements of fraud and deceit, section (1) in contrast remains silent. Despite the language requiring a demonstration of fraud or deceit to qualify under the aggravated felony provision quoted above, 8 U.S.C. § 1101(a)(43)(M), an Immigration Judge and subsequent adjudicators have ruled the Kawashimas deportable for having been convicted of an aggravated felony. The instant case involves a judicial choice between applying the directive of Congress as established through the language of the statute, or expanding the definition of aggravated felony to include such minor tax offenses as underreporting income to the IRS.

SUMMARY OF ARGUMENT

The aggravated felony designation is among the most severe penalties handed down by the United States government, and is unrivaled in its caustic power in the immigration context. Those found guilty of qualifying crimes face immediate and immutable deportation, extended nondiscretionary detention, summary and complete dismissal of countervailing equities, and rejection of United States protection during times of widespread hysteria, natural disaster, war, and/or government persecution in the "country of origin."

Despite these devastating consequences for such a conviction, it is often those left behind in the United States who suffer most. Those aliens deported are frequently fathers, mothers, spouses, children, and siblings. They are not unattached violators of American law, but rather integral members of families long-settled here in the United States. Many American families are a mix of citizens and noncitizens with varying degrees of social ties and relationships. Deportation frequently rips a parent away from his or her child, separates spouses, or ships a child back to a nation in which he or she has no connections, nor can even speak the language vital for daily tasks.

As with any criminal sentence, the burden of an aggravated felony conviction falls on the violator's family, friends, and community. However, what makes the aggravated felony so much more destructive is the permanent nature of its penalties. When the government deports a U.S. citizen child's resident parent, it breaks apart a family forever, and leaves another American youth to fend for himself or herself without a parent's guidance. This phenomenon is even more pronounced in lower-income families who cannot afford to travel back and forth between the United States and the country of origin. Children in such families are effectively sentenced with their parents. They frequently face the choice of self-deporting, or leaving behind the American dream and their life in the United States.

The history of how "aggravated felonies" evolved shows that Congress has consistently intended a narrow construction of the definition by specifying exactly which crimes would qualify for such a designation. The statute as presently written

includes a large number of crimes of varying severity. Congress has repeatedly updated the list, amended prior declarations, and emphasized mens rea and specific conviction detail when new qualifying crimes were added. Congress has drafted the aggravated felony definitions with great specificity, eliminating any doubt as to the intended inclusion or exclusion of particular offenses.

ARGUMENT

I. The History Of How Aggravated Felonies Evolved Demonstrates Congress's Intent To Limit Their Definition To Specific Designated Crimes

Aggravated felonies evolved in a manner which demonstrates that Congress intended to limit their definition only to crimes specifically denominated as such under the INA. Rather than provide a broad, open-ended framework describing criminal activity such as "crimes involving moral turpitude"[1] or a "violation of…a regulation relating to a controlled substance,"[2] Congress specifically defined and thus limited which crimes would be included within the definition of aggravated felony.

Congress has continued to refine the definition of "aggravated felony" by making amendments to the

[1] INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i); INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A).
[2] INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B); INA § 212(a)(2)(A)(i), (C); 8 U.S.C. § 1182(a)(2)(A)(i), (C).

INA.[3] In each successive amendment to the aggravated felony provision, Congress has deliberately cabined the designation to a specific set of crimes.[4] The increasingly precise definition of aggravated felonies demonstrates Congress's attempt to make clear to courts and enforcement agencies exactly which crimes qualify, with a commensurate specificity of statutory language.

Had Congress intended for an expansive statute with room for judicial interpretation and agency application, it would have employed a more generalized term such as "crimes involving moral turpitude" ("CIMT").[5] Courts have been provided much interpretive authority in applying the CIMT designation, precisely because Congress has not explicitly enumerated qualifying crimes.[6] Had

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[3] The current definition is found at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

[4] *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (ADAA) (establishing an additional ground of deportability for crimes deemed particularly serious, specifically limited to murder, drug trafficking, and illegal firearm trafficking); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (1994) (expanding the definition of aggravated felony to specific offenses including burglary, fraud, deceit, and theft).

[5] The Board of Immigration Appeals (BIA) defines a CIMT as a crime that "refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995).

[6] *See*, *e.g.*, *Matter of Short*, 20 I. & N. Dec. 136, 139 (BIA 1989); *Matter of Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980); *see also Marmolejo-Campos v. Holder*, 558 F.3d 903, 907-12 (9th Cir. 2009) (*en banc*) (*Chevron* deference applies to BIA's interpretation of CIMTs; citing other circuits).

Congress listed a number of specific crimes as CIMTs, as it did for aggravated felonies, courts would not have had to fill the interpretive void presented by the actual, elastic provision, instead limiting CIMTs' reach to specifically-cited crimes.

Similarly, in the context of controlled-substance-related offenses, courts have applied Congress's broad language in section 237(a)(2)(B)[7] in a proportionately broad manner.[8] Congress's choice not to enumerate the specific violations which qualify as offenses relating to controlled substances, has provided courts with a less constricted opportunity to interpret the statute. In contrast, an enumerated list of qualifying drug-related crimes would have restricted court action to those crimes that were denominated. With aggravated felonies, Congress's demonstrated desire to define the qualifying crimes with specificity mandates a restrictive reading of the provision to encompass only those crimes enumerated in the statute.[9]

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[7] "Any alien who at any time after admission has been convicted of a violation of…any law or regulation of a Sate, the United States, or a foreign country relating to a controlled substance…is deportable." INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

[8] *See*, *e.g.*, *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118, 120-22 (BIA 2009) (in context of inadmissibility for drug paraphernalia the BIA maintained a broad reading of "relating to" language); *Matter of Esqueda*, 20 I. & N. Dec. 850 (BIA 1994) (includes conviction for being under the influence of a drug, including any conviction lacking specific intent or mens rea); *see also Desai v. Mukasey*, 520 F.3d 762 (7th Cir. 2008) (distribution of a "look-alike substance" was a violation of state law relating to a controlled substance).

[9] *Carachuri-Rosendo v. Holder*, 560 U.S. ___, No. 09-60, 2010 WL 2346552 (June 14, 2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006).

The term "aggravated felony" in 1988 initially meant: "murder, any drug trafficking crime…or any illicit trafficking in any firearms or destructive devices…or any attempt or conspiracy to commit such an act, committed within the United States."[10] Today the definition is expanded, but more specific:

> (A) Murder, rape or sexual abuse of a minor; (B) illicit trafficking in a controlled substance…including a drug trafficking crime…; (C) illicit trafficking in firearms or destructive devices…or in explosive materials…; (D)…laundering of monetary instruments or…engaging in monetary transactions in property derived from specific unlawful activity if the amount of the funds exceeded $10,000; (E)(i)…explosive materials offense; (ii)…firearms offenses; or (iii) [additional section of the United States Code similarly] relating to firearms offenses; (F) a crime of violence…for which the term of imprisonment is at least one year; (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year; (H) an offense…relating to the demand for or receipt of ransom; (I)…child pornography; (J) an offense…relating to racketeer influenced corrupt organizations or…gambling offenses for which a sentence of one year imprisonment or more may be imposed; (K)(i)…owning, controlling, managing or supervising of a

[10] ADAA, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1998).

prostitution business; (ii)…transportation for the purposes of prostitution if committed for commercial advantage; or (iii)…peonage, slavery, and involuntary servitude; (L)(i)…gathering or transmitting national defense information…disclosure of classified information…sabotage [or] treason; (ii)…protecting the identity of undercover intelligence agents; or (iii) [similar provision] relating to protecting the identity of undercover intelligence agents; (M) an offense that – (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii)…tax evasion in which the revenue loss to the government exceeds $10,000; (N)…alien smuggling [unless first offense and for purpose of aiding immediate family members]; (O) [previously deported aliens convicted of aggravated felonies]; (P)…falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument or…document fraud…for which the term of imprisonment is at least 12 months…; (Q)…failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of five years or more; (R)…commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year; (S)…obstruction of justice, perjury, or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year; (T)…failure to appear before a court pursuant to a court

> order to answer to or to dispose of a charge of a felony for which a sentence of two years imprisonment or more may be imposed; and (U) an attempt or conspiracy to commit an offence described in this paragraph. The term applies to an offense described in this paragraph whether in violation of a Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the last 15 years. Notwithstanding any other provision of the law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after [enactment].[11]

Congress has repeatedly dictated the precise scope of its immigration laws. The INA has been frequently amended, updating the list of predicate crimes and the consequences an aggravated felony conviction. With these amendments, Congress has not foreclosed judicial or agency interpretation, instead providing explicit directions about which crimes are included and which are excluded. This specificity supports a careful and narrow construction of the "aggravated felony" definition.

II. An Aggravated Felony Mandates Harsh Legal Consequences, And Therefore Necessitates Careful And Accurate Review Of A Conviction To Determine Whether An Individual Qualifies For Designation As An Aggravated Felon.

[11] INA § 1101(a)(43), 8 U.S.C. § 1101(a)(43).

Congress considers aggravated felonies to be "the most serious offenses" covered by the immigration laws.[12] Legislation has reserved the most severe consequences for these offenses. At least nineteen disabilities or consequences result from a determination that an immigrant has been convicted of an aggravated felony.[13] These penalties range from permanent and irrevocable removal from the United States, to an absolute bar to fulfilling the necessary

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[12] Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. REP. NO. 109-345(I), at 69.

[13] Mandatory detention pursuant to 8 U.S.C. § 1226(c)(1)(B), mandatory detention under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Div. C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639 (1996), *see* IIRIRA § 303(b)(3)(A)(i), and expedited removal proceedings under 8 U.S.C. § 1228. Further, an alien may be disqualified from immigration-based benefits under 8 U.S.C. § 1229b(a) (cancellation of removal for permanent residents), 8 U.S.C. § 1229b(b) (cancellation of removal for non-permanent residents), former 8 U.S.C. § 1254 (suspension of deportation), former 8 U.S.C. § 1182(c) relief, 8 U.S.C. 1229c(a)(1) (pre-hearing voluntary departure), 8 U.S.C. § 1229c(b)(1) (post-hearing voluntary departure), 8 U.S.C. § 1158 (asylum), 8 U.S.C. § 1231(b)(3) (withholding), 8 U.S.C. § 1254a(c)(2) (Temporary Protected Status), and 8 U.S.C. § 1229b(b)(2) (benefits for victims of domestic violence). Other ineligibilities may be found at § 202(a)(1)(B) of the Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, 111 Stat. 2160 (NACARA) (1997) (adjustment of status), § 203 of NACARA (special rule governing cancellation), and the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (adjustment of status). Moreover, an alien may be barred from demonstrating good moral character under 8 U.S.C. § 1101(f)(8), and thereby excluded from the benefits that require such a demonstration (e.g. naturalization). Finally, inadmissibility disabilities can be found at 8 U.S.C. §§ 1182(a)(9)(A) and 1182(h)).

criteria for naturalization, to exclusion from asylum eligibility, and include much more.

As one scholar put it, aliens convicted of aggravated felonies populate the eighth ring of immigrant hell, in a sinister allusion to Dante's legendary categorization.[14] Some of the most severe consequences of such a determination are:

A. Permanent Removal From The United States

The INA states that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."[15] The crime need not be committed within a certain number of years of establishing residence, or after being lawfully admitted. To the contrary, many immigrants are detained and placed in removal proceedings years after their admission, sometimes five, ten, or even twenty years later.[16] If removed on the ground of an aggravated felony conviction, they are ineligible for visas or admission to the United States; they become permanently excludable aliens pursuant to section 1182.[17]

Further, the length of the alien's residence in the United States plays no role in the determination

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[14] Robert James McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and the Immigration Consequences to Aliens Convicted of Crimes Revisited*, 11 GEO IMMGR. L.J. 507, 519 (1997).

[15] INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

[16] *See*, *e.g.*, *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (noncitizen deportable pursuant to a removal order issued more than twenty years after the predicate conviction).

[17] INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).

of eligibility for permanent removal. While in many contexts, longstanding residence in the United States is an outstanding equity, Immigration Judges are barred from considering it as a mitigating factor when an immigrant is convicted of an aggravated felony.[18]

Lawful permanent residents are particularly likely to have strong family and community ties to the United States. Their extended residence in our country and often close intermingling with the larger community make removal a particularly serious punishment. Many of these noncitizens have spent their entire lives in the United States and do not even remember their time in the nation to which they are being deported.[19]

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[18] *See*, *e.g.*, *Ayala-Chavez v. INS*, 944 F.2d 638, 640 (9th Cir. 1991) (LPR for 18-years deportable despite retaining the majority of his family in the U.S. and a minor daughter whom he supported both emotionally and financially).

[19] *See*, *e.g.*, *Minto v. Mukasey*, 302 F. App'x 13 (2d Cir. 2008) (No. 05-0007-ag) (entered U.S. at age eight); *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008) (Nos. 06-3987, 06-3994, 06-3476) (two LPRs, one in the U.S. since age nine, another in the U.S. for over 40 years); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008) (LPR since 1977, 30 years in U.S.); *Lopez-De Rowley v. INS*, 253 F. App'x 62, 64 (2d Cir. 2007) (LPR since 1970) *Knutsen v. Gonzales*, 429 F.3d 733, 735, 739-40 (7th Cir. 2005) (LPR since 1957); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1047 (9th Cir. 2004) (LPR since age 11); *Chang v. INS*, 307 F.3d 1185, 1187-90 (9th Cir. 2002) (LPR since 1975); *Valenzuela-Zamarano v. Ashcroft*, 11 F. App'x 805, 806 (9th Cir. 2001) (LPR since age five); *Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992) (LPR since age two); *Shurney v. INS*, 201 F. Supp. 2d 783, 786 (N.D. Ohio 2001) (entered U.S. at age three); *In re Collymore*, 2008 WL 4222241, *1 (BIA Aug. 28, 2008) (LPR since 1972); *In re Espinal*, 2008 WL 1734657, *1 (BIA Mar. 28, 2008) (LPR since 1973); *In re Flores-Gomez*, 2004 WL 2374449, *1 (BIA Jul. 27,

When an alien is convicted of an aggravated felony, he or she is not allowed to demonstrate the severe damage that will be done to those relatives who must often remain behind in the United States. Frequently it is United States citizens who are the most cruelly punished by the removal of a non-citizen.[20] Human Rights Watch has estimated that since 1997 nearly 1.6 million immediate family members currently living in the United States have been separated from their parents, children, and spouses because of deportation based on a criminal conviction.[21] There are countless examples of families who have been forced to confront this emotionally wrenching and economically devastating separation.[22]

2004) (admitted to U.S. in 1943); *Rodriguez-Diaz v. Holder*, 130 S. Ct. 3463 (2010) (entered U.S. at just six months).

[20] *See* Michael Falcone, *100,000 Parents of Citizens Were Deported Over 10 Years*, N.Y. TIMES, Feb. 14, 2009, A16.

[21] Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed By United States Deportation Policy* 6 (2007) (estimating that approximately 540,000 of those left behind were United States citizens by birth or naturalization); *See also* David Thronson, *Immigration Raids and the destabilization of American Families*, 43 WAKE FOREST L. REV. 391 (2008); NATIONAL COUNCIL FOR LA RAZA AND THE URBAN INSTITUTE, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN (2007); Jo Ann Zuniga, *Deportation Rules Break up Families*, *INS Critics Charge*, HOUSTON CHRON., May 31, 1998, 29.

[22] *See*, *e.g.*, *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 172, 175-80 (5th Cir. 2008) (mother, two sisters, two brothers, and two U.S. citizen children); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1047 (9th Cir. 2004) (two U.S. citizen children; parents and siblings are citizens and LPRs); *Gerbier v. Holmes*, 280 F.3d 297, 300 (3d Cir. 2002) (mother, brother and three U.S. citizen children); *Gonzeles-Buitrago v. INS*, 5 F.3d 1495 (5th Cir. 1993) (U.S. citizen wife and daughter); *Gomez v. DHS*, No. 03-135 L,

B. Asylum, Withholding Of Removal, And Temporary Protected Status

Asylum is a discretionary form of relief that is available to those noncitizens who fear persecution upon returning to their country of origin. Such persecution must find its basis in "race, religion, nationality, membership in a particular social group, or political opinion."[23] Asylum will not only provide a basis to prevent deportation, but also may qualify a receiving alien for lawful permanent residence and/or citizenship.

A noncitizen convicted of an aggravated felony is statutorily barred from seeking asylum regardless of the severity of the threat faced upon return to the country of origin.[24] The INA bars asylum eligibility for those noncitizens "convicted by a final judgment of a particularly serious crime" that "constitutes a danger to the community of the United States."[25] Aggravated felonies are explicitly defined as qualifying "serious crimes" barring eligibility.

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*1 (D.R.I. 2003) (U.S. citizen grandparents, two citizen children); *Young v. Holder*, 130 S. Ct. 3455 (2010) (case involving LPR with U.S. citizen wife and four citizen children); *Texeira Baptista v. Mukasey*, No. 08-60142 (5th Cir. Aug. 5, 2008) (U.S. citizen mother, LPR father, three citizen siblings, one citizen daughter); *Yanez-Garcia v. Ashcroft*, 388 F.3d 280 (7th Cir. 2004) (LPR wife, seven U.S. citizen children); *Ramirez-Solis v. Holder*, 130 S. Ct. 3463 (2010) (LPR wife, three minor U.S. citizen children).

[23] INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i); INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

[24] INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i).

[25] INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii).

This statutory bar has resulted in numerous previous residents of the United States being removed to dangerous countries.[26] The dangerousness of the country of origin often effectively serves as a court-ordered family dismantling, because parents and/or spouses face too severe a threat of injury to follow the removed alien. The family destruction which ensues affects the well-being of both U.S. citizens and lawful permanent residents.[27]

Withholding of removal is a similar form of relief available to those noncitizens adjudged removable whose "life or freedom" would be threatened on account of the same factors listed above and for whom persecution is "more likely than not."[28] In contrast to asylum, withholding of removal is a temporary bar against government deportation, and may not be used as the basis for petitioning for lawful permanent residency or citizenship. Withholding of removal is primarily meant for removable individuals who face a greater than 50% likelihood of persecution, torture, or even death if returned to their home countries.

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[26] *See*, *e.g.*, *Lemaine v. Holder*, 393 F. App'x 353 (5th Cir. 2010) (Haitian national deportable despite the prospect of indefinite imprisonment upon arrival, and the documented horrific prison conditions common to Haiti (guards beating inmates with fists, sticks, and belts; burning with cigarettes; choking; hooding; and torture by electric shock)); *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006) (removal of an Eritrean national facing severe religious persecution upon return to country of origin); *In re Haili-Mariam*, 2007 WL 4182339, *2 (BIA Oct. 22, 2007).

[27] Michael Falcone, *supra* note 20.

[28] INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(b)(1)(B)(iii).

Congruently with noncitizens seeking asylum, aliens convicted of an aggravated felony are often ineligible for withholding of removal. Those aggravated felony convictions resulting in a criminal sentence of more than five years are defined in the statute as particularly serious crimes warranting an automatic bar to withholding of removal.[29] Going beyond this clear statement of statutory ineligibility, the Attorney General has also held that aggravated felony convictions carrying little to no criminal sentence bar withholding of removal.[30] There is no guarantee that an alien convicted of an aggravated felony would be permitted to stay temporarily in the United States even if facing extreme forms of persecution, torture, or death upon returning to the country of origin.

Finally, the INA has established a temporary safe haven in the United States for nationals of a foreign state if the Attorney General, after consultation with appropriate government agencies, determines that one of the enumerated afflictions plagues the foreign state.[31] Qualifying circumstances include: (1) Ongoing armed conflict within the state poses a serious threat to the personal safety of the country's nationals if removed;[32] (2) earthquake, flood, drought, epidemic, or other environmental

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[29] INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).

[30] *See Matter of Y-L-*, *Matter of A-G, & Matter of R-S-R-*, 23 I. & N. Dec. 270, 273 (BIA 2002) (drug trafficking crimes regardless of accompanying criminal sentence may be presumed to be per se "particularly serious crime" unless "extraordinary and compelling circumstances" are demonstrated); *see also* 8 C.F.R. § 208.16(d)(2).

[31] INA § 244, 8 U.S.C. § 1254a; 8 C.F.R. §§ 244, 1244; 56 FR 23491 (May 22, 1991).

[32] INA § 244(b)(1)(A), 8 U.S.C. § 1254a(b)(1)(A).

disaster has resulted in a substantial but temporary disruption of living conditions in the area affected; the foreign state is unable temporarily to handle the return of its nationals; and the foreign state has affirmatively requested designation;[33] or (3) extraordinary and temporary conditions in the foreign state prevent its nationals from returning safely, unless the Attorney General determines that it is contrary to national interests to allow these aliens to remain temporarily.[34] Upon being granted Temporary Protected Status ("TPS"), an alien may only retain that status for 6 to 18 months before reapplication.[35]

Despite these stringent qualification requirements, aliens convicted of aggravated felonies are barred from applying for TPS.[36] The result in the context presented to the Court would be sending tax-reporting offenders back to warring nations or ongoing natural disasters.

C. Mandatory Detention

Those individuals placed in removal proceedings due to an aggravated felony conviction face mandatory detention without the possibility of bond.[37] Unlike similar noncitizens facing removal, aliens convicted of an aggravated felony are not afforded the opportunity to prove that they are not a

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[33] INA § 244(b)(1)(B), 8 U.S.C. § 1254a(b)(1)(B).
[34] INA § 244(b)(1)(C), 8 U.S.C. § 1254a(b)(1)(C).
[35] INA § 244(a)(1)(A), 8 U.S.C. § 1254a(a)(1)(A).
[36] INA § 244(c)(2), 8 U.S.C. § 1254a(c)(2).
[37] INA § 236(c)(1), 8 U.S.C. § 1226(c)(1). Additionally, IIRIRA mandates detention at § 303(b)(3)(A)(i).

flight risk or a danger to the community. Instead, these individuals often sit in Immigration and Customs Enforcement ("ICE") custody for months, or even years, before the courts adjudicate their cases.[38] Such prolonged detention frequently results in hardship to families and enormous administrative costs.

D. Unlawfully Entering The United States

Noncitizens who entered the United States unlawfully, or re-enter after having been removed, face severe penalties for their violation of the immigration laws.[39] While all noncitizens are subject to fines and lengthy imprisonment,[40] the harshest penalties are reserved for those previously convicted of an aggravated felony. Aliens convicted of an aggravated felony face both a fine and up to twenty years in prison for a single reentry conviction, regardless of the severity of the predicate aggravated felony offense.[41] Moreover, those charged with assisting an alien convicted of an aggravated felony to enter the United States unlawfully face both a fine and up to ten years imprisonment.[42] This heavy

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[38] *See*, *e.g.*, *Flores-Torres v. Mukasey*, 548 F.3d 708 (9th Cir. 2008) (detaining an immigrant for over two years during removal proceedings initiated on account of an aggravated felony conviction); *Valansi v. Reno*, 278 F.3d 203 (3d Cir. 2002) (detaining an immigrant pursuant to section 1226(c) for nearly a year pending the completion of removal proceedings).
[39] INA § 276(a), 8 U.S.C. § 1326(a).
[40] INA § 276(a)(2), 8 U.S.C. § 1326(a)(2). The baseline sentence for this crime is a fine or imprisonment of up to two years, or both.
[41] INA § 276(b)(2), 8 U.S.C. § 1326(b)(2).
[42] INA § 277, 8 U.S.C. § 1327.

punishment is imposed regardless of the relationship between the offender and the alien convicted of an aggravated felony, or the citizenship status of the aiding party. Sentencing is mandated based solely on the status of the alien convicted of an aggravated felony.

E. Naturalization

A prerequisite for naturalization in the United States is a demonstration of good moral character for five years prior to filing, extending all the way to the time of admission.[43] However, despite this required window, the INA states that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was…one who at any time has been convicted of an aggravated felony."[44] Therefore, an alien convicted of an aggravated felony is permanently barred from seeking naturalization, regardless of the severity of the predicate offense, any demonstration of rehabilitation, or the passage of time since that conviction. This stringent bar to citizenship stands even if the aggravated felony was forgiven through a waiver many years ago, and even if the crime was committed prior to its categorization as an aggravated felony.[45] The only limit to the

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[43] INA § 316(a)(3), 8 U.S.C. § 1427(a)(3); 8 C.F.R. § 316.2(a)(7).
[44] INA § 101(f)(8), 8 U.S.C. § 1101(f)(8).
[45] Letter, Miller, Acting Asst. Comm. Adjudications HQ 316-C (May 5, 1993), *reprinted in* 70 No. 22 *Interpreter Releases* 752, 769-70 (June 7, 1993); *Chan v. Gantner*, 464 F.3d 289, 292-94 (2d Cir. 2006) (applying INA §§101(a)(43)(N), (U) retroactively such that a conviction for conspiracy to commit alien smuggling

naturalization bar is that the alien's aggravated felony must have been sentenced after November 29, 1990.

F. Violence Against Women Act ("VAWA")

VAWA was enacted by Congress in part as a means for battered immigrant women and their children to escape violent and abusive marriages without facing the threat of deportation.[46] The Act serves as a legal basis for such abused women and their children to self-petition for lawful permanent residence and cancellation of removal.[47] This procedure allows the abused immigrants to pursue relief from their circumstances without requiring the cooperation of the abusing relative. It has been shown that such abusive spouses often use physical, mental, emotional, and economic violence against noncitizens as a result of their immigration status.[48]

However, VAWA requires that self-petitioners demonstrate the aforementioned good moral character prior to qualifying either themselves or

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barred citizenship for lack of good moral character despite affirmative grant of section 212(c) relief); *Socarras v. DHS*, 672 F. Supp. 2d 1320, 1324-25 (S.D. Fla. 2009) (aggravated felony bar to naturalization was not waived where petitioner had received a section 212(i) waiver when she became an LPR).

[46] Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1941-42 (1994). Eligibility is defined at INA § 101(a)(51).

[47] INA §§ 204(a)(1)(A)(iii)-(vii), (B)(ii)-(ii), 8 U.S.C. §§ 1154(a)(1)(A)(iii)-(vii), (B)(ii)-(ii); 8 C.F.R. § 204.2(c), (e).

[48] Joanne Lin & Leslye Orloff, *VAWA 2005 Immigration Provisions*, Dec. 18, 2005, *reprinted in* AILA InfoNet Doc. No. 05122110, Dec. 21, 2005.

their children for relief.[49] The conviction for an aggravated felony bars any finding of good moral character, and eliminates the opportunity for battered women and their children to seek VAWA-based relief from their abusive relationships.

G. Cancellation Of Removal

Conviction of an aggravated felony categorically establishes a noncitizen's ineligibility for cancellation of removal.[50] Such cancellation proceedings allow lawful permanent residents of at least five years,[51] who have resided in the United States for at least seven years,[52] to request an immigration court to weigh the equities both for and against removal. This process allows the noncitizen to present evidence supporting his or her contention that removal is contrary to the interests of the United States,[53] with ultimate discretion regarding the granting of relief residing with the government. Positive factors in the cancellation analysis include: family ties within the United States, residency of long duration, evidence of hardship to the immigrant and family if removal were to occur, service in the

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[49] *Matter of* ___, A76-093-795, EAC 99-034-52692 (AAO Aug. 11, 1999), *reported in* 77 No. 5 *Interpreter Releases* 155, 168 (Feb. 1, 2000); 8 C.F.R. § 204.2(c)(2)(v).
[50] For permanent residents: INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3). For non-permanent residents: INA § 240A(b), 8 U.S.C. § 1229b(b).
[51] INA § 240A(a)(1), 8 U.S.C. § 1229b(d).
[52] INA § 240A(a)(2), (d), 8 U.S.C. § 1229b(a)(2), (d).
[53] *Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998).

Armed Forces,[54] history of employment, existence of property or business ties, existence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and evidence attesting to an immigrant's good moral character.[55]

Conviction of an aggravated felony bars consideration of the aforementioned factors, and removal, barring extreme circumstances, is automatic. In fact, a noncitizen who satisfies all factors favoring cancellation of removal as listed above yet committed a minor aggravated felony decades ago receives the same categorical treatment as an alien convicted of multiple counts of first-degree homicide yesterday. Such inflexibility in the immigration laws prohibits the government from exercising sound discretion in individual immigrants' removal proceedings.

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[54] The United States has expressed a profound interest in protecting its veterans and service members. The linguistic and cultural diversity noncitizens bring to the armed forces is especially valuable in the context of national security. ANITA U. HATTIANGADI ET AL., NON-CITIZENS IN TODAY'S MILITARY: FINAL REPORT 1 (2005). In recognition of the benefits that noncitizens can offer the military, the government has been expanding its recruitment of noncitizens. Gerry J. Gilmore, *Military Recruits Non-citizen Health Care Workers, Linguists*, AMERICAN FORCES PRESS SERVICE, Dec. 5, 2008. There are approximately 29,000 non-citizens serving in the United States military, with another 8,000 enlisting each year. Moreover, thousands of immigrants have already served tours of duty in the United States military. More than 660,000 military veterans became citizens through naturalization between 1862 and 2000. HATTIANGADI ET AL., *supra* at 19.

[55] *C-V-T-*, 22 I. & N. Dec. 7; *Matter of Wadud*, 19 I. & N. Dec. 182 (BIA 1984); *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978).

H. Waivers Of Inadmissibility

Lawful permanent residents convicted of an aggravated felony are barred from seeking waivers of inadmissibility such as section 212(h) relief.[56] These waivers are designed to prevent deportation in circumstances where removal would result in extreme hardship to qualifying family members who are citizens or lawful permanent residents of the United States. These waivers are designed to protect the interests of the community.

I. Voluntary Departure

Grants of voluntary departure are not permitted for those aliens convicted of an aggravated felony.[57] Voluntary departure permits an alien to leave on his or her own accord within a stated period of time after tying up their affairs and paying their own way to depart. This provision provides an opportunity for removable aliens to ensure that lawful permanent resident and United States citizen relatives are taken care of after their removal and do not become public charges. Failing this, courts may

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[56] INA § 212(h), 8 U.S.C. § 1182(h); *Matter of Young*, 21 I. & N. Dec. 610 (BIA 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639 (1996). Aliens convicted of an aggravated felony are also barred from seeking relief from inadmissibility pursuant to INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A), or INA § 212(c), 8 U.S.C. § 1182(c).

[57] For pre-hearing voluntary departure: INA § 240B, 8 U.S.C. § 1229c(a)(1). For post-hearing voluntary departure: INA § 240B, 8 U.S.C. § 1229c(b)(1).

deport aliens convicted of an aggravated felony immediately, often requesting aliens to show up for proceedings with their bags packed. Valuable enforcement resources are preserved through voluntary departure, as the alien is charged with funding his or her own removal.

J. Expedited Removal, Administrative Removal, And Bar To Adjustment of Status

Most aliens convicted of an aggravated felony face expedited removal.[58] This process entails a conclusive presumption of deportability, and virtually no procedural protections ensuring a right to contest the charges.[59] Immigration officers are empowered by the INA to determine summarily the ineligibility of aliens convicted of aggravated felonies for continued admission, and immediately remove them from the United States without further hearing or review. Expedited removal requires the Attorney General to remove the alien within thirty day of conviction, or more commonly immediately following completion of the related prison sentence.

Additionally, under INA section 238(b), the Attorney General, through the administrative actions of ICE and other agencies, may determine the removability of aliens who are not lawful permanent residents or conditional permanent residents, and are finally convicted of a qualifying aggravated felony.[60] Those aliens entered into

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[58] INA § 238, 8 U.S.C. § 1228.
[59] INA § 238(c), 8 U.S.C. § 1228(c).
[60] INA § 238(b), 8 U.S.C. § 1228(b).

administrative removal proceedings are not afforded a hearing in front of an immigration judge to explain their circumstances. None of the protections that attend an immigration court hearing apply.[61]

Moreover, aliens convicted of an aggravated felony may be barred from adjustment of status for inadmissibility, or in the absence of such a designation, pursuant to the Attorney General's discretion.[62] For example, adjustment of status may be denied for people married to U.S. citizens, based on a single aggravated felony conviction.

K. Additional Disabilities

Further ineligibilities may be found in the Nicaraguan Adjustment and Central American Relief Act.[63] Similar penalty provisions are embedded in the Haitian Refugee Immigration Fairness Act.[64] Moreover, aliens convicted of aggravated felonies are prohibited from seeking a temporary suspension of deportation.[65] The suspension provisions were designed by Congress to exempt certain Salvadorans, Guatemalans, Haitians, Nicaraguans, and Eastern Europeans, among others, from the harsh consequences of retroactive application of the aggravated felony definition.

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[61] INA § 238(b)(4)(B), 8 U.S.C. § 1228(b)(4)(B).
[62] INA § 245, 8 U.S.C. § 1255.
[63] Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997). *See*, *e.g.*, Section 202(a)(1)(B) (adjustment of status); Section 203 (special rule governing cancellation);
[64] Haitian Refugee Immigration Fairness Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (adjustment of status).
[65] INA § 243, 8 U.S.C. § 1254.

III. The Rule Of Lenity And The Rule Granting A Presumption To The Alien Of Narrow Statutory Construction Require Extending The Aggravated Felony Provisions Only To Those Predicate Crimes For Which Congress Has Clearly And Unambiguously Indicated Application.

The Rule of Lenity requires that deportation statutes be narrowly construed in favor of aliens. Judicial decisions have long applied this statutory interpretation canon to benefit noncitizens.[66] The rule is most frequently used in the context of immigration law in adjudicating discrepancies

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[66] *See*, *e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (applying the rule of lenity as an alternative basis in interpreting why negligent acts would not constitute an aggravated felony under 18 U.S.C. §16); *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (recognizing the rule of lenity and "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948) (matter of doubt should be resolved in favor of the alien); *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003) ("[T]he general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion…is particularly so in the immigration context where doubts are to be resolved in favor of the alien"); *INS v. Errico*, 385 U.S. 214, 225 (1966) (applying rule to provisions relating to relief); *Francis v. Reno*, 269 F.3d 162, 170-71 (3d Cir. 2001) (applying the rule of lenity to narrow interpretation of conviction as not being an aggravated felony); *Martin v. Gantner*, 443 F. Supp. 2d 367, 373 (E.D.N.Y. 2006) (in naturalization context, court held that conviction was not an aggravated felony because doubts are resolved in favor of the alien).

concerning whether a deportation provision should apply to a noncitizen. The central question in these cases is whether Congress unequivocally intended the exclusionary application. The Rule of Lenity also carries particular force where a statutory definition has both criminal and immigration consequences. The definition of ambiguous terms should be consistent in both the immigration and criminal contexts.[67]

In the instant case, there exists sufficient ambiguity in the statutory construction of the pertinent aggravated felony provision, 8 U.S.C. § 1101(a)(43)(M), and how it relates to the tax offense of which Petitioners were convicted to warrant application of the Rule of Lenity. The tremendously harsh consequences of a judicial expansion of the aggravated felony statute should serve as the impetus for interpretive constraint.

The Rule of Lenity has been applied with particular force in situations where a favorable interpretation of a statute serves that statute's "humanitarian purpose."[68] There is no doubt that the disabilities imposed on aliens convicted of an aggravated felony, as enumerated above, are in direct conflict with the humanitarian intent of Congress when it passes such statutory immigration relief. Asylum, withholding of removal, and temporary protected status were all designed to ensure that removable aliens were not sent home to face circumstances such as war, natural disaster, or

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[67] *Leocal v. Ashcroft*, 543 U.S. 1 (2004)

[68] *Errico*, 385 U.S. at 225 (applying rule of lenity to provisions relating to relief in order to serve their intended "humanitarian purpose").

extensive persecution. Cancellation of removal and waivers of inadmissibility were explicitly enacted both to protect the interests of United States citizens who would suffer extreme hardship due to an alien's removal, and to balance equities such as close family ties, long residence, community service, employment history, and rehabilitation against a single conviction. Finally, no congressional action can be said to serve a more humanitarian purpose than the Violence Against Women Act, enacted to provide women and their children a safe avenue for escaping abusive spouses.

Amici have witnessed firsthand how the separation of families living in the United States from their deported relatives can have disastrous emotional, physical, and financial consequences. This is particularly true in low-income families with limited resources, who often lack the economic means to visit a deported loved one. Removal, therefore, often serves as the complete and permanent destruction of a mixed status family, deporting the alien convicted of an aggravated felony and also ruining the lives of U.S. citizen and other relatives.

In applying the principles employed by this Court in congruent circumstances, the aggravated felony statute should be construed as narrowly as possible. In keeping with the Rule of Lenity, the Court should remain wary of interpretive expansion, and leave to Congress the application of all the devastating penalties described above to new, less severe crimes.

CONCLUSION

The disabilities and consequences which result for those aliens convicted of an aggravated felony inflict profound harm to both the noncitizens in question and, in many cases, to the families, communities, and country they leave behind. *Amici* respectfully urge this Court to reject expansive interpretations of the aggravated felony statute as inconsistent with congressional intent and core principles of statutory interpretation. The Court should therefore reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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