No. 10-694

IN THE
Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

Brief Of *Amici Curiae* 39 Immigration Law Professors In Support Of Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

INTEREST OF *AMICI CURIAE*

Amici curiae are law school professors of immigration law. They research, write, and teach about the intersection of immigration law and the constitutional rights of noncitizens. *Amici curiae* have a professional interest in ensuring that this Court is fully and accurately informed about the law relating to the constitutional rights of lawful permanent resident aliens in the United States. *Amici* have no personal, financial, or other professional interest in, and take no position on, the other issues raised in the case at bar. *Amici* do not represent the views of their universities and join this brief solely on their own behalf. A complete list of *amici* is included as an Appendix.[1]

STATEMENT

An alien admitted to the United States is *deportable* under 8 U.S.C. § 1227(a)(2)(A)(iii) if he has been convicted of an aggravated felony at any point after his admission. Meanwhile, an alien may be inadmissible to the United States under 8 U.S.C. § 1182(a)(2)(A)(i)(I) if he has been convicted of "a crime involving moral turpitude."

Former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), provides for a discretionary waiver of excludability for lawful permanent resident aliens reentering the United States, but this relief has long been applied also to aliens

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

who are deportable due to convictions that would likewise render them excludable. *See INS v. St. Cyr*, 533 U.S. 289, 295 (2001).[2] At issue in this case is the Board of Immigration Appeals' ("BIA") recent decision to foreclose deportable aliens from arguing that a deportable aggravated felony would also qualify as an excludable crime involving moral turpitude, but only if they have not left the United States since their convictions. According to the BIA, this result is compelled by the fact that the substantive deportability and excludability provisions do not utilize "similar language to describe substantially equivalent categories of offenses." *Matter of Blake*, 23 I. & N. Dec. 722, 728 (BIA 2005); *see also Matter of Brieva-Perez*, 23 I. & N. Dec. 766, 773 (BIA 2005).

Under this construction, a deportable alien who has remained in the United States may not seek relief, but a deportable alien who has traveled outside the country at some point since his conviction can argue that his offense qualifies as an excludable crime of moral turpitude that renders him eligible for Section 212(c) relief *nunc pro tunc*. *See Blake v. Carbone*, 489 F.3d 88, 94 (2d Cir. 2007) (noting that a "sleight of hand" allows the alien who has traveled abroad to be treated as though he is in exclusion proceedings instead of deportation proceedings); *see also Zamora-Mallari v. Mukasey*, 514 F.3d 679, 684 (7th Cir. 2008); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 308 (5th Cir. 1999).

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[2] Though Congress repealed Section 212(c) in 1996, this Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001), that Section 212(c) relief remains available to aliens who would have been eligible for such relief at the time of their plea agreements under the law then in effect. *Id.* at 326.

Petitioner Joel Judulang is a citizen of the Philippines who entered the United States in 1974 at the age of eight. Cert. Opp. 5. In 1989, he was convicted of voluntary manslaughter. *Id.* He has not traveled outside of the United States since this conviction. Pet. for Cert. 14. In 2005, the government commenced removal proceedings against Mr. Judulang. Cert. Opp. 5. An immigration judge found Mr. Judulang deportable based in part on his conviction for voluntary manslaughter, an aggravated felony "crime of violence" under 8 U.S.C. § 1101(a)(43)(F), and ordered him removed to the Philippines. Cert. Opp. 5-6. The immigration judge found that Mr. Judulang was not eligible for a waiver of deportation under Section 212(c). *Id.*

The BIA affirmed the deportation order, applying its decision in *Matter of Brieva-Perez* to hold Mr. Judulang ineligible for relief under Section 212(c) because, it stated, an aggravated felony "crime of violence" has no statutory counterpart in the grounds for excludability under Section 212(a). *Matter of Judulang*, A34 461 941, 2006 WL 557842 (BIA Feb. 3, 2006) (per curiam). If Mr. Judulang had left the country at any time after his conviction, however, he could have argued that he should be treated as excludable for having committed a "crime involving moral turpitude" and deemed eligible for Section 212(c) relief *nunc pro tunc* in deportation proceedings. Mr. Judulang sought review of the BIA's decision, and the Ninth Circuit denied his petition for review. *Judulang v. Gonzales*, 249 F. App'x 499 (9th Cir. 2007). The court held that his conviction for voluntary manslaughter was "not substantially similar to any ground for exclusion," precluding him from relief under Section 212(c). *Id.* at 502.

SUMMARY OF ARGUMENT

Though the question petitioner presents is one of statutory interpretation, background principles of constitutional law bear upon the statutory analysis. Where a statute is susceptible to more than one reasonable construction, the Court should presume "that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

The BIA's current interpretation of Section 212(c) violates the equal protection guarantees of the U.S. Constitution by classifying deportable lawful permanent resident aliens based on their travel history—a factor that bears no relation at all to any conceivable purpose Congress might have had in enacting Section 212(c)'s avenue for discretionary relief. The classification thus fails even rational basis scrutiny. This Court should not presume Congress intended such a result and should construe Section 212(c) in a manner that avoids the violation of equal protection principles that the BIA's and the Ninth Circuit's construction of Section 212(c) now imposes.

There is a long history of applying equal protection principles to noncitizens residing in the United States. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Though Congress retains significant power in the immigration context, this Court has not ceded enforcement of the Constitution's equal protection guarantees to the legislature. Instead, it has required that, at a minimum, legislative distinctions survive rational basis scrutiny.

In *Kleindienst v. Mandel*, 408 U.S. 753 (1972) and *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court held that, even in the context of *admission* into the United States, a congressional policy choice must demonstrate a "facially legitimate and bona fide reason" to survive judicial scrutiny. This

formulation restates rather than negates rational basis review. Courts applying *Fiallo* have consistently used *Fiallo*'s language interchangeably with more classic formulations of rational basis review. There has never been a suggestion from this Court that it intended to create a (conceptually troublesome) standard of review less deferential than rational basis scrutiny. If rational basis review applies to classifications drawn among applicants for admission into the United States, it follows that classifications drawn among lawful permanent residents should merit at least rational basis review, if not closer judicial scrutiny.

Rational basis review generously construes inferences in favor of the legislature, requiring only that a statutory classification be rationally related to a legitimate governmental interest—regardless of whether this interest was actually a purpose in the legislators' minds. It requires only that a court be capable of finding some practical advancement of an identifiable, legitimate purpose that is not wholly unrelated to the classification scheme utilized.

Even under the most relaxed conception of rational basis scrutiny, the BIA's interpretation of Section 212(c) violates equal protection. The government has not offered any rational basis for the classification BIA has drawn among deportable aliens because there is simply no legitimate state purpose discernible from discriminating among deportable legal resident aliens based on their travel histories. To the extent a relationship between travel and eligibility for continued residence in the United States is ascertainable, Congress could rationally *favor* those resident aliens who remain in the country and who presumably exhibit greater loyalty to, or desire to remain in, the United States. The BIA's interpretation of Section 212(c) does exactly the opposite and *penalizes* the group that, by its continuous physical

presence, has demonstrated a more steadfast attachment to the United States. The irrationality of this scheme is confirmed by the fact that it could operate successfully only if deportable noncitizens were aware of the immigration consequences of their travel histories. Yet, few (if any) noncitizens possibly could have predicted the BIA's abrupt change in course with respect to its interpretation of Section 212(c).

Because the BIA's interpretation of Section 212(c) to distinguish among deportable noncitizens based on their travel history raises serious constitutional issues, this Court should avoid it.

ARGUMENT

I. BIA DETERMINATIONS OF ELIGIBILITY FOR SECTION 212(C) RELIEF ARE SUBJECT AT LEAST TO RATIONAL BASIS REVIEW.

A. The Equal Protection Guarantees Of The Constitution Apply To All Persons Physically Present In The United States, Including Aliens.

Though it has been said that "Congress has 'plenary power' to create immigration law," "that power is subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). One of those "important constitutional limitations" is the guarantee of equal protection of the laws provided by the Fifth and Fourteenth Amendments.

At least since *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), it has been clear that the Fourteenth Amendment applies to all "persons" within the jurisdiction of the United States, regardless of their alienage. *Id.* at 369. The Due Process Clause and Equal Protection Clause, the Court held, "are universal in their application, to all persons within the

territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." *Id.* And at least since *Wong Wing v. United States*, 163 U.S. 228 (1896), it has been clear that the Fifth Amendment similarly guarantees that a legal resident alien "is entitled to the equal protection of [the] laws." *Id.* at 242 (Fields, J., concurring in part and dissenting in part).

In the century that followed, this Court repeatedly affirmed that the Constitution's guarantees of equal protection extend to aliens physically present in the United States. *See*, *e.g.*, *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 69 (1941); *Truax v. Raich*, 239 U.S. 33, 39 (1915). Those guarantees apply even to aliens present without authorization. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982). "[U]ntil [a person present in the United States] leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws." *Plyler*, 457 U.S. at 215.

B. Discrimination Within A Class Of Aliens Must Survive At Least Rational Basis Review.

Though Congress has "wide discretion" in the immigration and naturalization contexts, the Equal Protection Clause requires at least that it "classify persons on bases that are reasonable and germane having regard to the purpose of the legislation." *Cockrill v. California*, 268 U.S. 258, 262 (1925). In

Mathews, for example, the Court stressed the appropriateness of "a narrow standard of review" but still proceeded to scrutinize Congress's limits on eligibility for a federal medical insurance program. 426 U.S. at 82. The Court concluded that an eligibility classification drawn based on "both the character and the duration of his residence" survived rational basis review because "those who qualify under the test . . . may reasonably be presumed to have a greater affinity with the United States than those who do not," and it was reasonable for Congress to parcel out such benefits based on the strength of an alien's ties to the United States. *Id.*; *see also Reno v. Flores*, 507 U.S. 292, 306 (1993) (describing the broad power of Congress in the immigration context but observing that, "[o]f course," a regulation must still survive rational basis scrutiny).

This Court's decision in *Fiallo v. Bell*, 430 U.S. 787 (1977) is not to the contrary. *Fiallo* considered a provision in the Immigration and Nationality Act that granted preferential immigration status to a parent-child relationship involving an unwed mother but not to an identical relationship involving an unwed father. *Id.* at 788-89. In holding that the statute did not violate equal protection, the Court noted that, even in the context of regulation of entry into the United States, Congress needed at least a "'facially legitimate and bona fide reason'" to make such a policy choice. *Id.* at 794 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

Despite its deferential language, the *Fiallo* Court hardly treated this standard as negating the equal protection inquiry. Indeed, the Court explicitly rebuffed the government's argument that equal protection claims brought by those seeking entry into the United States were nonjusticiable; the Court saw no

basis for it to abdicate "judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens." *Fiallo*, 430 U.S. at 793 n.5. Instead, the Court pointed to at least two possible rational bases for the legislative distinction: "a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations." *Id.* at 799.

Some courts of appeals have suggested that *Fiallo* created a stand-alone constitutional standard unique to the immigration realm. *See*, *e.g.*, *Campos v. INS*, 961 F.2d 309, 316 (1st Cir. 1992) ("The test for determining the constitutionality of an immigration law provision is whether it is based upon a 'facially legitimate and *bona fide* reason.'" (quoting *Fiallo*, 430 U.S. at 794)); *see also Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1152 (10th Cir. 1999). In fact, *Fiallo* applied the same brand of rational review (albeit with verbal variances) as this Court has applied repeatedly since. Indeed, the government recognizes as much. In its opposition to certiorari, it uses the *Fiallo* standard and the rational basis standard interchangeably, first quoting the "facially legitimate and bona fide reason" language, Cert. Opp. 11, then describing its analysis as occurring "under the rational-basis standard of review," *id.* at 13.

While the *Fiallo* standard and the rational basis standard have in practice been treated identically by this Court, lower courts have more explicitly considered the two terms synonymous. The Ninth Circuit has expressly adopted the approach that *Fiallo* left implicit in its analysis: "Although the Supreme Court has never explicitly described the standard for re-

viewing immigration-law classifications among aliens as a rational basis test, . . . the rational-basis standard of review . . . is consistent with the Supreme Court's approach as reflected in the [*Fiallo*] language." *United States v. Barajas-Guillen*, 632 F.2d 749, 752 (9th Cir. 1980); *see also Friend v. Reno*, 172 F.3d 638, 645-46 (9th Cir. 1999) (stating that the *Fiallo* "inquiry is equivalent to the more traditional rational basis review used in many equal protection cases"); *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995) (reaffirming that "the 'facially legitimate and bona fide reason' test is equivalent to the rational basis test typically applied in equal protection cases").

The Second Circuit also has equated the search for a "facially legitimate and bona fide reason" with rational basis scrutiny. When the government sought a lower level of scrutiny in the immigration context, the court responded "that no distinction is intended by the ['facially legitimate and bona fide reason'] language and therefore conclude[d] that the rational basis test is applicable." *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2nd Cir. 1990).

Other circuits are in accord. *See*, *e.g.*, *Johnson v. Whitehead*, Nos. 09-1981, 10-1488, 2011 WL 1998333, at *6 (4th Cir. May 24, 2011) (equating faithfulness to *Fiallo*'s "facially legitimate and bona fide reason" language with the "appl[ication of] rational basis review"); *Breyer v. Meissner*, 214 F.3d 416, 422 n.6 (3d Cir. 2000) (observing that the *Fiallo* test "has been found analytically equivalent to the rational basis test normally applied in equal protection cases in which no suspect class is involved"). *But see Bangura v. Hansen*, 434 F.3d 487, 495 (6th Cir. 2006) (leaving open the possibility

that the *Fiallo* standard "may be even lower than rational basis review").

If rational basis review applies to congressional policy choices concerning the *entry of aliens*, the harshness of *deportation for lawful permanent residents*, which this Court has explained "can be the equivalent of banishment or exile," commands application of at least that minimal level of scrutiny in this context. Indeed, precisely "because deportation is a drastic measure," this Court previously has resolved doubts in construing immigration statutes to avoid deportation. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) Like procedural due process guarantees of fair notice and an opportunity to be heard, fair application of rational basis review similarly ensures at least that the government does not "make [a resident alien's] right to remain here dependent on circumstances . . . fortuitous and capricious." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *see also Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (underscoring the "severity" of deportation as a punishment); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (opining that deportation can result not only in loss of liberty but also "in loss of both property and life; or of all that makes life worth living").

As Judge Learned Hand wrote in *Di Pasquale v. Karnuth*, 158 F.2d 878 (2d Cir. 1947), later to be quoted in full by the Supreme Court, *Rosenberg v. Fleuti*, 374 U.S. 449, 455 (1963): "It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, *shall not be subject to meaningless and irrational hazards*." 158 F.2d at 879 (emphasis added). Protection against "irrational hazards" is all that rational basis

review affords, and *Fiallo* does not license the government to impose such irrationalities, peculiarly, in the immigration context alone.

II. NO RATIONAL BASIS SUPPORTS THE BIA'S DISTINCTION AMONG DEPORTABLE ALIENS.

A. Classifications Drawn Must Be Rationally Related To An Identifiable State Interest.

Properly conceptualized, the rational basis standard of review in equal protection cases balances competing, and often contradictory, objectives: maintaining due deference for legislative judgments and preventing arbitrary burdens on disadvantaged groups. This level of scrutiny "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Requiring a meaningful—albeit deferential—relationship between the government interest and the means adopted, however, "gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature . . . ; and it marks the limits of [the judiciary's] own authority." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Rational basis review requires that any law that differentiates among similarly situated people at a minimum reflect: (1) an identifiable, legitimate state interest the legislature could have pursued, and (2) a rational attempt to advance such interest through the disparate treatment. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) ("Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473

U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) ("Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest.").

While the legitimate governmental purpose that forms the first prong of the rational basis inquiry need not be *identified* by the legislature, it must at least be *identifiable* by the court; it must be a purpose that "could . . . reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Deference to legislative decisions is appropriate only when the facts supporting the identified purpose are at least "arguable." *Id.* at 112; *see also Romer*, 517 U.S. at 632 (noting that laws subject to rational basis scrutiny must be "grounded in a sufficient factual context" to allow for meaningful judicial review).

The challenged classification must also bear a rational relationship to the achievement of the ascertainable interest. In the first instance, this requirement means that division into legal categories must be grounded on criteria related to the statute's aims. *Cleburne*, 473 U.S. at 446 (noting that a classification's "relationship to an asserted goal [may not be] so attenuated as to render the distinction arbitrary or irrational"); *Johnson v. Robison*, 415 U.S. 361, 374 (1974) (observing that equal protection denies the power to create "'different classes on the basis of criteria wholly unrelated to the objective of that statute'" (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971))). A rational relationship does not require "precise

mathematical nicety" but does require that disparate treatment not be "wholly without any rational basis." *Moreno*, 413 U.S. at 538 (internal quotation marks omitted). Such relationship, moreover, may not be merely theoretical; instead, a challenged classification must operate rationally "in practical effect." *Id.* at 537. A court must ultimately be capable of "find[ing] some footing in the realities of the subject addressed by the legislation" for the legislature's choice to provide for disparate treatment of otherwise comparable groups. *Heller*, 509 U.S. at 321.

B. The BIA's Classification Of Deportable Aliens Fails Even This Most Relaxed Mode Of Scrutiny.

The BIA's new interpretation of Section 212(c) draws a distinction between two groups of *deportable* residents: those who have left the United States subsequent to their convictions and returned, and those who have remained in the United States. *See* Cert. Reply Br. 8-9; *see also* Cert. Opp. 17 (observing that the "[p]etitioner could have easily avoided [the effects of the BIA's interpretation] by departing the country voluntarily at any point before his removal proceedings were initiated").

The government has suggested no rational basis for this distinction—and has not done so in thirty-five years. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) (noting a similar failure on the government's part "to suggest any reason why this petitioner's failure to travel abroad following his conviction should be a crucial factor in determining whether he may be permitted to remain in this country").

Various courts of appeals have suggested various (quite thin) rationales for distinguishing between aliens in exclusion proceedings and aliens in deporta-

tion proceedings. A number of courts have suggested that Congress may rationally treat excludable aliens more leniently than deportable aliens to create an incentive for deportable aliens to leave the country on their own: "To induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to the country . . . ." *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998); *see also Abebe v. Mukasey*, 554 F.3d 1203, 1206 (9th Cir. 2009) (en banc) (per curiam); *Vo v. Gonzales*, 482 F.3d 363, 371 (5th Cir. 2007); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999). Relatedly, other courts have surmised that voluntary departures from the United States could lead to procedural cost savings because not all departing aliens would attempt to return, thus reducing the aggregate number of deportation and exclusion proceedings. *See*, *e.g.*, *DeSousa v. Reno*, 190 F.3d 175, 185 (3d Cir. 1999). And, less obviously, some have divined a relation to public safety, noting that deportable criminal aliens remain a danger to the American public, while criminal aliens outside the United States pose no such threat. *See Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1152-53 (10th Cir. 1999).

But even if these asserted justifications could survive a fair application of rational basis review—and they cannot—each of them is, at most, a rationale for distinguishing between *excludable* and *deportable* aliens. These rationales have no application whatsoever to distinctions *among deportable aliens*. Each focuses on the presumed advantages of a waiver process that occurs while the alien applicant is physically located *outside the United States*. But as between two groups of deportable aliens, *both physically present inside the United States* at the

time of their deportation proceedings, the conceivable rational bases hypothesized by lower courts are utterly irrelevant.

In fact, even those courts of appeals that have upheld classifications on the basis of differences between *excludable* and *deportable* aliens have reiterated the irrationality of discriminating between two classes of *deportable* aliens. *See*, *e.g.*, *De la Rosa v. U.S. Attorney General*, 579 F.3d 1327, 1338 (11th Cir. 2009) (per curiam) (stressing its commitment to *Francis*'s extension of "equal protection to two classes of similarly situated deportable aliens"); *DeSousa*, 190 F.3d at 183-84 (reaffirming that "the distinctions drawn by the BIA [before *Francis*] among certain deportable aliens were irrational"); *Requena-Rodriguez*, 190 F.3d at 309 (opining that a distinction between excludable and deportable aliens "is not so tenuous as the one rejected in *Francis*"); *LaGuerre*, 164 F.3d at 1041 (noting that in *Francis* "the government was taking the irrational position" that international travel entitled a deportable alien to more consideration in deportation proceedings).

The BIA's current interpretation of Section 212(c) commits exactly the equal protection violation that *Francis* avoided—"creat[ing] two classes of aliens identical in every respect except for the fact that members of one class have departed and returned to this country at some point after they became deportable." 532 F.2d at 272. Equal protection guarantees—and common sense—prohibit classes of permanent lawful resident aliens from being treated differently in their eligibility for discretionary relief on the basis of "irrelevant and fortuitous factors" like travel history. *Id.* at 273. After all, such an arbitrary dividing line may permit discretionary relief for someone who enters Canada for a few hours but not for a

similarly situated resident alien who remains in the United States. *Id.*; *see also Abebe*, 554 F.3d at 1219 (Thomas, J., dissenting) ("There is no rational basis for treating a lawful permanent resident who steps across the border for a day better than one who does not.").

It is possible that travel history might bear some rational relationship to legislative objectives in the immigration context; any relationship, however, would be exactly the inverse of that suggested by the BIA's current interpretation of Section 212(c). Indeed, if any rational distinction can be made based upon travel history, it is that Congress may be within its power to *disfavor* those aliens who have traveled abroad with a given frequency. *See Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963) (noting that "valid policy reasons" exist for legislating that a legal permanent resident "imperils his status by interrupting his residence too frequently or for an overly long period of time"); *see also Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (permitting Congress to draw lines that favor those aliens who have been in the country longest). The reverse proposition—favoring aliens who remain in the country less often—serves no conceivable legislative aim. *See Francis*, 532 F.2d 273 ("Reason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive *at least as much* consideration as an individual who may leave and return from time to time.") (emphasis added).

It should not be surprising, then, that this Court already has recognized that brief, temporary travel is an irrational basis upon which to ground momentous immigration consequences. In *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), a Mexican citizen

legally residing in the United States traveled on an American merchant ship that was torpedoed near Cuba. *Id.* at 389. He was rescued, taken to Cuba for about one week, and returned to the United States, where he was later placed in deportation proceedings. *Id.* at 389-90. The Court held that classifying his return to the country as an "entry" for purposes of the Immigration and Nationality Act would be "a capricious application" of the law, *id.* at 391, and would "impute to Congress a purpose to subject aliens 'to the sport of chance,'" *id.* (quoting *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947)).

The Court solidified this posture in *Rosenberg v. Fleuti*. In that case, a permanent resident with Swiss citizenship voluntarily left the United States to visit Mexico for a few hours. 374 U.S. at 450. He was later placed in deportation proceedings in part because of his "entry" into the United States after this brief excursion. *Id.* The Court again held that when a lawful resident alien "steps across a border and, in effect, steps right back, subjecting him to exclusion . . . seems to be placing him at the mercy of the 'sport of chance' and the 'meaningless and irrational hazards' to which Judge Hand alluded." *Id.* at 460 (quoting *Di Pasquale*, 158 F.2d at 879). Ultimately, the *Rosenberg* Court construed the relevant statute to draw no such arbitrary lines based on brief travel outside the country, recognizing that "the insignificance of a brief trip to Mexico or Canada bears little rational relation to the punitive consequence of subsequent excludability." *Id.* at 461.

As in *Delgadillo* and *Rosenberg*, the irrationality of the distinction drawn here by the BIA is amplified by the abruptness with which it was sprung on noncitizens. Few, if any, noncitizens—indeed, few, if

any, professors of immigration law—could have predicted that the BIA would invent a "similar language" test completely untethered to the text or historical application of Section 212(c) in order to limit eligibility for discretionary relief. Whatever governmental objective (if any) is advanced by encouraging deportable noncitizens to take ephemeral trips abroad depends completely on those noncitizens being aware of the benefit to be obtained from such trips. The absence of fair notice of the significant immigration consequences arising from such a trip (or the failure to take it)—manifest here but threatened whenever the government abruptly announces a novel and textually insupportable interpretation of an immigration statute—obliterates any chance that the government will obtain its hypothesized benefit. This confirms that the BIA's interpretation advances no conceivable legitimate governmental interest.

This Court has recognized that when the government's interpretation of an immigration law "would raise a serious constitutional problem," it is appropriate to construe the statute instead "in light of the Constitution's demands" if the language of the statute possibly admits of such a construction. *Zadvydas v. Davis*, 533 U.S. 678, 689-90 (2001); *see also Clark v. Martinez*, 543 U.S. 371, 381 (2005). The BIA's distinction among deportable noncitizens, favoring those who travel outside the United States over those who remain within the United States, does, indeed, "raise a serious constitutional problem," because it does not—and cannot, given the manner in which it was issued—rationally advance any legitimate governmental objective. This Court should avoid that interpretation.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to interpret Section 212(c) in a manner that avoids constitutional infirmities by requiring similar treatment of similarly situated deportable aliens. If it does so, the judgment of the court of appeals must be reversed.

Respectfully submitted,

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APPENDIX

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