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 THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC., AND WORLD RELIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

Amici curiae, the Catholic Legal Immigration Network, Inc. (CLINIC), and World Relief respectfully submit this brief in support of petitioner Joel Judulang.[1] The Catholic Legal Immigration Network, Inc. (CLINIC), a national religious organization established in 1988, is the largest network of immigration legal service providers in the country, assisting more than 600,000 people annually with immigration matters. CLINIC was created by the United States Conference of Catholic Bishops to support a rapidly growing network of community-based immigration programs. CLINIC's network originally comprised 17 programs. It has since increased to more than 201 diocesan and other affiliated immigration programs with 290 field offices in 47 states. The network currently employs roughly 1,200 attorneys and accredited paralegals.

Among CLINIC's and our network's clients, parishioners, and community members are numerous lawful permanent residents who have lived in the United States for many years, in some instances for their entire adult lives; who have married and raised children in this country; who have overcome their past mistakes, including decades-old criminal convictions, often with the help

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[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.

of religious faith and counseling; who have paid their taxes, founded businesses, and created charitable organizations; and who have become pillars, leaders, and invaluable members of their local communities as well as our national fabric.

As a religious organization, we are particularly alarmed by misinterpretations of immigration law that fail to take account of true rehabilitation, often achieved with the support of a community of faith. We fear that a rule precluding a form of longstanding immigration relief that offers a discretionary opportunity for forgiveness and mercy to those who have continuously remained in this country, often for decades, would penalize those lawful permanent residents whose ties to this country are strongest and who contribute most to the economic, social, and religious communities of the United States.

Amicus curiae World Relief is a religious international relief and development organization committed to serving the most vulnerable populations, through partnerships with faith-based and community-based organizations. Originally founded in 1944 as the War Commission of the National Association of Evangelicals to assist victims of World War II, World Relief currently works on five continents, in some of the most impoverished areas of the world. In the United States, World Relief focuses on serving the foreign-born, including providing immigration legal services to refugees, asylees, parolees, and other vulnerable immigrants in twenty cities around the country. Since 1979, World Relief has resettled more than 236,000

refugees in the U.S. under a cooperative agreement with the Department of State. World Relief also supports churches in developing immigration legal services programs.

Many of World Relief's clients and church and community members are lawful permanent residents who have lived in the United States for many years. They have made countless contributions to their families, communities, places of worship, and this country. Many have overcome prior criminal and other problems and achieved rehabilitation, often with the assistance of faith-based organizations. World Relief believes that such rehabilitation should be adequately considered under immigration law.

SUMMARY OF ARGUMENT

The Board of Immigration Appeals' (BIA) recent and sudden reinterpretation of former Immigration and Nationality Act (INA) § 212(c) improperly distinguishes between two sets of lawful permanent residents (LPRs) within our borders: those who have not traveled abroad and are therefore rendered ineligible for relief, and others who do leave and return and thereby remain eligible. This BIA rule contravenes consistent congressional immigration policy, which has always encouraged lawful permanent residents to remain physically within the United States. It will inflict, and already has inflicted, needless suffering on valuable members of our communities who received no notice of this about-face regarding § 212(c) relief that cut off a 70-year tradition of allowing the exercise of

discretionary mercy in deserving cases of rehabilitation.

BACKGROUND

For over 70 years, long-term lawful permanent residents ("LPRs") have been eligible for a discretionary waiver of deportation.[2] The authority to issue such a waiver was initially enacted in the seventh proviso to the Immigration Act of 1917,[3] and later reaffirmed in substantially the same manner by former Immigration and Nationality Act ("INA") § 212(c), 8 U.S.C. § 1182(c).[4] Section 212(c) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[5] and replaced by the more restrictive cancellation of removal, current INA § 240A(a), 8 U.S.C. § 1229b(a). However, this Court, in INS v. St. Cyr, 533 U.S. 289, 326 (2001), preserved the § 212(c) eligibility of aliens who pled guilty or no contest prior to the effective date of IIRIRA.

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[2]The congressional policy of retaining flexibility to relieve deserving aliens from deportation long predates these waiver provisions. See, e.g., Alien Friends Act, Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570, 570-71 (1798) (granting the President authority to order dangerous or treasonous aliens removed while maintaining his ability to issue discretionary "licenses" to remain).

[3]39 Stat. 875, § 3 (1917) ("[A]liens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and upon such conditions as he may prescribe.").

[4] Pub. L. No. 82-414, 66 Stat. 163 (1952).

[5] Pub. L. 104-208, Div. C, 110 Stat. 3009-546 (1996).

Facially, both the seventh proviso and § 212(c) relate only to LPRs returning from abroad. But for more than 70 years and to this day, the BIA has held without interruption that such waivers are also available *nunc pro tunc* to an LPR who has left the U.S. and returned after his or her conviction and before deportation proceedings against the alien are initiated. See Matter of L, 1 I. & N. Dec. 1 (1940) (Jackson, A.G.); Matter of G- A-, 7 I. & N. Dec. 274 (BIA 1956); see also St. Cyr, 533 U.S. at 294.

Initially, in Matter of Arias-Uribe, the BIA held that an LPR could *only* apply for a § 212(c) waiver if the alien had travelled abroad since his or her conviction. 13 I. & N. Dec. 696, 697-98 (BIA 1971). But, in Francis v. INS, the Court of Appeals for the Second Circuit rejected this rule on equal protection grounds. 532 F.2d 268, 273 (2d Cir. 1976). *Francis* reasoned that it was irrational to prohibit an LPR from even applying for a discretionary waiver when another LPR, identical in every respect except that the alien left the U.S. and returned at some point after conviction, would be eligible to seek a favorable exercise of discretion. Id. The court pointed out that "[r]eason 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." Id. (emphasis added).

This holding was quickly adopted by the BIA,[6] as well as by every other Circuit Court of Appeals.[7]

However, in 2005, the BIA announced a new rule: § 212(c) relief would only be available to a "nondeparting" LPR if the ground on which the alien is found to be deportable used "similar language" to a ground of inadmissibility. Matter of Blake, 23 I. & N. Dec. 722 (BIA 2005). Because the underlying *nunc pro tunc* rule was undisturbed, the result was that, as in Francis, two LPRs identical in every respect except that one left the country and returned, while the other did not, must be treated differently in assessing their eligibility for a discretionary waiver that is frequently described as the "'forgiveness' provision" of the INA. See, e.g., Nakaranurack v. United States, 68 F.3d 290, 292 (9th Cir. 1995).

In Abebe v. Mukasey, upon which the Ninth Circuit relied in deciding the instant case, the court reasoned that Francis, and the Ninth Circuit's own subsequent decision in Tapia-Acuna, had overlooked Congress's supposedly rational interest in "encouraging [the] self-deportation" of LPRs in order to "save resources [the government] would otherwise devote to arresting and deporting" them. 554 F.3d 1203, 1206 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010). Abebe therefore overruled Tapia-Acuna, suggesting that the BIA could return to the rule it originally announced in Matter of Arias-Uribe, permitting an LPR's § 212(c) eligibility to

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[6] Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976).

[7] See, e.g., Tapia-Acuna v. INS, 640 F.2d 223, 225 (9th Cir. 1981).

turn solely on whether or not the alien travelled abroad after a conviction.

In ruling this way, Abebe misconstrued Tapia-Acuna, stating Tapia-Acuna's holding to be that "there's no rational basis for providing section 212(c) relief from inadmissibility, but not deportation." Id. at 1207. Tapia-Acuna instead held that "eligibility for [§ 212(c)] relief cannot constitutionally be denied to an otherwise eligible alien . . . whether or not the alien has departed from and returned to the United States after the conviction giving rise to deportability." 640 F.2d at 225. In other words, in Tapia-Acuna, as in Francis, the relevant comparison is why § 212(c) relief is available to one alien in deportation proceedings but not to a similarly situated person, solely on the basis that the first left and returned after conviction while the second did not. See Abebe v. Holder, 577 F.3d 1113 (9th Cir. 2009) (Berzon, J., dissenting from denial of full court rehearing) ("[Abebe is] based on a fundamental misunderstanding of Tapia-Acuna's holding.").

ARGUMENT

I. THE BIA'S RULE DENYING § 212(C) ELIGIBILITY BASED SOLELY ON AN LPR'S REMAINING IN THE UNITED STATES CONTRAVENES CONGRESSIONAL INTENT AND FORECLOSES § 212(C)'S CRITICAL FUNCTION AS A DISCRETIONARY PROVISION OF MERCY AND FORGIVENESS FOR DESERVING LONG-TIME LAWFUL RESIDENTS.

From the beginning of the Republic, it has been the consistent policy of the United States, expressed through statutory enactments, to encourage lawful alien residents to remain in the United States, and to discourage them from departing. "It is . . . clear from the early discussions of immigration problems and policies in and out of Congress that the most highly approved immigrant was one who came with the intention of remaining permanently, becoming a citizen, and bringing his family or establishing it after arrival."[8] Conversely, early Congresses held a "long-standing prejudice against the 'bird of passage' and 'habitual commuter' who came and went without putting down roots."[9]

Congress has continued to encourage aliens to remain in the United States in modern immigration law by making physical presence a prerequisite for various kinds of immigration benefits. For example, both non-LPR cancellation of removal[10] and cancellation of removal under the Violence Against Women Act of 1994[11] require certain periods of continuous physical presence, as do Temporary Protected Status[12] and legalization under the Immigration Reform and Control Act of 1986.[13]

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[8] Edward P. Hutchinson, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 (1981), 505.
[9] Id.
[10] INA § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A).
[11] INA § 240A(b)(2)(A)(ii), 8 U.S.C. § 1229b(b)(2)(A)(ii).
[12] INA § 244(c)(1), 8 U.S.C. § 1254a(c)(1).
[13] INA § 245A(a)(3), 8 U.S.C. § 1255a(a)(3); see also 8 C.F.R. § 245a.11(c) (physical presence requirement for LIFE Act legalization); INA § 101(a)(27)(I), 8 U.S.C. § 1101(a)(27)(I)

Various other immigration benefits require the applicant to be physically present at the time of the application.[14] Congress has expressed its desire that LPRs in particular remain in the country by, for example, mandating that to be eligible to naturalize an LPR normally must have continuously resided in the U.S. for five years with actual physical presence for at least half that time.[15] This requirement is echoed in various other special naturalization provisions.[16]

This Court has consistently recognized and reaffirmed Congress's policy of encouraging physical presence within the United States in order to develop the especially strong community and family "ties that go with permanent residence." Landon v. Plasencia, 459 U.S. 21, 32 (1982). Landon recognized the line of cases affording greater procedural protections to "continuously present residents" facing deportation. Id. (citing United States ex rel. Tisi v. Tod, 264 U.S. 131, 133, 134 (1924); Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912); Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.8 (1953)). In light of the brevity of her absence

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(physical presence requirement for Special Immigrant visas for retired employees of international organizations and family members of employees of such organizations).

[14] See, e.g., 8 U.S.C. § 1158(a)(1) (asylum); INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (T-visa); INA § 245(i)(1), 8 U.S.C. § 1255(i)(1).

[15] INA § 316(a), 8 U.S.C. § 1427(a).

[16] See, e.g., INA § 319(a), 8 U.S.C. § 1430(a) (physical presence requirement for naturalization of battered spouses and children); see also INA § 301, 8 U.S.C. § 1401 (physical presence requirements for parents of children seeking naturalization by birth).

and the length of her residence, the Court held that Plasencia was entitled to due process as a returning LPR. Id.; see also Chew, 344 U.S. at 596. However, the Court warned, "[i]f the permanent resident alien's absence is extended" she may lose her claim to be treated as "an alien continuously residing and physically present in the United States." Landon, 459 U.S. at 33. The Court distinguished Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), as involving a much more extended absence, one long enough to interrupt even Mezei's considerable prior ties to the U.S. Id. at 33-34. The principle is clear: the longer and more consistently residents remain in the United States, the greater their benefits and protections.

As far as *Amici* are aware, Congress has never enacted an immigration provision that explicitly provided for the preferential treatment of lawful permanent residents who left the U.S. and returned, or for the disadvantageous treatment of similarly situated residents who never left the country. On the contrary, Congress's consistent policy to encourage residents to remain in the country with their families and communities suggests that, if anything, Congress has always intended more favorable treatment of residents who remain in the country longer and more continuously, "have a greater affinity with the United States," and are therefore "most like citizens." Mathews v. Diaz, 426 U.S. 67, 83 (1976); see also Francis, 532 F.2d at 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.").

Abebe's contrary result is particularly worrisome because, in *Amici*'s experience, most contemporary applicants for § 212(c) relief are long-time LPRs who have some or all of the qualities Congress and the BIA have for many decades identified as being particularly desirable in LPRs and as critically important in determining whether to grant discretionary relief. See, e.g., Matter of Marin, 16 I. & N. Dec. 581, 584-85 (BIA 1978) ("Favorable considerations . . . include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character."). Congress has never suggested that it disagrees with this over-forty-year-old assessment of meritorious factors. Indeed, two of the Marin factors, long-term residence and family ties, have been venerable threshold eligibility requirements for discretionary relief from deportation and also positive factors in determining whether an alien merits a favorable exercise of discretion.[17]

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[17] Regarding long-term residence, there is an unbroken chain of legislation including: an 1888 amendment to the Alien Contract

Particularly since the passage of IIRIRA, repealing former INA § 212(c), and this Court's decision in St. Cyr,[18] cases demonstrate that § 212(c) relief has become the province of extremely long-term lawful permanent residents.[19] These long-term

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Labor Law, 25 Stat. 566 (1888) (establishing statute of limitations on removal); the 1891 Immigration Act, 26 Stat. 1084 (1891) (same); the Immigration Act of 1917, 39 Stat. 875 (1917), § 3 (Seventh Proviso); former INA § 212(c), 8 U.S.C. § 1182(c); and currently INA § 240A(a)(2), 8 U.S.C. § 1229b(b)(2) (LPR cancellation of removal). Regarding family ties, similarly, legislation includes the 1924 Immigration Act, Pub. L. No. 68-139, 43 Stat. 153, § 14 (1924) (providing for the discretionary suspension of deportation of a minor temporarily admitted to the United States and overstaying a visa if the minor had a U.S. Citizen parent); the 1940 Alien Registration Act, 54 Stat. 670, § 40 (1940) (providing that the Attorney General could suspend a deportation if, *inter alia,* the deportation would "result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien"); Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206 (1948) (same); 1952 INA, Pub. L. No. 82–414, 66 Stat. 163 (1952) (establishing five categories of deportable aliens eligible for suspension of deportation and requiring for eligibility that the alien be "a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence"); Act of October 24, 1962, Pub. L. No. 885, 76 Stat. 1247 (1962) (simplifying categories but retaining family hardship requirement); INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (non-LPR cancellation of removal).

[18] 533 U.S. at 326 (preserving § 212(c) eligibility of noncitizens who pled guilty or no contest prior to IIRIRA).

[19] See, e.g., In re De La Cruz, 2010 WL 4509731 (BIA Oct. 29, 2010) (26-year residence); In re Olajope, 2009 WL 4899011 (BIA Nov. 27, 2009) (LPR for 26 years); In re Telleria, 2009 WL 3713330 (BIA Oct. 29, 2009) (LPR for approximately 40 years); In re Pupo, 2009 WL 3713308 (BIA Oct. 28, 2009) (LPR for over 30 years); In re Lobaina-Gil, 2009 WL 3713244 (BIA Oct. 26,

residents raise families in this country, including U.S. citizen children, spouses, and other relatives; own or contribute to businesses; and pay their taxes. In our experience, applicants' criminal convictions are often extremely old[20] and relatively minor.[21]

2009) (LPR for almost 30 years); In re Salinas-Flores, 2008 WL 655909 (BIA Feb. 15, 2008) (35-year residence); In re Bowen, 2007 WL 275726 (BIA Jan. 11, 2007) (LPR for 35 years, or "her entire adult life"); In re Cushicagua-Peralta, 2006 WL 2008289 (BIA May 31, 2006) (respondent came to U.S. at the "young age of 13 and had been a lawful permanent resident in this country for almost 30 years"); In re Raola-Rosaria, 2004 WL 2418656 (BIA Sept. 1, 2004) (respondent entered the U.S at a "young age" and resided in the U.S. for 40 years); In re Mclean, 2004 WL 1739118 (BIA June 17, 2004) (30-year residence).

[20] See, e.g., Francois v. Attorney Gen. of U.S., 264 Fed. App'x 211, 212 (3d Cir. 2008) (upholding pretermission of waiver regarding 23-year-old crimes committed when respondent was 17 years old); Castaneda-Sanchez v. Holder, 396 Fed. App'x 84 (5th Cir. 2010) (upholding pretermission of waiver of 28-year-old conviction); In re Quinones, 2010 WL 3157442 (BIA July 27, 2010) (pretermitting waiver of 20-year- old conviction); Pupo, 2009 WL 3713308 (granting waiver of 20-year-old conviction); Lobaina-Gil, 2009 WL 3713244 (granting waiver of over 20-year-old conviction; respondent had been an LPR for almost 30 years); Bowen, 2007 WL 275726 (granting waiver of 22-year-old conviction when respondent was 21 years old); In re Donaldson, 2005 WL 3802267 (BIA Nov. 28, 2005) (pretermitting waiver of 23-year-old conviction); Raola-Rosaria, 2004 WL 2418656 (granting waiver for respondent who had last been arrested 20 years prior).

[21] See St. Cyr, 533 U.S. at 347 (noting that the changes in the 1996 statutes included "bringing under the definition [of "aggravated felony"] more minor crimes"); United States v. Copeland, 369 F. Supp. 2d 275, 307 (E.D.N.Y. 2005), aff'd, 232 Fed. App'x 72 (2d Cir. 2007) ("'[W]hile it is indeed lengthy, the respondent's criminal record includes several arrests for minor offenses which were committed when the respondent was a minor from an abusive and troubled background.'") (quoting Matter of Dominos Dias Goncalves, No. A34 744 205, 26 Immig.

These long-term LPRs with old criminal convictions have frequently turned their lives around in the interim, rehabilitated themselves, and become important and valuable members of their communities. They are quintessential examples of why the "forgiveness" provision that § 212(c) represents was for so long part of the INA. Retroactively depriving these LPRs of an opportunity to seek discretionary relief – to present a final plea for mercy based on evidence of good conduct – is both unlawful and unconscionable.

As faith-based organizations, we are particularly sensitive to the role of redemption and mercy in our immigration system. Section 212(c) relief is for lawful permanent residents an instantiation of the principle that individualized

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Rptr. (MB) B1-117 (BIA Nov. 25, 2002)); In re Emordi, 2006 WL 2391253 (BIA June 22, 2006) (granting waiver of 16-year-old expunged conspiracy conviction for which respondent was sentenced to probation only); In re Murray, 2004 WL 2943520 (BIA Oct. 29, 2004) (granting waiver of two convictions of simple possession of marijuana for which respondent was not sentenced to a term of imprisonment); In re Acosta-Campos, 2004 WL 2374871 (BIA Aug. 18, 2004) (granting waiver for 13-year-old conviction, subsequently dismissed, for which respondent was given an "extremely light sentence" of six days in jail with probation); In re Ochoa de Fuentes, 2004 WL 1059687 (BIA Jan. 9, 2004) (granting waiver for 10-year-old conviction; respondent had taken phone messages for her uncle, some of which related to drugs, and the "prosecutor in her case urged the judge to impose a light sentence because of her very minor role" in the conspiracy); In re Marine Nunez, 2003 WL 23270113 (BIA Oct. 28, 2003) (granting waiver for 19-year-old conviction for attempted robbery, in part because sentence of only four months in prison indicates that respondent's role may have been minor).

discretion should be available to pardon those who have transgressed but subsequently learned from and risen above their errant acts. See, e.g., Gallegos-Vasquez v. Holder, 636 F.3d 1181, 1183 (9th Cir. 2011) (Church membership and activities part of Respondent's post-conviction life); Avilez-Granados v. Gonzales, 481 F.3d 869, 871 (5th Cir. 2007) (Respondent "won his victim's forgiveness"); Gonzalez v. INS, 996 F.2d 804, 808 (6th Cir. 1993) (Respondent was "active in her church and performed a great deal of community service"); In re Olajope, 2009 WL 4899011 (BIA Nov. 27, 2009) (Respondent was an "active member of his church community"); In re Acosta-Campos, 2004 WL 2374871 (BIA Aug. 18, 2004) (Respondent was "very involved in the community through his church"). To give but one comprehensive example out of manifold cases, in Matter of Arreguin de Rodriguez, 21 I. & N. Dec. 38 (BIA 1995), the BIA recognized that a waiver under § 212(c) was appropriate for a mother of five U.S. citizen children where, "[d]espite her current incarceration, the record reflects that the applicant has apparently used her time in prison well in that she has advanced her otherwise meager education by voluntarily pursuing GED studies, for which she received a letter of commendation, has pursued other courses, has had no prison infractions, and has been involved in a church ministry." *Id.* at 40. Section 212(c) relief recognized the possibility of rehabilitation and encouraged LPRs to devote themselves to reconstructing their damaged lives by communicating the message that their banishment from family and community in the United States would not be mandatory.

Under the BIA's rule and the Ninth Circuit's reasoning, however, similar "long-time residents with deep roots in American communities" will "face virtually automatic deportation" even though "in many cases [immigration authorities have] only recently taken note of their long past criminal activities." Catney v. INS, 178 F.3d 190, 191 (3d Cir. 1999) (citing Mirta Ojito, *Old Crime Returns to Haunt an Immigrant*, N.Y. TIMES, Oct. 15, 1997, at B1 (describing an alien subject to deportation for a "misdemeanor he committed 23 years ago and for which, until now, he had never spent a day in jail")).[22] For such long-term residents, this means being "picked up off the streets for crimes . . . committed many years ago, torn from his or her family, job or business, and deported." Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997), aff'd in part, dismissed in part sub nom. Henderson v. INS, 157 F.3d 106 (2d Cir. 1998). Congress did not intend this result and the hitherto unbroken chain of case precedent created contrary reliance interests for long-time LPRs who were accorded no notice that their opportunity to present a case for mercy would suddenly be short-circuited.

II. THE NINTH CIRCUIT'S HYPOTHESIS IN *ABEBE* IS UNSUPPORTED AND IRRATIONAL.

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[22] See also U.S. Rep. Zoe Lofgren, A Decade of Radical Change in Immigration Law: An Inside Perspective, 16 STAN. L. & POL'Y REV. 349, 360 (2005) (noting that because of the unavailability of relief under § 212(c) "nuclear families have been separated and adversely affected . . . often by the deportation of a parent of U.S. citizens who committed only one minor crime many years before 1996").

The Ninth Circuit's "self-deportation" rationale for upholding the BIA's rule is unsupported and unsupportable. The hypothesis that Congress sought to encourage LPRs to leave after a conviction flies in the face of actual congressional policy. As noted above, Congress has never suggested that it intended for LPRs, particularly long-term residents with deep family and community ties who would still be eligible for discretionary § 212(c) relief after IIRIRA, to "self-deport." On the contrary, Congress has consistently set up incentives encouraging LPRs to remain in the country.

The Ninth Circuit's rationale suggests that Congress intended long-term LPRs to remove themselves from the country before any allegation or finding as to the immigration effects of their criminal conviction.[23] While Congress has clearly articulated a policy of removing aliens who have been convicted of certain crimes, it has never encouraged LPRs to undermine their ties to this country before they have even been charged with removability, much less subjected to a final order of removal. On the contrary, the purpose of § 212(c)

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[23] "Self-deportation" is a technical term in immigration law, signifying an alien's departure from the United States while subject to an outstanding valid order of deportation or removal. See INA § 101(g), 8 U.S.C. § 1101(g); Matter of Bulnes-Nolasco, 25 I. & N. Dec. 57 (BIA 2009). But in the scenario suggested by the Ninth Circuit, there is no order of deportation or removal. Before the long-term LPR in question could actually self-deport, the alien would first have to be charged as removable; second, demonstrated and found to be removable; and third, found ineligible for or not to warrant any relief from removal.

was the creation of administrative discretion to forgive deserving LPRs. See, e.g., Nakaranurack, 68 F.3d at 292 ("Nakaranurack admitted his criminal conviction and conceded deportability, but sought discretionary relief under the so-called 'forgiveness' provision of section 212(c) of the [INA], 8 U.S.C. § 1182(c)."); Marti-Xiques v. INS, 713 F.2d 1511 (11th Cir. 1983), modified on other grounds by 741 F.2d 350 (11th Cir. 1984) ("[T]he purpose of the section is to allow forgiveness."); Matter of Granados, 16 I. & N. Dec. 726, 728 (BIA 1979) (noting the "generous spirit" of § 212(c), which it termed a "forgiveness statute"). Particularly since IIRIRA and St. Cyr, in *Amici*'s experience and as reflected in reported and unreported cases, such worthy, rehabilitated, long-term LPRs comprise the lion's share of § 212(c) applicants. For LPRs convicted of a minor crime decades ago to be torn away from their families without even the opportunity to ask for a discretionary exercise of mercy by demonstrating the ways in which their lives have turned around and become enmeshed with their communities is completely contrary to congressional treatment of LPRs and to the long-and-commonly understood purpose of § 212(c) relief.

Take by way of example two hypothetical aliens who have both been LPRs since 1970. In 1984, each was arrested in Florida and pled guilty to one count of dealing in stolen property. The criminal court imposed suspended terms of one year imprisonment. The convictions constitute both an

aggravated felony,[24] rendering each deportable,[25] and a crime involving moral turpitude,[26] rendering each inadmissible.[27] The BIA would permit LPR 1 to apply for § 212(c) relief if LPR 1 is ever placed in removal proceedings and has returned to the United States after traveling abroad. But the BIA would not permit LPR 2 to apply for § 212(c) relief absent a trip abroad, regardless of identical compelling factors demonstrating redemption.

Yet LPR 2 would have had no notice of the BIA's changed rule regarding § 212(c) relief, and would have been unable to plan accordingly despite putting forth strong efforts to rehabilitate. Instead, he or she would have focused on Congress's long-standing encouragement of LPRs to remain in the United States and relied upon decades of statutory enactments supporting this policy, as well as clear case law allowing § 212(c) applications by those in LPR 2's circumstances. The distinction newly drawn by the BIA between LPRs 1 and 2 is an artificial one that sorts deportable LPRs in a manner that Congress never intended, one that is starkly inconsistent with § 212(c)'s history and how LPRs have been consistently treated for decades. Contrary to the Ninth Circuit majority's portrayal in Abebe, these are exactly the parallel situations addressed by the BIA's new rule. The rule is an irrational and invidious distinction that must not stand.

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[24] INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R); Matter of Cardiel-Guerrero, 25 I. & N. Dec. 12 (BIA 2009); In re Uribe-Rocha, 2010 WL 4500864, *4 (BIA Oct. 28, 2010).
[25] INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).
[26] Matter of G-----, 2 I. & N. Dec. 235 (BIA 1945).
[27] INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).

In sum, the Ninth Circuit's rationale for the BIA's new rule has no basis in congressional intent. It will accomplish nothing except for increased detention and hardship for LPRs who deserve an opportunity to present a case for discretionary mercy before they are removed from all the ties they have built in the United States. Such harsh consequences run squarely counter to a consistent array of legislation aimed at keeping LPRs in the United States with the understanding that § 212(c) functioned as a safety valve for all deserving long-term LPRs who have remedied their failings and should remain part of our society.

CONCLUSION

The BIA's new rule resurrects irrational discrimination against LPRs who remain in the United States without having traveled abroad, who are treated less favorably than other LPRs present in the United States who happen to have traveled and returned. In so doing, it directly contravenes Congress's clearly expressed and consistent intent to encourage LPRs to remain physically within the United States, as well as the historical role of § 212(c) relief as a measure of discretionary mercy to encourage and recognize redemption after a fall. The Ninth Circuit's decision must therefore be reversed.

Respectfully submitted.

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