No. 14-9565

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ASEL H. AL-FATLAWI,

Petitioner-Appellant

v.

ERIC V. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent-Appellee

On review from the Board of Immigration Appeals

BRIEF OF *AMICI CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE AMERICAN IMMIGRATION COUNCIL IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

I, Beth Werlin, attorney for *Amici Curiae*, the American Immigration Council and the American Immigration Lawyers Association, certify that *amici* are both not-for-profit organizations. Neither organization has a parent corporation; neither organization issues stock; consequently there exists no publicly held corporation which own 10% or more of the stock of either organization.

October 7, 2014

s/ Beth Werlin

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INTRODUCTION

Amici American Immigration Council (Immigration Council) and the American Immigration Lawyers Association(AILA)[1] proffer this brief in support of Petitioner's claim to statutory eligibility for a waiver under section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h).[2] This issue is one of surpassing importance to lawful permanent residents (LPRs) whose removal from the United States could cause extreme (or in a more limited number of cases, exceptional and extremely unusual) hardship to their U.S. citizen or lawfully residing spouses, parents, or children. Based on the plain text of the statute and applying the statutory definition of the relevant terms, seven courts of appeals have held that the penultimate sentence of § 1182(h),[3] applies only to noncitizens who were *admitted* in LPR status at a port of entry, as distinct from those who *adjusted* to LPR status post-entry. *Stanovsek v. Holder*, No. 13-3279, __ F.3d __, 2014 U.S. App. LEXIS 18265 (6th Cir. Sept. 24, 2014); *Negrete-Ramirez v. Holder*, 741 F.3d

[1] *Amici* state pursuant to Fed. R. App. P. 29(c) that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amici curiae*, their members, and their counsel contributed money intended to fund preparing or submitting the brief.

[2] *Amici* take no position on the other issues involved in the case.

[3] The penultimate sentence of § 1182(h) applies to any "alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence."

1047, 1054 (9th Cir. 2014); *Papazoglou v. Holder*, 725 F.3d 790, 794 (7th Cir. 2013); *Hanif v. Attorney General*, 694 F.3d 479, 484 (3d Cir. 2012); *Leiba v. Holder*, 699 F.3d 346, 352 (4th Cir. 2012); *Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012); *Lanier v. U.S. Att'y Gen.*, 631 F.3d 1363, 1366-67 (11th Cir. 2011); *Martinez v. Mukasey*, 519 F.3d 532, 546 (5th Cir. 2008).[4]

As these decisions demonstrate, the Board of Immigration Appeals' (Board) contrary precedent erroneously disregards the statutory definition of "admitted" when it interprets the penultimate sentence of § 1182(h) as applying to *all* LPRs – regardless of the procedure by which their status was accorded – so as to avoid the purported "serious incongruities" it believes would result from a literal reading of the statute's plain text. *Matter of E. W. Rodriguez*, 25 I&N Dec. 784, 789 (BIA 2012); *see also Matter of Koljenovic*, 25 I&N Dec. 219, 221 (BIA 2010).

In this brief, *amici* demonstrate the importance of this relief from removal to LPRs convicted of a variety of crimes – including many minor ones – and to their U.S. citizen and LPR family members. *Amici* also set forth the two principal reasons why this Court should reject the Board's conclusion in favor of that reached by the majority of circuits. First, Congress' intent is evidenced by the plain text of the statute. Congress unmistakably sought to describe only noncitizens admitted in LPR status at a port of entry when it chose the language

[4] The Eighth Circuit is the only circuit to find the statute ambiguous and uphold the agency's interpretation. *Roberts v. Holder*, 745 F.3d 928 (8th Cir. 2014).

"an alien who has previously been *admitted* to the United States as an alien *lawfully admitted for permanent residence*." 8 U.S.C. § 1182(h) (emphasis added). If Congress desired § 1182(h)'s penultimate sentence to apply to *all* LPRs regardless of when they obtained that status, lawmakers easily could have written the statute to accomplish such a result. The Board's contrary construction of the statute renders much of the relevant text superfluous.

Second, no absurdities would result from a literal reading of the statute. The seven courts that have rejected the Board's interpretation recognize plausible reasons why Congress chose to distinguish between LPRs based on the manner in which their status was accorded.

INTEREST OF *AMICI CURIAE*

The Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the INA.

AILA is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the

administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

The Immigration Council and AILA have a long-standing interest in this issue. They filed *amicus curiae* briefs in the cases that resolved this issue in the Third, Fourth, Sixth, and Seventh Circuits. *See Hanif*, *supra* (*amicus* brief *filed* Sept. 19, 2011); *Leiba*, *supra* (*amicus* brief *filed* Dec. 7, 2011); *Stanovsek*, *supra* (*amicus* brief *filed* June 5, 2013); *Papazoglou*, *supra* (amicus brief *filed* Aug. 15, 2012). *Amici* also have filed an *amicus curiae* brief on this issue in a pending case in the Second Circuit. *See Husic v. Holder*, No. 14-607 (2d Cir. *amicus* brief *filed* Aug. 18, 2014).

BACKGROUND

A. Section 1182(h)

Section 212(h) of the INA, 8 U.S.C. § 1182(h), permits immigration authorities to excuse the commission of designated criminal offenses that would otherwise prevent noncitizens from entering or remaining in the United States. Relief under § 1182(h) is not available solely to applicants seeking to enter the United States from abroad. Rather, § 1182(h) waivers long have been available to

persons facing removal from within the United States (including LPRs) who are eligible to avoid deportation by adjusting (or re-adjusting) to LPR status. *See Matter of Parodi*, 17 I&N Dec. 608, 612 (BIA 1980)

Noncitizens eligible to receive a § 1182(h) waiver are 1) those whose activities causing them to be inadmissible occurred more than fifteen years earlier, who have since been rehabilitated, and who are not a threat to the nation's welfare, safety, or security; 2) those who have a U.S. citizen or LPR spouse, parent or child who would suffer extreme hardship if the § 1182(h) waiver were denied; and 3) certain victims of domestic violence who are eligible to apply for permanent residence on that basis. *See* § 1182(h)(1)(A), (B), and (C). While the second category is the one under which Petitioner falls, LPRs in all categories will be impacted by a decision here if they adjusted status post-entry and subsequently committed an aggravated felony.

As relevant to Petitioner's case, an eligible applicant may secure a § 1182(h) waiver by, *inter alia*, demonstrating that denial of the waiver would result in "extreme hardship" to a U.S. citizen or LPR spouse, parent, son, or daughter. 8 U.S.C. § 1182(h)(1)(B). Where the noncitizen's conviction is found to be "violent or dangerous," the noncitizen must meet a heightened standard by showing that the

denial of the waiver would result in "exceptional and extremely unusual hardship" to the specified relative. 8 C.F.R. §1212.7(d).[5]

Prior to 1996, the only noncitizens categorically ineligible to receive § 1182(h) waivers were those convicted of committing, or attempting to or conspiring to commit, "murder or criminal acts involving torture." *See* Immigration Act of 1990, Pub. L. 101-649, § 601(d)(4), 104 Stat. 4978, 5076-77. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, Congress created a new ground of ineligibility. In what is now the penultimate sentence of § 1182(h), Congress provided:

> No waiver shall be granted under this subsection in the case of *an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence* if [ ] since the date of such admission the alien has been convicted of an aggravated felony ….

IIRIRA, Pub. L. No. 104-208, Div. C, § 348, 110 Stat. 3009-639 (emphasis added). Finding this text to be plain under step one of *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), seven courts of appeals have found the key phrase – "previously been admitted to the United States as an alien lawfully admitted for permanent residence" – to be limited to noncitizens who were "admitted" in LPR status at a

[5] *See* Petitioner's Brief at 8 n.8 (acknowledging that a showing of "extraordinary circumstances" under 8 C.F.R. § 1212.7(d) may be required were his case to be remanded but indicating a belief that he has sufficient evidence to satisfy this standard). If this regulation were applied to him, Petitioner would have to demonstrate the heightened hardship standard. 8 C.F.R. § 1212.7(d)

port of entry, as distinct from those who adjusted to LPR status post-entry. *Stanovsek, supra*; *Negrete-Ramirez*, 741 F.3d at 1054; *Papazoglou*, 725 F.3d at 794; *Hanif*, 694 F.3d at 484; *Leiba*, 699 F.3d at 352; *Bracamontes, supra*; *Lanier*, 631 F.3d at 1366-67; *Martinez*, 519 F.3d at 546.

These decisions all hinge on – and give meaning to – the two distinct phrases contained within the penultimate sentence of § 1182(h): (1) "*admitted* to the United States as," and (2) "an alien *lawfully admitted for permanent residence*." Under specific statutory definitions, the latter phrase refers to the *status* enjoyed by noncitizens permitted to reside permanently in the United States, 8 U.S.C. § 1101(a)(20); whereas the former refers to a particular *process* by which such status can be obtained, 8 U.S.C. § 1101(a)(13)(A).

B. "Lawfully admitted for permanent residence," "admission," and "adjustment of status"

1. "Lawfully admitted for permanent residence"

The INA defines the term "lawfully admitted for permanent residence" as "the *status* of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." 8 U.S.C. § 1101(a)(20) (emphasis added). Though the term "status" is not defined, it remains central to federal immigration law. As the Board explained in *Matter of Blancas* 23 I&N Dec. 458, 460 (BIA 2002) (emphasis added):

> "Status" is a term of art, which is used in the immigration laws in a manner consistent with the common legal definition. It denotes someone who possesses a *certain legal standing*, e.g., classification as an immigrant or nonimmigrant.

Noncitizens generally acquire LPR status in one of two ways – by being "admitted" in LPR status at a port of entry, or by adjusting to LPR status following a previous entry to the United States.

2. "Admission" versus "adjustment of status"

The terms "admitted" and "admission" are defined to mean "the lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13); *see also Cordero-Soto v. Holder*, 659 F.3d 1029, 1033 (10th Cir. 2011) (discussing the statutory meaning of the terms "admitted" and "admission. The first route by which noncitizens may obtain LPR status is by being "admitted" in LPR status at a port of entry. In such a case, a noncitizen must present an immigrant visa received from a consular officer abroad to an inspector at a U.S. port of entry. The noncitizen is not an LPR unless and until the port inspector authorizes his or her admission into the U.S. *See, e.g.*, 8 U.S.C. §§ 1225, 1154(e) and 1201(h).

The second route by which noncitizens may obtain LPR status is to enter the country in another fashion – such as through an admission in nonimmigrant status, a parole into the U.S, or an entry without inspection – and subsequently "adjust" to LPR status. *See* 8 U.S.C. § 1255(a) (adjustment of status for noncitizens admitted

or paroled into United States). Unlike the term "admission," the term "adjustment of status" is not defined in the INA. As the Board has explained, however, adjustment of status is a "procedural mechanism," whereby noncitizens already inside the United States can acquire LPR status without having to leave the U.S. *Matter of Koljenovic*, 25 I&N Dec. at 221 (quoting *Matter of Rainford*, 20 I&N Dec. 598, 601 (BIA 1992)).

C. Treatment of adjustment of status as admission in the case law

1. *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010) and *Matter of Rodriguez*, 25 I&N Dec. 784, 789 (BIA 2012)

Notwithstanding the exclusive statutory definition of "admitted," in *Matter of Koljenovic*, the Board expanded the penultimate sentence of § 1182(h) to apply to all LPRs, regardless of whether they were "admitted" in LPR status. 25 I&N Dec. 219 (BIA 2010). *Matter of Koljenovic* continues a line of decisions that simplistically hold that *all* post-entry adjustments of status qualify as an "admission," regardless of the context in which the terms are used. Such a blanket interpretation ignores both the statutory definition of the term "admission" as well as the importance of interpreting a provision in accord with the context in which it arises. *See United States v. Ceballos-Martinez*, 387 F.3d 1140, 1147 (10th Cir. 2004) (explaining that the "plain language" rule requires a court to "interpret Congress's choice of words in the context that it chose to use them"); *see also Abdelqadar*, 413 F.3d 668, 674 (7th Cir. 2005) (admonishing the Board that "the

whole point of contextual reading is that context matters" and concluding that the context for the term "admission" in one INA provision "differs substantially" from its use in another).

In *Matter of Rosas*, 22 I&N Dec. 616, 623 (BIA 1999) (*en banc*), the Board initially held that an adjustment of status by a noncitizen who originally entered the country without inspection constitutes an "admission" for purposes of 8 U.S.C. § 1227(a)(2)(A)(iii) – which creates a ground of removability for the commission of an aggravated felony at any time "after admission" – based on the "drastic" consequences that would result from a contrary interpretation. *Id*. at 621; *see also Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134-35 (9th Cir. 2001) (same).

Subsequently, in *Matter of Shanu*, 23 I&N Dec. 754, 756 (BIA 2005), the Board went a step further and held that adjustment of status constitutes an "admission" even for noncitizens who previously were "admitted" within the meaning of 8 U.S.C. § 1101(a)(13)(A). The Board based its decision on the "peculiar results" that ostensibly would arise from a plain reading of the statute, such as the purported inability to seek certain waivers of inadmissibility in connection with an adjustment application. *Id*. at 757. Numerous courts rejected the Board's interpretation. *See Abdelqadar*, 413 F.3d at 673 (finding that the Board ignored the "context" in which the term admission was used); *Aremu v. DHS*, 450 F.3d 578 (4th Cir. 2006) (overturning *Matter of Shanu* upon finding the

Board improperly disregarded the statutory definition for admission); *Shivaraman v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004); *Zhang v. Mukasey*, 509 F.3d 313 (6th Cir. 2007). Although the Board later partially overruled *Matter of Shanu*, it did so on other grounds and specifically reaffirmed its interpretation that all adjustments constitute admissions. *Matter of Alyazji*, 25 I&N Dec. 397, 404 (BIA 2011) (stating that an adjustment should be treated as an admission "*in all cases*") (emphasis in original).

In *Matter of Koljenovic*, the Board interpreted the phrase "previously admitted to the United States as an alien lawfully admitted for permanent residence" in § 1182(h), holding that it applied both to noncitizens "admitted" in LPR status at a port of entry and to those who adjusted to LPR status post-entry. 25 I&N Dec. at 222. The Board conceded that an adjustment does not constitute an admission as the term is "literally defined" in 8 U.S.C. § 1101(a)(13)(A). *Id*. at 220. However, it cited the "absurd" and "problematic consequences" it believed would result from not finding that an adjustment constituted an admission. *Id*. at 222, 224.

Subsequently, in *Matter of E.W.Rodriguez*, the Board reaffirmed *Matter of Koljenovic*, 25 I&N Dec. at 789. While acknowledging that, under *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005, it was bound to follow circuit court decisions rejecting its interpretation in cases arising

within those circuits, it held that it would continue to apply *Matter of Koljenovic* in other circuits. *Matter of E.W.Rodriguez*, 25 I&N Dec. at 788-89; *see also Matter of Chavez-Alvarez*, 26 I&N Dec. 274, 277 (BIA 2013) (acknowledging that the Board's view "has not generally been well received by the courts of appeals" and that courts have "thus far rejected [its] position that an adjustment of status virtually always constitutes a form of 'admission.'"). Currently, there remain only four circuits in which the Board's interpretation can be applied: within this and the Second Circuit, where cases raising the issue are pending;[6] within the First Circuit;[7] and within the Eighth Circuit, the lone court to uphold the Board's decision. *Roberts*, *supra*.

2. Courts' rejection of the "adjustment-as-admission" approach in interpreting § 1182(h)

To date, seven federal appellate courts have rejected the Board's application of its "adjustment-as-admission" approach to § 1182(h)'s penultimate sentence. The Fifth Circuit held that "for aliens who adjust post-entry to LPR status, § 1182(h)'s plain language demonstrates unambiguously Congress' intent *not* to bar them from *seeking* a waiver of inadmissibility." *Martinez*, 519 F.3d at 546 (emphasis in original). Citing the statutory definition, the court noted that

[6] The issue is pending before the Second Circuit in *Husic v. Holder*, No. 14-607 (2d Cir. 2014).

[7] *Amici* are not aware of a case raising the issue currently pending in the First Circuit.

"admitted" means "the lawful *entry* of an alien after inspection, something quite different, obviously, from post-entry adjustment of status." *Id.* at 544 (emphasis in original). The Fifth Circuit proffered a number of reasons why lawmakers would distinguish between LPRs based on how their status was accorded, but noted that Congress' motivations were ultimately "irrelevant" because neither it nor the agency was "at liberty to override the plain, unambiguous text of [§ 1182(h) and [§ 1101(a)(13)]." *Id*. at 545.

The Eleventh Circuit explicitly rejected the Board's analysis in *Matter of Koljenovic*. *Lanier*, 631 F.3d at 1365-67. As in *Matter of Koljenovic*, the applicant in *Lanier* had entered the country without inspection before adjusting to LPR status, and thus was never "admitted" within the meaning of the statutory definition. *Id.* at 1365. The court found the "unambiguous text" of § 1182(h's penultimate sentence indicated that "the statutory bar to relief does not apply to those persons who, like Lanier, adjusted to [LPR] status while already living in the United States." *Id*. at 1366-67. Because the court found "no ambiguity" in the text of the statute, it declined to afford any deference to *Matter of Koljenovic*. *Id.* at 1367 n.3.

The Fourth Circuit agreed that the plain language of § 1182(h) prohibited the Board's reading, as it "would require [the court] to ignore the plain meaning of the first phrase of the definition, 'the lawful *entry* of the alien *into* the United States,'

which is in turn modified by the 'inspection and authorization' language." *Bracamontes*, 675 F.3d at 386. Moreover, because of the statute's plain language, the court disregarded the Board's "speculation concerning congressional intent." *Id.*

The Third Circuit also found § 1182(h) plain and unambiguous. *Hanif*, 694 F.3d at 484. The court held that for the statutory bar to apply there had to be a prior admission to the U.S. made *while* the noncitizen was in the status of a lawful permanent resident. *Id.* (emphasis added). The court rejected an interpretation of the statute that would omit the modifier "admitted." *Hanif*, 694 F.3d at 486.

The Seventh Circuit found that the language of § 1182(h), while "tortured," was nonetheless plain, and that the terms "admitted" and "lawfully admitted for permanent residence" in the penultimate sentence of § 1182(h) are distinct requirements. *Papazoglou*, 725 F.3d at 793-94. *Id.* Consequently, the court held that the bar to relief only applies if the noncitizen was "admitted" to the U.S. as an LPR at a port of entry.

Subsequently, the Ninth Circuit also agreed that § 1182(h) is plain and unambiguous. *Negrete-Ramirez*, 741 F.3d at 1051. It held that "admitted," as used in § 1182(h), had to be accorded the meaning Congress gave to it in the definition. As such, it found that the bar to § 1182(h) plainly applies only to those "admitted" in LPR status. *Negrete-Ramirez*, 741 F.3d at 1051. Finally, the Sixth Circuit, in

Stanovsek, *supra*, followed the majority. Additionaly, it explained why the contrary reasoning in *Roberts v. Holder*, 745 F.3d 928, 932 (8th Cir. 2014), was not "compelling:"

> to conclude that 8 U.S.C. § 1182(h) is ambiguous as to the meaning of "previously been admitted as an alien lawfully admitted for permanent residence" discounts the fact that the phrase is comprised of two distinct terms, both explicitly defined in the statute – "admitted" and "lawfully admitted for permanent residence." Each defined term adds its own meaning to that phrase: the first refers to a type of entry into this country, while the second refers to a certain status held by aliens.

Stanovsek, 2014 U.S. App. LEXIS 18265 at *8.

ARGUMENT

I. A decision on this issue will impact LPRs with various criminal convictions, the majority of which will not be violent or dangerous.

This Court's reading of "admitted" § 1182(h) will impact all noncitizens with aggravated felonies who did not enter the United States as LPRs, but instead adjusted to LPR status subsequent to their entry. If the court agrees with the government, *all* noncitizens who committed aggravated felonies and adjusted to LPR status post-entry would be ineligible for a § 1182(h) waiver. Only a minority of these LPRs will have committed "violent or dangerous" crimes. The remainder will have committed non-violent, non-dangerous aggravated felonies – a category that encompasses such minor infractions as shoplifting. *See Hem v. Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006) (explaining that the immigration definition of "aggravated felony" "include[s] misdemeanor and low-level offenses."); *United*

States v. Elizalde-Altamirano, 2007 U.S. App. LEXIS 14959 (10th Cir. 2007) (interpreting the INA's "aggravated felony" definition as including a misdemeanor joyriding conviction under Utah law).

Generally, the LPRs who will be impacted by a decision in this case will have committed the aggravated felony more than fifteen years earlier and have since been rehabilitated; will have U.S. citizen or LPR spouses, children or parents who will suffer extreme hardship or worse should their loved one be removed; or will be eligible for relief as a victim of domestic violence. *See* § 1182(h)(1)(A), (B), and (C). Additionally, many of the LPRs who will be impacted will have resided in the United States for far more than the requisite seven years and will have developed strong community ties.

The nature of the conviction triggering the waiver analysis is not central to a determination of a noncitizen's eligibility for § 1182(h) relief. Instead, the principal issue, as discussed in the remainder of this brief, is whether the bar found in the penultimate sentence of § 1182(h) encompasses noncitizens who adjusted status post-entry. However, for all those who are eligible to apply for a waiver, the nature of their crime will be a factor that the immigration judge will consider when determining whether to grant the discretionary waiver. Noncitizens convicted of aggravated felonies who seek a § 1182(h) waiver must not only demonstrate to the immigration court that they are not barred by the penultimate sentence of §

1182(h), but also must be found deserving of a waiver in the court's discretion. *See* 8 U.S.C. § 1182(h). Additionally, in all cases under § 1182(h)(1)(B), the noncitizen must demonstrate that his or her qualifying relative will suffer extreme hardship if the noncitizen is removed. In cases implicating "violent or dangerous crimes," the noncitizen must demonstrate that the qualifying relative will suffer "exceptional and extremely unusual hardship" if the waiver is denied. 8 C.F.R. § 212.7(d). Even if a noncitizen is able to meet this heightened standard, the immigration court may deny the waiver in its discretion. *Id*.

An immigration court's broad discretion to grant or deny a waiver will not be limited or altered in any way if this Court follows the seven Courts of Appeals and finds that the plain language of the penultimate sentence of § 1182(h) applies only to noncitizens admitted in lawful permanent resident status at a port of entry. If this Court agrees with the government, however, and interprets the statute to deny § 1182(h) waivers to noncitizens who adjusted to LPR status post-entry, the immigration courts' discretionary analysis will become obsolete. Noncitizens who may have benefitted from § 1182(h) waivers, many of whom who have not committed violent or dangerous crimes, will be ineligible to apply.

II. Congress intended the penultimate sentence of § 1182(h) to apply only to noncitizens admitted in LPR status at a port of entry, not to those who adjusted to LPR status post-entry.

When reviewing an agency's construction of a statute, courts must first determine whether "the intent of Congress is clear." *Chevron*, 467 U.S. at 842. If the court finds the intent of Congress to be clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. Here, both the statutory phrase in question and other language in § 1182(h) demonstrates that Congress intended the penultimate sentence to apply only to noncitizens admitted in LPR status at a port of entry, not to those who adjusted to LPR status post-entry.

A. The text of the statute is clear

The key to discerning the intent of Congress here is recognizing that "the text is divisible into two distinct phrases: namely, (1) 'an alien who has previously been *admitted* to the United States' and (2) 'as an alien *lawfully admitted for permanent residence*.'" *Sum v. Holder*, 602 F.3d 1092, 1095 (9th Cir. 2010) (emphasis added). To determine Congresses' intent, courts must "assess the effect of each term on the meaning of this provision as a whole." *Lanier*, 631 F.3d at 1366.

With respect to the first phrase, numerous courts recognize that the statutory definition of "admitted" does *not* include adjustment of status. *Abdelqadar*, 413 F.3d at 673 ("Section 1101(a)(13)(A) defines admission as a lawful entry, not as a particular legal status afterward); *Aremu*, 450 F.3d at 581-82; *Lanier*, 631 at 1366;

Martinez, 519 F.3d at 544. This conclusion is unsurprising given that the process by which noncitizens adjust status from inside the United States is distinct from an "admission" at a port of entry. Rather than requiring an "entry into" the United States, the purpose of adjustment is to excuse the applicant from having to leave the country, obtain an immigrant visa from a foreign consulate, and re-enter the United States for "admission" as an LPR. *See* 8 C.F.R. § 245.1(a) (requiring adjustment applicants to be, *inter alia*, "physically present in the United States"). In addition, unlike those seeking "admission," adjustment applicants enter the country *before*, not after, the "inspection and authorization" which takes place in conjunction with their adjustment of status. *See* 8 U.S.C. §§ 1101(a)(13); 1255(a).

Meanwhile, Congress defined "lawfully admitted for permanent residence" as "the *status* of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." 8 U.S.C. § 1101(a)(20) (emphasis added). *Lanier*, 631 F.3d at 1366 (finding that "lawfully admitted for permanent residence" "describes a particular immigration status, without any regard for how or when that status is obtained"); *Martinez*, 519 F.3d at 546 (noting that "lawfully admitted for permanent residence" encompasses "both admission to the United States as an LPR and post-entry adjustment to LPR status").

Accordingly, "when the statutory provision is read as a whole, the plain language of § 1182(h) provides that a person must have entered the United States, after inspection, as a lawful permanent resident in order to have 'previously been admitted to the United States as an alien lawfully admitted for permanent residence.'" *Lanier*, 631 F.3d at 1366-67; *see also Martinez*, 519 F.3d at 546 ("§ [1182(h)] only denies waivers of eligibility to those aliens who have 'previously been *admitted* [§ 1101(a)(13)] to the United States as an *alien lawfully admitted for permanent residence* [§ 1101(a)(20)]'") (emphasis, bracketed material in original).

The Board's interpretation of § 1182(h) violates the "'cardinal principle of statutory construction'" that a statute is to be interpreted so that "'no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Rajala v. Gardner*, 709 F.3d 1031, 1038 (10th Cir. 2013) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)); *see also Fletcher v. U.S.A.*, 730 F.3d 1206, 1210 (10th Cir. 2013) ("[W]e are always reluctant to assume a statute is so worthless that Congress was up to – literally – nothing when it bothered to labor through the grueling process of bicameralism and presentment."). Here, the Board's construction renders superfluous the phrase "an alien who has previously been admitted to the United States as…" If Congress intended the penultimate sentence to apply to *all* LPRs, it could have provided, simply, that "no waiver shall be granted under this subsection

in the case of an alien lawfully admitted for permanent residence….," just as it did with respect to waivers for document fraud. *See, e.g.*, 8 U.S.C. §§ 1182(d)(12)(A), 1227(a)(3)(C) (permitting waiver for document fraud "in the case of an alien lawfully admitted for permanent residence"). Alternatively, Congress could have stated that no waiver may be granted under § 1182(h) "in the case of an alien who has previously been admitted to the United States as, *or who has adjusted to the status of*, an alien lawfully admitted for permanent residence." *See, e.g.*, 8 U.S.C. § 1151 (referencing noncitizens who receive immigrant visas "*or who may otherwise acquire the status of* an alien lawfully admitted [ ] for permanent residence") (emphasis added).

As enacted, however, the text of is susceptible to only one plausible construction: that the penultimate sentence of § 1182(h) applies solely to noncitizens "admitted" in LPR status at a port of entry.

B. The legislative history does not support the Board's ruling, and need not be consulted in any event.

Matter of Koljenovic relied in part on a misreading of legislative history. First, reference to legislative history was unwarranted; courts and agencies may "resort to legislative history only when necessary to interpret ambiguous statutory text." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 187 n.8 (2004); *United States v. Husted*, 545 F.3d 1240, 1247 (10th Cir. 2008) (discussing the "longstanding principle that absent ambiguity [the court] cannot rely on legislative

history to interpret a statute."). Because the relevant language of § 1182(h) is plain, this Court need not examine its legislative history.

Even were legislative history considered, however, the Board's analysis of it is flawed for at least two reasons. First, the Board relied on a sentence from the Conference Report that it previously interpreted to stand for precisely the opposite conclusion. Second, the Board overlooked a significant amendment made by the conferees that supports the Petitioner's reading of the statutory language.

The pertinent sentence from the Conference Report states, in full:

> The managers intend that the provisions governing continuous residence set forth in [8 U.S.C. § 1229b] as enacted by this legislation shall be applied as well for purposes of waivers under [§ 1182(h)].

H.R. Rep. 104-828, at 228 (1996) (Conf. Rep.).[8] In *Matter of Koljenovic*, the Board interpreted this statement as a desire to "create congruity in the residence requirements for these two forms of relief," 25 I&N Dec. at 222, such that LPRs unable to meet the seven-year residency requirement for cancellation of removal under 8 U.S.C. § 1229b(a) must necessarily be ineligible for a waiver of inadmissibility under § 1182(h). This assertion conflicts with *Matter of Rotimi*,[9] however, where the Board explicitly rejected the suggestion that this "legislative

[8] Under 8 U.S.C. § 1229b, the Attorney General may cancel the removal of both LPRs and non-LPRs who satisfy certain conditions.

[9] The issue in *Matter of Rotimi* was whether an applicant for a § 1182(h) waiver failed to satisfy the seven-year residency requirement because of a gap between the expiration of his original nonimmigrant visa and his adjustment of status.

history indicates that the 'residence' required under sections [1182(h)] and [1229b] [ ] be treated as the same." 24 I&N Dec. 567, 573 (BIA 2008) ("We are therefore unpersuaded that the conference report's reference to section [1229b] overrides the differently worded language of section [1182(h)]"). While an agency's reading of legislative history is never itself entitled to deference, this Court should accord little weight to a reading of a Conference Report that the Board itself recently eschewed.

In addition, the Board's review of legislative history failed to account for a key amendment made by the Conference Committee that supports *amici's* reading. As enacted by the House of Representatives, the amendment to § 1182(h) applied to any "immigrant who previously has been admitted to the United States.…" H.R. 2202, 104th Congress, Immigration in the National Interest Act of 1996, § 301(h). The Conference Committee then modified the provision to apply in the case of any "alien who has previously been *admitted* to the United States as an alien *lawfully admitted for permanent residence*…." IIRIRA, Pub. L. 104-208, Div. C, § 348, 110 Stat. 3009-639 (emphasis added). By specifically inserting this phrase, the conferees plainly sought to tailor the reach of § 1182(h)'s penultimate sentence to noncitizens "admitted" to the United States as "alien[s] lawfully admitted for permanent residence."

C. Any lingering ambiguities should be construed in favor of the Petitioner.

Finally, to the extent any uncertainty remains, this Court should abide by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the noncitizen. *See, e.g.*, *Martinez*, 519 F.3d at 544; *Lanier*, 631 F.3d at 1367 n.4. Like the rule of lenity in criminal cases, this canon has long been recognized as an "accepted principle[] of statutory construction" in the field of immigration law, *Costello v. INS*, 376 U.S. 120, 128 (1964), because "deportation is a drastic measure and at times the equivalent of banishment or exile." *Id.* (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

III. No absurdities would result from following the plain text of § 1182(h)'s penultimate sentence.

Unable to overcome the plain text of § 1182(h)'s penultimate sentence, *Matter of Koljenovic* instead catalogued the purportedly absurd results it believed would arise from a straightforward reading of the statute. 25 I&N Dec. at 222-24.[10] However, a statute's plain meaning must be adhered to unless "it would have been unthinkable for Congress to have intended the result commanded by the

[10] Although the Board in *Matter of Rodriguez* contended that *Matter of Koljenovic* found § 1182(h) to be ambiguous, this conclusion is not clear. To the contrary, the fact that *Matter of Koljenovic* disregarded the text of the statute in light of purported "absurd results" indicates that it found the language plain. *See, e.g.*, *U.S. v. Head*, 552 F.3d 640, 643 (7th Cir. 2009) (indicating that the "absurd results" doctrine comes into play when a statute cannot be read in accord with its plain language). Moreover, in an earlier case, the Board held that the penultimate sentence of § 1182(h) was "clear and unambiguous." *Matter of Michel*, 21 I&N Dec. 1101, 1104 (BIA 1998).

words of the statute – that is, when the result would be 'so bizarre that Congress could not have intended it.'" *Robbins v. Chronister*, 435 F.3d 1238, 1241 (10th Cir. 2006) (*en banc*) (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 190-91 (1992)). But that is not the case here. As the other courts have found, numerous plausible reasons exist why Congress would deliberately exempt successful adjustment applicants from the reach of § 1182(h)'s penultimate sentence.

First, Congress may have deemed successful adjustment applicants to be more "deserving" candidates for § 1182(h) waivers because they often live in the United States for numerous years before obtaining LPR status. *Martinez*, 519 F.3d at 545. Moreover, unlike noncitizens admitted in LPR status, successful adjustment applicants go through the scrutiny of adjustment and may have more citizen relatives adversely affected by their removal. *Id.*

Though it did not respond directly to *Martinez* on this point, the Board speculated that Congress "presumably" would not have intended to benefit noncitizens who entered the country without inspection before adjusting to LPR status over those who entered the country as LPRs. *Matter of Koljenovic*, 25 I&N Dec. at 222-23. Yet, as this case illustrates, adhering to the plain text of the statute would not solely benefit noncitizens who entered without inspection; it benefits *all* noncitizens who adjusted to LPR status, including those who initially entered in nonimmigrant or refugee status. *See also Jankowski-Burczyk v. INS*, 291 F.3d 172,

180 (2d Cir. 2002) (noting that individuals who enter the country in non-LPR status "include many persons who could rationally be granted special deference and courtesy under the immigration laws").[11] And even if a literal reading of § 1182(h) incidentally benefits some LPRs who entered the country without inspection, the fact that Congress created a limited exception for such noncitizens to adjust status, *see* 8 U.S.C. § 1255(i), suggests that lawmakers were willing to forgive their initial transgression, and that it is improper for the Board to continue to hold their unlawful entry against them.

A second reason why Congress may have exempted successful adjustment applicants is that lawmakers wanted to take an "incremental" approach toward restricting eligibility for § 1182(h) waivers. *Martinez*, 519 F.3d at 545 ("Congress may well have been taking a 'rational first step toward achieving the legitimate goal of quickly removing aliens who commit certain serious crimes from the country'") (quotations omitted). *See also McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) ("[A] legislature traditionally has been allowed to take reform 'one step at a time'").

While the Board did not respond directly to this point, it expressed skepticism that Congress would favor noncitizens who adjusted to LPR status

[11] In fact, adjustment generally is not available to those who enter without inspection. *See* 8 U.S.C. § 1255(a). Instead, such individuals must satisfy a specific, time-limited exception. 8 U.S.C. § 1255(i).

because they "currently comprise a substantial majority of all those admitted to lawful permanent resident status." *Matter of Koljenovic*, 25 I&N Dec. at 224. Yet even accepting the premise of this argument, which relied on statistics from fiscal years 2007 through 2009, the Board's contention is fatally undermined by the comparable figures for the period preceding the enactment of § 1182(h). Indeed, in fiscal years 1992, 1993, 1994 and 1995, the number of noncitizens who were admitted as LPRs at ports of entry *exceeded* the number of noncitizens who adjusted to LPR status post-entry.[12]

Finally, the Board speculated that Congress would not have exempted noncitizens who adjusted to LPR status from the statute's penultimate sentence because doing so would allow them to "forever avoid the effect of the aggravated felony bar in [§ 1182(h)]." *Matter of Koljenovic*, 25 I&N Dec. at 224. But this argument ignores that waivers under § 1182(h) are granted as a matter of discretion, not as of right and that those who were convicted of violent or dangerous crimes must establish a heightened standard of hardship to their qualifying relatives to qualify for the waiver. 8 U.S.C. § 1182(h)(2).

[12] See 1999 Statistical Yearbook of the Immigration and Naturalization Service, "Immigrants Admitted by Type and Selected Class of Admission, Fiscal Years 1992-1999," at Table 4 (showing higher numbers of new LPR arrivals than successful adjustment applicants in those fiscal years), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1999/IMM99.pdf.

In any event, the precise reason why Congress crafted the penultimate sentence of section 1182(h as it did is "irrelevant" to the resolution of the issue in this case. *Martinez*, 519 F.3d at 545. Instead, "[what] *is* relevant is that there are countervailing explanations for the statutory distinction between 'admitted' and 'adjustment,' which are just as plausible, if not more so, than the Government's contention that such a reading would lead to an absurd result." *Id.* (emphasis added). Thus, because a literal reading of the statue would not lead to an "absurd" result, this Court, like the agency, cannot "'correct' the statute simply because it makes a bad substantive choice." *U.S. v. Head*, 552 F.3d at 643.

In sum, there is no justification for departing from the plain text of § 1182(h)'s penultimate sentence in this case. This Court therefore should find – in accord with the seven courts that have so held – that Congress clearly intended the limitation on § 1182(h) waivers to apply only to noncitizens who were admitted in LPR status at a port of entry.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for review and remand the case to the Board for further consideration.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2014 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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