No. 10-1211

IN THE

Supreme Court of the United States

PANAGIS VARTELAS,

Petitioner,

—v.—

ERIC H. HOLDER, JR.,

Respondent.

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

BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DEBORAH S. SMITH
LAW OFFICE OF
DEBORAH S. SMITH
7 West Sixth Avenue, Suite 4M
Helena, Montana 59601
(406) 457-5345
deb@debsmithlaw.com

IRA J. KURZBAN
Counsel of Record
KURZBAN, KURZBAN, WEINGER,
TETZELI & PRATT P.A.
2650 S.W. 27th Avenue,
2nd Floor
Miami, Florida 33133
(305) 444-0060
ira@kkwtlaw.com

Attorneys for Amicus Curiae
American Immigration Lawyers Association

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The American Immigration Lawyers Association ("AILA") is a voluntary bar association formed in 1946, and comprised of more than 11,000 lawyers and law 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 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.

AILA has appeared as *Amicus* before this Court in numerous cases relating to the administration and interpretation of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq*., including recently in *Judulang v. Holder*, No. 10-694. *Judulang*, like the present matter, concerns immigration consequences of old criminal offenses committed by lawful permanent resident aliens. AILA's members represent many permanent resident aliens who travel abroad and upon return to the United States are affected by the INA's definition of "admission" in 8 U.S.C. § 1101(a)(13)(C)(v), because they may have been convicted or charged with a criminal offense in the past. AILA has a strong interest in protecting the rights of permanent residents to return to their

homes in the United States following brief, innocent and casual trips abroad.[1]

SUMMARY OF ARGUMENT

This case does not require the Court to decide the extent to which *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), survived the enactment of 8 U.S.C. § 1101(a)(13)(C). *Fleuti*'s constitutional underpinnings make erroneous any assertion that its doctrine of "brief, casual, and innocent" departures was abrogated. Should the Court determine that it needs to construe 8 U.S.C. § 1101(a)(13)(C), these constitutional constraints as well as that provision's plain language require a narrow interpretation that is consonant with the longstanding due process rights of returning lawful permanent residents (LPRs).

ARGUMENT

I. The Court should refrain from deciding the effect of 8 U.S.C. § 1101(a)(13)(C) on *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), an opinion that was based in part on returning LPRs' constitutional due process rights.

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, and its 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.

A. Background

When petitioning for certiorari in this case, the petitioner framed his question presented as: "Should 8 U.S.C. § 1101(a)(13)(C)(v), which removes [an] LPR of his right, under *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), to make "innocent, casual, and brief" trips abroad without fear that he will be denied reentry, be applied retroactively to a guilty plea taken prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009 (1996)?"[1] *Amicus* respectfully requests that the Court refrain from deciding the open question of *Fleuti*'s current status, which the cert. petition begged in its assumption that *Fleuti* is no longer good law. In so doing, the Court would avoid making a determination unnecessary to the resolution of this case, which has been premised on the retroactive, not prospective, effects of IIRIRA's addition of 8 U.S.C. § 1101(a)(13)(C)(v).

Lower courts and the Board of Immigration Appeals (BIA) have erred in assuming that *Fleuti*, a decision with constitutional underpinnings, was abrogated by the enactment in 1996 of 8 U.S.C. § 1101(a)(13)(C)(v). *Amicus* believes that these decisions fail to consider the due process foundation of *Fleuti*, which acknowledges an LPR's right to return to the United States – as though no meaningful departure from the U.S. had occurred – following a brief, casual and innocent trip abroad.

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[1] *Vartelas v. Holder*, No. 10-1211, Petition for Certiorari (Apr. 4, 2011).

Resolving the question of *Fleuti*'s ongoing viability is tremendously significant to LPRs. IIRIRA enacted definitions of "admission" and "admitted," codified in relevant part at 8 U.S.C. § 1101(a)(13)(C). If *Fleuti* has been abrogated in full – a proposition that *Amicus* disputes – an LPR who previously could be exposed only to deportation proceedings in which the government bears the burden to establish deportability, *see* 8 U.S.C. § 1251 (1996); *see also* 8 U.S.C. §§ 1227, 1229a(c)(3)(A) (removal proceedings), may be exposed to inadmissibility (formerly, exclusion) proceedings in which she or he bears the burden of establishing admissibility to the United States, *see* 8 U.S.C. §§ 1182, 1229a(c)(2). Moreover, the LPR could be subject to detention without a bond hearing upon return home to the U.S. following a short trip abroad. *See* 8 C.F.R. § 1003.19(h)(2)(i)(B) ("[A]n immigration judge may not redetermine conditions of custody imposed by the Service with respect to . . . [a]rriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act.").

Accordingly, *Amicus* urges the Court to leave the question of *Fleuti*'s ongoing viability for another day, and to resolve this case without opining on whether *Fleuti* has been abrogated *in toto* – or, to the extent *Fleuti* is grounded in the Due Process Clause of the Fifth Amendment of the United States Constitution, may be abrogated – by Congress. The question appears to have been waived by the petitioner, and thus requires no resolution in this case. The petitioner's Opening Brief notes that "[t]his Court has never passed on whether the *Fleuti* doctrine survives IIRIRA, but petitioner assumes for

the sake of argument that it does not."[2] Because the question is of enormous constitutional, and practical, significance to LPRs, *Amicus* respectfully submits that the question would be best addressed by a case that squarely confronts *Fleuti*'s present relevance.

B. 8 U.S.C. § 1101(a)(13)(C) demonstrates that Congress did not intend to abrogate *Fleuti.*

In *Amicus*'s view, Congress altered but did not abrogate *Fleuti*'s rule that LPRs returning from abroad after "brief, casual, and innocent" departures from the United States were to be treated as never having left for purposes of their right to remain in the U.S. This is clear from the neighboring provisions within 8 U.S.C. § 1101(a)(13)(C), the long history of constitutional immigration law on which *Fleuti* rests, and the statute's grammar, which plainly permits broad consideration of pertinent factors for returning LPRs who fall into one of 8 U.S.C. § 1101(a)(13)(C)'s categories in the determination of whether they should be regarded as seeking admission.

As an initial matter, it is clear that Congress in enacting IIRIRA did not intend to abolish *Fleuti*, which established a "brief, casual, and innocent" exception for LPR departures. Indeed, *Fleuti*'s premise was in part codified by IIRIRA. IIRIRA

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[2] While this brief does not address the retroactivity issue, *Amicus* supports the petitioner's position that 8 U.S.C. § 1101(a)(13(C), as interpreted by the government, erroneously in *Amicus*'s view, *see infra*, should not be applied retroactively.

provided clear rules to instantiate *Fleuti*'s principles. For example, the statute now rules out of "brief" departures those in which an LPR abandons or relinquishes status, and presumptively treats all "brief" trips abroad lasting 180 days or fewer as irrelevant to the maintenance of LPR status. *See* 8 U.S.C. §§ 1101(a)(13)(C)(i)-(ii). Similarly, 8 U.S.C. § 1101(a)(13)(C)(iii) addresses the "innocent" prong of *Fleuti* by attaching culpability to conduct when an LPR "engaged in illegal activity after having departed the United States."

8 U.S.C. § 1101(a)(13)(C)(iv) simply carries forward the *Fleuti*-era exception for departures under cloud of legal process. *Compare id.* (LPR who "has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings") *with* 8 U.S.C. § 1101(a)(13) (1963) ("no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception" to the definition of "entry").

8 U.S.C. § 1101(a)(13)(C)(vi) codified the pre-IIRIRA understanding that the rare LPR who enters the U.S. without inspection jeopardizes his or her ability to rely on the *Fleuti* doctrine if such entry is connected to activity that is not "innocent." *See Gunaydin v. INS*, 742 F.2d 776 (3d Cir. 1984) (stating in a case where LPRs entered without inspection along with a nonresident alien that "we cannot overlook that the obvious purpose of counsel's willingness to waive the *Fleuti* issue was to preclude the apparently damaging testimony of border patrol

officers. If that evidence had been admitted, *Fleuti* would most likely not be applicable in any event.").

As five of six provisions in 8 U.S.C. § 1101(a)(13)(C) are fully consonant with *Fleuti*, *Amicus* urges the Court to view romanette (v) through the lens of that decision as well. *See, e.g.*, *Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.").

C. This Court's precedents ground returning LPRs' rights in due process.

The purpose of *Amicus*'s submissions is to convey to the Court that the scope of *Fleuti*'s ongoing validity implicates complex and multi-faceted questions affected by constitutional considerations, none of which are necessary to decide this case.

There is a long lineage of precedent by this Court establishing the constitutional dimension of an LPR's rights upon return to the United States from abroad. The Court has consistently held that under the Constitution returning LPRs are entitled to due process protections. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), addressed the case of a returning LPR seaman "whose entry was deemed prejudicial to the public interest" when he was inspected at the Port of San Francisco, a determination ratified upon his subsequent disembarkation in New York. Detained at Ellis Island, the petitioner challenged the Attorney General's order of exclusion, which was based on evidence unavailable to him and issued without a hearing. *Id.* at 595.

The Court's analysis began with an unequivocal endorsement of a returning LPR's due process rights: "For purposes of his constitutional right to due process, we assimilate petitioner's status to that of an alien continuously residing and physically present in the United States. To simplify the issue, we consider first what would have been his constitutional right to a hearing had he not undertaken his voyage to foreign ports, but had remained continuously within the territorial boundaries of the United States." *Id.* (footnote omitted). Building on this principle of assimilation to the rights of an LPR who never left the country, the Court held that

> before his expulsion, he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal. Although Congress may prescribe conditions for his expulsion and deportation, *not even Congress may expel him without allowing him a fair opportunity to be heard*. For example, he is entitled to a fair chance to prove mistaken identity. At the present stage of the instant case, the issue is not one of exclusion, expulsion, or deportation. It is one of legislative construction and of *procedural due process*.

Id. at 597 (emphasis added, footnotes omitted). The Court quoted *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950), for historical context based on *The Japanese Immigrant Case*, 189 U. S. 86 (1903): "It was under compulsion of the Constitution that this Court long ago held that an antecedent deportation

statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time, even if illegally." *Kwong Hai Chew*, 344 U.S. at 597 n.6 (quoting *Wong Yang Sung*, 339 U.S. at 49-50).

Applying these constitutional constraints to the petitioner's case, *Kwong Hai Chew* held that the regulation applied to him by the Attorney General would not have applied if he had remained within the United States. A fortiori, it was inapplicable to the petitioner because "[w]e do not regard the constitutional status which petitioner indisputably enjoyed prior to his voyage as terminated by that voyage. From a constitutional point of view, *he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien*, and we do not now reach the question whether he is to be so treated." *Id.* at 600 (emphasis added); *see also Shaughnessy v. United States ex rel. Mezei*, 345 U. S. 206, 214 (1953) ("[T]o escape constitutional conflict, [in *Kwong Hai Chew*] we held the administrative regulations authorizing exclusion without hearing in certain security cases inapplicable to aliens so protected by the Fifth Amendment.").

Fleuti itself addressed the case of an LPR returning from a visit to Mexico of "about a couple hours duration." 374 U.S. at 450. Fleuti was charged with a then-existing ground of exclusion for being an alien "afflicted with psychopathic personality," based on his homosexuality. *Id.* at 451. This ground was not applicable in deportation proceedings, but only to exclusion. Fleuti therefore could not be denied entry on that basis as an LPR, but only if he were treated

as seeking to enter the United States like any other non-citizen.

The Court considered "whether Fleuti's return to the United States from his afternoon trip to Ensenada, Mexico . . . constituted an 'entry' within the meaning of § 101(a)(13) of the Immigration and Nationality Act of 1952, 66 Stat. 167, 8 U.S.C. § 1101(a)(13), such that Fleuti was excludable for a condition existing at that time even though he had been permanently and continuously resident in this country for nearly four years prior thereto." *Id.* at 451-52. To answer this question, the Court's opinion in *Fleuti* established that Congress's 1952 revision to the definition of "entry" was intended to be ameliorative, based on lessons drawn from two cases, *Di Pasquale v. Karnuth*, 158 F.2d 878 (2d Cir. 1947) (L. Hand, J.), and *Delgadillo v. Carmichael*, 332 U. S. 388 (1947). In *Di Pasquale* and *Delgadillo*, non-citizens left the United States involuntarily, the former on a train from Buffalo to Detroit that passed through Canada, and the latter after being rescued when his ship was torpedoed during World War II: he was taken to Cuba for recuperation. These decisions contrasted with the rule of *United States ex rel. Volpe v. Smith*, 289 U. S. 422 (1933), in which this Court had upheld the exclusion of an LPR after his brief visit to Cuba.

Fleuti concluded that "Congress, in approving the judicial undermining of *Volpe* . . . and the relief brought about by the *Di Pasquale* and *Delgadillo* decisions, could not have meant to limit the meaning of the exceptions it created in § 101(a)(13) to the facts of those two cases." 374 U.S. at 458. In support of its understanding of congressional intent, the Court pointed to the latter decisions' "recognition that the

'interests at stake' for the resident alien are 'momentous,' 158 F.2d at 879, and that '[t]he stakes are indeed high and momentous for the alien who has acquired his residence here,' 332 U.S. at 391. This general premise of the two decisions impelled the more general conclusion that 'it is . . . important that the continued enjoyment of [our] hospitality once granted, shall not be subject to meaningless and irrational hazards.' 158 F.2d at 879." *Id.* at 458-59.

In searching for the meaning of "entry," *Fleuti* also emphasized the 1952 Act's introduction of an "enlightened concept of what constitutes a meaningful interruption of the continuous residence which must support a petition for naturalization." *Id.* at 459. This amendment, still extant in 8 U.S.C. § 1427, provided that the five-year continuous residence period required prior to an application for U.S. citizenship is meaningfully interrupted only by absences that individually last more than six months. For the *Fleuti* Court, this provision "strengthens the foundation underlying a belief that the exceptions to § 101(a)(13) should be read to protect resident aliens who are only briefly absent from the country." *Id.* at 460.

At this juncture, the Court reaffirmed *Kwong Hai Chew*'s constitutional dimension via the process due to returning LPRs: "Of further, although less specific, effect in this regard is this Court's holding in *Kwong Hai Chew v. Colding*, 344 U. S. 590 (1953), that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him, a holding which supports the general proposition that *a resident alien who leaves this country is to be regarded as retaining certain basic rights*." *Id.*

(emphasis added). Applying this confluence of rationales, including direct reliance on the Constitution, the Court announced *Fleuti*'s "brief, casual, and innocent" exception for LPR departures:

> [S]ubjecting [Fleuti] to exclusion for a condition for which he could not have been deported had he remained in the country seems to be placing him at the mercy of the 'sport of chance' and the 'meaningless and irrational hazards' to which Judge Hand alluded. *Di Pasquale*, *supra*, at 879. In making such a casual trip, the alien would seldom be aware that he was possibly walking into a trap, for the insignificance of a brief trip to Mexico or Canada bears little rational relation to the punitive consequence of subsequent excludability. There are, of course, valid policy reasons for saying that an alien wishing to retain his classification as a permanent resident of this country imperils his status by interrupting his residence too frequently or for an overly long period of time, but we discern no rational policy supporting application of a reentry limitation in all cases in which a resident alien crosses an international border for a short visit.

Id. at 460-61.

Landon v. Plasencia, 459 U.S. 21 (1982), recognized that *Kwong Hai Chew* and *Fleuti* were cases of regulatory and statutory interpretation that depended on constitutional analyses. *See* Hiroshi Motomura, *Immigration Law after a Century of*

Plenary Power: Phantom Constitutional Norms and Statutory Interpretation. 100 YALE L.J. 545, 580 (1990) ("*Plasencia* transformed [*Kwong Hai Chew and Fleuti*] into 'real' constitutional immigration law."); *Developments in the Law — Immigration Policy and the Rights of Aliens*. 96 HARV. L. REV. 1286, 1319 (1983) ("*Plasencia* represented the culmination of a line of cases in which the Court had fictionalized the statutory concept of entry in order to hold that resident aliens returning to the United States after involuntary departures were not entering the country within the meaning of the immigration statute and thus were not subject to exclusion proceedings. The fiction yielded enhanced protection for the returning alien; the government, deprived of its exclusion power, could only expel the alien in accordance with the greater constitutional safeguards provided in the deportation setting." (footnote omitted)).

Plasencia was a returning LPR who was placed in exclusion proceedings to determine whether she had effected an "entry" after a brief stay in Mexico that allegedly included making arrangements for alien smuggling, conduct that would remove her departure from the realm of *Fleuti*'s "brief, casual, and innocent" exception. *Id.* at 23. The Court held that it was permissible for the government to make this threshold determination in an exclusion proceeding, but added that LPRs retain distinct due process rights. "Any doubts that *Chew* recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by *Rosenberg v. Fleuti* . . . ." *Id.* at 33.

Placensia included a comprehensive exposition of the basis for returning LPRs' due process rights,

concluding that, like Chew and Fleuti, "[Plasencia] can invoke the Due Process Clause on returning to this country." *Id.* at 32. The Constitution applied because "[t]his Court has long held that an alien seeking initial admission to the United States requests a privilege, and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. . . . As we explained in *Johnson v Eisentrager*, 339 U. S. 763, 770 (1950), however, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Id.*; *see also Mezei*, 345 U.S. at 213 ("[A] lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process. *Kwong Hai Chew v. Colding*, 344 U. S. 590, 601 (1953); *cf. Delgadillo v. Carmichael*, 332 U.S. 388 (1947). Only the other day, we held that, under some circumstances, temporary absence from our shores cannot constitutionally deprive a returning lawfully resident alien of his right to be heard. *Kwong Hai Chew v. Colding, supra*.").[3]

Plasencia underscored the petitioner's embeddedness in her community as an LPR, noting

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[3] Although instructive in its reading of *Kwong Hai Chew*, *Mezei*'s analysis of returning LPRs' rights was called into question by *Plasencia*, which distinguished *Mezei* based on the length of the LPR's absence from the country, which exceeded a year in Mezei's case. *See Plasencia*, 459 U.S. at 34 ("We need not now decide the scope of *Mezei* . . . ."); *Developments*, 96 HARV. L. REV. at 1328 ("[I]t is impossible to square the reasoning of *Plasencia* with that of *Mezei*.").

that her right to "stay and live and work in this land of freedom" was at stake along with her right to rejoin immediate family. 459 U.S. at 34 (quoting *Bridges v. Wixon*, 326 U. S. 135, 154 (1945)). As the Court explained, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Id.* at 32 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society.")).

D. IIRIRA could not undermine this Court's due process protections.

In 1996, IIRIRA introduced 8 U.S.C. § 1101(a)(13)(C), which used the replacement concept of "admission" in lieu of what had been considered "entry": "An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien" falls into one of six listed categories. Lower courts have incorrectly assumed that this amendment supersedes *Fleuti*, without properly grappling with that decision's constitutional underpinnings.

For example, in *De Fuentes v. Gonzales*, 462 F.3d 498 (5th Cir. 2006), the court asserted that "*Fleuti* is properly read as a case of statutory interpretation, and the statute it interprets has been amended. No 'constitutional core' has been violated in this case." *Id.* at 503. *De Fuentes* dismissed *Fleuti*'s constitutional component as mere "*dicta* supporting the general thrust of its result." 462 F.3d

at 503. Similarly, in *Tineo v. Ashcroft*, 350 F.3d 382 (3d Cir. 2003), the Third Circuit evaded *Fleuti*'s constitutional rationale by erasing its validity: "[The petitioner's] purported constitutional right simply does not exist. . . . *Fleuti* had no basis in constitutional principles." *Id.* at 397; *see also id.* at 398 ("[A]s a statutory interpretation decision, *Fleuti* did not create any constitutional rights.").

In the decision under review, the Second Circuit Court of Appeals also concluded that *Fleuti* was a dead letter. The court did not confront the due process constraints on its statutory interpretation of 8 U.S.C. § 1101(a)(13)(C), but elected to defer to the BIA's opinion in *Matter of Collado-Munoz*, 21 I. & N. Dec. 1061 (BIA 1998) (en banc). *Vartelas v. Holder*, 620 F.3d 108, 117 (2d Cir. 2010) (following *De Vega v. Gonzales*, 503 F.3d 45, 48 (1st Cir. 2007); *Camins v. Gonzales*, 500 F.3d 872, 880 (9th Cir. 2007); *De Fuentes*, 462 F.3d 498; and *Tineo*, 350 F.3d 382).

Collado-Munoz, however, explicitly depended on the BIA's acknowledgment that "neither an Immigration Judge nor this Board has the authority to rule upon the constitutionality of the laws we administer." 21 I. & N. Dec. 1064-65; *cf. id.* at 1070 (Rosenberg, Board Member, dissenting ("I recognize that we are not authorized to address the constitutionality of the laws we interpret and administer. We are, however, authorized and encouraged to construe these laws so as not to violate constitutional principles."). The BIA's holding in *Collado-Munoz* that "the *Fleuti* doctrine, with its origins in the no longer existent definition of 'entry' in the Act, does not survive the enactment of the

IIRIRA as a judicial doctrine," *id.* at 1065, therefore occurred in a constitutional vacuum.[4]

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[4] *Collado-Munoz* is also in tension with the BIA's decision in *Matter of Romalez-Alcaide*, 23 I. & N. Dec. 423 (BIA 2002) (en banc), which to the detriment of immigrants preserved a "brief, casual, and innocent" exception to the plain language of 8 U.S.C. § 1229b(d)(2) ("An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days."). *See Rivera-Jimenez v. INS*, 214 F.3d 1213, 1218 (10th Cir. 2000) (remanding to the BIA after commenting that the agency's conclusion that the petitioner's departure was not "brief, casual, and innocent" was "irrelevant … in light of the IIRIRA's special rules relating to continuous physical presence"); *see also Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 964 (9th Cir. 2003) (Berzon, J., dissenting from the denial of rehearing en banc) (*Romalez-Alcaide* as upheld by the panel opinion "reads the 'brief, casual, and innocent' standard back into the continuous physical presence provision, retaining the regime affirmatively deleted by Congress and replaced by a single, objective, clear rule"). At a minimum, these decisions illustrate the confusion in the lower courts and at the BIA concerning *Fleuti*'s viability in the wake of IIRIRA's definition of "admission." Guidance from this Court on *Fleuti*'s lasting effects may well one day be necessary to resolve this confusion, but not in this case where the petitioner is not relying on *Fleuti*'s current status. The competing paths to

Absent attention to this constitutional context, courts have neglected the process due to returning LPRs. The recent decision in *Doe v. Attorney General of the United States*, -- F.3d --, 2011 WL 3930281 (3d Cir. Sept. 8, 2011) (mandate pending), is a case in point. *Doe* addressed 8 U.S.C. § 1101(a)(13)(C)(v)'s language concerning a returning LPR who "has committed an offense identified in section 212(a)(2)." The panel majority held that because there was an "outstanding warrant for [the petitioner's] arrest, and he has never challenged its validity," he could be treated as seeking admission. *Doe*, 2011 WL 3930281 at *5. *But see Matter of Rivens*, 25 I. & N. Dec. 623, 626 n.4 (BIA Oct. 19, 2011) ("We respectfully disagree with this determination [in *Doe*], because we find that it is based on an apparent misapprehension of the legal effect of treating a returning lawful permanent resident as an applicant for admission."). Acknowledging weaknesses in the petitioner's briefing, the court in *Doe* wrote that "in the absence of an argument more substantial than those with which we are today presented, we cannot conclude that the Attorney General's invocation of statutorily-authorized procedural devices violates the Due Process Clause." *Id.* at *6. As a result, without either a conviction or a legally-binding admission of conduct, an LPR can be treated as seeking admission based on an outstanding warrant. This consequence is a far cry from the due process guarantees for returning LPRs repeatedly affirmed by this Court's decisions.

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decision offered by the parties here do not necessitate a complicated *Fleuti* detour.

In short, the present case does not require the Court to pronounce on *Fleuti*'s ongoing validity, a question that touches on an unbroken series of cases recognizing the constitutional dimension of returning LPRs' due process rights.

II. 8 U.S.C. § 1101(a)(13)(C)'s plain meaning is that the government may, but is not required to, treat certain returning LPRs as seeking admission, remaining mindful of the severe consequences that attach to such classification.

Given *Fleuti*'s constitutional foundation, the Court, if it chooses to interpret the meaning of 8 U.S.C. § 1101(a)(13)(C), should adopt a construction that avoids constitutional problems. *See, e.g.*, *United States v. Del. & Hudson Co.*, 213 U.S. 366, 407 (1909) ("[W]hen the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity."). The statute's plain language offers just such a construction, one that respects *Fleuti* and recognizes the longstanding principles that returning LPRs are to be treated differently from others seeking entry or, now, admission.

8 U.S.C. § 1101(a)(13)(C) employs "shall not . . . unless" language to describe when a returning LPR can be treated as seeking admission: "An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of

the immigration laws unless the alien" falls into one of six designated categories, including the criminal offense category (v) at issue in this case. This Court hews to the principle that "the legislative purpose is expressed by the ordinary meaning of the words used. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citing *INS v. Phinpathya*, 464 U.S. 183, 189 (1984)). The Court should therefore make clear that, in addition to the constitutional constraints imposed by *Fleuti*, 8 U.S.C. § 1101(a)(13)(C) must be read to be a permissive, not mandatory provision. *But see Tineo*, 350 F.3d at 390-91 ("If our statutory interpretation analysis were limited . . . , we would tend to agree that the "shall not . . . unless" construction is sufficiently ambiguous to permit the consideration of other factors even if a returning alien falls into one of the six enumerated exceptions. Our inquiry, however, cannot end here. . . . We must . . . examine the complete package of alterations, including language eliminated, language preserved, structure, subject matter, and legislative intent."); *Collado-Munoz*, 21 I. & N. Dec. at 1064 & n.5 ("Given the plain language of this provision and its placement in a definitional section, not in a discretionary relief provision, for example, such a reading of the statute strikes us as exceedingly strained.").

As a matter of grammar, "shall not . . . unless" does not require that returning LPRs who fall into 8 U.S.C. § 1101(a)(13)(C)'s six categories be treated as seeking admission. "Unless" is defined as "except on the condition that." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). "Shall not . . . unless" establishes a prerequisite for applying an

admission requirement, but does not mandate that it be imposed in all cases.

This mode of construction is illuminated by considering the distinction between necessary and sufficient conditions. A necessary condition creates a prerequisite to action, while a necessary and sufficient condition mandates that action. Here, 8 U.S.C. § 1101(a)(13)(C) enumerates necessary conditions for treating returning LPRs as seeking admission, but the BIA in *Collado-Munoz* misread the statute as establishing necessary and sufficient conditions.

"Shall not . . . unless" is a familiar phrase in other statutory contexts. The federal habeas corpus statute, for example, provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that [*inter alia*] the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b). Under this provision, federal courts *may*, but are not required to, grant relief to persons in custody who have exhausted state remedies. *See also Collado-Munoz*, 21 I. & N. Dec. at 1072-73 (Rosenberg, Board Member, dissenting) (citing 28 U.S.C. § 2675(a); 42 U.S.C. § 1594a(c)(2); and Or. Rev. Stat. § 30.925(2) (1993) as additional statutory examples of the "shall not . . . unless" variety).

Similarly, the statute at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), provided in part that "a physician shall not perform an abortion . . . unless, in the case of a woman who is less than 18 years of age, he first obtains the informed consent both of the pregnant woman and of one of her parents." *Id.* at

904. There was no suggestion in *Casey* that this provision *required* physicians to perform abortions after receiving informed consent.

In *Matter of Coelho*, 20 I. & N. Dec. 464 (BIA 1992), the BIA considered a regulation allowing for motions to reopen immigration proceedings. The regulation's language was analogous to 8 U.S.C. § 1101(a)(13)(C). It provided that "[m]otions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 20 I. & N. Dec. at 471 n.3 (quoting 8 C.F.R. § 3.2 (1991)). The BIA noted that, like 8 U.S.C. § 1101(a)(13)(C), the regulation "is couched solely in negative terms." *Id.* (citing *INS v. Doherty*, 502 U.S. 314, 315 (1992)). "As the Supreme Court stated, the pertinent regulation 'requires that under certain circumstances a motion to reopen be denied, but it does not specify the conditions under which it shall be granted.'" *Id.* (quoting *Doherty*, 502 U.S. at 315). The BIA went on to note that the regulation specifies no circumstance under which a motion to reopen must be granted, and it plainly disfavors motions to reopen. *Id.* Similarly, § 1101(a)(13)(C) says nothing compulsory about the treatment of returning LPRs, and the statute disfavors treating an LPR as an applicant for admission.

The plain language of 8 U.S.C. § 1101(a)(13)(C) shows that Congress, cognizant of *Fleuti*'s ongoing validity, intended to preserve the agency's consideration of pertinent factors for some returning LPRs who fall into the six categories denoting them as possible seekers of admission, while treating others as if they had never left the

United States. At the same time, the statute eliminates any uncertainty with respect to returning LPRs who do not fall into the six categories, by requiring that they be treated akin to LPRs residing in the U.S. who never left. In *Collado-Munoz*, an incorrect assumption was therefore applied by the agency to support its treatment of a returning LPR as seeking admission.

The agency's erroneous understanding of its classification authority under 8 U.S.C. § 1101(a)(13)(C), like its assumption that *Fleuti* did not survive that provision's enactment, has severe consequences for returning LPRs who are mistakenly treated as seeking admission. Aside from being subject to detention without a bond hearing, *see* 8 C.F.R. § 1003.19(h)(2)(i)(B), an LPR treated as seeking admission becomes subject to all the inadmissibility grounds contained in 8 U.S.C. § 1182. Exposure to inadmissibility grounds disadvantages a returning LPR because of harmful features they have as compared with removability grounds contained in 8 U.S.C. § 1227.

For example, under 8 U.S.C. § 1182(i), a waiver is available for inadmissibility based on 8 U.S.C. § 1182(a)(6)(C)(i) (fraud or willful misrepresentation of a material fact). That waiver, however, requires a showing of "extreme hardship to the citizen or lawfully resident spouse or parent" of the LPR. *See* 8 U.S.C. § 1182(i). The comparable waiver in 8 U.S.C. § 1227(a)(1)(H), located within the removability grounds section of the statute, requires no showing of "extreme hardship," however, and also extends the boundaries of eligible applicants to include parents of U.S. citizens and LPRs, a category not included in 8 U.S.C. § 1182(i). In addition, an

alien seeking admission "from a foreign territory contiguous to the United States" is subject to being returned to that territory at the discretion of U.S. border authorities. *See* 8 U.S.C. § 1225(b)(2)(C); 8 C.F.R. § 235.3(d) ("In its discretion, the Service may require any alien who appears inadmissible and who arrives at a land border port-of-entry from Canada or Mexico, to remain in that country while awaiting a removal hearing.").

Criticizing the majority view in *Collado-Munoz*, dissenting Board Member Rosenberg emphasized that "treatment of LPRs who have traveled legally outside the United States would be significantly worse than treatment of those who have not departed. Not only may the latter group be free from . . . custody (with access to review by an Immigration Judge) pending a final determination of their right to remain in the United States, but they are not vulnerable to charges of having committed certain offenses, and must actually have been convicted of such offenses before being charged with being removable." 21 I. & N. Dec. at 1077 (Rosenberg, Board Member, dissenting).[5]

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[5] Notably, the government at oral argument to this Court in *Judulang v. Holder*, No. 10-694 (Oct. 12, 2011), commented with respect to that petitioner's 1987 (pre-IIRIRA) trip abroad: "[T]here is a legal reason why I would caution the Court against assuming that . . . the Petitioner could have been deportable for a crime involving moral turpitude, and that is the so-called *Fleuti* Doctrine. Under this Court's 1963 decision in *Rosenberg v. Fleuti*, which is actually relevant to a case on which you granted certiorari a couple of weeks ago, this Court

It is clear from the government's position in this case that it takes a cramped view of returning LPRs' rights. The Solicitor General's brief in opposition to certiorari cited with approval the Second Circuit Court of Appeals' decision in *Oduko v. INS*, 276 F. App'x 21 (2d Cir. 2008).[6] In *Oduko*, the court upheld the BIA's reliance on an indictment to constitute "commission" of an offense justifying treatment of a returning LPR as seeking admission, pursuant to 8 U.S.C. § 1101(a)(13)(C)(v). *Id.* at 24.

This position, like the Third Circuit's in *Doe*, which accepted an outstanding warrant as sufficient to constitute "commission" of an offense, has recently been rejected by the BIA in *Matter of Rivens*, 25 I. & N. Dec. 623. *Rivens* held that, even after IIRIRA, for a returning LPR, "we find no reason to depart from our longstanding case law holding that the DHS bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking an admission." *Id.* at 625. As a result, the BIA noted its disagreement with *Doe* (and implicitly with *Oduko* and the Solicitor General's position in this case):

> We acknowledge that in a recent published decision, the United States Court of Appeals for the Third Circuit appears to have reached a different

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concluded that if an LPR takes a brief, casual, and innocent trip outside the country and returns to the United States, that will not trigger an entry upon his return to the United States."

[6] *Vartelas v. Holder*, No. 10-1211, Brief in Opposition to Petition for Certiorari (Aug. 5, 2011), 12.

> conclusion. In [*Doe*], the court found that the DHS could meet its burden of establishing that the exception in section 101(a)(13)(C)(v) of the Act had been met by showing that there was 'probable cause to believe' that the alien had committed one of the crimes identified in section 212(a)(2) of the Act. *Id.* at *5. We respectfully disagree with this determination, because we find that it is based on an apparent misapprehension of the legal effect of treating a returning lawful permanent resident as an applicant for admission. *See Matter of Lok*, 18 I. & N. Dec. 101 (BIA 1981) (holding that a lawful permanent resident retains such status until the entry of a final administrative order of removal), *aff'd*, 681 F.2d 107 (2d Cir. 1982)).

Id. at 626 n.4. The BIA, therefore, has been more attentive than the circuit courts and the Solicitor General to the long history of returning LPRs' distinct status at the border. Although *Collado-Munoz* failed to recognize *Fleuti*'s constitutional dimension, on the ground that the BIA's authority does not extend to constitutional law, *Rivens*, by allocating to the government the burden of proof regarding whether an admission is sought, provides partial vindication of returning LPRs' rights under *Fleuti*. *Rivens*, however, continues to fall short by ignoring the BIA's duty to construe the statute to avoid a constitutional deficiency. Specifically, pursuant to *Fleuti*, LPRs returning to the United States following brief, casual, and innocent trips abroad have not meaningfully interrupted their U.S.

residence such that they may be exposed to inadmissibility grounds under 8 U.S.C. § 1182. If the Court chooses to interpret 8 U.S.C. § 1101(a)(13)(C), it should adopt this construction, which respects both the constitutional foundation of *Fleuti* and the plain "shall not . . . unless" language of the statute, which preserves the agency's examination of factors other than the six specified categories of LPR admission.

CONCLUSION

Amicus respectfully urges the Court to be mindful of its consistent fidelity to the due process rights of returning LPRs. There is no need in this case to decide the ongoing validity of *Fleuti*, a decision grounded in part on those constitutional considerations. Instead, the Court should adopt, if necessary, a plain language analysis of 8 U.S.C. § 1101(a)(13)(C)'s "shall not . . . unless" language, implementing the most logical reading of Congress's phraseology: Returning LPRs falling into 8 U.S.C. § 1101(a)(13)(C)'s six categories may, if due process permits, be considered as seeking admission, but the statute leaves room for the examination of other pertinent factors in each case. Particularly in light of the harsh consequences that attach to a decision to treat a returning LPR as seeking admission, including being subject to detention without a bond hearing and a host of immigration law disabilities, the Court should reject the government's expansive approach to 8 U.S.C. § 1101(a)(13)(C)'s scope.

Respectfully submitted,

IRA J. KURZBAN
Counsel of Record

KURZBAN, KURZBAN, WEINGER, TETZELI & PRATT, P.A.
2650 S.W. 27th Avenue
Miami, Florida 33133
(305) 444-0060

DEBORAH S. SMITH

LAW OFFICE OF DEBORAH S. SMITH
7 West Sixth Avenue, Suite 4M
Helena, MT 59601
(406) 457-5345
deb@debsmithlaw.com

Attorneys for Amicus Curiae

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