**No. 09-72059**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MARIA MATILDE CARRILLO DE PALACIOS,
PETITIONER,

v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT.

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# Brief Amici Curiae, National Immigrant Justice Center And American Immigration Lawyers Association In Support Of Petitioner's Petition For Panel Rehearing Or Rehearing En Banc

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TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases



## Immigration & Nationality Act

**Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Divison C of Pub. L. No. 104-208, 110 Stat. 3009-549**



**Agency Documents**

## INTRODUCTION

The panel decision in *Carrillo de Palacios* overturns more than a decade of agency precedent on the basis of a single unpublished Board of Immigration Appeals decision and the post hoc rationalization of agency counsel. The decision greatly expands the classes of individuals who are *permanently* barred from immigrating to the United States, notwithstanding close family ties. It voids the considered interpretation and guidance to adjudicators worldwide issued by the Department of Homeland Security and the Secretary of State.

Because the panel overlooked and misapprehended critical legal authorities, the panel decision is erroneous. The petition for rehearing or rehearing en banc should be granted.

## INTEREST OF *AMICI CURIAE*

Heartland Alliance's National Immigrant Justice Center is a non-profit organization accredited by the Board of Immigration Appeals to provide immigration assistance since 1980.

The American Immigration Lawyers Association is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. [1]

## ARGUMENT

### I. Legal Background

#### A. The "Unlawful Presence" Inadmissibility Provisions.

Congress added the unlawful presence bars to the Immigration and Nationality Act with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, tit. III, § 301, effective April 1, 1997. Prior to IIRIRA, "unlawful presence" was an unregulated concept. *Cf.* former-§ 241(a)(1)(B) of the INA (regulating an *entry without inspection*). With IIRIRA, Congress imposed three discrete consequences on noncitizens who accumulated unlawful presence. Noncitizens who accumulated more

[1] This brief was authored in whole by amici without assistance or

than 180 days and less than one year of unlawful presence before departing the United States triggered an inadmissibility period of three years. *See* INA § 212(a)(9)(B)(i)(I). A noncitizen who accumulated more than one year of unlawful presence before departing the United States triggered an inadmissibility period of ten years. *See* INA § 212(a)(9)(B)(i)(II). Noncitizens who accumulated an aggregate of more than one year of unlawful presence and then attempted to reenter or reentered the United States without being admitted became permanently inadmissible. *See* INA § 212(a)(9)(C)(i)(I).

**B. The Universal Agency Interpretation.**

Because "unlawful presence" was a new concept to the inadmissibility grounds, the question was when would the unlawful presence penalty begin to count? For the unlawful presence bars at § 212(a)(9)(B)(i)(I) and (II), the answer was ultra-clear: no period of time prior to April 1, 1997 would matter. *See* IIRIRA § 301(b)(3). For the permanent bar at § 212(a)(9)(C)(i)(I), Congress was clear

that it took effect on April 1, 1997, but the text of IIRIRA § 301(b)(3) lacked the same ultra-clear statement for § (C)(i), and thus, a reasonable question remained: does IIRIRA § 301(b)(3) apply to § 212(a)(9)(C) and, thereby, only penalize post-April 1, 1997 unlawful presence?

Beginning in 1997 and over the course of the next 14 years, the leadership of the former-Immigration and Naturalization Service, the United States Citizenship and Immigration Services, and the Department of States, including the Secretary of State herself opined, repeatedly, on this statutory uncertainty. These authorities universally acknowledged that Congress did not intend to regulate unlawful presence prior to April 1, 1997 for § 212(a)(9)(C).

In the immediate aftermath of the enactment of 1996 immigration reform act, the former INS issued a series a instructions to the field that communicated the INS (which was then part of the Justice Department) interpretation of the statute.

At first, it appears that the INS interpreted IIRIRA § 301(b)(3) to mean that § 212(a)(9)(C)(i)(I) covered pre-enactment conduct. *See* Paul W. Virtue, Acting Executive Associate Commissioner, Memorandum, *Implementation of section 212(a)(6)(A) and 212(a)(9) grounds of inadmissibility*, March 31, 1997, AILA InfoNet Doc. No. 97033190 (posted Mar. 31, 1997).[2] Apparently realizing that IIRIRA § 301(b)(3) was meant to include § 212(a)(9)(C)(i)(I), the INS revised its opinion and explained that,

> [the] Service has revisited its March 31, 1997, guidance with respect to measuring time unlawfully present under [§ 212(a)(9)(C))i)(I)]. No period of unlawful presence in the United States prior to April 1, 1997, is considered for purposes of applying section 212(a)(9)(C)(i)(I) of the Act. Therefore, only those aliens entering or attempting to enter the United States without being admitted on or after April 1, 1998, following an aggregate period of unlawful presence of 1 year or more are inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

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[2] All documents cited in this brief with an "AILA InfoNet Doc. No." are available for public viewing at http://search.aila.org using the document number.

*See* Paul W. Virtue, Acting Executive Associate Commissioner, Memorandum, *Additional Guidance for Implementing Section 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act*, June 17, 1997, AILA InfoNet Doc. No. 97061790 (posted June. 17, 1997).

The State Department weighed in shortly thereafter with a cable to all diplomatic and consular posts worldwide opining that "[u]nlawful presence prior to the effective date of Title III-A of Pub. L. 104-208 (April 1, 1997) shall not be counted for purposes of [section 212(a)(9)(C)]." *See* Peter Tarnoff, Cable to all diplomatic and consular posts, Nov. 20, 1996 at par. 16, AILA InfoNet Doc. No. 96120480 (posted Dec. 6, 1996). A little less than two years later, the Secretary of State herself reasserted this interpretation. *See*, Madeleine Albright, Secretary of State, Cable to Diplomatic and Consular Posts, April 4, 1998 at par. 36, AILA InfoNet Doc. No. 98040490 (posted Apr. 4, 1998) ("As with [section 212(a)(9)(B)],

period of time prior to April 1, 1997, do not count toward unlawful presence for purposes of 212(a)(9)(C)(i)(I).")..

In May 2009, the executive leadership of the United States Citizenship and Immigration Services issued a joint memorandum consolidating all the guidance respecting unlawful presence to all USCIS field leadership all around the world. Donald Neufeld, Acting Associate Director for Domestic Operations, Lori Scialabba, Associate Director for Refugee, Asylum and International Operations, and Pearl Chang, Acting Chief of Policy and Strategy, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Section 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, May 6, 2009, AILA InfoNet Doc. No. 09051468 (posted May 14, 2009). In this consolidated memorandum, USCIS reaffirmed that § 212(a)(9)(C)(i)(I) applies only to unlawful presence after April 1, 1997.

Both USCIS and the State Department codified their interpretations. *See* USCIS, Adjudicator's Field Manual ¶

40.9.2(a)(4)(B) ("Under section 212(a)(9)(C)(i)(I) of the Act, the alien's unlawful presence is counted in the aggregate, i.e. the total amount of unlawful presence time is determined by adding together all periods of time during which an alien was unlawfully present in the United States on or after April 1, 1997."); s*ee* 9 F.A.M. § 40.93 n1 (explaining that "Consular officers should note that [for § 212(a)(9)(C)(i)(I)], attempted unlawful re-entry after a year's unlawful presence, applies only with respect to unlawful presence after April 1, 1997.")

The fact that these agencies came to a universal agreement on the meaning of a statute that they jointly administer is significant when one realizes just how much "administering" of the INA they actually do. The DHS and DOS adjudicate more claims involving inadmissibility than any other unit within the Federal government; more than the Immigration Courts and BIA combined. In 2010, the

DHS approved over 550,000 applications for permanent residence, [3] processed 163 million temporary visitors[4] and 35,000 applications for waivers of inadmissibility.[5] The Department of State adjudicated 6.5 million visas in fiscal year 2010.[6] In each instance, the admissibility – including whether an individual was subject to the unlawful presence grounds – was at issue. By contrast, the

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[3] See U.S. Dep't of Homeland Security, Office of Immigration Statistics, *Annual Flow Report, March 2011: U.S. Legal Permanent Residents: 2010*, at 2 found at http://www.dhs.gov/files/statistics/immigration.shtm (last visited 8/15/11)

[4] See U.S. Dep't of Homeland Security, Office of Immigration Statistics, *Annual Flow Report April 2010, Nonimmigrant Admission to the United States: 2009*, at 1.

[5] See U.S. Dep't of Homeland Security, Office of Citizenship and Immigration Services Ombudsman, *Waivers of Inadmissibility* at 8, Table D (June 10, 2010) available at http://www.dhs.gov/files/publications/editorial_0769.shtm (last visited 8/15/11).

[6] See U.S. State Department, Report of the Visa Office 2010, Table I, Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts Fiscal Years 2006-2010 (available at http://www.travel.state.gov/visa/statistics/statistics_5240.html) (last visited 8/15/11).

Immigration Courts and the BIA completed a fraction of these adjudications.[7]

The panel overlooked the publication of this agency interpretation and how it has guided the DHS and DOS in millions of adjudications each year. Accordingly, the views of these agencies, more so than a single member, unpublished decision of the BIA, merit additional scrutiny.

The panel overlooked the clearly appropriate nature of the "ordinary remand rule" in a case such as this. The BIA has not authoritatively addressed the issues reached by the panel. The BIA has taken no steps to reconcile its position with the plainly contrary position taken by DHS and DOS. Rather than stepping in to resolve these legal issues in the first instance, "the proper course … is to remand to the agency for additional investigation or

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7 EOIR, FY10 Statistical Yearbook, at R3, found at <http://www.justice.gov/eoir/statspub/fy10syb.pdf> (last accessed, Aug. 1, 2011).

explanation." *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (*per curiam*). The BIA and the Attorney General, as a matter of course, routinely rely on the published interpretations and guidance memoranda of USCIS and DOS. *See, e.g., Matter of Baires-Larios*, 24 I. & N. Dec. 467 (BIA 2008); *Matter of Picone*, 10 I. & N. Dec. 139 (AG 1963).

## II. The *Chenery* Doctrine Suggests Remand is Appropriate.

In its briefing to this Court, an attorney for the Department of Justice – which appears to represent, *inter alia*, the Department of Homeland Security, *see, e.g.*, *Diouf v. Napolitano*, (9th Cir. No. 09-56774) – attacked her own client's legal interpretation:

> [T]he Board – a separate agency – was not bound by the authority upon which de Palacios relies for this contention and such authority is not binding in the Ninth Circuit, but rather advisory. Moreover, the interpretation that de Palacios proposes is unsupported by the plain language of the statute.

Brief for Respondent at 15. Presented with a conflict between the two agency interpretations, counsel defended an agency decision

that failed to address the contrary published guidance of USCIS and DOS.

This implicates the *Chenery* Doctrine, *SEC v. Chenery Corp.*, 332 U. S. 194 (1947), under which, "[t]he courts may not accept appellate counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 168–169 (1962). Where appellate counsel chooses between competing threads of agency thinking, it invites if not requires "post-hoc rationalization." Counsel is simply not in a position to do otherwise.

## III. The Panel Decision Ignored The Best Reading of The Statute.

The panel's interpretation of IIRIRA § 301(b)(3) and § 212(a)(9)(C)(i)(I) is erroneous. The best reading of the statute provides that only post-April 1, 1997 presence matters. The

structure of §§ 212(a)(9)(B) and (C) provides conclusive indicia that Congress meant "unlawful presence" to cover only post-enactment time.

First, it must be understood that the definitional and penalty sections of the unlawful presence inadmissibility schemes are distinct, which itself is a common feature of the INA. *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1079 (CA9 2010). Section 212(a)(9)(B)(ii) sets forth the definition of "unlawful presence" whereas §§ 212(a)(9)(B)(i) and (C)(i) set forth the penalty provisions. The definition of unlawful presence at § 212(a)(9)(B) covers the entire section – both § (B) *and* § (C), which, notably, are the *only* places in the entire INA that rely on the concept of "unlawful presence". Indeed, it would be more than passing strange for Congress to create different definitions of unlawful presence in two side-by-side, interconnected statutes. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005).

Second, IIRIRA § 301(b)(3) is *not* an effective date for the statute; it is part of the definition of the term of art "unlawful presence." The panel misapprehended this critical distinction. *See, e.g.,* IIRIRA § 309 (effective dates for Subtitle A). Congress did not refer to § (C)(i)(I) in IIRIRA § 301(b)(3) because the definition of unlawful presence is in § (B), not § (C). The fact that § (C) cannot comfortably stand on its own strongly supports the proposition that § (B) provides the definition. *See, e.g., Freeman v. Francis*, 196 F.3d 641, 643 (CA6 1999).

Third, all the canons of statutory construction support this interpretation that "unlawful presence" means the same thing in both sections of the statute. The close placement of these provisions within the statute suggests the application of *noscitur a sociis*. Under that principle of statutory construction, an ambiguous term "is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). That "commonsense canon" has particular application

where the words at issue have "multiple and wide-ranging meanings." *Id.* Here, the term "unlawful presence" has various potential meanings; employing the Congressional limitations of § 212(a)(9)(B) gives the term concrete meaning.

## CONCLUSION

*Amici* respectfully urge the panel to withdraw its earlier decision and remand with instructions for the BIA to consider the question in a published opinion or for the court to rehear the matter *en banc* to do the same.

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 15, 2011. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen W Manning
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