NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Board Of Immigration Appeals

IN THE MATTER OF

LIMBERG JAVIER CORTEZ ARIAS,

A087-214-544

Respondent.

Appeal from an Immigration Judge decision entered on February 23, 2011

BRIEF OF AMICUS, AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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Introduction

Minors are different. Parents know it. The United States Supreme Court has said it. Scientific evidence proves it. Legislatures all over the world, including the United States Congress, have presumed it for decades. It is such a well-accepted norm that it completely permeates United States domestic law, criminal, civil, and contract. Importantly here, it is also a fixture within immigration law and jurisprudence.

Coming on nearly fifteen years after §§ 212(a)(9)(B) and (C) of the Immigration & Nationality Act were enacted, we continue to lurch along without any harmonizing rule on how unlawful presence should be interpreted to regulate immigration. None of the immigration agencies have yet promulgated any regulations implementing these grounds. Indeed, the agencies themselves are at cross-hairs on implementation. For example, the United States Customs and Border Patrol has refused to follow the guidance from either the Department of State or the United States Citizenship and Immigration Services. *See* Michigan AILA CBP Liaison Committee, Response to Question 7 (Nov. 23, 2010), AILA

AILA InfoNet Doc. No. 11081069. (Posted 08/10/11)

InfoNet Doc. No. 11080850 (posted 08/08/2011). The Board's interpretative silence on several recurring and important questions has led to conflicting judicial opinions, *cf. Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), with *Acosta v. Gonzales*, 439 F.3d 550 (CA9 2006).[1]

In this case, the Board is asked to decide whether the inadmissibility ground at § 212(a)(9)(C) of the Act applies to noncitizens who accrued unlawful presence prior to turning 18 years of age. In this brief, AILA explains why the best reading of the statute, in light of its language, its purpose, and Congressional treatment of minors as different than adults for deportability and admissibility purposes, excludes minors from § 212(a)(9)(C)(i)(I). We view these factors as conclusively pointing to the proposition that minor noncitizens, like the one in this case,

[1] The Board's delay in this context has spawned a whole new set of questions such as reliance and predictability. *See, e.g., Garfias-Rodriguez v. Holder*, -- F.3d --, 2011 WL 134690 (CA9 April 11, 2011), sua sponte order from chambers directing parties to address "[w]hat effect, if any, does the recent en banc decision in *Nunes-Reyes v. Holder*, --- F.3d ----, 2011 WL 2714159 (9th Cir. July 14, 2011), have on our decision that the BIA's precedential opinion in *Matter of Briones*, 24 I. & N. Dec. 355 (BIA 2007), applies retroactively?" (July 29, 2011).

cannot be subjected to an adult-centric interpretation of the inadmissibility ground at § 212(a)(9)(C)(i)(I). As explained why below, the Board should publish an opinion holding that the inadmissibility bar at § 212(a)(9)(C) does not apply to individuals who would have otherwise accrued unlawful presence but for their status as minors.

Statement of interest of amicus

The American Immigration Lawyers Association ("AILA") 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. 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. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office

for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and Supreme Court.

Argument

The Board should adopt the best and most reasonable construction of the statute which excludes minors from the scope of § 212(a)(9)(C). In explaining why the best reading of the statute excludes minors from the operation of § 212(a)(9)(C), AILA articulates three points: (1) the text of § 212(a)(9) plainly authorizes an interpretation excluding minors from its scope; (2) the purpose of § 212(a)(9)(C) is undermined by subjecting minors to its inadmissibility ban; and (3) the Act, regulations, and reasoned agency policy consistently acknowledge that minors are different than adults respecting immigration rules.

We address each issue in turn. We take no position on the merits of the respondent's claim.

A. The unlawful presence inadmissibility grounds

Congress added the unlawful presence bars to the 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; it certainly was not used as a statutory immigration control. *Cf.* former-§ 241(a)(1)(B) of the Act (regulating an unlawful *entry*). With IIRIRA, Congress imposed three discrete consequences on noncitizens who accumulated unlawful presence. Noncitizens who accumulated more than 180 days and less than one year of unlawful presence before departing the United States triggered an inadmissibility period of three years. *See* § 212(a)(9)(B)(i)(I) of the Act. A noncitizen who accumulated more than one year of unlawful presence before departing the United States triggered an inadmissibility period of ten years. *See* § 212(a)(9)(B)(i)(II) of the Act. 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* § 212(a)(9)(C)(i)(I) of the Act.

B. The best reading of the statute.

The best reading of the statute, either as a plain language interpretation or as a policy interpretation for an ambiguous statute, *Negusie v. Holder*, 555 U.S. 511, 129 S.Ct. 1159, 1164 (2009), resolves the following hypothetical the same way:

> A child, age 3, is smuggled into the United States to be with his parents. The child lives in the United States with his parents for four years, is taken back to his home country for a short period when he is 7 years old, and then smuggled back into the United States a few months later. Now, at the age of 15, he seeks an immigrant visa based on an approved relative petition filed by a parent.[2]

No one would dispute that, in this example, § 212(a)(9)(B)(i) is not triggered because our hypothetical applicant was under the age of 18 at all times. How, though, should § 212(a)(9)(C)(i)(I) be interpreted with respect to this hypothetical?[3]

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[2] Regretfully, there is nothing make-believe in this hypothetical because the facts are drawn from a real case. *See* Email from Tori Alvarenga-Watkins, St. Francis Cabrini For Immigrant Legal Assistance, to Stephen Manning (Aug. 3, 2011) on file with AILA. It is one of the stories collected by AILA through its case

[3] Because it makes no difference to the analysis here whether the statute is ambiguous or not, we do not address the issue.

1. The Text of § 212(a)(9)

The statute, § 212(a)(9), sets out a layered regulatory approach. Each section builds on the previous section. Because the subsections are pieces of the same regulatory approach, the whole section must be read in unison.

Because § 212(a)(9)(B)(iii)(I) says that it applies to "clause (i)" – that is, § 212(a)(9)(B)(i) – one might be lead to believe that this means that it *only* applies to § 212(a)(9)(B)(i). For example, the Immigration Judge and DHS counsel take that position in this case. *See also*, USCIS Adjudicator's Field Manual, § 40.9.2(b)(2) (same). But that style of interpretation is unsound and has been repeatedly rejected by the United States Supreme Court because it ignores the structure and context of the whole statute. Indeed, to read the statute in such "a mechanical fashion" would "create obvious incongruities in the language" and would "destroy one of the major purposes" of the statute. *Lawson v. Suwanee Fruit & S.S. Co.,* 336 U.S. 198, 201 (1949). The structure of § 212(a)(9)(B) provides several indicia that Congress meant for the minority exception to apply to § 212(a)(9)(C) as well.

First, the definitional and penalty portions of §§ 212(a)(9)(B) and (C) are distinct by design. Sections 212(a)(9)(B)(i) and (C)(i) provide for an inadmissibility penalty triggered by unlawful presence. The definition of unlawful presence is codified at §§ 212(a)(9)(B)(ii) and (iii). The exceptions at § (B)(iii) are exceptions to the definition, *not* the penalty portions of the statute. And this distinction makes all the difference in the statute's interpretation.

Second, the operation of the penalty portions of §§ 212(a)(9)(B) and (C) indicate that the definition of unlawful presence is comprised of both §§ (B)(ii) and (iii). Section 212(a)(9)(B)(i)(II) imposes a ten-year inadmissibility period on an adult noncitizen who departs the United States after accruing more than one year of unlawful presence during any single discrete stay. Section 212(a)(9)(C)(i)(I) imposes a permanent inadmissibility period on an adult noncitizen who aggregates more than one year of unlawful presence prior to an unadmitted entry. If a minor noncitizen cannot accrue unlawful presence to trigger the first inadmissibility period under § 212(a)(9)(B), then

that minor noncitizen cannot trigger § 212(a)(9)(C) because he or she will not have any unlawful presence when he or she departed after single or subsequent stay.

Third, the penalty portions of the statute are meant to work in harmony, not in conflict. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 466 n.30 (1987). Notably, the text of § 212(a)(9)(B)(i) aligns nearly perfectly with § 212(a)(9)(C)(i)(I). Read in harmony, § 212(a)(9)(C)(i)(I) was Congress's effort to regulate the noncitizen immigration violators who, because of their short unlawful stays, would escape regulation under § (9)(B). Section (9)(C) is not an additional regulatory control, rather it is meant to fill a gap in the regulatory scheme.[4]

The statute provides a single definition of "unlawful presence" that applies with equal force to §§ (a)(9)(B) and (C). This definition includes blanket exceptions for minors. Minors do not accrue unlawful presence and cannot

[4] Section 212(a)(9)(B)(iv) is part of the penalty portion of the statute. It is not an exception to the definition of unlawful presence. It merely stops the running of the unlawful presence clock while an application for a change of status or an extension of status is pending.

trigger the permanent bar at § 212(a)(9)(C)(i)(I) of the Act.

2. The culpability rationale of § 212(a)(9)(C)

Board Member Pauley, writing for the Board in both *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006) and *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), characterized § 212(a)(9)(C) as an inadmissibility ground intended to punish recidivist immigration violators. In strongly drafted language describing the punitive purpose, a precedent for which we were unable to find among the Board's published decisions, Board Member Pauley explained that § 212(a)(9)(C) is "concerned with punishing and preventing recidivist immigration violations[,]" *Matter of Briones*, 24 I&N Dec. at 366, and that the focus "is recidivism, and not mere unlawful presence, that section 212(a)(9) is designed to prevent[,]" *Matter of Rodarte*, 23 I&N Dec. at 909. His opinions looked broadly at Congress's immigration legislation in general to finely hone the sharp point of § 212(a)(9)(C) as embodying special punishment for its violators. "The enactment of these multifarious provisions to expedite the detection, deterrence, and punishment of recidivist immigration violators reflects a clear

congressional judgment that such repeat offenses are a matter of special concern and that recidivist immigration violators are more culpable, and less deserving of leniency, than first-time offenders." *Matter of Briones*, 24 I&N Dec. at 371; Black's Law Dictionary 1269 (9th Ed.) (defining "recidivist" as an "habitual criminal; a criminal repeater. An incorrigible criminal. One who makes a trade of crime.").

This get-tough-on-immigrants philosophy loses its legal – and moral – power when applied to our hypothetical. The absurdity of labeling a 3-year old child "culpable" for his unlawful presence in the United States or "punishing" a 7-year old for his "recidivist" uninspected entries is apparent from the face of this sentence. It cannot be correct, then, that minors are subject to § 212(a)(9)(C). First, minors, like the minor in our example, do not live autonomous lives. Second, minors lack the competency to make judgments about their status. This is true legally and factually. In our hypothetical, the child applicant cannot be a recidivist because he lacks the ability - both cognitively and legally - to form the requisite intent to violate the law. We cannot

label the child as "incorrigible". And, there is nothing in the statute that would permit vicarious inadmissibility liability: the child is not "punishable" for the decisions made by others to smuggle him to the United States. *See* § 212(a)(9)(C)(i)(I) (applies only to *the* alien seeking admission).

Even the most extreme rule-based regimes recognize that children are innocent actors. *E.g.*, Shirley Jackson, *The Lottery and Other Short Stories* (2d Ed. 2005) (exempting children who are at least younger than 17 from stoning punishment). The best reading of the statute would avoid this absurdity.

3. The clear Congressional view is to protect minors, not punish them.

There are "multifarious" immigration enactments, decisions, and guidance memoranda that present a clear view that minors are to be protected, not "punished". Congress has placed particular emphasis on protecting minors throughout the INA in accord with conventional legal principles. For example, § 208(a)(2)(E) of the Act precludes the use of safe third country or time limitations to bar an asylum application for certain minors.

Section 208(b)(3)(C) provides for initial asylum jurisdiction with the asylum office for certain minors instead of removal proceedings. Section 301 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), prevents the detention and deportation of minors who are unlawfully present in the United States with close family ties. Congress has directed that "the Attorney General shall prescribe safeguards to protect the rights and privileges" of incompetent aliens, such as minors, in removal proceedings. *See* § 240(b)(3) of the Act. Indeed, Congress has spared minors from inadmissibility even for their *convicted* criminal conduct. *See* § 212(a)(2)(A)(ii)(I) of the Act.

The Board has recognized that judgments in juvenile delinquency proceedings are not convictions for immigration purposes. *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000). An asylum applicant's status as a minor can be an "extraordinary circumstance" excusing noncompliance with the one-year deadline for applying for asylum. 8 C.F.R. § 1208.4(a)(5)(ii). Immigration Judges cannot accept an admission from an unrepresented minor respondent. 8 C.F.R. §

1240.10(c). There are special rules for serving Notices to Appear on children. 8 C.F.R. § 236.2. Certain minor children, unlike adults, may benefit from voluntary departure free of charge. 8 U.S.C. § 1232(a)(5)(D). Also unlike most adults, an alien child can be released from detention without bond. 8 C.F.R. § 236.3. Certain minors are not subject to numerous grounds of inadmissibility (including several significant grounds such as public charge, entry without inspection, and false claim of citizenship), a policy decision rooted in the inherent vulnerability of minors. *See* 2 U.S.C. § 7101; 8 C.F.R. §§ 245.1.(e)(2)(vi)(B)(3); 1245.1(e)(2)(vi)(B)(3).

Immigration enforcement agencies also maintain various discretionary policies providing added protection for minors, a trend that has been advancing in recent years. A recent ICE memorandum on prosecutorial discretion instructs agency personnel to consider a person's entrance into the United States at a young age as a factor weighing against enforcement actions. John Morton, Director, Immigration & Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil*

Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, June 17, 2011, at 4. The memorandum explains that "special consideration [be] given to minors" before the decision to commence an enforcement action. *Id* at 10. Immigration officials also must abide by special standards when detaining juveniles. *See* ICE Family Residential Standards (2008), *available at* http://www.ice.gov/detention-standards/family-residential/; Final Text of Settlement Establishing Minimum Standards and Conditions for Housing and Release of Juveniles in INS Custody, *available at* http://centerforhumanrights.org/children/Document.2004-06-18.8124043749. When assessing child asylum applicants, USCIS guidelines instruct adjudicators to view the minor as "a child first and an asylum-seeker second." USCIS Asylum Division, Guidelines for Children´s Asylum Claims 13 (2009). The guidelines emphasize that the asylum officer should consider numerous factors of development - cognitive and emotional among others - when adjudicating the child's case. *Id; see also Liu v. Aschroft*, 380 F.3d 307, 314 (7th Cir. 2004) ("[A]ge can be a critical

factor in the adjudication of asylum claims."). This example is not unique. The Juvenile Protocol Manual of the former INS explicitly instructs that juveniles should not be charged with inadmissibility under § 212(a)(6)(C) unless it is clear that they fully understood that they were committing fraud. INS, Juvenile Protocol Manual 2.1.1 (2007); *published on* AILA InfoNet Doc. No. 07111561 (posted Nov. 15, 2007). Additionally, EOIR maintains separate guidelines for proceedings involving unaccompanied minor children, and ICE can decide to parole an individual merely for being a juvenile. Memorandum, David Neal, Chief Immigration Judge, EOIR (May 22, 2007), *published on* AILA InfoNet at Doc. No. 07052360. Finally, juveniles are exempt from the "reasonable request for assistance" requirement for a T Visa. Memorandum, Yates, Assoc. Dire. Operations, USCIS, HQQPRD 70/6.2 (Apr. 15, 2004), *published on* AILA InfoNet Doc. No. 04060110.

As a matter of policy, the U.S. Citizenship and Immigration Services and the Department of State have both promulgated policies to expand upon the statutory tolling provisions. USCIS, Adjudicator's Field Manual § 40.9.2(b)(3)(B);

Cable, Department of State, No. 00-State-102274 (May 30, 2000), *published on* AILA InfoNet at Doc. No. 00060202. Consequently, it is clearly inscribed in immigration jurisprudence that minors will be treated differently than adults.

4. Conventional legal principles offer protection to minors

Congress's special treatment of minors and the mirror approach of the immigration agencies accord with conventional legal principles. Our nation's legal framework generally aims to protect minors: courts are cautious in meting out punishment because of a minor's inability to appreciate the wrongfulness of his actions, his inability to reason as an adult, and the state's *parens patriae* role. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982); Marsha L. Levick & Robert G. Schwartz, *Changing the Narrative: Convincing Courts to Distinguish Between Misbehavior and Criminal Conduct in School Referral Cases*, 9 U.D.C.L. Rev. 53, 86 (2007). This principle guides society's decision to deem minors as incapable of formulating the requisite intent in a variety of contexts: juvenile delinquency proceedings, for example,

do not aim to find criminal culpability or guilt because minors generally do not have the legal capacity to establish a culpable mental state. *See, e.g.*, *Johnson v. Ford Motor Co.*, 707 F.2d 189, 194 (5th Cir. 1983) (holding that a minor has no legal capacity); *Thomas v. United States*, 121 F.2d 905 (D.C. Cir. 1941) (explaining that rehabilitation and not "conviction or punishment for a crime" is the focus of juvenile delinquency proceedings). Indeed, the common law has long reasoned that minors do not have the legal capacity to willfully consent to a variety of legal activities, such as entering into a contract, consenting to a sexual activity, or marrying before a certain age. *See, e.g.*, *Vermont v. Deyo*, 915 A.2d 249, 254 (Vt. 2006); *Needham v. Needham*, 33 S.E. 2d 288, 290 (Va. 1945); *Langham v. Alabama*, 55 Ala. 114 (Ala. 1876).

The United States Supreme Court has definitively noted that minors are different biologically and, therefore, legally, when ascertaining culpability. *See Graham v. Florida*, --U.S.--, 130 S. Ct. 2011 (2010) (holding life imprisonment without parole is unconstitutional for juvenile offenders who did not commit

homicide); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding capital punishment is unconstitutional for juvenile offenders). *Roper* explains that adolescents maintain particular developmental handicaps, broadly apparent in three categories: a lack of maturity; acute vulnerability to outside influences, such as peer pressure; and lack of cognitive and personality development. *Roper*, 543 U.S. at 569. *Graham* recognizes this truth as well. In *Graham*, the Court concluded that juveniles have a significantly diminished sense of moral culpability. *See* 130 S. Ct. at 2027.

The Supreme Court recently recognized that a child's age is a key factor in the *Miranda* custody analysis. *J. D. B. v. North Carolina*, 131 S. Ct. 2394 (2011). A child's age is far "more than a chronological fact." *Id.* at 2403. It is a fact that "generates commonsense conclusions about behavior and perception." *Id.* Children are generally less mature than adults and they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. *Id.* For their own protection, children are limited in their ability to alienate property, enter into a binding contract, or even

marry. *Id.* at 2403-04. Children even have a different "reasonable person" standard. *Id.* at 2404.

None of this is to say that Congress cannot create inadmissibility grounds applicable to minors, even morally silly ones. Congress, within its constitutional constraints, can generally fashion exclusionary rules targeted at minors. But Congress generally speaks in an unmistakable manner when legislating against convention. For example, Congress drafted explicitly clear language to exclude minors who committed violent offenses from special deportation protection. *See* § 383(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-652 (Sept. 30, 1996) (excluding violent juveniles from the Family Unity program at § 301 of the Immigration Act of 1990). In this regard, the absence of a particular clause *subjecting* minors to § 212(a)(9)(C) is particularly persuasive in holding that Congress intended minors to be exempt from its reach. "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing to A. Doyle, Silver Blaze, in *The*

Complete Sherlock Holmes 335 (1927)).

5. Inadmissibility grounds involving competency and autonomy.

The lack of a direct reference to § 212(a)(9)(C) within the minors provision at § 212(a)(9)(B)(iii) means very little because the general view is that when competency and autonomy are required to take an action that creates deportation liability (such as repeated uninspected entries or making false statements), minors are not judged like adults. Section § 212(a)(6)(C) presents such an example. Although the statute does not contain a specific intent or age provision, the courts have refused to subject children to this permanent bar because of decisions made by their parents. *Singh v. Gonzales*, 451 F.3d 400, 405-10 (6th Cir. 2006). While minors are subject to the general entry and maintenance of status rules, they lack the capacity and ability to engage in fraudulent conduct. *Id.* Imputing a parent's fraud to a child will not meaningfully deter either the parent or the child. *Id.*

Likewise, in *Sandoval v. Holder*, the Eighth Circuit

remanded to allow the Board to address whether children can trigger the permanent bar associated with false claims to U.S. citizenship. 641 F.3d 982 (8th Cir. 2011). While the false claim to citizenship statute contains a limited exception for certain children, § 212(a)(6)(C)(ii)(II) of the Act, the court acknowledged that it would be reasonable to excuse all or most minors from this harsh provision. 641 F.3d at 987-88. In fact, the Attorney General conceded as much at oral argument. *Id.* at 987.

Conclusion

The best reading of § 212(a)(9)(C) includes the minority provision because immigration law consistently treats minors differently than adults and minors cannot be "culpable" in the same way that adults are when adjudicating immigration law violations. Under the best reading of the statute, the minor in our hypothetical is not inadmissible under § 212(a)(9)(C)(i)(I).

Respectfully submitted,

_____

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Certificate of Service

I, Stephen W Manning, certify that on August 9, 2011, I served a true and correct copy of the attached brief on the parties below by first class regular mail.

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