No. 13-2876

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALEXANDER J.C. MANSFIELD
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1

I, Russell R. Abrutyn, attorney for the *Amici Curiae,* American Immigration Council and the American Immigration Lawyers Association, certify that these organizations are non-profit organizations that do not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10% or more of their stock.

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INTRODUCTION

Amici American Immigration Lawyers Association (AILA) and American Immigration Council (Immigration Council)[1] proffer this brief in support of the Petition for Rehearing En Banc of the panel's decision, *Mansfield v. Holder*, No. 13-2876 (8th Cir. Jan. 30, 2015). The Court's decision in *Roberts v. Holder*, 745 F.3d 928 (8th Cir. 2014), stands alone in its opposition to the decisions of nine other circuits. The en banc Court should rehear this case to resolve the 9-1 circuit split.

Nine courts agree that the penultimate sentence of §1182(h) unambiguously applies *only* to noncitizens who were admitted as lawful permanent residents (LPR) at a port of entry. *Medina-Rosales v. Holder*, No. 14-9541, 2015 WL 756345, __ F.3d __ (10th Cir. Feb. 24, 2015); *Husic v. Holder*, No. 14-607, __ F.3d __ (2d Cir. Jan. 8, 2015); *Stanovsek v. Holder*, 768 F.3d 515 (6th Cir. 2014); *Negrete-Ramirez v. Holder*, 741 F.3d 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, 385 (4th Cir. 2012); *Lanier v. U.S. Att'y*

[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 that was intended to fund preparing or submitting the brief.

Gen., 631 F.3d 1363, 1366-67 (11th Cir. 2011); *Martinez v. Mukasey*, 519 F.3d 532, 546 (5th Cir. 2008). In contrast, the *Roberts'* panel, without examining all of the language of § 1182(h), found that because Congress used the term "admission" inconsistently in the INA, its use in §1182(h) was necessarily ambiguous. The panel then deferred to the Board of Immigrations Appeals' (BIA) interpretation in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010).

In this brief, amici curiae argue first that the plain text of the statute reflects Congress' intent to limit §1182(h) to noncitizens admitted as LPRs at a port of entry. Second, no absurdities will result from a literal reading of the statute.

INTEREST OF *AMICI CURIAE*

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 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.

Amici have filed *amicus* briefs on this issue in the cases cited above in the Second, Third, Fourth, Sixth, and Seventh Circuits.

STATUTORY BACKGROUND

Section 1182(h) permits federal immigration authorities, in the exercise of their discretion, to excuse the commission of designated criminal offenses or other misconduct that would otherwise prevent noncitizens from entering or remaining in the United States. Noncitizens eligible to receive a waiver include 1) those whose activities causing them to be inadmissible occurred more than fifteen years earlier, who have since been rehabilitated and are not a threat to the nation's welfare, safety, or security; 2) those who have a U.S. citizen or LPR qualifying relative who would suffer extreme hardship if the §1182(h) waiver were denied; or 3) certain victims of domestic violence who are eligible for LPR status on that basis. *See* §1182(h)(1)(A), (B), and (C). The petitioner in this case falls under the second category; however, LPRs in all categories will be impacted by this Court's decision if they adjusted status post-entry and subsequently committed an aggravated felony.

By statute, the §1182(h) waiver is restricted. The penultimate sentence of §1182(h) provides:

> 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 …

Finding this text to be unambiguous under *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), nine courts have found the phrase "previously been admitted to the United States as an alien lawfully admitted for permanent residence," to be limited to noncitizens who were "admitted" as LPRs at a port of entry, as distinct from those who adjusted to LPR status post-entry.[2]

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).

> "Status" is a term of art, which … denotes someone who possesses a *certain legal standing*, e.g., classification as an immigrant or nonimmigrant.

Matter of Blancas, 23 I&N Dec. 458, 460 (BIA 2002) (emphasis added). Noncitizens generally acquire LPR status in one of two ways: by being "admitted"

[2] *Medina-Rosales*, __ F.3d __, *8-11; *Husic*, __ F.3d __, *3; *Stanovsek*, 768 F.3d at 517-19; *Negrete-Ramirez*, 741 F.3d at 1054; *Papazoglou*, 725 F.3d at 794; *Hanif*, 694 F.3d at 486 ; *Leiba*, 699 F.3d at 352 ; *Bracamontes*, 675 F.3d at 385; *Lanier*, 631 F.3d at 1366-67; *Martinez*, 519 F.3d at 544.

as LPRs at a port of entry, or by adjusting to LPR status following a previous entry to the United States, lawful or otherwise.

2. "Admission" versus "adjustment of status"

The INA defines "admission" as "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); *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008). A noncitizen is "admitted" as an LPR when he or she obtains an immigrant visa from a consular officer abroad, presents the visa to an inspector at a U.S. port of entry, and a port inspector authorizes his or her admission into the U.S. *See, e.g.*, 8 U.S.C. §§1225, 1154(e) and 1201(h).

Alternately, noncitizens may obtain LPR status by entering the country and subsequently "adjusting" to LPR status. "Adjustment of status" is a "procedural mechanism" whereby noncitizens inside the United States can acquire LPR status without having to leave the U.S. *Matter of Koljenovic*, 25 I&N at 221 (BIA 2010) (quotations omitted).

ARGUMENT

I. Congress Intended the Penultimate Sentence of §1182(h) to Apply Only to Noncitizens Admitted as LPRs at a Port of 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 intent is 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.

The key to discerning Congress' intent here is recognizing that the relevant 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*.'" *Negrete-Ramirez*, 741 F.3d at 1051 (citations omitted) (emphasis added). Determining the intent of Congress "requires [courts] to 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, the courts and the BIA agree that the statutory definition of "admitted" does *not* include adjustment of status. *Zhang v Mukasey*, 509 F.3d 313, 316 (6th Cir. 2007); *Emokah*, 523 F.3d at 118; *Aremu v. DHS*, 450 F.3d 578, 581-82 (4th Cir. 2006); *Martinez*, 519 F.3d at 544; *Matter of Rosas*, 22 I&N Dec. 616, 617 (BIA 1999). This conclusion is unsurprising given that 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).

In contrast, the second phrase–"lawfully admitted for permanent residence"–is a status. 8 U.S.C. §1101(a)(20) (defining the term as a status). In comparing this phrase with "admission," the Seventh Circuit noted that "[t]he former is a legal

status, the latter an entry into the United States." *Abdelqadar*, 413 F.3d at 673; *see also Lanier*, 631 F.3d at 1366; *Martinez*, 519 F.3d at 546; *Hanif*, 694 F.3d at 485. 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; *Hanif*, 694 F.3d at 484.

The BIA, in *Matter of Koljenovic*, failed to consider the interplay between these two distinct phrases. Instead, the BIA relied on its refusal, in earlier cases, to apply the statutory definition of "admission" because doing so with respect to the specific provisions at issue in those cases could lead to an absurd result. *Koljenovic*, *id.* at 221 (citing *Matter of Rosa*s, 22 I&N Dec. 616 (BIA 1999)). To avoid this result in those earlier cases, the Board found it necessary to disregard the statutory definition and conclude that an adjustment was an admission. *Id.* In *Koljenovic*, the BIA relied upon this limited expansion of the statutory definition of admission to reach the same conclusion with respect to its use in §1182(h). It did so, however, without actually grappling with the wording of this sentence. The BIA thus never engaged in the careful analysis of the language of §1182(h) carried out by the majority of courts.

The BIA's interpretation of §1182(h) also violates the "cardinal principle of statutory construction" that a statute is to be interpreted so that no clause, sentence, or word is rendered superfluous. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Under its construction, the phrase "an alien who has previously been admitted to the United States as…" is superfluous. If Congress intended the penultimate sentence to apply to *all* LPRs, it could have stated this directly, as it has done in other provisions. *See, e.g.*, 8 U.S.C. §1151(a) (referencing noncitizens who receive immigrant visas "*or who may otherwise acquire the status of* an alien lawfully admitted [ ] for permanent residence") (emphasis added).

Committing the same error as the BIA, the *Robert's* panel failed to analyze the two separate phrases from the relevant sentence of §1182(h). Instead, it relied on one INA provision in which the term admission does not fit the statutory definition. From this limited example, the panel found §1182(h) ambiguous. Such a result violates the principle that "[s]tatutory definitions control the meaning of statutory words . . . in the usual case." *Burgess v. U.S.*, 553 U.S. 124, 128 (2008) (citations omitted).

II. Application of the Plain Language of §1182(h) will not Lead to Absurd Results.

The Court's responsibility is to enforce the plain language of the statute. *Union Pacific R. Co. v. U.S. Dept. of Homeland Sec.*, 738 F.3d 885, 897 (8th Cir. 2013); *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). This is not one of those

rare cases where applying the plain language will lead to absurd results. There are plausible reasons why Congress distinguished between LPRs who adjusted their status and those who obtained immigrant visas abroad. In addition, by drawing the line where it did, Congress preserved the availability of a waiver of inadmissibility for the most vulnerable noncitizens: asylees, those abused by U.S. citizens and LPR family members, victims of serious crimes, and victims of trafficking.

The panel's decision in *Roberts* was premised on an understanding that only four courts of appeals had reached the issue. *Roberts*, 745 F.3d at 932. In fact, six courts had ruled as of the date of the *Roberts* decision. The panel overlooked decisions from the Seventh and Ninth Circuits. Since *Roberts*, three more circuits have addressed this issue and specifically rejected the reasoning of the *Roberts*' panel, instead concluding that §1182(h)'s aggravated felony bar does not apply to LPRs who obtained that status through an adjustment of status. *Medina-Rosales*, __ F.3d __, at *8-11; *Husic*, __ F.3d. __, at * 16-18; *Stanovsek*, 768 F.3d at ___. Now, nine circuits stand in opposition to the panel's decision. Given this deep circuit split, the en banc Court should review the issue. Left standing, the split will cause inconsistent results for otherwise similar cases based solely on the location of the removal hearing.

"[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it

according to its terms." *Lamie*, 540 U.S. at 534 (internal quotations and citations omitted). The absurdity exception is narrowly applied. It is not available merely because the statute is "awkward" or "ungrammatical," *Lamie*, 540 U.S. at 534, or would lead to "harsh" results. *Dodd v. U.S.*, 545 U.S. 353, 359 (2010). It is "for Congress, not this Court, to amend the statute" if the plain language is dissatisfying. *Id.* at 359-60.

In *Koljenovic*, the Board's speculation as to possible absurd results that would flow from an interpretation of §1182(h) consistent with its plain language is premised on an assumption that application of the statutory definition here would require its application in all other contexts. *Koljenovic*, 225 I&N Dec. at 222. This is not the case, however. Both the BIA and courts have demonstrated that "admission" must be interpreted consistent with the context. Consequently, when necessary, courts have treated the adjustment of a noncitizen who entered without inspection and then adjusted status as the functional equivalent of an admission. *See Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134-35 (9th Cir. 2001); *Stanovsek*, 768 F.3d at 518 (6th Cir. 2014); *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011). Thus, construing this waiver consistent with the plain language here will not bind the Board or courts with respect to other, unrelated statutory provisions.

In *Leiba*, the Fourth Circuit distinguished between §1182(h) and other statutory provisions, including §1227. That court noted the argument that "admission" might need to be interpreted to include an adjustment to give effect to §1227, but held that this would not prevent the Court from applying the plain language of §1182(h). *Leiba*, 699 F.3d at 354. The Second Circuit also found the government's invocation of the absurd results doctrine insufficient to overcome the statute's plain language. *Husic*, __ F.3d __ at *19-20; *see also Hanif*, 694 F.3d at 486-87.

In *Contemporary Industries Corp. v. Frost*, this Court concluded that statutory language relating to transfers in the Bankruptcy Code was plain and unambiguous and would not lead to absurd results. 564 F.3d 981, 987 (8th Cir. 2009). "At the very least, we can see how Congress might have believed undoing similar transactions could impact those markets, and why Congress might have thought it prudent to extend protection to payments such as these." *Id.* In other words, so long as there was some reason why Congress structured the statute the way it did, the plain language controls.

Here, there are at least two plausible reasons why Congress might have distinguished between those who gain LPR status at a port of entry and those who adjust to that status after entry. First, Congress recognized that noncitizens who were already in the U.S. when they adjusted often have stronger ties to the U.S.

Family and community ties make LPRs who adjust post-entry more deserving of a waiver if they run afoul of the law.

Second, the most vulnerable categories of LPRs – asylees, crime victims, and victims of human trafficking can – generally only can obtain this status through adjustment because they have to meet physical presence requirements.[3] By permitting LPRs who adjusted status to apply for an §1182(h) waiver, Congress sought to protect vulnerable immigrants by giving them an opportunity to remain in the United States.

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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[3] 8 U.S.C. §§1159(b)(2) (one year physical presence requirement for asylees); 1255(l)(1)(A) (three year presence requirement for trafficking victims; 1255(m)(1)(A) (same requirement for victims of serious crimes).

CERTIFICATE OF COMPLIANCE

Pursuant to 8th Cir. R. 28A(h), this filing has been scanned for viruses and is virus free.

/s/ Russell R. Abrutyn
Russell R. Abrutyn

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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