**21-9502**

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**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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**Mikhail SOLOMONOV,**
**Petitioner,**

**v.**

**Merrick GARLAND, U.S. Attorney General,**
**Respondent.**

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# AMICUS BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR INITIAL HEARING EN BANC

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## STATEMENT OF INTEREST

The American Immigration Lawyers Association (AILA) is a nonpartisan, nonprofit national association of more than 15,000 attorneys and professors who practice and teach immigration law. AILA members represent U.S. families, businesses, foreign students, entertainers, asylum seekers, applicants for immigrant visas, and people in removal proceedings, often pro bono, as well as providing continuing legal education, professional services, and information to a wide variety of audiences. AILA has participated as amicus curiae in numerous cases in the federal courts.

Of relevance to these proceedings, AILA members routinely represent noncitizens facing possible deportation due to criminal convictions. AILA members are acutely aware of the procedural and substantive handicaps attached to individuals labeled as aggravated felons. In light of those substantial, adverse consequences, AILA believes Congress intended that noncitizens should only be categorized as

aggravated felons after they had been afforded an opportunity to pursue all direct appeals.

Pursuant to Fed. R. App. P. 29(a)(4), AILA states that it is not a corporation, no party counsel authored any part of the brief,[1] and no person or entity other than AILA contributed money to prepare or file it. Petitioner consents to the filing of this amicus brief.

## DISCUSSION

### The catastrophic consequences of an aggravated felony conviction counsel against a finding that Congress intended a conviction to considered final for immigration purposes where that conviction is on direct appeal.

Dr. Solomonov was found deportable as an aggravated felon due to a 2019 conviction for sexual assault and physically removed from the U.S. Pet. Br. at 5, 7-9. The aggravated felon designation attached even though Dr. Solomonov had a pending, direct appeal. *Id*. In his attempts to

[1] In the interests of full disclosure, it is noted that the drafter of this amicus brief works in the same law firm as Petitioner's counsel, James Lamb. While attorney Lamb supports the filing of the amicus brief, he took no part in its production. Undersigned counsel does not represent Dr. Solomonov, did not represent him in the past, and drafted this brief solely in his role as a volunteer attorney for AILA's amicus committee.

prosecute his appeal from abroad, Dr. Solomonov will presumably benefit from his privileged socioeconomic status, and the fact that he was deported to Canada—a developed, prosperous country. Other noncitizens are not so fortunate. Once removed, numerous procedural, technological, financial, and safety issues may prevent them from litigating to completion their good-faith appeals, and potentially innocent people will lose their opportunity for vindication.

A conviction for an "aggravated felony" has devastating consequences under the immigration laws, for lawful permanent residents ("LPRs") and asylum seekers alike. The gravity of these consequences counsels against discerning a Congressional intent in 8 U.S.C. § 1101(a)(48)(A) that a trial-level conviction pending on direct appeal is, nonetheless, final for immigration purposes. Some of the most serious consequences are outlined below.

### 1. An aggravated felony conviction precludes an LPR from seeking relief from removal no matter how inequitable the result.

A determination that an offense is an aggravated felony can have catastrophic consequences, even for longstanding residents of the U.S. Most importantly, a person convicted of an aggravated felony may not seek "cancellation of removal." 8 U.S.C. § 1229b(a)(3). Cancellation is a form of discretionary relief; through this mechanism, Congress allows individuals who have lived in the U.S. for at least seven years, and who have been LPRs for at least five years, to make a case to stay in the U.S. based on their equities. Positive factors include family ties, residency of long duration, hardship to the respondent and family, service in the Armed Forces, history of employment, property or business ties, service to the community, rehabilitation if a criminal record exists, and evidence of good moral character. *See, e.g., Matter of Marin,* 16 I. & N. Dec. 581 (BIA 1978); *Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998).

Given the grave consequences of deportation, it should come as no surprise that Congress created this relief. These consequences are felt as

much by the family, friends, and community of the noncitizen as they are by the noncitizen himself. Deporting a child's parent effectively breaks apart a family forever and may leave a young American citizen to fend for himself. And the effects of deportation are even more pronounced in lower-income families who cannot afford to travel back and forth between the U.S. and their country of origin to visit loved ones.

For LPRs who have spent nearly their entire lives in the U.S., deportation is among the most extreme punishments imaginable. In many cases, it amounts to permanent exile from the only home they have ever known. Many of these noncitizens have spent their entire lives in the U.S. and do not even remember their time in the nation to which they are being deported.[2] As Learned Hand once observed:

> We think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows

[2] *See, e.g., Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008) (LPR since 1977, 30 years in U.S.); *Knutsen v. Gonzales*, 429 F.3d 733, 735, 739-40 (7th Cir. 2005) (LPR since 1957); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1047 (9th Cir. 2004) (LPR since age 11); *Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992) (LPR since age two).

> no other language, no other people, no other habits, than ours; he will be as much a stranger in [his country of origin] as any one born of ancestors who immigrated in the seventeenth century. However heinous his crime, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized people.

*United States ex rel. Klonis v. Davis*, 13 F.2d 630, 630 (2nd Cir. 1926); accord *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (deportation means "a life sentence of exile.").

An LPR tagged as an aggravated felon will have no ability to access cancellation. He will not have any opportunity to argue that as a matter of equity, he should be allowed to remain in this country. He will have no ability to present evidence weighing in favor of cancellation—like family ties, history of employment, proof of rehabilitation, and good moral character—and no immigration judge will have the power to consider such factors. He will face automatic deportation, no matter how long he has lived here, how minimal his connections are to his country of origin, how many people here are depending on him, and how much of a hardship his deportation would create for his family and community.

These consequences are particularly troubling with respect to individuals who have served in the U.S. Armed Forces. For any LPR in removal proceedings, a record of military service would ordinarily weigh in favor of granting cancellation. Many LPRs serve in the U.S. military, and the linguistic and cultural diversity they bring to their service is especially valuable in the context of national security. ANITA U. HATTIANGADI ET AL., NON-CITIZENS IN TODAY'S MILITARY: FINAL REPORT 1 (2005). Yet under the Government's position, a veteran who was convicted of an aggravated felony at the trial level, but with a pending, good-faith direct appeal, would have no opportunity to argue for relief based upon his military service, or based upon the hardship his removal would present to his family.

**2. A conviction for an aggravated felony bars a noncitizen from seeking asylum.**

An aggravated felony conviction also permanently blocks a noncitizen from seeking refuge in the U.S. based on a well-founded fear that he will face persecution or death if returned to his country of origin. The gravity of this consequence means that the Court should be

particularly cautious about any effort to categorize noncitizens as aggravated felons while their convictions are on direct appeal.

The current mechanism for asylum in the U.S. was created when the U.S. acceded to the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577 (1968) ("the Protocol"). Under the Protocol, the U.S. made a commitment to comply with the substantive provisions of Articles 2 through 34 of the U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("the Convention"). *See INS v. Stevic*, 467 U.S. 407, 416 (1984). Article 33 of the Convention—incorporated by reference into the Protocol—"provides an entitlement for the subcategory [of refugees] that 'would be threatened' with persecution upon their return." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). It states:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

PROTOCOL RELATING TO THE STATUS OF REFUGEES, art. 33, 19 U.S.T. 6223.

Article 33 also describes two narrow categories of refugees who are not entitled to this protection, in view of the danger they might present:

> The benefit of the present provision may not * * * be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of *a particularly serious crime,* constitutes a danger to the community of that country.

The Convention, art. 33(2), 189 U.N.T.S. 150. (emphasis added).

In recognition of the Protocol and Convention, Congress made a series of changes to the INA, codifying the method by which a refugee can apply for asylum. *See* 8 U.S.C. § 1158; *Cardoza-Fonseca,* 480 U.S. at 423. Congress also incorporated language that tracks the exception in the second paragraph of Article 33, rendering the protection of asylum off-limits for any refugee who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community." 8 U.S.C. § 1158(b)(2)(A)(ii). Congress further defined "particularly serious crime" to include any "aggravated felony." 8 U.S.C. § 1158(b)(2)(B)(i).

Under these provisions, any person convicted of an "aggravated felony" is statutorily barred from seeking asylum, regardless of the severity

of the threat faced upon return to the country of origin. This statutory bar can and does result in the deportation of noncitizens to countries where they face imminent harm.[3]

### 3. An aggravated felony conviction subjects certain noncitizens to expedited removal and mandatory detention.

An aggravated felony conviction may also make the process of removal faster and may deprive the noncitizen of access to resources to defend himself. The INA provides for special expedited removal proceedings for noncitizens with aggravated felony convictions. 8 U.S.C. § 1228. This entails a conclusive presumption of deportability and virtually no procedural protections ensuring the right to contest the charges effectively. 8 U.S.C. § 1228(c).

The denial of these protections could have devastating consequences. In one case, for example, a Congolese woman was summarily ordered removed based on a 2011 conviction for misdemeanor battery, which the

[3] *See, e.g., Berhe* v. *Gonzales,* 464 F.3d 74, 86 (1st Cir. 2006) (removal of an Eritrean national as an aggravated felon, despite the fact that she faced severe religious persecution upon return).

government classified as an aggravated felony. *Malu v. U.S. Atty. Gen.*, 764 F.3d 1282, 1284 (11th Cir. 2014), cert. dismissed per Rule 45, *Malu* v. *Lynch*, No. 14-1044, 2015 LEXIS 3153 (U.S. May 13, 2015). The notice was in error because of the Supreme Court's decision in *Johnson v. United States*, 559 U.S. 133 (2010), holding that simple battery is not a crime of violence. 764 F.3d at 1286. But appearing pro se, Ms. Malu did not submit legal arguments against these charges within the ten-day period given to her to mount a defense. The Eleventh Circuit concluded that because she had failed to contest her aggravated felony status within those ten days, she had failed to exhaust administrative remedies and was barred from seeking relief based on her fear of persecution. *Id*. at 1287.

At the same time, a noncitizen with an aggravated felony conviction may face extended, mandatory detention without the possibility of bond. 8 U.S.C. § 1226(c)(1). People in removal proceedings often sit in immigration custody for months, or even years, before the courts adjudicate their cases. *See, e.g., Flores-Torres v. Mukasey*, 548 F.3d 708 (9th Cir. 2008) (detention of over two years); *Valansi v. Reno*, 278 F.3d 203 (3rd

Cir. 2002) (detention of nearly a year). Pre-removal detention is highly disruptive to the noncitizen's life, can prevent him or her from being in a position to arrange for care for family members after deportation, and limits his access to resources that might assist in preventing removal. Thus even during the removal process itself, an aggravated felony conviction can have grave consequences.

#### 4. Once deported as an aggravated felon, a noncitizen faces nearly insurmountable obstacles to return.

A person removed from the U.S. as an aggravated felon faces nearly insurmountable obstacles to ever returning lawfully to his former home. Under 8 U.S.C. § 1182(a)(9)(A)(ii), such a person faces a lifetime bar to future admissions. While 8 U.S.C. § 1182(a)(9)(A)(iii) allows for the possibility of a waiver, other provisions within 8 U.S.C. § 1182(a)(2) create, depending on the nature of the offense, either waivable,[4] or non-waivable,[5] lifetime bars. Even where a waiver is theoretically available, if

[4] *See*, *e.g.*, 8 U.S.C. § 1182(a)(2)(A)(i)(I) (crime involving moral turpitude), waivable under 8 U.S.C. § 1182(h).
[5] *See*, *e.g.*, 8 U.S.C. 1182(a)(2)(C)(i) (controlled substance trafficking), *not* waivable under 8 U.S.C. § 1182(h).

the offense is deemed a violent or dangerous crime, then the applicant must demonstrate extraordinary circumstances, such as "exceptional and extremely unusual hardship" to a qualifying relative, to warrant a favorable exercise of discretion. *Matter of Jean*, 23 I. & N. Dec. 373, 383 (Att'y Gen. 2002). And finally, the waiver is off-limits completely to individuals labeled aggravated felons who had previously entered the U.S. as LPRs. *Matter of J-H-J-*, 26. I. & N. Dec. 563 (BIA 2015).

**5. An aggravated felony is a permanent bar to naturalization.**

Even if a deported aggravated felon is able to navigate his way to a re-admission to LPR status, that rare individual will face a permanent barrier to citizenship. An applicant for naturalized citizenship must demonstrate good moral character for five years prior to filing. 8 U.S.C. § 1427(a)(3); 8 C.F.R. § 316.2(a)(7). By statute, however, "[n]o person shall be regarded as, or found to be, a person of good moral character * * * who at any time has been convicted of an aggravated felony." 8 U.S.C. § 1101(f)(8). Therefore, a person with an aggravated felony conviction is permanently barred from naturalization, regardless of the severity of the

predicate offense, any showing of rehabilitation, or the passage of time since the conviction. This stringent bar to citizenship remains even if the aggravated felony was "waived" many years ago for purposes of obtaining legal permanent resident status.[6]

## CONCLUSION

Amicus urges the Court to grant Petitioner's request for initial hearing en banc.

Respectfully submitted,

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[6] *Chan v. Gantner*, 464 F.3d 289, 292-294 (2nd Cir. 2006) (applying 8 U.S.C. § 1101(a)(43)(N) retroactively such that a conviction for conspiracy to commit alien smuggling barred citizenship for lack of good moral character despite affirmative grant of relief under 8 U.S.C. § 1182(c) (repealed 1996)); *Socarras v. DHS*, 672 F. Supp. 2d 1320, 1324-1325 (S.D. Fla. 2009) (aggravated felony bar to naturalization was not waived where petitioner had received a waiver for crime when she became a lawful permanent resident).

## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that: (1) this brief complies with Federal Rules of Appellate Procedure 29(b)(4)because it contains 2,599 words, excluding the parts exempted by Rule 32(f); (2) this brief complies with the typeface requirements of Rule 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Iowan Old Style; (3) the digital submission has been scanned for viruses with the most recent version of macOS Mojave operating system (version 10.14.6) and, according to the program, is free of viruses; and (4) the brief is in compliance with the privacy and redaction requirements of Rule 25(a)(5), as well as Federal Rules of Civil Procedure 5.2, as it does not contain any social security numbers or tax identification numbers, birth dates, minors' names, or financial account numbers.

s/ Mark R. Barr
Attorney of record for Amicus Curiae

## CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2021, I electronically filed the foregoing amicus brief with the Clerk of Court using the CM/ECF system which will send notification of such filing to Gregory Michael Kelch and William Clark Minick, attorneys for the Office of Immigration Litigation at the U.S. Department of Justice.

s/ Mark R. Barr
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