No. 14-1096

In the Supreme Court of the United States

JORGE LUNA TORRES, PETITIONER,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL
OF THE UNITED STATES, RESPONDENT

**On Writ of Certiorari to
the United States Court of Appeals for the
Second Circuit**

BRIEF FOR THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

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INTRODUCTION AND INTERESTS OF *AMICI*

The National Immigrant Justice Center and the American Immigration Lawyers Association, as *amici curiae*,[1] respectfully submit this brief to alert the Court to the impact the Government's position would have on lawful permanent residents and individuals fleeing persecution. As a practical matter, the Government's reading of 8 U.S.C. § 1101(a)(43)(E) would expand the category of "aggravated felonies" to include a variety of minor state arson offenses, many of which are punished as misdemeanors. There is nothing in the text of the statute to suggest that Congress intended such a counterintuitive result.

Congress has long recognized that deportation may cause great hardship—leaving children without parents, depriving families of their livelihood, and even exposing the deported person to a risk of persecution and death upon return to his country of origin. In recognition of this risk of hardship—and in acknowledgement of our Nation's obligations under the 1967 Protocol Relating to the Status of Refugees—Congress has created several avenues for relief. These avenues are designed specifically to provide hope for people who would otherwise be subject to deportation—for example, people who have no prior right to be in the United States but have come here seeking safety from persecution, and longstanding lawful permanent residents who have run into trouble with the law. Congress thus

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[1] Counsel for all parties have consented to the filing of this brief, in letters that are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel has made a monetary contribution to the preparation or filing of this brief.

intended these avenues for relief to be open even if the individual has been convicted of a crime—unless the crime was an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43).

This case is the latest in a series of cases in which the Government has attempted to block access to these avenues for relief by adopting an overly expansive definition of "aggravated felony." The definition of "aggravated felony" includes some broad categories of crimes—like "murder" and "rape"—as well as certain "offense[s] described in" specific sections of the federal criminal code. The question before the Court is whether a state offense counts as "an offense described in" a federal criminal statute when it lacks a critical element of that federal offense: the element relating to interstate commerce. As a matter of statutory interpretation, the answer is no. The state arson conviction in this case was not for the "offense described in" the federal arson statute because it was missing an essential element—proof that the burned property was connected to "interstate commerce." 18 U.S.C. § 844(i).

The Government's contrary position would have the bizarre effect of treating a variety of minor state offenses (including misdemeanors) as "aggravated felonies" that block an immigrant's access to relief. As discussed below, many state arson statutes address relatively minor offenses that involve only tiny amounts of damage, cause no injury to anyone, and are punished with only nominal jail time or fines. For example, the state of Arizona punishes arson as a misdemeanor if it involves property worth $100 or less. Ariz. Rev. Stat. § 13-1703. That statute might be used, for example, if a local prosecutor decides to

prosecute a teenager and send him to jail overnight after he is caught setting fire to a neighbor's garbage can—a crime, to be sure, but not a particularly serious one. Under the Government's position, however, that crime would be deemed an "aggravated felony." The teenager could be placed in removal proceedings, and his conviction would deprive him of the ability to seek asylum or make a case for relief from deportation—no matter how long he has lived here or what hardship his deportation would cause. There is no reason to believe that Congress intended such an extreme result.

Amici are well suited to assist the Court in understanding the practical implications of this case for individuals fleeing persecution, as well as for all other individuals who may find themselves in deportation proceedings. The National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the Nation's leading law firms, NIJC provides direct legal services to approximately 8,000 individuals annually. This experience informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage. NIJC has a substantial interest in the issue now before the Court, both as an advocate for the rights of refugees and asylum seekers generally and as the leader of a network of pro bono attorneys who regularly represent refugees and asylum seekers in court. Given NIJC's experience and perspective, it is

well-situated to assist the Court in understanding how the "aggravated felony" issue will impact individuals fleeing religious and political persecution, as well as how it will affect others seeking relief from deportation after spending most of their lives here.

The American Immigration Lawyers Association ("AILA") is a national organization composed of more than 13,000 immigration lawyers throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are 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 immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a pro bono basis.

Amici share a significant interest in ensuring the fair, uniform, and predictable administration of federal immigration laws. As leaders in the field—and as advocates for the rights of immigrants and refugees—*Amici* are uniquely qualified to address the practical consequences of the Government's position in this case and how those consequences should inform the issues of statutory interpretation.

SUMMARY OF ARGUMENT

1. As a practical matter, the Government's position in this case would expand the definition of "aggravated felony" to include a host of minor state arson convictions, including convictions for crimes

that caused no harm and are subject to only minimal jail time. Whereas federal arson convictions are *always* felonies and tend to be more serious—as reflected by the statute's 5-year mandatory minimum sentence—many state convictions relate to very minor offenses, some of which are punished only as misdemeanors.

This alone is a sufficient reason to reject the Government's interpretation. As this Court has held, it must be "very wary" of applying the "aggravated felony" label in a way "the English language tells us not to expect," *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 575 (2010), unless Congress has provided a "clear statutory command to override [the] ordinary meaning." *Lopez v. Gonzales*, 549 U.S. 47, 55 n.6 (2006). No such clear command exists here—and the English language certainly would not lead any reasonable person to expect that the term "aggravated felony" could be applied to include offenses that are neither felonies nor particularly "aggravated." Accepting Petitioner's interpretation avoids that problem.

2. A noncitizen with an "aggravated felony" conviction faces extensive and severe consequences under the immigration laws, and those consequences counsel against an overbroad interpretation. A lawful permanent resident with a conviction for an aggravated felony is ineligible for "cancellation of removal"—a discretionary, equitable means of relief that Congress has made available to certain long-time residents. A person convicted of an aggravated felony is automatically ineligible for asylum, even if she was or would be persecuted in her country of nationality. A noncitizen with an aggravated felony

conviction may face expedited removal proceedings and mandatory detention. And even for an individual who is never placed in removal proceedings, an aggravated felony conviction serves as a permanent, insurmountable barrier to citizenship.

In view of these grave and often catastrophic consequences, Congress could not have intended to expand the definition of "aggravated felony" to include minor state arson offenses, as the Government's position would hold. An aggravated felony conviction will generally put both asylum seekers and lawful permanent residents on an express train to permanent and irrevocable exile. Congress has reserved this treatment for those convicted of particularly serious crimes, and the Court should keep it that way.

3. This Government's position should also be rejected under the "longstanding principle" of "construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." *INS* v. *St. Cyr,* 533 U.S. 289, 320 (2001) (quoting *INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 449 (1987)). The Court follows this approach—akin to the criminal rule of lenity—"because deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan* v. *Phelan,* 333 U.S. 6, 10 (1948).

Here, the Government's position would effectively "banish" or "exile" a longstanding resident based on a minor state arson offense—even if it injured no one, involved property worth less than $100, and subjected the offender to just an overnight stay in jail. Under *St. Cyr, Fong Haw Tan,* and other precedents of this Court, the immigration laws

cannot be read to impose such a drastic result without a clear statement by Congress.

ARGUMENT

I. The Government's position would treat many minor state arson offenses—including misdemeanors—as "aggravated felonies," distorting that term's meaning and violating this Court's precedent.

The question framed in this case is whether, for purposes of the definition of "aggravated felony," a state offense can be one "described in" a particular federal criminal statute where it lacks a critical element of that statute—namely, the element relating to interstate commerce. As relevant here, the aggravated felony statute includes the "offense described in * * * 844(d), (e), (f), (g), (h), or (i) of [Title 18] (relating to explosive materials offenses)." 8 U.S.C. § 1101(a)(43)(E)(i). Section 844(i) describes an offense that arises only where the offender "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property *used in interstate or foreign commerce* or in any activity *affecting interstate or foreign commerce*." (Emphasis added). By its nature, this "interstate commerce" element tends to be a feature of *federal* criminal statutes. As a practical matter, then, for that particular subsection of the "aggravated felony" definition, the "described in" formulation generally limits the offense to one prosecuted under federal law.[2]

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[2] Under the categorical approach, "courts may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior

The Government argues otherwise—and the consequences of its argument are extreme. Whereas arson offenses prosecuted under federal law tend to be quite serious—as evidenced by the 5-year mandatory minimum sentence the statute provides, see 18 U.S.C. § 844(i)—state arson offenses may include far less serious crimes, many of which are not felonies at all.

In Arizona, for example, the crime of "knowingly damaging a structure or property through fire" is punished as a class 1 misdemeanor "if the property had a value of one hundred dollars or less." Ariz. Rev. Stat. § 13-1703. An offense satisfying all those elements would necessarily meet all the elements of the federal arson statute—except the element of interstate commerce. Under the Government's position in this case, then, an Arizona conviction for class 1 misdemeanor arson—relating to personal property worth just a few dollars—would qualify as an "aggravated felony."

Arizona is not alone. Many other states also have laws on their books that punish minor arson as a misdemeanor, with minimal fines and jail time. A sample of relevant statutes is provided here:

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offenses * * *," not to the underlying facts. *Descamps* v. *United States*, 133 S. Ct. 2276, 2283 (2013). Neither the Government nor the courts have considered in any detailed way whether there are, in fact, state offenses that would satisfy all the elements of the federal arson statute.

Ariz. Rev. Stat. § 13-1703	"[K]nowingly and unlawfully damaging a structure or property by knowingly causing a fire or explosion *** is a class 1 misdemeanor if the property had a value of one hundred dollars or less."
Colo. Rev. Stat. § 18-4-103	Whoever "knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any property of another without his consent" is guilty of a class 2 misdemeanor, "if the damage is less than one hundred dollars."
Mich. Stat. § 750.77	Whoever "intentionally damages or destroys by fire or explosive any personal property having a value of $1,000.00 or less * * * is guilty of fifth degree arson, [which is] a misdemeanor."
Minn. Stat. § 609.5632	"Whoever intentionally by means of fire or explosives sets fire to or burns or causes to be burned any real or personal property of value is guilty of a misdemeanor and may be sentenced to imprisonment for not more than 90 days or to payment of a fine of not more than $1,000, or both."
Neb. Rev. Stat. § 28-504	Intentionally setting fire to property or damaging it with an explosive is a misdemeanor if the damage is "less than one thousand five hundred dollars."

N.H. Rev. Stat. § 634:1	Whereas certain categories of arson are punished as a felony—including arson to an occupied or historic structure, or to collect insurance payments, or to property worth more than $1,000—"[a]ll other arson is a misdemeanor."

In all, at least 18 states have misdemeanor arson offenses that could be deemed an "aggravated felony" under the Government's interpretation.[3] Thus, while Petitioner's conviction for third-degree arson was a felony, the Government's interpretation would apply equally to fifth-degree arson under New York law, which is a misdemeanor and is punished accordingly. Compare N.Y. Penal Law § 150.10 (intentionally damaging a "building or motor vehicle" is arson in the third degree, a class C felony) with *id.* § 150.01 (intentionally damaging the "property of another" is arson in the fifth degree, a class A misdemeanor); *id.* § 70.15(1) (imprisonment for a class A misdemeanor "shall not exceed one year").

This is not the first time the Government has attempted to expand the definition of "aggravated felony" in a way that would encompass a minor state offense—and in each instance, this Court has rejected its arguments. See, *e.g.*, *Lopez* v. *Gonzales*, 549 U.S.

[3] See, *e.g.*, Ariz. Rev. Stat. § 13-1703(B); Ark. Stat. § 5-38-301(b)(1); Colo. Rev. Stat. § 18-4-103(3); D.C. Code § 22-303; Haw. Rev. Stat. § 708-8254; Iowa Code § 712.4; Md. Code, Crim. Law § 6-105(c); Mich. Stat. § 750.77(3); Minn. Stat. § 609.5632; Neb. Rev. Stat. § 28-504(3); N.H. Rev. Stat. § 634:1(IV); N.M. Stat. § 30-17-5(B); N.Y. Penal Law. § 150.01; Ohio Rev. Code § 2909.03(B)(2)(a); S.C. Code § 16-11-150(a); Utah Code § 76-6-102(5); Va. Code. § 18.2-80; Wyo. Stat. § 6-3-104(b).

47, 56-57 (2006); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 575 (2010); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1693 (2013). As this Court has explained, the term "aggravated felony" should be given its "common-sense conception" wherever possible. *Lopez*, 549 U.S. at 53. It should not be interpreted in a way "the English language tells us not to expect" without a clear statutory command. *Carachuri-Rosendo*, 560 U.S. at 575.

Under any common-sense understanding, a "felony" "is a serious crime usually punishable by imprisonment for more than one year or by death." *Id.* at 574 (internal quotation marks and alteration omitted). Indeed, federal law itself defines a felony as a crime punishable by "more than one year" in jail. 18 U.S.C. § 3559(a)(5). In addition, "an 'aggravated' offense" is generally understood to be a felony "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime." *Carachuri-Rosendo*, 560 U.S. at 574 (internal quotation marks omitted). Obviously, a conviction for arson punishable by "imprisonment for not more than 90 days" (Minn. Stat. § 609.5632) is neither a "felony" nor "aggravated" under a common-sense interpretation.[4]

[4] At one time, the Board of Immigration Appeals would have agreed. In *Matter of Crammond*, the Board held that only a *felony* conviction for "sexual abuse of a minor" could be "considered an 'aggravated felony' under section 101(a)(43)(A)." 23 I. & N. Dec. 9, 14 (en banc), *vacated on other grounds*, 23 I. & N. Dec. 179 (BIA 2001) (en banc). The Board reasoned that the statute did not clearly indicate whether misdemeanors could equal "aggravated felonies," and accordingly it "turn[ed] to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Ibid.* (internal quotation marks omitted). Some courts of appeals, however,

As Petitioner's brief explains, the language in the "aggravated felony" definition does not provide the "clear statutory command" necessary to overcome the term's common-sense meaning. Take, for example, the penultimate sentence of § 1101(a)(43)—which sweeps in any "offense described in this paragraph whether in violation of Federal or State law." That sentence has been interpreted by this Court to mean that for any offense identified specifically by reference to a federal statute, a state offense is included only if its elements "include the elements" of the federal one. *Lopez*, 549 U.S. at 57. Some of the federal offenses listed in § 1101(a)(43) do have a state law analog. See, *e.g.*, 8 U.S.C. § 1101(a)(43)(A) ("murder," "rape"). Some, however, necessarily do not. See *id.* §§ 1101(a)(43)(H) (offense "described in" federal statute that criminalizes using the Postal Service to demand ransom), (E)(iii) (offense "described in" statute relating to noncompliance with Internal Revenue Code regarding firearms), (L)(i) (offense "described in" federal statute relating to treason against the United States).[5]

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disagreed with the Board's view. See, *e.g.*, *Guerrero-Perez* v. *Holder*, 242 F.3d 727, 737 (7th Cir. 2001). The Board eventually reversed its stance and held that misdemeanors can be "aggravated felonies" under the immigration laws without any clear congressional statement to that effect. See *Matter of Small*, 23 I. & N. Dec. 448, 450 (BIA 2002) (en banc).

[5] Nor would this interpretation "leave subparagraph [(E)(i)] with little, if any, meaningful application." Cf. *Nijhawan* v. *Holder*, 557 U.S. 29, 39 (2009). In *Nijhawan*, there was no federal statute that directly matched the aggravated felony definition, and few state statutes would have done so; thus, adopting Nijhawan's argument would have resulted in a "limited and * * * haphazard" statute. *Id.* at 40. By contrast, Petitioner's argument here would respect the distinct and precise way

For arson, by referring to an "offense described in" § 844(i)—rather than using the generic term "arson"—Congress limited its definition to convictions that would meet the elements of the federal arson statute, including the element of "interstate commerce." As a practical matter, that may well mean that a state arson conviction will not qualify as an aggravated felony under§ 1101(a)(43)(E)(i). But there is nothing absurd or unexpected about that, given that state arson convictions are often far less serious than federal ones. And in any event, state arson convictions that trigger a sentence of more than one year may still qualify as "aggravated felonies" under a different section of the definition—the provision for "crimes of violence" for which the term of imprisonment is "at least one year." 8 U.S.C. § 1101(a)(43)(F); *Matter of Palacios*, 22 I. & N. Dec. 434, 437 (BIA 1998) (so holding).[6] It would have been entirely reasonable for Congress to conclude that this is adequate to protect the interests of the United States where state-law arson is concerned. Petr. Br. 36–38.

Congress chose to define aggravated felonies, whereas it is the Government's approach that would lead to a strained and unusual result.

[6] Moreover, a particular state arson conviction might still have immigration implications even if it is not an "aggravated felony." For example, arson has been held to involve moral turpitude and thus may trigger removability or inadmissibility. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i), 1227(a)(2)(A); *Vuksanovic v. U.S. Atty. Gen.*, 439 F.3d 1308, 1312 (11th Cir. 2006); *Matter of S--*, 3 I. & N. Dec. 617–18, 1949 WL 6507 (BIA 1949). And as discussed below, a judge evaluating whether to grant discretionary relief may take even a minor conviction into account. *Infra* at 19.

Indeed, it is not clear that Congress even intended to include all *federal* arson felonies as "aggravated felonies." Its reference to § 844(i) includes a parenthetical specifying "explosive materials offenses" (8 U.S.C. § 1101(a)(43)(E)(i)), thus apparently excluding any offense based solely on "fire" (18 U.S.C. § 844(i) ("fire or an explosive")). In all, the level of precision Congress used to lay out this definition—with some offenses described generally ("burglary") and some described based on their specific elements (the offense "described in * * * 844(i) of that title (relating to explosive materials offenses)")—cannot simply be brushed aside.

II. The catastrophic, irrevocable consequences of an aggravated felony conviction counsel against an overbroad interpretation.

A conviction for an "aggravated felony" has devastating consequences under the immigration laws, for lawful permanent residents and asylum seekers alike. As courts have imposed no statute of limitations to limit these consequences, the passage of time is no comfort; a noncitizen may be deported based on an aggravated felony conviction many years after it occurs—even when the conviction is only later classified as an aggravated felony. See 8 U.S.C. § 1227(a)(2)(A)(iii); *e.g.*, *Perriello* v. *Napolitano*, 579 F.3d 135, 137 (2d Cir 2009) ("We acknowledge the significant hardship that Perriello and his family will face as a result of the unaccountable delay in the decision to seek his removal decades after his conviction, and notwithstanding his evidently lawful and productive life in the interval."), *Kuhali* v. *Reno*, 266 F.3d 93 (2d Cir. 2001) (finding a noncitizen

deportable pursuant to a removal order issued more than twenty years after the predicate conviction).

The gravity of these consequences counsels against adopting the Government's position. Under the circumstances, Congress could not have intended to impose such grave consequences based upon relatively minor state-law offenses. We outline some of the most serious consequences below.

A. An aggravated felony conviction precludes a longtime resident from seeking relief from removal no matter how inequitable the result.

As Mr. Luna's own case demonstrates,[7] a determination that a particular offense was an "aggravated felony" can have catastrophic consequences, even for longstanding residents of the United States. Most importantly, a person convicted of an aggravated felony may not seek "cancellation of removal." 8 U.S.C. §§ 1229b(a)(3). "Cancellation of removal" is a form of discretionary relief; through this mechanism, Congress allows individuals who have lived in the United States for at least seven years following their admission, and who have been lawful permanent residents for at least five years, to make a case to stay in the United States based on the equities. Positive factors include family ties within the United States, residency of long duration, evidence of hardship to the respondent and family if deportation occurs, service in the Armed Forces, history of employment, existence of property or

[7] Although the removal proceedings use Petitioner's full name, Jorge Luna Torres, he refers to himself as George Luna, and that preference is respected here.

business ties, existence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and evidence attesting to a respondent's good moral character. See, *e.g.*, *Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998); *Matter of Wadud*, 19 I. & N. Dec. 182 (BIA 1984); *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978).

Given the grave consequences of deportation, it should come as no surprise that Congress created this mechanism for 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 mother or father 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 United States and their country of origin to visit loved ones.

For a lawful permanent resident ("LPR") like Mr. Luna—who has lived in this country for nearly all his life—deportation is among the most extreme punishments imaginable. It amounts to permanent exile from the only home he has ever known. Many of these noncitizens have spent their entire lives in the United States and do not even remember their time in the nation to which they are being deported.[8] As Learned Hand once observed:

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[8] See, *e.g.*, *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171 (5th Cir. 2008) (LPR since 1977, 30 years in U.S.); *Lopez-De Rowley* v. *INS*, 253 F. App'x 62, 64 (2d Cir. 2007) (LPR since 1970) *Knutsen* v. *Gonzales*, 429 F.3d 733, 735, 739–40 (7th Cir. 2005) (LPR since 1957); *Chang* v. *INS*, 307 F.3d 1185, 1187–90 (9th Cir. 2002) (LPR since 1975); *Ferreira* v. *Ashcroft*, 382 F.3d 1045,

> 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 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 (N.Y. 1926); accord *Jordan* v. *De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (deportation means "a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens").

Under the Government's position in this case, a lawful permanent resident who was convicted of a minor state arson misdemeanor will have no ability to access this form of relief. He will not have any

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1047 (9th Cir. 2004) (LPR since age 11); *Valenzuela-Zamarano* v. *Ashcroft*, 11 F. App'x 805, 806 (9th Cir. 2001) (LPR since age five); *Amaral* v. *INS*, 977 F.2d 33 (1st Cir. 1992) (LPR since age two); *Shurney* v. *INS*, 201 F. Supp. 2d 783, 786 (N.D. Ohio 2001) (entered U.S. at age three); *Minto* v. *Mukasey*, 302 F. App'x 13 (2d Cir. Dec. 5, 2008) (entered U.S. at age eight); *Fernandez* v. *Mukasey*, 544 F.3d 862 (7th Cir. 2008) (Nos. 06-3987, 06-3994, 06-3476) (two LPRs, one in the U.S. since age nine, another in the U.S. for over 40 years); *Matter of Flores-Gomez*, 2004 WL 2374449, at *1 (BIA Jul. 27, 2004) (admitted to U.S. in 1943).

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. It is difficult to imagine how devastating this would be—both to the noncitizen himself and to his family.

These consequences are particularly troubling with respect to individuals who have served in the U.S. Armed Forces. For any lawful permanent resident who finds himself in removal proceedings, a record of military service would ordinarily weigh in favor of granting cancellation of removal. Many lawful permanent residents 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). Indeed, in recognition of the benefits that noncitizens can offer the military, the Government's recruitment of noncitizens is on the rise. Gerry J. Gilmore, *Military Recruits Non-citizen Health Care Workers, Linguists*, AMERICAN FORCES PRESS SERVICE, Dec. 5, 2008. There are approximately 29,000 noncitizens serving in the United States military currently, with another 8,000 enlisting each year. *Ibid.* Under the Government's

position, however, a veteran who committed a minor state arson offense—no matter how long ago—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.

Importantly, cancellation of removal remains a matter of discretion. See *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013). A ruling in Petitioner's favor would not mean that he would "escape[] deportation"; it would only mean that he would "avoid[] mandatory removal." *Ibid.* Accordingly, as this Court has already observed, "to the extent that [its] rejection of the Government's broad understanding of the scope of 'aggravated felony' may have any practical effect on policing our Nation's borders, it is a limited one." *Ibid.* (citing *Carachuri-Rosendo*, 560 U.S. at 581).

In borderline cases, the exercise of discretion is a far better way to assess the gravity of an offense under the circumstances. The weighing of equities may include the fact that the applicant was previously convicted of a crime, taking into account whether the offense was minor or serious, how long ago it was committed, and whether he has demonstrated that he has changed his ways—along with other factors such as his military service, character, family ties, employment history, and hardship to family members. An immigration judge is well-suited to make that determination, exercising discretion based on a full record. Absent a clear statutory command, this Court should not assume that Congress intended to replace that discretion with the blunt instrument of denying all relief.

B. An aggravated felony conviction bars a noncitizen from seeking asylum.

An aggravated felony conviction permanently blocks a noncitizen from seeking refuge in the United States 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 expand the definition of "aggravated felony." Indeed, the history of refugee protection in the United States demonstrates that a noncitizen should be barred from this relief only if his crime was particularly serious.

The current mechanism for asylum in the United States was born more than 40 years ago, when the United States acceded to the Protocol Relating to the Status of Refugees. Under the Protocol, the United States made a commitment to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, developed in the aftermath of World War II. See *INS* v. *Stevic*, 467 U.S. 407, 416 (1984). Article 33 of the Convention—incorporated by reference and reproduction 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 would present to the host country:

> 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.

CONVENTION RELATING TO THE STATUS OF REFUGEES, July 28, 1951, 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 Immigration and Nationality Act ("INA"), including to add a provision codifying the method by which a refugee can apply for asylum. 8 U.S.C. § 1158; *Cardoza-Fonseca*, 480 U.S. at 423. Asylum is a form of discretionary relief that allows the noncitizen to stay and work legally in the United States, seek derivative asylum status for family members, and ultimately seek permanent residence and citizenship. See, *e.g.*, 8 C.F.R. § 209.2; 8 U.S.C. § 1158.[9]

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[9] Congress also created a separate form of relief, known as "withholding of removal," which is mandatory upon a showing of a clear probability of persecution. 8 U.S.C. § 1231(b)(3). By

Congress also incorporated language that tracks the exception in the second paragraph of Article 33. Thus, it placed the relief 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." *Id.* § 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.[10] Yet the context and language of these provisions demonstrates that Congress intended the term "aggravated felony" to be equivalent to a "particularly serious crime" that makes the individual "a danger to the community." This undermines the Government's argument—

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itself, however, this form of relief does not address all of this Nation's obligations under the Protocol. For instance, the Protocol requires that to the extent possible, each nation must facilitate the assimilation of refugees into society. By definition, "withholding of removal" cannot achieve this; only a grant of asylum allows a refugee to achieve lawful permanent residence status and thus to move toward full assimilation in U.S. society, including naturalization. 8 U.S.C. §§ 1445–1448; see also CONVENTION art. 28 (requiring nations to provide refugees with travel documents); 8 C.F.R. § 223.1 (denying such documents to recipients of "withholding" relief).

[10] See, *e.g.*, *Berhe* v. *Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006) (even in the face of severe religious persecution in an Eritrean national's country of origin, access to relief depended in the first instance on whether prior conviction was an aggravated felony).

which, as shown above, would expand the definition to include a variety of very minor state arson convictions.

C. 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 and the opportunity to defend himself. The INA provides for the creation of special expedited removal proceedings for noncitizens with a conviction for an aggravated felony. 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. *Id.* § 1228(c).

The denial of these protections could have devastating consequences. In one recent case, for example, a Congolese woman was summarily ordered removed based on a 2011 conviction for misdemeanor battery, which the Department of Homeland Security 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 WL 802339 (U.S. May 14, 2015). That allegation was in error under *Johnson* v. *United States*, 559 U.S. 133 (2010). See *United States* v. *Diaz-Calderone*, 716 F.3d 1345, 1349 (11th Cir. 2013). 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. After a lengthy appeals process, 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. *Malu*, 764 F.3d at 1287. Although the Government ultimately settled the litigation with Ms. Malu and allowed her to remain here, the Eleventh Circuit's decision demonstrates the potentially dire consequences of expedited proceedings.

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 and Customs Enforcement 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) (detaining an immigrant for over two years during removal proceedings initiated on account of an aggravated felony conviction); *Valansi* v. *Reno*, 278 F.3d 203 (3d Cir. 2002) (detaining an immigrant pursuant to section 1226(c) for nearly a year pending the completion of removal proceedings). 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.

D. An aggravated felony conviction is a permanent bar to naturalization.

An aggravated felony conviction also makes it impossible for a noncitizen to show good moral character. Among other consequences, this operates as a permanent barrier to citizenship, as long as the

conviction occurred after the INA amendments became effective in 1990. An applicant for naturalized citizenship must demonstrate good moral character for a period of time, generally 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, and even if the crime was committed prior to its categorization as an aggravated felony.[11] As a matter of fairness—and under the rule of lenity, discussed below—this Court should not impose such an irrevocable and drastic consequence on a minor state offense unless Congress says so explicitly.

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[11] Letter, Miller, Acting Asst. Comm. Adjudications HQ 316-C (May 5, 1993), reprinted in 70 No. 22 *Interpreter Releases* 752, 769-70 (June 7, 1993); *Chan* v. *Gantner*, 464 F.3d 289, 292–94 (2d Cir. 2006) (applying § 1101(a)(43)(N) and (U) retroactively such that a conviction for conspiracy to commit alien smuggling barred citizenship for lack of good moral character despite a prior waiver); *Socarras* v. *DHS*, 672 F. Supp. 2d 1320, 1324–25 (S.D. Fla. 2009) (aggravated felony bar to naturalization was not waived where petitioner had received a waiver for crime when she became an LPR).

III. The Government's position violates this Court's canon construing ambiguity in the immigration laws in favor of noncitizens.

As Petitioner's brief explains, the plain language of § 1101(a)(43)(E)(i) requires holding that a state offense must satisfy *all* elements of the relevant federal criminal statute in order to qualify as an "offense described in" 18 U.S.C. § 844(i). That includes the element of interstate commerce. In the event that the Court finds the statute ambiguous, however, any ambiguity should be construed in favor of the noncitizen, given the tremendously harsh consequences that would otherwise result.

For many years, this Court has recognized a "longstanding principle" of "construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." *INS* v. *St. Cyr,* 533 U.S. 289, 320 (2001) (quoting *INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 449 (1987)). This principle—akin to the criminal rule of lenity—applies to the immigration laws in light of the harsh consequences that flow from deportation, as discussed above. *Fong Haw Tan* v. *Phelan,* 333 U.S. 6, 10 (1948) (resolving statutory ambiguities in favor of noncitizen "because deportation is a drastic measure and at times the equivalent of banishment or exile"). In *Leocal* v. *Ashcroft,* for example—another case that turned on whether a particular conviction would lead to a lawful permanent resident's deportation—this Court explained that even if the plain language did not require it, "we would be constrained to interpret any ambiguity in the statute in petitioner's favor." 543 U.S. 1, 12 n.8 (2004).

This canon of construction has particular force in situations where a favorable interpretation of a predicate statute serves that statute's "humanitarian purpose." *INS* v. *Errico*, 385 U.S. 214, 225 (1966) (interpreting an INA provision to preclude the deportation of a noncitizen who obtained entry through misrepresentation under certain conditions). As discussed above, the statutes providing for cancellation of removal and asylum were enacted to avoid overly harsh results, to protect the interests of United States citizens who would suffer extreme hardship due to a noncitizen's removal, and (for asylum) to reflect the United States' international treaty obligations.[12] All of these purposes call for application of this canon.

This case demonstrates why this principle is so important. Mr. Luna was sentenced to one day's imprisonment and five years of probation. Yet after spending 32 years among us—working hard, buying a home, going to school, and providing for himself and his fiancé as she completes an advanced degree—his hopes hang on the interpretation of a statute that has stumped educated lawyers. *Padilla* v. *Kentucky*, 559 U.S. 356, 378 (2010) (Alito, J. concurring in the judgment) (noting "as has been widely acknowledged, determining whether a particular crime is an 'aggravated felony' or a 'crime involving moral turpitude' is not an easy task"). If the statute is unclear, then Mr. Luna could not have been on notice of the consequences of his actions when he committed

[12] Cf. *Murray* v. *Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains").

them—a fundamental Due Process problem that the rule of lenity and this canon are designed to solve.

In short, any ambiguity in the definition of "aggravated felony" should be resolved in favor of Mr. Luna. This canon of construction counsels that the Court should remain wary of interpretive expansion. If Congress wishes to extend the devastating consequences of an aggravated felony conviction to minor state law offenses, it must express its intention in clear statutory terms.

CONCLUSION

Amici urge this Court to reverse the decision of the Second Circuit and hold that for purposes of 8 U.S.C. § 1101(a)(43), a crime is not an "offense described in" a federal criminal statute unless it meets *all* the elements of that statute, including the interstate commerce requirement.

Respectfully submitted.

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