No. 16-54

In the Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

CHUCK ROTH
National Immigrant Justice Center
208 S. LaSalle Street
Suite 1300
Chicago, IL 60601
(312) 660-1613

Counsel for National Immigrant Justice Center

MICHAEL B. KIMBERLY
Counsel of Record
KEVIN S. RANLETT
MADELEINE L. HOGUE
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly@mayerbrown.com

Counsel for *amici curiae*

additional counsel listed on inside cover

REBECCA SHARPLESS
MARK BARR
American Immigration
Lawyers Association
1331 G Street, NW
Ste. 300
Washington, DC 20005
(202) 507-7600

Counsel for the American
Immigration Lawyers Association

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INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*

The National Immigrant Justice Center and the American Immigration Lawyers Association respectfully submit this brief as *amici curiae* to alert the Court to the severe—and unintended—consequences that the government's expansive reading of the aggravated-felony statute would create.[1]

Congress knows well that deportation causes great hardship. Deportation divides families and can deprive them of their means of support. It separates children from their parents. And it can expose the deported person to a risk of persecution and death upon return to his or her country of origin. In recognition of these hardships—and in acknowledgement of our Nation's obligations under the 1967 Protocol Relating to the Status of Refugees—Congress has created several avenues for individuals facing deportation to seek relief. Among these are laws providing for cancelation of removal and asylum, which grant immigration judges discretionary authority to halt removal in cases where the nation's interests and values would be better served by allowing the noncitizen to remain in the United States. See 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i); *id.* §§ 1229b(a)(3), (b)(1)(C). Congress intended these avenues for relief to be open even if the individual has been convicted of a crime—unless the crime is an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43).

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to the filing of this brief, in letters that are on file with the Clerk or submitted contemporaneously with this brief.

The government would block access to these avenues for requesting relief from removal by urging an expansive definition of "aggravated felony." The question before the Court is whether convictions under the seven state statutes that criminalize consensual sexual intercourse between a 21-year-old and a 17-year-old or a 20-year-old and a 16-year-old (such as California Penal Code § 261.5(c)) constitute the "aggravated felony" of "sexual abuse of a minor" under Section 1101(a)(43)(A)—and therefore constitute grounds for mandatory removal. As a matter of statutory interpretation, the answer is no.

Among other reasons, petitioner has explained that, under the categorical approach this Court outlined in *Taylor* v. *United States*, 495 U.S. 575 (1990), statutes like California Penal Code § 261.5(c) fall well outside the definition of "aggravated felon[ies]." *Amici* agree with petitioner in all respects.

Amici submit this brief to elaborate on one particular reason why petitioner is correct: the government's interpretation of the aggravated-felony statute contravenes this Court's longstanding rule that ambiguities in deportation statutes should be construed in favor of the noncitizen because of the severity of the consequences of deporting immigrants whom Congress intended to be permitted to seek permission to remain. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001). This canon of statutory construction is sometimes called the rule of "immigration lenity." *E.g.*, Irene Scharf, *Un-Torturing the Definition of Torture and Employing the Rule of Immigration Lenity*, 66 RUTGERS L. REV. 1, 26-33 (2013).

The government's reading of Section 1101(a)(43)(A) would jettison this principle. As a practical matter, the government's reading would expand the

category of "aggravated felonies" to include conduct that is not aggravated, is not a felony, and, in many states, is not even criminalized. *Amici* agree with petitioner that the government does not point to anything in the text or legislative history of the statute demonstrating that Congress intended such an arbitrary and counterintuitive result, and that the government's rationale flouts the rule of lenity applied in both criminal and immigration cases. Petr. Br. 14-29, 38-43, 45-48.

The government's approach also runs counter to the statutory structure, which vests immigration judges with discretion to decide eligibility for asylum and cancellation of removal in most cases. The government's assertion that conduct governed by low-level statutes such as Section 261.5(c) constitutes an "aggravated felony" would prevent immigration judges from weighing the equities in precisely the sorts of cases that Congress intended them to have discretion. To the extent that doubt remains, the rule of immigration lenity applies—weighing conclusively against the government's arbitrary and counterintuitive approach.

Amici have a deep understanding of the practical implications of this case for individuals who find themselves in removal 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 noncitizens generally and as the leader of a network of pro bono attorneys who regularly represent noncitizens 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 (AMA) 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 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 conse-

quences underscore the need to apply this Court's rule of immigration lenity.

SUMMARY OF ARGUMENT

1. This Court has long recognized that provisions of deportation statutes (like the "aggravated felony" definition) should be construed in favor of the noncitizen because the consequences of removal are so harsh. This canon of construction—sometimes known as "the rule of immigration lenity" (*e.g.*, Scharf, 66 Rutgers L. Rev. at 26)—has particular force where the provision under consideration "was designed to accomplish a humanitarian result" (*INS* v. *Errico*, 385 U.S. 214, 225 (1966)). That is the case here. The statutes providing for cancellation of removal and asylum were designed to avoid overly harsh results, protect the interests of United States citizens who would suffer due to a noncitizen's removal, and honor our country's commitment to international law. Where ambiguous, these statutes should be interpreted in favor of the noncitizen.

2. The government proposes an overly-broad reading of "aggravated felony," one that would sweep in minor offenses, including conduct that many states do not even forbid. As petitioner demonstrates, only seven states criminalize consensual sexual intercourse between a 21-year-old and a 17-year-old or between a 20-year-old and a 16-year-old. Petr. Br. 20-21. Of the seven states that criminalize this conduct, only two states have chosen to designate that crime a "felony." *Id.* at 33. And regardless of the felony or misdemeanor designation, states tend to place such offenses on the lower rungs of the punitive hierarchy. Arizona, for example, criminalizes sexual conduct with older minors as a "class 6 felony" punishable by as little as four months of incarceration.

Ariz. Rev. Stat. Ann. §§ 13-1405, 13-702(D). As a result of this low-level treatment, many individuals who would be designated "aggravated felons" under the government's definition received only a minor custodial sentence for their underlying conviction—or no jail time at all.

Amici agree with petitioner that *Taylor* forecloses the determination that conduct criminalized in only seven jurisdictions constitutes an "aggravated felony" under Section 1101(a)(43). See *Taylor* v. *United States*, 495 U.S. 575, 598 (1990) (relying on the law of the majority of states, the federal government, and the Model Penal Code to determine a generic definition of the offense at issue). If the Court nonetheless finds the aggravated-felony provision at issue here ambiguous, the Court should apply the longstanding rule on interpreting ambiguities in deportation statutes in favor of the noncitizen. This principle is especially pertinent here because the title and nature of the aggravated-felony statute suggest that Congress intended to exclude low-level conduct, such as the conduct covered by California Penal Code § 261.5(c). With such commonsense indicators trending towards exclusion, to read the statute otherwise would be counterintuitive—a result that the principle of lenity is designed to avoid.

3. Finally, a narrow reading of the "aggravated felony" category is supported by the statutory structure, which makes access to discretionary relief the rule—not the exception—for long-term permanent residents. This structure reflects a congressional determination that, in most cases, immigration judges should have discretion to assess the gravity of an offense under the circumstances. For example, for cancellation of removal, the relevant circumstances may

include prior criminal records (or lack thereof), whether the offense was minor or serious, how long ago it was committed, and whether the applicant has been rehabilitated—along with other factors such as military service, character, family ties, employment history, and hardship to family members. Immigration judges are well-suited to make these sorts of determinations, exercising discretion based on the totality of circumstances. The government's interpretation of Section 1101(a)(43) would prevent the exercise of discretion in cases that merit relief, demanding deportation in circumstances where it is manifestly unwarranted.

ARGUMENT

I. THE COURT CONSTRUES DEPORTATION STATUTES IN FAVOR OF THE NONCITIZEN BECAUSE THE CONSEQUENCES OF REMOVAL ARE SO HARSH.

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 ensures that the harsh consequences resulting from deportation are visited only upon those whom Congress truly intended to be subject to removal. Because "deportation is a drastic measure and at times the equivalent of banishment [or] exile," this Court "will not assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the [statutory language]." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948).

This canon of construction is rooted in the same fundamental notions of fairness and due process underlying the doctrine of criminal lenity. If an ambiguity in a deportation statute regarding the impact of a past offense on removability were suddenly interpreted against noncitizens, the effective penalty for that offense would be retroactively increased. But as this Court has explained, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). Indeed, this Court has repeatedly relied upon the criminal rule of lenity in immigration cases. See, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Even if [the statute] lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in [the noncitizen's] favor," whether "in a criminal or noncriminal context."); *Bonetti* v. *Rogers*, 356 U.S. 691, 699 (1958) ("ambiguity" in Anarchist Act of 1918 must be "resolved in favor of lenity" (quoting *Bell* v. *United States*, 349 U.S. 81, 83 (1955))).[2]

As petitioner here has demonstrated, whether to adopt the government's interpretation of the phrase "aggravated felony" in Section 1101(a)(43)(A)—which would sweep in offenses under the laws of a handful of states criminalizing sexual contact between 21 and

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[2] *Amici* agree with petitioner that, as a hybrid statute with criminal and civil implications, the aggravated felony definition is subject to criminal lenity. Petr. Br. 38-43. But even without considering the rule of criminal lenity, the results in *Leocal* and *Bonetti* were consistent with—and required by—this Court's rule that deportation statutes should be interpreted in favor of the noncitizen.

17 year olds—is not a close question. Petr. Br. 14-35. But even if the issue were in doubt, this Court's rule of lenity for immigration statutes requires that doubt to be resolved against the government's position.

Like the provisions addressed in *St. Cyr* and *Fong Haw Tan*, the "aggravated felony" provisions at issue here impose devastating consequences on lawful permanent residents and asylum seekers alike. A person convicted of an "aggravated felony" is deportable under 8 U.S.C. § 1227(a)(2)(A)(iii). Moreover, when deportation proceedings are instituted on the basis of an aggravated felony, removal is mandatory; the noncitizen cannot seek discretionary relief such as asylum or cancellation of removal. *Id.* §§ 1158-(b)(2)(A)(ii), (B)(i); *id.* §§ 1229b(a)(3), (b)(1)(C). Even worse, because courts have imposed no statute of limitations or *ex post facto* protections to limit these consequences, a noncitizen may be deported based on the subsequent reclassification of an offense as an aggravated felony many years after the offense was actually committed. See *id.* §§ 1227(a)(2)(A)(iii); see also, *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, 110-111 (2d Cir. 2001) (similar).

The rule of immigration lenity has particular force where, as here, the statute at issue "was designed to accomplish a humanitarian result." *INS* v. *Errico*, 385 U.S. 214, 225 (1966). *Errico* involved an INA provision providing for removal of noncitizens who had originally procured entry into the United

States by fraud. *Id.* at 215. The provision contained an exception for the spouse, parent, or child of a United States citizen or lawful permanent resident so long as the person seeking an exception had been "otherwise admissible at the time of entry." *Ibid.* The Court interpreted the term "otherwise admissible" in favor of the noncitizen,[3] explaining that the exception should be read broadly "in the light of its humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens." *Id.* at 225.

The statutes providing for cancellation of removal and asylum mirror the structure of the provision analyzed in *Errico*. They were enacted with humanitarian goals in mind: avoiding overly harsh results, protecting citizens who would suffer if a noncitizen were removed, and ensuring the safety of refugees fleeing persecution. The denial of a request for cancellation of removal or asylum results in the ultimate immigration consequence—deportation. Thus, where ambiguous, these provisions should be interpreted in favor of the noncitizen.

II. THE GOVERNMENT'S APPROACH WOULD READ "AGGRAVATED FELONY" TO COVER LOW-LEVEL OFFENSES FOR WHICH CONGRESS DID NOT INTEND TO IMPOSE MANDATORY REMOVAL.

This Court has cautioned against interpreting the "aggravated felony" provision to encompass of-

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[3] The Court held that a visa applicant who lied about his nationality to avoid quota restrictions was "otherwise admissible at the time of entry" even though disclosing his correct nationality would have resulted in the denial of his application. *Errico*, 385 U.S. at 224-225.

fenses that may be neither aggravated nor felonies—a result that "the English language tells us not to expect." *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 575 (2010). The government's approach in this case ignores that warning. Instead, the government proposes to interpret Section 1101(a)(43)(A) as sweeping in low-level offenses, including misdemeanors, involving conduct that is not even a crime in most jurisdictions. As petitioner demonstrates, federal law does not criminalize consensual sexual intercourse between a 21-year-old and someone who is almost 18. Petr. Br. 17-19. Nor does the Model Penal Code, and nor do the vast majority of states. *Id.* at 20-21. Indeed, while every state criminalizes sex between someone under 16 and a person more than four years older, only seven states criminalize the least-culpable conduct at issue here. *Ibid.*

The immigration consequences of an "aggravated felony" conviction are vastly disproportionate to the culpability associated with violations of statutes such as California Penal Code § 261.5(c). Of the seven States that criminalize consensual sexual intercourse between a 21-year-old and a 17-year-old, only two States have chosen to designate that crime a "felony." Ariz. Rev. Stat. Ann. § 13-1405; Idaho Code § 18-6101(2). Four states deem the offense a misdemeanor. N.D. Cent. Code § 12.1-20-05(1); Or. Rev. Stat. § 163.415(1); Va. Code Ann. § 18.2-371; Wis. Stat. § 948.09. And one (California) provides for felony or misdemeanor charges at the discretion of the prosecutor. Cal. Penal Code § 261.5(b). Although state-law felony and misdemeanor designations may not be themselves determinative of whether particular conduct is an "aggravated felony" under the INA, they are certainly relevant insofar as they reflect a considered determination by the States as to the na-

ture of consensual sexual intercourse between an older teenager and someone relatively close in age. States reasonably treat it as a low-level crime deserving of low-level punishment, not a sex-abuse crime meriting harsher criminal sanction.

It is instructive, moreover, that regardless of the felony or misdemeanor designation assigned, States tend to situate statutes such as California Penal Code § 261.5(c) on the lower rungs of the punitive hierarchy. Arizona, for example, criminalizes sexual conduct with older minors as a "class 6 felony" punishable by as little as 4 months of incarceration. Ariz. Rev. Stat. Ann. §§ 13-1405, 13-702(D). By contrast, sexual conduct with younger minors, such as a 13-year-old, is a class 2 felony punishable with between 3 and 12.5 years imprisonment—or even longer, depending upon the age of the perpetrator. *Id.* § 13-702(A), (C), (D). Thus, although Arizona applies the felony designation to sexual conduct with older minors—such as the 16-year-old at issue in this case—it does not treat such conduct as an "aggravated" felony and recognizes that felony-level punishment may not be appropriate in every case.

Similarly, although California Penal Code § 261.5(c) affords prosecutors discretion to determine whether a felony or misdemeanor charge is warranted, the statute as a whole allocates culpability differently based on the age of the child and the perpetrator. Compare Cal. Penal Code § 261.5(c) (minor more than three years younger than the perpetrator), with *id.* § 261.5(d) (minor younger than 16 when the perpetrator is 21 or older). Predictably, the section involving a wider age gap is subject to stricter sentencing guidelines. Cal. Penal Code §§ 261.5(d), 1170(h). For example, in this case, petitioner was 20 years old

when he had sexual contact with his 16-year-old girlfriend, and although he was charged with a felony violation of California Penal Code § 261.5(c), he was not charged with the higher offense of violating California Penal Code § 261.5(d). Petr. Br. 6.

Some States designate the relevant conduct a misdemeanor rather than a felony. Petr. Br. 33. But they also reserve harsher penalties for offenses involving sexual relationships with younger minors.[4]

As a result of this low-level treatment, many individuals who would be designated "aggravated felons" under the government's definition received only a minor custodial sentence for their underlying conviction, or no jail time at all. In some cases, for example, the criminal sentence was limited to probation or community service. See, *e.g.*, *People* v. *Benitez*, 2009 WL 1564963, at *1 (Cal. Ct. App. June 4, 2009) (three years of probation and no jail time).

Other cases involve minimal jail time. In one case, a noncitizen applying for asylum and cancellation of removal had been convicted at the age of 18 of a misdemeanor violation of California Penal Code § 261.5 resulting from his consensual relationship with his girlfriend. He was sentenced to 18 days in jail (with credit for 12 days of time served), along with three years of probation. Under the govern-

[4] See, *e.g.*, N.D. Cent. Code § 12.1-20-05 (sexual act with a minor age fifteen or older is a class A misdemeanor, unless the perpetrator is twenty-two years of age or older, in which case it is a class C felony); Wis. Stat. §§ 948.09, 948.02 (sexual intercourse with a minor age 16 or older is a Class A misdemeanor, but sexual intercourse with a minor under the age of 16 is a Class B or Class C felony, depending on the age of the child).

ment's approach, his offense would be deemed an "aggravated felony."[5]

In some cases, the sexual conduct at issue between the noncitizen and his teenage girlfriend falls well short of intercourse. See, *e.g.*, 18 Pa. Cons. Stat. § 3126(a)(8). Under the government's approach, offenses under these statutes too would be deemed to be aggravated felonies, despite the low-level nature of the conduct. See, *e.g.*, *Matter of Colon*, 2004 WL 2374484, at *1 (BIA 2004).

In short, the government's interpretation of Section 1101(a)(43) would deem conduct that few states criminalize and that often receives only minor penalties in the handful of states that do prohibit it as an "aggravated felony." That counterintuitive result confirms that the government is mistaken. But even if there were any doubt, that doubt should be resolved in favor of petitioner, in accordance with this Court's longstanding rule that ambiguities should be resolved in favor of the noncitizen.

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[5] California prosecutors report exercising their discretion to choose between felony and misdemeanor charges by charging what they perceive to be low-culpability cases as misdemeanors, thereby further mitigating the consequences of conviction. Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 730-731 (2006) (compiling in-person interviews and survey data from district attorneys' offices across California). Characteristics that may warrant misdemeanor treatment include cooperation by the defendant, supportive behavior by the defendant—*e.g.*, child support or marriage—and the absence of violence, pregnancy, multiple victims, manipulation, coercion, or a position of trust. *Ibid.* Additionally, many "[c]ases with sixteen and seventeen year-old victims or twenty year-old defendants * * * are treated as misdemeanors or result in lenient sentences." *Id.* at 744.

III. THE GOVERNMENT'S APPROACH WOULD DEPRIVE IMMIGRATION JUDGES OF DISCRETION TO CONSIDER CANCELLATION OF REMOVAL OR ASYLUM IN APPROPRIATE CASES.

Any lingering uncertainties on the question presented are further "clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). Here, the statutory structure confirms that petitioner's reading of the statute is correct.

Congress drafted immigration law to avoid overly harsh results while still permitting the effective policing of our Nation's borders. To achieve these goals, Congress provided immigration judges with discretion to make judgment calls in light of the facts and circumstances of the case. But an "aggravated felony" conviction removes that discretion, mandating removal regardless of how compelling the countervailing equities may be. To read such a provision broadly would upset the statutory scheme because it would divest immigration judges of discretion in precisely the sorts of cases where exercise of discretion is most warranted. This is not a result that Congress could have intended.

A. An "aggravated felony" finding precludes cancellation of removal or asylum.

1. As petitioner's case demonstrates, a determination that a particular offense is an "aggravated

felony" has catastrophic consequences, even for long-standing lawful permanent residents of the United States. For example, a person convicted of an aggravated felony may not seek "cancellation of removal." 8 U.S.C. § 1229b(a). Cancellation of removal is a form of discretionary relief through which 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, may request an order allowing them to stay in the United States. Equitable factors relevant to an immigration judge's exercise of discretion under this provision 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 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, 11 (BIA 1998); *Matter of Wadud*, 19 I. & N. Dec. 182, 186-187 (BIA 1984); *Matter of Marin*, 16 I. & N. Dec. 581, 584-585 (BIA 1978).

Congress's provision for cancellation of removal reflects its understanding that the consequences of removal are felt as much by the noncitizen's family, friends, and community as by the noncitizen himself. Deporting a child's mother or father breaks apart a family forever and may leave young American citizens to fend for themselves or in foster care, from whence they face "formidable barriers to reunification with their families." SETH FREED WESSLER, APPLIED RESEARCH CENTER, SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 6 (2011) (of-

fering a "conservative[] estimate[]" of "at least 5,100 children currently living in foster care whose parents have been either detained or deported"). The effects of deportation are most pronounced in lower-income families that 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 such as petitioner, who has lived in this country for his entire adult life, deportation is among the most extreme punishments possible. 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.[6] As Learned Hand once observed:

> [W]e think it not improper to say that deportation under the circumstances would be de-

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[6] See, *e.g.*, *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 180 (5th Cir. 2008) (lawful permanent resident ("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, 739-740 (7th Cir. 2005) (LPR since 1957); *Chang* v. *INS*, 307 F.3d 1185, 1187-1190 (9th Cir. 2002) (LPR since 1975); *Ferreira* v. *Ashcroft*, 382 F.3d 1045, 1047 (9th Cir. 2004) (LPR since age 11); *Valenzuela-Zamorano* v. *Ashcroft*, 11 F. App'x 805, 806 (9th Cir. 2001) (LPR since age five); *Amaral* v. *INS*, 977 F.2d 33, 34 (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, 13 (2d Cir. 2008) (entered U.S. at age eight); *Fernandez* v. *Mukasey*, 544 F.3d 862, 864-865 (7th Cir. 2008) (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 2004) (admitted to U.S. in 1943).

> plorable. 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 crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.

United States ex rel. Klonis v. *Davis*, 13 F.2d 630, 630 (2d Cir. 1926); accord *Jordan* v. *De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (removal 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 approach, a 21-year-old who engages in consensual sexual intercourse with a 17-year-old and is convicted under a statute like California Penal Code § 261.5(c) would be statutorily barred from seeking cancellation of removal. Such a noncitizen would have no opportunity to argue that, as a matter of equity, he should be allowed to remain in this country; or to present evidence of family ties, history of employment, proof of rehabilitation, and good moral character. He would, instead, face automatic deportation—no matter how long he had lived in the United States; no matter how minimal and remote his connections to his country of origin; and no matter how many people in the United States depend on him for support.

Under petitioner's approach, by contrast, immigration judges would have the leeway to consider these factors and to grant relief when warranted. Conversely, in those cases where the conduct of conviction is truly objectionable, immigration judges would be able to exercise their discretion to deny cancellation. There is, accordingly, no reason to be concerned that petitioner's reading of the statute would result in fewer deportations of those whom Congress truly meant to deport.

2. The practical, human consequences of the government's approach to the question presented are, for these reasons, deeply troubling. Take, for example, 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. See, *e.g.*, Anita U. Hattiangadi et al., CNA Corp., Non-Citizens in Today's Military: Final Report 1 (2005). Indeed, in recognition of the benefits that noncitizens offer the military, the government has made a concerted effort "to provide services and opportunities to service members, veterans, and their families interacting with the U.S. immigration system." Barack Obama, Presidential Memorandum—Supporting New American Service Members, Veterans, and their Families (Dec. 22, 2016). Since 2001, over 110,000 service members have been naturalized. *Ibid.* But many more service members remain noncitizens. Under the government's position, however, a veteran who violated California Penal Code § 261.5(c)—no matter how long ago, and no matter

the circumstances—would have no opportunity to argue for cancellation of removal based upon military service or the hardship that removal would present to his or her family or community.

3. An aggravated-felony conviction also permanently blocks a noncitizen from seeking asylum in the United States based on a well-founded fear that he or she will face persecution or death if returned to his or her country of origin. The history of refugee protection in the United States demonstrates that a noncitizen should be barred from this relief only if his or her crime was "particularly serious." *Konou* v. *Holder*, 750 F.3d 1120, 1127 (9th Cir. 2014).

Congress enacted the current asylum system in the United States 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, Jan. 31, 1967, 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 art. 33(2), July 28, 1951 189 U.N.T.S. 150 (emphasis added).

In recognition of the Protocol and Convention, Congress made a series of changes to the 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 U.S.C. § 1158.9; 8 C.F.R. § 209.2.

Congress also incorporated language that tracks the exception in the second paragraph of Article 33. Thus, it placed 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, and regardless of the circumstances surrounding the offense. This statutory bar can and does result in the deportation of noncitizens to countries where they face imminent harm.[7] Yet under the government's approach, even very minor state convictions would trigger these severe consequences.

B. The statutory structure indicates that Congress intended to give immigration judges discretion to resolve cases like this one.

The structure of the INA reflects Congress's judgment that, in most cases, the exercise of discretion is the best way to assess the gravity of an offense. A broad interpretation of the "aggravated felony" definition would undermine this structure by mandating removal in cases where the circumstances indicate removal is inappropriate.

By contrast, a narrow reading of "aggravated felony" preserves an immigration judge's discretion to deny relief in truly aggravated cases calling for removal. Petitioner's interpretation of "aggravated felony" would not cause dangerous criminals to "escap[e] deportation." *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013). Rather, it would shift more in-

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[7] 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).

dividuals to the discretionary category, where immigration judges and the BIA can make individualized assessments of whether removal is appropriate. *Ibid.* With respect to crimes for which Congress has not clearly mandated removal, the later result is more consistent with the statutory scheme and the ends of justice, as discretionary relief may still be granted or denied, depending upon the circumstances.

Experience under the Ninth Circuit rule shows that the government's interpretation of Section 1101(a)(43) would prevent the exercise of judicial discretion in cases that merit relief—an outcome that cannot be squared with the statutory scheme.

Consider the case of D.M.—one of many immigrants who have convictions under low-level statutory rape statutes such as California Penal Code § 261.5(c).[8] In 1992, D.M. was convicted of violating § 261.5 because of his relationship with his girlfriend. At the time of his arrest, D.M. was 20 and his girlfriend was 16. D.M. was sentenced to probation and, shortly after his conviction, he and his girlfriend were married. D.M. and his wife had two children and lived together as a family for 15 years, before divorcing in 2007. His ex-wife trusted him enough to grant him custody of both children, who still live with him. D.M. was granted lawful permanent resident status in 2006, and he naturalized in 2013. Yet under the government's interpretation of Section 1101(a)(43), D.M.'s decades-old conviction would have been deemed to be an "aggravated felony," rendering him ineligible for naturalization.

Other similar examples abound. For instance, Gustavo H. pleaded guilty to a misdemeanor viola-

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[8] See *Matter of D-M-*, 2016 WL 316705, at *1 (AAO 2016).

tion of California Penal Code § 261.5(c). He received a suspended sentence and three years of probation. After the conviction, Gustavo and his girlfriend were married. When their child was three years old, Gustavo was able to adjust his immigration status based on his marriage—an adjustment that was made possible only by the Ninth Circuit's holding in *Estrada-Espinoza*, which held that violations of Section 261.5(c) are not "sexual abuse of a minor" for purposes of the INA. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1150 (9th Cir. 2008). Gustavo's naturalization interview occurred after the BIA issued *Matter of Esquivel-Quintana*, 26 I. & N. Dec. 469, 470 (BIA 2015); thanks to *Estrada-Espinoza*, Gustavo was able to demonstrate good moral character notwithstanding his conviction under § 261.5(c). Now that Gustavo is a U.S. citizen, he can continue to provide for his family. By contrast, under the government's approach in this case, Gustavo would have been forever denied U.S. citizenship and potentially subject to removal, depriving his family of support.

Jurisdictions that interpret the "aggravated felony" definition to include these types of offenses separate families and impose significant hardships on family members, including children, who are left behind in the United States.[9] A noncitizen who we will call Smith came to the United States from Mexico when he was 13 years old. He qualified for Deferred

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[9] As explained in Part II, *supra*, only seven states criminalize consensual sexual intercourse between a 21-year-old and someone just under 18. Not all of the stories *amici* present below are taken from those seven states. But the examples of noncitizens from other states are illustrative both of the human element of the disputed conduct and of the broader difficulties with deeming it to constitute an "aggravated felony."

Action for Childhood Arrivals (DACA). At the age of 19, Smith began dating an underage girl in a relationship that was approved of and supported by both families. The couple had a child together and Smith worked to support the child. When police learned of the relationship, however, they charged Smith with "criminal sexual conduct" in violation of Minn. Stat. § 609.344, subd. 1(b). At sentencing, Smith was detained by immigration and subjected to an order of expedited removal. The immigration judge was not permitted to exercise discretion to cancel the removal. Setting aside the consequences to Smith—who is now in Mexico—the person hurt most by this lack of discretion is Smith's U.S. citizen child. The child has lost Smith, both as a father and a source of support, and is now receiving public assistance benefits.

Another noncitizen, who we call Jones, was 20 years old. His girlfriend told him, falsely, that she was 17.[10] She became pregnant, and Jones supported her financially during the pregnancy. After the birth, the hospital reported Jones to the police without the knowledge or consent of the girlfriend. Although the girlfriend refused to cooperate with the investigation, Jones was arrested and pleaded guilty to an attempted violation of N.Y. Penal Law § 130.30(1). Section 130.30(1) is a strict-liability offense prohibiting sexual intercourse between a person under 15 and a person age 18 or older. In the years following his arrest, Jones played a continuous role in his child's life. He supported the mother and child financially, visited the child weekly, and paid for the mother to attend college. Years later, when the government insti-

[10] Although federal law provides for a mistake of age defense, see 18 U.S.C. § 2243(c), a similar defense was not available under the state law, see N.Y. Penal Law §§ 130.30, 15.20(3).

tuted removal proceedings, the immigration judge determined that Jones's offense constituted "sexual abuse of a minor," foreclosing Jones from discretionary cancellation of removal. Jones remains detained pending petition for rehearing in the Second Circuit. This has been hard on the child, who has a very close relationship with her father. For her part, the mother is supportive of Jones and wishes for him to be free.

Nothing in the INA suggests that Congress intended the "aggravated felony" distinction to apply to low-level offenders like petitioner or these other noncitizens. The categorical denial of discretion to accommodate such cases is inconsistent with the statutory scheme. The conduct that would be covered by Section 1101(a)(43) under the government's reading is, in many cases, the exact opposite of an "aggravated felony." If Congress wishes to extend the devastating consequences of an aggravated felony conviction to such minor state law offenses, it is free to do so. But it is simply wrong to say that it already has.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHUCK ROTH
National Immigrant Justice Center
208 S. LaSalle St., Suite1300
Chicago, IL 60601
(312) 660-1613

REBECCA SHARPLESS
MARK BARR
American Immigration Lawyers Association
1331 G Street, NW
Suite 300
Washington, DC 20005
(202) 507-7600

MICHAEL B. KIMBERLY
Counsel of Record
KEVIN S. RANLETT
MADELEINE L. HOGUE*
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly@mayerbrown.com

Counsel for *amici curiae*

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* Admitted to practice in North Carolina only. Not admitted in the District of Columbia. Practicing under the supervision of firm principals.