No. 12-3359

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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SHAUN M. ROBERTS,
Petitioner,

v.

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

---

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

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

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## CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1

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

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## INTRODUCTION

*Amici* American Immigration Lawyers Association (AILA) and American Immigration Council (Immigration Council)[1] proffer this brief in support of the Petition for Rehearing or Rehearing En Banc of the panel's decision, *Roberts v. Holder*, 745 F.3d 928 (8th Cir. 2014). Every court of appeals to have examined the availability of statutory eligibility for a waiver under section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h) – other than the panel in this case – has agreed that the penultimate sentence of § 1182(h) applies only to noncitizens who were admitted as lawful permanent residents (LPR) at a port of entry. *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1054 (9th Cir. 2014); *Papazoglou v. Holder*, 725 F.3d 790, 794 (7th Cir. 2013); *Hanif v. Attorney General*, 694 F.3d 479, 484 (3d Cir. 2012); *Leiba v. Holder*, 699 F.3d 346, 352 (4th Cir. 2012); *Bracamontes v. Holder*, 675 F.3d 380, 385 (4th Cir. 2012); *Lanier v. U.S. Att'y Gen.*, 631 F.3d 1363, 1366-67 (11th Cir. 2011); *Martinez v. Mukasey*, 519 F.3d 532, 546 (5th Cir. 2008). This issue is pending before the Sixth Circuit in *Stanovsek v. Holder*, No. 13-3279 and the Second Circuit in *Sampathkumar v.*

[1] *Amici* state pursuant to Fed. R. App. P. 29(c) that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amici curiae*, their members, and their counsel contributed money that was intended to fund preparing or submitting the brief.

*Holder*, No. 11-4342. This court is the sole court of appeals to rule that the waiver is unavailable to those who have adjusted to LPR status after entering the U.S.

In this brief, AILA and the Immigration Council set forth two principal reasons why this court should reconsider the panel decision. First, the plain text of the statute reflects Congress' intent to limit the availability of § 1182(h) for noncitizens admitted as LPRs at a port of entry. Second, no absurdities will result from a literal reading of the statute and the extension of § 1182(h) relief to LPRs who adjusted after entering the country. On the contrary, § 1182(h) waivers provide an important protection for certain post-entry LPRs, including particularly vulnerable groups.

## INTEREST OF *AMICI CURIAE*

AILA is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council has an interest in ensuring that the § 1182(h) waiver is interpreted to ensure all noncitizens whom Congress intended to benefit are eligible to apply, and has filed *amicus* briefs in the Second, Third, Fourth, Sixth, and Seventh Circuits addressing the same issue raised in this case.[2]

## STATUTORY BACKGROUND

### A. 8 U.S.C. § 1182(h)

Section 212(h) of the INA, 8 U.S.C. § 1182(h), permits federal immigration authorities to excuse the commission of designated criminal offenses or other misconduct that would otherwise prevent noncitizens from entering or remaining in the United States.[3] Noncitizens eligible to receive a waiver include 1) those

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[2] *See Hanif v. Attorney General, supra* (3d Cir. amicus brief *filed* Sept. 19, 2011); *Mendoza-Leiba v. Holder, supra* (4th Cir. amicus brief *filed* Dec. 7, 2011); *Stanovsek v. Holder,* No. 13-3279 (6th Cir. amicus brief *filed* June 5, 2013); *Papazoglou v. Holder, supra* (7th Cir. amicus brief *filed* Aug. 15, 2012); *Sampathkumar v. Holder*, No. 11-4342 (2d Cir. *amicus brief* filed Jan. 8, 2014).

[3] Relief under § 1182(h) is not limited solely to applicants seeking to enter the United States from abroad. Rather, it is available to noncitizens who are applying for an immigrant visa from abroad, LPRs who are denied admission at a port of entry, *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007), noncitizens who are applying for adjustment of status, and LPRs who are reapplying for adjustment of status as a form of relief from removal, *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992).

whose activities causing them to be inadmissible (including certain prostitution-related grounds) occurred more than fifteen years earlier, who have since been rehabilitated, and who are not a threat to the nation's welfare, safety, or security; or 2) those who have a U.S. citizen or LPR spouse, parent, son or daughter who would suffer extreme hardship if the § 1182(h) waiver were denied; or 3) certain victims of domestic violence who are eligible to apply for permanent residence on that basis. *See* § 1182(h)(1)(A), (B), and (C).[4] The petitioner in this case falls under the second category; however, LPRs in all categories will be impacted by this Court's decision if they adjusted status post-entry and subsequently committed an aggravated felony.

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

> No waiver shall be granted under this subsection in the case of *an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence* if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

[4] Noncitizens who have been convicted of a "violent or dangerous" crime must generally meet a heightened standard by showing that the denial of the waiver would result in "exceptional and extremely unusual hardship" to the specified relative. 8 C.F.R. § 212.7(d).

Finding this text to be unambiguous under step one of *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), six courts of appeals have found the phrase –"previously been admitted to the United States as an alien lawfully admitted for permanent residence" – to be limited to noncitizens who were "admitted" as LPRs at a port of entry, as distinct from those who adjusted to LPR status post-entry.[5]

## B. "Lawfully admitted for permanent residence," "admission," and "adjustment of status"

### 1. "Lawfully admitted for permanent residence"

The INA defines the term "lawfully admitted for permanent residence" as "the *status* of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." 8 U.S.C. § 1101(a)(20) (emphasis added). Though the INA does not define the term "status," it remains central to federal immigration law. As the BIA explained in *Matter of Blancas*:

> "Status" is a term of art, which is used in the immigration laws in a manner consistent with the common legal definition. It denotes someone who possesses a *certain legal standing*, e.g., classification as an immigrant or nonimmigrant.

23 I&N Dec. 458, 460 (BIA 2002) (emphasis added). Noncitizens generally acquire LPR status in one of two distinct ways – by being "admitted" as LPRs at a

[5] *Negrete-Ramirez*, 741 F.3d at 1054; *Papazoglou*, 725 F.3d at 794; *Hanif*, 694 F.3d at 486 ; *Leiba*, 699 F.3d at 352 ; *Bracamontes*, 675 F.3d at 385; *Lanier*, 631 F.3d at 1366-67; *Martinez*, 519 F.3d at 544.

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

**2. "Admission" versus "adjustment of status"**

The INA defines the terms "admitted" and "admission" as "the lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13); *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008). A noncitizen is "admitted" as an LPR when he or she obtains an immigrant visa from a consular officer abroad, presents the visa to an inspector at a U.S. port of entry, and a port inspector authorizes his or her admission into the U.S. *See, e.g.*, 8 U.S.C. §§ 1225, 1154(e) and 1201(h).

The second route by which noncitizens may obtain LPR status is to enter the country–such as through an admission in nonimmigrant status, parole into the U.S., or an entry without inspection–and to subsequently "adjust" to LPR status.[6] Though the INA does not define "adjustment of status", the BIA has explained that it is a "procedural mechanism," whereby noncitizens inside the United States can acquire LPR status without having to leave the U.S. *Matter of Koljenovic*, 25 I&N Dec. 219, 221 (BIA 2010) (quoting *Rainford*, 20 I&N Dec. at 601).

[6] The vast majority of adjustments occur pursuant to 8 U.S.C. § 1255 (adjustment of status for noncitizens admitted or paroled into United States). However, there also are a number of special statutory adjustment provisions for certain categories of noncitizens. *See, e.g.*, 8 U.S.C. § 1159 (refugees and asylees); 8 U.S.C. § 1160 (Special Agricultural Workers); 8 U.S.C. § 1255a (noncitizens who entered unlawfully prior to 1982).

## ARGUMENT

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

When reviewing an agency's construction of a statute, courts must first determine whether "the intent of Congress is clear." *Chevron*, 467 U.S. at 842. If the court finds the intent to be clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43; *Patel v. Ashcroft*, 375 F.3d 693, 697-698 (8th Cir. 2004) (reversing BIA decision that was contrary to the plain meaning of the statute and its regulations); *Cuadra v. Gonzales*, 417 F.3d 947, 951-52 (8th Cir. 2005) (interpreting NACARA statute according to its plain language).

The key to discerning the intent of Congress in this case is recognizing that the relevant text "'is divisible into two distinct phrases: namely, (1) 'an alien who has previously been *admitted* to the United States' and (2) 'as an alien *lawfully admitted for permanent residence*.'" *Negrete-Ramirez* 741 F.3d at 1051 (citations omitted) (emphasis added). Determining the intent of Congress "requires [courts] to assess the effect of each term on the meaning of this provision as a whole." *Lanier*, 631 F.3d at 1366.

With respect to the first phrase, the courts–and even the BIA–agree that the statutory definition of "admitted" does *not* include adjustment of status. *Zhang v Mukasey*, 509 F.3d 313, 316 (6th Cir. 2007) ("We hold that there is only one 'first

lawful admission,' and it is based on physical, legal entry into the United States, not on the attainment of a particular legal status"); *Abdelqadar v. Gonzales*, 413 F.3d 668, 673 (7th Cir. 2005); *Emokah*, 523 F.3d at 118; *Aremu v. DHS*, 450 F.3d 578, 581-82 (4th Cir. 2006); *Lanier*, 631 at 1366; *Martinez*, 519 F.3d at 544; *Matter of Rosas*, 22 I&N Dec. 616, 617 (BIA 1999). This conclusion is unsurprising given that the process by which noncitizens adjust status from inside the U.S. is distinct from an "admission" at a port of entry. The very purpose of adjustment of status is to excuse the applicant from having to leave the country, obtain an immigrant visa from a foreign consulate, and re-enter the United States for "admission" as an LPR. *See* 8 C.F.R. § 245.1(a) (requiring adjustment applicants to be, *inter alia*, "physically present in the United States"). In addition, unlike those seeking "admission," adjustment applicants enter the country *before*, not after, "inspection and authorization" of their adjustment applications. *See* 8 U.S.C. § 1101(a)(13). Thus, the panel's decision fails to accord to the term "admission" the definition Congress provided it in § 1101(a)(13). *See Burgess v. U.S.*, 553 U.S. 124, 128 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case.") (citations omitted); *Beattie Inv. Co. v. United States*, 101 F.2d 850, 852 (8th Cir. 1939) (finding the word at issue was "defined in the act in language clear and definite").

With respect to the second phrase–"lawfully admitted for permanent residence"–Congress defined it as "the *status* of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." 8 U.S.C. § 1101(a)(20) (emphasis added). In comparing this phrase with the term "admission," the Seventh Circuit noted that "[t]he former is a legal status, the latter an entry into the United States." *Abdelqadar*, 413 F.3d at 673; *see also Lanier*, 631 F.3d at 1366; *Martinez*, 519 F.3d at 546; *Hanif*, 694 F.3d at 485. Accordingly, "when the statutory provision is read as a whole, the plain language of § 1182(h) provides that a person must have entered the United States, after inspection, as a lawful permanent resident in order to have 'previously been admitted to the United States as an alien lawfully admitted for permanent residence.'" *Lanier*, 631 F.3d at 1366-67; *see also Martinez*, 519 F.3d at 546; *Hanif*, 694 F.3d at 484.

In addition, the BIA's interpretation of § 1182(h) also violates the "cardinal principle of statutory construction" that a statute is to be interpreted so that no clause, sentence, or word is rendered superfluous, void, or insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Under the BIA's construction, the phrase "an alien who has previously been admitted to the United States as…" is superfluous. If Congress intended the penultimate sentence to apply to *all* LPRs, it could have stated that no waiver may be granted under § 1182(h) "in the case of an alien who

has previously been admitted to the United States as, *or who has adjusted to the status of*, an alien lawfully admitted for permanent residence." *See, e.g.*, 8 U.S.C. § 1151(a) (referencing noncitizens who receive immigrant visas "*or who may otherwise acquire the status of* an alien lawfully admitted [ ] for permanent residence") (emphasis added).

## II. Like the Other Six Circuits, the Court Should Apply the Plain Language of the Statute Because it will not Lead to Absurd Results.

The Court's responsibility is to enforce the plain language of the statute. *Union Pacific R. Co. v. U.S. Dept. of Homeland Sec.*, 738 F.3d 885, 897 (8th Cir. 2013); *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). This is not one of those rare cases where applying the plain language will lead to absurd results. There are plausible reasons why Congress distinguished between LPRs who adjusted their status and those who obtained immigrant visas abroad. In addition, by drawing the line where it did, Congress preserved the availability of a waiver of inadmissibility for the most vulnerable noncitizens: asylee, those abused by U.S. citizens and LPR family members, victims of serious crimes, and victims of trafficking.[7]

[7] 8 U.S.C. § 1159(b)(2) (asylees have to be physically present in the U.S. for one year to qualify for LPR status); 8 U.S.C. § 1255(l)(1)(A) (victims of trafficking have to be physically present in the U.S. for three years to qualify for LPR status); 8 U.S.C. § 1255(m)(1)(A) (same requirement for victims of serious crimes).

### A. The absurd results exception is rarely applied and inappropriate here.

It has long been the law that "when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie*, 540 U.S. at 534 (internal quotations omitted) (citing *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917)). The absurdity exception to the plain language rule is narrowly applied. It is not available merely because the statute is "awkward" or "ungrammatical." *Lamie*, 540 U.S. at 534. Nor does it matter if the plain language leads to "harsh" results. *Dodd v. U.S.*, 545 U.S. 353, 359 (2010). It is "for Congress, not this Court, to amend the statute" if the plain language is dissatisfying. *Id.* at 359-60.

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

**B. Not applying § 1182(h)'s plain language would vitiate the statute.**

Not only would the plain language not produce absurd results, disregarding the plain language would effectively vitiate the statute. *Renteria-Ledesma v. Holder*, 615 F.3d 903, 906 (8th Cir. 2010). Congress's careful choice of words in 8 U.S.C. § 1182(h) indicates its clear intent to distinguish between individuals who obtained LPR status through adjustment of status and those who obtained immigrant visas abroad. There are at least three plausible reasons why Congress did this.

First, by distinguishing between LPRs who adjusted status and those who obtained immigrant visas abroad, Congress recognized that noncitizens who were already in the U.S. when they adjusted often have stronger ties to the U.S. than those that obtained visas abroad. Family and community ties make LPRs who adjust post-entry more deserving of a waiver if they run afoul of the law.

Second, the most vulnerable categories of LPRs – asylees, crime victims, and victims of human trafficking can – generally only can obtain this status through adjustment because they have to meet physical presence requirements.[8]

[8] 8 U.S.C. § 1159(b)(2) (asylees have to be physically present in the U.S. for one year to qualify for LPR status); 8 U.S.C. § 1255(l)(1)(A) (victims of trafficking have to be physically present in the U.S. for three years to qualify for LPR status); 8 U.S.C. § 1255(m)(1)(A) (same requirement for victims of serious crimes). *See* 2012 Yearbook of Immigration Statistics, 20-24, *at* http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf (last visited

Victims of family abuse and juvenile court dependents do not have similar requirements, but as a practical matter almost always obtain permanent resident status through adjustment of status.[9] By permitting LPRs who adjusted their status to apply for an § 1182(h) waiver, Congress sought to protect vulnerable immigrants by giving them an opportunity to remain in the United States.

Third, by limiting the availability of § 1182(h) for new arrivals and not for those who adjusted their status, Congress decided not to implement a wholesale restriction on this relief. Perhaps one day it will remove this restriction. Perhaps, instead, it will incrementally expand the restriction. Or perhaps it will do as it has done for the last 17 years and keep it in place because it strikes the balance that Congress intended. That is a decision for Congress, not the courts, to make.

### C. Congress and the agency have employed other safeguards to prevent undeserving applicants from receiving waivers under § 1182(h).

The panel's decision will impact all noncitizens with aggravated felonies who adjusted subsequent to their entry. Only a minority of these LPRs who adjusted will have committed crimes determined to be "violent or dangerous" by an immigration judge. The remainder will have committed crimes that encompass

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May 19, 2014) (providing information on adjustment of status versus immigrant visa applications).

[9] Over 90 percent of abused family members and juvenile court dependents obtain LPR status through adjustment. *See* 2012 Yearbook of Immigration Statistics, 21-22, *at* http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf (last visited May 19, 2014).

even minor infractions such as shoplifting or assault convictions that result in one year suspended sentences. 8 U.S.C. §§ 1101(a)(43)(F) and (G). *See Escoto-Castillo v. Napolitano*, 658 F.3d 864 (8th Cir. 2011) (third degree burglary resulting in suspended one year jail term classified is an aggravated felony); *Lukowski v. INS*, 279 F.3d 644, 646 (8th Cir. 2002) (auto theft is an aggravated felony); *Bosede v. Mukasey*, 512 F.3d 946, 948, n.1 (7th Cir. 2008) (convicted of retail theft for drinking liquor in a grocery store without paying for it).

To the extent that LPRs who adjusted their status are undeserving of relief because, for example, they have committed serious crimes or lack sufficient ties to the U.S., there are multiple safeguards in place, some statutory and some regulatory. For example, those convicted of murder or torture are ineligible for this waiver. 8 U.S.C. § 1182(h); *Matter of M-W-*, 25 I&N Dec. 748 (BIA 2012). In addition, applicants with other than prostitution-related or very old convictions must demonstrate extreme hardship to a U.S. citizen or LPR spouse, parent, or child. 8 U.S.C. § 1182(h)(1)(B). Applicants who have been convicted of violent or dangerous crimes must meet a heightened standard – exceptional and extremely unusual hardship – and show extraordinary circumstances. 8 C.F.R. § 212.7(d). Finally, relief is discretionary and unfavorable exercises of discretion are not reviewable by the federal courts. 8 U.S.C. §§ 1182(h)(2) and 1252(a)(2)(B)(i).

**D. <u>The "absurd" results that the Court fears will not come to pass.</u>**

There have not been absurd results in the six circuits that have found 8 U.S.C. § 1182(h) to be unambiguous in its meaning and scope because the courts continue to interpret provisions of the statute in a manner that furthers Congressional intent in other contexts. For example, in some instances, courts have treated the adjustment of status of an immigrant who entered without inspection and then adjusted status as the functional equivalent of an admission. *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134-35 (9th Cir. 2001) (for a noncitizen who entered without inspection, the adjustment of status is regarded as the equivalent of an admission for purposes of determining removability); *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011) (treating an adjustment of status as equivalent to an admission for purposes of subjecting a noncitizen to the 8 U.S.C. § 1227 removal grounds only if the noncitizen entered without inspection and did have a prior admission). Thus, differentiating between an adjustment of status and an "admission" in this context will not lead to absurd results in other contexts.

## CONCLUSION

For the reasons set forth above, the Court should grant the petition for review and remand the case to the Board for further consideration.

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CERTIFICATE OF COMPLIANCE

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

*/s/ Russell R. Abrutyn*

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

*/s/ Russell R. Abrutyn*

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