No. 11-4342

In The United States Court of Appeals For The Second Circuit

PADMASHRI SAMPATHKUMAR,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

On review from the Board of Immigration Appeals

BRIEF OF *AMICI CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE AMERICAN IMMIGRATION COUNCIL IN SUPPORT OF PETITIONER'S PETITION FOR REVIEW

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Amici Curiae, American Immigration Lawyers Association (AILA) and the American Immigration Council (Council), certifies that Amici Curiae are associations of lawyers practicing immigration law. AILA and the Council have no corporate parents, affiliates and/or publicly held companies that own 10% or more of its stock.

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INTRODUCTION

Amici American Immigration Lawyers Association (AILA) and American Immigration Council (Council)[1] proffer this brief in support of Petitioner's claim to statutory eligibility for a waiver under section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h).[2] This issue is one of surpassing importance to lawful permanent residents (LPRs) whose removal from the United States could cause extreme hardship to their U.S. citizen or lawfully residing spouses, parents, or children. Based on the plain text of the statute and applying the statutory definition of the relevant terms, five courts of appeals have unanimously held that the penultimate sentence of § 1182(h)[3], applies only to noncitizens who were *admitted* in LPR status

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[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.

[2] *Amici* take no position on the other issues involved in the case.

[3] The penultimate sentence of § 1182(h) applies to any "alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence."

at a port of entry, as distinct from those who *adjusted* to LPR status post-entry. *Papazoglou v. Holder*, 725 F.3d 790 (7th Cir. 2013); *Hanif v. Attorney General*, 694 F.3d 479 (3d Cir. 2012); *Leiba v. Holder*, 699 F.3d 346 (4th Cir 2012); *Bracamontes v. Holder*, 675 F.3d 380 (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); *see also Sum v. Holder*, 602 F.3d 1092, 1095 (9th Cir. 2010) (considering the same language in a different context and reaching the same interpretation); *Zhang v. Mukasey*, 509 F.3d 313 (6th Cir. 2007) (same).[4]

As these decisions demonstrate, the Board of Immigration Appeals' (BIA) contrary precedent erroneously disregards the statutory definition of "admitted" when it interprets the penultimate sentence of § 1182(h) as applying to *all* LPRs – regardless of the procedure by which their status was accorded – so as to avoid the purported "serious incongruities" it believes would result from a literal reading of the plain text of the statute. *Matter of Rodriguez*, 25 I&N Dec. 784, 789 (BIA 2012); *see also Matter of Koljenovic*, 25 I&N Dec. 219, 221 (BIA 2010).

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[4] This issue is pending before the Sixth Circuit in *Stanovsek v. Holder*, No. 13-3279.

In this brief, AILA and the Council set forth the two principal reasons why this court should reject the BIA's conclusion in favor of that reached by the Third, Fourth, Fifth, Seventh, and Eleventh Circuits. First, Congress' intent is evidenced by the plain text of the statute. Congress unmistakably sought to describe only noncitizens admitted in LPR status at a port of entry when it chose the statutory language "an alien who has previously been *admitted* to the United States as an alien *lawfully admitted for permanent residence*." 8 U.S.C. § 1182(h) (emphasis added). If Congress desired § 1182(h)'s penultimate sentence to apply to all LPRs, lawmakers easily could have written the statute to accomplish such a result. Instead, the BIA's construction of the statute renders much of the relevant text superfluous and relies upon a reading of legislative history it previously rejected.

Second, no absurdities would result from a literal reading of the statute. The five Courts of Appeals that have rejected the BIA's interpretation, *see supra* p.2, all recognize plausible reasons why Congress chose to distinguish between LPRs based on the manner in which their status was accorded.

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 frequently appears before federal courts on issues relating to the interpretation of the INA. The Council filed *amicus* briefs in the Third, Fourth, Sixth, and Seventh Circuits addressing the same issue raised in this brief. *See Hanif v. Attorney General*, 694 F.3d 479 (3d Cir. 2012) (*amicus* brief *filed* Sept. 19, 2011); *Leiba v. Holder*, 699 F.3d 346 (4th Cir 2012) (*amicus* brief *filed* Dec. 7, 2011); *Stanovsek v. Holder*, No. 13-3279 (6th Cir. amicus brief filed June 5, 2013); *Papazoglou v. Holder*, 725 F.3d 790 (7th Cir.

2013) (amicus brief filed Aug. 15, 2012).

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. 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; lawful permanent residents who are denied admission at a port of entry[5]; noncitizens who are applying for adjustment of status; and lawful permanent residents who are reapplying for adjustment of status as a relief from removal.[6]

The categories of noncitizens eligible to receive a § 1182(h) waiver are 1) those whose activities causing them to be inadmissible occurred more than fifteen earlier, who have since been rehabilitated, and who are not a threat to the nation's welfare, safety, or security; 2) those who have a U.S. citizen or LPR spouse, parent, or child who would suffer

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[5] *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007).

[6] *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992).

extreme hardship if the § 1182(h) waiver were denied; and 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).[7] While the second category is the one under which Petitioner falls, LPRs in all categories will be impacted by a decision on this issue if they adjusted status post-entry and subsequently committed an aggravated felony.

Prior to 1996, the only noncitizens categorically ineligible to receive § 1182(h) waivers were those convicted of committing, or attempting to or conspiring to commit, "murder or criminal acts involving torture." *See* Immigration Act of 1990, Pub. L. 101-649, § 601(d)(4), 104 Stat. 4978, 5076-77. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[8], Congress created a new ground of ineligibility. In what is now the penultimate sentence of § 1182(h), Congress provided:

> No waiver shall be granted under this subsection in the case of *an alien who has previously been admitted to the*

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[7] Noncitizen who have been convicted of a "violent or dangerous" crime must 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).

[8] Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

> *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.

Pub. L. No. 104-208, Div. C, § 348, 110 Stat. 3009-639 (emphasis added). Finding this text to be unambiguous under step one of *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), five courts of appeals have found the phrase at issue in this case –"previously been admitted to the United States as an alien lawfully admitted for permanent residence" – to be limited to noncitizens who were "admitted" in LPR status at a port of entry, as distinct from those who adjusted to LPR status post-entry. *Papazoglou*, 725 F.3d 790 (7th Cir. 2013); *Hanif*, 694 F.3d 479 (3d Cir. 2012); *Leiba*, 699 F.3d 346 (4th Cir 2012); *Bracamontes*, 675 F.3d 380 (4th Cir. 2012); *Lanier*, 631 F.3d 1363, 1366-67 (11th Cir. 2011); *Martinez*, 519 F.3d 532, 546 (5th Cir. 2008); *see also Sum*, 602 F.3d 1092, 1095 (9th Cir. 2010) (considering the same language in a different context and reaching the same interpretation); *Zhang*, 509 F.3d 313 (6th Cir. 2007) (same).

These decisions all hinge on – and give meaning to – the two distinct phrases contained within the penultimate sentence of § 1182(h):

(1) "*admitted* to the United States as," and (2) "an alien *lawfully admitted for permanent residence*." These are terms of art that are accorded specific definitions in the INA. The latter phrase refers to the *status* enjoyed by noncitizens permitted to reside permanently in the United States, INA § 101(a)(20), 8 U.S.C. § 1101(a)(20); whereas the former refers to a particular *process* by which such status can be obtained, INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A). *See also Abdelqadar v. Gonzales*, 413 F.3d 669, 673 (7th Cir. 2005) (noting the same).

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 ways – by being "admitted" in LPR status at a port of entry, or by adjusting to LPR status following a previous entry to the United States, lawful or otherwise. While both processes accord noncitizens LPR "status," the processes by which such status is accorded remain distinct.

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). The first route by which noncitizens may obtain LPR status is by being "admitted" in LPR status at a port of entry. In such a case, a noncitizen obtains an immigrant visa from a consular officer abroad and presents that visa to an inspector at a U.S. port of entry. The noncitizen does not become an LPR until the 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 in another fashion – such as through an admission

in nonimmigrant status, a parole into the U.S., or an entry without inspection – and subsequently "adjust" to LPR status.[9] Unlike the term "admission," the term "adjustment of status" is not defined in the INA. As the BIA has explained, however, adjustment of status is a "procedural mechanism," whereby noncitizens already inside the United States can acquire LPR status without having to leave the U.S. *Koljenovic*, 25 I&N Dec. at 221 (quoting *Rainford*, 20 I&N Dec. at 601).

C. The BIA's treatment of adjustment of status as admission

1. *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010) and *Matter of Rodriguez*, 25 I&N Dec. 784 (BIA 2012)

Notwithstanding the exclusive statutory definition of "admitted," in *Koljenovic* the BIA expanded the penultimate sentence of § 1182(h) to apply to all LPRs, regardless of whether they were "admitted" in LPR status. 25 I&N Dec. 219. *Koljenovic* continued a line of decisions that simplistically hold that *all* post-entry adjustments of status qualify as

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[9] 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).

an "admission," regardless of the context in which the terms are used. Such a blanket interpretation ignores both the statutory definition of the term "admission" as well as the federal courts' specific admonishment to the BIA that "the whole point of contextual reading is that context matters." *Abdelqadar*, 413 F.3d at 674 (finding that the context for the use of the term "admission" in one INA provision "differs substantially" from its use in another INA provision).

First in this line of cases was *Matter of Rosas*, 22 I&N Dec. 616, 623 (BIA 1999) (*en banc*), in which the BIA held that an adjustment by a noncitizen who originally entered the country without inspection constitutes an "admission" for purposes of 8 U.S.C. § 1227(a)(2)(A)(iii) – which creates a ground of removability for the commission of an aggravated felony at any time "after admission" – based on the "drastic" consequences that would result from a contrary interpretation. *Id*. at 621; *see also Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134-35 (9th Cir. 2001).

Subsequently, in *Matter of Shanu*, 23 I&N Dec. 754, 756 (BIA 2005), the BIA held that adjustment of status constitutes an "admission" even for noncitizens who previously were admitted to the United States within the meaning of 8 U.S.C. § 1101(a)(13)(A). The BIA

based its decision on the "peculiar results" that would ostensibly arise from a plain reading of the statute, such as the purported inability to seek certain waivers of inadmissibility in connection with an adjustment application. *Id*. at 757. Several courts rejected the BIA's interpretation. *See Abdelqadar*, 413 F.3d at 673 (finding that the BIA ignored the "context" in which the term admission was used); *Aremu v. DHS*, 450 F.3d 578 (4th Cir. 2006) (overturning *Shanu* upon finding the BIA improperly disregarded the statutory definition at 8 U.S.C. § 1101(a)(13)(A)); *Shivaraman v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004); *Zhang*, 509 F.3d 313.

Despite the uniform federal court rejection of the BIA's blanket disregard of the statutory definition of admission, the BIA has continued to treat all adjustments of status as "admissions." *See*, *e.g.*, *Matter of Alyazji*, 25 I&N Dec. 397, 404 (BIA 2011) (stating that adjustment should be treated as an admission "*in all cases*") (emphasis in original)[10]; *Rodriguez*, 25 I&N Dec. at 789 (reaffirming its prior

[10] Though *Alyazji* continued to treat adjustment of status as an "admission," it overruled *Shanu* in part by holding that the date of adjustment does not constitute "the date of admission" under 8 U.S.C. § 1227(a)(2)(A)(i) for noncitizens who were already present in the United States pursuant to a prior admission. 25 I&N Dec. at 408.

precedent).

Consistent with its previous rulings, in *Koljenovic*, the BIA interpreted the phrase "previously admitted to the United States as an alien lawfully admitted for permanent residence" to apply not only to noncitizens who were "admitted" in LPR status at a port of entry, but also to those who adjusted to LPR status post-entry. 25 I&N Dec. at 222. In reaching this conclusion, the BIA conceded that adjustment of status does not constitute an admission as the term is "literally defined" in 8 U.S.C. § 1101(a)(13)(A). *Id.* at 220. Instead, the BIA cited the "absurd" and "problematic consequences" it believed would result from not expanding the statutory definition to include adjustment of status. *Id.* at 222, 224.

Most recently, in *Rodriguez*, the BIA reaffirmed its holding in *Koljenovic*. 25 I&N Dec. at 789. While the BIA acknowledged that, under *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), it was bound to follow *Bracamontes*, *Martinez*, and *Lanier* in cases arising within the Fourth, Fifth and Eleventh Circuits respectively, it held that it would continue to apply *Koljenovic* in all other circuits. *Rodriguez*, 25 I&N Dec. at 788-89.

2. Courts' rejection of the "adjustment-as-admission" approach in interpreting § 1182(h)

To date, five federal appellate courts have rejected the BIA's application of its "adjustment-as-admission" approach to § 1182(h)'s penultimate sentence. The Fifth Circuit held that "for aliens who adjust post-entry to LPR status, § 1182(h)'s plain language demonstrates unambiguously Congress' intent *not* to bar them from *seeking* a waiver of inadmissibility." *Martinez*, 519 F.3d at 546 (emphasis in original). Citing the statutory definition, the court noted that "admitted" means "the lawful *entry* of an alien after inspection, something quite different, obviously, from post-entry adjustment of status." *Id.* at 544 (emphasis in original). The Fifth Circuit proffered a number of reasons why lawmakers would distinguish between LPRs based on how their status was accorded, but noted that Congress' motivations were ultimately "irrelevant" because neither it nor the agency was "at liberty to override the plain, unambiguous text of [§ 1182(h)] and [§ 1101(a)(13)]." *Id.* at 545.

The Eleventh Circuit explicitly rejected the BIA's analysis in *Koljenovic*. *Lanier*, 631 F.3d at 1365-67. As in *Koljenovic*, the applicant in *Lanier* had entered the country without inspection before adjusting to LPR status, and thus was never "admitted" at a port of entry within

the meaning of 8 U.S.C. § 1101(a)(13)(A). *Id.* at 1365. Following the Fifth Circuit, the court found the "unambiguous text" of § 1182(h)'s penultimate sentence to indicate that "the statutory bar to relief does not apply to those persons who, like Lanier, adjusted to [LPR] status while already living in the United States." *Id.* at 1366-67. Because the court found "no ambiguity" in the text of the statute, it declined to afford any deference to the BIA's decision in *Koljenovic*. *Id.* at 1367 n.3.

The Fourth Circuit agreed that the plain language of § 1182(h) prohibited the BIA's reading, as it "would require [the court] to ignore the plain meaning of the first phrase of the definition, 'the lawful *entry* of the alien *into* the United States,' which is in turn modified by the 'inspection and authorization' language." *Bracamontes*, 675 F.3d at 386. Moreover, because it found the statutory language plain, the court disregarded the BIA's "speculation concerning congressional intent." *Id.* The Fourth Circuit extended *Bracamontes* to LPRs who adjusted their status following an entry without inspection. *Leiba*, 699 F.3d at 352-54.

The Third Circuit agreed that the language of § 1182(h) is plain and unambiguous. *Hanif*, 694 F.3d at 484. The court held that for the statutory bar to apply, there had to be both a prior admission to the U.S. and that admission had to be made while the noncitizen was in the

status of a lawful permanent resident. *Id.* The court found significant Congress's use of both "admitted" and "lawfully admitted for permanent residence" in § 1182(h). *Hanif*, 694 F.3d at 486. The court rejected an interpretation of the statute that would omit the modifier "admitted." *Id.*

Most recently, the Seventh Circuit found that the language of § 1182(h), while "tortured," was nonetheless plain. *Papazoglou*, 725 F.3d at 793-94. The court found that the terms "admitted" and "lawfully admitted for permanent residence" in the penultimate sentence of § 1182(h) are distinct requirements. *Id.* The bar to relief only applies if the noncitizen was "admitted" to the U.S. as a lawful permanent resident at a port of entry.

ARGUMENT

I. Congress intended the penultimate sentence of § 1182(h) to apply only to noncitizens admitted in LPR status at a port of entry, not to those who adjusted to LPR status post-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 of Congress 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.

A. The text of the statute is clear

The key to discerning the intent of Congress in this case is recognizing that "the 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*.'" *Sum*, 602 F.3d at 1095 (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 five circuits that have addressed this issue directly and the two circuits that have done so in other contexts concluded that the statutory definition of "admitted" does *not* include adjustment of status. *Zhang*, 509 F.3d at 316 ("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*, 413 F.3d at 673 ("Section 1101(a)(13)(A) defines admission as a lawful entry, not as a particular legal status afterward"); *Emokah*, 523 F.3d at 118; *Aremu*, 450 F.3d at 581-82; *Lanier*, 631 at 1366; *Martinez*, 519 F.3d at 544. 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. Rather than requiring an "entry into" the U.S., 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 application. *See* 8 U.S.C. § 1101(a)(13).

Meanwhile, Congress defined "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). In comparing this term 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 (finding that "lawfully admitted for permanent residence" "describes a particular immigration status, without any

regard for how or when that status is obtained"); *Martinez*, 519 F.3d at 546 (noting that "lawfully admitted for permanent residence" encompasses "both admission to the United States as an LPR and post-entry adjustment to LPR status"); *Hanif*, 694 F.3d at 485 ("Congress treated 'admission' as an event or action, while [ ] Congress regarded 'lawfully admitted for permanent residence' as an immigration status. The date of gaining a new status is not the same as the date of the physical event of entering the country").

Accordingly, "when the statutory provision is read as a whole, the plain language of § 1182(h) provides that a person must have entered the United States, after inspection, as a lawful permanent resident in order to have 'previously been admitted to the United States as an alien lawfully admitted for permanent residence.'" *Lanier*, 631 F.3d at 1366-67; *see also Martinez*, 519 F.3d at 546; *Hanif*, 694 F.3d at 484.

The BIA'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); *see also U.S. v. Deen*, 706 F.3d 760, 766 (6th Cir. 2003). Here, the BIA's construction renders superfluous the phrase "an alien who has previously been

admitted to the United States as…" If Congress intended the penultimate sentence to apply to *all* LPRs, it could have provided, simply, that "no waiver shall be granted under this subsection in the case of an alien lawfully admitted for permanent residence….," just as it did with respect to waivers for document fraud. *See*, *e.g.*, 8 U.S.C. §§ 1182(d)(12)(A), 1227(a)(3)(C)(ii) (permitting waiver for document fraud "in the case of an alien lawfully admitted for permanent residence"). Alternatively, Congress 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).

B. The legislative history does not support the BIA's ruling, and need not be consulted in any event

Koljenovic relied in part on a misreading of legislative history. As an initial matter, reference to legislative history was unwarranted as courts and agencies may "resort to legislative history *only* when necessary to interpret ambiguous statutory text." *BedRoc Ltd., LLC v.*

United States, 541 U.S. 176, 187 n.8 (2004) (emphasis added); *Gordon v. Softtech Intern., Inc.*, 726 F.3d 42 (2d Cir. 2013). Because the relevant language of § 1182(h) is plain and unambiguous, this Court need not examine the legislative history of the provision.

Even were legislative history considered, however, the BIA's analysis of this history is flawed for at least two reasons. First, the BIA relied on a sentence from the Conference Report that it previously interpreted to stand for precisely the opposite conclusion. Second, the BIA overlooked a significant amendment made by the conferees that supports the Petitioner's reading of the statutory language.

The pertinent sentence from the Conference Report states, in full:

> The managers intend that the provisions governing continuous residence set forth in INA section 240A as enacted by this legislation shall be applied as well for purposes of waivers under INA section 212(h).

H.R. Rep. 104-828, at 228 (1996) (Conf. Rep.).[11]

In *Koljenovic*, the BIA interpreted this statement as a desire to "create congruity in the residence requirements for these two forms of

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[11] Under INA § 240A, 8 U.S.C. § 1229b, the Attorney General is permitted to cancel the removal of both LPRs and non-LPRs who satisfy certain conditions.

relief," 25 I&N Dec. at 222, such that LPRs unable to meet the seven-year residency requirement for cancellation of removal under 8 U.S.C. § 1229b(a) must necessarily be ineligible for a waiver of inadmissibility under § 1182(h). This assertion conflicts with *Matter of Rotimi*[12], however, where the BIA explicitly rejected the suggestion that this "legislative history indicates that the 'residence' required under sections [1182(h)] and [1229b] [ ] be treated as the same." 24 I&N Dec. 567, 573 (BIA 2008) ("We are therefore unpersuaded that the conference report's reference to section [1229b] overrides the differently worded language of section [1182(h)]"). While an agency's reading of legislative history is never itself entitled to deference, this Court should accord little weight to an interpretation that the BIA itself recently eschewed.

In addition, the BIA's review of legislative history failed to account for a key amendment made by the Conference Committee that supports *amici*'s reading. As enacted by the House of Representatives, the amendment to § 1182(h) applied to any "immigrant who previously

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[12] The issue in *Matter of Rotimi* was whether a § 1182(h) waiver applicant failed to satisfy the seven-year residency requirement because of a gap between the expiration of the noncitizen's original nonimmigrant visa and his adjustment to LPR status. The BIA found that Rotimi was ineligible for the waiver.

has been admitted to the United States.…" H.R. 2202, 104th Congress, Immigration in the National Interest Act of 1996, § 301(h). The Conference Committee then modified the provision to apply in the case of any "alien who has previously been *admitted* to the United States as an alien *lawfully admitted for permanent residence*…." IIRIRA, Pub. L. 104-208, Div. C, § 348, 110 Stat. 3009-639 (emphasis added). By specifically inserting the precise phrase at issue in this case, the conferees plainly sought to tailor the reach of § 1182(h)'s penultimate sentence to noncitizens "admitted" to the United States as "alien[s] lawfully admitted for permanent residence."

II. No absurdities would result from following the plain text of § 1182(h)'s penultimate sentence

Unable to overcome the plain text of § 1182(h)'s penultimate sentence, *Koljenovic* instead catalogued the purportedly absurd results it believed would arise from a straightforward reading of the statute. 25 I&N Dec. at 222-24.[13] Where interpreting a statute consistent with its

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[13] Although the BIA in *Rodriguez* contended that *Koljenovic* found § 1182(h) ambiguous, the opposite appears to be the case. The fact that the BIA disregarded the text of the statute in light of purported "absurd results" indicates that it found the language plain. *See Frank G. v. Board of Educ. of Hyde Park*, 459 F.3d 356 (2nd Cir. 2006); *see also Tran*

plain meaning truly would produce an "absurd" result, an alternative meaning can be recognized so long as it is consistent with the legislative intent. *Frank G. v. Board of Educ. of Hyde Park*, 459 F.3d 356, 368 (2d Cir. 2006) (courts rarely invoke the need to avoid absurd results to override the plain language of a statute). But that is not the case here. Numerous plausible reasons exist why Congress would deliberately exempt successful adjustment applicants from the reach of § 1182(h)'s penultimate sentence.

Initially, as the Fifth Circuit recognized, Congress may have deemed successful adjustment applicants to be more "deserving" candidates for § 1182(h) waivers because they often lived in the United States for numerous years before obtaining LPR status. *Martinez*, 519 F.3d at 545. The Fifth Circuit also noted that unlike noncitizens admitted in LPR status, successful adjustment applicants go through the scrutiny of adjustment and may have more U.S. citizen relatives

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v. Gonzales, 447 F.3d 937, 941 (6th Cir. 2006) (citations omitted) (indicating that the "absurd results" doctrine is relevant when a statute cannot be read in accord with its plain language). Moreover, in an earlier case, the BIA held that the penultimate sentence of § 1182(h) was "clear and unambiguous." *Matter of Michel*, 21 I&N Dec. 1101, 1104 (BIA 1998).

adversely affected by their removal. *Martinez*, 519 F.3d at 545. Though it did not respond directly to *Martinez* on this point, the BIA speculated that Congress "presumably" would not have intended to benefit noncitizens who entered the country without inspection before adjusting to LPR status over those who entered the country as LPRs. *Koljenovic*, 25 I&N Dec. at 222-23. As this case illustrates, however, adhering to the plain text of the statute would not solely benefit noncitizens who entered without inspection; it benefits *all* noncitizens who adjusted to LPR status, including those, such as Petitioner here, who initially entered with a nonimmigrant visa. *See also Jankowski-Burczyk v. INS*, 291 F.3d 172, 180 (2d Cir. 2002) (noting that individuals who enter the country in non-LPR status "include many persons who could rationally be granted special deference and courtesy under the immigration laws").[14]

Even if a literal reading of § 1182(h) incidentally benefits some LPRs who entered the country without inspection, the fact that Congress created a limited exception for such noncitizens to adjust

[14] In fact, adjustment generally is not available to those who enter without inspection. *See* 8 U.S.C. § 1255(a). Instead, such individuals must satisfy a specific, time-limited exception. 8 U.S.C. § 1255(i).

status, *see* 8 U.S.C. § 1255(i), suggests that lawmakers were willing to forgive their initial transgression, and that it is improper for the BIA to continue to hold their unlawful entry against them. Moreover, the fact that the plain language of the statute may lead to a broader result than Congress might have anticipated does not render the result absurd. *Cleland v. Bronson Healthcare Group*, 917 F.2d 266, 270 (6th Cir. 1990); *see also Hanif*, 694 F. 3d at 487 ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning").

A second reason why Congress may have exempted successful adjustment applicants is that lawmakers wanted to take an "incremental" approach toward restricting eligibility for § 1182(h) waivers. *Martinez*, 519 F.3d at 545 ("Congress may well have been taking a 'rational first step toward achieving the legitimate goal of quickly removing aliens who commit certain serious crimes from the country'") (quoting *Lara-Ruiz v. INS*, 241 F.3d 934, 947 (7th Cir. 2001)). *See also McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) ("[A] legislature traditionally has been allowed to take reform 'one step at a time'").

While the BIA did not respond directly to this point, it expressed skepticism that Congress would favor noncitizens who adjusted to LPR status because they "currently comprise a substantial majority of all those admitted to lawful permanent resident status." *Koljenovic*, 25 I&N Dec. at 224. Yet even accepting the premise of this argument, which relied on statistics from fiscal years 2007 through 2009, the BIA's contention is fatally undermined by the comparable figures for the period preceding IIRIRA's amendments to § 1182(h). Indeed, in fiscal years 1992, 1993, 1994 and 1995, the number of noncitizens who were admitted as LPRs at ports of entry *exceeded* the number of noncitizens who adjusted to LPR status post-entry.[15]

Finally, the BIA speculated that Congress would not have exempted noncitizens who adjusted to LPR status from the statute's penultimate sentence because doing so would allow them to "forever avoid the effect of the aggravated felony bar in [§ 1182(h)]." *Koljenovic*,

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[15] See 1999 Statistical Yearbook of the Immigration and Naturalization Service, "Immigrants Admitted by Type and Selected Class of Admission, Fiscal Years 1992-1999," at Table 4 (showing higher numbers of new LPR arrivals than successful adjustment applicants in those fiscal years), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1999/IMM99.pdf (last visited January 8, 2014).

25 I&N Dec. at 224. But this argument ignores that waivers under § 1182(h) are granted as a matter of discretion, not as of right. 8 U.S.C. § 1182(h)(2).

In any event, the precise reason why Congress crafted the penultimate sentence of section § 1182(h) as it did is "irrelevant" to the resolution of the issue in this case. *Martinez*, 519 F.3d at 545. Instead, "[what] *is* relevant is that there are countervailing explanations for the statutory distinction between 'admitted' and 'adjustment,' which are just as plausible, if not more so, than the Government's contention that such a reading would lead to an absurd result." *Id.* (emphasis added).

In sum, there is no justification for departing from the plain text of § 1182(h)'s penultimate sentence in this case. This Court therefore should find—in accord with the Third, Fourth, Fifth, Seventh, and Eleventh Circuits—that Congress clearly intended the limitation on § 1182(h) waivers to apply only to noncitizens who were admitted in LPR status at a port of entry.

III. Prior Second Circuit decisions do not require a contrary result

The Court has not ruled on the precise question presented in this case, which is whether the bar to § 1182(h) eligibility applies to a lawful

permanent resident who obtains that status via an adjustment of status as opposed to an admission at a port of entry.

In *Dobrova*, the Court addressed the unrelated question of whether the term "previously admitted" in § 1182(h) referred to a lawful permanent resident who obtained that status in error. *Dobrova v. Holder*, 607 F.3d 297 (2d Cir. 2010). The result in *Dobrova* hinged on Congress's choice of tense. *Id.* at 301-02. The Court did not address, and was not asked to address, whether lawful permanent residents who obtained that status via an adjustment of status were subject to the eligibility bar contained in § 1182(h)'s penultimate sentence. Dobrova was admitted to the U.S. as a lawful permanent resident at a port of entry and did not obtain that status via an adjustment of status. *Dobrova*, 607 F.3d at 298.

In an earlier decision, the Court rejected an equal protection challenge to the penultimate sentence of § 1182(h). *Jankowski-Burczyk*, 291 F.3d 172. The LPR in that case challenged the application of the aggravated felony bar to LPRs while nonLPR aggravated felons remain eligible for § 1182(h) waivers. This dichotomy is further indication that Congress intended to place limitations on the bar to eligibility by applying it to a very specific and narrowly drawn group. The Court did

not address, and was not asked to address, whether lawful permanent residents who obtained their status via an adjustment of status come within the reach of that bar to statutory eligibility. Although Jankowski-Burczyk obtained her status via an adjustment of status, she did not raise the issue being raised in this case and the Court did not consider the meanings of the terms "admitted" and "lawfully admitted for permanent residence" in the penultimate sentence of § 1182(h). Moreover, because she was initially admitted as a refugee, her adjustment of status application was treated as an admission by 8 U.S.C. § 1159(a)(1). *See Spacek v. Holder*, 688 F.3d 536, 539 (8th Cir. 2012).

CONCLUSION

For the reasons set forth above, the *Amici* respectfully request that the Court follow the Third, Fourth, Fifth, Seventh, and Eleventh Circuits in rejecting the Board of Immigration Appeals' interpretation of 8 U.S.C. § 1182(h).

Respectfully submitted this 8th day of January 2014.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,367 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2010**, in **Century Schoolbook 14 point font**.

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Dated: January 8, 2014

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I hereby certify that on January 8, 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.

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