No. 18-725

In The
Supreme Court of the United States

ANDRE MARTELLO BARTON,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* IMMIGRATION LAW PROFESSORS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

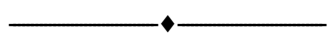
Amici are forty-three law professors whose areas of specialization include immigration law. *Amici* submit this brief to underscore the deep historical roots of the distinction between laws applied to persons seeking admission and those applied to persons who face deportation. *Amici* have different views about the wisdom of these distinctions and the appropriate substantive rules, procedures and forms of relief for different categories of noncitizens. Regardless of those views, *amici* believe that it is ahistorical and not true to the language and structure of the Immigration and Nationality Act to read the stop-time rule for cancellation of removal as applying inadmissibility rules to persons who are not seeking to be admitted into a status. Moreover, applying inadmissibility rules in this context would be such a departure from the history and norms of immigration law that one would at a minimum expect a clear indication from Congress that it intended such a result. Far from offering such an indication, Congress used language that reinforced a regime in which a noncitizen is subject to charges of inadmissibility or deportability but not both.

The names of the law professors participating in this brief are appended after the conclusion of this brief.[1]

[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief pursuant to Rule 37.3(a).

SUMMARY OF ARGUMENT

The Eleventh Circuit interpreted the stop-time rule in a way that ignores the history and structure of the Immigration and Nationality Act, ("INA"). Far from being a new term for which the Court might reference a dictionary, the concepts of inadmissibility and its predecessor term, excludability, have deep roots in the INA and predecessor laws. From the beginning, this country's immigration laws have had a dual structure – applying different rules and procedures for those who are newly arriving and those who later become deportable. Those distinctions exist in the substantive rules that govern the right to enter or stay in the United States, the burdens of proof in proceedings, and the forms of relief that are available to those who face removal. The 1996 changes to immigration law shifted the lines somewhat but retained the basic duality of immigration law. Under this dual system, Mr. Barton, a lawful permanent resident who accrued seven years of lawful residence before any travel, and who in fact never traveled, was not "rendered inadmissible" by his 1996 offense and therefore did not trigger the stop-time rule. Moreover, nothing in the statutory history or text suggests that Congress meant to impose the Eleventh Circuit's radical new bar to those seeking discretionary relief.



ARGUMENT

I. The history and structure of the INA and its predecessor statutes show the separate development of grounds of exclusion and deportation with clear distinctions in the substantive rules and procedures applied to those subject to deportation and those subject to exclusion.

Throughout the early history and development of immigration law in the United States, Congress made clear distinctions between those subject to exclusion on criminal grounds and those subject to deportation. Congress began with a focus on exclusion. Over time, Congress developed deportation laws aimed at those who were convicted of offenses after they were lawfully admitted. Throughout, Congress treated exclusion and deportation as separate concepts subject to different standards and procedures, with the law generally being more forgiving for those facing deportation.

In the late 1800s, Congress began enacting the first crime-based federal laws of exclusion and deportation since the 1798 Alien and Sedition Acts. In 1875, Congress passed the Page Act, which forbade the entry of individuals undergoing a sentence for a non-political felony crime in their home countries and women "imported for the purposes of prostitution." Page Act of 1875, 43 Cong. Ch. 141, § 5, 18 Stat. 477, 477-478.[2] In

[2] *See* Kerry Abrams, *Polygamy, Prostitution and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641 (2005) (discussing how the Page Law served as an early proxy for laws aimed at Chinese Exclusion).

1891 Congress expanded criminal grounds of exclusion to include persons convicted of a felony or "other infamous crime or misdemeanor involving moral turpitude, [and] polygamists." Immigration Act of 1891, 51 Cong. Ch. 551, § 1, 26 Stat. 1084, 1084.

In the twentieth century, Congress developed crime-based grounds of deportability that targeted persons following their lawful admission. At first Congress limited these laws to offenses within the first few years that an immigrant was in the United States. Later it adopted grounds that applied regardless of the length of residence.[3]

With the Immigration Act of 1907, Congress first authorized deportation based on acts committed after lawful entry, specifically for women and girls who engaged in prostitution within three years of entry. *See* Immigration Act of 1907, Pub. L. No. 59-96, § 3, 34 Stat. 898, 899-900. Ten years later, the Immigration Act of 1917 broadly targeted lawful entrants who within five years of entry were convicted of "a crime involving moral turpitude," or at any time after entry were found to be "advocating or teaching anarchy." *See* Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889. Various subsequent laws further expanded the grounds of deportation.[4] Finally, the 1952 Immigration

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[3] *See* Daniel Kanstroom, *Deportation Nation: Outsiders in American History*, 124-136 (2007).

[4] *See* Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. Davis L. Rev. 173, 186-188 (2018) (describing expansion of deportation grounds for drug-related offenses).

and Nationality Act ("INA") organized immigration statutes into one body of laws. *See* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952). It also greatly expanded the grounds of deportability, many more of which now lacked any statute of limitations. *See id*., § 241, 66 Stat. at 204-08.

After 1952, Congress periodically revisited the grounds of exclusion and deportation, but always kept them separate. For example, the 1986 Anti-Drug Abuse Act expanded the drug-related grounds of exclusion and deportation. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207, 3207-47. The Anti-Drug Abuse Act of 1988 then added additional categories of "aggravated felonies." *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342-7344, 102 Stat. 4181, 4469-71. These categories were later expanded through the Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 ("IMMACT"), and the Immigration and Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22. Congress also revised the grounds of excludability and deportability in IMMACT. These changes cemented distinctions between those inadmissible and deportable on controlled substance grounds, requiring a conviction for deportability but not inadmissibility, and creating an exception for deportability where the violation involved a possession of thirty grams or less of marijuana for one's own use. *See* IMMACT, §§ 601(a), 602(a), 108 Stat. at 5067, 5080.

Importantly, each law listed excludability grounds and deportability grounds separately, thus signifying

the continuing conceptualization of exclusion and deportation as distinct categories. For example, the Immigration Act of 1917 listed the classes of excludable noncitizens in Section 3 and the classes of deportable noncitizens in Section 19. *See* Pub. L. No. 64-301, §§ 3, 19, 39 Stat. 874, 875, 889. Moreover, similar classes of crimes were treated differently depending on the section in which they fell. For example, noncitizens were excludable if they "[had] been convicted of or admit[ted] having committed a felony or other crime or misdemeanor involving moral turpitude." *Id*., § 3, 39 Stat. at 875. However, the related deportability ground for crimes involving moral turpitude required that the noncitizen be convicted of such an offense, that the noncitizen commit the offense within five years of entry, and that the sentence be at least one year, or that the noncitizen be convicted of two such offenses. *See id*., § 19, 39 Stat. at 889. The consolidation of immigration laws into the INA kept this separate structure, providing for the grounds for exclusion and related processes in sections 211-240 and the grounds for deportation and related processes in sections 241-250. *See* Pub. L. No. 82-414, §§ 211-250, 66 Stat. 163, 181-219. Again, some classes of crimes were treated differently depending on whether they were grounds of exclusion or of deportation. For example, regarding crimes related to substance abuse, "narcotic drug addicts" were both excludable and deportable, but "chronic alcoholics" were excludable but not deportable. *Id*., §§ 212(a)(5), 241(a)(11), 66 Stat. at 182, 206. In 1990, Congress reorganized and revised the INA, but continued to keep grounds of exclusion separate from

grounds of deportation. *See* IMMACT §§ 601 (revising grounds of exclusion), 602 (revising grounds of deportability), 104 Stat. at 5067-77, 5077-82.

The laws also maintained differences in the processes required and rights guaranteed for exclusion and deportation proceedings. For example, the 1917 Act set out distinct procedures for exclusion, in section 17, and for deportation, in section 19. *See* Pub. L. No. 64-301, §§ 17, 19, 39 Stat. 874, 887, 889. This separation continued in the INA. In particular, the INA explicitly required certain procedures for deportation proceedings, but not for exclusion proceedings. These included requirements of notice of charges and time and place of proceedings, the privilege of representation at no expense to the government, and an opportunity to examine the evidence against the noncitizen and to present their own evidence. *See* Pub. L. No. 82-414, § 242(b)(1)-(3), 66 Stat. 163, 209. Moreover, the INA stated that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." *Id*., § 242(b)(4), 66 Stat. at 210. The sections governing exclusionary proceedings contained no such required regulations. *See id*., §§ 235-36, 287(b), 66 Stat. at 198-200, 233.

Throughout the development of modern immigration law in the United States the grounds of exclusion and deportability have evolved. Nevertheless, these various statutes have always held exclusion and deportation as unique concepts, with different, though sometimes overlapping, grounds, and with different

procedures provided and rights afforded for the two distinct processes.

II. In 1996 Congress retained the basic dual structure of the INA, in which different standards, procedures and rights attach to those in and admitted to the country, and in which criminal bars to relief from deportation are connected to the individual's immigration status.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, ("IIRIRA") shifted the statutory line that separated exclusion from deportation but retained the same historical duality in immigration law.[5] The primary change in 1996 was to move from a line based on physical entry into the United States to one that looked at whether the individual had been admitted into the country. Those who enter but are not admitted are now subjected to the grounds that formerly only applied to those seeking entry. Grounds of "excludability" became grounds of "inadmissibility." *See id.* § 301(c), 110 Stat. at 3009-578 (declaring persons who are present without admission as "inadmissible"), § 301(d), 110 Stat. at 3009-579 (changing each

[5] There is a separate longstanding constitutional line drawn in the caselaw between those who have entered and those who are seeking entry. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

reference to "excludable" to read "inadmissible").[6] Despite this shift, the law retained its deep binary structure.

The duality of the statute is reflected in the preamble to each provision. Under current law, as amended in 1996, deportability applies to those "in and admitted" to the United States. INA § 237(a), 8 U.S.C. § 1227(a). Inadmissibility applies to those seeking "to receive visas [or] . . . to be admitted to the United States." INA § 212(a), 8 U.S.C. § 1182(a).

The duality in treatment of those facing grounds of inadmissibility and deportability is further reflected in the provision that combined exclusion and deportation proceedings into "removal" proceedings. Although combined into one proceeding, the two groups face either charges of inadmissibility or deportability. *See* INA § 240(a)(2), 8 U.S.C. § 1229a(a)(2). Noncitizens face different burdens under the statute depending on whether they are admitted to the United States. *Compare* INA § 240(c)(2), 8 U.S.C. § 1229a(c)(2) (placing the burden on the noncitizen for admissibility) *with* INA

[6] Note that prior to 1996, Congress sometimes used the term "admissible" to refer to exclusion grounds in the context of applications for status. *Compare* INA § 245(a)(2) (1995), 8 U.S.C. § 1255(a)(2) (1995) (referring to requirement that an applicant for adjustment of status be "admissible") *with* INA § 101(f)(3) (1995), 8 U.S.C. § 1101(f)(3) (1995) (referring to bars to good moral character for classes of persons "whether excludable or not").

§ 240(c)(3), 8 U.S.C. § 1229a(c)(3) (placing burden on the government for deportability).[7]

Under the 1996 amendments to the INA, Congress also retained major distinctions between the criminal grounds that apply to a person who may be charged with deportability and those that apply to a person who can be charged with inadmissibility. Perhaps the most striking difference (which tracks the historical distinction between those subject to exclusion as compared to deportation), is that inadmissibility on criminal grounds may be established through either an admission of past conduct or a conviction. *See* INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A). In sharp contrast, most criminal grounds of deportability rest only on convictions. *See*, *e.g.*, INA § 237(a)(2)(A)(i)-(v), 8 U.S.C. § 1227(a)(2)(A)(i)-(v); INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B). As a result, a person admitted into the United States has a far more secure status than one who has not been admitted. Moreover, when charged with a crime, a person who has been admitted has greater protection through the criminal justice

[7] Lawful permanent residents returning from a trip abroad are in a unique position under the law. This Court has found that they are deserving of greater constitutional protections, *see Landon v. Plasencia*, 459 U.S. 21, 25-27 (1982) (discussing heightened constitutional protections for returning lawful permanent residents) and has read prior statutes as protecting them in some circumstances from application of exclusion rules. *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963). The degree to which they can be rendered inadmissible after a brief trip due to the 1996 amendments to INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) remains unsettled. *See Vartelas v. Holder*, 566 U.S. 257, 262 n. 2 (2012) (not reaching question whether 1996 laws abrogated *Rosenberg v. Fleuti*).

system because most immigration consequences turn on the ultimate conviction. *See Padilla v. Kentucky*, 559 U.S. 356 (2010) (discussing obligations of counsel with respect to immigration consequences of convictions); *Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958 (2017) (discussing prejudice resulting from erroneous immigration advice about immigration consequences).

The consequences of the distinction between admission-based standards and conviction-based standards is illustrated by *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002). Pazcoguin applied for an immigrant visa from the Philippines based on being the adult son of a lawful permanent resident ("LPR"). He was ultimately barred from admission to the United States because he admitted to a medical officer that he had smoked marijuana in his youth. Under the standards for admissibility, the key question was whether he had admitted committing acts "which constitute the essential elements of . . . a violation of . . . any law or regulation of a State, the United States, or any foreign country relating to a controlled substance. . . ." INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). In contrast, if he had been "in and admitted" to the United States he would not have been deportable for a marijuana charge unless he had been "convicted of a violation of . . . a regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana. . . ." INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

Similarly, there is a major distinction between inadmissibility and deportability for a "crime involving moral turpitude" ("CIMT"). Once again, inadmissibility grounds reach to admissions about past conduct and not just convictions. But more importantly, the deportability ground is largely restricted to two CIMTs, *see* INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii), while the inadmissibility ground does not require multiple convictions. *See* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).[8]

Throughout the INA, those seeking admission are generally treated more harshly than admitted immigrants who face deportation. For example, in the mandatory detention provisions inserted in 1996, Congress swept in all of the criminal inadmissibility grounds while carving out only some criminal deportability grounds. *Compare* INA § 236(c)(1)(A), 8 U.S.C. § 1226(c)(1)(A) (reaching anyone who is "inadmissible" under INA § 212(a)(2)) *with* INA § 236(c)(1)(B), (C), 8 U.S.C. § 1226(c)(1)(B), (C) (identifying only some grounds of criminal deportability as a basis for mandatory detention). Similarly, limits on judicial review are broader for those inadmissible on criminal grounds than for those deportable on criminal grounds. *See* INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (limiting judicial review for those who are inadmissible under INA

[8] There is a narrow circumstance in which a single conviction for CIMT can lead to deportability, but that requires a CIMT conviction for an offense committed within five years for which a sentence of one year or longer may be imposed. INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).

§ 212(a)(2), 8 U.S.C. § 1182(a)(2), but not doing so for those deportable under INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i), and carving out some of those deportable under INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii)).

In 1996, Congress also maintained a dual approach to relief from removal even as it tightened the standards for obtaining relief. Building on the historic system in which different relief was available to long time lawful permanent residents than to others facing deportation, Congress created two basic types of cancellation of removal, one for immigrants with a defined period of lawful permanent residence and one for other qualifying noncitizens. As indicated in the conference report for IIRIRA, these provisions were expressly intended to replace the old provisions of 212(c) relief for lawful permanent residents and suspension of deportation under old 244(a) for those otherwise facing removal. *See* H.R. Rep. No. 104-828, at 213 (1996) (Conf. Rep.) ("Conf. Rep.").

The two new types of cancellation of removal, like the old 212(c) and 244(a) provisions, are more generous towards long time lawful permanent residents than they are to others seeking relief from removal. The LPR provision bars a person who has been convicted of an "aggravated felony." *See* INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3). In contrast, the non-LPR provision bars anyone convicted of an offense listed under the criminal inadmissibility or criminal deportability grounds. *See* INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C). Using drug offenses as an example, the bar for LPRs is

geared at the aggravated felony category for drug trafficking offenses, *see*, *e.g.*, *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Lopez v. Gonzales*, 549 U.S. 47 (2006), while the bar for non-LPRs reaches any conviction under any law involving a controlled substance. *See* INA § 240A(b)(1)(C), 8 U.S.C. § 1227b(b)(1)(C) (barring relief for any conviction of an offense under INA § 212(a)(2), 8 U.S.C. § 1182(a)(2), which includes a violation of any law involving a controlled substance, as defined by federal law. INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II)). Similarly, a fraud conviction that is a CIMT bars relief for a lawful permanent resident if the loss is over $10,000, s*ee Nijhawan v. Holder*, 557 U.S. 29 (2009), but it bars non-LPR cancellation even if there is no loss to the victim.

The two types of cancellation also have very different standards for relief. The standard for granting relief for LPRs, following the old standard for 212(c) relief, involves a balancing of the equities. *See Matter of C-V-T-*, 22 I & N Dec. 7, 11 (BIA 1998) (incorporating balancing standard from *Matter of Marin*, 16 I & N Dec. 581, 584-85 (BIA 1978)). In contrast, for non-LPR cancellation, the non-LPR must demonstrate exceptional and extremely unusual hardship to a lawful permanent resident or citizen parent, spouse or child. *See* INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D). Non-LPRs are also required to meet a good moral character showing, *see* INA § 240A(b)(1)(B), 8 U.S.C. § 1229b(b)(1)(B), which can be barred based on conduct fitting within specified criminal inadmissibility grounds. *See* INA § 101(f)(3), 8 U.S.C. § 1101(f)(3)

(borrowing from criminal inadmissibility bars – whether or not the person is inadmissible – to determine good moral character during a specified period). No such good moral character requirement with specified criminal bars to good moral character applies to LPR cancellation. Instead, LPR cancellation looks holistically at rehabilitation and humanitarian factors and considers whether they support relief from removal.

Altogether, the 1996 revisions to inadmissibility, deportability, and relief for LPRs and non-LPRs retained the dual treatment of prior law. Congress expanded the grounds of removal and tightened access to relief but broadly continued to treat those admitted better than those who sought admission and those with long term LPR status better than those without that status. There remain some oddities in the immigration law that deviate from this framework,[9] but they are overshadowed by the overwhelming structural protections for those who are admitted and those with long term LPR status. The INA has drawn and continues to draw sharp distinctions between deportability and inadmissibility, and between those with long term LPR status and those who lack that status.

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[9] Most notably, Congress did not add the "aggravated felony" category to grounds of inadmissibility. Although most convictions that are aggravated felonies match inadmissibility grounds, there are some occasions in which the definitions diverge. *See Judulang v. Holder*, 565 U.S. 42, 50 (2011) (describing situations in which the inadmissibility grounds may be less broad than deportability grounds).

III. Reading the stop-time rule to block relief based on inadmissibility criteria for those admitted to the United States creates an across the board criminal bar that is radically different from the substantive requirements for the two forms of cancellation of removal and the delineation of criminal bars that apply to one type of cancellation and not the other.

The Eleventh Circuit's reading of the stop-time bar creates a novel and broad bar to relief from removal that ignores the dual structures of grounds of removal and provisions for relief. Under the Eleventh Circuit view, the very same bar applies regardless of whether a person is a lawful permanent resident or a person who never had that status. In either case, the Eleventh Circuit would apply the harshest rules from the inadmissibility system where there is no tempering effect from decisions by the criminal justice system whether to charge, prosecute, and convict the individual for an offense.

The stop-time rule states that the continuous residence period stops when "(A) . . . the alien is served a notice to appear under 239(a), or (B) the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable under section 237(a)(2) or 237(a)(4), whichever is earliest." INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1). As petitioner explains, a proper reading of this provision limits its reach based on whether the person was actually

rendered inadmissible or removable. As read by the Eleventh Circuit, however, this provision has the effect of denying access to relief to any noncitizen based on inadmissibility grounds, even if the individual is not in any way chargeable or charged with inadmissibility on any criminal ground.

The effect of the proposed reading is to impose criminal bars to relief from removal that sweep far beyond those Congress has proposed as appropriate. For years, Congress has considered when and how it should limit general equitable relief for LPRs who have criminal convictions. Prior to 1990, there was no criminal bar to access to 212(c) relief, the precursor to relief under section 240A of the INA. In 1990, Congress created a restriction for LPRs who had served five years in prison for an aggravated felony conviction. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052. In the proposals leading to the 1996 changes, Congress considered expanding these bars, with both houses adopting proposals that would deny relief for a person with an aggravated felony conviction and a sentence of five years in prison, regardless of whether the sentence had been served.[10] In

[10] Both the House and Senate versions of IIRIRA would have permitted lawful permanent residents with seven years of lawful permanent residence to seek a waiver of deportation unless they were sentenced to a term of five years' imprisonment for an aggravated felony conviction. *See* Immigration in the National Interest Act of 1996, H.R. 2202, 104th Cong. § 304 (*reprinted in* H.R. Rep. No. 104-469, pt. 1 at 23 (1996)); Immigration Control and Financial Responsibility Act of 1996, S. 1664, 104th Cong. § 150(b) (*reprinted in* S. Rep. No. 104-249, at 125 (1996)). Neither

conference, Congress opted for a bar based on an aggravated felony conviction where some aggravated felony grounds included a sentence requirement and some did not. *Compare* INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (requiring a one-year prison sentence for a crime of violence aggravated felony), *with* INA § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M) (using a monetary threshold for fraud aggravated felony convictions). But neither the House nor Senate bills nor the conference report suggested importing criminal *inadmissibility* grounds into bars to eligibility for relief from deportation for lawful permanent residents.[11] The Eleventh Circuit's reading however, extends the bar to relief not just to convictions for offenses that render an LPR deportable, but also to convictions or admissions that do not even constitute grounds for deportation. The only limitation in the Eleventh Circuit's view is whether the relevant conduct happened in the first seven years of the individual's residence in the country. This is an extraordinary bar that is far beyond anything that was suggested in either house or made plain by the Conference.

To illustrate the reach of the Eleventh Circuit view consider a case in which a noncitizen immigrated at the age of 14 and faces deportation after decades of

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bill stopped the clock for continuous residence based on commission or conviction of a criminal offense.

[11] Indeed the Conference Report only refers to the clock stopping for "conviction of an offense that renders the alien deportable." Conf. Rep. at 214.

living in the United States as a lawful permanent resident.[12] Under the Eleventh Circuit view, if that person admits to having used marijuana before the age of 21, the immigrant would be barred from access to cancellation relief on that ground alone, even though such marijuana possession that did not lead to a conviction would not be grounds for deportation (and even a single possession conviction would be subject to the exception for a single conviction for possession of under thirty grams of marijuana).

There is nothing in the legislative history to suggest that Congress contemplated closing off access to equitable relief in such a dramatic way. Indeed the only mention of a criminal stop-time rule in the conference report refers to persons who are rendered deportable. While the language settled on in conference applies a stop time rule both to those facing inadmissibility and deportability charges, it rests on whether the person was rendered inadmissible or deportable. It would be

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[12] Note that there is a wide array of grounds that could lead to deportability, some of which involve nothing more than a person's good faith belief that she is a United States citizen. *See* INA § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D). This provision can lead to deportability for those who mistakenly believe they fall into one of the many situations in which the child of a citizen is automatically granted citizenship. *See generally*, INA §§ 301, 309, 8 U.S.C. §§ 1401, 1409 (describing conditions for acquiring citizenship at birth). The safety valve under the law is that this person can seek cancellation of removal under INA § 240A(a), 8 U.S.C. § 1229b(a). But as read by the Eleventh Circuit, an admission of marijuana use as a teenager prior to seven years of residence, which would not make the person deportable, would close off access to relief.

extremely strange for Congress to have chosen to dramatically expand the bars to relief for long term lawful permanent residents charged with deportability without so much as a mention in the report. As this Court has recognized, Congress "does not hide elephants in mouseholes," *Cyan Inc. v. Beaver Cty. Emples. Ret. Fund*, ___ U.S. ___, 138 S. Ct. 1061, 1071 (2018); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and it did not do so here.

CONCLUSION

Throughout the history of immigration law, Congress has adopted a dual approach to legal standards, procedures and remedies for those facing possible removal. The line marking that duality changed in 1996, with the statute applying former grounds of excludability to those who were never admitted to the United States. It has not, however, made a person in and admitted to the United States subject to being charged with those more stringent grounds. To read section 240A(d)(1)'s reference to persons "rendered inadmissible" as applying to this group is a sharp departure from the use of the term in the act as a whole and in the

longstanding role of equitable relief for lawful permanent residents facing deportation.

Respectfully submitted,

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