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 for *Amici Curiae* Former United States Immigration Judges in Support of Petitioner

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INTEREST OF *AMICI CURIAE*[1]

Amici, all former United States Immigration Judges, have, collectively, presided over thousands of immigration cases and appeals, including those involving cancellation of removal.

Hon. **Steven Abrams** was an Immigration Judge from 1997 to 2013 in New York City. Before his appointment to the bench, he was a general attorney for the former Immigration Naturalization Service ("INS").

Hon. **Sarah M. Burr** was an Immigration Judge in New York City from 1994 to 2006. In 2006, she was appointed Assistant Chief Immigration Judge for the New York, Fishkill, Ulster, Bedford Hills, and Varick Street immigration courts, and served in that capacity until 2011, when she returned to the bench full-time until she retired in 2012.

Hon. **Teofilo Chapa** was an Immigration Judge in Miami, Florida from 1995 to 2018.

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[1] All parties have consented to the filing of this brief. *See* Sup. Ct. R. 37.3(a). No counsel for either party authored this brief in whole or in part, and no person or entity other than the *Amici* or their counsel made a monetary contribution to the brief's preparation or submission.

Hon. **Jeffrey S. Chase** was an Immigration Judge in New York City from 1995 to 2007, and an attorney advisor and senior legal advisor at the Executive Office for Immigration Review ("EOIR") Board of Immigration Appeals ("BIA") from 2007 to 2017.

Hon. **George T. Chew**, after serving as an INS trial attorney, was an Immigration Judge in New York from 1995 to 2017.

Hon. **Bruce J. Einhorn** was an Immigration Judge in Los Angeles, California from 1990 to 2007.

Hon. **Cecelia M. Espenoza** was a Member of the EOIR BIA from 2000 to 2003, and served in the Office of the General Counsel from 2003 to 2017, where she was Senior Associate General Counsel, Privacy Officer, Records Officer and Senior FOIA Counsel.

Hon. **Noel Ferris** was an Immigration Judge in New York from 1994 to 2013, and an attorney advisor to the EOIR BIA from 2013 to 2016. Before her judicial appointment, she was Chief of the Southern District of New York's Immigration Unit from 1987 to 1990.

Hon. **John F. Gossart, Jr.** was an Immigration Judge in Baltimore, Maryland from 1982 to 2013, and is the former president of the National Association of Immigration Judges. From 1975 to 1982, he held various positions with the INS, including general attorney, naturalization attorney, trial attorney, and Deputy Assistant Commissioner for Naturalization. He is the co-author of the *National Immigration Court Practice Manual*, which is used by practitioners across the United States.

Hon. **Miriam Hayward** was an Immigration Judge in San Francisco, California from 1997 to 2018.

Hon. **Rebecca Jamil** was an Immigration Judge in San Francisco, California from 2016 to 2018, before which she served as Assistant Chief Counsel for U.S. Immigration and Customs Enforcement in San Francisco beginning in 2011.

Hon. **William P. Joyce** was an Immigration Judge in Boston, Massachusetts from 1996 to 2002, before which he served as legal counsel to the Chief Immigration Judge and as Associate General Counsel for enforcement for INS.

Hon. **Carol King** was an Immigration Judge in San Francisco, California from 1995 to 2017, and a temporary Member of the EOIR BIA for six months in 2010/2011.

Hon. **Elizabeth A. Lamb** was an Immigration Judge in New York City from 1995 to 2018.

Hon. **Margaret McManus** was an Immigration Judge in New York City from 1991 to 2018.

Hon. **Charles Pazar** was an Immigration Judge in Memphis, Tennessee from 1998 to 2017, before which he was Senior Litigation Counsel in the Department of Justice Office of Immigration Litigation, and in the INS Office of General Counsel.

Hon. **Laura Ramirez** was an Immigration Judge in San Francisco, California from 1997 to 2018.

Hon. **John W. Richardson** was an Immigration Judge in Phoenix, Arizona from 1990 to 2018.

Hon. **Lory D. Rosenberg** was a Member of the EOIR BIA from 1995 to 2002. She is the author of *Immigration Law and Crimes.*

Hon. **Susan Roy** was an Immigration Judge in Newark, New Jersey from 2008 to 2010, before which she was an Assistant Chief Counsel, National Security Attorney, and Senior Attorney for the DHS Office of Chief Counsel in Newark. She is the Chair-Elect of the New Jersey State Bar Association Immigration Law Section. She serves on the Executive Committee of the New Jersey Chapter of the American Immigration Lawyers Association ("AILA") as Secretary, and is the New Jersey AILA Chapter Liaison to EOIR. She also serves on the AILA-National 2019 Convention Due Process Committee.

Hon. **Paul W. Schmidt** was an Immigration Judge in Arlington, Virginia from 2003 to 2016, before which he was Chairman of the EOIR BIA from 1995 to 2001, and a Member from 2001 to 2003. He was Deputy General Counsel of the INS from 1978 to 1987, and Acting General Counsel from 1986 to 1987 and 1979 to 1981. He was a founding member of the International Association of Refugee Law Judges, and presently is its Americas Vice President.

Hon. **Ilyce S. Shugall** was an Immigration Judge in San Francisco, California from 2017 to 2019.

Hon. **Denise Slavin** was an Immigration Judge in Baltimore, Maryland and the Krome Processing Center in Miami, Florida from 1995 to 2019.

Hon. **Andrea Hawkins Sloan** was an Immigration Judge in Portland, Oregon from 2010 to 2017.

Hon. **William Van Wyke** was an Immigration Judge in New York City and York, Pennsylvania from 1995 to 2015.

Hon. **Gustavo D. Villageliu** was a Member of the EOIR BIA from July 1995 to April 2003, and Senior Associate General Counsel for the EOIR until he retired in 2011. He was an Immigration Judge in Miami, Florida from 1990 to 1995, presiding over both detained and non-detained dockets, as well as the Florida Northern Region Institutional Criminal Alien Hearing Docket. He joined the EOIR BIA as a staff attorney in 1978, specializing in war criminal, investor, and criminal alien cases.

Hon. **Polly A. Webber** was an Immigration Judge from 1995 to 2016 in San Francisco, California, with details in Tacoma, Port Isabel, Boise, Houston, Atlanta, Philadelphia, and Orlando Immigration Courts. She was National President of AILA from 1989 to 1990, and a National AILA Officer from 1985 to 1991.

INTRODUCTION AND ARGUMENT SUMMARY

This brief presents the view of former immigration judges on two issues: first, the proper standard for assessing whether a lawful permanent resident may be barred from seeking relief from removal; and second, the impact on the administration of immigration courts were Respondent's interpretation of the "stop-time" rule, set forth in 8 U.S.C. § 1229b(d)(1), to be adopted.

Petitioner correctly contends that, for purposes of the stop-time rule, a lawful permanent resident who is not actively seeking admission to the United States cannot retroactively be rendered inadmissible. Petitioner's interpretation is consistent with the purpose of the law and reflects the proper role of immigration judges.

Respondent incorrectly argues that a lawful permanent resident may be rendered inadmissible years after a criminal act for purposes of the stop-time rule, despite the fact that the resident is not actively seeking admission to the United States. That interpretation, if adopted, would interfere with the appropriate exercise of discretion by immigration judges in removal cases, transform discretionary hearings from open explorations of whether the lawful permanent resident has been genuinely rehabilitated into opportunities to extract evidence to form a basis for the government to argue that the hearings not go forward, and create practical difficulties for the administration of the immigration courts.

The standard by which an immigration judge assesses an alien's eligibility for cancellation of removal from the United States is distinct from the concerns about an alien's eligibility for admission to the United States. However, the government would apply inadmissibility standards—the stringent rules used to determine whether to permit aliens' entry into the United States in the first instance—to the determination of whether to allow a lawful permanent resident to make his case that he should not be deported.

Doing so would impermissibly diminish the due process protections guaranteed to aliens during removal proceedings—rights that reflect longtime residency in the United States and an acknowledgement that deportation often means the "loss of both property and life, or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

This brief explains (1) the differences between deportability and admissibility, (2) the stop-time rule, (3) the immigration court system and proceedings to remove a lawful permanent resident alien from the United States, and (4) the practical impact that adoption of the government's position would have on removal proceedings.

ARGUMENT

I. Deportability Versus Admissibility

Considerations regarding an alien's eligibility for cancellation of *removal* from the United States are distinct from the concerns surrounding an alien's eligibility for *admission* to the United States.

Federal law recognizes that deportability and admissibility present different issues, *Landon v. Plasencia*, 459 U.S. 21, 25 (1982), and provides distinct processes for each. An alien is "deportable" when he is "in and admitted to the United States" and falls under one of the categories of "deportable aliens" listed in 8 U.S.C. § 1227(a). Admissibility, on the other hand, is governed by 8 U.S.C. § 1182, which lists ten grounds that render an alien ineligible for entry into the United States. When seeking admission to the United States, an alien must receive approval for entry from one of several Executive Branch agencies. This may be done outside the United States (for example, by applying for a visa at an American consulate or embassy) as well as when seeking entry at the border (through an arrival inspection by a Customs and Border Protection officer). Aliens may also seek "admission" after a period of residence in the United States by applying for an adjustment of status (for example, an alien who entered the United States on a non-immigrant visa may apply for permanent residency).

Aliens living lawfully in the United States possess greater rights, benefits, and privileges than those seeking admission. As this Court observed, Congress has "long made a distinction between those aliens who

have come to our shores seeking admission . . . and those who are within the United States after an entry." *Leng May Ma. v. Barber*, 357 U.S. 185, 187 (1958). Aliens residing in the United States are entitled to due process under the Fifth Amendment; accordingly, removal proceedings are conducted in immigration courts before immigration judges. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) ("[T]he Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Li Hua Lin v. U.S. Dep't of Justice,* 453 F.3d 99, 104–05 (2d Cir. 2006) ("Due process requires that an applicant receive a full and fair hearing which provides a meaningful opportunity to be heard.") (quoting *Capric v. Ashcroft,* 355 F.3d 1075, 1087 (7th Cir. 2004)).

The statutory bases for deportability and inadmissibility can both involve the consideration of an alien's criminal activity, but that analysis differs significantly based on whether the issue is deportation or admission. Of particular relevance to the present case, 8 U.S.C. § 1227 provides that an alien is "deportable" if he is "*convicted* of a crime involving moral turpitude committed within five years . . . after the date of admission [and] for which a sentence of one year or longer may be imposed." *Id.* § 1227(a)(2)(A)(i).[2] On the other hand, 8 U.S.C. § 1182, which governs admissibility, is not limited to formal convictions of a crime; it provides that an alien is "inadmissible" if he is *either* "convicted of, *or* . . . *admits committing acts which constitute the essential elements of* . . . a crime involving moral turpitude . . . or a violation of . . . any

[2] All emphasis has been added unless otherwise stated.

law or regulation . . . relating to a controlled substance." *Id.* § 1182(a)(2)(A)(i). Congress added this clause to ensure that immigration officers "will be able to determine from the information supplied by the alien whether he falls within the 'criminal' category of excludables, notwithstanding the fact that there may be no record of conviction or admission of the commission of a specific offense." S. Rep. No. 82-1137, at 9 (1952), *reprinted in* Oscar M. Trelles, II & James F. Bailey, III, 3 *Immigration and Nationality Acts Legislative Histories and Related Documents* doc. 3 (1979) ("*Legislative Histories*"); H.R. Rep. No. 82-1365, at 48 (1952), *reprinted in Legislative Histories* doc. 4, *also reprinted in* 1952 U.S.C.C.A.N. 1653, 1702.

An alien's confession to having committed a crime (or the essential elements of a crime) may only be used to bar admission if certain procedural rules are followed. The Board of Immigration Appeals ("BIA") decisions have established those rules. *See, e.g., Matter of K*, 7 I. & N. Dec. 594 (BIA 1957); *Matter of J*, 2 I. & N. Dec. 285 (BIA 1945). The rules include:

> the admitted conduct must constitute the essential elements of a crime in the jurisdiction where it occurred; (2) the applicant for admission must have been provided with the definition and essential elements of the crime prior to his admission; (3) this admission must have been voluntary.

Pazcoguin v. Radcliffe, 292 F.3d 1209 (9th Cir. 2002). These rules are intended to ensure that aliens "receive fair play" while also precluding any later claims that the alien was "unwittingly entrapped into admitting

the commission of a crime involving moral turpitude." *Matter of K*, 7 I. & N. Dec. at 597. If an immigration officer fails to adhere to these rules, then any admission to criminal conduct by the alien is invalid and cannot be used to preclude his entry under 8 U.S.C. § 1182(a)(2)(A).

II. The Stop-Time Rule

In the event the government initiates removal proceedings against a lawful permanent resident alien, the alien may apply for relief in the form of "cancellation of removal." As with most forms of relief in immigration courts, cancellation of removal is granted or denied at the discretion of the immigration judge. In order to qualify for cancellation of removal, a lawful permanent resident alien must prove that he has: (1) been admitted for permanent United States residence for not less than five years; (2) resided in the United States continuously for seven years after being admitted in any status; and (3) not been convicted of any aggravated felony. 8 U.S.C. § 1229b(a)(1)-(3). In addition to satisfying these statutory requirements, an alien must establish that he warrants relief in the immigration judge's discretion.

Additionally, the seven-year continuous residence requirement is subject to the "stop-time" rule, which provides that the lawful permanent residency period is "deemed to end" when two requirements are established: (1) the "commi[ssion] [of] an offense referred to in section 1182(a)(2) of [Title 8]," and (2) that offense's effect of "render[ing]" the applicant "inadmissible to the United States under section 1182(a)(2) of [Title 8] or removable from the United

States under section 1227(a)(2) or 1227(a)(4) of [Title 8]." 8 U.S.C. § 1229b(d)(1).

The question here is whether an applicant who has previously been admitted to the United States (and is therefore not actively seeking admission), can be rendered "inadmissible" by acknowledging the commission of an offense referred to in section 1182(a)(2).

The government answers that question affirmatively, and, in doing so, conflates inadmissibility requirements with those for removal. Under the government's interpretation, a lawful permanent resident may be deemed "inadmissible" even though he has already been lawfully admitted to the United States, has been a lawful United States resident for years, and is not seeking admission to the country.

III. Immigration Courts and Removal Proceedings

Immigration courts are the exclusive venue for proceedings to remove an alien from the United States. 8 U.S.C. §§ 1229a(a)(1) & (3). The Department of Justice's Executive Office for Immigration Review ("EOIR") operates sixty-three immigration courts. There, immigration judges appointed by the Attorney General preside over removal proceedings. *See* 8 C.F.R. § 1003.10(a)(1). As of May 2019, there were approximately 400 immigration judges and 875,878 cases pending before them—over 2,100 cases on average for each judge. Office of the Chief Immigration Judge, United States Department of Justice (Feb. 21, 2019), https://www.justice.gov/eoir/ office-of-the-chief-immigration-judge; Immigration Court Backlog

Through May 2019, TRAC Reports, Inc., https://trac.syr.edu/phptools/immigration/court_backlog/.[3]

The Immigration and Nationality Act ("INA") vests the Department of Homeland Security ("DHS") with the exclusive authority to commence removal proceedings. *See Matter of S-O-G & F-D-B*, 27 I. & N. Dec. 462 (A.G. 2018). Unlike defendants in criminal proceedings, aliens in removal proceedings do not have a constitutional right to counsel, and over 60% of aliens proceed *pro se*, opposed by experienced DHS attorneys. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

Aliens are protected by the Fifth Amendment's due process requirements during removal proceedings. *See Reno*, 507 U.S. at 306. For over a century, this Court has recognized that removal is among the gravest possible punishments and stressed the importance of protecting the due process rights of those who face removal. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 740-41 (1893) (removal is "among the severest of punishments" and "[e]very one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that

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[3] TRAC Reports, Inc. is a nonpartisan, nonprofit data research center affiliated with the Newhouse School of Public Communications and the Whitman School of Management, both at Syracuse University.

oftentimes [sic] most severe and cruel") (Brewer, J., dissenting).

A. Initiation of Removal Proceedings

DHS initiates removal proceedings by issuing, serving, and filing with the immigration court a Notice to Appear ("Notice"). 8 U.S.C. § 1229(a); 8 C.F.R. § 1003.14(a). The Notice specifies the nature of the proceedings against the alien, including the statutory provisions alleged to be violated, and the time and place at which the initial Master Calendar Hearing ("MCH") will be held. 8 U.S.C. § 1229(a)(1). The Notice also states that the alien may be represented by counsel. *Id*. § 1229(a)(1)(E).

B. The Master Calendar Hearing

In removal proceedings, an alien's first appearance before an immigration judge is at the MCH. The MCH—which typically lasts no more than five minutes, with dozens of MCHs scheduled at the same time—is similar in style to the arraignment of a criminal defendant. The purpose of the MCH is to advise the alien of his rights regarding the removal proceedings, explain the charges and factual allegations in the Notice, and identify and narrow the factual and legal issues regarding removal and the requested relief. During the MCH, the immigration court may: (1) receive pleadings; (2) set deadlines for filing applications for relief, submitting briefs, motions, prehearing statements, exhibits, witness lists, and other documents; and (3) schedule individual merits hearings to adjudicate any contested matters or

applications for relief. *See* 8 U.S.C. § 1229a(b), 8 C.F.R. § 1240.10.

At the MCH, the alien must admit or deny the charges and factual allegations contained in the Notice, either conceding or contesting the grounds on which DHS contends the alien is removable.[4] The alien also must disclose any applications for relief from removal he intends to file, including cancellation of removal, which Petitioner sought in this case. 8 U.S.C. § 1229b. In turn, DHS will state its position on the factual and legal issues, including the alien's eligibility for relief, and will later file all documents that support the charges and factual allegations contained in the Notice.

At the end of the MCH, the judge schedules an individual merits hearing ("Merits Hearing"), akin to a trial, if the alien has pleaded one or more of the bases for relief from removal. Non-detained aliens can expect to wait an average of over two years for their Merits Hearing.[5]

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[4] An alien with lawful permanent resident status who is present in the United States may be removed for any of the following violations of immigration law: (1) being "inadmissible at time of entry or of adjustment of status or violates status"; (2) "criminal offenses"; (3) "failure to register and falsification of documents"; (4) "security and related grounds"; (5) "public charge"; or (6) "unlawful voters." 8 U.S.C. § 1227(a)(1)-(6).

[5] This is because of the courts' large caseload. In some jurisdictions, the average wait is closer to four years. *See* Average Time Pending Cases Have Been Waiting in Immigration Courts as of May 2019, TRAC Reports, Inc., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php.

C. Prehearing Submissions

In advance of the Merits Hearing, the alien and DHS may submit corroborating evidence. For the government, this may include records of criminal arrests, prosecutions, and convictions to establish a basis for removal; for the alien, this may include evidence of his rehabilitation in the form of, *inter alia*, psychiatric evaluations, tax records, school documents, evidence about community activities, and affidavits from family, friends, and neighbors, supporting his entitlement to relief from removal.

D. Establishing Eligibility for Cancellation of Removal

While the government bears the burden of proving the basis for an alien's removability (which is often uncontested and admitted at the MCH), the alien bears the burden of demonstrating eligibility for relief from removal. *See* 8 U.S.C. § 1229a(c)(3)(A), (4)(A); 8 C.F.R § 1240.8(a), (d). To do so, an alien must show, typically at the MCH, that he meets the statutory requirements of 8 U.S.C. § 1229b.

Relief in the form of cancellation of removal is available only to certain categories of aliens placed in removal proceedings. Lawful permanent resident aliens can qualify for cancellation of removal if they can prove that they have: (1) been admitted for permanent residence in the United States for not less than five years; (2) resided in the United States continuously for seven years after admission; and (3) not been convicted of any aggravated felony. 8 U.S.C. § 1229b(a)(1)-(3).

The continuous residence requirement is subject to the "stop-time" rule. If an alien does not meet the continuous residency requirements, his application for relief may be pretermitted and he either will not receive a Merits Hearing or his hearing will be terminated if it has begun.

E. The Merits Hearing

In addition to satisfying the three statutory eligibility requirements discussed above, an alien must establish that he is potentially entitled to relief from removal as a matter of the immigration judge's discretion. 8 U.S.C. § 1229a(c)(4)(A). The Merits Hearing is an evidentiary hearing designed to determine whether such relief is warranted. Immigration judges are tasked with ascertaining an alien's character, standing in his community and family, and history of behavior; the judges must then balance the factors weighing for and against an alien to determine whether, in the judges' discretion, the alien is entitled to relief. *Matter of Edwards*, 10 I. & N. Dec. 506, 195 (BIA 1964); *Matter of Marin*, 16 I. & N. Dec. 581, 585 (BIA 1978).

At the Merits Hearing, "[d]ue process requires that an applicant receive a full and fair hearing which provides a meaningful opportunity to be heard." *Lin,* 453 F.3d at 104–05. While the Federal Rules of Civil Procedure and Evidence do not apply in Merits Hearings, those hearings proceed in trial-like fashion. For example, the alien and DHS typically make opening statements, present and object to evidence, present and cross-examine witnesses and object to testimony, and offer closing statements. The alien is

almost always the first witness because the purpose of the Merits Hearing is to examine the equities, including evidence of rehabilitation. Other witnesses who testify under oath in support of the alien often include family members whose livelihood depend on the alien's income, colleagues who depend on the alien's contributions at work, close friends who speak to the alien's character, and neighbors who speak to the alien's standing and influence in the community. A typical Merits Hearing lasts three to four hours.

A unique feature of immigration courts is that immigration judges have authority under the INA to "interrogate, examine, and cross-examine the alien and any witnesses" during the Merits Hearing. 8 U.S.C. § 1229a(b)(1). More broadly, "[i]n deciding the individual cases before them … immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." 8 C.F.R. § 1003.10(b). Particularly for *pro se* aliens, immigration judges typically exercise that authority and actively question the alien and any witnesses.

The Merits Hearing is intended to be a probing, personal inquiry: "there is no inflexible standard for determining who should be granted discretionary relief, and each case must be judged on its own merits." *Matter of C-V-T*, 22 I. & N. Dec. 7, 11 (BIA 1998). Immigration judges are broadly empowered to make credibility determinations based on such factors as: "the demeanor, candor, or responsiveness of the

applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements, . . . and any inaccuracies or falsehoods in such statements." 8 U.S.C. § 1229a(c)(4)(C).

The positive factors that an immigration judge may consider include: family ties within the United States and hardship to the resident alien's family if deportation occurs; residency of long duration in the United States; service in the Armed Forces; employment history; ownership of property; business ties; value and service to the community; proof of genuine rehabilitation if there was criminal conduct; and other evidence attesting to good character. *Matter of C-V-T*, 22 I. & N. Dec. at 7.

The negative factors that an immigration judge may consider include: the nature of the grounds for removal; additional immigration violations; existence of a criminal record; and other evidence of bad character. *Matter of Edwards*, 10 I. & N. Dec. at 195; *Matter of Marin*, 16 I. & N. Dec. at 585.

In practice, this necessitates that lawful permanent resident aliens with criminal records provide immigration judges with evidence of their rehabilitation in order to tip the balance in favor of a grant of cancellation of removal. *Matter of C-V-T*, 22 I. & N. Dec. at 12 ("With respect to the issue of rehabilitation, a respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion"). An alien's candid discussion of his past behavior is essential to showing rehabilitation.

After both sides have presented their respective cases, and after assessing the record as a whole and weighing the positive and negative considerations in the alien's specific case, the immigration judge will determine whether "the granting of . . . relief appears in the best interest of this country." *Matter of C-V-T*, 22 I. & N. Dec. at 11 (quoting *Matter of Marin*, 16 I. & N. Dec. at 584-85). The immigration judge may issue an oral decision at the Merits Hearing or issue an oral or written decision at a later date.

F. Pretermission

Aliens in removal proceedings are only entitled to a Merits Hearing where the alien contests the government's charges of removability or has asserted that he can satisfy the statutory bases for certain relief, such as cancellation of removal. Thus, the government can move to pretermit a Merits Hearing if the lawful permanent resident alien: (1) does not have any basis on which to challenge removability; and (2) cannot satisfy the eligibility requirements for any form of relief. DHS may move to pretermit by written or oral motion at the MCH, by written motion before the Merits Hearing, or by written or oral motion during the Merits Hearing. If the court grants DHS's pretermit motion, the proceedings immediately end—meaning either no Merits Hearing or the cessation of the Merits Hearing if it had begun. *See* 8 C.F.R. § 240.21(c)(1).

IV. The Government's Interpretation of Admissibility Would Change an Essential Function of Immigration Courts

Immigration proceedings are designed to allow judges to evaluate the equities of an individual alien's situation. *See* Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J. FORUM 499, 506 (2014). In order to do so, immigration judges must have the authority to exercise broad discretion—an "essential function" with immeasurable "value in our jurisprudence." *United States v. U.S. Steel Corp.*, 251 U.S. 417, 452 (1920). Such discretion can only be exercised if a full Merits Hearing occurs.

Respondent's interpretation undermines immigration judges' authority to exercise their discretion and drastically changes the way in which relief hearings work. It would divorce cancellation of removal procedures from the spirit and purpose of 8 U.S.C. § 1229b for three reasons:

First, immigration judges would be deprived of their right to exercise discretion in contexts where, typically, decisions are made by balancing "the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of . . . relief appears in the best interests of this country." *Matter of Marin*, 16 I. & N. Dec. 581 at 584.

Second, lawful permanent resident aliens would lose their right to challenge removal if they were convicted of, or admitted to, a listed offense, irrespective of the severity of that offense and the alien's rehabilitation. This deprives immigration judges of the ability to exercise any discretion because even minor offenses would become outcome-determinative, rendering a lawful permanent resident alien ineligible for relief. This is so notwithstanding that the commission of petty offenses currently often does not lead immigration judges to deny a lawful permanent resident alien relief, particularly when the alien's application demonstrated positive community ties and rehabilitation.

Third, because admissibility would be determined based not only on convictions, but also *confessions* to past criminal acts, the government's interpretation would set up traps for the unwary. DHS would be able to use a resident alien's candor as a basis for inadmissibility. Applicants thus would be forced to be very circumspect in answering questions, in order to walk a fine line between omitting relevant information and foregoing their Fifth Amendment rights against self-incrimination. What was once a positive factor that immigration judges could weigh in exercising their discretion (*i.e.*, the demonstration of genuine rehabilitation from past criminal conduct), may become a liability for resident aliens. This would disproportionately harm *pro se* applicants—the majority of those seeking relief from removal—who may be unaware that conduct to which they admit could end their hearing and result in their deportation.

Finally, the government's interpretation would create inefficiency and more delays in the immigration court system. It would strongly incentivize DHS attorneys to engage in time-consuming, open-ended questioning during Merits Hearings in the hopes of obtaining confessions of past criminal conduct, forcing immigration courts to devote precious time and resources to numerous "mini-hearings" to determine the validity and effect of those confessions.

A. The Government's Interpretation Is Contrary to the Purpose of the Statute

Immigration judges exercise discretion "according to [their] own understanding and conscience." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954); *see also* 8 C.F.R. § 1003.10(b). This authority to exercise discretion has been inextricably "woven into the fabric of the [immigration court] system." Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 751-52 (1997). The immigration process relies on immigration judges making discretionary determinations of relief as "matters of grace" based on the personal narratives conveyed by individual immigrants. *Jay v. Boyd*, 351 U.S. 345, 354 (1956); *see also INS v. St. Cyr*, 533 U.S. 289, 308 (2001). "Discretion is often needed to enable [immigration judges] to respond creatively to the circumstances of individual cases," and, while immigration judges' discretion is bounded and cannot be arbitrary, it "allows for the operation of expertise and human sensitivity where standards or stringent review might stifle such expression." Abraham D.

Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM L. REV. 1293, 1296 (1972).

1. The Government's Interpretation Would Deprive Immigration Judges of the Authority to Exercise Discretion by Pretermitting Merits Hearings

Immigration judges can only exercise discretion if they can conduct a hearing, during which they often examine witnesses. By statute, immigration judges assess the credibility and significance of the evidence to decide what weight to apply to it. 8 U.S.C. § 1229a(c)(4)(C); *Matter of C-V-T*, 22 I. & N. Dec. 7.

Immigration judges frequently exercise their discretion to give lesser weight to evidence of criminal conduct that did not result in a conviction. *See, e.g., Matter of C-V-T*, 22 I. & N. Dec. 7 (granting relief to alien whose single minor drug offense was not a particularly serious crime or ongoing threat); *Matter of Arreguin de Rodriguez*, 21 I. & N. Dec. 38, 42 (BIA 1995) ("Just as we will not go behind a record of conviction to determine the guilt or innocence of an alien, so we are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein.").

The government's interpretation of the stop-time rule, however, would allow DHS to move to pretermit the Merits Hearing if the lawful permanent resident alien has a conviction or admits to conduct constituting a crime involving moral turpitude or a violation of the

controlled substances laws, regardless of their severity or surrounding circumstances. Doing so would prevent immigration judges from exercising their statutorily prescribed discretion to balance evidence of past criminal conduct or crimes—including convictions of low-level misdemeanors, expunged convictions of low-level misdemeanors, or even facts that would constitute a low-level misdemeanor admitted by an alien who had been honest and forthcoming in his relief proceeding—against positive factors such as important ties to the United States, community involvement, hardship to the lawful permanent resident alien's family if he is deported, and positive evidence of rehabilitation. This positive evidence would never be heard by the immigration judge if the Merits Hearing were pretermitted based on the government's construction of the stop-time rule.

2. No Consideration Will Be Given to the Severity of the Offense, Warranting the Same Drastic Result

A lawfully admitted permanent resident may be deported for a single crime involving "moral turpitude." 8 U.S.C. § 1227(a)(2)(A). Neither the INA nor any other statute defines "crime involving moral turpitude" ("CIMT"). *See Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1068 (9th Cir. 2011) ("there are no statutorily established elements for a crime involving moral turpitude"), *overruled on other grounds by United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc).

This has resulted in incongruous judicial decisions. For example, some courts have held that crimes of moral turpitude are those that involve fraud, as well as those that are "base, vile, or depraved," or "offend society's most fundamental values." *Id.* at 1074 (Reinhardt, J., concurring). Others, however, have interpreted relatively minor crimes as deportable offenses. For example, in *Michel v. INS*, 206 F.3d 253 (2d Cir. 2000), the Second Circuit affirmed a holding that Michel, a lawfully admitted permanent resident who had resided in the United States for eighteen years, was deportable based on two convictions for criminal possession of stolen property—bus transfers—in the fifth degree. The Second Circuit specifically rejected Michel's defense based on the triviality of the offenses and affirmed the BIA's precedent that the seriousness of the crime is irrelevant to the definition of a CIMT.

Under the government's construction of 8 U.S.C. § 1182, the *mere admission* of an action that might amount to a CIMT—a term repeatedly recognized to be ambiguous and potentially encompassing the most trivial crimes—would become the basis for inflicting the "severest of punishments." *Fong Yue Ting*, 149 U.S. 698 at 741 (Brewer, J., dissenting). Of particular concern is that these admissions may have been elicited in circumstances where an alien had no counsel.

Similarly, while the grounds for deportability exclude convictions for possession of thirty grams or less of marijuana for personal use, 8 U.S.C. § 1227(a)(2)(B)(i), the grounds for inadmissibility do

not. *See* 8 U.S.C. § 1182(a)(2)(C)(i) (possession of any amount of marijuana for personal use is a ground for inadmissibility). Thus, the government's interpretation would render an applicant ineligible for cancellation of removal based on an admission to possession of a small amount of marijuana during the first seven years of his residency in the United States—whether or not he was criminally charged—upon motion by the government. This would be true notwithstanding the fact that an actual conviction for the same conduct would not be grounds for deportability.

3. Immigration Judges Will Be Deprived of Evidence Needed to Effectively Exercise Discretion

The personal narratives of lawful permanent resident aliens seeking cancellation of removal are an important part of the Merits Hearing. Resident aliens are advised to provide a full picture of their lives in this country, which often includes an honest recounting of their past difficulties. Indeed, such honesty is critical to an immigration judge's ability to determine credibility, character, and rehabilitation.

But the bright-line rule regarding eligibility for relief proffered by the government will significantly discourage such candor on the part of resident aliens. The government's interpretation of the stop-time rule allows DHS to seize upon admissions of past criminal conduct given during the resident aliens' personal narrative. What resident aliens have used to demonstrate credibility and rehabilitation would become a liability.

Under the government's rule, a resident alien's admission of long-past, one-time drug use—for example, smoking a single marijuana cigarette at a party when he or she was a college undergraduate—in the first seven years of his residency in the United States (whether or not he was criminally charged) would render that resident alien ineligible for relief upon motion by the government. Such a scenario is neither far-fetched nor hypothetical, but is a slight variant of what happened to the lawful permanent resident alien in *Nguyen v. Sessions* prior to reversal by the Ninth Circuit. 901 F.3d 1093, 1095 (9th Cir. 2018) ("During his merits hearing, Nguyen admitted on cross-examination that he used cocaine [more than a decade earlier] in 2005. The government argued below that Nguyen's commission of a drug offense rendered him inadmissible, therefore stopping his accrual of continuous residence at five years. The [immigration judge] agreed and pretermitted Nguyen's cancellation application. The [BIA] affirmed in an unpublished decision.").

In effect, the government's interpretation would transform Merits Hearings from proceedings that center on an applicant's acknowledgment of responsibility for past bad acts and evidence of rehabilitation and other equities into inquisitions to find uncharged conduct within the first seven years of the applicant's residence in the United States. Immigration lawyers will counsel clients not to volunteer any evidence of past behavior that might be viewed as criminal and thus could serve as a basis of ineligibility—meaning that immigration judges may

well be basing their decisions on incomplete pictures of resident aliens' lives in this country.

Further, expert reports will likely be more narrowly written. Expert reports authored by mental health professionals are often submitted as evidence of a lawful permanent resident alien's rehabilitation. Immigration judges rely heavily on these expert reports for their analyses of a resident alien's likelihood of rehabilitation and recidivism. Experts require a detailed account of past criminal conduct—charged and uncharged—in order to make an informed recommendation as to the risk of recidivism. An alien's representative would not submit such an expert report if it contained evidence that could be argued to render her client ineligible for relief.

4. The Government's Interpretation Disproportionately Disadvantages *Pro Se* Applicants

According to the government, an applicant's admission of the elements of a crime will trigger the stop-time rule. This reading puts applicants, particularly those proceeding *pro se*, in danger of inadvertently admitting to past offenses, rendering themselves inadmissible. In Merits Hearings, applicants testify to their personal history, and often describe past indiscretions and evidence of rehabilitation. However, if mention of petty crimes or minor drug offenses can result in removal, *pro se* applicants are vulnerable to misunderstanding the consequences of their testimony. This is particularly true in reference to personal use of marijuana. The jurisdiction where the alien resides may have no or

minimal state or local penalties for marijuana possession, and so, "believing that they have done nothing wrong, immigrants may readily admit to officials that they possessed marijuana . . . A real danger posed . . . is that immigrants will wrongly believe it is 'safe' to disclose apparently lawful conduct to federal officials, when in fact this can result in catastrophic immigration consequences." Kathy Brady, Zachary Nightingale & Matt Adams, *Practice Advisory: Immigration Risks of Legalized Marijuana*, Immigrant Legal Resources Center (Jan. 2018), https://www.ilrc.org/sites/default/files/resources/marijuana_advisory_jan_2018_final.pdf.

Crimes involving moral turpitude create similar risks for *pro se* applicants. "In the past two years, almost every decision issued by the BIA has expanded the definition of moral turpitude to encompass more criminal activity" in such a way that has "def[ied] common sense and undermine[d] the prevailing methodology for assessing the immigration consequences of crime." Jennifer Lee Koh, *Crimmigration Beyond the Headlines: The Board of Immigration Appeals' Quiet Expansion of the Meaning of Moral Turpitude*, 71 STAN. L. REV. ONLINE 267 (2019). *Pro se* applicants will thus have an increasingly difficult time predicting what testimony could render them ineligible for relief.

Because of its prejudicial effect on unrepresented applicants, the government's interpretation of the stop-time rule is inconsistent with the policy goals of immigration courts. The Justice Department has committed to protecting the rights of *pro se* applicants.

EOIR guidance ensures that "unrepresented ('pro se') respondents have the same hearing rights and obligations as represented respondents." Executive Office for Immigration Review, U.S. Department of Justice, Immigration Court Practice Manual 88 (Aug. 2, 2018). The guidance instructs immigration judges to notify *pro se* applicants if they may be eligible for relief. *Id*. at 75. At hearings, judges explain procedures and legal standards for relief. *See Agyeman v. INS*, 296 F.3d 871, 875 (9th Cir. 2002) (holding an immigration judge's failure to advise a *pro se* alien of the procedure and relevant legal standards violated due process). By virtue of their power to question the applicant and witnesses, immigration judges help *pro se* applicants meet this standard of proof. The Justice Department's and immigration judges' recognition of their duty to protect the rights of unrepresented applicants stands in sharp contrast to the government's position in this case.

B. The Government's Interpretation Would Create Inefficiencies in an Already Over-Burdened System

The government's interpretation of the stop-time rule would create additional systemic inefficiencies that would deplete immigration courts' precious time and resources. While it may appear that, by creating a stricter rule regarding eligibility for relief, the government's interpretation would make immigration courts more efficient by decreasing the number of resident aliens who qualify for cancellation of removal, in practice it would have the opposite effect. The government's interpretation would strongly incentivize

government attorneys to engage in time-consuming, open-ended questioning during Merits Hearings in the hope of obtaining admissions of past criminal conduct. This would force immigration courts to repeatedly devote precious time and resources to "mini-hearings" to determine the validity of those disqualifying admissions. *See, e.g., Moncrieffe v. Holder*, 569 U.S. 184, 200–01 (2013) (rejecting the government's proposed rule to determine whether criminal conduct constitutes an "aggravated felony" because such an approach would "have our Nation's overburdened immigration courts" engage in a "post hoc investigation into the facts of predicate offenses" and "[relitigate] past convictions in minitrials conducted long after the fact.").

The immigration courts are overburdened and under-resourced. "Immigration Courts have faced structural deficiencies, crushing caseloads and unacceptable backlogs for many years. Many of the 'solutions' that have been set forth to address these challenges have in fact exacerbated the problems and undermined the integrity of the Courts, encroached on the independent decision-making authority of the Immigration Judges, and further enlarged the backlogs." *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Sec. and Immigration of the S. Comm. on Judiciary*, 115th Cong. 2 (2018) (statement of Judge A. Ashley Tabaddor, Pres. of the National Association of Immigration Judges). The government's interpretation of the stop-time rule will only serve to exacerbate the problems facing an already over-burdened system.

1. Immigration Courts Will Be Forced to Determine Whether Resident Aliens' Admissions Are Sufficient to Render Them Inadmissible

Unlike removability, which is typically based only on a formal conviction of a qualifying criminal offense, inadmissibility can also be based on a confession of commission of a crime or acts that constitute a crime. In determining whether an alien has so confessed: (1) the conduct in question must clearly constitute a crime under the law where it is alleged to have occurred; (2) the alien must be advised of the essential elements of the alleged crime; (3) the alien must clearly admit conduct constituting the essential elements of the crime; and (4) the admission must be free and voluntary. *See Matter of J*, 2 I. & N. Dec. at 285; *see also Matter of K* ,7 I. & N. Dec. at 594 (these rules "were not based on any specific statutory requirement but appear to have been adopted for the purpose of insuring that the alien would receive fair play and to preclude any possible later claim by him that he had been unwittingly entrapped into admitting the commission of a crime involving moral turpitude.").

Because this requirement is based upon BIA opinions rather than statutes, experience has demonstrated that law enforcement officers often are unaware of these rules. Immigration judges thus will need to carefully scrutinize admissions to law enforcement personnel. This could plunge immigration judges into the vagaries of the criminal laws of the various jurisdictions—both domestic and foreign—in which admitted conduct took place. By way of example,

an immigration judge sitting in New York, presiding over the application of a lawful permanent resident alien who has admitted to the purchase of pseudoephedrine (a common allergy medication sometimes used in the manufacture of methamphetamine) in Mississippi, would be required to determine if his conduct met the essential elements of Mississippi criminal law relating to controlled substances.

A motion by the government to pretermit a Merits Hearing based upon an admission by the alien could be resolved in two ways, both of which would create further inefficiencies within the immigration courts. An immigration judge may, *during an ongoing Merits Hearing*, hear arguments and render a decision as to whether statements constitute an admission of criminal conduct that would render an alien inadmissible. Alternatively, an immigration judge can adjourn an ongoing Merits Hearing and schedule briefing and a separate hearing to decide whether the statements constitute an admission. Either scenario presents complications and requires additional time and resources.

Moreover, the inefficiencies would not end at the trial level, but would extend to the appellate process. Because the government's interpretation of the stop-time rule allows for mid-hearing pretermissions of Merits Hearings, more appeals would be heard on the sole issue of pretermission, often involving an incomplete Merits Hearing. What is more, if the BIA or the Circuit Court later were to overturn an immigration judge's pretermission decision and remand

for consideration of the merits of the resident alien's application, the immigration court would need to hold an entirely new Merits Hearing, after a long delay, because the first hearing had been prematurely terminated.

2. The Government's Interpretation Will Encourage Dilatory Legal Strategies

The government's interpretation of the stop-time rule will incentivize both attorneys for the government and for aliens to employ new strategies in connection with Merits Hearings, at odds with the goals of the immigration court system. These new tactics will likely delay and complicate proceedings.

A lawyer may, for instance, instruct his client not to volunteer information about past acts for fear of incentivizing the government to conduct an extensive inquiry into those (and other) acts in the hopes of substantiating a motion to pretermit the alien's Merits Hearing. Previously, such information about problems that have been overcome could have been used to demonstrate rehabilitation. Not only could that result in an incomplete record upon which an immigration judge must render a decision, but any apparent gaps in the alien's history may cause the government's attorney to waste time pursuing potential issues that do not exist.

While resident aliens could be forced into taking overly defensive positions, the government can wield the stop-time rule to try to cut the Merits Hearing short. The government can, and reasonably would,

arm itself with a list of questions to ask the alien while under oath to attempt to contest the alien's eligibility for relief. Were an alien to invoke his Fifth Amendment right against self-incrimination, the immigration judge would likely draw "an adverse inference." *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011). The government could conduct such questioning, whether productive or not, in virtually every hearing. Such "admission-fishing" questioning—in effect, turning Merits Hearings into open-ended depositions of often uncounseled aliens—will only serve to draw out hearings and further clog up the already overloaded dockets of immigration judges, particularly if they become a regular part of Merits Hearings, without leading to better results.

Indeed, this is precisely the sort of behavior by DHS that this Court sought to curtail in *Maslenjak v. United States*, 137 S. Ct. 1918 (2017). *Maslenjak* concerned the interpretation of 18 U.S.C. § 1425(a), which makes it a crime to "procure, contrary to law, naturalization." The government proposed an interpretation of 18 U.S.C. § 1425(a) in tandem with another law—18 U.S.C. § 1015(a), which prohibits knowingly making a false statement under oath during a naturalization proceeding. The government asserted that any false statement, including statements made on the standard application for citizenship form, even if immaterial or unimportant to the government's decision to grant citizenship, would constitute a violation of 18 U.S.C. § 1425(a). The Court rejected this interpretation, and made note of the "world of disquieting consequences"

that would result from the government's interpretation, an observation that resonates in the present case:

> Consider the kinds of questions a person seeking citizenship confronts on the standard application form. Says one: "Have you EVER been . . . in any way associated with[] any organization, association, fund, foundation, party, club, society, or similar group[?]". Asks another: "Have you EVER committed . . . a crime or offense for which you were NOT arrested?" Suppose, for reasons of embarrassment or what-have-you, a person concealed her membership in an online support group or failed to disclose a prior speeding violation. Under the Government's view, a prosecutor could scour her paperwork and bring a §1425(a) charge on that meager basis, even many years after she became a citizen. That would give prosecutors nearly limitless leverage—and afford newly naturalized Americans precious little security.

Id. at 1927 (citations omitted).

The construction urged by the government here suffers from the same logical and legal flaws as did its argument in *Maslenjak*, and would harm the administration of the immigration courts and deny justice to immigrants facing removal. The *Maslenjak* Court stated that it "would need far stronger textual support to believe [that was what] Congress intended." The same is true here, and that support is similarly lacking.

CONCLUSION

For the foregoing reasons, respectfully, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

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