No. 19-373

In The
Supreme Court of the United States

JAMES WALKER,
Petitioner,
v.
UNITED STATES,
Respondent.

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

BRIEF OF AMERICAN IMMIGRATION COUNCIL, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IMMIGRANT DEFENSE PROJECT, JUST FUTURES LAW, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND NORTHWEST IMMIGRANT RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

United States v. Walker (No. 19-373) concerns whether a crime with a *mens rea* of recklessness may count as a "violent felony" under the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e)(2)(B)(i). The Immigration and Nationality Act ("INA") uses a nearly identical definition of what is an "aggravated felony" for immigration law. 8 U.S.C. § 1101(a)(43)(F) (incorporating the definition of "crime of violence" in 18 U.S.C. § 16(a)). A person who is convicted of an "aggravated felony" faces a number of immigration consequences, including deportation, administrative removal, a ban on reentry, and an inability to be considered for cancellation of removal.

Amici curiae are immigrant rights organizations, many of whose members and clients could face severe consequences if the Court rules that a criminal offense committed with a *mens rea* of recklessness qualifies as a "violent felony" under the ACCA. As organizations that work closely with immigrants, their families, and their communities, we have a profound interest in ensuring that their voices are included in the resolution of the issue in this case. The following entities join this brief as amici: American Immigration Council, American Immigration Lawyers Association, Immigrant Defense Project, Just Futures Law, National Immigrant Justice Center, National

[1] Counsel of record for all parties consent to the filing of this brief. S. CT. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

Immigration Project of the National Lawyers Guild, and Northwest Immigrant Rights Project. Detailed statements of interest for each entity appear in the appendix of this brief.

This brief will discuss the severe consequences that will arise in immigration cases if the Court determines that a crime with a *mens rea* of recklessness qualifies as a "violent felony." In so doing, this brief will highlight the consequences that are most likely to be triggered by a ruling against Petitioner.

BACKGROUND

The ACCA provides an enhanced mandatory minimum sentence if a defendant has three previous convictions for violent felonies. 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as "any crime punishable by imprisonment for a term exceeding one year…that—(i) *has as an element the use, attempted use, or threatened use of physical force against the person of another*." 18 U.S.C. § 924(e)(2)(B) (emphasis added).

The INA incorporates nearly identical language into the immigration laws. To define an "aggravated felony," 8 U.S.C. § 1101(a)(43)(F) incorporates the definition of "crime of violence" from 18 U.S.C. § 16: "The term 'crime of violence' means—(a) an offense that *has as an element the use, attempted use, or threatened use of physical force against the person or property of another*" (emphasis added). The definition

employed by the INA adds the phrase "or property" but is otherwise identical to the definition in the ACCA.[2]

This Court's decision as to whether a crime with a *mens rea* of recklessness can qualify as a "violent felony" for purposes of the ACCA therefore will likely determine how courts interpret what is an "aggravated felony" for purposes of immigration law.

Whether a conviction qualifies as an "aggravated felony" has profound and far-reaching implications for immigrants. In contrast to the ACCA, where the defendant must have *three* "violent felony" convictions to trigger the enhanced mandatory minimum, an immigrant with a *single* conviction for an "aggravated felony" is automatically deportable. *Compare* 18 U.S.C. § 924(e)(1), *with* 8 U.S.C. § 1227(a)(2)(A)(iii). Congress therefore looked to the ACCA crime of violence definition to determine when one conviction alone is so serious as to justify mandatory deportation and lack of access to relief from removal. Indeed, that single conviction renders an order of removal nearly automatic because it also makes the immigrant ineligible for numerous forms of relief from deportation including cancellation of removal (Part I.A.1, below), asylum (Part I.A.2, below), and voluntary departure (Part I.A.5, below). That single conviction also prompts a much more draconian

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[2] The U.S. Sentencing Guidelines also use similar language in describing a career offender. The guidelines define a "crime of violence" as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1).

deportation process called administrative removal for non-permanent residents that lacks many of the due process features to which the immigrant would otherwise have access. Part I.A.4, below. And the conviction subjects the immigrant to mandatory detention during the deportation proceedings. Part I.A.3, below.

Despite these most serious consequences, a conviction can qualify as an "aggravated felony" under the INA even if it was not a felony at all. A conviction that is considered a misdemeanor under state law can count as a "crime of violence" under the INA, so long as the "term of imprisonment" is at least one year. 8 U.S.C. § 1101(a)(43)(F).

And an offense can have a "term of imprisonment" of "at least one year" even if the defendant served no time at all in jail. The INA provides that "term of imprisonment" includes the sentence actually imposed by the court, even if that sentence is suspended. 8 U.S.C. § 1101(a)(48)(B). Thus, a defendant who is convicted of a misdemeanor and receives a suspended sentence of one year (*i.e.*, a defendant who serves no time in jail) is considered to have been sentenced to a "term of imprisonment" of "at least one year" under the INA. 8 U.S.C. § 1101(a)(43)(F). This is significant because state courts often choose to suspend a sentence for low-level felony and misdemeanor cases, especially those

involving first-time offenders.[3] The consequences of a conviction being classified as a crime of violence are therefore dramatic. Even those with a sentence that was completely suspended by the criminal court will be found to be convicted of an aggravated felony. *See, e.g.*, *Drakes v. Zimski*, 240 F.3d 246, 251 (3d Cir. 2001) (suspended sentence of one year meets aggravated felony category based on length of sentence imposed).

Compounding the danger that this case poses for immigrants in our communities, the INA provides no recency requirement for a conviction to qualify as an aggravated felony. Thus, if a court decides that a conviction qualifies as an aggravated felony, a lawful permanent resident could become deportable and ineligible for relief based on a single decades-old conviction. What is at stake here, then, is not just deportation, but exile: the possibility that an adult who is a lawful permanent resident and has lived in the United States nearly her entire life could be deported to a country she does not know or remember.

SUMMARY OF ARGUMENT

The immigration laws use nearly identical language to the ACCA to define a crime of violence (and, by extension, an "aggravated felony"). A ruling for Respondent in this case would therefore trigger severe consequences for immigrants convicted of even minor crimes based on a *mens rea* of recklessness.

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[3] RICHARD FRASE, Suspended Sentences and Free-Standing Probation Orders in U.S. Guideline Systems: A Survey and Assessment, 82 LAW AND CONTEMPORARY PROBLEMS 51, 66 (2019).

A. A single conviction for an aggravated felony renders an immigrant deportable. In addition, the immigrant becomes ineligible for many forms of discretionary relief from removal:

A.1. Once convicted of an aggravated felony, a lawful permanent resident is not eligible for cancellation of removal. Cancellation of removal is a process by which an immigration judge may consider numerous equitable factors to determine whether removal is in fact appropriate. The judge can consider the seriousness of the underlying offense, evidence of rehabilitation, family ties in the United States, length of residence, hardship to the noncitizen and her family should deportation occur, United States military service, and other evidence of good character. But a judge may not consider these factors if the immigrant has been convicted of an aggravated felony.

A.2. The immigrant likewise becomes ineligible for asylum, losing the ability to argue that she will be persecuted if she is returned to her country of origin.

A.3. If involved in a removal proceeding, the immigrant is automatically subject to mandatory detention in facilities that are largely indistinguishable from prisons.

A.4. Rather than undergo the normal removal process, complete with all of its due process protections, an immigrant who is not a lawful permanent resident is subject to administrative removal proceedings. She will be barred from presenting evidence, calling or cross-examining witnesses, or presenting any oral argument other than on persecution claims. All of her arguments must be

in writing, and she has just ten days to rebut the government's charges.

A.5. And, if convicted of an aggravated felony, the immigrant may not even request to leave the country voluntarily at her own expense. Such "voluntary departure" normally allows an immigrant to choose the country to which she seeks entry, so that she may avoid returning to a country in which she would be unsafe. It also allows the immigrant to avoid the bars to reentry that accompany removal, allowing the immigrant to reenter the United States legally in the future. But voluntary departure is not available to those convicted of an aggravated felony; instead, those individuals face deportation with no say in where they will land.

B. Immigrants convicted of an aggravated felony face other harsh consequences: lawful permanent residents who otherwise qualify for citizenship can never become citizens and face bars to ever reentering the United States. This means that a noncitizen may never be able to return to the home she established in the United States, even if she has spent the majority of her life in this country, and even if the rest of her family remains here.

C. The deportation that an aggravated felony conviction all but guarantees is devastating to the immigrant and her family. It deprives an immigrant of the livelihood she has established in the United States, and of the Social Security benefits she has earned. It separates an immigrant from any family in the United States. And it is devastating for the children of parents who are deported. Such children

often face economic hardship, loss of housing, and lack of food, along with a number of severe emotional and behavioral problems caused by the loss of a parent.

D. Finally, a ruling for Respondent would overturn the expectations of many immigrants who believed they were making immigration-safe pleas. Criminal defendants naturally consider the immigration consequences of criminal convictions when they decide whether to plead guilty to a crime. At least eleven Circuits have previously ruled that recklessness offenses do not constitute crimes of violence for purposes of either the immigration laws, the ACCA, or the U.S. Sentencing Guidelines. Undoubtedly, many defendants pled guilty to recklessness offenses believing that their pleas would not subject them to deportation. A ruling for Respondent, however, would subject those immigrants to deportation, even decades after completing their sentence.

ARGUMENT

I. HOLDING THAT RECKLESSNESS CRIMES QUALIFY AS VIOLENT FELONIES UNDER THE ACCA WILL TRIGGER CATASTROPHIC IMMIGRATION CONSEQUENCES FOR NONCITIZENS.

A noncitizen convicted of an "aggravated felony" faces "the harshest deportation consequences." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 566 (2010). In particular, these noncitizens are stripped of the benefits of individualized, discretionary review by an immigration judge before removal. If crimes with a *mens rea* of recklessness are reclassified as crimes of

violence, noncitizens convicted of such crimes will face catastrophic immigration consequences, including (1) eliminating an immigration judge's discretion to cancel removal due to equitable factors; (2) ineligibility for asylum, regardless of the threat to the noncitizen in her native country; (3) mandatory detention during removal proceedings; (4) for those who are not lawful permanent residents, the loss of the right to a full and fair hearing before a neutral arbiter before removal; and (5) ineligibility for voluntary departure in lieu of removal. Immigration judges will be barred from considering forms of relief in which an immigration judge may examine the equities, including the specific circumstances of the conviction, its remoteness, evidence of genuine rehabilitation, and other equitable factors such as the amount of time the noncitizen has lived in the United States, military service, and family ties in this country.

These noncitizens will also face other catastrophic consequences, including a ban on future citizenship, the economic and personal hardships that accompany removal, and bars to return. This danger is particularly troubling for immigrants who pled to recklessness offenses with the understanding that they were making an immigration-safe plea, i.e., one that does not threaten their immigration status.

A. Once An Individual Is Convicted Of An "Aggravated Felony," Immigration Judges Have No Discretion To Grant Numerous Forms Of Relief Based On The Individual's Particular Circumstances.

1. Cancellation of Removal

Lawful permanent residents convicted of an aggravated felony are barred from cancellation of removal, a longstanding aspect of the immigration laws that allows an immigration judge to consider individual equities and determine whether removal is warranted. Generally, if a lawful permanent resident has held that status for at least five years and has spent seven continuous years as a United States resident, an immigration judge has discretion to cancel her removal. 8 U.S.C. § 1229b(a). In determining whether cancellation of removal is appropriate, immigration judges consider equitable factors, such as family ties in the United States, length of residence, hardship to the noncitizen and her family should deportation occur, United States military service, and other evidence of good character. *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998). This discretion has a long history in immigration law. The Immigration Act of 1917 gave the Secretary of Labor discretion to cancel the removal of an immigrant who committed a crime of moral turpitude, section 212 of the Immigration and Nationality Act of 1952 provided similar discretion for lawful permanent residents convicted of moral turpitude and narcotics offenses, and in 1996 Congress enacted the current form of

cancellation of removal, 8 U.S.C. § 1229b. *I.N.S. v. St. Cyr*, 533 U.S. 289, 294–297 (2001).

But noncitizens, including lawful permanent residents, lose access to this relief if they are convicted of an "aggravated felony." Regardless of their particular circumstances, they are statutorily barred from obtaining cancellation of removal. 8 U.S.C. §§ 1229b(a)(3), (b)(1)(C). In such cases, immigration judges cannot consider even the most persuasive equitable factors. For example, even if a lawful permanent resident has lived in the United States since childhood, and served in the United States armed forces, the immigration judge cannot cancel the removal. Similarly, the immigration judge cannot consider the fact that the lawful permanent resident is the sole breadwinner and caregiver for her children in a single-parent household. Nor can the judge cancel removal even if the immigrant "has been battered or subjected to extreme cruelty by a spouse or parent" who is a U.S. citizen or lawful permanent resident. 8 U.S.C. § 1229b(b)(2)(A).

Perhaps most importantly, because the aggravated felony designation prevents a fact-based hearing on the equities, the immigration judge cannot consider the underlying criminal offense that led to the "aggravated felony" conviction. Typically, one of the factors the immigration judge can weigh in granting cancellation of removal is proof of rehabilitation if a criminal record exists. *In re C-V-T-*, 22 I. & N. Dec. at 11. However, an individual convicted of an "aggravated felony" is ineligible for this individualized review, even if the conviction occurred decades before the removal proceedings and the

individual has been a positive and productive member of her community in the United States since then.

Likewise, without a fact-based hearing on the equities, a judge cannot consider the seriousness (or lack of seriousness) of the underlying offense. A judge could not consider, for instance, that a conviction for second-degree manslaughter actually involved recklessly leaving a child alone with lit candles that later started a fire. *United States v. Torres-Villalobos*, 487 F.3d 607, 616 (8th Cir. 2007) (citing *Boyer v. State*, No. C8–01–617, 2001 WL 1491450, at * 1 (Minn. Ct. App. Nov. 27, 2001)). Nor could a judge consider that a conviction for aggravated assault involved a driver who ran a stop sign and caused an accident that injured his passenger. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 & n.10 (9th Cir. 2006) (citing *State v. Miles*, 123 P.3d 669, 671 (Ariz. Ct. App. 2005)). Once a conviction is deemed an "aggravated felony", the discretion to consider particular circumstances like these is eliminated. 8 U.S.C. §§ 1229b(a)(3), (b)(1)(C).

2. Asylum

Noncitizens convicted of an "aggravated felony" risk deportation to their countries of origin, even if their country of origin is extremely dangerous and they fear persecution. In general, noncitizens who have suffered past persecution, or face a well-founded fear of future persecution in their home countries, may seek asylum in the United States. 8 U.S.C. §§ 1158(b)(1)(A), 1101(a)(42). However, those convicted of a "particularly serious crime" are precluded from obtaining asylum relief. 8 U.S.C.

§ 1158(b)(2)(B)(i). All "aggravated felony" convictions are automatically classified as a "particularly serious crime," 8 U.S.C. § 1158(b)(2)(B)(i) and bar noncitizens from asylum relief. 8 C.F.R. § 1208.16(d)(2). No matter the extent and severity of the persecution an individual endured or will likely face upon return to her home country, an immigration judge cannot grant asylum relief to that individual if she has been convicted of an "aggravated felony."

Similarly, an individual who has been granted asylum in the United States is subject to removal if she is convicted of a "particularly serious crime," including an "aggravated felony." 8 U.S.C. § 1158(b)(2)(B)(i), (c)(2)(B), (c)(3).

3. Mandatory Detention

Typically, a noncitizen may be released on bond during the pendency of her removal proceeding if an immigration judge determines that the noncitizen does not pose a threat to persons, property, or national security, and that she is not a flight risk. *In re Adeniji*, 22 I&N Dec. 1102, 1103–04 (B.I.A. 1999). Whether a noncitizen merits release on bond is a discretionary decision, with immigration judges considering factors such as length of residency in the United States, family ties in the United States, and the specific circumstances surrounding any past criminal activity. *In re Guerra*, 24 I&N Dec. 37, 40 (B.I.A. 2006).

Those convicted of an "aggravated felony" lose access to individualized determinations of whether detention is necessary. Regardless of personal circumstances, a noncitizen convicted of an aggravated felony is subject to mandatory detention

during removal proceedings in facilities that are largely indistinguishable from prisons. 8 U.S.C. § 1226(c). Immigration judges are barred from considering factors such as the length of time since the conviction or evidence of genuine rehabilitation. Even if an individual's aggravated felony conviction occurred a decade before the removal proceedings, that individual will automatically suffer a total loss of liberty during the proceedings.

Furthermore, immigrants who are detained are less likely to be assisted by counsel than are citizens. From 2007 to 2012, 66% of all immigrants in removal proceedings were represented by counsel, but only 14% of detained immigrants were represented. [4] Representation can be critical to an immigrant's chances of avoiding removal. One study found that represented immigrants obtained relief from removal five-and-a-half times more often than those without representation.[5]

4. Administrative Removal

All noncitizens whose convictions are classified as aggravated felonies who are not lawful permanent residents, including those with conditional permanent resident status, are subject to an "administrative removal" process (sometimes called "expedited removal"). 8 U.S.C. § 1228(b)(2).

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[4] INGRID V. EAGLY & STEVEN SHAFER, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA L. REV. 1, 32 (2015).

[5] *Id.* at 9.

These expedited proceedings deprive the noncitizen of important procedural protections. In a standard removal proceeding, the noncitizen has the opportunity to present evidence, cross-examine government witnesses, and seek discretionary relief. 8 U.S.C. § 1229a(b)(4). In contrast, administrative removal is essentially a paper process where the noncitizen lacks a meaningful opportunity to present and rebut evidence. Unless the immigrant presents a persecution claim, she may not call witnesses of her own and may not cross-examine the government's witnesses. *See* 8 C.F.R. § 238.1. Indeed, the immigrant has no right to make in-person arguments at all; any rebuttal must be in writing. *Id.* § 238.1(c)(2). And the immigrant has just ten days to rebut the government's charges. *Id.* § 238.1(c)(1).

Furthermore, in an administrative removal proceeding, a Department of Homeland Security officer, rather than an immigration judge, presides over the proceeding. Although not a lawyer, this hearing officer must make difficult legal judgments. She must first determine whether the immigrant is a citizen or lawful permanent resident, and then must determine whether a conviction qualifies as an aggravated felony. 8 C.F.R. §§ 238.1(d), 1003.1(b). That requires examining "the elements of the statute of conviction, not the facts of each defendant's conduct." *United States v. Fish*, 758 F.3d 1, 5 (1st Cir. 2014) (alteration and citation omitted). *See also Oyebanji v. Gonzales*, 418 F.3d 260, 262 (3d Cir. 2005) (In deciding whether a conviction is an aggravated felony, one must "look only to the fact of conviction and the statutory definition of the offense, not the person's

actual conduct."). If this Court adopts the government's view in this case, the non-lawyer hearing officer would have to determine, for instance, whether the minimum *mens rea* for a given crime is negligence (which does not count as an aggravated felony under *Leocal v. Ashcroft*, 543 U.S. 1 (2004)) or recklessness. The hearing officer likewise must determine whether the sentencing court imposed probation directly on a defendant without suspending the sentence or instead imposed a prison sentence, then suspended it and imposed probation. The latter sentence can count as a term of imprisonment for purposes of determining whether there is an aggravated felony; the former cannot. *Compare United States v. Ayala-Gomez*, 255 F.3d 1314, 1318 (11th Cir. 2001), *with United States v. Banda-Zamora*, 178 F.3d 728, 730 (5th Cir. 1999).

The stakes of the hearing officer's determinations are high: because many immigrants are not represented during the administrative removal process, they may fail to raise objections that might have saved their case and lose the benefit of those arguments forever. For instance, in one case, a hearing officer ordered a Congolese woman deported through an administrative removal process based on a misdemeanor battery conviction. *Malu v. U.S. Atty. Gen.*, 764 F.3d 1282, 1284 (11th Cir. 2014). Malu's conviction does not qualify as an aggravated felony under this Court's decision in *Johnson v. United States*, 559 U.S. 133 (2010). But because the hearing officer missed this distinction, and because Malu did not raise this issue within the ten days allowed when she represented herself in the administrative removal

proceeding, the Eleventh Circuit regretfully concluded it lacked jurisdiction to correct the error. *Malu*, 764 F.3d at 1287. Although the government eventually reached a settlement with Malu that allowed her to remain in the United States, her case demonstrates the dire consequences that can result from an immigrant's being subject to an administrative removal proceeding.

5. Voluntary Departure

Noncitizens convicted of an "aggravated felony" cannot seek to protect themselves from dangerous conditions in their country of origin, or seek a safe environment with family or friends, by voluntarily departing the United States for a country of their choice.

Under normal circumstances, before, during, or after the conclusion of a removal proceeding, a noncitizen can ask to leave the United States voluntarily at the noncitizen's own expense, rather than be deported. 8 U.S.C. § 1229c(a)(1), (b)(1). An immigrant might do so to avoid some of the most severe consequences of removal. For example, a noncitizen who voluntarily departs the United States can choose the country to which she seeks entry, giving the noncitizen the power to avoid returning to a country where she fears persecution or other dangerous conditions. Those who voluntarily depart the United States also avoid the statutory bars to reentry that accompany removal. 8 U.S.C. § 1182(a)(9)(A)(i). Therefore, a noncitizen who voluntarily departs the United States can maintain the hope of reuniting with her family and community

through legal reentry into the United States in the future. However, immigration judges are barred from considering the voluntary departure remedy for any noncitizen convicted of an aggravated felony. 8 U.S.C. § 1229c(a)(1), (b)(1).

B. Other Severe Immigration Law Consequences Follow An "Aggravated Felony" Conviction

1. Naturalization

To qualify for naturalization, a noncitizen must demonstrate that she was a person of "good moral character" for a specified amount of time before and during the naturalization process. 8 U.S.C. § 1427. In general, the statute requires that good moral character be shown for a period of five years. *Id.* An individual who was convicted of an "aggravated felony" at any time after November 29, 1990, however, cannot satisfy the "good moral character" requirement, so she can never become a naturalized citizen. 8 U.S.C. § 1101(f)(8). As a result, if this Court concludes that a single crime involving reckless *mens rea* can constitute an aggravated felony, it will be barring lawful permanent residents whose only conviction dates back almost three decades from becoming citizens, no matter how blameless their life has been since the time of their conviction.

2. Restriction on Reentry

Once an individual convicted of an "aggravated felony" is removed from the United States, she is precluded from being granted readmission. 8 U.S.C. § 1182(a)(9)(A)(i). Except in the rare circumstances

where the Attorney General grants special permission for reentry, this prohibition means that the noncitizen can never return to the home she established in the United States, even if that is where she spent the majority of her life and the rest of her family remains. 8 U.S.C. § 1182(a)(9)(A)(iii).

C. Deportation And Its Consequences

Removal from the United States carries with it detrimental economic and personal consequences that impact not only the removed individual, but her family and community in the United States. Those convicted of an "aggravated felony" are deportable, and, as discussed above, such individuals are ineligible for most forms of relief that could halt the removal. 8 U.S.C. § 1227(a)(2)(A)(iii).

Deportation is a particularly harsh punishment for long-term United States residents who have spent the majority of their lives in this country. Residents who have built businesses or careers in the United States abruptly lose access to their sources of livelihood and means of providing for their families. As this Court has stated, "deportation may result in the loss 'of all that makes life worth living.'" *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

Also, lawful permanent residents who have spent their adult lives working in the United States and contributing to the Social Security system lose access to those benefits when they are deported. 42 U.S.C. § 402(n)(1). Generally, benefit payments are reinstated if the noncitizen later returns to the United States and obtains lawful permanent resident status.

However, due to the ban on reentry following an "aggravated felony" conviction, it is unlikely that those removed on this basis will ever receive the Social Security benefits they contributed towards during their years (or even decades) in the United States.

Perhaps the most damaging consequence of deportation is the separation of families and the resulting consequences to spouses and children who remain in the United States. By one estimate, between 2011 and 2013 alone, half a million children in the United States experienced the apprehension, detention, and deportation of at least one parent.[6] After a parent is deported, children often face economic hardship, loss of housing, and lack of food, along with a number of severe emotional and behavioral problems caused by the loss of a parent.[7] In one study, children with deported parents refused to eat, pulled out their hair, had persistent stomachaches and headaches, engaged in substance abuse, lost interest in daily activities, and had difficulty maintaining positive relationships with non-

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[6] RANDY CAPPS ET AL., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families*, URBAN INST. (Sept. 2015), https://www.urban.org/sites/default/files/alfresco/publication-exhibits/2000405/2000405-Implications-of-Immigration-Enforcement-Activities-for-the-Well-Being-of-Children-in-Immigrant-Families.pdf.

[7] REGINA DAY LANGHOUT ET AL., *Statement on the Effects of Deportation and Forced Separation on Immigrants, Their Families, and Communities*, 62 AM. J. COMMUNITY PSYCHOL. 3, 5-6 (2018), https://onlinelibrary.wiley.com/doi/epdf/10.1002/ajcp.12256.

deported parents.[8] Additionally, these childhood traumas can inflict lasting harms, including anxiety, depression, and severe impairments of a child's self-worth and ability to form close relationships later in life.[9] With the permanent bar on reentry for noncitizens convicted of an "aggravated felony," it is likely that the children of those deported on that basis, especially those in low-income households, will not see their parents for extended periods following removal.

D. A Ruling For Respondent Would Overturn The Expectations Of Many Immigrants Who Believed They Were Making Immigration-Safe Pleas.

Defendants naturally consider the immigration consequences of criminal convictions when they decide whether to plead guilty to a crime. As this Court has observed, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001) (citation omitted). Indeed, this Court has held that it can constitute ineffective assistance of counsel for an attorney not to advise her client that pleading to an aggravated felony subjects

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[8] HEATHER KOBALL ET AL., *Health and Social Service Needs of US-Citizen Children with Detained or Deported Immigrant Parents*, URBAN INST. and MIGRATION POL'Y INST., 5 (Sept. 2015), https://www.urban.org/sites/default/files/publication/71131/2000405-Health-and-Social-Service-Needs-of-US-Citizen-Children-with-Detained-or-Deported-Immigrant-Parents.pdf.

[9] KRISTEN LEE GRAY, *Effects of Parent-Child Attachment on Social Adjustment and Friendship in Young Adulthood*, CAL. POLY. ST. U., SAN LUIS OBISPO (Jun. 2011), https://tinyurl.com/j3lgrno.

the immigrant to deportation under 8 U.S.C § 1227(a)(2)(B), particularly where such consequences are clear. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

At least eleven circuits have previously held that crimes with a *mens rea* of recklessness do not constitute crimes of violence under 18 U.S.C. § 16(a) and its corollaries under the ACCA and the Sentencing Guidelines. *United States v. Rose*, 896 F.3d 104, 110 (1st Cir. 2018); *United States v. Moreno*, 821 F.3d 223, 228 (2d Cir. 2016); *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010); *Singh v. Gonzales*, 432 F.3d 533, 540 (3d Cir. 2006); *Garcia v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006); *United States v. Rutherford*, 54 F.3d 370, 374 (7th Cir. 1995); *United States v. Boose*, 739 F.3d 1185, 1187 (8th Cir. 2014), (*but see United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016)); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1123 (10th Cir. 2008), *overruled by United States v. Bettcher*, 911 F.3d 1040 (10th Cir. 2018); *United States v. Vargas-Duran*, 356 F.3d 598, 604 (5th Cir. 2004), *overruled by United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir.

2018).[10] As this Court has acknowledged, "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to constitute a "use of force." *United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014).

Although this Court in *Leocal* declined to decide whether a reckless offense could constitute a crime of violence (543 U.S. at 13), defendants understandably took comfort in *Leocal*'s holding that a crime with a *mens rea* of negligence did not qualify as a crime of violence under 18 U.S.C. § 16(a). There, this Court explained that the phrase "against the person or property of another" required a "higher degree of intent than negligent or merely accidental conduct" and suggested "a category of violent, active crimes." *Leocal*, 543 U.S. at 9, 11. Undoubtedly, many defendants in these and other circuits pled to recklessness offenses on the understanding that their plea did not subject them to deportation under the

[10] Circuits have likewise held that reckless offenses are also not crimes of violence under § 16(a)'s even broader corollary, 18 U.S.C. § 16(b). *See, e.g., United States v. Fish*, 758 F.3d 1, 9–10 (1st Cir. 2014); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008); *Oyebanji v. Gonzales*, 418 F.3d 260, 261 (3d Cir. 2005) (Alito, J.). Section 16(b) defines "crime of violence" to mean "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Section 16(b) thus includes offenses in which there is a substantial risk that physical force will be used, whereas section 16(a) applies only if that force was actually attempted, threatened, or used. This Court found section 16(b) to be so broad as to be "unconstitutionally vague." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018).

INA. Were a ruling for Respondent in this case to apply retroactively, such a ruling could potentially transform those defendants' convictions into aggravated felonies and render the immigrants who entered those pleas deportable. This is particularly troubling because there is no recency requirement for a conviction to qualify as an aggravated felony under the INA. A conviction that meets the requirements of 8 U.S.C. § 1101(a)(43)(F) renders the immigrant deportable, regardless of how old the conviction is.

* * *

This Court's decision could have serious unintended consequences for noncitizens convicted of even minor crimes. If recklessness offenses can count as aggravated felonies, an immigrant could move to this country at the age of two, become a lawful permanent resident, commit a misdemeanor offense at the age of 20 with a *mens rea* of recklessness, serve a one year suspended sentence with no jail time, and be rendered deportable a decade later. An immigration judge would not have discretion to consider virtually any mitigating circumstances: whether the immigrant lived in this country for a decade after completing her sentence and committed no other crimes; whether she raised a family, served in our military, or started a business; or whether the original crime of conviction was a particularly serious offense. Such severe consequences cannot be what Congress intended.

CONCLUSION

This Court should reverse the judgment of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The American Immigration Council ("AIC") is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The AIC frequently appears in federal courts on immigration issues relating to the availability of immigration relief. The AIC has a keen appreciation of the consequence of classifying convictions as aggravated felonies and has a strong interest in ensuring that noncitizens may pursue all forms of immigration relief and protection for which they are eligible.

The American Immigration Lawyers Association ("AILA") is a national non-profit association with more than 15,000 members throughout the United States and abroad, 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; 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. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for

Immigration Review, as well as before the United States District Courts, Courts of Appeals, and Supreme Court.

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes and, therefore, has a keen interest in ensuring the correct interpretation of laws that may impact the rights of immigrants at risk of detention and deportation based on past criminal charges. This Court has accepted and relied on *amicus curiae* briefs submitted by IDP in key cases involving the interplay between criminal and immigration law, including *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); and *INS v. St. Cyr*, 553 U.S. 289 (2001) (brief cited at 322-23).

Just Futures Law ("JFL") is a transformational immigration lawyering project that works to support the immigrant rights and racial justice movements in partnership with grassroots organizations. JFL staff have decades of experience in providing expert legal advice, written legal resources, and training for immigration attorneys and criminal defense attorneys on the immigration consequences of criminal conduct, including crimes of violence. JFL has a significant interest in ensuring the fair, uniform, and predictable administration of federal immigration laws.

The National Immigrant Justice Center ("NIJC") is a non-profit organization accredited since 1980 by the Board of Immigration Appeals (the "Board" or "BIA") to provide representation to individuals in removal proceedings. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. Through its staff of attorneys and paralegals, and a network of over 1,000 pro bono attorneys, NIJC provides free or low cost legal services to over 10,000 individuals each year. Amongst its other work, NIJC represents individuals charged with an aggravated felony conviction, and advises criminal defense counsel of the likely immigration consequences of criminal convictions.

The National Immigration Project of the National Lawyers Guild ("National Immigration Project") is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. The National Immigration Project has provided legal training to the bar and the bench on the immigration consequences of criminal conduct and authored Immigration Law and Crimes and four other treatises published by Thompson-Reuters. The National Immigration Project has participated as *amicus curiae* in several significant immigration related cases before the Supreme Court, Circuit Courts of Appeals, and Board of Immigration Appeals.

The Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated

to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants placed in removal proceedings, including lawful permanent residents who face removal because of criminal convictions.