No. 19-5410

In The
Supreme Court of the United States

CHARLES BORDEN, JR.,
Petitioner,
v.
UNITED STATES,
Respondent.

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

BRIEF OF IMMIGRANT RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Devin S. Sikes
Jeffrey Kane
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street NW
Washington, D.C. 20006

Izabelle Raven Tully
AKIN GUMP STRAUSS HAUER & FELD LLP
One Bryant Park
44th Floor
New York, N.Y. 10036

Rex S. Heinke
Counsel of Record
AKIN GUMP STRAUSS HAUER & FELD LLP
1999 Avenue of the Stars
Suite 600
Los Angeles, CA 90067
(310) 229-1030
rheinke@akingump.com

Leila Kang
Manuel D. Vargas
IMMIGRANT DEFENSE PROJECT
40 West 39th Street, 5th Floor
New York, NY 10024

Counsel for *Amici Curiae*

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

This case concerns whether a crime with a *mens rea* of recklessness is 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 a "crime of violence" constituting an "aggravated felony" under 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, mandatory detention, expedited removal proceedings, an inability to be considered for discretionary relief from removal, and a ban on reentry.

Amici curiae are immigrant rights organizations, many of whose members and clients could face these severe consequences if the Court rules that a criminal offense committed with a reckless *mens rea* qualifies as a violent felony under the ACCA. For nearly two decades, immigrants and their advocates have relied on well-settled law that a crime with a *mens rea* of recklessness is not a "crime of violence" aggravated felony for immigration purposes. Under this settled law in several Circuits, immigrants convicted of such crimes may face removal proceedings, but not automatic deportation. Thus, an immigrant may still

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[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.

seek discretionary relief from removal based on compelling reasons, such as her length of time in the United States, deep family ties in this country, and threat of persecution abroad.

Relying on this settled rule, immigrants have pled guilty to crimes with a *mens rea* of recklessness because they and their counsel understood that such a conviction would not carry with it such harsh immigration consequences. The decision below, if upheld, could completely upend this well-settled rule and could expose immigrants, including those with decades-old misdemeanor convictions, to harsh and unanticipated immigration consequences.

As organizations that work closely with immigrants, their families, and their communities, amici curiae have a profound interest in ensuring that their voices are included in the resolution of the issue in this case. The American Immigration Council, American Immigration Lawyers Association, the Capital Area Immigrants' Rights Coalition, Immigrant Defense Project, the Immigrant Legal Resource Center, Just Futures Law, National Immigrant Justice Center, National Immigration Project of the National Lawyers Guild, and Northwest Immigrant Rights Project join this brief as amici. Their detailed statements of interest appear in the appendix of this brief.

This brief will discuss the severe consequences that could arise in immigration cases if the Court determines that a crime with a *mens rea* of recklessness qualifies as a "violent felony." This brief will also highlight the settled expectations that could

be upset 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 "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 contains nearly identical language. An "aggravated felony" is defined by reference to twenty-one subcategories of offenses, 8 U.S.C. § 1101(a)(43)(A)–(U), one of which is a "crime of violence," *id.* § 1101(43)(F). To define a "crime of violence" aggravated felony, the INA incorporates the language of 18 U.S.C. § 16: "[t]he 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]

The Court's decision as to whether a crime with a *mens rea* of recklessness can qualify as a "violent

[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).

felony" for purposes of the ACCA could determine how courts define a "crime of violence" aggravated felony for purposes of immigration law.

Whether a conviction qualifies as an aggravated felony has profound and far-reaching implications for immigrants. While a defendant must have *three* "violent felony" convictions to trigger the enhanced mandatory minimum under the ACCA, an immigrant with a *single* conviction for an aggravated felony is immediately deportable under the INA. *Compare* 18 U.S.C. § 924(e)(1), *with* 8 U.S.C. § 1227(a)(2)(A)(iii). 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.3, below). For non-permanent residents, that single conviction also prompts expedited removal, a draconian deportation process that lacks many of the due process features to which the immigrant would otherwise have access. Part I.B.2, below. An aggravated felony conviction also subjects the immigrant to mandatory detention during the deportation proceedings. Part I.B.1, below.

Despite these serious consequences, courts have found that certain convictions can qualify as an aggravated felony under the INA even if it was not a felony at all. Indeed, even if a state considers a crime to be a misdemeanor, it nonetheless can be considered a felony under the INA so long as the term of imprisonment is at least one year. *See, e.g., United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001) (applying 8 U.S.C.

§ 1101(a)(43)(F) "crime of violence" aggravated felony designation to a state misdemeanor simple assault offense).

An offense can have a term of imprisonment of at least one year, even if the defendant served no time at all, because "term of imprisonment" includes the sentence actually imposed by the court, even if that sentence is suspended "in whole or in part." 8 U.S.C. § 1101(a)(48)(B). In practice, state courts often choose to suspend a sentence for low-level felony and misdemeanor cases, especially those involving first-time offenders.[3] Thus, if the offense is defined as a "crime of violence," even a defendant who is convicted of a misdemeanor and receives a suspended sentence of one year (*i.e.*, serves no time in jail) is considered to have been convicted of an aggravated felony under the INA. 8 U.S.C. § 1101(a)(43)(F); *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). The consequences of a conviction being classified as a crime of violence are therefore drastic.

What is more, the INA's definition of an aggravated felony contains no recency requirement. 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.

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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).

Compounding the danger that this case poses for immigrants in our communities, the INA bars reentry if a person has been convicted of an aggravated felony. Part I.C.2, below. The dream of citizenship likewise disappears. Part I.C.1, below.

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 and would probably never be able to return to the United States. The result devastates her and her family. Part I.D, below. And this new reality completely disrupts the expectations settled by numerous Circuits. Part II, below.

SUMMARY OF ARGUMENT

I. 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 could therefore trigger severe consequences for immigrants convicted of even minor crimes that involve a *mens rea* of recklessness.

A. A single conviction for an aggravated felony renders an immigrant deportable. Moreover, 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 barred from seeking cancellation of removal. Cancellation of removal is a process by which an immigration judge may consider numerous equitable factors to determine whether

removal should be waived, including 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 the immigration judge may not consider any of 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 show that she will be persecuted if she is returned to her country of origin.

A.3. 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 seek readmission to the United States 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 or whether they can ever return.

B. An aggravated felony also deprives noncitizens of important procedural protections against detention and removal.

B.1. If placed in a removal proceeding at any time after an aggravated felony conviction, the immigrant is automatically subject to mandatory detention in facilities that are largely indistinguishable from prisons.

B.2. Rather than undergo the normal removal process, an immigrant who is not a lawful permanent resident is subject to expedited administrative removal proceedings lacking in due process protections. She will be barred from presenting evidence, calling or cross-examining witnesses, or presenting any oral argument. All of her arguments must be in writing, and she has just ten days to rebut the government's charges.

C. Immigrants convicted of an aggravated felony face other harsh consequences.

C.1. Lawful permanent residents who otherwise qualify for citizenship can never become citizens.

C.2. Moreover, those removed face permanent bars to reentering the United States: 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.

D. 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, including her children. 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.

II. Moreover, a ruling for Respondent could overturn the expectations of many immigrants who believed they were making immigration-safe pleas. Because counsel must advise her client on deportation risks, *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010), noncitizen defendants consider the immigration consequences of criminal convictions when they decide whether to plead guilty to a crime. Numerous 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, could subject those immigrants to deportation, even decades after completing their sentence.

ARGUMENT

I. HOLDING THAT RECKLESSNESS CRIMES QUALIFY AS VIOLENT FELONIES UNDER THE ACCA COULD 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 could face catastrophic immigration consequences,

including not only deportability but also (1) eliminating an immigration judge's discretion to cancel removal due to equitable factors; (2) ineligibility for asylum, regardless of the threat to the noncitizens in their native countries; and (3) ineligibility for voluntary departure in lieu of removal. Immigration judges could be barred from considering forms of relief which require an examination of the immigrants' equities, including the specific circumstances of the conviction, its remoteness, evidence of genuine rehabilitation, and other equitable factors, such as the length of residence in this country, family and community ties, and military service.

In addition, these noncitizens could face mandatory detention during removal proceedings and, 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.

These noncitizens could also face other catastrophic consequences, including a ban on future citizenship, the economic and personal hardships that accompany removal, and bars to return.

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

1. Cancellation of Removal Based on Long Residence and/or Family Hardship

Lawful permanent residents deemed convicted of an aggravated felony are barred from cancellation of removal, a longstanding form of relief under the INA 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. *Matter of 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, 294–97 (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 compelling 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).

Because the aggravated felony designation prevents a fact-based hearing on the equities, the immigration judge also cannot consider what has occurred since the underlying criminal offense that led to the aggravated felony conviction. Typically, one of the factors the immigration judge may weigh in granting cancellation of removal is proof of rehabilitation if a criminal record exists. *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 since taken significant steps to rehabilitate.

Finally, without a fact-based hearing on the equities, a judge cannot even consider the nature of the underlying offense. A judge could not consider, for instance, that a conviction for reckless second-degree manslaughter resulted from an accident. *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 reckless aggravated assault stemmed from unintentional conduct. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 & n.10 (9th Cir. 2006) (citing *State v. Freeland*, 863 P.2d 263, 265–66 (Ariz. Ct. App. 1993)). 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 Based on a Well-Founded Fear of Persecution Abroad

Noncitizens deemed convicted of an aggravated felony risk deportation even if they have a well-founded fear of persecution in the country of removal. 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). Any aggravated felony conviction is automatically classified as a "particularly serious crime," 8 U.S.C. § 1158(b)(2)(B)(i), precluding

noncitizens from obtaining 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. Voluntary Departure Preserving a Possibility of Return in the Future

Noncitizens deemed convicted of an aggravated felony cannot seek to voluntarily depart the United States and thereby preserve the possibility of return or protect themselves from dangerous conditions in their country of origin. Before, during, or after the conclusion of a removal proceeding, a noncitizen may ordinarily 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 may 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). A noncitizen who voluntarily

departs the United States may therefore maintain the hope of reuniting with her family and community through legal reentry into the United States in the future. However, Congress has barred immigration judges from considering the voluntary departure remedy for any noncitizen convicted of an aggravated felony. 8 U.S.C. § 1229c(a)(1), (b)(1).

B. Loss of Liberty and Important Due Process Rights Ensue from an Aggravated Felony Conviction

1. Mandatory Detention During Removal Proceedings

Typically, a noncitizen detained pending removal proceedings may be released on bond or conditions 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. *Matter of Adeniji*, 22 I&N Dec. 1102, 1103–04 (B.I.A. 1999). To determine whether a noncitizen poses a risk of flight or danger to the community, immigration judges consider 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. *Matter of 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 because they are subject to mandatory detention under 8 U.S.C. § 1226(c)(1)(B). Regardless of personal circumstances, a noncitizen convicted of an aggravated felony is detained in facilities that are largely indistinguishable from

prisons, often for lengthy periods of time. Individuals detained under section 1226(c) are ineligible for a bond hearing that permits immigration judges to consider 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 could automatically suffer a total loss of liberty during the proceedings. *Nielsen v. Preap*, 139 S. Ct. 954, 968 (2019) (holding that section 1226(c) mandates detention even for noncitizens "who are arrested well after their release").

Furthermore, immigrants who are detained face numerous barriers to seeking relief from removal, including obstacles to receiving legal advice and representation. Detained noncitizens are less likely to be assisted by counsel than those who are not detained. In 2017, over 60% of non-detained immigrants in removal proceedings were represented by counsel, but only about 30% 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]

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[4] TRAC IMMIGRATION, Who is Represented in Immigration Court? (Oct. 16, 2017), https://trac.syr.edu/immigration/reports/485/.

[5] INGRID V. EAGLY & STEVEN SHAFER, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA L. REV. 1, 9 (2015).

2. Expedited Removal Proceedings with No Due Process Hearing Before an Immigration Judge

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 "expedited removal" process (commonly referred to as "administrative removal"). 8 U.S.C. § 1228(b)(2).

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). Not so in an expedited removal proceeding. Unless the immigrant presents a plausible persecution claim and passes a rigorous screening, she may not call witnesses of her own and may not cross-examine the government's witnesses. 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 expedited removal proceeding, a Department of Homeland Security officer, who need not be a lawyer, much less an immigration judge, presides over the proceeding and makes difficult legal judgments. Indeed, the officer would be left 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 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 may 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).

Of course, these are not the only legal judgments the non-lawyer officer must render. 8 C.F.R. §§ 238.1(b)(1), 239.1(a). For example, 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). That requires a legal analysis of "the elements of the statute of conviction" without considering the facts of the 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.").

The stakes of the officer's determinations are high: because many immigrants are not represented during the expedited 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 expedited 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 *Johnson v. United States*, 559 U.S. 133 (2010). But because the 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 may result from an immigrant being subject to an expedited removal proceeding.

C. Other Severe Immigration Consequences Follow An Aggravated Felony Conviction

1. Permanent Ineligibility for 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 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. *Id.* § 1101(f)(8). As a

result, if a single crime involving a reckless *mens rea* were deemed an aggravated felony under the INA, it could bar lawful permanent residents whose only conviction dates back almost three decades from becoming citizens, no matter how blameless their life has been since their conviction.

2. Severe Restrictions on Reentry to the United States

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 discretionary 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).

D. 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, 8 U.S.C. § 1227(a)(2)(A)(iii), and, as discussed above, such individuals are ineligible for most forms of relief that could halt removal.

"[D]eportation 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)). Deportation is a particularly

harsh punishment for those who face persecution or re-traumatization upon return in their countries of removal. Deportation also punishes 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. And the communities who rely on such businesses are left to scramble in search of alternative sources for goods and services.

As an example, 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 could ever receive the Social Security benefits they helped to fund during their years (or even decades) in the United States.

One of the most damaging consequences 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] Once 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-deported parents.[8] 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

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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.

[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 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, could not see their parents for many years following removal.

II. A RULING FOR RESPONDENT COULD OVERTURN THE EXPECTATIONS OF MANY IMMIGRANTS WHO BELIEVED THEY WERE MAKING IMMIGRATION-SAFE PLEAS.

"Preserving 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). As a result, ineffective assistance of counsel may arise from an attorney's failure to advise her client that pleading to an aggravated felony subjects the immigrant to deportation under 8 U.S.C § 1227(a)(2)(B), particularly when such consequences are clear. *Padilla*, 559 U.S. at 369.

The issue here does not lack clarity. Although *Leocal* declined to decide whether a reckless offense could constitute a crime of violence (543 U.S. at 13), noncitizen defendants have relied on federal court case law applying to reckless offenses *Leocal*'s reasoning 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.

Since *Leocal*, numerous circuits have applied this reasoning to find 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. *See, e.g.*, *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); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006); *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

[10] Several 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).

recklessness is not sufficient" to constitute a "use of force." *United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014).[11]

Amici have accordingly advised noncitizens in these circuits that pleas to recklessness offenses did not subject them to aggravated felony deportation consequences under the INA.[12] Should a ruling for Respondent in this case apply retroactively, such a ruling could potentially transform those defendants' convictions into aggravated felonies and render the immigrants who entered those pleas mandatorily 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 the conviction's age.

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[11] Since *Voisine*, some Circuits have changed course and concluded that crimes with a *mens rea* of recklessness constitute crimes of violence under 18 U.S.C. § 16(a). But as Petitioner explains, those decisions suffer from flawed reasoning. *See* Pet'r's Br. 29–37.

[12] Consistent with the law of the circuits, the Board of Immigration Appeals has also routinely terminated removal proceedings brought against lawful permanent residents upon finding that convictions with a *mens rea* of recklessness do not constitute a crime of violence aggravated felony. *See, e.g.*, *Matter of Arnold Manuel Warmels*, No. AXXX XX5 818, 2014 WL 7691435, *4 (B.I.A. Dec. 23, 2014) (misdemeanor assault conviction under KY. REV. STAT. § 508.030(1)(a) could be "proven by reference to reckless conduct"); *Matter of Mustapha Bayoh*, No. AXXX XX0 716, 2018 WL 4002292 (B.I.A. June 29, 2018) (misdemeanor assault conviction under 18 PA. CONS. STAT. ANN. § 2301 could be committed with *mens rea* of recklessness).

* * *

The Court's decision could have serious unintended immigration consequences for noncitizens convicted of even minor crimes, including those who pled guilty to those crimes with the understanding that they would avoid such consequences. If a recklessness offense may count as a crime of violence aggravated felony under the INA, a longtime lawful permanent resident who commits a misdemeanor offense and serves a one-year suspended sentence with no jail time may be rendered deportable, even decades later—after having obtained an education, raised a family, climbed the occupational ranks in a country that she loves, and opened a business upon which her community relies. An immigration judge would not have discretion to consider virtually any mitigating circumstances: whether the immigrant lived in this country for decades after completing her sentence and committed no other crimes; whether she raised a family, served in our military, or started a business; or whether she had a well-founded fear of persecution in her country of removal. Such Kafkaesque consequences cannot be what Congress intended.

CONCLUSION

This Court should reverse the judgment of the Sixth Circuit.

Respectfully submitted,

Rex S. Heinke
Counsel of Record
Devin S. Sikes
Jeffrey Kane
Izabelle Raven Tully
AKIN GUMP STRAUSS
HAUER & FELD LLP

Leila Kang
Manuel D. Vargas
IMMIGRANT DEFENSE
PROJECT

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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 **Capital Area Immigrants' Rights Coalition** ("CAIR Coalition") is a nonprofit legal services organization that serves adults and children detained and facing removal proceedings throughout Virginia and Maryland. CAIR Coalition provides detained immigrants with various legal services, including legal rights presentations, pro se workshops, and pro bono counsel. CAIR Coalition also provides technical assistance to area public defender organizations and court-appointed indigent defense attorneys in Virginia, Maryland, and the District of Columbia, as well as training and consultation services to individual criminal defense attorneys on the interplay between criminal and immigration law. Many of the detained noncitizens CAIR Coalition serves have been placed in removal proceedings on account of previous criminal convictions. This case presents a question that could have profound consequences for our clients who have been convicted of federal or state offenses and how these are categorized as violent offenses under the categorical and modified categorical approach. This Court has previously granted CAIR Coalition leave to appear as amicus curiae in *Barton v. Barr*, No. 18-725, ___ S. Ct. ___ (2020).

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).

The **Immigrant Legal Resource Center** ("ILRC") is a national nonprofit resource center whose mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. The ILRC has a direct interest in this case because it advocates for greater rights for noncitizens accused or convicted of crimes, and each year provides assistance to hundreds of attorneys nationally who represent noncitizens in criminal courts, removal proceedings, and applications for naturalization and other immigration benefits.

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 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.