No. 21-

IN THE

Supreme Court of the United States

MOHAMMAD SHARIF KHALIL,

Petitioner,

v.

UR JADDOU, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Immigration and Nationality Act (INA) identifies various "terrorist activities" that render a noncitizen inadmissible. 8 U.S.C. § 1182(a)(3)(B). The REAL ID Act of 2005 amended the INA to, among other things, add a ground of inadmissibility for receipt of "military-type training . . . from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi))." *Id.* § 1182(a)(3)(B)(i)(VIII). No other terrorism-related grounds of inadmissibility under § 1182 include the language "at the time" to describe the conduct at issue.

In the early–mid 1980s, Petitioner Mohammad Sharif Khalil fought against the Soviets with the U.S.-backed and trained war-time ally known as Jamiat-i-Islami (Jamiat). Mr. Khalil disclosed his background with Jamiat and was granted asylum in 2000. In its 2019 denial of Mr. Khalil's application to adjust status, U.S. Citizenship and Immigration Services claimed that beginning in the late 1980s, Jamiat qualified as an undesignated "Tier III" terrorist organization under § 1182(a)(3)(B)(vi)(III) of the INA, as amended by the PATRIOT Act of 2001.

The question presented is:

Whether the INA, as amended by the REAL ID Act, permits the government to retroactively deem a noncitizen inadmissible for receiving military-type training from or on behalf of a group that the United States did not consider a terrorist organization "at the time" of his training.

PARTIES TO THE PROCEEDING

Petitioner Mohammad Sharif Khalil was the Plaintiff-Appellant below.

Francis Cissna, in his official capacity as Director of U.S. Citizenship and Immigration Services; Kevin McAleenan, in his official capacity as Acting Secretary of the U.S. Department of Homeland Security; and Loren K. Miller, in his official capacity as Director of the U.S. Citizenship and Immigration Services, Nebraska Service Center, were the Defendants in the District Court.

Kenneth Cuccinelli, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services, and Chad Wolf, in his official capacity as Acting Secretary of the U.S. Department of Homeland Security, were substituted pursuant to Federal Rule of Civil Procedure 25(d) and were the Appellees in the Circuit Court.

Ur Jaddou, in her official capacity as Director of U.S. Citizenship and Immigration Services, and Alejandro Mayorkas, in his official capacity as Secretary of the U.S. Department of Homeland Security, are currently in the respective positions and have been substituted pursuant to Rule 25(d).

Accordingly, Ur Jaddou, Alejandro Mayorkas, and Loren K. Miller are the Respondents before this Court.

RELATED CASES

There are no related cases other than the opinions identified below in this matter:

Khalil v. McAleenan, et al., No. 2:18-cv-07903-DMG-KS, United States District Court for the Central District of California, Western Division. Judgment entered Jan. 21, 2020.

Khalil v. Cissna, et al., No. 20-55323, United States Court of Appeals for the Ninth Circuit. Judgment entered Mar. 12, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mohammad Sharif Khalil respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

By September 11, 2021, the United States will have completed its withdrawal of forces from Afghanistan. Simultaneously, the government is evacuating thousands of Afghan visa applicants whose lives are at risk because of the work they did for American forces fighting the Taliban. *See* discussion *infra* Section IV. This case implicates an important and recurring foreign policy question affecting those applicants and many others: After serving alongside the United States in conflicts around the world, can our war-time allies trust that we will not turn our backs on them when they seek refuge?

Mr. Khalil is one of many asylees who fought against the Soviets with Jamiat-i-Islami (Jamiat)—a U.S.-supported and U.S.-trained group in Afghanistan. Jamiat was not designated and did not qualify as a terrorist organization at the time Mr. Khalil received the training in the early-mid 1980s. Years after he disclosed this background and obtained asylum in the United States, the government denied his request for adjustment of immigration status on the ground that he had engaged in terrorist activity during his involvement with Jamiat. In its final denial, the government raised a new ground of inadmissibility, claiming that Mr. Khalil had received military-type training from a Tier III terrorist organization.

The Ninth Circuit panel expressed its concern that the government's position in this case sends the message to U.S.-allied fighters that "the United States will betray you. It will treat you as a terrorist." *See infra* Section IV. But apparently believing it had no choice, the court adopted a flawed view of retroactivity and an incorrect interpretation of the REAL ID Act. Consequently, its decision conflicts with cases involving similar language and with the plain language of the statute itself, which expressly requires that the group from which the noncitizen received training was a terrorist organization "at the time" of the training. Not only did the court of appeals flout the rules of statutory construction and render these words superfluous, it also exacerbated a circuit split between the Fifth and Ninth Circuits.

An interpretation of the REAL ID Act that retroactively renders Mr. Khalil inadmissible for receiving military-type training from a group not considered a terrorist organization at the time of his training undermines the statute's stated purpose—to prevent future terrorist attacks by identifying and removing terrorists who exploit the asylum system to infiltrate and harm the United States. The court of appeals' interpretation simultaneously excludes deserving noncitizens from adjusting status yet permits these same noncitizens to remain in the country as asylees and refugees despite being labeled as threats to national security. With thousands more allies-turned-refugees on the way, this Court's intervention is urgently needed.

OPINIONS BELOW

The Ninth Circuit's decision is not reported but available at *Khalil v. Cissna*, No. 20-55323, 2021 U.S. App. LEXIS 7298 (9th Cir. Mar. 12, 2021). Pet. App. 1a-4a. The District Court's decision is not reported but available at *Khalil v. McAleenan*, No. 2:18-cv-07903-DMG-KS, 2020 U.S. Dist. LEXIS 37626 (C.D. Cal. Jan. 21, 2020). Pet. App. 5a-12a.

JURISDICTION

The Ninth Circuit entered judgment on March 12, 2021. This Court's July 19, 2021 Order provides that for any case in which the judgment was entered prior to July 19, 2021, the deadline to petition for a writ of certiorari was extended to 150 days from the date of the lower court judgment. Petitioner timely filed this Petition on August 9, 2021, within 150 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Immigration and Nationality Act, as amended by the REAL ID Act of 2005, provides in relevant part:

> (i) In general. Any alien who—
>
> > (VIII) has received military-type training (as defined in [18 U.S.C. § 2339D(c)(1)]) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in [8 U.S.C. § 1182(a)(3)(B)(vi)]); [] . . . is inadmissible.

8 U.S.C. § 1182(a)(3)(B)(i)(VIII).

The INA, as amended by the USA PATRIOT Act of 2001, defines "terrorist organization" as an organization:

> (I) designated under section 219 [8 U.S.C. § 1189];
>
> (II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or
>
> (III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

8 U.S.C. § 1182(a)(3)(B)(vi).

Other relevant portions of the INA, 8 U.S.C. § 1182(a)(3)(B), are reproduced in the Appendix, *infra* Pet. App. 32a-36a.

STATEMENT OF THE CASE

A. Statutory and Legal Background

Originally enacted in 1952, the Immigration and Nationality Act (INA) delineates numerous grounds that exclude noncitizens[1] from receiving visas and admission into the United States. 8 U.S.C. § 1182(a). A noncitizen described in § 1182(a)(3) of the INA is deportable under 8 U.S.C. § 1227 and may be placed in removal proceedings based on any of the § 1182 grounds of inadmissibility. 8 U.S.C. §§ 1229a(a), (e). In 1990, Congress amended the INA to, among other things, exclude and deport noncitizens for participation in terrorist activities. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. The amendment defined "engage in terrorist activity" and for the first time identified several acts as part of a non-exhaustive list of terrorist activities. 8 U.S.C. § 1182(a)(3)(B). In the years that followed, and particularly after the 1993 World Trade Center bombing, Congress expanded the anti-terrorism provisions in the INA to fund counterterrorism measures and bar noncitizens on terrorism-related grounds from receiving asylum or withholding of removal. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

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1 The term "noncitizen" substitutes the term "alien" throughout this Petition. *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1687 (2020); Maria Sacchetti, *ICE, CBP to stop using 'illegal alien' and 'assimilation' under new Biden administration order*, Wash. Post (Apr. 19, 2021), https://www.washingtonpost.com/immigration/illegal-alien-assimilation/2021/04/19/9a2f878e-9ebc-11eb-b7a8-014b14aeb9e4_story.html (discussing agency memos directing use of more inclusive terms for immigrants).

Nearly twenty years ago, Congress enacted the PATRIOT Act the month after the September 11, 2001 attacks, further amending the INA to include additional terrorism-related inadmissibility grounds. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (PATRIOT Act). The PATRIOT Act expanded the existing list of terrorist activities under § 1182. It also amended the definition of "terrorist organization" to include a category for undesignated groups of two or more individuals who "engage in terrorist activity," referred to as "Tier III" terrorist organizations. 8 U.S.C. § 1182(a)(3)(B)(vi)(III). As noted above, "engage in terrorist activity" was originally defined in 1990. *Id.* § 1182(a)(3)(B). Despite other noteworthy amendments, the PATRIOT Act did not significantly change the definition of "engage in terrorist activity." Pet. App. 35a; *see also Amrollah* discussion *infra* Section II.

In late 2002, Congress created the National Commission on Terrorist Attacks Upon the United States, known as the 9/11 Commission. *See* Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383 (2002). The 9/11 Commission identified multiple instances where terrorists entered and remained in the United States by exploiting then-existing asylum laws. *See generally* 9/11 Commission, The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (2004). In response, Congress passed the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Pub. L. No. 109-13, 119 Stat. 231 (REAL ID Act), to, among other thing,

"unify terrorism-related grounds for inadmissibility and removal." H.R. REP. No. 109-72 (2005). In its effort to streamline deportation of terrorists, the REAL ID Act added a ground of inadmissibility for noncitizens who have "received military-type training . . . from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in [the PATRIOT Act])." 8 U.S.C. § 1182(a)(3)(B)(i)(VIII).

The INA, with the PATRIOT Act and REAL ID Act amendments, serves as a broad statutory scheme allowing the government to exclude noncitizens on terrorism-related grounds, including material support, endorsement of a terrorist organization, and solicitation of funds for terrorist activity.[2] *Id.* §§ 1182(a)(3)(B)(i)(VII), (iv)(V)-(VI). Yet among its vast provisions, Congress included the short but clear phrase, "at the time," which expressly limits the statute's otherwise expansive reach as it relates to receipt of military-type training. *Id.* § 1182(a)(3)(B)(i)(VIII). No other terrorism-related inadmissibility ground contains the words "at the time," indicating that Congress purposely included them in § 1182(a)(3)(B)(i)(VIII).

2 *See McAllister v. U.S. Att'y Gen.*, 444 F.3d 178, 191-92 (3d Cir. 2006) (Barry, J., concurring) (expressing alarm at the government's sweeping definitions of "terrorist activity" and "terrorist organization"); *In re S-K-*, 23 I. & N. Dec. 936, 948-49 (BIA 2006) (Osuna, J., concurring) (discussing the "broad reach" of the material support ground of inadmissibility).

B. Factual and Administrative Background

Born and raised in war-torn Afghanistan, Mohammad Sharif Khalil joined Jamiat at age 15 during the Soviet invasion of Afghanistan. Pl.'s First Am. Compl. ¶¶ 9-10, ECF No. 31. Supporting groups like Jamiat was the official U.S. policy under then-President Ronald Reagan. Known as the "Reagan Doctrine," the U.S. provided funds, support, training, and weapons to Jamiat and other anti-Soviet groups in Afghanistan and around the globe. *See* Charles Krauthammer, *The Reagan Doctrine*, WASH. POST (July 19, 1985), https://www.washingtonpost.com/archive/politics/1985/07/19/the-reagan-doctrine/b2a06583-46fd-41e5-b70d-c949dd3c50c2/ ("The Reagan Doctrine, enunciated in the 1985 State of the Union address, declares, quite simply, American support for anticommunist revolution 'on every continent from Afghanistan to Nicaragua.'"). Like many Afghan youth, Mr. Khalil fought with Jamiat against the Soviets after being trained by U.S. forces. Pl.'s First Am. Compl. ¶ 11. Mr. Khalil's involvement with Jamiat ceased in the late 1980s at the end of the Soviet invasion.

Following the fall of the Soviet-supported Afghan government in 1992, Jamiat was one of many groups vying for power in Afghanistan. Jamiat joined the coalition known as the United Islamic Front for the Salvation of Afghanistan or "Northern Alliance." The Northern Alliance opposed the Islamic Emirate of Afghanistan, commonly known as the Taliban. With the majority of Afghanistan under Taliban control, Mr. Khalil was targeted as a former member of Jamiat. *Id.* at ¶ 13. After initially seeking refuge in Germany, on January 21, 2000, Mr. Khalil entered the United States through Newark International Airport and requested asylum. *Id.* at ¶ 16.

In his applications for asylum and for withholding of removal, Mr. Khalil fully disclosed to the Immigration and Naturalization Service (INS)[3] that he "joined the [Jamiat] at the age of 15 and became a fighter at 18" and "supported the Jamiat in there [sic] resistance against the Communists and there [sic] fighting against Hekmatyar and his Hezb-i-Islami party." *Id.* On March 30, 2000, the immigration judge (IJ) granted Mr. Khalil's application for asylum. *Id.* at ¶ 17.[4]

Mr. Khalil filed his first Application to Register Permanent Residence or Adjust Status with U.S. Citizenship and Immigration Services (USCIS) on December 3, 2001, four years before Congress passed the REAL ID Act. Once granted, adjustment of status permits noncitizens to travel more freely internationally, receive financial aid, join certain branches of the U.S. armed forces, and ultimately seek U.S. citizenship after five years. Kira Monin et al., *Refugees and Asylees in the United States*, Migration Pol'y Inst. (May 13, 2021), https://www.migrationpolicy.org/article/refugees-and-asylees-united-states-2021. Mr. Khalil again disclosed his ties to Jamiat.

After nearly eight years with no explanation for the delay, USCIS denied Mr. Khalil's first application,

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3 The INS existed at the time of Mr. Khalil's asylum proceedings. Congress created the Department of Homeland Security (DHS) in November 2002 and USCIS in March 2003. USCIS is an agency within DHS.

4 IJs are statutorily barred from granting asylum to noncitizens who are found to be inadmissible on terrorism-related grounds, such as "engaging in terrorist activity." 8 U.S.C. § 1158(b)(2)(A)(v); *see also* 8 U.S.C. § 1182(a)(3)(B)(i)(I).

claiming he was inadmissible under 8 U.S.C. § 1182(a)(3)(B)(i)(I) for engaging in terrorist activity. On January 31, 2011, Mr. Khalil filed a second application. Pl.'s First Am. Compl. ¶ 22. Another seven years later, on November 16, 2018, USCIS sent Mr. Khalil a Notice of Intent to Deny his second application (the 2018 NOID). Pet. App. 37a-46a. The 2018 NOID asserted that Mr. Khalil was "inadmissible under [§ 1182(a)(3)(B)(i)(I)] for having engaged in terrorist activity, as defined in [§1182(a)(3)(B)(iii)(V)(b)] when, as a Mujahedeen fighter, [he] used a rocket launcher to endanger the safety of one or more individuals." *Id.* at 44a. It also claimed Mr. Khalil was inadmissible "as defined by [§ 1182(a)(3)(B)(iv)(VI)] for having provided material support to Jamiat Islami by working with [his] uncle and by fighting with the organization." *Id.* Mr. Khalil timely submitted a response to the 2018 NOID, which addressed each ground of denial.

On February 14, 2019, USCIS sent another NOID regarding Mr. Khalil's second application (the 2019 NOID). *Id.* at 47a-56a. The 2019 NOID included requests for additional information and stated that "[w]hile USCIS still intends to deny [Mr. Khalil's] application, this information will allow USCIS to better evaluate the arguments you raised in your response to the [2018] NOID." *Id.* at 52a. On March 8, 2019, Mr. Khalil submitted his response to the 2019 NOID, asserting, among other arguments, that USCIS was collaterally estopped from denying his application on its stated grounds because the issue of his admissibility and involvement with Jamiat was fully litigated at the asylum stage. *See Amrollah v. Napolitano*, 710 F.3d 568, 571 (5th Cir. 2013) (applying collateral estoppel to USCIS's denial of adjustment of status on terrorism-related inadmissibility grounds).

USCIS denied Mr. Khalil's second application on March 21, 2019. Pet. App. 13a-31a. It reasserted the grounds of inadmissibility from the denial of his first application and the 2018 NOID (engaging in terrorist activity and material support of terrorism), but in an attempt to circumvent Mr. Khalil's collateral estoppel argument, USCIS also added a third ground: receipt of military-type training from a terrorist organization pursuant to 8 U.S.C. § 1182(a)(3)(B)(i)(VIII). *Id.* at 29a-30a. USCIS purportedly based this new ground of inadmissibility on a statement in the addendum to Khalil's second application repeating what he had previously disclosed during his 2000 asylum proceeding (that he was a member of Jamiat in the 1980s and received training from U.S. forces to fight the Soviets). *Id.*; *see also* Pl.'s First Am. Compl. ¶¶ 30-31. USCIS admitted as much in its denial when it acknowledged that Mr. Khalil disclosed his involvement in Jamiat "in their [sic] resistance against the Communists." Pet. App. 16a. Nevertheless, USCIS stated in its denial, "The fact that the United States supported Mujahedeen fighting the Soviet and Soviet-sponsored Afghan government does not make the group you were a member of any less of a [Tier III] terrorist organization. . . ." *Id.* at 27a. In other words, USCIS disregarded the fact that Mr. Khalil received "military-type training" (from the U.S.) two decades before the REAL ID Act expressly created this terrorism-related ground of inadmissibility and years before it decided that Jamiat was a "terrorist organization" under the Tier III definition.

C. Lower Court Proceedings

Mr. Khalil initially filed a Writ of Mandamus on September 11, 2018, to challenge USCIS's seven-year

delay of his second application. On April 9, 2019, after USCIS's ultimate denial, Mr. Khalil filed his First Amended Complaint seeking a declaration that USCIS's denial of the second application was unlawful and should be set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because Respondents were collaterally estopped from denying adjustment of status on all stated grounds. *See generally* Pl.'s First Am. Compl.

Respondents moved to dismiss the complaint for lack of jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(ii). Defs.' Mot. to Dismiss 3, ECF No. 32. When the Ninth Circuit decided a similar case while the motion to dismiss was pending, *Janjua v. Neufeld*, 933 F.3d 1061 (9th Cir. 2019), the district court instructed the parties to submit supplemental briefing on the collateral estoppel issue raised by Mr. Khalil. The Ninth Circuit in *Janjua* held that because the specific terrorism-related ground was not created until after the noncitizen's asylum hearing, the issue was not "actually litigated" and collateral estoppel did not apply. 933 F.3d at 1067-68. The *Janjua* court created a split with the Fifth Circuit in *Amrollah v. Napolitano*, 710 F.3d 568 (5th Cir. 2013). *See* discussion *infra* Section II.

On January 21, 2020, the district court granted the motion to dismiss, but not on the grounds that it lacked jurisdiction. Rather, it concluded that under *Janjua*, collateral estoppel did not preclude Respondents from denying Mr. Khalil's second application because the IJ who previously granted Mr. Khalil asylum in 2000 could not have considered grounds of inadmissibility that were codified by the PATRIOT Act and REAL ID Act after the asylum decision. Pet. App. 7a-11a. The district

court construed "terrorism-related activity" narrowly and decided that because the Tier III definition was not available at the time of Mr. Khalil's asylum in 2000, inadmissibility related to Jamiat's Tier III designation was not "actually litigated" during the asylum proceedings. *Id.* at 9a-10a.

The Ninth Circuit affirmed the dismissal on March 12, 2021. Seemingly acknowledging that collateral estoppel could apply to the first two grounds of inadmissibility, the court of appeals pivoted and focused on the third ground: receipt of military-type training under § 1182(a)(3)(B)(i)(VIII). *Id.* at 4a (concluding, "even if the record showed that the agency was estopped on some of the other issues on appeal, it would not change the result as to Khalil's 'military-type training'"). It held that collateral estoppel did not apply to the military-type training ground because the REAL ID Act was passed in 2005, after the IJ decision granting Mr. Khalil's asylum application in 2000. *Id.* at 3a. At the same time, the court of appeals rejected Mr. Khalil's argument that the REAL ID Act cannot retroactively render him inadmissible because of its "at the time" language; instead, it concluded simply that "the REAL ID Act explicitly permits retroactivity" based on the Act's note stating that the amendments apply to "acts and conditions constituting a ground for inadmissibility . . . occurring or existing before, on, or after [May 11, 2005]." *Id.* As a result, even though the INA covered the same terrorism-related conduct for the 15 years preceding the REAL ID Act, the court of appeals held that the military-type training ground could not have been actually litigated in the asylum proceeding. *Id.*

This petition followed.

REASONS FOR GRANTING THE PETITION

In a results-driven decision, the Ninth Circuit contradicted other judicial interpretations of the statutory language "at the time," exacerbated a circuit split, and ignored long-standing rules of statutory construction. The court of appeals' interpretation—that under the REAL ID Act, the government can retroactively deem a noncitizen inadmissible for receiving military-type training from a group that was not considered a terrorist organization *at the time* of the training—is wrong. And the consequences of its misinterpretation of this provision of § 1182 necessitate this Court's review.

I. THE DECISION BELOW CONFLICTS WITH JUDICIAL INTERPRETATIONS OF IDENTICAL LANGUAGE.

As the Court is aware, when Congress uses identical words throughout the same statute, they "are intended to have the same meaning." *Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 342 (1994). The phrase "at the time" is employed to mean "when" in other parts of § 1182. Because courts have followed the plain meaning of "at the time" in other § 1182 cases, the decision below conflicts with and creates inconsistency in the law interpreting this language.

For example, 8 U.S.C. § 1182(a)(6)(E) sets forth a ground of inadmissibility where a noncitizen smuggled another noncitizen into the United States. Section 1182(a)(6)(E)(iii) permits a waiver, however, when the person the noncitizen smuggled was the noncitizen's spouse or other immediate relative. The waiver is further explained in § 1182(d)(11): "the Attorney General may, in his discretion . . . waive application of [§ 1182(a)(6)(E)(i)] . . . if the alien

has [smuggled] only an individual who *at the time* of such action was the alien's [spouse or other immediate relative] to enter the United States in violation of law." *Id.* § 1182(d)(11) (emphasis added). Federal courts and the Board of Immigration Appeals hold that the waiver only applies if the individual smuggled was a spouse or other immediate relative when the smuggling occurred. *See, e.g., Moran v. Ashcroft*, 395 F.3d 1089, 1090 (9th Cir. 2005) ("Because Moran and his wife were married after he helped her enter the country illegally, he does not fall within the exception to the alien smuggling provision . . . ."), *overruled on other grounds by Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009); *In re Farias-Mendoza*, 21 I. & N. Dec. 269, 282, 1997 BIA LEXIS 22, at *4 (BIA May 7, 1997) ("At the time the respondent assisted her current husband in entering the United States in violation of law, she was not married to him.").

Likewise, § 1182(a)(6)(C)(ii)(II) provides that a noncitizen is not inadmissible for making a false claim of citizenship if his parents naturalized before he turned 16 and he "reasonably believed *at the time* of making such representation that he [] was a citizen." 8 U.S.C. § 1182(a)(6)(C)(ii)(II) (emphasis added). Courts also interpret "at the time" in this provision to mean "when." *See, e.g., Muratoski v. Holder*, 622 F.3d 824, 828 (7th Cir. 2010) (rejecting the noncitizen's argument that he reasonably believed he was a citizen at the time he obtained a falsified passport and subsequently made a false claim of citizenship); *Adrien v. U.S. Att'y Gen.*, 194 F. App'x 748, 751 (11th Cir. 2006) (agreeing with the BIA that there was no evidence the noncitizen's "memory problems existed at the time of his [IJ] hearing").[5]

5 The government's position in this case is at odds with its position on waivers for smuggling family members under § 1182(d)

The Ninth Circuit's holding conflicts with interpretations of the same language with the same meaning. Because of the other holdings interpreting "at the time" differently (and correctly), resolving the question presented has implications for other provisions in § 1182 and related immigration and terrorism statutes. *See, e.g.*, Intelligence Reform and Terrorism Prevention Act of 2004, 18 U.S.C. § 2339D (imposing criminal liability upon a person who "knowingly receives military-type training from or on behalf of any organization designated *at the time* of the training [as a foreign terrorist organization]") (emphasis added).

II. THE DECISION BELOW BUILDS ON AN EXISTING CIRCUIT SPLIT.

While the district court applied the Ninth Circuit's decision in *Janjua v. Neufeld*, the court of appeals' decision below took it further, building on the Ninth and Fifth Circuits' split on collateral estoppel in asylum and adjustment of status cases. Pet. App. 3a.

In *Janjua*, much like in this case, a noncitizen who obtained asylum later sought adjustment of status. 933 F.3d at 1063. At the time of his asylum application, Janjua disclosed his former involvement with the Muhair Qaumi Movement (MQM), a political group in Pakistan. *Id.*

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(11). In the latter, it does not retroactively deem a noncitizen's after-acquired spouse to be their spouse at the time of smuggling, which makes sense because such an interpretation would run afoul of the statute's plain language. Same with its position on false claims under § 1182(a)(6)(C)(ii)(II). These contradictory interpretations of the same language violate many tenets of statutory construction. *See infra* Section III.

During his subsequent adjustment of status proceedings, Janjua argued that the government was collaterally estopped from denying his application on the grounds that he had provided material support to MQM, which later qualified as a Tier III terrorist organization. *Id.* The Ninth Circuit in *Janjua* first concluded that collateral estoppel applies if a claim is "actually and necessarily litigated." *Id.* at 1065. The court considered an issue to be actually litigated when it was "raised, contested, and submitted for determination." *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. d (AM. L. INST. 1982)). Because the Tier III definition was not invented until after Janjua's asylum hearing, the court held that the issue was not actually litigated, and thus, collateral estoppel did not apply to the government's ground for denial. *Id.* at 1067. The *Janjua* court ignored that the definition of a Tier III terrorist organization hinges on whether the group "engaged in terrorist activity," a term already defined by the INA at the time of his asylum proceedings and which Congress had not significantly changed in the PATRIOT Act.

The Fifth Circuit in *Amrollah v. Napolitano* had already considered facts nearly identical to *Janjua*. Namely, the government denied an asylee's application for permanent resident status on the ground that he engaged in terrorist activity by providing material support to a Tier III terrorist organization. 710 F.3d 568, 571 (5th Cir. 2013). But in contrast to *Janjua*, the Fifth Circuit held that the government was collaterally estopped from raising this ground of inadmissibility because the definition of "engage in terrorist activity" under the existing statute was not "significantly different" from the amended definition in the PATRIOT Act. *Id.*

at 573. The Fifth Circuit recognized that although the PATRIOT Act and REAL ID Act amended the labels applied to assess a noncitizen's inadmissibility, they did not materially affect the definitions of "engage in terrorist activity" or "terrorist organization." *Id*. at 571. The legal analysis before and after the amendments is the same. Consequently, *Janjua* is wrong about collateral estoppel in the § 1182 context.

In this case, the district court found that *Janjua* effectively barred Mr. Khalil's collateral estoppel argument, in part because it concluded that "the receipt of military-style training from a Tier III organization was not a basis for inadmissibility [and thus, could not have been actually litigated] until the REAL ID Act became law in May 2005." Pet. App. 10a ("*Janjua* indicates that whether Plaintiff was inadmissible for receiving military-type training from a Tier III terrorist organization could not have been actually litigated because any IJ could not have considered inadmissibility on those grounds until they were added to § 1182 in 2001 and 2005, respectively.") (cleaned up). But because the issue of whether Mr. Khalil engaged in terrorist activity was actually litigated at the asylum stage, the first two grounds of inadmissibility (material support of terrorism and engaging in terrorist activity) should have been barred by collateral estoppel. *See Amrollah*, 710 F.3d at 571-73.

The Ninth Circuit also applied *Janjua's* collateral estoppel holding and then went a step further by concluding that § 1182(a)(3)(B)(i)(VIII) applied retroactively to military-type training received from a group that was not considered a terrorist organization at the time of the training. But unlike the district court, the court of appeals

appeared to recognize the similarity between the first two grounds and focused its analysis on the third ground of inadmissibility—military-type training. Pet. App. 3a-4a. The court effectively took the bait that USCIS dropped when it belatedly added military-type training to its final denial. In conjunction with the incongruence caused by the *Janjua-Amrollah* split, the Ninth Circuit's decision below leaves the government free to turn its back on wartime allies by arbitrarily labeling them as terrorists and denying them the ability to adjust status.

III. THE DECISION BELOW IS WRONG.

Multiple principles of statutory interpretation reveal that the Ninth Circuit's decision is based on an erroneous reading of 8 U.S.C. § 1182(a)(3)(B)(i)(VIII) and a misunderstanding of retroactivity in the REAL ID Act.

1. The court of appeals ignored the plain language of the military-type training provision. In statutory construction cases, courts must first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (concluding that "related person" was unambiguous in the Coal Act). If it does, courts are obliged to "apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (applying the ordinary meaning of the word "now" in the Indian Reorganization Act); *see also Barber v. Gonzales*, 347 U.S. 637, 643 (1954) ("In the absence of explicit language showing a contrary congressional intent, we must give technical words in deportation statutes their usual technical meaning."). "[F]or where, as here, the statute's language is plain, 'the

sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

The key statutory language at issue in this case is "at the time." 8 U.S.C. § 1182(a)(3)(B)(i)(VIII). The meaning of this phrase has significant implications for Mr. Khalil and countless other noncitizens. Merriam-Webster defines the phrase "at the time of" to mean "when (something) happened." *At the time of (something)*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/at% 20the%20time%20of%20%28something%29 (last visited June 14, 2021). Similarly, the leading dictionary defining words and idioms for English learners defines "at the time" to mean "at a particular moment or period in the past when something happened, especially when the situation is very different now." *At the time*, Longman Dictionary of Contemp. Eng., https://www.ldoceonline.com/dictionary/at-the-time (last visited June 14, 2021). And Garner's Modern English Usage describes the phrases "at the time (that)" and "at the time (when)" as "invariably verbose for *when*." *At the time (that); at the time (when)*, Garner's Modern English Usage (4th ed. 2016) (emphasis in original).

Section 1182(a)(3)(B)(i)(VIII) states that the terrorist activities inadmissibility ground includes "military-type training . . . from or on behalf of any organization that, at the time the training was received, was a terrorist organization . . . ." 8 U.S.C. § 1182(a)(3)(B)(i)(VIII). Interpreting the statute's language by its ordinary and common meaning, a noncitizen is inadmissible for terrorist activities if he received military-type training from an

organization that was considered a terrorist organization *when* he was receiving the training. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (beginning analysis with the ordinary meaning of the term "bribery"). The meaning of "at the time" is plain and unambiguous.[6] Indeed, this Court frequently uses the phrase while discussing statutory construction; *e.g.*, "It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (cleaned up); *see also Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").[7] The Ninth Circuit essentially wrote "at the time" out of this statute.

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6 Because "at the time" is unambiguous, courts need not consider the legislative history. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (explaining that its statutory construction "analysis begins with the language of the statute" and "where the statutory language provides a clear answer, it ends there as well"). But even if they did, the legislative history does not address the meaning of "at the time" in § 1182(a)(3)(B)(i)(VIII). To the extent the Congressional Record offers any insight into Congress's intent, it indicates that Congress sought to stop terrorists like those who exploited asylum laws to enter the U.S. and commit the 9/11 attacks, not noncitizens who fought alongside the U.S. in armed conflicts in the 1980s. *See* 151 Cong. Rec. S3775 (2005).

7 Likewise, Article II, Section 1 of the Constitution, known as the "Eligibility Clause," contains an exemption that permitted persons (*i.e.*, founders and men who served in the Revolutionary War) not born in the U.S. to become president so long as they were citizens "at the time" the Constitution was ratified. U.S Const. art. II, § 1 ("No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.").

As discussed *supra*, USCIS claimed that beginning in the late 1980s, Jamiat engaged in activities that render it a Tier III terrorist organization. Pet. App. 18a-21a. But Mr. Khalil did not receive military-type training at that time. *Id.* at 17a. Rather, as the government conceded, he received military-type training in the early to mid-1980s, when Jamiat was not considered a terrorist organization and would not have qualified as a Tier III terrorist organization. *See id.* The Ninth Circuit, by concluding that § 1182 applies to Mr. Khalil's receipt of military-type training, ignored the plain meaning of the statute requiring that the group be a terrorist organization "at the time" of the training.

2. The court of appeals' interpretation also renders the statutory language superfluous. It is a basic interpretative canon that statutes should be read "so that effect is given to all [] provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018). Similarly, because identical phrases are treated as having the same meaning in a statute, rendering a phrase surplusage in one provision has consequences for other provisions. *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 561-62 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."). And courts should presume that "Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 537 (1994).

The court of appeals in this case failed to apply these established tenets of statutory construction. It treated "at

the time" as superfluous. There is no need for Congress to specify that an organization was considered a terrorist organization *at the time* the noncitizen received the military-type training if the government need not make such a showing to deem a noncitizen inadmissible under § 1182. Put another way, if all the government must show is that at some point the organization was a terrorist organization under § 1182(a)(3)(B)(vi), the words "at the time" have no meaning. This interpretation is not only wrong but has the added risk of rendering the same language superfluous in other provisions of § 1182. *See*, *e.g.*, 8 U.S.C. §§ 1182(a)(6)(C) (using the phrase "at the time"), (a)(8) (same).

The Ninth Circuit's decision also implies that Congress's inclusion of "at the time" in § 1182(a)(3)(B)(i)(VIII) was a thoughtless technicality, even though Congress plainly omitted those words in all other terrorism-related provisions of §1182(a)(3). By amending this part of the INA to include military-type training but with a qualification—at the time—courts must presume that Congress added the language intentionally. Based on its dissimilarity with those other terrorism-related grounds of inadmissibility, it is apparent Congress intended to protect war-time allies who received military-type training from and alongside U.S. troops in conflicts around the world.

3. The court of appeals disregarded the centuries-old presumption against retroactivity of statutes. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 842-44, 855-56 (1990) (Scalia, J., concurring) (explaining that statutes must not be applied retroactively unless Congress clearly states otherwise dates back to "the

beginning of the Republic and indeed since the early days of the common law"); *Soc'y for the Propagation of the Gospel v. Wheeler*, 2 Gall. 105, 22 F. Cas. 756, F. Cas. No. 13156 (C.C.N.H. 1814) (Story, J.) (quoting the New Hampshire bill of rights' declaration that "retrospective laws are highly injurious, oppressive and unjust"). This legal doctrine exemplifies the considerations of fair notice and reasonable reliance provided by both the *Ex Post Facto* Clause and the Due Process Clause. *Ventura v. Sessions*, 907 F.3d 306, 313 (5th Cir. 2018); *see also INS v. St. Cyr*, 533 U.S. 289, 324 (2001) ("As our cases make clear, the presumption against retroactivity applies far beyond the confines of the criminal law."), *superseded by statute on other grounds*, REAL ID Act of 2005, 119 Stat. 310, 8 U.S.C. § 1252(a)(5). And it reflects the concern that lawmakers' "responsivity to political pressures poses a risk that [they] may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 267 (1994). As a result, "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Id.* at 265.

There is no dispute that this case "implicates a federal statute enacted after the events in the suit." *Id.* Accordingly, the retroactivity question here presents itself in two ways. The first is simple and surely calls for a "yes" answer: Does § 1182(a)(3)(B)(i)(VIII) retroactively apply to military-type training taking place before the Act's May 2005 passage? The second, on the other hand, is not so clear: Does § 1182(a)(3)(B)(i)(VIII) retroactively deem a noncitizen inadmissible for receiving military-type training from a terrorist organization when the group was not considered a terrorist organization at the time of

the training? To answer this second question, the lower courts should have applied *Landgraf*, which announced the current standard for retroactivity with a two-part inquiry. *Id.* at 280-81. Initially, courts must ask "whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. "Cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *St. Cyr*, 533 U.S. at 316-17 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)). If the text expressly and unambiguously states that it applies to preenactment conduct, the inquiry ends and courts should apply the law retroactively as stated. *Landgraf*, 511 U.S. at 281. In the absence of express language, courts next determine if the statute has a retroactive effect, "*i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the answer is yes, courts apply the traditional presumption against retroactivity "absent clear congressional intent favoring such a result." *Id.*; *see also Vartelas v. Holder*, 566 U.S. 257, 266 (2012) (applying the presumption against retroactivity because IIRIRA attached a new disability to the noncitizen by denying him reentry).

As noted, the Ninth Circuit is correct that the REAL ID Act expressly provides it "shall apply to . . . acts and conditions constituting a ground for inadmissibility . . . occurring or existing before, on, or after [May 11, 2005]." 8 U.S.C. § 1182 note; Pet. App. 3a. This means that the provision applies to conduct taking place before its enactment. As a straightforward example of the REAL ID Act's retroactivity, a noncitizen seeking admission today

who received military-type training from Al-Qaeda in 2003 would be inadmissible under § 1182(a)(3)(B)(i)(VIII) because Al-Qaeda was considered a terrorist organization in 2003 (designated in 1997).

The court of appeals incorrectly concluded, however, that retroactivity also means the statute applies to a noncitizen who received military-type training from a group that was not a terrorist organization at the time of the training but was later deemed to be one, whether designated or undesignated. Pet. App. 3a-4a. Indeed, the Ninth Circuit's confusion over retroactivity in this provision was apparent during oral argument, when Judge Tallman said:

> To me, your client is in a very sympathetic position. I don't understand why somebody—I mean, he was our terrorist. . . . He was our guy. And now Congress is saying well maybe then but retroactively not now. I don't know how to get around that the statutory change is applicable before, now, and after.

Oral argument at 10:42, *Khalil v. Cissna*, No. 20-55323, 2021 U.S. App. LEXIS 7298 (9th Cir. Mar. 3, 2021) https://www.ca9.uscourts.gov/media/view.php?pk_id=0000036505. Contrary to the court of appeals' holding, the provision's "at the time" language leads to the opposite conclusion. Because the statute does not *expressly* retroactively deem groups as terrorist organizations in § 1182(a)(3)(B)(i)(VIII) and because the congressional history gives no clear guidance, the traditional presumption against retroactivity must control. Thus, to hold that a noncitizen is inadmissible under § 1182(a)(3)(B)(i)(VIII), the group

from which he received military-type training must have been a terrorist organization *at the time* of the training.

4. Similarly, the court of appeals' interpretation violates the immigration rule of lenity. *See* Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 Geo. Immigr. L.J. 515, 519-20 (2003) (discussing this Court's history of construing immigration statutes narrowly in favor of noncitizens).[8] If, after considering the plain language and legislative history, there remains any doubt about the meaning of the statute, courts must construe its language in favor of the noncitizen. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (recognizing the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]"). This Court held in *Fong Haw Tan v. Phelan* that because "deportation is a drastic measure . . . we will not assume that Congress meant to trench on [the noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." 333 U.S. 6, 10 (1948); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (explaining that because deportation is "a particularly severe penalty" and often "intimately related to the criminal process," courts should apply the standard for criminal laws to immigration laws that make a noncitizen deportable).

8 Because "at the time" in § 1182(a)(3)(B)(i)(VIII) is unambiguous, the government's interpretation is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

DHS's determination that Mr. Khalil is inadmissible under § 1182(a)(3) is a similarly drastic outcome that restricts his immigration status and leaves him vulnerable to deportation, a severe penalty authorized by 8 U.S.C. § 1227 and § 1229a. As a statute seeking to render noncitizens inadmissible and immediately removable on terrorism-related grounds, the lower courts should have construed any potential retroactive application of § 1182(a)(3)(B)(i)(VIII) in Mr. Khalil's favor. *See* H.R. Rep. No. 109-72 (2005).

IV. THE DECISION BELOW BETRAYS WAR-TIME ALLIES AND MAKES AMERICA LESS SAFE.

The Ninth Circuit's decision now stands as the authority dictating when the § 1182 military-type training ground of inadmissibility applies to noncitizens. And its holding, which renders the provision's "at the time" language meaningless, has precisely the implications that the panel openly lamented during oral argument:

> I'm also worried that, boy if our adversaries got hold of this, it would be great publicity for them to say if you fight for the United States at the United States' request with weapons furnished by the United States, the United States will betray you. It will treat you as a terrorist. . . .
>
> It seems to me we're constantly using cats' paws, as most big countries do, to fight our battles for us. And, uh, gosh what a message to people like the Montagnards in Vietnam years ago and the Kurds and the Anticommunists in Afghanistan in the '70s and '80s.

Oral argument at 28:04, *Khalil v. Cissna*, No. 20-55323, 2021 U.S. App. LEXIS 7298 (9th Cir. Mar. 3, 2021), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000036505. Thus, while the Ninth Circuit's interpretation of the statute was incorrect, the panel's statements highlight the important foreign policy issue that affects individuals like Mr. Khalil as well as the next generation of U.S.-supported "freedom fighters"—groups and individuals in the Middle East that fought alongside the U.S. in the War on Terror. *See* Stephen M. Shapiro et al., SUPREME COURT PRACTICE § 4.13 (11th ed. 2019) ("Significant federal statutory questions implicating foreign affairs may give rise to review on certiorari."). Indeed, the U.S. has for decades relied on groups to fight for democratic interests in countries around the globe. Christian Parenti, *America's Jihad: A History of Origins*, 28 (3) SOC. JUST. 31, 31-33 (2001) (discussing the United States' support and funding of groups to fight communism during the Soviet-Afghan War). And there are no greater examples in the last 50 years of the U.S. government receiving support from allied militia groups than those in Afghanistan and Iraq. Jamiat is just one such ally.

Likewise, this issue keeps coming to the forefront as it relates to our country's more recent coalitions in the Middle East. In 2007, a year before Congress passed the Refugee Crisis in Iraq Act, the House Subcommittee on the Middle East and South Asia discussed the United States' obligation to support Iraqi refugees who served U.S. forces: "The people who put their lives and lives of their families on the line by assisting the United States Government, our armed forces and our coalition partners [in the War on Terror], must not be abandoned in their hour of need." *Iraqi Volunteers, Iraqi Refugees: What is*

America's Obligation: Hearing Before the H. Subcomm. on the Middle E. and S. Asia, Comm. on Foreign Affs., 110th Cong. 3 (2007) (statement of Rep. Gary Ackerman, Chairman, H. Subcomm. on the Middle E. and S. Asia). This dilemma has returned in full force again in 2021, with the U.S. withdrawing from Afghanistan and evacuating war-time allies who served alongside our troops, thereby putting those allies in imminent danger and requiring them to seek refuge. *See* Jonathan Landay and Idrees Ali, *U.S. to start evacuating some under-threat Afghan visa applicants*, REUTERS (July 14, 2021), https://www.reuters.com/world/exclusive-us-expected-announce-start-evacuation-afghan-visa-applicants-2021-07-14/ (discussing Operation Allies Refuge). Congressional and executive efforts to support those who assisted us in the War on Terror reflect the longstanding American interest in maintaining credibility abroad and "making good on our obligation to help [our war-time allies]." Interview with Antony J. Blinken, U.S. Sec'y of State, in Brussels, Belg., U.S. DEP'T OF STATE (June 13, 2021), https://www.state.gov/secretary-antony-j-blinken-on-cnns-state-of-the-union-with-dana-bash/. USCIS's denial, the Ninth Circuit's interpretation of § 1182, and the ambiguity created by its ruling undermine those efforts and ignore our obligations to these allies.[9] *See* Jenna Krajeski, *A victim of terrorism*

9 Moreover, to deem noncitizens inadmissible for receipt of military-type training from a "terrorist organization"—when the group was not a terrorist organization at the time—undermines the executive's constitutional power to set U.S. foreign policy and recognize coalitions abroad (such as the Reagan Doctrine). *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

faces deportation for helping terrorists, NEW YORKER (June 12, 2019), https://www.newyorker.com/news/news-desk/a-victim-of-terrorism-faces-deportation-for-helping-terrorists (noting the case of an Iraqi translator for the U.S. military who was denied a green card based on his membership in the Kurdish Democratic Party because it was recently categorized as an "undesignated terrorist group").

A final glaring conundrum with the government's position in this case is that it seeks to label Mr. Khalil inadmissible as a terrorist but has claimed that it will not seek to remove him or revoke his asylum status. More broadly, based on the Ninth Circuit's interpretation of § 1182(a)(3), the government may deny noncitizens adjustment of status on terrorism-related inadmissibility grounds but keep those "terrorists" in the country as asylees—precisely what the REAL ID Act seeks to prevent. This interpretation requires review because it violates established rules of statutory interpretation, exacerbates a circuit split, betrays allies seeking refuge, and perhaps most importantly, makes America less safe. Such an outcome undermines the purpose of the REAL ID Act.

CONCLUSION

In reflecting on the government's insistence that Mr. Khalil is inadmissible after his years of fighting alongside the United States, the panel below observed, "What a message." The question presented here asks whether this is truly the message that Congress intended to send when it passed the REAL ID Act.

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 12, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-55323

MOHAMMAD SHARIF KHALIL,

Plaintiff-Appellant,

v.

L. FRANCIS CISSNA, IN HIS CAPACITY AS DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES; *et al.,*

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

March 3, 2021, Argued and Submitted,
Pasadena, California

March 12, 2021, Filed

Before: KLEINFELD, TALLMAN, and OWENS, Circuit Judges.

Appendix A

MEMORANDUM*

Mohammad Sharif Khalil appeals from the district court's judgment granting United States Citizenship and Immigration Services' ("USCIS") motion to dismiss. As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

As a threshold matter, we "[a]ssum[e] without deciding" that we have jurisdiction to review this appeal. *See, e.g.*, *Janjua v. Neufeld*, 933 F.3d 1061, 1062 (9th Cir. 2019). Thus, we need not decide whether the agency is correct that its decision was discretionary and therefore foreclosed from judicial review under 8 U.S.C. § 1252(a)(2)(B)(ii).

Khalil argues that USCIS was estopped from finding him inadmissible in 2019 because, by granting him asylum in 2000, the agency had "actually and necessarily" decided he was not "engaged in a terrorist activity." *See* 8 U.S.C. § 1182(a)(3)(B)(i). Khalil further contends that the intervening changes in the law during that 19-year period did not sufficiently alter the terrorism-related grounds for inadmissibility to undermine his ability to assert collateral estoppel.

We disagree. In 2005, Congress passed the REAL ID Act, which rendered inadmissible any noncitizen who "received military-type training . . . from or on behalf

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

of any organization that, at the time the training was received, was a terrorist organization." Pub. L. No. 109-13, § 103(a), 119 Stat. 307 (May 11, 2005) (codified as amended at 8 U.S.C. § 1182(a)(3)(B)(i)(VIII)). Receiving "military-type training" from a "terrorist organization" was thus an entirely new ground for inadmissibility that did not exist when Khalil received asylum in 2000. For issue preclusion to apply, an issue must have been "identical in both proceedings" and "actually litigated and decided in the prior proceedings." *Janjua*, 933 F.3d at 1065 (citations omitted). "[A]n issue was actually litigated only if it was raised, contested, and submitted for determination in the prior adjudication." *Id.* at 1062. Khalil's inadmissibility for receiving "military-type training" from a terrorist organization could not have been "actually litigated and decided" in 2000, as "military-type training" was not a ground for inadmissibility at the time. The fact that this provision also referenced other changes in the law, *see* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 347-48 (Oct. 26, 2001) (codified as amended at 8 U.S.C. § 1182(a)(3)(B)(vi)(III)) (expanding the definition of "terrorist organization" to include the "Tier III" category), does not change this basic fact.

Khalil's primary argument is that this new provision cannot be applied retroactively to him. But the REAL ID Act explicitly permits retroactivity under these circumstances. Pub. L. No. 109-13, § 103(d), 119 Stat. 308-09 (May 11, 2005) (codified as amended at 8 U.S.C. § 1182 (note)) (stating that the REAL ID Act's amendments "shall apply to . . . acts and conditions constituting a ground for inadmissibility . . . occurring or existing before, on, or after [May 11, 2005]").

Finally, the district court did not abuse its discretion when it denied Khalil's request for limited factual discovery to establish "with certainty" whether the terrorism-related grounds for inadmissibility were "actually litigated" in his asylum proceedings. Because the "military-type training" ground did not exist until 2005, the issue could not have been "actually litigated" in 2000. Thus, even if the record showed that the agency was estopped on some of the other issues on appeal, it could not change the result as to Khalil's "military-type training."

Like the district court, we are "not unsympathetic to [Khalil's] predicament as there are many equities that favor his cause." For the above reasons, however, we have no choice but to affirm.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED JANUARY 21, 2020

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 18-7903-DMG (KSx)

MOHAMMAD SHARIF KHALIL,

v.

KEVIN MCALEENAN, *et al.*

January 21, 2020, Decided
January 21, 2020, Filed

Present: The Honorable DOLLY M. GEE,
UNITED STATES DISTRICT JUDGE.

CIVIL MINUTES—GENERAL

Proceedings: IN CHAMBERS - ORDER RE DEFENDANTS' MOTION TO DISMISS [32]

After Defendants filed a Motion to Dismiss ("MTD") Plaintiff's First Amended Complaint on May 9, 2019 [Doc. # 32], the Court issued an Order on September 18, 2019 requesting supplemental briefing concerning a Ninth Circuit decision, *Janjua v. Neufeld*, 933 F.3d 1061 (9th Cir. 2019), that was published after the parties completed

their initial briefing on the MTD.[1] [Doc. # 36.] The parties have since submitted their supplemental briefs. [Doc. ## 37 ("Defs.' Suppl. Br."), 38 ("Pl.'s Suppl. Br.").] For the following reasons, the Court **GRANTS** Defendants' MTD.

I.

THE COURT WILL NOT RECONSIDER ITS RULING ON ITS JURISDICTION TO DECIDE THIS MATTER

As an initial matter, Defendants' supplemental brief exceeds the scope of the issue that the Court ordered the parties to brief. Defendants submitted briefing on *Janjua*'s impact on this action, but they also reiterated their MTD's principal argument—that USCIS' decision to deny Plaintiff's application to adjust status as a matter of discretion renders the denial judicially unreviewable. Defs.' Suppl. Br. at 5-6.

The request for supplemental briefing on *Janjua*'s effect on this case was not an invitation for a *de facto* motion for reconsideration of the Court's prior jurisdictional ruling. Defendants have already had ample opportunity to brief the issue of the Court's jurisdiction to hear this case and, as stated in the September 18 Order, have not shown that the Court lacks jurisdiction to decide whether USCIS is estopped from denying Plaintiff's application. [Doc. # 36 at 5-6.] The Court shall not disturb that conclusion now.

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1. The factual and procedural background relevant to the MTD is set forth in the Court's September 18 Order.

Appendix B

II.

THE ISSUES ON WHICH DEFENDANTS BASED THEIR DENIAL OF PLAINTIFF'S APPLICATION WERE NOT "ACTUALLY LITIGATED" UNDER *JANJUA*

Defendants argue that collateral estoppel does not preclude them from denying Plaintiff's application to adjust status because the Immigration Judge ("IJ") who granted Plaintiff asylum could not have considered certain grounds for inadmissibility that were codified by the USA PATRIOT Act and REAL ID Act after the IJ made his asylum decision.[2]

Plaintiff responds that, because the pre-and post-PATRIOT Act versions of 8 U.S.C section 1182 (the statute governing inadmissibility) include similar definitions of "terrorist activity," Plaintiff could not have received asylum "unless the IJ first determined that the applicant had not engaged in terrorist activity." Pl.'s Opp. at 4. Plaintiff's citations in support of this argument, however, focus on whether the issue of an asylum seeker's terrorist activity was necessarily or impliedly decided in his asylum proceedings. *See id.* at 3-4 (citing ("Accordingly, before

2. As set out in the Court's September 18 Order, the IJ granted Plaintiff asylum in March 2000. Federal law did not recognize the provision of support to a Tier III terrorist organization as a basis for inadmissibly until President Bush signed into law the USA PATRIOT Act in October 2001. Similarly, the receipt of military-style training from a Tier III organization was not a basis for inadmissibility until the REAL ID Act became law in May 2005.

the IJ could grant Khan's application for asylum he was required to determine that Khan had not engaged in a terrorist activity.") and *Islam v. U.S. Dep't of Homeland Sec.*, 136 F. Supp. 3d 1088, 1092 (N.D. Cal. 2015) ("Because the IJ was statutorily barred from granting Islam asylum if he was found to have participated in terrorist activity, that issue was necessarily decided when the IJ did in fact grant Islam asylum.")). As *Janjua* makes clear, however, whether or not an issue was *necessarily decided* in a previous proceeding, collateral estoppel does not apply unless that issue was also *actually litigated* in that proceeding. *Janjua*, 933 F.3d at 1066 (distinguishing the two elements of collateral estoppel). The latter requirement is the focus of *Janjua*'s discussion and the Court's request for supplemental briefing.

To satisfy the "actually litigated" requirement, Plaintiff must show that the "question, issue, or fact" that underlies Defendants' denial of Plaintiff's application to adjust status, *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012), was "raised, contested, and submitted for determination" before the IJ in the asylum proceedings. *Janjua*, 933 F.3d at 1066.

The parties have differing conceptions of the pertinent "question, issue, or fact" to which collateral estoppel may apply in this context. Defendants define the questions or issues narrowly—they argue that the questions of whether Plaintiff was inadmissible due to "his provision of material support to, or receipt of military training from, a Tier III terrorist organization" could not have been actually litigated in Plaintiff's asylum proceeding because neither activity was a basis for inadmissibility

when Plaintiff received asylum. Defs.' Suppl. Br. at 4; *see also* First Amended Complaint [Doc. # 31], Ex. D ("Final USCIS Decision") at 6 (concluding that Plaintiff is inadmissible for "having engaged in terrorist activity," having "provided material support to" a Tier III terrorist organization, and "having received military-type training from" a Tier III terrorist organization). Plaintiff, on the other hand, takes a broader view—he alleges that the issue of his "terrorism-related activity," writ large, was actually litigated before the IJ because he fully disclosed his affiliation with Jamiat-i-Islami during his asylum proceedings. Pl.'s Suppl. Br. at 5.

Janjua is more consistent with Defendants' narrower view. There, the Ninth Circuit examined whether the plaintiff's "terrorism-related inadmissibility was actually litigated" in the prior proceedings by looking at whether certain, more narrowly defined, questions were "raised, contested, and submitted for determination" before the IJ. *Janjua*, 933 F.3d at 1067. These questions included whether the organization with which the plaintiff was affiliated "qualifie[d] as a terrorist organization," whether the plaintiff "engaged in terrorist activity and was inadmissible as a result," and whether the plaintiff's "support for the [the organization] would make him inadmissible." *Id.* at 1067-68. The court held that it "ma[de] sense" that these questions were not raised or contested in the previous proceedings because these bases for inadmissibility "did not exist at the time of the hearing."[3] *Id.*

3. *Janjua* also discussed the Ninth Circuit's previous decision in *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011). In

Therefore, even assuming Plaintiff is correct that, as a factual matter, he made his connections to Jamiat-i-Islami known to the IJ in his asylum proceedings, *Janjua* indicates that the "specific issues," *id.* at 1068, of whether Plaintiff was inadmissible for providing material support to, or receiving military training from, a Tier III terrorist organization could not have been actually litigated because any IJ reviewing Plaintiff's asylum application could not have considered his potential inadmissibility on those grounds until they were added to section 1182 in 2001 and 2005, respectively. *See id.* at 1068. The Court agrees with Plaintiff that *Janjua* cannot be read to bar all collateral

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distinguishing *Paulo, Janjua* suggested that collateral estoppel may still apply if the government merely advances a "new *argument*" for ineligibility for an immigration benefit, as opposed to raising a new *issue* that renders an application ineligible. Plaintiff does not address *Paulo* or *Janjua*'s discussion of it, but the Court determines that *Paulo* is distinguishable, just as it was in *Janjua*. In *Paulo*, the government raised an argument against the plaintiff's eligibility for an immigration benefit that it could have raised in a prior proceeding, but did not. *Paulo*, 669 F. 3d at 917-918. Despite the government's contention that this "new" argument defeated issue preclusion, the court held that "[t]he fact that a particular argument against [the plaintiff's] eligibility was not made by the government and not addressed by the district court does not mean that the issue of [the plaintiff's] eligibility for . . . relief was not decided." *Id.* ("If a party could avoid issue preclusion by finding some argument it failed to raise in the previous litigation, the bar on successive litigation would be seriously undermined."). Here, in contrast, the government *could not have made* the arguments for inadmissibility on which it based its denial of Plaintiff's adjustment of status application because the statutory grounds for those arguments did not exist at the time the IJ granted Plaintiff asylum.

estoppel arguments based on asylum determinations before the PATRIOT Act or REAL ID Act became effective. *See* Pl.'s Opp. at 5. But it appears to require courts to determine, when reviewing collateral estoppel arguments in this context, whether the pre-PATRIOT Act and pre-REAL ID Act asylum proceedings involved the "actual litigation" of issues upon which the government's later denial of an immigration benefit turns. If such issues were not, or could not have been, actually litigated, collateral estoppel cannot apply under *Janjua*. This is such a case.

Plaintiff also requests "in the alternative" that the Court permit "jurisdictional discovery" into whether "the issue of terrorist activity was in fact actually litigated at the asylum level." Pl.'s Opp. at 7. If the question of whether collateral estoppel applied in this case turned on a question of fact, discovery would be necessary because courts may not decide such questions at the pleading stage. Because the Court can determine as a matter of law, however, that the issues of whether Plaintiff provided material support to, or received of military training from, a Tier III terrorist organization were not actually litigated during the asylum proceedings, any fact discovery into the proceedings themselves would be futile.

The Court is not unsympathetic to Plaintiff's predicament as there are many equities that favor his cause. *Janjua*, however, is controlling Ninth Circuit precedent and therefore the Court must apply it.

Appendix B

III.

CONCLUSION

Because the Court determines that Plaintiff could not cure the defects in his claims by alleging new or different facts, leave to amend is **DENIED**. *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) ("Leave to amend should be granted unless the district court 'determines that the pleading could not possibly be cured by the allegation of other facts.").

For the foregoing reasons, Defendants' MTD is **GRANTED with prejudice**.

IT IS SO ORDERED.

APPENDIX C — DECISION OF THE U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DATED MARCH 21, 2019

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

U.S. Citizenship and Immigration Services

March 21, 2019

CHARLES SWIFT
CLCMA
833 EAST ARAPAHO ROAD STE 102
RICHARDSON, TX 75081

LIN1190312426

RE: MOHAMMAD SHARIF KHALIL
I-485, Application to Register Permanent Resident or Adjust Status

DECISION

On January 31, 2011, you filed an Application to Register Permanent Residence or Adjust Status (Form I-485) in accordance with Section 209(b) of the Immigration and Nationality Act (INA) (Title 8, United States Code, section 1159). After consideration, it is the decision of U.S. Citizenship and Immigration Services to deny your Form I-485.

Appendix C

Section 209(b) of the INA states in pertinent part:

> The Secretary of Homeland Security or the Attorney General, in the Secretary's or the Attorney General's discretion and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who-
>
> (1) applies for such adjustment,
>
> (2) has been physically present in the United States for at least one year after being granted asylum,
>
> (3) continues to be a refugee within the meaning of [INA] section 101(a)(42)(A) of this title or a spouse or child of such a refugee,
>
> (4) is not firmly resettled in any foreign country, and
>
> (5) is admissible (except as otherwise provided under subsection (c) of this section) as an immigrant under this chapter at the time of examination for adjustment of such alien.

Appendix C

The INA section 209(c) waiver of inadmissibility is not available to aliens who are inadmissible under INA section 212(a)(3)(B) (terrorist activities).

Section 212(a)(3)(B) of the INA, as amended by the REAL ID Act of 2005 states in pertinent part:

> (i) In general. Any alien who-
>
> > (I) has engaged in a terrorist activity
> > ... is inadmissible

INA section 212(a)(3)(B)(iv) defines "engage in terrorist activity," which includes at (I), in an individual capacity or as a member of an organization "to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity."

INA section 212(a)(3)(B)(iii) defines "terrorist activity" to include, in pertinent part: highjacking; kidnapping; and the use of any explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain) with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; and the attempt or threat to do any of these activities.

INA section 212(a)(3)(B)(iv)(VI) includes in the definition of "engaging in terrorist activity": to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material

financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--

> (dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

Terrorist organizations are defined at INA section 212(a)(3)(B)(vi). Section 212(a)(3)(B)(vi)(III) defines an undesignated terrorist organization as "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv)" of INA section 212(a)(3)(B) (also referred to as "Tier III" organizations).

INA section 212(a)(3)(B)(i) makes an alien inadmissible who "(I) has engaged in a terrorist activity" and who "(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) from or on behalf of any organization that, at the time the training was received, was a terrorist organization."

You stated on your Form I-589, Application for Asylum, filed on February 18, 2000, that your father and uncles worked closely with Jamiat Islami, an organization led by Bemahuddin Rabbani. You stated that you joined the

Jamiat Islami Mujahedin at the age of 15. You stated that you became a fighter at the age of 18. You supported Jamiat Islami in their resistance against the Communists and their fighting against Hekmatyar and his Hezb-i-Islami party. You worked with your uncle and you were a Mujahedin fighter specialized in the use of shoulder-held-rocket launchers. You stated that in March 1995, you fled to Pakistan. After three weeks in Pakistan, you arrived in Germany on April 16, 1995.

On your Addendum to Form I-485, Part 3, Section B, you stated that you and your family, through the association of your uncle, assisted the U.S.-backed Mujahedin who provided you with "paramilitary training." You stated that your family was a part of the overwhelming majority of Afghans who opposed the Communist regime and assisted in the way that they could.

You told the asylum officer that your entire family was involved with Jamiat Islami and that you were a member since the age of 15. At 18 years of age, while a Jamiat fighter, you fought the communists from 1986 until 1987 including as a "rocket specialist" using shoulder-based surface to air missiles. After that, you fought against the party of Hekmatyar and his Hezb-i-Islamic party. Additionally, you told the asylum officer during your interview that you were a supporter of Rabbani and your membership began in 1984 and ended in 1995.

Jamiat-i Islami is a complex, predominantly ethnic-Tajik, Islamist organization with an approximately 50-year history, which has included engaging in political activities

as a political party, and organizing armed resistance to the Soviets, to Communist Afghans, to the Taliban, and to rival Mujahideen factions. One author has noted that the organization was about 25 percent Pashtun (See Afghanistan: A Cultural and Political History, Thomas Barfield, p.237, Princeton University Press (2012)). At times, Jamiat Islami has held the presidency and other high-level offices in Afghanistan.

In the late 1980s, according to Afghan sources in Quetta, the Mujahideen forces included those under the command of Mullah Naqib of Jamiat-e Islami, who took some 60 soldiers into custody, and those under the command of Mullah Farooq, also of Jamiat-e Islami, who took 30 soldiers into custody. The soldiers were reportedly executed because "no one could guarantee that they were good Muslims." Interview with Afghan exile in Washington, D.C., January 21, 1991. See The Forgotten War: Human Rights Abuses and Violations of the Laws Of War Since the Soviet Withdrawal, Human Rights Watch, note 115, Feb. 1991; see also, By All Parties to the Conflict: Violations of the Laws of War in Afghanistan, Human Rights Watch, p.63-64, March 1988.

It is noted that there are also reports of Jamiat efforts to curtail abuses of prisoners by commanders, and to hold trials of prisoners accused of wrong-doing, albeit often ending in execution. See Tears, Blood and Cries"; Human Rights in Afghanistan Since the Invasion 1979-1984, Helsinki Watch, p.204-205, Dec. 1984.

In March 1992, the government of Afghanistan, at that time led by Najibullah, president of Afghanistan and

head of the People's Democratic Party of Afghanistan, collapsed. Najibullah's government forces put up no resistance to the various Mujahideen groups and Kabul was captured without fighting. However, Jamiat forces battled with rival Mujahideen groups for control, resulting in tens of thousands of civilians killed or injured in fighting in Kabul in 1992-1993. For example, on April 24, [1992] as Hekmatyar was about to seize control of the city, Massoud and Dostum's forces entered Kabul, taking control of most government ministries. Jamiat attacked Hezb-e Islami forces occupying the interior ministry and Presidential Palace, pushing Hezb-e Islami south and out of the city. There was shelling and street-to-street fighting through April 25 and 26. See Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity, Human Rights Watch, Jul. 7, 2005 (hereafter Blood-Stained Hands). Reports describe the shelling of civilian areas by all parties to the conflict, including Jamiat. Human Rights Watch reported that:

> With respect to Wahdat, Ittihad, and Jamiat hostilities in west Kabul, there is compelling evidence that factions regularly and intentionally targeted civilians and civilian areas for attack, and recklessly and indiscriminately fired weapons into civilian areas. There is little evidence that the factions made meaningful efforts during hostilities to avoid harming civilians or stopped attacks once the harm to civilians was evident. See Blood-Stained Hands.
>
> A former high-level official in Shura-e Nazar confirmed that Jamiat troops on the Mamorine

> mountain (the western peak next to Television Mountain and above west Kabul) regularly launched rockets and artillery into the civilian areas of west Kabul in 1992 and 1993. See Blood-Stained Hands.

Some witnesses further stated that Jamiat forces would target civilians for recreation during the conflict and abduct civilians for ransom. Further, "Human Rights Watch interviewed scores of journalists, health workers, aid workers, taxi drivers, civil servants, and soldiers who witnessed widespread pillage and looting by Jamiat ... forces after the Najibullah government fell." See Blood-Stained Hands.

In February 1993, Jamiat carried out the "Afshar Campaign" that involved massive artillery strikes on civilian areas of Afshar followed by a ground attack that included shelling fleeing civilians. Human Rights Watch reported that:

> The Afshar campaign was marked by widespread and serious violations of international humanitarian law. War crimes included attacks on the civilian population and civilian objects, killings, torture and other inhumane treatment, rape, abductions and forced disappearances, forced labor, and pillage and looting .... [T]here is compelling evidence that the senior ... Jamiat commanders involved in the Afshar campaign are implicated in these violations. It is also possible that some commanders may be liable

> for crimes against humanity. Illegal acts that were part of a widespread or systematic attack on a civilian population, such as the killing or abduction of members of certain minorities, may amount to crimes against humanity. See Blood-Stained Hands.

There are reports on continued armed conflict and serious human rights abuses committed by Jamiat forces during Rabbani's June 1992 to September 1996 Presidency. For example:

> On the night of February 11, 1993, Jamiat-i Islami forces and those of another faction, Abdul Rasul Sayyaf's Ittihad-i Islami, conducted a raid in West Kabul, killing and "disappearing" ethnic Hazara civilians, and committing widespread rape. Estimates of those killed range from about seventy to more than one hundred.

A group meets the definition of an undesignated terrorist organization (Tier III) when it engages in terrorist activity or has a subgroup that engaged in terrorist activity, as defined in INA section 212(a)(3)(B). Jamiat-i-Islami has engaged in extensive combat with the Soviet army, the army of the People's Democratic Party of Afghanistan (which led Afghanistan for a number of years), other Mujahideen, the Taliban, and regional militia. Therefore, Jamiat-i-Islami meets the definition of a Tier III organization while it engaged in these activities, including during the period you were involved with it, from approximately 1982 to 1995.

Appendix C

On November 16, 2018, you were issued a Notice of Intent to Deny (NOID). USCIS informed you that you are inadmissible under INA section 212(a)(3)(B)(i)(I) for having engaged in terrorist activities as defined by 2l2(a)(3)(B)(iii)(V)(b) when, as a Mujahideen fighter, you used a rocket launcher to endanger the safety of one or more individuals. You are also inadmissible as defined by 212(a)(3)(B)(iv)(VI) for having provided material support to Jamiat Islami by working with your uncle and fighting with the organization.

USCIS explained that there are no existing exercises of the Secretary's discretionary exemption authority under INA section 212(d)(3)(B) that apply to the terrorism-related inadmissibility grounds in your case. You were given thirty days to respond.

On December 18, 2018, USCIS received your NOID response. Your legal representative asserted that your Form I-485, Application to Register Permanent Residence or Adjust Status, warranted approval because USCIS is collaterally estopped from finding you inadmissible based on facts already adjudicated by an Immigration Judge.

After a thorough review of the record including your response to the NOID, USCIS required additional information and sent you a second NOID on February 19, 2019. USCIS informed you that you are inadmissible under INA section 212(a)(3)(B)(i)(I) as an alien who has engaged in terrorist activity (as defined at INA section 212(a)(3)(B)(iii)(V)(b)), for the use of a weapon with intent to endanger the safety of one or more individuals or to

cause substantial damage to property; and under INA section (a)(3)(B)(iv)(VI)(dd), for the voluntary commission of an act that afforded material support to a terrorist organization and under INA section 212(a)(B)(i)(VIII) for the voluntary receipt of military-type training from a terrorist organization. There is no existing exercise of the Secretary's discretionary exemption authority under INA section 212(d)(3)(B)(i) that applies to those grounds of inadmissibility nor are those grounds waivable. For these reasons, you are ineligible to adjust status under 209(b).

The second NOID included the following questions:

1. Material Support

a. What activities did you perform as a member of Jamiat? Please list and describe each activity, including dates.

b. What work did you provide for your uncle while you were a member of Jamiat? Please list and describe each duty, including dates.

2. Military-Type Training

a. What type of training did you receive as a member of Jamiat from Jamiat?

b. When did you receive training?

c. What did the training include?

d. Who trained you on the use of the shoulder-held rocket launcher and other training you may have received?

You were given thirty days to respond.

On March 19,2019, USCIS received your second NOID response. Your legal representative provided four documents: the Form G-28, your Declaration, the Declaration of Dr. Marc Sageman, and the article, "When the CIA Played by the Rules," Milt Bearden, *The New York Times,* Nov. 4, 2005.

In your second NOID response, your representative reasserted that your Form I-485, Application to Register Permanent Resident or Adjust Status, warrants approval because your asylum application, in which your involvement with Jamiat was noted, was granted by an Immigration Judge. Your representative asserted that the grant of asylum by the immigration judge precludes future agency decisions to the contrary. Your representative asserted that, under the doctrine of collateral estoppel, USCIS cannot make a different determination on your eligibility, because "[a] final decision of an Immigration Judge was a preclusive effect on future litigation of an agency's decision," citing *Khan v. Johnson*, 160 F. Supp. 3d 1199, 1210 (C.D. Cal. 2016); *Amrollah v. Napolitano*, 710 F.3d 568, 571 (5th Cir. 2013).

Your grant of asylum on March 30, 2000, and the current adjudication of your Application to Adjust Status are separate decisions relating to separate benefits. In order to adjust status under INA section 209(b), you must be

"admissible … at the time of examination for adjustment of status." The decision on your application to Adjust Status is not bound by the decision on prior benefit adjudication. This is especially true when as here there is no indication that the issue of terrorist activity was actually litigated before the Immigration Court. Further, some of the grounds of inadmissibility that serve the basis of this denial have been added to the INA since your asylum grant.

In light of the above, you are inadmissible under INA section 212(a)(3)(B)(i)(I) for having engaged in terrorist activity as defined by 212(a)(3)(B)(iii)(V)(b) when, as a Mujahedin fighter, you engaged in combat, including by using a rocket launcher to endanger the safety of one or more individuals. You are also inadmissible as defined by 212(a)(3)(B)(iv)(VI) for having provided material support to Jamiat Islami, a Tier III terrorist organization, by working with your uncle and by fighting with the organization. The material support to a Tier III terrorist organization provision was enacted as part of the USA PATRIOT Act of 2001, see section 411(a)(l)(G), Pub. Law 107-56 (Oct. 26, 2001), and thus did not apply to your 2000 asylum adjudication. Further, you are inadmissible for having received military-type training from a terrorist organization pursuant to INA section 212(a)(3)(B)(i). The military-type training provision was added to the INA in 2005 after your asylum grant. See section 103(a) of Division B of Pub. Law 109-13 (May 11, 2005).

Adjustment of Status under INA section 209(b) is discretionary. Matter of K-A-, 23 I&N Dec. 661, 666

(BIA 2004) (relief under section 209(b) of the Act is discretionary). An applicant has the burden of showing that discretion should be exercised in his favor. Matter of Patel, 17 I&N Dec. 597 (BIA 1980); Matter of Leung, 16 I&N Dec. 12 (BIA 1976); Matter of Arai, 13 I&N Dec. 494 (BIA 1970). Additionally, the Attorney General in Matter of Jean, 23 I&N Dec 373 (A.G. 2002), stated, "[f]rom its inception, the United States has always been a nation of immigrants; it is one of our greatest strengths. But aliens arriving at our shores must understand that residency in the United States is a privilege, not a right."

Your representative stated that USCIS should not consider Jamiat a Tier III terrorist organization at the time you were involved, because doing so would effectively render the United States a state sponsor of terrorism. Your representative contends that this would be inconsistent with the policies of the U.S. government openly taken and advocated at all times relevant to you, as described by both the senior intelligence officer at the time (Referencing Ex. D to the NOID response) and Dr. Sageman, a recognized expert on the subject (Referencing Ex. C to the NOID response). Your representative stated that given the fact that you fully disclosed his activities at the time of his asylum hearing in 2000, it is clear that the United States did not view Jamiat as a terrorist organization and his actions therefore did not prevent his entry into the United States.

Your representative also stated that USCIS should grant a waiver in your favor because Jamiat was an ally of the United States at the time and has been a consistent ally

of the United States for forty years, as pointed out by Dr. Sageman (Ex. C to the NOID response).

The fact that the United States supported Mujahideen fighting the Soviet and Soviet-sponsored Afghan government does not make the group you were a member of any less of a terrorist organization as defined at INA section 212(a)(3)(B)(vi), or your actions any less a terrorist activity as defined at INA section 212(a)(3)(B). There is no exception for groups allied with and supported by the United States. (See In re S-K-, 23 I&N Dec. 936, 941 (BIA 2006), noting that "Congress intentionally deafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters,' and it did not intend to give us discretion to create exceptions for members of organizations to which our Government might be symphathetic.")). This is further evidenced by the fact that in 2007, Congress explicitly excluded certain groups that were allied with the United States during the Vietnam War from the INA definition of terrorist organizations (See section 691(b) of Division J of the Consolidated Appropriations Act of 2008 (CAA), Pub. Law 110-161 (Dec. 27, 2007), excluding appropriate groups affiliated with the Hmong and Montagnards). There would be no need for Congress to exclude such groups from the definition of terrorist organizations if they were already excluded from the definition by virtue of having been being allied with and even supported by the United States.

Your representative also stated that you warrant a favorable decision because positive factors outweigh your involvement with the Jamiat. Namely, the nearly 18 years

you have spent in the United States with your spouse, a United States Lawful Permanent Resident, and your six children, all U.S. citizens. Your counsel asserts that one of the core legal principles in immigration law is the focus on keeping a bona fide immigrant family united.

The nearly 18 years you have resided in the United States and the fact that you have family members who reside here are indeed positive factors. However, after careful review of all of the facts, USCIS has determined that you do not warrant adjustment of status as a matter of discretion even if you were statutorily qualified for adjustment of status. The positive factors in your case are outweighed by your use of a dangerous weapon when you used rocket launchers in combat as a Mujahideen fighter. You argue in your response to the NOID that discretion should be exercised in your favor in order to keep your family together. However, the denial of your adjustment of status application would not terminate your asylum status and thus would not cause your family to be separated.

In your declaration in response to the NOID, you stated that you did not volunteer for Jamiat-i-Islami but were brought by your family. Your uncle, Mohammad Rasul, was a well-known commander of the Jamiat-i-Islami party. You stated that you did not work directly under him because you were a junior member of the force and were very young. You were assigned to the rocket team. You stated that the rocket weapon did not have any special aiming. Your job was only to carry up to three additional rockets in case they were needed.

You stated that you did not receive any formal training for the job. The training you received was from the person you called "the rocket man". "He told all the members of his team how to fire the rocket in case he was killed or injured and could not fight. He also taught you how to clean and load the weapon as you were operating on the field." You stated that you mostly learned to operate it by watching him operate it and explain what he was doing.

Receiving military-type training from a foreign terrorist organization as defined by 18 U.S.C. section 2339D "military-type training" includes training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction (as defined in section 2232a(c)(2). You stated you did not receive any formal training on use of the rockets and that the weapon was more like a grenade launcher. However, you were taught how to fire a weapon which qualifies as military-type training under 18 U.S.C. section 2339D. Since you received the training from an organization that qualified as an undesignated terrorist organization at the time, you are also inadmissible on that ground.

You stated on your Form I-589, Application for Asylum, that you became a Mujahedin fighter and specialized in the use of shoulder-held-rocket launchers.

On your Addendum to Form 1-485, Part 3, Section B, you stated that you and your family, through the association

of your uncle, assisted the U.S. backed Mujahedin who provided you with "paramilitary training."

You told the asylum officer that at 18 years of age, while a Jamiat fighter, you fought the communists from 1986 until 1987 including as a "rocket specialist" using shoulder-based surface to air missiles.

The burden is on the applicant to establish eligibility for the benefit sought. INA section 291. Based on the above, USCIS finds that you have not established your eligibility for the benefit sought.

There is no existing exercise of the Secretary's discretionary exemption authority pursuant to INA section 212(d)(3)(B)(i) that applies to your activities with Jamiat Islami which are subject to the terrorist-related inadmissibility grounds described above. Since you are inadmissible and that inadmissibility is not waivable or subject to an exemption, you are ineligible to adjust status under 209(b).

Accordingly, your application is denied.

NOTICE: USCIS regulations do not provide for an appeal to this decision. However, you may file a motion to reopen or reconsider an adverse decision. A motion must be filed using Form I-290B, Notice of Appeal or Motion. Form I-290B must be filed within 30 days from the date of this notice (33 days if this notice was received by mail) with the appropriate filing fee and other documentation in support of the motion. Do not send the completed Form

I-290B directly to the Nebraska Service Center. For more information about filing motions, as well as fee required and filing locations, and to download Form I-290B, please visit the USCIS website at www.uscis.gov. You may also contact the USCIS Contact Center at 800-375-5283.

Sincerely,

/s/_____
Loren K. Miller
Director
Officer: 0899

APPENDIX D — 8 U.S.C. § 1182(a)(3)(B)

8 U.S.C. § 1182(a)(3)(B) provides in relevant part:

(B) Terrorist activities.

(i) In general. Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code [18 USCS § 2339D(c)(1)]) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

***

(iii) "Terrorist activity" defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

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(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

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(iv) "Engage in terrorist activity" defined. As used in this Act, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

***

(vi) "Terrorist organization" defined. As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 219 [8 USCS § 1189];

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

APPENDIX E — NOTICE OF INTENT TO DENY OF THE U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DATED NOVEMBER 16, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

U.S. Citizenship and Immigration Services

November 16, 2018

SEHLA ASHAI
CLCMA
833 EAST ARAPAHO ROAD STE 102
RICHARDSON, TX 75081

LIN1190312426

RE: MOHAMMAD SHARIF KHALIL
I-485, Application to Register Permanent Residence or Adjust Status

NOTICE OF INTENT TO DENY

This notice refers to the Form 1-485, Application to Register Permanent Residence or Adjust Status, you filed with this office on January 31, 2011. You are requesting an adjustment of status under Section 209 of the Immigration and Nationality Act (INA) (Title 8, United States Code, section 1159).

Section 209(b) of the INA states:

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… The Secretary of Homeland Security or the Attorney General, in the Secretary's or the Attorney General's discretion and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who-

(1) applies for such adjustment,

(2) has been physically present in the United States for at least one year after being granted asylum,

(3) continues to be a refugee within the meaning of [INA] section 101(a)(42)(A) of this title or a spouse or child of such a refugee,

(4) is not firmly resettled in any foreign country, and

(5) is admissible (except as otherwise provided under subsection (c) of this section) as an immigrant under this chapter at the time of examination for adjustment of such alien.

The INA section 209(c) waiver of inadmissibility is not available to aliens who are inadmissible under INA section 212(a)(3)(B) (terrorist activities).

Section 212(a)(3)(B) of the INA, as amended by the REAL ID Act of 2005, describes an alien who is inadmissible and states in pertinent part:

(i) In general. Any alien who-

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(1) has engaged in a terrorist activity … is inadmissible

INA section 212(a)(3)(B)(iv) defines "engage in terrorist activity," which includes at (I), in an individual capacity or as a member of an organization "to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity."

INA section 212(a)(3)(B)(iii) defines terrorist activity, and includes activities such as highjacking; kidnapping; and the use of any explosive, firearm, or other weapon or dangerous device, other than for mere personal monetary gain, with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; and the attempt or threat to do any of these activities.

INA section 212(a)(3)(B)(iv)(VI) includes in the definition of engaging in terrorist activity (VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

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INA section 212(a)(3)(B)(vi)(III) defines a undesignated Tier III terrorist organization as "(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv)."

You stated on your 1-589 Application for Asylum. filed on February 18, 2000, that you became a member of Jamiat Islami, also known as Jamiat-i-Islami, when you were fifteen years old. This would have been in 1982. You stated that when you were eighteen years old, you became a Mujahideen fighter for the group. You supported the Jamiat Islami in its resistance to the Communists, and in fighting against the Hezb-i-Islami Party led by Hekmatyar. You specialized in the use of shoulder held rocket launchers. You also stated that you worked with your uncle, who was very close to the chief leader of the Jamiat Islami Party, Burhanuddin Rabbani. In March, 1995, you fled to Pakistan.

Jamiat-i Islami is a complex, predominantly ethnic-Tajik, Islamist organization with an approximately 50-year history, which has included engaging in political activities as a political party, and organizing armed resistance to the Soviets, to Communist Afghans, to the Taliban, and to rival Mujahideen factions. (One author noted that the organization was about 25 percent Pashtun. See Afghanistan: A Cultural and Political History, Thomas Barfield, p.237, Princeton University Press (2012)). At times Jamiat Islami has held the presidency and other high-level offices in Afghanistan.

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In the late 1980s, according to Afghan sources in Quetta, the Mujahideen forces included those under the command of Mullah Naqib of Jamiat-e Islami, who took some 60 soldiers into custody, and those under the command of Mullah Farooq, also of Jamiat-e Islami, who took 30 soldiers into custody. The soldiers were reportedly executed because "no one could guarantee that they were good Muslims." Interview with Afghan exile in Washington, D.C., January 21, 1991. (See The Forgotten War: Human Rights Abuses and Violations of the Laws Of War Since the Soviet Withdrawal, Human Rights Watch, note 115, Feb. 1991; see also, By All Parties to the Conflict: Violations of the Laws of War in Afghanistan, Human Rights Watch, p.63-64, March 1988).

It is noted that there are also reports of Jamiat efforts to curtail abuses of prisoners by commanders, and to hold trials of prisoners accused of wrong-doing, albeit often ending in execution. (See Tears, Blood and Cries": Human Rights in Afghanistan Since the Invasion 1979-1984., Helsinki Watch, p.204-205, Dec. 1984).

In March 1992, under the leadership of Najibullah, president of Afghanistan and head of the People's Democratic Party of Afghanistan, the government collapsed. Najibullah's government forces put up no resistance to the Mujahideen and Kabul was captured without fighting. However, Jamiat forces battled with rival Mujahideen for control, resulting in tens of thousands of civilians killed or injured in fighting in Kabul in 1992-1993. For example:

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On April 24, [1992] as Hekmatyar was about to seize control of the city, Massoud and Dostum's forces entered Kabul, taking control of most government ministries. Jamiat attacked Hezb-e Islami forces occupying the interior ministry and Presidential Palace, pushing Hezb-e Islami south and out of the city. There was shelling and street-to-street fighting through April 25 and 26. Reports describe the shelling of civilian areas by all parties to the conflict, including Jamiat. Human Rights Watch reported that:

With respect to Wahdat, Ittihad, ,and Jamiat hostilities in west Kabul, there is compelling evidence that factions regularly and intentionally targeted civilians and civilian areas for attack, and recklessly and indiscriminately fired weapons into civilian areas. There is little evidence that the factions made meaningful efforts during hostilities to avoid harming civilians or stopped attacks once the harm to civilians was evident. (See Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity, Human Rights Watch, Jul. 7, 2005).

A former high-level official in Shura-e Nazar confirmed that Jamiat troops on the Mamorine mountain (the western peak next to Television Mountain and above west Kabul) regularly launched rockets and artillery into the civilian areas of west Kabul in 1992 and 1993. Some witnesses further stated that Jamiat forces would target civilians for recreation during the conflict and abduct civilians for ransom. Further, "Human Rights Watch interviewed scores of journalists, health workers, aid workers, taxi drivers, civil servants, and soldiers who

witnessed widespread pillage and looting by Jamiat . . . forces after the Najibullah government fell." (See Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity, Human Rights Watch, Jul. 7, 2005).

In February 1993, Jamiat carried out the "Afshar Campaign" that involved massive artillery strikes on civilian areas of Afshar followed by a ground attack that included shelling fleeing civilians. Human Rights Watch reported that:

The Afshar campaign was marked by widespread and serious violations of international humanitarian law. War crimes included attacks on the civilian population and civilian objects, killings, torture and other inhumane treatment, rape, abductions and forced disappearances, forced labor, and pillage and looting . . . . [T]here is compelling evidence that the senior . . . Jamiat commanders involved in the Afshar campaign are implicated in these violations. It is also possible that some commanders may be liable for crimes against humanity. Illegal acts that were part of a widespread or systematic attack on a civilian population, such as the killing or abduction of members of certain minorities, may amount to crimes against humanity. (See Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity, Human Rights Watch, Jul. 7, 2005).

There are reports on continued armed conflict and serious human rights abuses committed by Jamiat forces during Rabbani's June 1992 to September 1996 Presidency. For example:

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On the night of February 11, 1993, Jamiat-i Islami forces and those of another faction, Abdul Rasul Sayyaf's Ittihad-i Islami, conducted a raid in West Kabul, killing and "disappearing" ethnic Hazara civilians, and committing widespread rape. Estimates of those killed range from about seventy to more than one hundred.

A group meets the definition of an undesignated terrorist organization (Tier III) when it engages in terrorist activity or has a subgroup that engaged in terrorist activity, as defined in INA Section 212(a)(3)(B). Jamiat-i-Islami has engaged in extensive violent combat with the Soviet army, the army of the People's Democratic Party of Afghanistan (which led Afghanistan for a number of years), other Mujahideen, the Taliban, and regional militia. Therefore, Jamiat-i-Islami meets the definition of a Tier ill organization while it engaged in these activities, including during the period you were involved with it (from 1982-1995).

You are inadmissible under INA section 212(a)(3)(B)(i)(I) for having engaged in terrorist activities as defined by 212(a)(3)(B)(iii)(V)(b) when, as a Mujahideen fighter, you used a rocket launcher to endanger the safety of one or more individuals. You are also inadmissible as defined by 212(a)(3)(B)(iv)(VI) for having provided material support to Jamiat Islami by working with your uncle and by fighting with the organization.

There is no existing exercise of the Secretary's discretionary exemption authority under INA section 212(d)(3)(B)(i) that applies to the terrorist-related

inadmissibility grounds at issue in your case. Since you are inadmissible and that inadmissibility is not waivable or subject to an exemption, you are ineligible to adjust status under 209(b).

Since you not only provided material support to the Jamiat Islami while you were a member, but you also personally engaged in terrorist activity when you used a rocket launcher with intent to endanger the safety of one or more individuals, USCIS finds that you do not warrant adjustment of status as a matter of discretion in the totality of the circumstances.

Adjustment of Status under INA Section 209(b) is discretionary. Matter of K-A-, 23 I&N Dec. 661, 666 (BIA 2004) (relief under section 209(b) of the Act is discretionary). An applicant has the burden of showing that discretion should be exercised in his favor. Matter of Patel, 17 I&N Dec. 597 (BIA 1980); Matter of Leung, 16 I&N Dec. 12 (BIA 1976); Matter of Arai, 13 I&N Dec. 494 (BIA 1970). Additionally, the Attorney General in Matter of Jean, 23 I&N Dec 373 (A.G. 2002), stated, "[f]rom its inception, the United States has always been a nation of immigrants; it is one of our greatest strengths. But aliens arriving at our shores must understand that residency in the United States is a privilege, not a right."

The nearly 18 years you have spent in the United States and the fact that you have family members who reside here are positive factors. However, any positive factors are outweighed by your terrorist activities. After careful review of all the facts, USCIS has determined that the

positive factors do not outweigh the negative factors and that your application for adjustment of status should be denied as a matter of discretion in addition to the statutory ineligibility cited above.

Accordingly, USCIS intends to deny your application to adjust status.

You have 33 days from the date on this letter to respond to this Notice of Intent to Deny. Your written response and any attached documents must be mailed to the address at the top of this Notice with a copy of this Notice of Intent to Deny firmly attached to the front of your response packet. At the end of the 33 day period, if no response is received, or after receiving and considering your response, USCIS will make a final decision on your Form 1-485, Application to Register Permanent Residence or Adjust Status.

Sincerely,

/s/
Loren K. Miller
Director
Officer: 0899

APPENDIX F — NOTICE OF INTENT TO DENY OF THE U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DATED FEBRUARY 14, 2019

U.S. Department of Homeland Security
U S Citizenship and Immigration Services
P O Box 82521
Lincoln, NE 68501-2521

U.S. Citizenship and Immigration Services

February 14, 2019

SEHLA ASHAI
CLCMA
833 EAST ARAPAHO ROAD STE 102
RICHARDSON, TX 75081

LIN1190312426

RE: MOHAMMAD SHARIF KHALIL
I-485, Application to Register Permanent Residence or Adjust Status

NOTICE OF INTENT TO DENY

This notice refers to the Form 1-485, Application to Register Permanent Residence or Adjust Status, you filed with this office on January 31, 2011. You are requesting an adjustment of status under Section 209 of the Immigration and Nationality Act (INA) (Title 8, United States Code, section 1159).

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Section 209(b) of the INA states:

...The Secretary of Homeland Security or the Attorney General, in the Secretary's or the Attorney General's discretion and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who-

(1) applies for such adjustment,

(2) has been physically present in the United States for at least one year after being granted asylum,

(3) continues to be a refugee within the meaning of [INA] section 101(a)(42)(A) of this title or a spouse or child of such a refugee,

(4) is not firmly resettled in any foreign country, and (5) is admissible (except as otherwise provided under subsection (c) of this section) as an immigrant under this chapter at the time of examination for adjustment of such alien.

The INA section 209(c) waiver of inadmissibility is not available to aliens who are inadmissible under INA section 212(a)(3)(B) (terrorist activities). Section 212(a)(3)(B) of the INA, as amended by the REAL ID Act of 2005, describes an alien who is inadmissible and states in pertinent part: (i) In general. Any alien who- (I) has engaged in a terrorist activity ...is inadmissible

INA section 212(a)(3)(B)(i) makes an alien inadmissible who "(I) has engaged in a terrorist activity" and who

"(VIII) has received military-type training (as defined in section 2339D(c)(l) of title 18, United States Code) from or on behalf of any organization that, at the time the training was received, was a terrorist organization."

INA section 212(a)(3)(B)(iv) defines "engage in terrorist activity," which includes at (I), in an individual capacity or as a member of an organization "to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity."

INA section 212(a)(3)(B)(iii) defines terrorist activity, and includes activities such as highjacking; kidnapping; and the use of any explosive, firearm, or other weapon or dangerous device, other than for mere personal monetary gain, with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; and the attempt or threat to do any of these activities.

INA section 212(a)(3)(B)(iv)(VI) includes in the definition of engaging in terrorist activity (VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence

that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

Section 2339D(c)(1) of Title 18 of the United States Code defines "military-type training" as "training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction (as defined in section 2232a(C)(2)."

You stated on your Form 1-589, Application for Asylum, filed on February 18, 2000, that your father and uncles worked closely with Jamiat Islami, an organization led by Bernahuddin Rabbani. You stated that you joined the Jamiat Islami Mujahedin at the age of 15. You stated that you became a fighter at the age of 18. You supported Jamiat Islami in their resistance against the Communists and their fighting against Hekmatyar and his Hezb-i-Islami party. You worked with your uncle, were a Mujahedin fighter and specialized in the use of shoulder-held rocket launchers. You stated that in March, 1995, you fled to Pakistan. After three weeks to Pakistan, you arrived in Germany on April 16, 1995.

On your Addendum to Form 1-485, Part 3, Section B, you stated that you and your family, through the association of your uncle, assisted the U.S.-backed Mujahedin who provided you with "paramilitary training." You stated that your family was a part of the overwhelming majority of Afghans who opposed the Communist regime and assisted in the way that they could.

You told the asylum officer that your entire family was involved with Jamiat Islami and that you were a member since the age of 15. At 18 years of age, while a Jamiat fighter, you fought the communists from 1986 until 1987 including as a "rocket specialist" using shoulder-based surface to air missiles. After that, you fought against the party of Hekmatyar and his Hezb-i-Islamic party. Additionally, you told the asylum officer during your interview that you were a supporter of Rabbani and your membership began in 1984 and ended 1995.

On November 16, 2018, USCIS sent you a Notice of Intent to Deny (NOID) stating that you are inadmissible under INA section 212(a)(3)(B)(i)(I) for having engaged in terrorist activities as defined by 212(a)(3)(B)(iii)(V)(b) when, as a Mujahedin fighter, you used a rocket launcher to endanger the safety of one or more individuals. You are also inadmissible as defined by 212(a)(3)(B)(iv)(VI) for having provided material support to Jamiat lslami by working with your uncle and by fighting with the organization.

On December 18, 2018, USCIS received your NOID response. Your legal representative asserted that your Form I-485, Application to Register or Adjust Status, warrants approval because USCIS is collaterally estopped from finding you inadmissible based on facts already adjudicated by an Immigration Judge.

Your representative also stated that you warrant a favorable decision because positive factors outweigh your involvement with the Jamiat. Namely, the nearly 18 years you have spent in the United States with your spouse, a

United States Lawful Permanent Resident, and your six children, all U.S. citizens. Your counsel asserts that one of the core legal principles in immigration law is the focus on keeping a bona fide immigrant family united.

After thorough review of the record including your response to the NOID, USCIS requires additional information on the following issues. While USCIS still intends to deny your application, this information will allow USCIS to better evaluate the arguments you raised in response to the NOID.

1. Material Support

You stated on your Form I-589 and Form I-485 Addendum that you were a member of Jamiat from 1982 until 1995. Your asylum interview records indicate that you were a member of Jamiat from 1984 until 1995. You stated on your Form I-589 and Form I-485 Addendum that you worked with your uncle while a member of Jamiat. Please answer the following questions to the best of your ability.

a. What activities did you perform as a member of Jamiat? Please list and describe each activity, including dates.

b. What work did you provide for your uncle while you were a member of Jamiat? Please list and describe each duty, including dates.

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2. Military-Type Training

You stated on your Form I-589 that you were a Mujahedin fighter and specialized in the use of shoulder-held rocket launchers. You stated that you became a fighter at the age of 18. You supported the Jamiat in their resistance against the Communists and their fighting against Hekmatyar and his Hezb-i-Islami party. You also worked with your uncle while a member of Jamiat.

On your Form I-485 Addendum, you stated that you and your family, through the association of your uncle, assisted the U.S.-backed Mujahedin wherein you received "paramilitary training."

You stated that your family was a part of the overwhelming majority of Afghans who opposed the Communist regime and assisted in the way that they could.

You told the asylum officer that at 18 years of age, you fought against the communists, then fought against Hekmatyar and his Hezb-i-Islami party. According to the record, your activities with Jamiat Islami included being a shoulder-based surface to air missile "rocket specialist" at 18 years of age. You also fought the communists from 1986 until 1987. Please answer the following questions to the best of your ability.

a. What type of training did you receive as a member of Jamiat or from Jamiat?

b. When did you receive training?

c. What did the training include?

d. Who trained you on the use of the shoulder-held rocket launcher and other training you may have received?

You are inadmissible for voluntary receipt of military-type training from a terrorist organization under INA Section 212(a)(3)(B)(i)(VIII), use of a weapon with intent to endanger the safety of one or more individuals or to cause substantial damage to property under INA section 212(A)(3)(B)(iii)(V)(b), and voluntary commission of an act that afforded material support to a terrorist organization under INA section 212(a)(3)(B)(iv)(Vl)(dd). There is no existing exercise of the Secretary's discretionary exemption authority under INA section 212(d)(3)(B)(i) that applies to those grounds of inadmissibility nor are those grounds waivable. For these reasons, you are ineligible to adjust status under 209(b).

In addition, because of your close relationship with Jamiat Islami over a period of more than ten years, USCIS finds that you do not warrant adjustment of status as a matter of discretion in the totality of the circumstances.

Adjustment of Status under INA Section 209(b) is discretionary. Matter ofK-A-, 23 I & N Dec. 661, 666 (BIA 2004) (relief under section 209(b) of the Act is discretionary). An applicant has the burden of showing that discretion should be exercised in his favor. Matter of Patel, 17 l&N Dec. 597 (BIA 1980); Matter of Leung, 16 I&N Dec. 12 (BIA 1976); Matter of Arai, 13 I&N Dec. 494

(BIA 1970). Additionally, the Attorney General in Matter of Jean, 23 I&N Dec 373 (A.G. 2002), stated, "[f]rom its inception, the United States has always been a nation of immigrants; it is one of our greatest strengths. But aliens arriving at our shores must understand that residency in the United States is a privilege, not a right."

The nearly 18 years you have spent in the United States and the fact that you have family members who reside here are positive factors. However, any positive factors are outweighed by your close association with, and support for a terrorist organization. After careful review of all the facts, USCIS has determined that the positive factors do not outweigh the negative factors and that your application for adjustment of status should be denied as a matter of discretion in addition to the statutory ineligibility cited above.

Accordingly, USCIS intends to deny your application to adjust status.

You have 33 days from the date on this letter to respond to this Notice of Intent to Deny. Your written response and any attached documents must be mailed to the address at the top of this Notice with a copy of this Notice of Intent to Deny firmly attached to the front of your response packet. At the end of the 33 day period, if no response is received, or after receiving and considering your response, USCIS will make a final decision on your Form I-485, Application to Register Permanent Residence or Adjust Status.

Sincerely,

/s/_____
Loren K. Miller
Director
Officer: 0899