No. 10-694

IN THE

Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL IMMIGRANT JUSTICE CENTER AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE NEW BLAKE/BRIEVA RULE AFFECTS LAWFUL PERMANENT RESIDENTS WITH DECADES OF RESIDENCE, STRONG TIES TO THE UNITED STATES, AND PROVEN RECORDS OF REHABILITATION. 5

A. The Blake/Brieva rule categorically precludes noncitizens from seeking § 212(c) waivers, no matter the noncitizen's dedication to and integration in the United States 5

B. The Blake/Brieva rule categorically precludes noncitizens from seeking § 212(c) waivers, no matter the noncitizen's record of rehabilitation 7

C. The Blake/Brieva rule categorically precludes noncitizens from seeking § 212(c) waivers, and changes the rules as they were understood at the time of many noncitizens' convictions 10

TABLE OF CONTENTS
(continued)

Page

II. THERE IS NO REASON TO BELIEVE THAT CONGRESS ACTUALLY WISHED TO TREAT NONCITIZENS WHO TRAVEL ABROAD MORE FAVORABLY THAN NONCITIZENS WHOSE STRONG CONNECTIONS TO THE UNITED STATES KEEP THEM FROM EVER LEAVING THIS COUNTRY 12

A. Noncitizens with the strongest ties to this country are often less likely to travel abroad 15

B. Congress routinely passes laws granting more rights and favorable treatment to noncitizens with the most time in and connections to the United States 16

C. Limiting § 212(c) relief to noncitizens who travel abroad results in permanent exile for noncitizens who often have the greatest ties to the United States..... 18

D. Exclusion proceedings provide no unique benefit to the Agency that explains the distinctive focus on foreign travel 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Abebe v. Mukasey,
554 F.3d 1203 (9th Cir. 2009) (en banc) 13, 21

Blake v. Carbone,
489 F.3d 88 (2d Cir. 2007) 3, 13, 14, 15

Francis v. INS,
532 F.2d 268 (2d Cir. 1976) 13, 15, 19, 20

Frederick v. Holder,
No. 09-2607, 2011 WL 1642811
(7th Cir. May 3, 2011)..... 9, 19

Hoang v. Hoang,
No. 08-7470 (9th Cir. Aug. 18, 2009) 8

INS v. Phinpathya,
464 U.S. 183 (1984)..... 17, 18

INS v. St. Cyr,
533 U.S. 289 (2001)..... 3, 12

Johnson v. Eisentrager,
339 U.S. 763 (1950)..... 16

Khodja v. Holder,
No. 11-2346 (7th Cir.) 11, 12

Lovan v. Holder,
574 F.3d 990 (8th Cir. 2009) 22

Matter of Bennett,
A13-006-447 (BIA Apr. 19, 2005) 11

Matter of Birkett,
A36-868-892, 2006 WL 2183538
(BIA June 26, 2006) 6, 7, 19, 23

TABLE OF AUTHORITIES
(continued)

Page(s)

Matter of Blake,
23 I&N Dec. 722 (BIA 2005) 2, 4

Matter of Burbano,
20 I&N Dec. 872 (BIA 1994) 23

Matter of L-,
1 I&N Dec. 1 (BIA, A.G. 1940) 20

Matter of Manzueta,
A93-022-672, 2003 WL 23269892
(BIA Dec. 1, 2003) 20

Matter of Meza,
20 I&N Dec. 257 (BIA 1991) 14

Matter of Rodriguez-Cortes,
20 I&N Dec. 587 (BIA 1992) 14, 21

Requena-Rodriguez v. Pasquarell,
190 F.3d 299 (5th Cir. 1999) 13

Rubio v. Gonzales,
182 F. App'x 925 (11th Cir. 2006)
(per curiam) 5, 6

STATUTES AND REGULATIONS

Immigration and Nationality Act, 8 U.S.C.

§ 1101(a)(13) 17

§ 1182(a) ..... *passim*

§ 1182(c) ..... *passim*

§ 1182(h) 17

§ 1229b(a) 16

§ 1229b(b) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

8 U.S.C. § 1446(a) 22

8 C.F.R. § 1212.3(a) 22

8 C.F.R. § 1212.3(e) 22

OTHER AUTHORITIES

Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-548, 3009-589 (1996)..... 3

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, Title I, 111 Stat. 2440, 2448 (1997)..... 22

Application for the Exercise of Discretion Under 212(c) of the Immigration and Nationality Act, 56 Fed. Reg. 50,033 (Oct. 3, 1991)..... 21, 22

The National Immigrant Justice Center ("NIJC") and the American Immigration Lawyers Association ("AILA") respectfully submit this brief as *amici curiae* in support of petitioner.[1]

INTEREST OF *AMICI CURIAE*

The NIJC and AILA are two immigration-focused organizations with substantial interest in the Court's resolution of this case.

Heartland Alliance's National Immigrant Justice Center ("NIJC") is a Chicago-based non-profit organization, accredited since 1980 by the Board of Immigration Appeals ("BIA") to provide immigration assistance. NIJC works to ensure that the laws and policies affecting noncitizens in the United States are applied in an even-handed and humane manner. NIJC provides free and low-cost legal services to approximately 8,000 noncitizens per year, and represents hundreds of noncitizens who encounter serious immigration obstacles as a result of entering guilty pleas in state criminal court without realizing the immigration consequences. For nearly ten years, NIJC has offered no-cost training and consultation to criminal defense attorneys representing noncitizens, to advise them on the immigration consequences resulting for their clients from various potential dispositions in criminal cases. NIJC also publishes manuals designed for criminal defense attorneys who defend noncitizens in criminal proceedings. Because

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[1] All parties have consented in writing to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

of the severity of the immigration consequences for noncitizens, NIJC has a strong interest in ensuring that criminal convictions have consequences which are reasonable, predictable, and publicly known.

AILA is a national association with over 11,000 members throughout the United States, including lawyers and law professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

As two preeminent organizations in the immigration litigation field, NIJC and AILA share a significant interest in the availability of § 212(c) waivers to all removable noncitizens who would qualify for them under any ground for exclusion in § 212 of the Immigration and Nationality Act, 8 U.S.C. § 1182(a).

SUMMARY OF ARGUMENT

The BIA's about-face in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), and *Matter of Brieva-Perez*, 23 I&N Dec. 766 (BIA 2005), upsets settled expectations for numerous noncitizens with meaningful ties to this country, who have been convicted of criminal offenses, and puts in real jeopardy their ability to remain here—with potentially catastrophic results.

For decades the BIA analyzed eligibility for a waiver pursuant to former Immigration and Nationality Act ("INA") § 212(c), 8 U.S.C. § 1182(c) (repealed 1996), under the statutory counterpart

analysis the same way for *both* deportable *and* excludable noncitizens, made so by commission of a crime. *Blake v. Carbone*, 489 F.3d 88, 93-94 (2d Cir. 2007) ("*Blake II*"). Both could apply for such a waiver if the conduct that rendered them either deportable or excludable fell under any waiveable ground for exclusion in § 212 of the INA, 8 U.S.C. § 1182(a). *Blake II*, 489 F.3d at 95.

In 1996, Congress repealed § 212(c) relief. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-548, 3009-589 (1996) ("IIRIRA"). But in *INS v. St. Cyr*, 533 U.S. 289, 323-24 (2001), this Court made clear that § 212(c) relief would still be available for otherwise-eligible noncitizens with convictions prior to the effective date of the repeal.

In 2005, however, in *Blake/Brieva*, the BIA changed the rules to focus the statutory counterpart inquiry on formalities rather than the actual offense of conviction. This leads to the following irrational distinction for three categories of noncitizens with the same conviction:

1. A noncitizen who has traveled abroad, and on return is subject to *exclusion*, can still qualify for a § 212(c) waiver if the conviction triggers inadmissibility under INA § 212.

2. A noncitizen who has traveled abroad after conviction, is admitted (accidentally) without examination of the conviction, and is later subject to *deportation* based on that conviction, is likewise eligible for a § 212(c) waiver if the conviction triggered inadmissibility under INA § 212.

3. But a noncitizen who has not traveled abroad after conviction, and is subject to deportation based on that conviction, is not eligible for a § 212(c) waiver

even if the conviction would render him excludable. Instead, he is eligible for that waiver *if and only if* the statutory ground for *deportability* made applicable by the conviction is formalistically the same as a § 212 ground of inadmissibility. *Blake*, 23 I&N Dec. 722. That is, the analysis for these noncitizens shifts from one of whether conduct underlying a conviction meets a § 212(c) ground, to one of whether the statutory ground for their deportability looks the same as a § 212(c) ground. It is not enough that the conviction would on its facts satisfy both; the two statutory definitions must look the same, only for this category of noncitizens.

This arbitrary change amounts to a categorical denial of § 212(c) waiver relief for countless noncitizens who have lived in, worked in, and contributed positively to this country for most of their lives. That such a denial should turn not on how any given conviction makes a noncitizen better or worse suited to continue living here, but solely on whether that person traveled abroad after the conviction, is absurd. Worse, it treats noncitizens who travel abroad and return to the country more favorably than those who never travel abroad. That runs contrary to a general immigration-law policy that affords *more* rights to noncitizens who remain in the country uninterrupted.

The Court should reverse the decision below, putting an end to the *Blake/Brieva* rule's irrational denial of § 212(c) waivers.

ARGUMENT

I. THE NEW *BLAKE/BRIEVA* RULE AFFECTS LAWFUL PERMANENT RESIDENTS WITH DECADES OF RESIDENCE, STRONG TIES TO THE UNITED STATES, AND PROVEN RECORDS OF REHABILITATION.

The BIA's avulsive change in the law in *Blake/Brieva* portends catastrophic consequences for real people—noncitizens who are living the American dream with their families in communities across this nation. And not because of the seriousness of their crimes, or anything else that could conceivably be relevant. But simply because they stayed here, contributing to their communities and raising their families, instead of traveling abroad after committing their crimes.

The examples below are precisely the types of stories that deserve an individualized weighing of the equities before granting or denying a § 212(c) waiver. Instead, the *Blake/Brieva* rule categorically precludes these people from even seeking § 212(c) waivers, no matter how deserving they may be.

A. The *Blake/Brieva* rule categorically precludes noncitizens from seeking § 212(c) waivers, no matter the noncitizen's dedication to and integration in the United States.

Antonio Rubio came to the United States at a very early age, perhaps as young as two years old. *Rubio v. Gonzales*, 182 F. App'x 925 (11th Cir. 2006) (per

curiam).[2] Mr. Rubio obtained temporary resident status in 1988 and lawful permanent resident status in 1990. *Rubio*, 182 F. App'x at 926. He has never returned to his native country of El Salvador. Instead, he has built a life here with his wife and three children, who are United States citizens. Brief for Petitioner at Statement of Facts, *Rubio*, 182 F. App'x 925 (Nos. 05-14759 & 05-15973). In fact, Mr. Rubio is so dedicated to this country that he served in the United States Naval Reserves following September 11th. *Id.*

Long before all of that, Mr. Rubio pled guilty to burglary for his involvement as the lookout during a burglary when he was 17 years old. *Rubio*, 182 F. App'x at 926; Brief for Petitioner at Statement of Facts, *Rubio supra*. He was sentenced to 5 years confinement, to be served on probation after completing 90-120 days in "Boot Camp." *Rubio*, 182 F. App'x at 926. Ten years later—after his marriage, the birth of his children, and his military service to this country—Mr. Rubio was found ineligible for § 212(c) relief based on the *Blake/Brieva* rule. *Rubio*, 182 F. App'x at 927. Though Mr. Rubio had not been to El Salvador since he was around two years old, he was ordered to leave his home and his life in the United States and to return to El Salvador.

Consider also Clete Noel Birkett, another noncitizen who has not traveled abroad, and as a consequence, is categorically ineligible for § 212(c) relief. *Matter of Birkett*, A36-868-892, 2006 WL 2183538 (BIA June 26, 2006). Mr. Birkett is a citizen

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[2] Case files for exemplars in this brief are on file with counsel for *amici curiae* and, where indicated by citation, available on Westlaw or Lexis.

of Trinidad and Tobago and a lawful permanent resident since 1981. Oral Decision of the Immigration Judge at 5, *Matter of Birkett*, A36-868-892 (Feb. 21, 2006). His wife is a United States citizen and Mr. Birkett has raised his wife's two daughters since they were young children. *Id.* Mr. Birkett cares for his wife, who suffers from sickle cell anemia and has suffered strokes and a heart attack in the past. *Id.* Thus, Mr. Birkett's family, all United States citizens, depends on him.

Mr. Birkett was placed into deportation proceedings for two past convictions: one for attempted criminal sale of a controlled substance in 1988 and another for robbery in 1993. *Matter of Birkett*, A36-868-892, 2006 WL 2183538. The immigration judge found that under *Blake/Brieva*, Mr. Birkett could not apply for a § 212(c) waiver because his convictions lacked a statutory counterpart under § 212. *Id.* The immigration judge stated, however, that *if* Mr. Birkett were eligible for § 212(c) relief, the judge *would grant the application* because Mr. Birkett demonstrated remorse and rehabilitation and posed a small risk of future problems. *Id.* As a result, but for Mr. Birkett's failure to travel abroad, Mr. Birkett could have applied for and received a § 212(c) waiver and been given permission to remain in this country to care for his family.

B. The *Blake/Brieva* rule categorically precludes noncitizens from seeking § 212(c) waivers, no matter the noncitizen's record of rehabilitation.

Lan Tung Hoang was involved in a bar fight twenty years ago, served his time, and now has a

loving family, home, and successful career. Mr. Hoang came to this country in 1987 as a political refugee from Vietnam. Brief for Petitioner at 10, *Hoang v. Hoang*, No. 08-7470 (9th Cir. Aug. 18, 2009). Since arriving in the United States, Mr. Hoang has never left. *Id.* Mr. Hoang's family here includes his wife (a lawful permanent resident) and four teenage children (United States citizens), as well as six siblings who are all citizens or lawful permanent residents. *Id.* at 10-11. The Hoangs own their family home. *Id.* at 11. Mr. Hoang's career at Trim Systems, an auto parts manufacturing company, has spanned 10 years now—he was first promoted to production leader and then supervisor. *Id.* His hard work and success have been acknowledged by company awards. *Id.*

Twenty years ago, in 1991, Mr. Hoang was convicted of assault with a deadly weapon following a bar fight. *Id.* at 8. The judge sentenced Mr. Hoang to 15 months in prison, though he served less than his full sentence. *Id.* at 12. Fifteen years later, after he applied for naturalization, Mr. Hoang was placed in removal proceedings and charged with both an aggravated felony and a crime involving moral turpitude based on his 1991 conviction. *Id.* at 9. The BIA found Mr. Hoang ineligible to apply for § 212(c) relief based on the *Blake/Brieva* rule. *Id.* at 12.

Consider also Michael Frederick, a German citizen, who is another example of a noncitizen who served prison time twenty years ago, and since then has raised a family, worked hard and earned company recognition, joined a church, and become known throughout his community as someone who is always willing to lend a helping hand. Mr. Frederick has lived in the United States for decades and, for at

least the last two decades, has never left because everything he loves is in this country. Brief for Petitioner at 34-35, *Frederick v. Holder*, No. 09-2607, 2011 WL 1642811 (7th Cir. May 3, 2011). Mr. Frederick has no known family in Germany, but two of his siblings are United States citizens and one sibling is a lawful permanent resident. *Id.* at 10. His wife is a United States citizen as well, as are her seven children whom Mr. Frederick raised and supported. *Id.* at 10-11. Mr. Frederick converted to Catholicism twenty years ago while in prison. Since then, he has lived a model, faith-filled life. He is known in his community as someone who will help others, whether financially, spiritually, or emotionally, lending a hand with projects or repairs, or even just giving someone a ride. *Id.* at 11. Mr. Frederick regularly checks on elderly friends and neighbors and helps them with their homes. He has worked since his prison release in 1991, and since 2000 has been employed and promoted at All-Service Contracting. *Id.* Mr. Frederick owns two homes, a cottage, and a boat. *Id.* at 35.

In 1990 Mr. Frederick pled guilty to two separate counts of aggravated criminal sexual abuse and received two four-year concurrent sentences. *Id.* at 7. He served his prison term from April 1990 to September 1991, *id.*, significantly less than the five years of actual imprisonment that would have barred eligibility to a § 212(c) waiver. While in prison, he earned his associate's degree in liberal arts and participated in Alcoholics Anonymous. *Id.* at 11. Despite having been deportable at the time of his offense, Mr. Frederick was not placed in removal proceedings until 2007, 16 years after his release from prison. *Id.* at 7-8. The BIA then found Mr.

Frederick ineligible for § 212(c) relief under the *Blake/Brieva* rule. *Id.* at 9.

C. The *Blake/Brieva* rule categorically precludes noncitizens from seeking § 212(c) waivers, and changes the rules as they were understood at the time of many noncitizens' convictions.

Ronald Bennett is a noncitizen who, following the advice of his attorney, pled guilty almost twenty years ago in part to avoid deportation. Mr. Bennett is a 75-year-old from the United Kingdom who was admitted to the United States as a lawful permanent resident in 1962. Statement of Eligibility for Relief at 3, *Ronald Bennett*, A013-006-447 (Immigration Court, Mar. 20, 2011). Since his admission to this country, Mr. Bennett has never left. He has no reason to travel to England; he has no surviving relatives there, and his son and grandchildren live in his Washington community. Ltr. Seeking Prosecutorial Discretion at 4 (Apr. 5, 2011). Mr. Bennett has an unwavering dedication to his community underscored by his long history of service and leadership. He served eight years on the Salvation Army Advisory Board (including one term as chairman), eight years on the Port Angeles City Planning Commission (including one term as chairman), 22 years in the Port Angeles Kiwanis Club (including one term as president), and 22 years in the Port Angeles Chamber of Commerce (including eight years on the Board of Directors). *Id.*

In 1992, Mr. Bennett pled guilty to the offense of child molestation and was sentenced to six months work release, with probation and a treatment program. Resp. Statement of Eligibility for Relief at

3. He completed both without issue and received outstanding recommendations from his probation officer and treatment provider. *Id.* At the time of his plea, Mr. Bennett's attorney advised him that pleading guilty would protect him from deportation, in part, because he would be eligible for a § 212(c) waiver. *Id.* At his removal hearing the immigration judge agreed, granting § 212(c) relief. Order at 1, *Ronald Bennett*, A13-006-447 (Immigration Court Mar. 31, 2011). But the BIA reversed, holding Mr. Bennett ineligible for the relief under the new *Blake/Brieva* rule. Order at 2, *Matter of Bennett*, A13-006-447 (BIA Apr. 19, 2005).

Finally, consider Nourredine Khodja, another classic example of a noncitizen who unfairly lost the potential of a § 212(c) waiver, despite a settled understanding that he was eligible for such a waiver. Mr. Khodja was convicted of armed violence and found guilty of aggravated battery in 1990. *Khodja v. Holder*, No. 11-2346 (7th Cir.) (decision pending); *see also* Brief for Respondent at 24 n.4, *Khodja supra* (finding that Khodja was mentally ill at the time).[3] At the time of his conviction, state court judges were authorized to issue a Judicial Recommendation Against Deportation ("JRAD"), which would protect an individual from removal. At Mr. Khodja's JRAD hearing, an INS attorney argued that the state court should deny the JRAD request because Mr. Khodja could always request a § 212(c) waiver before an immigration judge. Brief for Respondent at 7-8,

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[3] Mr. Khodja's case is currently pending at the Seventh Circuit and, although his brief is publically available to review, the court does not permit the brief to be copied. Consequently, this brief is not on file with counsel for *amici curiae*.

Khodja supra. The state court denied the JRAD request. *Id.* at 8. Fourteen years later, during Mr. Khodja's removal proceeding, the *same INS attorney* sought removal, arguing that Mr. Khodja was ineligible for § 212(c) relief. *Id.* at 24 n.4. Mr. Khodja's § 212(c) application was denied. *Id.* at 12. This is plainly unfair for Mr. Khodja, but also for any other noncitizen previously eligible for § 212(c) relief, and later denied the chance to apply for a § 212(c) waiver.

These stories and others highlight real lives that have been and will continue to be devastated by the *Blake/Brieva* rule. Prior to that change, Mr. Rubio, Mr. Birkett, Mr. Hoang, Mr. Frederick, Mr. Bennett, and Mr. Khodja could all have applied for § 212(c) waivers. And given the equities of their stories, it is likely that those waivers would have been granted, preventing them from having to leave their homes in this country. *See St. Cyr*, 533 U.S. at 296 n.5 (noting that about 50% of § 212(c) waiver applications are granted). But now, if the new *Blake/Brieva* rule remains law, these men and all their positive contributions will be lost, because (with no further fault of their own) they are categorically denied the possibility of a § 212(c) waiver.

II. THERE IS NO REASON TO BELIEVE THAT CONGRESS ACTUALLY WISHED TO TREAT NONCITIZENS WHO TRAVEL ABROAD MORE FAVORABLY THAN NONCITIZENS WHOSE STRONG CONNECTIONS TO THE UNITED STATES KEEP THEM FROM EVER LEAVING THIS COUNTRY.

One of the critical problems underscored by these cases is that under the BIA's new approach to the

statutory counterpart analysis in *Blake/Brieva*, noncitizens who have traveled abroad are treated better than those who have not. Courts have noted this irrational distinction in striking § 212(c) waiver limitations on Equal Protection grounds. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *Blake II*, 489, F.3d at 104. But regardless whether this distinction renders the *Blake/Brieva* rule constitutionally infirm, a more fundamental point remains: It simply makes no sense, and goes against the current of countless other immigration laws, to treat noncitizens who have never left the country—and often have the most ties to the United States—*worse* than noncitizens who have left. This is not what Congress intended, and should not be the law. As the *Francis* court stated, "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time." *See Francis*, 532 F.2d at 273.

To be sure, some courts have suggested that Congress *could* have rationally decided to reward travel abroad. *See, e.g.*, *Abebe v. Mukasey*, 554 F.3d 1203, 1206 (9th Cir. 2009) (en banc); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999). But there is no evidence—nor has any court suggested—that Congress *did actually intend* to reward travel abroad.[4] *See Francis*, 532 F.2d at 273

[4] Indeed, the *Blake/Brieva* rule is stranger still. It does not hold that Congress might have wished to condition § 212(c) eligibility on travel abroad generally, but only that it wished to do so for certain classes of aggravated felons. The *Blake/Brieva* rule impacts only certain categories of aggravated felony convictions;

("The government has failed to suggest any reason why this petitioner's failure to travel abroad following his conviction should be a crucial factor in determining whether he may be permitted to remain in this country."). In fact, the far more common thread in immigration law is the contrary: Congress has repeatedly chosen to provide *more* rights to noncitizens who have remained in this country for longer periods of time. Nor is there any practical benefit to a regime that treats noncitizens who travel abroad more favorably than those who remain in the country. The *Blake/Brieva* rule turns this logic on its head, making noncitizens with the greatest ties to this country—ties so strong, in fact, that they have never left—the only noncitizens who are categorically denied the benefit of the § 212(c) waiver.

That rule is not what Congress intended. Rather, as the Second Circuit correctly held in *Blake II*, what

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at the moment, only crimes of violence and sexual abuse of a minor. Other classes of deportable noncitizens—like drug traffickers and murderers—remain eligible for § 212(c) regardless of travel abroad, because the Board has found a "comparable ground" amongst the grounds of excludability. *See Matter of Rodriguez-Cortes*, 20 I&N Dec. 587, 590-91 (BIA 1992) (murder); *Matter of A-A-*, 20 I&N Dec. 492, 500-01 (BIA 1992) (murder); *Matter of Meza*, 20 I&N Dec. 257, 61 (BIA 1991) (drug trafficking). It would be one thing (though still quite odd) to say that Congress wished in this one area of the law to encourage travel abroad for noncitizens with criminal convictions; but the *Blake/Brieva* rule calls on the Court to believe that Congress had some deep purpose in wishing certain categories of aggravated felons to be benefited by travel abroad, whereas all other classes are disadvantaged by such travel. The sheer arbitrariness of the rule illustrates the slim likelihood that this rule reflects an understanding of the statute which Congress would endorse.

makes sense is to enforce *Francis'* mandate "to ensure that 'permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.'" *Blake II*, 489 F.3d at 104 (*quoting Francis*, 532 F.2d at 273). What follows under this proper analysis is that both excludable and deportable noncitizens, regardless whether they left the country after conviction or remained here all along, are eligible for a § 212(c) waiver if the offense behind the grounds for removal could form a basis for exclusion under § 212. *See id.* That is the very analysis the BIA used for decades before adopting the new *Blake/Brieva* rule in 2005.

A. Noncitizens with the strongest ties to this country are often less likely to travel abroad.

A noncitizen's length of residence in this country often closely coincides with his ties to this country, such as his job, his U.S. citizen children, or his involvement in the community. A noncitizen with continuing employment, U.S. citizen children, family members who are U.S. citizens or other lawful permanent residents, and strong community ties, is less likely to travel abroad, especially to the noncitizen's original home country.

As explained above, Mr. Rubio, Mr. Birkett, Mr. Hoang, Mr. Frederick, and Mr. Bennett all are closely tied to the United States. All of these men have families, including children, living not in their home countries, but here. Mr. Hoang, Mr. Frederick, and Mr. Bennett have jobs in this country and long lists of professional or community recognition. Mr. Rubio served in the United States Naval Reserves. None of

these noncitizens has had any reason to travel abroad, particularly back to their home countries.

These stories show, not surprisingly, that noncitizens who have never traveled abroad and never returned to their home countries often have strong reasons to stay here. In short, their families, their jobs, their passions, their beneficiaries, their very lives are centered in the United States. Therefore, they stay here, and their ties to this country continue to grow.

B. Congress routinely passes laws granting more rights and favorable treatment to noncitizens with the most time in and connections to the United States.

Accordingly, for good reason, many laws granting rights to a noncitizen turn on whether the noncitizen has been or has remained in the United States for a requisite period of time. More generally, a noncitizen "has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). And although this Court has previously recognized travel as a basis to *deny* certain benefits to noncitizens, there is no precedent for—or reason to recognize—travel abroad as a way to *create or enhance* a noncitizen's rights in this country.

To the contrary, many laws granting noncitizens' rights include requirements that noncitizens remain in this country for a minimum amount of time. For example, under INA § 240A(a), 8 U.S.C. § 1229b(a), the Attorney General may cancel removal of a permanent resident not convicted of an aggravated felony if the immigrant has been a lawful permanent resident for not less than five years and has resided

in the United States continuously for seven years after having been admitted in any immigration status. Similarly, under INA § 240B(b), 8 U.S.C. § 1229b(b), the Attorney General may cancel removal for certain nonpermanent residents under certain circumstances, with one requirement being the noncitizen must have been physically present in the United States for a continuous period of not less than ten years.

Similarly, some statutes remove rights if a lawful permanent resident is away from the United States for too long. For example, if a lawful permanent resident is absent from the United States for less than 180 days, he can return without being considered as seeking a new admission into the United States. But if he is absent from the United States for a continuous period in excess of 180 days, then he must seek admission into the United States anew. *See* INA § 101(a)(13), 8 U.S.C. § 1101(a)(13).

Even § 212(c) itself included a similar requirement: the waiver was available only to lawful permanent residents who achieved seven years of consecutive domicile. Likewise, § 212(h), which provides a waiver for certain crimes that could be criminal grounds for exclusion, is also unavailable to a noncitizen who has previously been admitted to the United States as a lawful permanent resident if the noncitizen has not lawfully resided continuously in the United States for at least seven years immediately preceding the removal proceeding. *See* 8 U.S.C. § 1182(h).

Finally, the Court has previously recognized travel as a means of denying benefits to a noncitizen in this country, but not the other way around. In *INS v. Phinpathya*, 464 U.S. 183 (1984), the Court held that a statutory requirement of a noncitizen's seven-year

"continuous physical presence" as a condition for suspension of deportation was to be interpreted according to plain meaning, however severe the consequences. *Id.* at 196. In that case, the Court reversed the Ninth Circuit, holding that it improperly considered other factors beyond the provision's plain language. *Id.* at 187-88. The Court recognized that the case dealt "with a threshold requirement added to the statute specifically to limit the discretionary availability of the suspension remedy" and that it had "every reason to believe that Congress considered the harsh consequences of its actions." *Id.* at 193-94. In his concurrence, Justice Brennan recognized that certain types of travel—such as long, deliberate vacations to a noncitizen's home country—had "meaningful bearing[s] on the attachment or commitment an alien has to this country." *See id.* at 197 (recognizing a difference between a noncitizen's three-month vacation to her native country and a short vacation abroad or an inadvertent border crossing).

These laws and others show that Congress has consistently *rewarded* noncitizens for the length of time they remain in the United States, and generally for the amount of ties they have to this country, recognizing that a noncitizen who comes to this country and stays has stronger ties and is better assimilated than a noncitizen who comes and goes.

C. Limiting § 212(c) relief to noncitizens who travel abroad results in permanent exile for noncitizens who often have the greatest ties to the United States.

In enacting § 212(c), "Congress was concerned that there be some degree of flexibility to permit worthy

returning aliens to continue their relationships with family members in the United States despite a ground for exclusion." *Francis*, 532 F.2d at 272. But instead of considering relevant factors for § 212(c) waiver determinations, under *Blake/Brieva*, eligibility for § 212(c) often turns entirely on whether a noncitizen has left the country after conviction.

This makes no sense for noncitizens like Mr. Frederick who never left the country and thus are precluded from § 212(c) relief. If granted a chance to make his case for a § 212(c) waiver, Mr. Frederick would likely point to the successful completion of his education and participation in Alcoholics Anonymous while in prison, his active participation in his Catholic church, his success at his job, his home ownership, and his dedication to helping members of his community as told by the many people who have benefitted from his kindness. Brief for Petitioner at 11, *Frederick supra*. But none of this matters for the simple reason that he did not leave the United States and thus, under the *Blake/Brieva* rule, is categorically ineligible for § 212(c) relief.

The same is true for Mr. Birkett, who has raised his wife's two daughters since they were young children and now cares for his ailing wife who suffers from sickle cell anemia. Oral Decision of the Immigration Judge at 5, *Matter of Birkett,* A36-868-892 (Feb. 21, 2006). In fact, the immigration judge stated that if Mr. Birkett were eligible for § 212(c) relief, the judge would grant the application. But under the *Blake/Brieva* rule, Mr. Birkett is categorically denied the waiver. *Matter of Birkett,* A36-868-892, 2006 WL 2183538 (BIA June 20, 2006).

Compare the story of Reyes Manzueta, who was convicted of an aggravated felony when he returned

fire on a group of thieves he followed out of his store after they had robbed him. *Matter of Manzueta*, A93-022-672, 2003 WL 23269892 (BIA Dec. 1, 2003). Though Mr. Manzueta was also in deportation proceedings, rather than exclusion proceedings, the BIA applied the pre-*Blake/Brieva* rule and found that, because Mr. Manzueta's aggravated felony conviction for a crime of violence (the ground for his being deportable) also qualifies as a crime involving moral turpitude (an exclusion ground), Mr. Manzueta could apply for a § 212(c) waiver. *Id.* Mr. Manzueta pointed to his long residency, business ownership, close relationships with family, and the fact that he supported a terminally ill woman and received § 212(c) relief from deportation. *Id.* The BIA's decision contains no discussion of whether Mr. Manzueta traveled, because pre-*Blake/Brieva*, past travel had no bearing on whether a person was a good candidate for a § 212(c) waiver.

As the Second Circuit understood, and as in the case of Mr. Manzueta, the availability of the § 212(c) waiver should not turn on whether a noncitizen traveled abroad. *See Francis*, 532 F.2d at 273. Indeed, requiring a noncitizen to travel abroad and reenter does not make the noncitizen a "better resident of this country." *Matter of L-*, 1 I&N Dec. 1, 6 (BIA, A.G. 1940). Rather, "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time." *See Francis*, 532 F.2d at 273.

D. Exclusion proceedings provide no unique benefit to the Agency that explains the distinctive focus on foreign travel.

Nor can the Government set forth any alternative explanation as to why this new rule makes sense, in the face of the illogical and unintended result of treating noncitizens who remain in the United States more harshly than those who do not.

First, from an efficiency perspective, it is no easier to exclude a noncitizen than it is to deport him. When a lawful permanent resident leaves and attempts to reenter the country and is deemed excludable yet potentially eligible for a § 212(c) waiver, the noncitizen is generally allowed to enter and to apply for the waiver from within the country. *See Abebe*, 554 F.3d at 1216 (Thomas, J., dissenting). If the noncitizen is later denied the waiver, the Government must remove him. *See id.* The Government's involvement and expense are no different than if the noncitizen had applied for a § 212(c) waiver during a deportation proceeding. *See id.* Regardless of the type of removal proceeding, noncitizens are not summarily returned to their home countries. If they are found removable, the Agency still must go to the effort and expense to remove them.

Second, from an administrative perspective, the § 212(c) waiver process is the same regardless whether the noncitizen applies for the waiver in a deportation or exclusion proceeding. *See Matter of A-A-*, 20 I&N Dec. 492, 502 n.22 (BIA 1992) (*citing* Application for the Exercise of Discretion Under 212(c) of the Immigration and Nationality Act, 56 Fed. Reg. 50,033 (Oct. 3, 1991)). The Attorney General has made clear that § 212(c) relief is

available "whether at a port of entry or in subsequent proceedings before a district director or Immigration Judge." *Id.* at 502 (*quoting* 56 Fed. Reg. 50,033). In both cases, the noncitizen completes the same form, Form I-191, and in the same way, must identify the reasons the noncitizen may be inadmissible. Form I-191; 8 C.F.R. § 1212.3(a) and (e).

Third, there is simply no logical reason why Congress would have wished to particularly advantage travel abroad—when this country has a particularly poor track record in catching inadmissible noncitizens, *see Lovan v. Holder*, 574 F.3d 990, 992 (8th Cir. 2009) (individual allowed to return despite inadmissibility)—as opposed to other means by which noncitizens affirmatively bring themselves to the attention of the Government. Indeed, the other vehicles whereby noncitizens bring themselves to the Government's attention, such as applying for naturalization, renewing a lawful permanent resident green card, or otherwise filing other affirmative applications, would be more likely to result in the detection of the noncitizen's past criminal activity. For example, applying for naturalization requires a criminal background check, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, Title I, 111 Stat. 2440, 2448 (1997), and authorizes a more detailed investigation of the applicant. 8 U.S.C. § 1446(a). Given that the Agency's rule does not require the inadmissible noncitizen to affirmatively declare their inadmissibility, there is no reason why Congress would have thought that it would be particularly successful to encourage noncitizens with past criminal convictions to make brief trips abroad.

Finally, apart from issues regarding the threshold *eligibility* for § 212(c) relief, the actual grant of a § 212(c) waiver is and has always been discretionary. As a result, if a noncitizen's crime is serious or cause for concern, the Agency can simply deny the § 212(c) waiver request on the merits. *See Matter of Burbano*, 20 I&N Dec. 872, 878 (BIA 1994) ("Indeed, it has been long understood that as an alien's crimes become more serious, there will be less likelihood that he or she will be able to establish that a favorable exercise of discretion is warranted."). However, in cases that are less serious, like Mr. Rubio's burglary conviction when he was 17 years old following his involvement as the lookout during a burglary, Brief for Petitioner at Statement of Facts, *Rubio supra*, the Agency should consider the equities. Since Mr. Rubio's conviction, he served his time and then married, had children, and served in the United States military. *Id.* And in Mr. Birkett's case, in fact, the immigration judge stated that given the equities, if Mr. Birkett were eligible for a § 212(c) waiver, the judge would grant it. *Matter of Birkett*, A36-868-892, 2006 WL 2183538.

In other words, singling out noncitizens who have never left the country for harsher treatment makes no sense and runs contrary to established immigration policy. And no other explanation can resurrect this rule as logical and within Congress's intent.

CONCLUSION

For the foregoing reasons, *amici curiae* National Immigrant Justice Center and American Immigration Lawyers Association respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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