

No. 13-2129

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROGELIO BLACKMAN HINDS,
Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,
Respondent.

ON PETITION FOR REVIEW FROM AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

**BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND
THE POST-DEPORTATION HUMAN RIGHTS PROJECT
AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER**

Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7522
(202) 742-5619 (fax)
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1

I, Beth Werlin, attorney for *Amici Curiae*, certify that the American Immigration Council and the Post-Deportation Human Rights Project do not have any parent corporations or issue stock.

s/ Beth Werlin

Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7522
bwerlin@immcouncil.org

Dated: November 29, 2013

STATEMENT PURSUANT TO FED. R. APP. P. 29(c)(5)

I, Beth Werlin, attorney for *Amici Curiae*, certify that this brief was not authored in whole or in part by the party's counsel. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief, nor did anyone – other than the *amici curiae*, its members or its counsel – contribute money that was intended to fund preparing or submitting the brief.

s/ Beth Werlin

Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7522
bwerlin@immcouncil.org

Dated: November 29, 2013

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I. INTRODUCTION AND STATEMENT OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), the American Immigration Council and the Post-Deportation Human Rights Project proffer this brief to assist the Court in considering the scope of an immigration judge's authority to determine whether removal of a lawful permanent resident (LPR) is impermissibly disproportionate to the underlying conduct. As the case examples in this brief demonstrate, the automatic removal of an LPR as a consequence of a criminal conviction, without any consideration of the circumstances of a particular case, can have a devastating impact on individuals and their families that constitutes an unduly harsh penalty.¹

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council has previously appeared as amicus before this Court on issues relating to the interpretation of federal immigration laws and policies. *See, e.g., Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005). The Post-Deportation Human Rights Project, based at the Center for Human Rights and International Justice at Boston College, is a legal

¹ *Amici* take no position on Petitioner's argument that entry of a removal order would be disproportionate in this case.

advocacy project devoted to the representation of individuals who have been deported and the promotion of the rights of deportees and their family members. Both organizations have a direct interest in ensuring that noncitizens are not removed from the United States in a manner contrary to core constitutional values.

II. ARGUMENT

A. Background

The stories of the individuals discussed below, some lifted from the pages of judicial opinions, others relayed by devastated family members and despairing advocates, highlight the critical importance of recognizing immigration judges' authority to halt the removal of lawful permanent residents whose deportations would impose penalties that are disproportionate to their underlying offenses and unduly harsh given the circumstances of their cases. These men and women share many attributes: all were lawful permanent residents; all established significant ties to this country; all left (or will leave) behind U.S. citizen family members; all committed nonviolent crimes; all have demonstrated rehabilitation; and none was afforded the opportunity to explain to the immigration judge (IJ) why removal and a permanent bar to reentry was unjustified under the circumstances.

Under our current system, immigrants, including those who have lived in this country for many years, may be effectively subjected to permanent exile from the United States for even minor crimes that occurred decades earlier. An

immigrant convicted of any “aggravated felony” under federal immigration law is not only subject to removal, but also is barred from ever returning to the United States. *See* 8 U.S.C. §§ 1227(a)(2)(A)(iii); 1182(a)(9)(A)(ii)(II). Yet, the term “aggravated felony” encompasses crimes that do not implicate public safety, including some that are “non-violent, fairly trivial misdemeanors.” Hon. Dana Leigh Marks and Hon. Denise Noonan Slavin, *A View Through the Looking Glass: How Crimes Appear from the Immigration Court Perspective*, 39 Fordham Urb. L.J. 91, 92 (2012).

As initially enacted in 1988, the term “aggravated felony” referred only to murder, federal drug trafficking, and illicit trafficking of certain firearms and destructive devices. Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 7342, 102 Stat. 4181, 4469-70. Congress has since expanded the definition of “aggravated felony” on numerous occasions. *See* Immigration Act of 1990, Pub. L. 101-649, §501, 104 Stat. 4978, 5048; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, § 222, 108 Stat. 4305, 4320-22; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 440(e), 110 Stat. 1214, 1277-78; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. 104-208, § 321, 110 Stat. 3009-546, -627-28. Over the years, “aggravated felony” has become a misnomer, as Congress has shoehorned into the definition numerous crimes that are neither aggravated nor felonies in the states

where the crimes were committed. *See, e.g., United States v. Cordoza-Estrada*, 385 F.3d 56, 58 (1st Cir. 2004) (state misdemeanors can constitute aggravated felonies). Further, in most instances, an offense qualifying as an aggravated felony will subject the person to removal, even if the crime was not considered an aggravated felony at the time of the conviction. *See* 8 U.S.C. § 1101(a)(43) (“Notwithstanding any other provision of law (including any effective date), the term [aggravated felony] applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.”); *see, e.g., Sena v. Gonzales*, 428 F.3d 50, 52-53 (1st Cir. 2005) (retroactive application of aggravated felony definition in 8 U.S.C. § 1101(a)(43)(N) does not violate individual’s due process rights).

Compounding this problem, Congress has stripped immigration judges of their ability to grant discretionary relief to individuals with aggravated felony convictions. *See, e.g., IIRIRA*, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, -597 (repealing 8 U.S.C. § 1182(c), which had contained a waiver for certain individuals with criminal convictions facing deportation). In fact, such individuals are barred from applying for nearly every form of discretionary relief from removal.² 8 U.S.C. §§ 1229b(a)(3) (providing that an LPR convicted of an

² Individuals convicted of aggravated felonies remain eligible for protection under the withholding of removal statute, 8 U.S.C. § 1231(b)(3), and the Convention Against Torture.

aggravated felony is ineligible for cancellation of removal);³ 1229c(a)(i), (b)(i)(C) (ineligible for voluntary departure); 1158(b)(2)(B)(i) (ineligible for asylum); 1182(h) (ineligible for 212(h) waiver sometimes used by LPRs seeking re-adjustment of status in removal proceedings). As the Supreme Court has acknowledged, removal “is now virtually inevitable for a vast number of noncitizens convicted of crimes.” *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010). For long-time residents of the United States, this “drastic measure,” *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), “may result in the loss of all that makes life worth living.” *See Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (quotation omitted).

Recognizing the increasing numbers of lawful permanent residents subject to unjust removals, in May of 2010, former New York governor David Paterson “created a special Immigration Pardon Panel to collect information and provide recommendations on pardons for deserving individuals to assist them in avoiding deportation.”⁴ Seven months later, Governor Paterson pardoned over thirty individuals with extraordinarily compelling cases who were at that time subject to

³ Cancellation of removal is a form of relief available to both LPRs and non-LPRs, provided that they have lived in the United States for a statutorily provided period of time, met certain other requirements, and warrant a favorable exercise of discretion. *See* 8 U.S.C. § 1229b.

⁴ Press Release, Office of the Governor of New York State, Governor Paterson Announces Pardons (Dec. 24, 2010), *available at* <http://www.governor.ny.gov/archive/paterson/press/122410-GovPatersonAnnouncesPardons.html> (hereinafter “Dec. 24, 2010 Press Release”).

deportation as a result of prior criminal convictions.⁵ The pardoned individuals, like the immigrants described here, faced automatic deportation based on old criminal convictions. Among those the governor pardoned were Lucila Cruz, an LPR for nearly two decades and the caretaker for her severely disabled son, who had been convicted of attempted larceny and sentenced to a conditional discharge in the mid-1990s, and Jose Palma, an LPR since 1971 who, in 1978, was convicted of reckless endangerment but went on to live “an exemplary life,” including owning his own business and raising a family with his wife of over thirty years.⁶ Governor Paterson found these individuals’ “efforts towards rehabilitation, their years of [law-abiding behavior], and their positive contributions to society” critical to obtaining pardons.⁷ Yet, the former governor considered only New York residents who had not yet been removed.⁸ As Governor Paterson recognized, his review encompassed just a small number of cases where removal would be unduly

⁵ Press Release, Office of the Governor of New York State, Governor Paterson Announces Pardons (Dec. 6, 2010), *available at* <http://www.governor.ny.gov/archive/paterson/press/120610Pardons.html>; Dec. 24, 2010 Press Release; Press Release, Office of the Governor of New York State, Governor Paterson Announces Pardons (Dec. 30, 2010), *available at* <http://www.governor.ny.gov/archive/paterson/press/123010-GovPatersonAnnouncesPardons.html> (hereinafter “Dec. 30, 2010 Press Release”).

⁶ Dec. 24, 2010 Press Release.

⁷ *Id.*

⁸ Press Release, Office of the Governor of New York State, Governor Paterson Creates Panel to Review Cases of Legal Immigrants Facing Deportation (May 3, 2010), *available at* <http://www.governor.ny.gov/archive/paterson/press/050310Deportation.html>.

harsh: “I wish time had permitted us to act on more of these requests, as injustice is prevalent.”⁹ There is no telling how many other people are similarly situated.

Likewise, the cases described below are just a few examples of individuals subject to unjust removal. As they demonstrate, absent the pursuit of withholding of removal or protection under the Convention Against Torture, removal proceedings for LPRs with aggravated felony convictions conclude as soon as the IJ determines that the respondent has been convicted of an aggravated felony. The LPR is left without an opportunity to present evidence regarding why removal amounts to a disproportionate penalty in his or her particular case. As a result, proportionality review is necessary to protect lawful permanent residents against the imposition of unduly harsh penalties.

B. Lawful Permanent Residents Subject to Disproportionate Penalties¹⁰

1. Lundy Khoy, a lifelong lawful permanent resident and current college student whose entire family fled Cambodia’s killing fields

Lundy Khoy, born to Cambodian parents in a Thai refugee camp on November 10, 1980, came to this country just after she turned one year old.¹¹ Her

⁹ Dec. 30, 2010 Press Release; *see also* Kirk Semple, *Panel is Facing Deadline on Immigrants’ Pardons*, N.Y. Times, Oct. 22, 2010, at A24 (“Hundreds of petitions from legal permanent residents for pardons have swamped the New York governor’s office, and a special clemency panel is rushing to sift through them and make recommendations to Mr. Paterson before his term and the program end on Dec. 31.”).

¹⁰ The case files for the examples in this brief are on file with counsel for *amicus* the American Immigration Council and will be provided to the Court upon request. Facts in the public record are cited.

entire family had been forced to flee Pol Pot's killing fields.¹² Ms. Khoy's family first settled in California, where she attended kindergarten, elementary, and junior high school.¹³ Ms. Khoy's sister and brother were born in California in 1982 and 1984, respectively. Ms. Khoy acquired lawful permanent resident status when she was five years old.

In many respects, Ms. Khoy's childhood was classically American. As she wrote:

I ate Cheerios for breakfast and took the bus to school. I played on the monkey bars, and my mom always packed my lunch. We went to Disneyland every year and religiously watched the Fourth of July fireworks from the beach.¹⁴

Ms. Khoy and her siblings were expected to come straight home from school, do their homework and help with the cooking and chores.¹⁵ During Ms. Khoy's teenage years, her family relocated to northern Virginia, where she graduated from high school.¹⁶ A strong student, Ms. Khoy was accepted into George Mason

¹¹ Lundy Khoy, *Escaping Genocide was the First Step*, Dec. 10, 2012, available at <http://www.momsrising.org/blog/my-story/> (hereinafter *Escaping Genocide*).

¹² Mike Riggs, *Lundy Khoy Barely Escaped Pol Pot's Purge; Now the U.S. Is Threatening to Deport Her for a Decade-Old Drug Charge*, Reason Magazine, Aug. 28, 2012, available at <http://reason.com/blog/2012/08/28/lundy-khoy-barely-escaped-pol-pots-purge> (hereinafter "*Barely Escaped Pol Pot*").

¹³ *Escaping Genocide*.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

University, where she enrolled in the fall of 1999.¹⁷ Although she was eligible for citizenship at that time, she could not afford the fees because she needed to save money for school.¹⁸

After starting college and living on her own for the first time, Ms. Khoy fell in with a bad crowd.¹⁹ By the end of her freshman year, Ms. Khoy had started experimenting with drugs.²⁰ In May of 2000, a police officer approached Ms. Khoy and asked her whether she was carrying drugs.²¹ She honestly replied that she had seven tablets of Ecstasy on her person.²² She was charged and convicted of possession with intent to distribute.²³ She was sentenced to five years' imprisonment, with all but three months suspended, followed by four years of supervised probation.²⁴

¹⁷ Tara Bahrapour, *After run-in with law, Cambodian immigrant's permanent residency is at risk*, Wash. Post, Oct. 3, 2012, available at http://articles.washingtonpost.com/2012-10-03/local/35502391_1_green-card-holders-green-card-jay-stansell (hereinafter *Cambodian immigrant's permanent residency is at risk*).

¹⁸ Jenny Doren, *Lundy Khoy, D.C. Woman Faces Deportation to Cambodia*, Oct. 4, 2012, ABC 7, available at <http://www.wjla.com/articles/2012/10/lundy-khoy-d-c-woman-faces-deportation-to-cambodia-80597.html>.

¹⁹ *Cambodian immigrant's permanent residency is at risk*.

²⁰ *Escaping Genocide*.

²¹ *Barely Escaped Pol Pot*.

²² *Id.*

²³ *Cambodian immigrant's permanent residency is at risk*.

²⁴ *Id.*

Ms. Khoy served her time and was released early for good behavior in February 2001.²⁵ She moved back in with her parents, found a job as a loan processor, and enrolled in community college.²⁶ Ms. Khoy regularly reported to her probation officer, never missing appointments or failing drug tests.²⁷ In the spring of 2004, while on her way to meet with her probation officer, Ms. Khoy was arrested by Immigration and Customs Enforcement (ICE) and placed in removal proceedings.²⁸ ICE detained Ms. Khoy without bond.

On August 24, 2004, an immigration judge ordered Ms. Khoy removed based on her sole conviction, which was deemed to be an aggravated felony. Ineligible for cancellation of removal, Ms. Khoy sought withholding of removal and relief under the Convention Against Torture, which the IJ denied.

ICE proceeded to take steps to deport Ms. Khoy. However, in December of 2004, unable to secure the necessary travel documents, ICE released Ms. Khoy on an Order of Supervision after nearly nine months in detention.

Following her release, Ms. Khoy worked hard to get her life back on track. She is now working to complete her Bachelor's Degree in Communications and is employed full time as an enrollment advisor for the University of Phoenix. Ms. Khoy volunteers with local charities such as Habitat for Humanity and March of

²⁵ *Barely Escaped Pol Pot.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Escaping Genocide.*

Dimes. Based on positive equities such as these, Ms. Khoy requested that ICE join her in moving to reopen her removal proceeding in November 2011. ICE declined.

In April 2012, despite full compliance with her Order of Supervision, ICE ordered Ms. Khoy to reapply immediately for a travel document from the Cambodian embassy.²⁹ ICE denied Ms. Khoy's follow-up request for deferred action in September 2012.

Ms. Khoy lives with the constant fear of deportation to a country that she does not know. She has never set foot in Cambodia and has no family there. Her entire life is in the United States, which is her home:

In America, I am surrounded by love, support, and encouragement. My family is indescribably helpful to me and they reassure me every day that I can be the best person possible. Every year I stay here, is one more year I grow and acquire skills and knowledge that allow me to contribute more and more to society. Having the tremendous opportunity to stay here would be allowing me to finally live how I've felt I've lived my entire life – as an American.³⁰

2. Arnold Giammarco, a U.S. Army veteran who had lawful permanent resident status for over fifty years

On or about July 13, 1960, at the age of four, Arnold Giammarco arrived in the United States as a lawful permanent resident. He came from Italy with his parents and sisters. The boy's grandparents, aunts, uncles, and cousins greeted the Giammarcos upon arrival. The family went on to settle in Connecticut, where Mr.

²⁹ *Cambodian immigrant's permanent residency is at risk.*

³⁰ *Escaping Genocide.*

Giammarco went to school, worked as a paperboy, played football with his classmates, and welcomed his brother into this world.

In 1976, Mr. Giammarco enlisted in the U.S. Army and underwent basic training in Oklahoma, where he specialized in field artillery. He was then stationed overseas in Germany where he became an accomplished soldier. In 1979, Mr. Giammarco was honorably discharged, though he remained determined to continue serving his country. In January of 1980, he joined the National Guard in Hartford, with which he served honorably until 1983.

After serving in the Army and returning home to Hartford, Mr. Giammarco worked as a meat-cutter and owned a small mom-and-pop store called Giammarco's Market. While Mr. Giammarco was working in Hartford in the early 1980s, he met his first wife. The couple married in 1988.

The marriage ended five years later, and Mr. Giammarco suffered emotional difficulties following his divorce. He self-medicated with illegal drugs and developed an addiction to cocaine. He lost his job and occasionally shoplifted to support his addiction. While struggling with his addiction, Mr. Giammarco also was convicted of minor, non-violent offenses related to his addiction, such as misdemeanor shoplifting offenses under Connecticut law that resulted in his serving three months in jail in 1997 and two months in 1999. During this period, Mr. Giammarco moved between jobs and spent nights in homeless shelters.

In 2000, Mr. Giammarco met Sharon Blair, a U.S. citizen. The couple found solace in each other during a difficult period in each of their lives. Over time, they fell in love.

Still struggling to overcome his addiction, Mr. Giammarco was convicted of simple drug possession in 2004, an offense for which he served no time in jail. Mr. Giammarco's final run-in with the criminal justice system occurred in 2007. During that year, he was convicted of minor offenses stemming from his addiction, including larceny in the fourth degree.

Following these 2007 incidents, Mr. Giammarco pledged to turn his life around. He enrolled in a rehabilitation program and successfully ended his period of addiction. Mr. Giammarco found a job at a McDonald's in Groton, Connecticut, where he worked long hours for little pay, but embraced the opportunity to do clean, honest work. He was eventually promoted to nighttime manager.

In November 2008, Mr. Giammarco's wife gave birth to their daughter, whom they named Blair. After working the night shift, Mr. Giammarco often cared for his daughter during the day while his wife studies to become a drug and alcohol counselor. On Sunday afternoons, Mr. Giammarco regularly set aside time to visit his elderly parents. Arnold Giammarco and Sharon Blair married on July 4, 2010.

Ten months later, ICE officials arrested Mr. Giammarco at his home. ICE detained him and initiated removal proceedings based on his two 1997 shoplifting convictions and his possessory drug conviction from 2004.

On May 15, 2012, the IJ found Mr. Giammarco removable. Furthermore, the IJ concluded that Mr. Giammarco's 2007 larceny conviction was an aggravated felony and therefore pretermitted his application for cancellation of removal. The IJ ordered Mr. Giammarco deported, and the Board of Immigration Appeals subsequently affirmed.

The same year, two days after Thanksgiving, ICE deported Mr. Giammarco to Italy, a country where he had not lived since the age of four. Before he left the country, he embraced his wife and daughter and said goodbye – possibly forever – to his aging and ill parents.³¹

Mr. Giammarco's life since his deportation has been lonely and hard. He lives in the small town of Prezza with distant cousins. He speaks only rudimentary Italian.³² The community shuns him because people mistakenly assume he must have committed a violent crime to have been deported from the United States.³³

³¹ Peggy McCarthy, *Veterans Expelled from U.S. Fight Deportations*, The Hartford Courant, Nov. 4, 2013, available at http://articles.courant.com/2013-11-04/news/hc-veterans-deported-20131104_1_u-s-immigration-immigration-law-veterans (hereinafter *Veterans Expelled*).

³² *Veterans Expelled*.

³³ *Veterans Expelled*.

Every night, Mr. Giammarco connects with his wife and daughter by Skype.³⁴ In the year since he was deported, he has been able to see his wife and daughter in person only twice due to the high cost of airfare.

Without Mr. Giammarco, Sharon and Blair have endured great hardship. Despite working seven days a week as a case manager in a rehabilitation center,³⁵ Sharon had no choice but to turn to the Supplemental Nutrition Assistance Program to feed herself and her daughter. As rent became unpayable, Sharon and Blair were forced to move in with members of Sharon's family.

In a moving letter posted on a website dedicated to the effort to bring Mr. Giammarco back to his home and family, Sharon wrote:

My husband is a good man who deserves a second chance. He has proven that people can change, despite the toughest of odds, and in turn, change the people around them. I live by his example, and choose to spend the rest of my life showing other addicts the way to a better life. But I still need him to teach me, to show me how it is possible to give to others unconditionally and succeed in gaining respect and love.³⁶

3. Kellyann Jeanette Charles, a lawful permanent resident and devoted wife and sister to U.S. citizen family members

A native of Trinidad and Tobago, Kellyann Jeanette Charles was six years old when she first entered the United States as a lawful permanent resident in 1988.

³⁴ *Veterans Expelled.*

³⁵ *Veterans Expelled.*

³⁶ Posting of Sharon Giammarco to Bring Arnold Home, <http://freearnold.com/yourhonor.htm> (Oct. 25, 2011).

She subsequently returned to Trinidad to live with her grandmother for much of her childhood. In 2000, at the age of 18, Ms. Charles came back to the United States on a returning resident visa and has remained here since that time.

As a young woman, Ms. Charles was convicted of two separate crimes: a misdemeanor shoplifting offense in New York in 2001 and a felony shoplifting offense in Virginia in 2002. In the Virginia case, though the value of the merchandise at issue was only \$200 according to the indictment, the judge sentenced Ms. Charles to three years in prison with all but three months suspended. Ms. Charles served her time and then proceeded to change her life. She has had no contact with the criminal justice system since the shoplifting incidents.

Ms. Charles has critical caretaking responsibilities for certain U.S. citizen family members and a close friend. Her younger brother, Kester Jamal Jack, a U.S. citizen, was recently diagnosed with schizophrenia, and Ms. Charles serves as his health proxy. In this capacity, she makes all of Kester's medical decisions. Moreover, Ms. Charles plays a critical role caring for her disabled friend, Nicole Bailey. Ms. Charles visits Ms. Bailey and helps bathe her, dress her, comb her hair and bring her meals.

Since marrying Tyrone Bird, a U.S. citizen, Ms. Charles has become very close to her husband's immediate and extended family. She was especially close to her brother-in-law Thomas, who suffered from a number of maladies and also

underwent open heart surgery. Thomas passed away in the summer of 2012. For Tyrone, his wife's support during the difficult aftermath of his brother's death was essential.

Ms. Charles is a valued employee with Art Department, a New York based fashion company. She has been promoted repeatedly since she began working there in 2006. The owner of the company describes Ms. Charles' work ethic as exemplary and notes that losing her would have an adverse impact on his business.

In 2010, upon returning from a short trip abroad, Customs and Border Protection initiated removal proceedings against Ms. Charles based on her eight and nine year-old shoplifting convictions. On May 17, 2011, concluding that the Virginia conviction amounted to an aggravated felony under 8 U.S.C. § 1101(a)(43)(G), the Immigration Judge pretermitted Ms. Charles' application for cancellation of removal and ordered her removed to Trinidad and Tobago.³⁷ On July 6, 2012, the Board of Immigration Appeals affirmed the Immigration Judge's decision.

At the time her Board appeal was pending, Ms. Charles' counsel requested prosecutorial discretion. This request was denied. On November 9, 2012, Ms. Charles filed a Petition for Review with the Second Circuit Court of Appeals. Ms.

³⁷ The Immigration Judge's oral decision provides that Ms. Charles' conviction "is relatively less serious than some aggravated felonies, such as serious drug trafficking, crimes of violence, et cetera. However, Congress wrote the Immigration law in the way I have outlined."

Charles' counsel sought prosecutorial discretion a second time, but this request, too, was denied.

4. Hugo Armendariz, a 35-year-old lawful permanent resident who was deported to Mexico after having resided virtually his entire life in the United States

Hugo Armendariz first entered the United States in June 1972, at age 2.³⁸

Mr. Armendariz's parents brought the young boy to the United States to provide a better life for him. It was here that Mr. Armendariz and his siblings grew up and went to school. In 1978, Mr. Armendariz became a lawful permanent resident.³⁹ He would remain in the United States until his removal in 2005.⁴⁰

Following a jury trial on September 15, 1995, Mr. Armendariz was convicted of possession of cocaine for sale, possession of drug paraphernalia, and hindering prosecution.⁴¹ He was sentenced to five years and eight months. The sentencing court specifically noted "the defendant's potential for rehabilitation, based on his age and employment and letters received on the defendant's behalf." Mr. Armendariz served his sentence at a minimum security work camp in Picacho, Arizona.

³⁸ *Wayne Smith, Hugo Armendariz, et al.*, Case 12.562, Inter-Am. Comm'n. H.R., Report No. 81/10, 19 (2010) (hereinafter *IACHR Decision*).

³⁹ *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 (9th Cir. 2002).

⁴⁰ *IACHR Decision*, at ¶ 19.

⁴¹ *Id.* at ¶ 20.

In April 1996, the INS issued an Order to Show Cause alleging that Mr. Armendariz was deportable from the United States based on his conviction of an aggravated felony.⁴² Determining that he was unable to consider Mr. Armendariz's equities on account of his past crimes, the IJ ordered him deported in April 1997.⁴³ Neither an appeal to the Board,⁴⁴ a petition for review by the Ninth Circuit, nor subsequent habeas proceedings changed the outcome.⁴⁵

While Mr. Armendariz pursued judicial review of his removal order, he was released from detention in August 2000 and began to put his life back together. Initially, he lived with his parents and looked for a job. After finding employment, he began making child support payments to help support his U.S. citizen daughter. Eventually, he fell in love with a long-time friend, Natalie, a U.S. citizen, and they began making wedding plans. In May 2004, Mr. Armendariz and his fiancée bought a house in Tucson, Arizona, where, together, they raised Natalie's then-3 year old U.S. citizen daughter, whom Mr. Armendariz helped support. Meanwhile, Mr. Armendariz ran a small business and paid taxes and child support. He also

⁴² *Armendariz-Montoya*, 291 F.3d at 1118.

⁴³ *Id.* at 1118.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1118-19. Mr. Armendariz did, however, receive a favorable ruling from the Inter-American Commission on Human Rights, which held that the United States violated his rights under Articles V (right to private and family life), VI (right to family), VII (right to protection for mothers and children), XVIII (right to fair trial) and XXVI (right to due process of law) of the American Declaration on the Rights and Duties of Man, O.A.S. Off. Rec. OEA/Ser. LV/I.4 Rev. (1965). *IACHR Decision*.

helped care for his elderly parents and forged connections with his brothers and sisters, all of whom are either LPRs or U.S. citizens.

At the time of his deportation in 2005, Mr. Armendariz had been out of jail and living in the United States as a productive, law-abiding citizen for almost five years. He and his fiancée were planning to marry two weeks after ICE apprehended Mr. Armendariz, without warning, at his place of business.

When Mr. Armendariz was deported to Mexico, he had nothing but the clothes on his back and about fifty cents in his pocket. He had no food, no clothes, and no way to survive. Unable to read or write Spanish, he could not find employment. Initially, he survived only because his fiancée sent money to him for food and shelter.

Mr. Armendariz is not able to cross the border to visit his U.S. citizen mother and lawful permanent resident father because he is permanently barred from reentering pursuant to 8 U.S.C. § 1182(a)(9)(A). Due to their advanced age, his parents rarely travel and thus see their son very infrequently. Although his fiancée and daughter have now relocated to Mexico, his parents and siblings are devastated by the loss of their son and brother.

5. Howard Dean Bailey, a Persian Gulf War veteran whose family was the center of his life

In 1989, at the age of 17, Mr. Bailey entered the United States as an LPR. Following his graduation from high school in New York, Mr. Bailey immediately

enlisted in the United States Armed Forces. He served on active duty with the U.S. Navy between August 7, 1990 and January 27, 1994, during the Persian Gulf War. Mr. Bailey received numerous awards in connection with his service and was honorably discharged. He returned home and began to start a family with his U.S. citizen girlfriend. They married and had two young children.

In 1995, Mr. Bailey pled guilty to possession of marijuana with intent to distribute and failure to appear in connection with the marijuana case. His lawyer did not tell him he would be subject to automatic deportation for the offense. He was sentenced to ten years for the marijuana offense and two years for the failure to appear. The judge suspended all but 15 months of his sentence, which Mr. Bailey served. Neither before nor after the 1995 events did Mr. Bailey have any interaction with the criminal justice system.

Upon his release, Mr. Bailey was determined to rebuild his life. After saving money to start a business, he opened and ran a small restaurant with two employees. Later, he started a trucking business, which employed up to five drivers. Over time, he was able to buy two homes, one of which he lived in with his family, and the other which he rented out for supplemental income.

Mr. Bailey's wife and two children were always the center of his life. He maintained a very close relationship with his mother, brother and sister, all of whom became U.S. citizens through naturalization. Moreover, he became a mentor

for other returning veterans. He supported the arts in his community and would donate toys and books to needy children.

After the attacks of September 11, 2001, Mr. Bailey attempted to re-enlist in the Armed Services. He was precluded from doing so, however, because of his criminal conviction.

In 2005, Mr. Bailey applied for citizenship. He reported his conviction from 10 years earlier and supplied all the records related to the case, as required in the application. After five years of delays, U.S. Citizenship and Immigration Services (USCIS) denied Mr. Bailey's application.

In the spring of 2010, some fifteen years after his marijuana conviction and six months after USCIS had denied his naturalization application, ICE officers surrounded Mr. Bailey's home, took him into custody and placed him in removal proceedings. On February 18, 2011, after denying a motion for a continuance to await the outcome of a post-conviction petition filed pursuant to *Padilla v.*

Kentucky, 559 U.S. 356 (2010),⁴⁶ an IJ ordered Mr. Bailey deported.⁴⁷ Mr. Bailey's marijuana conviction, which was held to be an aggravated felony,⁴⁸ foreclosed his

⁴⁶ In *Padilla*, the Supreme Court held that the Sixth Amendment's guarantee of effective assistance of counsel requires defense counsel to inform noncitizen clients whether a particular plea carries a risk of deportation.

⁴⁷ *In re Howard Dean Bailey*, A041 463 232, 2011 WL 2470934 (BIA June 2, 2011) (unpublished).

⁴⁸ *In re Howard Dean Bailey*, A041 463 232, 2011 WL 3888548 (BIA Aug. 9, 2011) (unpublished).

ability to seek discretionary relief from removal. Neither appeals,⁴⁹ motions to reopen or reconsider,⁵⁰ nor requests for prosecutorial discretion succeeded in keeping Mr. Bailey in the United States. In May of 2012, Mr. Bailey was deported to Jamaica, a country he had not seen in twenty-four years.

In Jamaica, Mr. Bailey is struggling to survive. He sleeps on the floor of a one bedroom home and has been unable to find work. Jamaican deportees face employment and other forms of discrimination and often are the targets of violent acts.⁵¹ Knowing this, Mr. Bailey lives in fear. Not only is he unable to support his family, but he subsists on the meager funds his mother is able to send him. Back in the United States, his family is struggling. His 16-year-old daughter has gone from being an honor roll student to barely passing her courses. His 18-year-old son has also started to get into trouble. His home is in foreclosure, and his business has closed.

⁴⁹ *In re Howard Dean Bailey*, A041 463 232, 2011 WL 2470934 (BIA June 2, 2011) (unpublished).

⁵⁰ *In re Howard Dean Bailey*, A041 463 232, 2011 WL 3888548 (BIA Aug. 9, 2011) (unpublished).

⁵¹ Marc Lacey, *No Paradise for Criminals Deported to Jamaica*, N.Y. Times, March 21, 2007, available at http://www.nytimes.com/2007/03/21/world/americas/21iht-web-0321jamaica.4975366.html?_r=0 (deportees, “regarded as the lowest of the low in Jamaica[,]” are scapegoated); Cassandra Szlarski, *Jamaica No Paradise for Beleaguered Deportees Sent to Live ‘Home Again’*, Times Colonist, March 18, 2013, available at <http://www.timescolonist.com/entertainment/movies/jamaica-no-paradise-for-beleaguered-deportees-sent-to-live-home-again-1.93461> (quoting documentary filmmaker who reports that deportees to Jamaica become part of the homeless population or “end up as murder statistics”).

III. CONCLUSION

For all of the individuals discussed within, and many more like them, *amici curiae* respectfully urge the Court to hold that immigration judges have the authority to determine, on a case-by-case basis, whether an individual's removal would be a disproportionate penalty. Constitutional proportionality requirements dictate that individuals like Lundy Khoy, Arnold Giammarco, Kellyann Charles, Hugo Armendariz, and Howard Dean Bailey be given an opportunity to show that any bad acts they committed in the past do not justify their permanent banishment from all that made their lives worth living.

November 29, 2013

Respectfully submitted,

s/ Beth Werlin

Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7522
bwerlin@immcouncil.org
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,584 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word, using Times New Roman in 14 point font.

s/ Beth Werlin

Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7522
bworlin@immcouncil.org

Dated: November 29, 2013

CERTIFICATE OF SERVICE FORM FOR ELECTRONIC FILINGS

I hereby certify that on November 29, 2013 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system and that copies will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

s/ Beth Werlin

Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7522
bwerlin@immcouncil.org

Dated: November 29, 2013