No. 16-72926

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY TOMCZYK,
Petitioner,

v.

MERRICK B. GARLAND, Attorney General,
Respondent.

REHEARING *EN BANC*

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.
2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

DATED: August 10, 2021

Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and lawful permanent residents, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in important immigration cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); and *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016). For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's parent organization, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has a direct interest in the issues here.

[1] All parties were notified of IRLI's intention to file this *amicus* brief. Respondent has consented to the filing of IRLI's brief. Petitioner indicated that he does not consent. Per Circuit Rule 29-2(b), IRLI has submitted a motion for leave to file this *amicus* brief with the Court. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

Congress gave the Attorney General the authority to reinstate a prior order of removal where "an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal." 8 U.S.C. § 1231(a)(5). At issue in this case is whether an alien's status as inadmissible at the time he or she reenters the United States makes that reentry illegal.

It clearly does. Under precedent of this Court, an entry is illegal if it is substantively illegal, that is, made by an alien who is not properly admissible. The structure and purposes of the Immigration and Nationality Act ("INA") also support the substantive view of illegal entry for purposes of reinstatement. The purpose of § 1231(a)(5) is to deter attempts at reentry by inadmissible aliens—a purpose that would be subverted if inadmissible aliens had an incentive to cross the border in the hopes of receiving, due to border officials' mistake or oversight, a procedurally regular entry. In addition, substantively illegal entry is sufficient for the crime of illegal reentry, and there is no reason it should not also be sufficient for the civil consequence of reinstatement.

ARGUMENT

I. This Court's precedent shows that the offense of Illegal Reentry under 8 U.S.C. § 1231(a)(5) is based on a substantively illegal reentry.

Aliens who have been removed and have reentered the country illegally are subject to reinstatement of their initial order of removal without further consideration by an immigration court. The predicates for reinstatement are clear:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. § 1231(a)(5).

As this Court has explained, there are two types of admission: "a *procedurally regular admission*—an inspection and authorization by an immigration officer—or . . . a *substantively legal admission*—the entry of those who were properly admissible . . . at the time of entry." *Tamayo-Tamayo v. Holder*, 725 F.3d 950, 953 (9th Cir. 2013) (en banc) (emphasis in original). This Court found no evidence "that Congress intended the procedural definition to apply to the phrase 'reentered the United States illegally' . . . and nothing in the history of § 1231(a)(5) suggests that Congress intended the procedural meaning of illegal reentry." *Id.* at 953. *See also Cuevas Garcia v. Holder*, 543 F. App'x 713, 713 (9th Cir. 2013) (internal quotation

marks omitted) (explaining that "Petitioner made no showing that he was properly admissible at the time he reentered the country. Therefore, the outcome of his case would not change even if he showed that his entry was procedurally regular in the sense that a border official allowed him to pass into the country"). Thus, that an immigration officer waved Petitioner through the border did not make his entry legal, because he was not "properly admissible" at that time. Indeed, "the reinstatement procedure simply asks whether circumstances have changed since the alien was lawfully deported. If nothing has changed, there is no reason to re-litigate those facts." *United States v. Martinez-Vitela*, No. 98-50440, 2000 U.S. App. LEXIS 11874, at *12-13 (9th Cir. May 25, 2000). Thus, status, not method of entry, is the standard for illegal reentry.

Additionally, this Court recognized that following a substantive approach to illegal reentry "is consistent with the decisions of our sister circuits." *Tamayo-Tamayo*, 725 F.3d at 953. The Tenth Circuit has held that a "procedurally regular" reentry does not render the reinstatement provision inapplicable. *See Lorenzo v. Mukasey*, 508 F.3d 1278, 1282-83 (10th Cir. 2007) ("Petitioner's allegation that she reentered the United States . . . without immigration officials questioning her right to enter, fails to amount to a claim that she entered the country legally."); *Cordova-Soto v. Holder*, 659 F.3d 1029, 1034 (10th Cir. 2011) (explaining that the courts do not "equat[e] a procedurally regular entry with a legal reentry under § 1231(a)(5) or

its precursor provisions."); *Beekhan v. Holder*, 634 F.3d 523, 725 (2d Cir. 2011) ("An alien is eligible for reinstatement of her prior removal order if she was removed from the United States and reenters the United States without the Attorney General's express consent, using a passport that is not her own."). Thus, the precedent of this and other courts makes clear that an alien who reenters the United States while inadmissible reenters illegally.

II. Rules of statutory interpretation support using a status-based approach to illegal reentry determinations.

The meaning of a statute is "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). *See also Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000) (internal citation omitted) (explaining the "fundamental canon of statutory construction that the words of a statute must be read . . . with a view to their place in the overall statutory scheme."). Therefore, where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions, courts should not read one part of the legislative regime (the INA) to provide a different, and conflicting solution." *Negusie v. Holder*, 555 U.S. 511, 545-46 (2009). The provisions of the INA dealing with illegal reentry, when taken together, reveal that status is the standard for illegal reentry determinations.

The language and context of the INA evince Congress's intention that final orders of removal remain enforceable when an inadmissible alien reenters the country. Using anything but a status-based approach to reinstatement would "leave open a truck-sized hole for all aliens" who have been removed from the United States. *Tellez v. Lynch*, 839 F.3d 1175, 1178 (9th Cir. 2016). Thus, the plain language of § 1231(a)(5), when taken in the context of the INA as a whole, establishes that an alien's admissibility status and not the manner in which he or she gained passage across the border is determinative of illegal reentry.

Section 1231(a)(5) aims to enforce orders of removal and deter illegal reentry by "eliminating the delays of affording previously removed aliens a hearing before an immigration judge each time they illegally reenter the United States." *Guijosa De Sandoval v. United States AG*, 440 F.3d 1276, 1279-80 (11th Cir. 2006). The reinstatement provision "merely gives effect to a final order issued after a formal hearing before an immigration judge." *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 150 (2d Cir. 2008). This deterrence purpose would be subverted if inadmissible aliens had an incentive to attempt reentry in the hope that, due to some error or oversight, it would be procedurally regular.

There are two other relevant provisions of the INA—8 U.S.C. § 1182 and 8 U.S.C. § 1326—that support the status-based approach to illegal reentry for reinstatement purposes. The application of those provisions in conjunction with

reinstatement in context of the INA as a whole evinces clear congressional intent that illegal reentry be based on an alien's status as inadmissible. *See United States v. Luna-Madellaga*, 315 F.3d 1224, 1230 (9th Cir. 2003) ("The purpose of § 1231(a)(5) is to expedite removal of *all* aliens who are in the country without permission after previously having been ordered removed."). As the dissent in *Castro-Cortez v. INS* noted,

> [t]hese cases involve aliens who came to our country illegally, were discovered, and who were accorded the procedural and due process rights we offer before they were deported. Nothing deterred, and with nothing if not disdain for our laws, they almost immediately reentered illegally. They were not unique, and Congress was very concerned about the problems that they and others caused.

Castro-Cortez v. INS, 239 F.3d 1037, 1053-54 (9th Cir. 2001) (Fernandez, J., dissenting). These provisions function together to "stop an indefinitely continuing violation" by an alien who has illegally returned after having been deemed inadmissible and removed. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 (2006).

The INA includes criminal penalties for illegal reentry, which are clearly based on inadmissibility under a prior order of removal. The government may impose fines or imprisonment for

> any alien who (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) *enters, attempts to enter, or is at any time found in*, the United States, unless . . . (A) *prior* to his [entry] . . . the Attorney General has expressly

> consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent.

8 U.S.C. § 1326(a) (emphasis added). This provision reflects Congress's repeated intention that inadmissibility is sufficient to render an alien guilty of illegal reentry.

As this Court explained, "under §§ 1326(a) and (b)(2), an alien is guilty of illegal reentry and subject to enhanced penalties if the alien was: (1) convicted of an aggravated felony, (2) subsequently removed from the United States, and (3) thereafter illegally reentered or was found in the United States." *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1259 (9th Cir. 2013). Because an alien may be charged with a crime for "reenter[ing] . . . after receiving a formal order of deportation, exclusion or removal, *all* reentering aliens are present in the United States in violation of the INA." *Morales-Izquierdo v. Gonzales*, 477 F.3d 691, 708 n.2 (9th Cir. 2007) (emphasis added). The fact that mere presence while inadmissible is sufficient to sustain criminal penalties supports applying the same standard to reinstatements.

Furthermore, reinstatement of removal orders for illegal reentry is permissible because an immigration court has already adjudicated the claims of such aliens. *See Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 498 (9th Cir. 2007) (explaining that although "aliens have a right to fair procedures, they have no constitutional right to force the government to re-adjudicate a final removal order by unlawfully reentering

the country."); *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 150 (2d Cir. 2008) (explaining that an order of reinstatement "merely gives effect to a final order issued after a formal hearing before an immigration judge."). This is because "[t]he scope of a reinstatement inquiry . . . is much narrower." *Morales-Izquierdo*, 486 F.3d at 491.

Thus, a court need only answer three questions to determine the validity of reinstatement: (1) is the person an alien; (2) have they been previously removed from the United States; and (3) have they reentered the United States illegally. *Padilla v. Ashcroft*, 334 F.3d 921, 925 (9th Cir. 2003). An alien with a prior order of removal who reenters without following proper reapplication procedures is inadmissible– all an immigration officer need do is search for the alien's prior order of removal to determine whether the alien reentered illegally. *See Cordova-Soto*, 659 F.3d at 1034 ("Congress could have based an alien's eligibility for reinstatement of removal on whether she had been admitted . . . But it did not do so. It chose instead to hinge eligibility for reinstatement on illegal reentry, the plain meaning of which is reentry in violation of the law."); *Lattab v. Ashcroft*, 384 F.3d 8, 20 (1st Cir. 2004) ("Congress . . . sought to make the removal of illegal reentrants more expeditious. Providing a mechanical procedure for the reinstatement of prior orders is entirely consistent with this purpose."). Logically, an alien's inadmissibility status is the standard for determining illegal reentry.

Accordingly, this Court has continued to follow the status approach to illegal reentry analysis. It has repeatedly rejected the claim that an alien who entered without "valid documentation and intended to dupe border officials" has legally reentered the country. *Tellez*, 839 F.3d at 1179. Now it must make clear that an alien's good luck in making his way past border agents while still inadmissible does not make his illegal entry legal. The provision is intended to deter illegal reentry, not to reward aliens who successfully manipulate or avoid immigration officials at the border.

CONCLUSION

For the foregoing reasons, the Court should uphold the reinstatement of Petitioner's prior order of removal.

Dated: August 10, 2021

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) because:

This brief contains 2405 words, including footnotes, but excluding parts of the brief exempted by FED. R. APP. P. 32(f).

2. 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 using Microsoft Word 365 in Times New Roman 14-point font.

DATED: August 10, 2021

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CERTIFICATE OF SERVICE

I certify that on August 10, 2021 I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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