Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than 25 years, the Board of Immigration Appeals (BIA) held that a legal permanent resident (LPR) who is deportable due to a criminal conviction could seek a discretionary waiver of removal under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. §1182(c), provided that the conviction also would have constituted a waivable basis for exclusion. In 2005, the BIA abruptly changed course, adding a requirement that the LPR be deportable under a statutory provision that used "similar language" to an exclusion provision. Deportable LPRs who departed and reentered the United States after their conviction, however, may seek Section 212(c) relief under a longstanding "*nunc pro tunc*" procedure that does not turn on similar language between deportation and exclusion provisions. Thus, under the BIA's current view, an LPR who pled guilty to an offense that renders him both deportable and excludable, but under provisions that use dissimilar phrasing, will be eligible for Section 212(c) relief from deportation if he departed and reentered the United States after his conviction, but ineligible if he did not depart. The circuits are split three ways on the lawfulness of the BIA's new interpretation.

The question presented is:

Whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did *not* depart and reenter the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the INA.

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JOEL JUDULANG,

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

PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The court of appeals' decision is unreported but available at 2007 WL 2733726. App. 1a-4a. The order dated August 26, 2010 denying rehearing and rehearing en banc is unreported. App. 21a.

The oral decision of the Immigration Judge (IJ) ordering Petitioner removed from the United States is unreported. App. 11a-20a. The decision of the Board of

Immigration Appeals (BIA) affirming the IJ's order is unreported but available at 2006 WL 557842. App. 5a-9a.

JURISDICTION

The court of appeals' judgment was entered on September 17, 2007. App. 1a. Rehearing was denied on August 26, 2010. App. 21a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law[.]"

2. The following provisions of the Immigration and Nationality Act, 8 U.S.C. §§1101 *et seq.*, are set forth in relevant part in the Appendix hereto:

a. 8 U.S.C. §1101(a)(43) (App. 23a);

b. 8 U.S.C. §1182(a) (App. 23a-24a);

c. 8 U.S.C. §1182(c) (1996) (repealed Apr. 1, 1997) (App. 24a-25a); and

d. 8 U.S.C. §1227(a) (App. 25a-26a).

3. 8 C.F.R. §1212.3(f)(5) is reproduced at App. 27a.

INTRODUCTION

This case presents an important question of immigration law on which the courts of appeals have split three ways. Prior to 2005, the BIA had repeatedly held that individuals in Petitioner's position could seek discretionary relief from removal under former Section

212(c) of the Immigration and Nationality Act (INA).[1] That year, however, reacting to this Court's reaffirmance of the availability of Section 212(c) relief to certain aliens (*see INS* v. *St. Cyr*, 533 U.S. 289, 326 (2001)), the BIA sought to curtail Section 212(c) relief in a way that disqualified numerous previously eligible individuals, including Petitioner. Purporting to interpret a 2004 regulation promulgated to implement *St. Cyr*, the BIA ruled that deportable lawful permanent residents (LPRs) who had *not* traveled abroad after their convictions could only seek discretionary relief if the government charged them under a deportation provision in the INA that used *similar language* to an exclusion provision. *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005). The BIA has acknowledged that *Blake* was a "change in law." *E.g.*, *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb. 22, 2008).

The practical result was suddenly to foreclose Section 212(c) relief for large numbers of LPRs whose attachment to the United States was so strong that they had not left the country following their conviction.

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[1] Before April 1, 1997, the INA distinguished between deportation proceedings, applicable to individuals already present in the United States, and exclusion proceedings, applicable to individuals seeking to enter the United States. The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, §304, 110 Stat. 3009-548, 3009-589 (1996) (IIRIRA), replaced both with "removal" proceedings and replaced the term "excludable" with "inadmissible." Nonetheless, the statutory distinction between the two categories of individuals remains. *Compare* 8 U.S.C. §1182(a) (defining class of inadmissible individuals) *with* 8 U.S.C. §1227(a) (defining class of deportable individuals). The terms "deportation" and "exclusion" and their variants are used where necessary to the analysis under former Section 212(c).

Meanwhile, under an established BIA practice that Congress has long accepted, Section 212(c) relief remained available to similarly situated LPRs who *did* leave the country following their conviction, reentered the United States, and were subsequently charged as deportable. Under 60-year-old precedents, such individuals may seek Section 212(c) relief "*nunc pro tunc*," as long as they are deportable for an offense that would have rendered them inadmissible upon reentry.

The circuits are split three ways as to the lawfulness of the BIA's new approach. The Second Circuit has correctly rejected the BIA's new position as resting on an irrational distinction. The Ninth Circuit, in a sharply divided en banc decision, ruled that Section 212(c) does not apply to deportable LPRs at all—a position that neither the BIA nor the government has ever endorsed and that directly conflicts with *St. Cyr*. Eight other circuits have affirmed the BIA's new approach.

Although Section 212(c) was repealed in 1996, it remains of critical importance to numerous longstanding residents of this country, many of whom—like Mr. Judulang—have worked hard for many years, have the support of U.S. citizen family members who in turn depend on them for support, have U.S. citizen children, and have made valuable contributions to their communities. The BIA would now deny these individuals the right to apply for relief that previously was available and that this Court reaffirmed in *St. Cyr*, based solely on the arbitrary nature of their travel history. Moreover, the three-way circuit split means that eligibility for relief currently depends on which circuit hears the appeal.

Although this question was twice presented last Term, neither case proved an adequate vehicle, perhaps because Justice Kagan acted as counsel for the government in both cases. This case poses no such problem. Accordingly, this Court should grant certiorari to review the judgment of the Ninth Circuit and bring much-needed uniformity to this important question.

STATEMENT

A. Availability Of Discretionary Relief Before 2005

Prior to its repeal, Section 212(c) provided: "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General[.]" 8 U.S.C. §1182(c).

Although the terms of Section 212(c) envision relief only for *excludable* LPRs, it has long been applicable to persons who, like Mr. Judulang, are *deportable* due to convictions that would also render them excludable.

1. Section 212(c)'s predecessor was the Seventh Proviso to Section 3 of the Immigration Act of 1917, which permitted a discretionary waiver of exclusion for "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." Pub. L. No. 64-301, 39 Stat. 874, 878. "Although that provision applied literally only to exclusion proceedings, and although the deportation provisions of the statute did not contain a similar provision, the INS relied on [the Seventh Proviso] to grant relief *in deportation proceedings* involving aliens who had departed and returned to this country after the ground for de-

portation arose." *St. Cyr*, 533 U.S. at 294 (emphasis added). The law treated the deportable LPR as if he had been placed in exclusion proceedings upon reentry, such that relief was available "*nunc pro tunc*." *Matter of L-*, 1 I. & N. Dec. 1, 5-6 (Att'y Gen. 1940).

2. Section 212 of the Immigration and Nationality Act of 1952 "replaced and roughly paralleled §3 of the 1917 Act." *St. Cyr*, 533 U.S. at 294. Its discretionary relief provision, Section 212(c), closely tracked the Seventh Proviso. The BIA soon ruled that Section 212(c) permitted relief for LPRs in deportation proceedings who had departed and reentered after a criminal conviction and before being placed in deportation proceedings. *Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956). The BIA also made clear that, if Section 212(c) "is exercised to waive a ground of inadmissibility based upon a criminal conviction, a deportation proceeding cannot thereafter be properly instituted based upon the same criminal conviction." *Id.* at 275.

The BIA initially refused to permit deportable LPRs who had *not* traveled abroad after conviction to seek Section 212(c) relief. *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 697-698 (BIA 1971), *aff'd*, 466 F.2d 1198 (9th Cir. 1972) (per curiam). In 1976, the Second Circuit rejected that approach, ruling that LPRs who had traveled abroad and those who had not were "in like circumstances, but for irrelevant and fortuitous factors," and therefore equal protection required that they be "treated in a like manner." *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). The Second Circuit noted that the government had proffered no reason to distinguish between LPRs based on a "failure to travel abroad following ... conviction" and concluded that "[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[.]" *Id.* The BIA and all courts of appeals followed *Francis*.[2]

Although *Francis* made Section 212(c) relief available to many deportable LPRs, it did not apply to LPRs who were deportable for convictions that *did not* make them inadmissible. Persons in that situation would not have been eligible for Section 212(c) relief *nunc pro tunc* even if they *had* departed and reentered, and there was accordingly no irrational distinction in denying relief in such cases. *See, e.g., Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 575 (BIA 1996) (stating that Section 212(c) relief was not available "to an alien in deportation proceedings when that same alien would not have occasion to seek such relief were he in exclusion proceedings instead").

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[2] *See St. Cyr*, 533 U.S. at 295; *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *see also Anwo* v. *INS*, 607 F.2d 435, 436 n.3 (D.C. Cir. 1979) (per curiam); *Lozada* v. *INS*, 857 F.2d 10, 11 n.1 (1st Cir. 1988); *Katsis* v. *INS*, 997 F.2d 1067, 1070 (3d Cir. 1993); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 248 n.1 (4th Cir. 1981); *Carrasco-Favela* v. *INS*, 563 F.2d 1220, 1221 n.3 (5th Cir. 1977) (per curiam); *Rodriguez-Reyes* v. *INS*, 1993 WL 8150, at *2 (6th Cir. Jan. 15, 1993) (unpublished); *Variamparambil* v. *INS*, 831 F.2d 1362, 1364 n.1 (7th Cir. 1987); *Varela-Blanco* v. *INS*, 18 F.3d 584, 586 (8th Cir. 1994) (per curiam); *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981), *overruled, Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam) (App. 63a-94a), *cert. denied sub nom. Abebe* v. *Holder*, 130 S. Ct. 3272 (2010); *Vissian* v. *INS*, 548 F.2d 325, 328 nn.2-3 (10th Cir. 1977); *Yeung* v. *INS*, 76 F.3d 337, 340 n.4 (11th Cir. 1995); *accord Tapia-Acuna* v. *INS*, 449 U.S. 945 (1980) (vacating and remanding in light of Solicitor General's change of position); *Abebe*, App. 85a (Thomas, J., dissenting) (noting government's concession in *Tapia-Acuna* that *Francis* was correct).

That limitation came to be known as the "statutory counterpart" rule: Section 212(c) relief was available in removal proceedings if the LPR was deportable for a conviction that fell under a "counterpart" exclusion provision. Because most crimes that are grounds for deportation are also grounds for exclusion, the statutory counterpart rule was satisfied by all but a limited group of LPRs—generally, only those deportable for certain firearms convictions[3] and entry without inspection.[4] The Attorney General stated as much in 1991, when he identified only "two grounds for deportation [that] have no analogue in the grounds for exclusion," namely entry without inspection and firearms offenses. *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991), *aff'd without op.*, 983 F.2d 231 (5th Cir. 1993); *see also* Aleinikoff, Martin, & Motomura, *Immigration: Process & Policy* 703-704 (3d ed. 1995) ("The two most significant deportation grounds without comparable exclusion grounds are entry without inspection and firearms violations.").

3. In 1996, Congress repealed Section 212(c). Illegal Immigration Reform and Immigrant Responsibility

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[3] *See, e.g., Drax* v. *Reno*, 338 F.3d 98, 101, 108-109 (2d Cir. 2003); *Cato* v. *INS*, 84 F.3d 597, 600 (2d Cir. 1996); *Gjonaj* v. *INS*, 47 F.3d 824, 825, 827 (6th Cir. 1995); *Campos* v. *INS*, 961 F.2d 309, 311-314 (1st Cir. 1992); *Matter of Esposito*, 21 I. & N. Dec. 1, 9-10 (BIA 1995); *Matter of Montenegro*, 20 I. & N. Dec. 603, 605-606 (BIA 1992); *Matter of Granados*, 16 I. & N. Dec. 726, 728-729 (BIA 1979).

[4] *See, e.g., Farquharson* v. *Attorney Gen.*, 246 F.3d 1317, 1325 (11th Cir. 2001); *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 948, 952 (7th Cir. 1993); *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 281, 286-287 (Att'y Gen. 1991), *aff'd without op.*, 983 F.2d 231 (5th Cir. 1993).

Act, Pub. L. No. 104-208, §304(b), 110 Stat. 3009-548, 3009-597 (1996) (IIRIRA). In 2001, this Court held that the repeal was prospective only and that LPRs who were deportable on account of convictions obtained through guilty pleas prior to April 1, 1997 (IIRIRA's effective date) could still seek Section 212(c) relief. *See St. Cyr*, 533 U.S. at 326.

In 2004, the Department of Justice (DOJ) promulgated a regulation implementing *St. Cyr* and setting out the criteria for Section 212(c) relief. The regulation included a statutory counterpart requirement. 8 C.F.R. §1212.3(f)(5) ("An application for relief under former section 212(c) of the Act shall be denied if ... [t]he alien is deportable ... on a ground which does not have a statutory counterpart in section 212 of the Act.").

4. Up to and including 2004, the BIA repeatedly held that persons deportable for certain "aggravated felonies" (*see* 8 U.S.C. §1227(a)(2)(A)(iii)) satisfied the "statutory counterpart" requirement, generally because the crime of conviction was also a "crime involving moral turpitude" (CIMT) that would render the LPR inadmissible under Section 212(a)(2)(A)(i). Although the provisions governing inadmissibility did not list aggravated felonies as a basis for exclusion, the BIA held that a Section 212(c) waiver was "not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, 'convicted of an aggravated felony.'" *Matter of Meza*, 20 I. & N. Dec. 257, 259 (BIA 1991). The BIA accordingly ruled that LPRs could seek waivers of deportation for aggravated felony convictions, including "crimes of violence" under 8 U.S.C.

§1101(a)(43)(F)[5] and "sexual abuse of a minor" under §1101(a)(43)(A).[6] The courts of appeals likewise noted

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[5] *See, e.g., Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-591 (BIA 1992) (LPR convicted of attempted murder "is not barred from applying for section 212(c) relief"); *Matter of A-A-*, 20 I. & N. Dec. 492, 500-501 (BIA 1992) (LPR convicted of murder was not disqualified from seeking Section 212(c) relief on that basis); *Matter of S-Lei*, No. A38139424 (BIA May 27, 2004) (App. 57a-58a) (affirming grant of Section 212(c) relief to LPR convicted of attempted robbery, a crime of violence); *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003) (affirming Section 212(c) waiver of conviction for voluntary manslaughter, a crime of violence); *see also Matter of Caro-Lozano*, 2004 WL 1398661 (BIA Apr. 22, 2004) (reaching merits of Section 212(c) application in crime of violence case); *Matter of Hussein*, 2004 WL 1059601 (BIA Mar. 15, 2004) (remanding for consideration of Section 212(c) relief where conviction was a crime of violence); *Matter of Martinez*, 2004 WL 1167082 (BIA Feb. 18, 2004) ("[I]t does appear that Section 212(c) could waive the burglary offense[.]"); *Matter of Loney*, 2004 WL 1167256 (BIA Feb. 10, 2004) (LPR convicted of crime of violence was "not precluded" from seeking Section 212(c) relief where crime was also a CIMT); *Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003) (recognizing that petitioner deportable for extortion, a crime of violence, would be "entitled" to seek Section 212(c) relief); *Matter of Munoz*, No. A35279774, 28 Immig. Rptr. B1-1 (BIA Aug. 7, 2003) (App. 45a-55a) (remanding for consideration of Section 212(c) relief where the crime of violence was also a CIMT); *Matter of Rowe*, No. 37749964 (BIA May 9, 2003) (App. 41a-44a) (rejecting government's argument that crime of violence was not waivable).

[6] *See, e.g., Hussein*, 2004 WL 1059601 (LPR convicted of indecency with a child was eligible for Section 212(c) relief because he could have been excluded due to a CIMT); *Matter of Rodriguez-Symonds*, 2004 WL 880246 (BIA Mar. 9, 2004) (remanding for consideration of whether LPR convicted of lewd act upon child was eligible for Section 212(c) relief because conviction was also CIMT); *Matter of Ashley*, 2003 WL 23521830 (BIA Nov. 4, 2003) (noting apparent Section 212(c) eligibility for LPR convicted of sexual offense against a child).

the availability of Section 212(c) relief in such cases. *See e.g.*, *Hem* v. *Maurer*, 458 F.3d 1185, 1187-1189 (10th Cir. 2006) (crime of violence); *De Araujo* v. *Gonzales*, 457 F.3d 146, 154-155 (1st Cir. 2006) (crime of violence); *United States* v. *Ortega-Ascanio*, 376 F.3d 879, 886-887 (9th Cir. 2004) (sexual battery); *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1051 (9th Cir. 2004) (burglary). This Court also recognized the importance of Section 212(c) in aggravated felony "crime of violence" cases. *St. Cyr*, 533 U.S. at 295-296 & n.4.

B. The BIA Changes Course In 2005

In 2005, the BIA abruptly changed the rules. In *Blake*, the BIA decided that an LPR who was deportable for a "sexual abuse of a minor" aggravated felony was categorically ineligible for Section 212(c) relief, regardless of whether the crime would provide a basis for inadmissibility as a CIMT. 23 I. & N. Dec. at 727-728. Without addressing its numerous decisions upholding discretionary waivers in similar circumstances, the BIA held that the "statutory counterpart" requirement could only be satisfied if the LPR was deportable under a subsection of INA §237 that was *phrased* similarly to an inadmissibility subsection in INA §212(a). *Id.* at 728. The BIA barred the LPR in *Blake* from applying for relief because the words "sexual abuse of a minor" do not appear in any inadmissibility provision. *Id.* at 728-729. The BIA did not consider whether Blake's conviction would have rendered him excludable and therefore eligible to seek Section 212(c) relief *nunc pro tunc* had he left the country and reentered. The BIA later applied the same reasoning to "crime of violence" aggravated felonies. *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (BIA 2005).

The BIA acknowledged that *Blake* was a retroactive change in its Section 212(c) jurisprudence—a fact that was confirmed by its later reversal of decisions to grant relief under the prior (correct) approach to Section 212(c). In one case, the BIA itself had affirmed an IJ's decision granting relief, but then vacated its decision on the government's motion, referring to *Blake* as "a *change in law* that appears to preclude a grant of 212(c) relief." *Cardona*, 2005 WL 3709244 (emphasis added); *see also Matter of Gomez-Perez*, 2006 WL 901334 (BIA Mar. 1, 2006) (vacating IJ's decision to grant Section 212(c) waiver because LPR is "no longer eligible for relief"), *appeal docketed*, No. 07-72569 (9th Cir. June 27, 2007); *Matter of Rangel-Zuazo*, No. A90640428 (BIA May 25, 2005) (App. 59a-61a) (reversing IJ's decision to grant relief because "intervening precedent renders the respondent statutorily ineligible for section 212(c) relief"), *appeal docketed*, No. 07-72316 (9th Cir. June 11, 2007); *Matter of Banuelos-Delena*, 2006 WL 901335 (BIA Mar. 2, 2006) (reversing grant of Section 212(c) relief and citing "intervening Board precedent"); *Matter of Umer*, 2010 WL 1606998 (BIA Mar. 31, 2010) (referring to rule "announced in" *Brieva-Perez*), *appeal docketed*, No. 10-60342 (5th Cir. Apr. 19, 2010); *cf. De la Rosa* v. *Attorney Gen.*, 579 F.3d 1327, 1332 (11th Cir. 2009) (calling *Blake* a "watershed moment in [Section] 212(c) jurisprudence"), *cert. denied*, 130 S. Ct. 3272 (2010).

C. The Circuit Split

The courts of appeals have divided three ways in response to *Blake*. Although the BIA claimed to base *Blake* on Second Circuit precedent, that court reversed the BIA in *Blake* itself. *Blake* v. *Carbone*, 489 F.3d 88, 103 (2d Cir. 2007). In 2009, the Second Circuit heard

more than 21% of the total number of appeals from the BIA. *See* Duff, *Judicial Business of the United States Courts: 2009 Annual Report of the Director*, Table B-3 (2010), *at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf (*2009 Annual Report*).

Eight other courts of appeals, which together heard over 30% of all appeals from the BIA (*2009 Annual Report* at Table B-3), have affirmed the BIA's *Blake* rule.[7] Finally, the Ninth Circuit, which heard over 44% of the appeals from the BIA (*id.*), recently ruled that Section 212(c) relief is unavailable to all deportable LPRs. Neither the government nor the BIA advocated that position, which was announced in a fractured en banc ruling that overturned more than a quarter-century of Circuit precedent. *Abebe* v. *Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc) (per curiam) (App. 63a-94a), *cert. denied*, 130 S. Ct. 3272 (2010). Seven judges dissented from the Ninth Circuit's denial of full court rehearing, asserting that "[i]f ever a case merited full court en

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[7] *Kim* v. *Gonzales*, 468 F.3d 58, 63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 167-168 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 368-369 (5th Cir. 2007); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009), *reh'g and reh'g en banc denied* (May 29, 2009); *Valere* v. *Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007); *Vue* v. *Gonzales*, 496 F.3d 858, 862-863 (8th Cir. 2007); *Falaniko* v. *Mukasey*, 272 F. App'x 742, 746-748 (10th Cir. 2008) (unpublished); *De la Rosa*, 579 F.3d at 1337.

banc consideration, this one did." *Abebe* v. *Holder*, 577 F.3d 1113 (9th Cir. 2009) (Berzon, J., dissenting).[8]

Petitions for certiorari were filed in *Abebe* and *De la Rosa*, an Eleventh Circuit case raising the same issue. *De la Rosa* was relisted twice; *Abebe* was relisted once. On May 10, 2010, the President announced the nomination to this Court of then-Solicitor General Kagan, who was counsel for the government in *Abebe* and *De la Rosa*. Both petitions were denied at the subsequent Conference. *De la Rosa* v. *Holder*, 130 S. Ct. 3272 (2010) (No. 09-594); *Abebe* v. *Holder*, 130 S. Ct. 3272 (2010) (No. 09-600).

D. Proceedings Below

Petitioner Joel Judulang, a native of the Philippines, entered the United States in 1974 at the age of eight. He has continuously resided in this country for thirty-six years, returning to the Philippines only once to attend his grandmother's funeral more than twenty years ago.

Mr. Judulang and his family have lengthy and close connections with the United States. His grandfather

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[8] The Ninth Circuit in *Abebe* suggested that deportable LPRs could still seek relief under the 2004 regulation (*see* App. 69a-70a), and the BIA has agreed (*Matter of Moreno-Escobosa*, 25 I. & N. Dec. 114, 116-117 (BIA 2009)). The Ninth Circuit's own application of the holding in *Abebe* has been inconsistent, however. *Compare Flores-Pelayo* v. *Holder*, 2010 WL 3469223 (9th Cir. Sept. 3, 2010) (rejecting ineffective assistance of counsel claim based on section 212(c) because *Abebe* rendered LPR in deportation proceedings "statutorily ineligible") *and Sito* v. *Holder*, 2010 WL 2782852 (9th Cir. July 13, 2010) *with Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010) (applying statutory counterpart rule pursuant to 8 C.F.R. §1212.3).

served in the U.S. military in the Philippines between 1923 and 1948 (App. 29a-30a) and became a U.S. citizen as a result. His parents both naturalized as well. App. 36a-37a. He has a 14-year-old daughter who is also a native-born citizen of the United States, as are his four nephews and two nieces. His two sisters are U.S. citizens and his older brother is an LPR. Unfortunately, Mr. Judulang's parents did not seek to obtain citizenship for him before he turned 18.[9]

In 1988, when Mr. Judulang was 22 years old, he was involved in a fight in which another person shot and killed someone. Although Mr. Judulang was not the shooter, he was charged as an accessory. He pled guilty to voluntary manslaughter under Cal. Penal Code §192(a). App. 31a-32a. Due to his minor involvement in the crime and his cooperation with authorities, Mr. Judulang was given a suspended sentence of six years. *Id.* He was released on probation immediately following his plea.

On June 10, 2005, the government commenced deportation proceedings against Mr. Judulang. The IJ found Mr. Judulang deportable based *inter alia* on his conviction for voluntary manslaughter, which is an aggravated felony "crime of violence." App. 15a-16a; *see also* 8 U.S.C. §§1101(a)(43)(F), 1227(a)(2)(A). The IJ informed Mr. Judulang that Section 212(c) "could have been applied to your manslaughter conviction," but believed that the length of his sentence disqualified him

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[9] Had Mr. Judulang's mother naturalized before Mr. Judulang turned 18, he would have become a U.S. citizen by operation of law. 8 U.S.C. §1432(a) (1988). She naturalized when he was 18 years and 11 months old. App. 36a-37a.

from Section 212(c) relief. App. 38a. The IJ stated that the sentence issue was "litigatable." *Id.*[10]

The BIA affirmed the deportation order, though it did not affirm the IJ's reasoning. Instead, it ruled that because Mr. Judulang was removable for a "crime of violence" aggravated felony, he was categorically ineligible for a Section 212(c) waiver under *Brieva-Perez*. App. 8a.

A panel of the Ninth Circuit denied Mr. Judulang's petition for review. App. 4a. His petition for rehearing and rehearing en banc was held in abeyance pending resolution of *Abebe* and ultimately denied on August 26, 2010. App. 21a. Justice Kennedy stayed the judgment of the Ninth Circuit pending the filing of a petition for certiorari. App. 39a.

While his case was pending in the Ninth Circuit, Mr. Judulang was released on bond from immigration custody following an order of the United States District Court for the Southern District of California. *Judulang* v. *Chertoff*, 535 F. Supp. 2d 1129 (S.D. Cal. 2008). Mr. Judulang lives with his elderly mother, a U.S. citizen, in Los Angeles and has been working to support himself and his family.

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[10] As Mr. Judulang argued on appeal, the IJ's view that his six-year sentence disqualified him from Section 212(c) relief was erroneous. *See* Pet. C.A. Br. 36 n.17. Although the IJ also found Mr. Judulang deportable on account of a second conviction for grand theft over $400, neither the BIA nor the Ninth Circuit relied on that theory, and it is not before the Court. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). Mr. Judulang has a substantial argument, preserved below, that he cannot be deported for the theft conviction should he be granted Section 212(c) relief regarding his manslaughter conviction. Pet. C.A. Br. 37-40.

REASONS FOR GRANTING THE PETITION

Section 212(c) continues to be an important source of relief for numerous legal permanent residents. *See INS* v. *St. Cyr*, 533 U.S. 289, 296 n.6 (2001). In the five and one-half years since *Blake*, the issue presented here has arisen in over 160 cases—including more than 30 appellate decisions this year—and produced published opinions in almost every circuit. App. 95a-105a (listing representative cases in which *Blake* or its progeny have been addressed). The circuits are irreconcilably split three ways on the proper application of Section 212(c) to LPRs deportable as a result of an aggravated felony conviction. This Court's guidance is urgently needed to restore a uniform application of Section 212(c).

The BIA's novel and unprecedented reinterpretation of the statutory counterpart test in *Blake*—ostensibly based on a 2004 regulation designed to implement this Court's ruling in *St. Cyr*—was in fact an evident effort to undermine *St. Cyr* and accomplish through agency and judicial decision what Congress had *not* done through legislation. The BIA's new approach creates an arbitrary and capricious distinction that is inconsistent with the settled interpretation of Section 212(c) and resurrects the unconstitutional practice of discriminating between similarly situated LPRs on the irrelevant basis of travel history. It also improperly gives retroactive effect to an (erroneous) interpretation of the 2004 regulation.

The Ninth Circuit's position is even more extreme, as it rejects three decades of consistent agency practice permitting deportable LPRs to seek discretionary relief under Section 212(c), regardless of travel history—a practice Congress unquestionably approved for dec-

ades. The Court should grant certiorari, reverse the judgment of the Ninth Circuit, and rule that Mr. Judulang may pursue Section 212(c) relief on the merits.

I. THE APPLICATION OF SECTION 212(c) TO DEPORTABLE LPRS HAS FULLY PERCOLATED AND PRODUCED AN INTRACTABLE THREE-WAY CIRCUIT SPLIT

Since the BIA's 2005 decision in *Blake*, ten courts of appeals have considered whether and under what circumstances an LPR who is deportable on the basis of an "aggravated felony" conviction is eligible for Section 212(c) relief. In answering this question, the courts of appeals have split three ways. *See Abebe*, App. 78a (Clifton, J., concurring in the judgment) (acknowledging "three-way circuit split"); *De la Rosa* v. *Attorney Gen.*, 579 F.3d 1327, 1335 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010).

First, the Second Circuit has recognized that the BIA's decision in *Blake* revived the equal protection problem—first identified in *Francis*—of giving *worse* treatment to LPRs who had *not* departed the United States. *Blake* v. *Carbone*, 489 F.3d 88, 102-104 (2d Cir. 2007). To cure the BIA's constitutional violation, the Second Circuit restored the law to its pre-2005 posture: Section 212(c) relief is available if the "particular offense" that rendered the LPR deportable "would render a similarly situated [LPR] excludable." *Id.* at 103. As the Second Circuit observed, "what makes one alien similarly situated to another is his or her act or offense, which is captured in the INA as either a ground of deportation or exclusion." *Id.* at 104 (explaining that equal protection principles "require[] [the court] to examine the circumstances of the deportable alien, rather than the language Congress used to classify his or her status"). The Second Circuit left to the BIA in the first

instance the task of determining whether a particular aggravated felony would render an LPR excludable. *Id.*[11]

Second, eight other courts of appeals have affirmed the BIA's formulaic approach in *Blake*. Instead of determining whether the underlying offense would also make the deportable LPR inadmissible, those circuits compare only the words used in the particular deportation provision charged by the government to the words used in the inadmissibility provisions of Section 212(a). *See, e.g., Caroleo* v. *Gonzales*, 476 F.3d 158, 164-165 (3d Cir. 2007). Under this "rather mechanical reading of the law," *Kim* v. *Gonzales*, 468 F.3d 58, 63 (1st Cir. 2006), Section 212(c) relief is only available if one of the inadmissibility provisions uses language that is substantially identical to the deportation provision charged. *E.g., De la Rosa*, 579 F.3d at 1338-1339. Because the inadmissibility provisions do not use the words "sexual abuse of a minor" or "crime of violence," LPRs who are charged as deportable under those provisions are held categorically ineligible for Section 212(c) relief, even if the underlying criminal conviction would render them inadmissible for having committed a "crime involving moral turpitude." *See, e.g., Caroleo*, 476 F.3d at 164-165.

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[11] Judges in the Ninth Circuit and elsewhere have praised the Second Circuit's reasoning. *See, e.g., Abebe*, App. 83a-94a (Thomas, J., dissenting); *Vue* v. *Gonzales*, 496 F.3d 858, 863 (8th Cir. 2007) (Bye, J., concurring); *Abebe* v. *Gonzales*, 493 F.3d 1092, 1108-1109 (9th Cir. 2007) (Berzon, J., concurring), *vacated, Abebe* v. *Mukasey*, 514 F.3d 909 (9th Cir. 2008).

However, if LPRs with such convictions leave the country, they *can* seek Section 212(c) relief—either upon reentry if they are charged as inadmissible or *nunc pro tunc* if they are charged as deportable—as long as their conviction is for a crime that would make them inadmissible, such as a CIMT. *See Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956); *see also Lovan v. Holder*, 574 F.3d 990, 996 & n.5 (8th Cir. 2009) (noting that under the *nunc pro tunc* analysis, "the focus is on whether the [LPR] when he returned from a trip abroad was in fact excludable *for any reason*, including prior conviction of a crime involving moral turpitude").[12]

Third, the Ninth Circuit, in the fractured *Abebe* decision that also determined the outcome of Mr. Judulang's case, overruled decades of agency decisions and its own precedent to hold that Section 212(c) does not apply to deportable LPRs at all. App. 70a. Under that view, Section 212(c) relief should not even be available as a *nunc pro tunc* correction for deportable LPRs who traveled abroad between their convictions and the initiation of deportation proceedings. As the concurring and dissenting opinions in *Abebe* noted, the Ninth Circuit majority failed to observe *stare decisis*, ignored consistent agency practice applying Section 212(c) relief to deportable LPRs, and disregarded Congress's acceptance of that settled construction of the statute. *See* App. 72a-78a (Clifton, J., concurring in the judgment); App. 83a-94a (Thomas, J., dissenting). Moreover, the Ninth Circuit's position is irreconcilable with

[12] Although eight circuits have adopted *Blake*, those circuits heard less than 31% of the total number of petitions for review from the BIA in 2009, whereas the Second Circuit *alone* heard more than 21%. *See 2009 Annual Report* at Table B-3.

this Court's decision in *St. Cyr*, which arose out of the well-established availability of Section 212(c) relief to deportable LPRs like Messrs. St. Cyr and Judulang. *St. Cyr*, 533 U.S. at 293-296; *see also Abebe* v. *Holder*, 577 F.3d 1113, 1114 (9th Cir. 2009) (Berzon, J., dissenting from denial of full court rehearing) (Ninth Circuit's decision "conflict[s] with the necessary assumption" made by the Supreme Court in *St. Cyr*).[13]

II. THE NINTH CIRCUIT'S AND BIA'S DECISIONS INCORRECTLY AND UNCONSTITUTIONALLY RESTRICT THE SCOPE OF SECTION 212(C) RELIEF

Since 1956, the BIA has made Section 212(c) relief available *nunc pro tunc* to deportable LPRs who reentered after travel abroad, if the LPR was deportable for conduct that also made him excludable. *See G-A-*, 7 I. & N. Dec. at 276. The Ninth Circuit's *sua sponte* abandonment of that congressionally-accepted agency practice was error. And since 1976, deportable LPRs could seek relief provided their crime of conviction would have rendered them inadmissible had they left the country and reentered. *See Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976). The BIA's abandonment of that practice was not only error, but produced an unconstitutionally irrational distinction based on travel history.

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[13] The Fourth and D.C. Circuits have yet to address the question presented, but those courts hear only a tiny fraction of the total number of petitions for review from the BIA. Between September 30, 2005 and September 30, 2009, the Fourth Circuit heard less than 2.8% of all BIA appeals, and the D.C. Circuit heard only one in 2009. *See 2009 Annual Report* at Table B-3.

1. The Ninth Circuit did not even acknowledge the lengthy history of agency decisions granting relief from deportation under Section 212(c) and its predecessor, the Seventh Proviso to Section 3 of the Immigration Act of 1917. *See St. Cyr*, 533 U.S. at 294; *supra* pp. 5-6. The Ninth Circuit also ignored Congress's acquiescence in that practice: Section 212(c) was enacted in 1952, long after the Attorney General's decision in *Matter of L-*, 1 I. & N. Dec. 1, 5-6 (Att'y Gen. 1940), which applied the Seventh Proviso to provide relief to a deportable LPR who had previously traveled abroad, just as it would have applied if he had been placed in exclusion proceedings at the border. Congress is presumed to have been aware of that interpretation of the discretionary waiver as applicable to deportable LPRs. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

As the BIA explained shortly after Section 212(c)'s enactment, Congress conducted a "comprehensive study" of the Seventh Proviso before enacting Section 212, "[y]et there is nothing to indicate that Congress wished to cut off this unique relief in deportation proceedings." *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1955). Congress thus "effectively ratified" the BIA's practice of granting discretionary relief from deportation as well as from exclusion. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000); *see also Boeing Co.* v. *United States*, 537 U.S. 437, 456-457 (2003) (Congress's failure to override a seven-year-old regulation when amending relevant statutory provisions "serves as persuasive evidence that Congress re-

garded that regulation as a correct implementation of its intent").[14]

The Ninth Circuit's complete abandonment of Section 212(c) relief in all deportation cases is manifestly contrary to Congress's intent to continue in Section 212(c) the relief from *deportation* available under the Seventh Proviso, as well as to decades of agency and judicial application of Section 212(c). Indeed, under the Ninth Circuit's view, Mr. St. Cyr himself would have been ineligible for Section 212(c) relief.

2. The Court should also reject the BIA's novel approach in *Blake* and *Brieva-Perez*, which has been adopted in the majority of circuits. Before 2005, the BIA consistently held that an LPR deportable on the basis of an aggravated felony conviction for "sexual abuse of a minor" or a "crime of violence" was eligible for Section 212(c) relief if the underlying conviction would have been a basis for inadmissibility (*e.g.*, as a "crime involving moral turpitude" under INA §212(a)(2)(A)(i)). *See supra* nn.5-6. As recently as 2003, the BIA affirmed a grant of Section 212(c) relief to an LPR convicted of voluntary manslaughter, ruling that "a conviction for first degree manslaughter is considered to be a crime involving moral turpitude" and that

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[14] Although Congress imposed limits on Section 212(c) relief prior to its 1996 repeal, Congress never sought to limit it to excludable LPRs only. *See* Immigration Act of 1990, Pub. L. No. 101-649, §511, 104 Stat. 4978, 5052 (providing that LPRs convicted of aggravated felonies could seek Section 212(c) relief only if they did not serve a term of imprisonment of five years or more); 136 Cong. Rec. S6586, S6604 (daily ed. May 18, 1990) (statement of Sen. Dole) ("Section 212(c) provides relief from exclusion, and by court decision from deportation[.] This discretionary relief is obtained by numerous excludable and *deportable* aliens[.]" (emphasis added)).

the LPR was accordingly *not* precluded from seeking Section 212(c) relief. *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003).

In *Blake*, however, the BIA sought to eliminate Section 212(c) relief retroactively for most deportable LPRs by creating a new eligibility requirement: that the charged deportation provision use "similar language" to an inadmissibility provision. The BIA thus categorically foreclosed numerous previously eligible individuals from seeking Section 212(c) relief, even though relief *is* available *nunc pro tunc* to similarly situated persons who have left the country and reentered before the removal proceeding began.

The BIA's *Blake* decision creates an irrational distinction between deportable LPRs who have traveled abroad and reentered and deportable LPRs who have not, contrary to Section 212(c) as it has consistently been interpreted and contrary to equal protection. Following the Second Circuit's 1976 decision in *Francis*, the BIA and all of the courts of appeals agreed that deportable LPRs who had *not* departed and reentered were constitutionally entitled to the same treatment under Section 212(c) as LPRs who had. *Francis*, 532 F.2d at 273 (ruling that LPRs who had not traveled abroad were "in like circumstances, but for irrelevant and fortuitous factors," to LPRs who had and therefore should be "treated in a like manner"); *see supra* n.2. The BIA implemented *Francis* using the "statutory counterpart" test, which meant that Section 212(c) relief was available to LPRs who were deportable for a *conviction* that fell under a "counterpart" exclusion provision.

Section 212(c) relief was widely available to LPRs charged with being deportable on the basis of aggravated felony convictions, including convictions for

"crimes of violence," because most such convictions are also grounds for exclusion—"crimes involving moral turpitude" under INA §212(a)(2)(A)(i). The BIA and numerous circuit decisions recognized the proper application of Section 212(c) relief in such aggravated felony cases. *See supra* nn.5-6. Although Congress amended the INA after *Francis*, it has not cast doubt on that consistent interpretation of Section 212(c). *See supra* n.14; *see also Cabasug* v. *INS*, 847 F.2d 1321, 1327 (9th Cir. 1988) (Wallace, J., concurring) (explaining that it would violate equal protection "to distinguish between *aliens who had committed the same crime* on the basis of whether they traveled abroad recently" (emphasis added)).

After the repeal of Section 212(c), the BIA attempted to apply the repeal retroactively to LPRs who had pled guilty before the repeal was enacted. *E.g.*, *St. Cyr* v. *INS*, 229 F.3d 406, 409 (2d Cir. 2000) (observing that the BIA denied St. Cyr's application for Section 212(c) relief "specifically" because IIRIRA repealed that provision), *aff'd*, 533 U.S. 289 (2001). After this Court reversed that practice in *St. Cyr*, the BIA tried another tack, claiming for the first time that eligibility "turns on whether Congress has employed *similar language* to describe substantially equivalent categories of offenses." *Matter of Blake*, 23 I. & N. Dec. 722, 728 (BIA 2005) (emphasis added). While acknowledging that "there may be considerable overlap" between deportation provisions like "sexual abuse of a minor" and inadmissibility provisions like "crime[] involving moral turpitude," the BIA claimed that the "two categories of offenses [were] not statutory counterparts." *Id.*

The BIA has admitted that this was "a change in law." *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb.

22, 2008). It was also contrary to the settled interpretation of Section 212(c) acknowledged in the BIA's own decisions. The BIA never attempted to explain why differences in the wording of deportation and inadmissibility provisions—most of which were independently amended at different times—should control whether an LPR is eligible for Section 212(c) relief. *See Blake* v. *Carbone*, 489 F.3d at 102 ("Congress did not employ similar terms when writing the grounds of exclusion and grounds of deportation because it had no need to, making it an exercise in futility to search for similar language to gauge whether equal protection is being afforded."). Indeed, the BIA held decades ago that a waiver of *exclusion* based on a particular criminal conviction also waived any basis for *deportation* based on "the same criminal conviction," without regard to the language of the statutory subsections. *G-A-*, 7 I. & N. Dec. at 275; *see Abebe*, 493 F.3d at 1109 (Berzon, J., concurring).

The BIA's new approach draws an arbitrary and irrational line based on recent travel abroad. Deportable LPRs who pled guilty to a pre-1997 offense that qualifies as both a "crime of violence" aggravated felony and a "crime involving moral turpitude" may still seek Section 212(c) relief by invoking the *nunc pro tunc* procedure, provided they departed the country and reentered. But under *Brieva-Perez*, identically-situated LPRs who did *not* depart and reenter are categorically ineligible for relief. Making Section 212(c) relief turn on whether a person has or has not left the country, in the face of consistent and contrary judicial and agency decisions before 2005, is arbitrary and capricious. *See* 5 U.S.C. §706(2)(A). That is particularly the case given that Section 212(c) is designed to *favor* those LPRs who have strong ties to the United States. *See Francis*, 532

F.2d at 273; *see also Rosario* v. *INS*, 962 F.2d 220, 225 (2d Cir. 1992) (noting the government's position that Section 212(c)'s purpose is to provide relief to "aliens who have developed such strong ties to this country that exclusion or deportation would be unjustly harsh" (internal quotation marks omitted)).[15]

The BIA's new approach is also inconsistent with the guarantee of equal protection in the Due Process Clause of the Fifth Amendment, which protects LPRs as well as citizens. *Mathews* v. *Diaz*, 426 U.S. 67, 77-78 (1976); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896). The BIA may not make discretionary waivers of deportation available only to a subcategory of similarly situated deportable LPRs on the basis of an irrational classification, such as travel history. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation ... will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886) ("Though the law itself be fair on its face ... if it is applied and

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[15] *Blake* is also arbitrary and capricious in that it gives the government an exclusive right to determine whether Section 212(c) relief will be available in many cases. A criminal conviction can often render an individual deportable under more than one provision—here, for instance, Mr. Judulang's manslaughter conviction was charged as both a "crime involving moral turpitude" (waivable under *Blake*) and a "crime of violence" (not waivable under *Blake* and *Brieva-Perez*). App. 33a-34a. The BIA's new rule places Section 212(c) eligibility entirely under the government's control; in some cases, LPRs who would have been eligible for a Section 212(c) waiver if the government had chosen to assert a criminal conviction as a CIMT are deemed ineligible because the government opts to charge it as an aggravated felony. *See Dalombo Fontes* v. *Gonzales*, 483 F.3d 115, 122 (1st Cir. 2007); *see also Kim*, 468 F.3d at 62-63.

administered by public authority ... so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

The Second Circuit's approach, by contrast, is faithful to the BIA's longstanding and accepted interpretation of Section 212(c), and it avoids the irrational distinction inherent in the BIA's new approach. As the Second Circuit held, an LPR should be eligible to apply for Section 212(c) relief "if his or her particular aggravated felony offense could form the basis of exclusion under §212(a) as a crime of moral turpitude." *Blake* v. *Carbone*, 489 F.3d at 104.

That approach, which the BIA and the courts followed for nearly thirty years under *Francis*, does not create any distinction based on departure from the United States. Rather, it simply continues the long-accepted rule that an LPR who would be entitled to seek relief *nunc pro tunc* from deportation, had he departed, remains eligible if he did not depart. *See, e.g.*, *Matter of Fuentes-Campos*, 21 I. & N. Dec. 905, 913 (BIA 1997) ("In *Francis* ... [the Second Circuit] concluded that the Board violated the constitutional requirement of equal protection when it permitted one alien in deportation proceedings to apply for a waiver but denied permission to another alien in deportation proceedings, based solely on the fact that one had departed and returned prior to the deportation proceedings while the other had not.").[16]

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[16] The Ninth Circuit suggested that a rational distinction existed between deportable LPRs and inadmissible LPRs. *Abebe*, App. 67a-68a. But that is the wrong comparison. The correct

The Second Circuit accordingly directed the BIA to determine whether the LPR's conviction was a "crime involving moral turpitude" that would have been waivable *nunc pro tunc* had he departed the United States and reentered and, if it was, to consider the Section 212(c) application on the merits. *Blake* v. *Carbone*, 489 F.3d at 105. The BIA's failure to do likewise in Mr. Judulang's case was arbitrary and capricious, inconsistent with the settled interpretation of Section 212(c), and unconstitutional.[17]

3. The BIA's *Blake* decision was also an improper retroactive application of an erroneous interpretation of the 2004 DOJ regulation, which sought to implement *St. Cyr*, not to confine it. The regulation provides that Section 212(c) relief "shall be denied if ... [t]he alien is deportable under former section 241 of the Act or removable under [S]ection 237 of the Act on a ground which does not have a statutory counterpart in [S]ection 212 of the Act." 8 C.F.R. §1212.3(f)(5). On its face, this regulation is consistent with the BIA's prior rulings that an LPR deportable for an aggravated felony conviction was eligible for Section 212(c) relief if the *conviction* would also fall under a counterpart inadmissibility provision.

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comparison is between two groups of *deportable* LPRs: one group that has left the country and reentered following conviction, and one that has not. *Blake* v. *Carbone*, 489 F.3d at 95; *Francis*, 532 F.2d at 273. To Petitioner's knowledge, neither the government nor the BIA has ever suggested any rational basis for treating the latter group *less* favorably than the former group.

[17] On remand from the Second Circuit, an IJ found Mr. Blake eligible for a Section 212(c) waiver and granted relief. The government did not appeal.

In *Blake*, the BIA purported to interpret the regulation differently, not based on anything in the regulation itself, but on an anonymous commenter's opinion, cited in the preamble to the final regulation, that Section 212(c) relief should be denied " 'if there is no comparable ground of inadmissibility for the specific *category* of aggravated felony charged. ... [F]or example, the rule should not apply to aggravated felons charged with deportability under specific types or categories of aggravated felonies such as "*Murder, Rape, or Sexual Abuse of a Minor*" or "*Crime of Violence*" aggravated felonies.' " 23 I. & N. Dec. at 726 (quoting 69 Fed. Reg. 57,826, 57,831 (Sept. 28, 2004)).

The commenter misinterpreted the statutory counterpart test by focusing on the category of aggravated felony charged rather than the underlying offense. The commenter did not identify a single decision forbidding an LPR with a conviction in any of the identified aggravated felony categories from seeking Section 212(c) relief. As noted above, the statutory counterpart rule affected LPRs with convictions for firearms offenses or entry without inspection. *See supra* nn.3-4; *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991), *aff'd without op.*, 983 F.2d 231 (5th Cir. 1993). And contrary to the commenter's assertion, Section 212(c) can be used to waive deportation for crimes such as murder and rape, although such serious offenses require a heightened showing in order to warrant a favorable exercise of discretion. *See* 6 Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure* §74.04[1][a], [2][g] (2007).[18]

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[18] The DOJ, in the "supplementary information" accompanying the final regulation, agreed that " 'an alien who is deportable or

But even if the commenter's interpretation were correct and constitutional (and it is neither), the BIA cannot use an adjudicatory proceeding to apply a regulation retroactively, when no statutory or regulatory language envisions retroactive application. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208-209 (1988) ("[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result.... Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.").

III. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL AND CONTINUING IMPORTANCE TO NUMEROUS LEGAL PERMANENT RESIDENTS

The LPRs most affected by the BIA's decision in *Blake* include many who have strong claims for a discretionary waiver of removal. As this Court has observed, Section 212(c) relief is granted based on criteria including "the seriousness of the offense, evidence of either rehabilitation or recidivism, the duration of the alien's residence, the impact of deportation on the family, the number of citizens in the family, and the character of any service in the Armed Forces." *St. Cyr*, 533 U.S. at 296 n.5 (citing *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978)). Mr. Judulang's immediate family, including his daughter, two sisters, and elderly mother are U.S. citizens and live in Southern California. He

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removable on a ground that does not have a corresponding ground of exclusion or inadmissibility is ineligible for section 212(c) relief.' " *Blake*, 23 I. & N. Dec. at 726-727 (quoting 69 Fed. Reg. at 57,831). It did not, however, take any position on the commenter's enumeration of the various offenses that the commenter believed lacked a statutory counterpart.

has continuously resided in this country since the age of eight. Since his release on bond, Mr. Judulang has continued to work to support himself and his family.

Mr. Judulang is not alone. Because deportable "aggravated felony" offenses have been defined broadly and "without regard to how long ago they were committed[,] ... the class of aliens whose continued residence in this country has depended on their eligibility for §212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for §212(c) relief have been granted." *St. Cyr*, 533 U.S. at 295-296 (noting that from 1989 to 1995, "§212(c) relief was granted to over 10,000 aliens"). Despite its repeal in 1996, Section 212(c) continues to provide critical relief to numerous LPRs who were convicted of a crime long ago, but are otherwise deserving members of their local United States communities. *See id.* at 296 n.6 (noting increased importance of Section 212(c) relief following 1996 expansion of "aggravated felony" definition to include "more minor crimes which may have been committed many years ago"). The pernicious effects of *Blake* are most obvious in cases where Section 212(c) relief was first granted, then rescinded after *Blake*. *See supra* p. 12.

Petitioner does not contend that he has a legal *right* to relief; Section 212(c) remains and has always been a discretionary provision. But he does have a right to have the agency exercise that discretion following an evidentiary hearing on the merits—a hearing that he was entitled to prior to the BIA's retroactive "change in law." *Cardona*, 2005 WL 3709244. Absent this Court's intervention, numerous deserving legal immigrants like Mr. Judulang will be unlawfully denied relief from removal based only on an accident of geography—the jurisdiction in which their immigration pro-

ceedings happen to be held. *See* App. 95a-105a (non-exhaustive list of cases affected by BIA's decision in *Blake*).

Although this issue has been presented in recent petitions for certiorari, they have proven to be unsuitable vehicles. At the time of the petition in *Gonzalez-Mesias* v. *Holder*, 129 S. Ct. 2042 (2009), the Eleventh Circuit had not yet addressed the issue and the Ninth Circuit was still considering the petition for full court rehearing in *Abebe*. The petitions in *De la Rosa* and *Abebe* would have triggered Justice Kagan's recusal under 28 U.S.C. §455(b)(3), which counseled against certiorari. *See, e.g., Microsoft Corp.* v. *United States*, 530 U.S. 1301, 1303 (2000) (statement of Rehnquist, C.J.) (in cases of recusal, "[n]ot only is the Court deprived of the participation of one of its nine Members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court"). This case raises none of these issues and is accordingly a proper vehicle for resolving this pressing question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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