No. 00-164

In the Supreme Court of the United States

RICARDO LOPEZ-ELIAS, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals properly dismissed for lack of subject matter jurisdiction under 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) petitioner's petition for review of his final removal order on the ground that petitioner was removable by reason of having committed an aggravated felony.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 209 F.3d 788. The decisions of the immigration judge (Pet. App. 16-19) and the Board of Immigration Appeals (Pet. App. 10-15) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2000. The petition for a writ of certiorari was filed on July 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress enacted several major changes to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Those changes were designed, in large part, to reduce the opportunities for criminal aliens to obtain administrative relief from removal, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their removal orders. Of particular relevance to this case are the new provisions for judicial review of removal orders enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996), as amended by Act of October 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657. See generally 8 U.S.C. 1252 (Supp. IV 1998).

Under the judicial review scheme prescribed by IIRIRA, judicial review of a final order of removal is by way of petition for review in the court of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998). The IIRIRA amendments provide, however, that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a criminal offense covered in, *inter alia*, 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). Section 1227(a)(2)(A)(iii) provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission" is deportable and, upon order of the Attorney General, "shall * * * be removed" from the United States. 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). The term "aggravated felony," in turn, is defined at 8 U.S.C. 1101(a)(43) (Supp. IV 1998) to include, *inter alia*,

> (F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year; [and]
>
> (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year.

2. Petitioner is a native and citizen of Mexico who was admitted to the United States as a lawful permanent resident in 1964. Pet. App. 16. On June 4, 1985, petitioner was charged in Texas state court with burglary of a vehicle, in violation of Texas Penal Code Annotated § 30.04 (West 1987). The indictment charged that petitioner did "knowingly and intentionally break into and enter a vehicle, without the effective consent of * * * the owner thereof, * * * with the intent to commit theft." C.A.R. (Certified Administrative Record) 203; Pet. App. 5, 16.[1] On July 11, 1985, petitioner was convicted and sentenced to four years' imprisonment. The sentence was suspended, and petitioner was released on probation. C.A.R. 201. Subsequently, on October 20, 1989, the sentencing court determined that petitioner had successfully completed his probation, and it entered an order setting aside petitioner's judgment

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[1] At the time petitioner committed his crime, a person was deemed to have committed burglary of a vehicle under Texas law "if, without the effective consent of the owner, he *breaks into or enters* a vehicle or any part of a vehicle with intent to commit *any felony or theft*." Tex. Penal Code Ann. § 30.04(a) (West 1987) (emphasis added). As noted in the text, however, the indictment charged that petitioner broke *and* entered into the vehicle, and that he did so with intent to commit theft. See also p. 8 n.4, *infra*.

of conviction and dismissing the indictment. *Id.* at 200; Pet. App. 16.

3. On December 17, 1998, the Immigration and Naturalization Service (INS) served petitioner with a Notice to Appear in removal proceedings. The Notice charged that petitioner was subject to removal as an aggravated felon under Section 1227(a)(2)(A)(iii), "in that, at any time after admission, you have been convicted of an aggravated felony as defined in [8 U.S.C. 1101(a)(43) (Supp. IV 1998)], to wit: a crime of violence * * * for which the term of imprisonment imposed was one year or more." C.A.R. 255. Petitioner moved for a more definite statement, and the INS responded by amending the Notice on March 25, 1999, to charge that petitioner was subject to removal as an aggravated felon under Section 1227(a)(2)(A)(iii), "in that, at any time after admission you have been convicted of an aggravated felony as defined in [8 U.S.C. 1101(a)(43) (Supp. IV 1998)], ***specifically subsection (G), a theft offense or burglary offense for which the term of imprisonment is at least 1 year***." C.A.R. 204 (emphasis in original). The amended Notice omitted the prior reference to a "crime of violence" and made no mention of Section 1101(a)(43)(F) in describing the charge for which petitioner was subject to removal.

On April 19, 1999, after a hearing, an immigration judge (IJ) found that petitioner was an aggravated felon under 8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998) and therefore ordered that he be removed from the United States. Pet. App. 17, 19. The IJ first noted that, although the INS's original charge specified that petitioner was an aggravated felon as defined in Section 1101(a)(43) without reference to any particular subsection thereof (but with reference to a "crime of violence"), the INS amended the charge in response to

petitioner's demand for clarification to refer only to subsection (G) of Section 1101(a)(43), which refers to burglary or theft. See *id.* at 17. The IJ nonetheless pointed out, with regard to subsection (F) (crime of violence), that under Fifth Circuit precedent, "[b]urglary of a vehicle has been held to be a crime of violence and an aggravated felony if a sentence of a year or more is imposed." *Ibid.* With regard to subsection (G) (theft or burglary), the IJ concluded that petitioner's crime could be characterized as either a theft offense or a burglary offense. *Id.* at 17-18. The IJ then noted that if proceedings were terminated under subsection (G), they could immediately be reinstituted as one controlled by subsection (F) because of the Fifth Circuit decisions concerning crimes of violence. *Id.* at 18.

4. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 10-15. The BIA first addressed whether the IJ had erred in finding petitioner removable as an aggravated felon under the subsection (F) "crime of violence" theory because the INS had amended the Notice to Appear to charge petitioner with removability only under subparagraph (G). *Id.* at 13. The BIA concluded that, because the INS had amended its charge, the IJ's discussion relating to petitioner's removability under subparagraph (F) was "not properly before [the Board]." *Ibid.*

With regard to the subsection (G) charge, the BIA first noted, but did not address in detail, the question whether burglary of a vehicle is properly considered a "burglary offense" under federal immigration law. Pet. App. 14.[2] The BIA then focused its analysis on whether

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[2] The BIA has since concluded that the Texas offense of burglary of a vehicle is not a "burglary offense" covered by the

petitioner's offense was a "theft offense." The BIA observed that the indictment in petitioner's case charged him specifically with breaking and entering the vehicle with intent to commit theft, and that petitioner had admitted that he stole a battery and a radio from the car. *Ibid.* The BIA also stated that "the term 'theft offense' is broader than the term 'theft'; that is, it incorporates violations other than those which are formally labeled theft." *Id.* at 14-15. The BIA therefore ruled that petitioner's burglary conviction constituted a conviction for a theft offense within the meaning of subsection (G) of Section 1101(a)(43). *Id.* at 14.

5. Petitioner filed a petition for review of his removal order in the court of appeals pursuant to 8 U.S.C. 1252(a)(1) (Supp. IV 1998).[3] The government moved to dismiss for lack of subject matter jurisdiction on the ground that Section 1252(a)(2)(C) deprived the court of jurisdiction to review the final order of removal because petitioner was "removable by reason of having committed" an aggravated felony. The government argued that the court lacked jurisdiction because petitioner's conviction for burglary of a vehicle constituted a "theft offense" and was therefore an aggravated felony under Section 1101(a)(43)(G). See Gov't Mot. to Dismiss 7-13. The government also argued (*id.* at 13-16) that petitioner's offense was properly classified as an aggra-

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definition of "aggravated felony" in subsection (G) of Section 1101(a)(43). See *In re Perez*, Interim Dec. No. 3432 (June 6, 2000).

[3] On December 2, 1999, petitioner was removed to Mexico. That removal, however, does not moot this case. Although 8 U.S.C. 1105a(c) (1994) previously precluded judicial review of a deportation order once the alien departed from the United States, the new judicial review provision of the INA that was enacted in IIRIRA, 8 U.S.C. 1252 (Supp. IV 1998), does not preserve that restriction on judicial review.

vated felony as a "crime of violence" under settled Fifth Circuit precedent. Petitioner filed a short response to the government's motion in which he objected to the government's characterization of his offense as a theft offense, but he did not address the government's alternative argument that his offense was a crime of violence.

The court of appeals granted the government's motion and dismissed the petition for lack of jurisdiction. Pet. App. 1-9. The court first noted that, notwithstanding Section 1252(a)(2)(C)'s preclusion of review of petitions challenging removal orders against aliens who are removable by reason of having committed an aggravated felony, the court retains threshold jurisdiction to review jurisdictional facts that are material to the application of the preclusion of review in Section 1252(a)(2)(C), including whether the petitioner is indeed an alien who is removable by reason of having committed an aggravated felony. *Id.* at 3 & n.3.

The court then concluded that petitioner's conviction for burglary of a vehicle was neither a "theft offense" nor a "burglary offense" under subsection (G) of Section 1101(a)(43). With respect to the "theft offense" theory (on which the BIA had relied), the court stated only that petitioner's conviction "did *not* require a finding that he had actually committed theft; mere intent to commit was sufficient." Pet. App. 5. Nor, the court held, had petitioner committed a "burglary offense." Following this Court's decision in *Taylor* v. *United States*, 495 U.S. 575, 598 (1990), the court concluded that "[w]hen Congress deploys the term 'burglary' without specifying a definition, a generic understanding of the word based on the modern usage of the states, rather than the common law definition, should be used," Pet. App. 6, and that the generic understanding of

"burglary" includes only burglary of a structure, not burglary of a vehicle, *id.* at 7.

The court nonetheless concluded that petitioner's offense was an aggravated felony because, it stated, under settled Fifth Circuit case law, burglary of a vehicle is "a crime of violence" and therefore an "aggravated felony" under subsection (F) of Section 1101(a)(43). Pet. App. 7.[4] The court acknowledged that the INS "did not actually pursue removal proceedings on this ground," but held that it lacked jurisdiction over petitioner's challenge because petitioner had in fact been convicted of a crime of violence and therefore was

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[4] The court of appeals relied on previous criminal cases construing the term "aggravated felony" under Sentencing Guidelines § 2L1.2(b)(1)(A), which refers to the definition of "aggravated felony" in Section 1101(a)(43), to include various crimes, including burglary of a vehicle. See Pet. 7 n.15. The Seventh and Ninth Circuits, however, have concluded that the offense of burglary of a vehicle is not a "crime of violence" (and therefore not an aggravated felony) rendering an alien removable if the offense is defined to include situations where the burglary does not involve a substantial risk of force or violence or is not accomplished through the use of force or violence—such as entering (but not breaking) the vehicle—and the charging papers and judgment of conviction do not show that force or violence was involved. See *Ye* v. *INS*, 214 F.3d 1128, 1134 (9th Cir. 2000); *Solorzano-Patlan* v. *INS*, 207 F.3d 869, 875-876 (7th Cir. 2000). In this case, although petitioner was charged with breaking *and* entering into a vehicle, see p. 3, *supra*, the judgment of conviction does not show whether the facts of the case involved breaking. As we have pointed out above (see p. 7, *supra*), however, petitioner did not raise any issue concerning the characterization of his offense as a "crime of violence" in the court of appeals, and he likewise does not present as a basis for review in this Court any question concerning a disagreement among the circuits as to whether burglary of a vehicle is a "crime of violence" under the INA. This case therefore does not warrant the Court's plenary review on that basis.

removable for having committed an aggravated felony. *Id.* at 7-8. The court noted that Section 1252(a)(2)(C) deprives it of jurisdiction to review any final order of removal against an alien "who *is removable* by reason of having committed" an aggravated felony. *Id.* at 8 (emphasis in original). "What the INS originally charged is of no consequence; so long as the alien in fact is removable for committing an aggravated felony, this court has no jurisdiction, irrespective of whether the INS originally sought removal for that reason." *Ibid.*

DISCUSSION

The court of appeals in this case rejected the theories of removability on which the INS actually proceeded against petitioner (namely, that he was convicted of an aggravated felony under subsection (G) of 8 U.S.C. 1101(a)(43) (Supp. IV 1998) because his crime was a burglary offense and a theft offense) and the sole basis on which the BIA actually found petitioner removable (that he was convicted of a theft offense). The court nonetheless ruled that it lacked jurisdiction over petitioner's petition for review because, it concluded, petitioner's conviction was a "crime of violence" under controlling Fifth Circuit precedent and was therefore properly classified as an aggravated felony under subsection (F) of Section 1101(a)(43). The court of appeals dismissed petitioner's challenge to his removal order based on that conclusion, even though the INS had withdrawn its charge that petitioner was subject to removal as an aggravated felon based on his having been convicted of a crime of violence and the final order of removal entered by the BIA did not rest on that ground.

Petitioner did not raise any objection to the government's motion to dismiss his petition for review in the

court of appeals on the ground that his offense constituted a crime of violence under subsection (F) of Section 1101(a)(43), and it accordingly would be appropriate for the Court to deny certiorari on that ground. Moreover, although petitioner contends (Pet. 9-10) that the court of appeals' invocation of the jurisdictional bar in Section 1252(a)(2)(C), based on his removability under subsection (F), violated due process, he does not contend that there were any disputed *factual* issues on the question whether his burglary of a vehicle constituted a crime of violence, such that he was entitled to an opportunity for a hearing on that question before the IJ, the BIA, or the court. The court of appeals, following circuit precedent that also had been cited by the IJ, simply concluded that his offense was a crime of violence as a *legal* matter. Petitioner had a full opportunity to contest that legal issue in the court of appeals, in response to the government's motion to dismiss his petition for review under the jurisdictional bar in Section 1252(a)(2)(C), but he failed to do so. Accordingly, we do not perceive any substantial due process objection to the decision below.

Nevertheless, for the reasons set forth below, in the particular circumstances of this case, we suggest that the Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further proceedings.

1. Section 1252(a)(2)(C) of Title 8 provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in" various provisions of the INA, including Section 1227(a)(2)(A)(iii), which provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." The court of appeals

reasoned that petitioner was "removable" by reason of having committed an aggravated felony because petitioner committed burglary of a vehicle, which, it further concluded, was a "crime of violence" as a matter of law under circuit precedent and was therefore an aggravated felony (which is defined to include certain crimes of violence, see 8 U.S.C. 1101(a)(43)(F) (Supp. IV 1998)). Although the court acknowledged that the INS did not proceed against petitioner on that ground, it concluded that "[w]hat the INS originally charged is of no consequence," since Section 1252(a)(2)(C) speaks to the jurisdiction of the courts, which is the responsibility of the courts, rather than the INS or the BIA, to ascertain. See Pet. App. 8.

We agree with the court of appeals that Section 1252(a)(2)(C) defines the jurisdiction of the courts, and that the courts are ultimately responsible for determining the reach of that jurisdiction. Thus, the government has argued (and the courts of appeals have generally agreed) that, if the BIA has concluded that an alien is removable based on a ground specified in the INA that would also preclude judicial review of the alien's removal order under Section 1252(a)(2)(C) (for example, a conviction for an aggravated felony), a court of appeals has the authority, on the alien's petition for review, to determine whether that statutory ground is properly applied to that case so as to trigger the jurisdictional bar in Section 1252(a)(2)(C). See Pet. App. 3 & n.3.[5] For example, if the BIA concludes (as it did in this case) that an alien is removable based on an aggravated-felony conviction because he was convicted

[5] See *Sousa* v. *INS*, 226 F.3d 28, 31-32 (1st Cir. 2000); *Solorzano-Patlan*, 207 F.3d at 871; *Aragon-Ayon* v. *INS*, 206 F.3d 847, 850-851 (9th Cir. 2000).

of a theft offense, the court of appeals has authority to determine whether the offense of conviction actually is a "theft offense" (and therefore an aggravated felony) within the meaning of the INA—with due regard for the BIA's principal responsibility in construing the terms of the INA. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); 8 U.S.C. 1103(a)(1) (1994 & Supp. IV 1998) (providing that "[t]he Attorney General shall be charged with the administration and enforcement" of the INA and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling").

The court of appeals concluded in this case that, even though the BIA expressly did not decide whether petitioner is removable for having been convicted of a crime of violence (see Pet. App. 13), the court should ascertain for itself whether petitioner's offense was a crime of violence because Section 1252(a)(2)(C) provides that no court shall have jurisdiction to review a final order of removal in any case in which the alien is "removable" for having committed an "aggravated felony," which is defined to include certain crimes of violence. Whatever the scope of the jurisdictional bar in Section 1252(a)(2)(C) may be in other settings, however, on further reflection we do not believe it should have been invoked either by the INS or the court in the particular circumstances of this case. A court of appeals should not dismiss a petition for review based on a theory of removability that the INS specifically omitted from the charge in response to the alien's motion for a more definite statement and that the BIA specifically declined to address for that reason—at least where, as here, the criminal offense that did form the basis of the removability charge filed by the INS and sustained by the BIA was found by the court of appeals not to

independently support the order of removal on another ground that would deprive the court of jurisdiction under Section 1252(a)(2)(C). The INA vests principal responsibility for determining whether an alien is removable in the Attorney General, see 8 U.S.C. 1229a(a) (Supp. IV 1998), and institutional considerations counsel that a reviewing court in these circumstances should not adopt and proceed under a theory of removability that both the INS and BIA eschewed in administrative proceedings.

2. We do not suggest that the court of appeals never has authority to conclude, on petition for review, that an alien's offense was an "aggravated felony"—and that the court therefore should dismiss the petition for review—even if the BIA has not specifically determined that the alien is removable based on one of the classes of offenses covered by the INA's definition of "aggravated felony." For example, a court may properly conclude that an alien is "removable" based on an aggravated felony conviction, and may therefore dismiss the petition for review under Section 1252(a)(2)(C), where (1) the BIA has properly found an alien removable on a particular basis, (2) the INA provides that the conviction for which the alien was found removable would *also* render the alien removable as an aggravated felon, and (3) the BIA has not rejected a charge of removability on that aggravated-felony theory.

That was the situation in *Abdel-Razek* v. *INS*, 114 F.3d 831 (9th Cir. 1997), on which the court of appeals relied in this case, see Pet. App. 8 n.17. There the alien was arrested seven months after his entry in 1995 for stabbing a man to death. He pled guilty to voluntary manslaughter and was sentenced to 11 years in prison. In 1995, the BIA entered an order of deportation

against him. 114 F.3d at 832. Although the Ninth Circuit's decision does not state the specific theory on which the INS brought its charge and the BIA found Abdel-Razek deportable, it appears that he was deportable under 8 U.S.C. 1251(a)(1)(A) (1994), which applied to any alien who committed a crime involving moral turpitude within five years of entering the United States. See *In re Pataki*, 15 I. & N. Dec. 324, 326 (B.I.A. 1975) (voluntary manslaughter is crime involving moral turpitude). While Abdel-Razek's petition for review was pending, new legislation took effect that —like the current 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998), at issue in this case—precluded the courts of appeals from reviewing petitions for review at the behest of aliens convicted of aggravated felonies. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(c), 110 Stat. 1277 (amending 8 U.S.C. 1105a(a)(10) (1994)). Because the court of appeals determined that Abdel-Razek's manslaughter conviction was by definition an aggravated felony,[6] and because there was no basis for otherwise questioning the theory on which the removal order was entered against him, the court properly dismissed Abdel-Razek's petition for review.

In *Briseno* v. *INS*, 192 F.3d 1320 (9th Cir. 1999), the alien was charged with deportability and found deportable based on two convictions for crimes involving moral turpitude: one for petty theft, and one for forcible oral copulation and sodomy. See 8 U.S.C.

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[6] The BIA has concluded that manslaughter is a crime of violence. See *In re Alcantar*, 20 I. & N. Dec. 801 (1994). It therefore is an aggravated felony under 8 U.S.C. 1101(a)(43)(F) (1994 & Supp. IV 1998) if the term of imprisonment exceeds a certain duration (which it did in *Abdel-Razak*).

1227(a)(2)(A)(ii) (Supp. IV 1998) (deportation for two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct). The INS did not charge Briseno with an aggravated felony based on his forcible sexual conduct offense, and the BIA did not specifically find him deportable on that basis, but the court nonetheless concluded that Briseno's forcible sexual conduct offense was an aggravated felony that deprived it of jurisdiction. The court of appeals thus simply added the legal characterization of "aggravated felony" to a conviction that otherwise supported a deportation order. In this case, by contrast, the court of appeals rejected the two other theories on which the INS had proceeded against petitioner, and so petitioner's removal order could not be sustained in the court of appeals except by reference to the "crime of violence" ground that the INS and the BIA had declined to adopt.

Similarly, in *Mendez-Morales* v. *INS*, 119 F.3d 738 (8th Cir. 1997), the BIA found the alien excludable based on his having been convicted of a crime involving moral turpitude, namely, first-degree sexual assault of a minor. See 8 U.S.C. 1182(a)(2)(A)(i)(I) (1994 & Supp. IV 1998) (alien excludable if convicted of a crime involving moral turpitude). While the alien's petition for review was pending, Congress expanded the definition of "aggravated felony" to include sexual abuse of a minor and made that expanded definition applicable to pending cases. See 8 U.S.C. 1101(a)(43)(A) (Supp. IV 1998). Because the crime forming the basis of Mendez-Morales' deportation order had thereby been defined also to be an aggravated felony, the court of appeals dismissed the petition for review. 119 F.3d at 739.

In our view, those decisions stand for the proposition that, where an alien has been properly found removable

by the BIA based on one ground of removability, and, in addition, the criminal offense that forms the basis of the alien's removal order is also properly classified as an aggravated felony as a legal matter, the court of appeals should dismiss the petition for review under the jurisdictional bar in Section 1252(a)(2)(C).[7] We agree

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[7] Those cases are therefore unlike *Choeum* v. *INS*, 129 F.3d 29 (1st Cir. 1997), and *Xiong* v. *INS*, 173 F.3d 601 (7th Cir. 1999), on which petitioner relies (Pet. 6-8). In *Choeum*, the BIA ruled that the alien was deportable based on her conviction for kidnaping, which the BIA has held to be a crime involving moral turpitude (but which, under the applicable law governing at the time, was not an aggravated felony, see 129 F.3d at 37). The court of appeals rejected the INS's submission that the court's jurisdiction was precluded because Choeum had also been convicted of burglary, which offense, the INS contended, was on the facts of that case a "firearms offense" depriving the court of jurisdiction under a statutory preclusion of review. See *id.* at 37-38. The court stressed that the INS's charges against Choeum did not mention the burglary conviction in either the factual allegations or the grounds for deportability, *id.* at 35-36, and concluded that the INS may not "substitute new grounds for deportation at [the judicial review] stage in the proceedings, solely for the purposes of depriving the federal courts of jurisdiction," *id.* at 40. In *Xiong*, the alien was convicted of statutory rape, and the BIA held that he had been convicted of a crime of violence. The court of appeals rejected the BIA's conclusion that the crime was one of violence. 173 F.3d at 605-607. The court also rejected the government's submission that the offense was an aggravated felony on the alternative ground that it involved sexual abuse of a minor (see 8 U.S.C. 1101(a)(43)(A) (Supp. IV 1998)), stressing that Xiong had never had the opportunity to challenge the classification of his offense as sexual abuse of a minor. 173 F.3d at 608.

Choeum and *Xiong* are distinguishable from *Abdel-Razek*, *Briseno*, and *Mendez-Morales*, discussed in the text, because they do not involve a situation where the court simply determined that a legal classification ("aggravated felony") was properly attached to a conviction that otherwise formed an independent and correct

with those decisions. We have concluded, however, that this case is different and that the jurisdictional bar should not have been invoked in a manner that leaves the final order of removal against petitioner unreviewed and therefore fully in effect. To be sure, the INS charged petitioner with removability based on an "aggravated felony" conviction. But as we have explained, the legal classification that the INS and the BIA employed to characterize petitioner's offense as an aggravated felony was entirely different than the one relied on by the court (which had been specifically dropped by the INS), and the grounds that were relied upon by the INS and the BIA to conclude that petitioner was an aggravated felon and therefore removable from the United States were rejected by the court. The consequence of applying the jurisdictional bar in these circumstances is that the court of appeals essentially held that the final order of removal could not be sustained on the only grounds that were relied upon by the agency, but proceeded to dispose of the case in a manner that effectively sustained the order on a ground that was not only not relied upon but was withdrawn by the agency. That result is in considerable tension with established principles of judicial review of agency action, see *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), and we do not believe that Section 1252(a)(2)(C) should be construed to require it.

The application of the jurisdictional bar in the unusual circumstances of this case presents no question of broad importance warranting plenary review by this Court. And, as we have said (see pp. 10-11, *supra*),

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basis for the BIA's deportation order. Because there thus is no conflict among the circuits, we do not believe that this issue warrants the Court's plenary review.

because petitioner did not raise the "crime of violence" issue in the court of appeals, this Court might appropriately deny review on that ground. But because the government specifically dropped the charges under subsection (F) in the administrative proceedings but then relied on subsection (F) in the court of appeals in successfully moving to dismiss the petition for review, we suggest that the Court grant the petition, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further proceedings in light of the position set forth in this brief.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for further proceedings in light of the position set forth in this brief. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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