No. 05-1032

In the Supreme Court of the United States

ORJI IBE OTAH, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals lacked jurisdiction to decide whether petitioner's conviction of laundering the proceeds of narcotics transactions was a serious drug offense, such that the immigration judge could require petitioner to show unusual or outstanding equities to obtain discretionary relief from deportation.

2. Whether petitioner's conviction of laundering the proceeds of narcotics transactions was a serious drug offense, such that the immigration judge could require petitioner to show unusual or outstanding equities to obtain discretionary relief from deportation.

3. Whether the immigration judge correctly balanced the equities in deciding that petitioner was not entitled to discretionary relief from deportation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 5a) and the immigration judge (Pet. App. 6a-24a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2005. The petition for a writ of certiorari was filed on February 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under Section 237(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1227(a) (2000 & Supp. II 2002), several classes of aliens are subject to deportation, including those who have been convicted of certain

criminal offenses, 8 U.S.C. 1227(a)(2). Under Section 237(a)(2)(B)(i), 8 U.S.C. 1227(a)(2)(B)(i), an alien is deportable if, at any time after admission, he has been convicted of a violation of a law or regulation "relating to a controlled substance" (as defined in 21 U.S.C. 802), other than a single offense involving possession for personal use of 30 grams or less of marijuana.

b. Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was construed to apply to deportation proceedings as well. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). When making a discretionary determination under Section 212(c), an immigration judge "balance[d] the positive and negative factors of an individual case." *In re Burbano*, 20 I. & N. Dec. 872, 876 (BIA 1994). An alien convicted of a "serious drug offense" was required to show "unusual or outstanding equities." *Id*. at 879.

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make categorically ineligible for discretionary relief aliens deportable by reason of having been convicted of certain offenses, including an offense relating to a controlled substance. See Pub. L. No. 104-132, § 440(d), 110 Stat. 1277. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress repealed Section 212(c), see Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a form of discretionary relief known as cancellation of removal. In *INS* v. *St. Cyr*, *supra*, this Court held

that, notwithstanding AEDPA and IIRIRA, Section 212(c) relief remains available to an alien convicted of a covered offense through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief under that section.

c. Judicial review of orders of removal is governed by 8 U.S.C. 1252. Under subsection (a)(2)(B) of Section 1252, no court has jurisdiction to review a denial of discretionary relief from removal, and under subsection (a)(2)(C), no court has jurisdiction to review a final order of removal against an alien removable by reason of having been convicted of certain offenses, including an offense relating to a controlled substance. Subsection (a)(2)(D), however, which was added by the REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, Tit. I, § 106, 119 Stat. 310, provides that those subsections do not "preclud[e] review of constitutional claims or questions of law raised upon a petition for review."

2. Petitioner is a native and citizen of Nigeria. He entered the United States in 1987 and ultimately became a lawful permanent resident. He was thereafter charged with money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (B)(I) (1994), in an information alleging the laundering of proceeds of narcotics transactions. In 1994, petitioner pleaded guilty to the charge and was sentenced to a prison term of 46 months. Pet. App. 1a-2a.

3. In 1997, the Immigration and Naturalization Service (INS)[1] commenced deportation proceedings, alleging that petitioner was deportable under Section

[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. II 2002).

237(a)(2)(B)(i) of the INA as an alien convicted of an offense relating to a controlled substance. When he appeared before an immigration judge (IJ), petitioner conceded deportablility but sought relief from deportation under Section 212(c) of the INA. The IJ denied the request, on the ground that AEDPA and IIRIRA rendered petitioner ineligible for such relief. Pet. App. 2a; Admin. R. 323-338.

Petitioner appealed to the Board of Immigration Appeals (BIA). While the appeal was pending, this Court decided *INS* v. *St. Cyr*, *supra*. Since petitioner's guilty plea antedated AEDPA and IIRIRA, the BIA remanded the case so that the IJ could adjudicate petitioner's Section 212(c) application on the merits. Admin. R. 263, 312-315.

4. On remand, the IJ denied relief in the exercise of discretion and ordered petitioner removed to Nigeria. Pet. App. 6a-24a. The IJ observed that, "where a serious drug offense is involved, * * * it is incumbent upon the applicant for relief that he demonstrate unusual and outstanding equities in order to * * * [obtain] a discretionary grant of the waiver sought." *Id*. at 10a. In the view of the IJ, the offense of which petitioner was convicted, which "implicate[d] him in the 'laundering' of the funds resulting from drug transactions," was sufficiently serious that petitioner should be required to demonstrate "the high level of favorable equity which is required where drug trafficking is involved." *Id*. at 10a-11a. After balancing the favorable and unfavorable equities, *id*. at 11a-23a, the IJ found that petitioner could not demonstrate the requisite "unusual or outstanding equities," *id*. at 23a.

The BIA affirmed without opinion. Pet. App. 5a.

5. Petitioner filed a petition for review. He contended that the IJ (1) applied an incorrect legal standard by requiring petitioner to show unusual or outstanding equities and (2) abused his discretion by denying petitioner's request for Section 212(c) relief. Pet. C.A. Br. 5-21. In an unpublished per curiam opinion, the court of appeals dismissed the petition for review. Pet. App. 1a-4a.

The court of appeals observed that, under 8 U.S.C. 1252(a)(2)(B), it lacked jurisdiction to review discretionary decisions of the Attorney General; that, under 8 U.S.C. 1252(a)(2)(C), it lacked jurisdiction to review the final order of removal of an alien removable by reason of having committed an offense relating to a controlled substance; and that, under 8 U.S.C. 1252(a)(2)(D), it retained jurisdiction only to consider questions of law and constitutional claims. Pet. App. 3a. The court then noted that petitioner contended that the IJ had "erroneously concluded that his conviction for money laundering was an offense relating to a controlled substance." *Id.* at 4a. Whether an offense is an offense relating to a controlled substance, the court said, "is a question of law." *Ibid.* The court then decided that question in favor of respondent. It explained that "[t]he offense to which [petitioner] pleaded guilty * * * is an offense relating to a controlled substance" because he pleaded guilty to "knowingly and willfully conduct[ing] and attempt[ing] to conduct a series of financial transactions . . . which involved the proceeds of specified unlawful activity, that is, the receiving, concealing, buying, selling and otherwise dealing in narcotic controlled substances." *Ibid.* Because the offense is one relating to a controlled substance, and because petitioner "d[id] not raise any constitutional issues," the court concluded that

it "d[id] not have jurisdiction to review the order of deportation." *Ibid.*

ARGUMENT

1. a. Petitioner's first claim in the court of appeals was that his money-laundering offense was not a serious drug offense and that the IJ therefore erred in requiring him to demonstrate unusual or outstanding equities to obtain Section 212(c) relief. Pet. C.A. Br. 5-14. In this Court, petitioner contends (Pet. 6-9) that the court of appeals failed to address that claim despite the fact that, because his claim presents both a legal and a constitutional issue, the court had jurisdiction to address it under 8 U.S.C. 1252(a)(2)(D). That contention is without merit, because the court of appeals *did* address petitioner's claim. The court acknowledged that it "retain[ed] jurisdiction * * * to consider questions of law"; it noted that petitioner "argue[d] that the Immigration Judge erroneously concluded that his conviction for money laundering was an offense relating to a controlled substance"; it stated that "[w]hether an offense is an offense relating to a controlled substance is a question of law"; and it held that "[t]he offense to which [petitioner] pleaded guilty * * * is an offense relating to a controlled substance." Pet. App. 3a-4a.

Insofar as the court of appeals declined to exercise jurisdiction, it declined to exercise jurisdiction over petitioner's *second* (and broader) claim, which was that the IJ abused his discretion in balancing the equities and denying petitioner's request for Section 212(c) relief. Pet. C.A. Br. 14-21. The court of appeals lacked jurisdiction to consider that claim both because the IJ's decision was discretionary and because petitioner was removable by reason of having committed an offense relat-

ing to a controlled substance. See Pet. App. 3a (citing 8 U.S.C. 1252(a)(2)(B) and (C)). It may be that, rather than dismissing the petition for review, the court of appeals should have denied it in part and dismissed it in part. But the precise formulation of the disposition cannot alter the fact that the court of appeals exercised jurisdiction over, and decided, petitioner's claim relating to the characterization of his conviction.

b. While the court of appeals used the term "offense relating to a controlled substance" rather than "serious drug offense" (Pet. App. 4a), the court should be understood to have been addressing petitioner's contention that the IJ erred in requiring him to show unusual or outstanding equities in order to warrant a favorable exercise of discretion, because there was (and is) no other issue in the case relating to the characterization of petitioner's conviction.[2] But even if, based on its choice of language, the court of appeals could be understood *not* to have been addressing the question whether petitioner's money-laundering offense was a serious drug offense that required a showing of unusual or outstand-

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[2] While petitioner's conviction of an offense "relating to a controlled substance" was the basis for his deportability, petitioner conceded deportability before the IJ, Pet. App. 2a, and acknowledged that "deportability is not at issue" in the court of appeals, Pet. C.A. Br. 11 n.4. Nor did the appeal present the question whether petitioner's conviction of an offense "relating to a controlled substance" rendered him ineligible for Section 212(c) relief, because the BIA ruled (in light of *St. Cyr*) that petitioner was eligible for such relief, Admin. R. 263, and the IJ decided the application on the merits. The claim relating to the characterization of his conviction that petitioner raised in the court of appeals was that the IJ erred in treating the conviction as a "serious drug offense" in denying petitioner's request for Section 212(c) relief in the exercise of discretion. Pet. C.A. Br. 5-14.

ing equities, this Court's review would still be unwarranted.

If the court of appeals did not address whether petitioner was convicted of a serious drug offense, it did not err in failing to do so. The former Section 212(c) imposed no restrictions on the Attorney General's exercise of discretion and described no standards for the Attorney General to apply. See 8 U.S.C. 1182(c) (1994) (repealed 1996). The question of how much weight should be given to a particular type of offense in the balancing of the equities is therefore subsumed within the Attorney General's discretion in ruling on a request for relief under Section 212(c). And under 8 U.S.C. 1252(a)(2)(B), a court of appeals has no jurisdiction to review the exercise of that discretion.

Petitioner cites no case holding that a determination of that type presents a legal or constitutional issue that falls within the authorization of judicial review under Section 1252(a)(2)(D).[3] And even if there were such authority, the court of appeals' decision in this case (which in any event is unpublished) would not conflict with it, because the court of appeals did not explicitly hold (or even state) that an IJ is exercising unreviewable discretion when he decides that an offense is sufficiently seri-

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[3] *Balogun* v. *United States Attorney General*, 425 F.3d 1356 (11th Cir. 2005), cert. denied, No. 05-1156 (May 1, 2006), on which petitioner relies (Pet. 6-8), does not so hold. The question held to be reviewable in *Balogun*, 425 F.3d at 1359-1360—whether a particular crime was an aggravated felony—determined whether the alien was *eligible* for a waiver of inadmissibility, *id*. at 1358-1359, 1362, not how the Attorney General's discretion would be exercised in deciding whether a waiver should be granted to an alien who is eligible for one. In any event, this Court does not grant certiorari to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

ous to require a showing of unusual or outstanding equities. The decision below thus does not preclude a future panel of the Eleventh Circuit from holding that such a determination is reviewable (assuming the decision below did not so hold).

2. Petitioner also renews his contention (Pet. 11-16) that the offense of which he was convicted was not a serious drug offense and that he therefore should not have been required to demonstrate unusual or outstanding equities to be entitled to relief under Section 212(c). According to petitioner (*ibid.*), his money-laundering offense was not a serious drug offense because the federal money-laundering statute reaches conduct other than drug trafficking (see 18 U.S.C. 1956(c)(7) (1994)) and it was impermissible for the IJ to rely on the Presentence Investigation Report in characterizing the offense (see Pet. App. 8a, 10a-11a). Petitioner relies (Pet. 11-14) on the Ninth Circuit's decision in *Lara-Chacon* v. *Ashcroft*, 345 F.3d 1148 (2003), but the decision below does not conflict with *Lara-Chacon*. Further review is therefore unwarranted.

a. *Lara-Chacon* held that an alien convicted of conspiracy to commit money laundering, in violation of Arizona law, was not deportable under either 8 U.S.C. 1227(a)(2)(B)(i), by reason of having been convicted of an offense "relating to a controlled substance," or 8 U.S.C. 1101(a)(43)(B) and 8 U.S.C. 1227(a)(2)(A)(iii), by reason of having been convicted of a "drug trafficking crime" and thus an "aggravated felony." 345 F.3d at 1152-1156. This case does not involve the question whether petitioner was deportable under the INA by reason of having been convicted of an offense "relating to a controlled substance" or a "drug trafficking crime." Petitioner conceded that he was deportable, and thus

necessarily conceded that he had been convicted of an offense "relating to a controlled substance" (the sole basis for deportability alleged). Pet. App. 2a. Indeed, this case does not involve any question of statutory interpretation at all. Rather, it involves the question whether the offense of which petitioner was convicted was sufficiently serious that he could be required to show unusual or outstanding equities in order to be granted relief from removal under Section 212(c) in the exercise of the Attorney General's discretion.

Petitioner cites no authority for the proposition that the "categorical" and "modified categorical" rules for characterizing offenses that are grounds for deportation under the INA, *Lara-Chacon*, 345 F.3d at 1151-1152; see generally *Taylor* v. *United States*, 495 U.S. 575 (1990), apply in this context, and that an IJ therefore may not look beyond "the elements of the statute of conviction" and "limited [types] of documents in the record," 345 F.3d at 1151-1152 (quoting *Chang* v. *INS*, 307 F.3d 1185, 1189 (9th Cir. 2002)), when exercising discretion in the adjudication of a Section 212(c) application. The absence of authority in the petition is understandable, since the justifications for those rules—"respect for congressional intent" and "avoidance of collateral trials," *Shepard* v. *United States*, 544 U.S. 13, 23 (2005)—are inapplicable here. Requiring "a high level of favorable equity" (Pet. App. 11a) when an alien seeking Section 212(c) relief has been convicted of a serious drug offense is not a statutory directive; it is an approach the Attorney General, acting through the BIA, has articulated for exercising the discretion conferred on him by Section 212(c). And since an IJ ruling on a Section 212(c) application considers all favorable and unfavorable factors, including the underlying circumstances of the prior con-

viction (if they are known), allowing the IJ to consider the facts of the criminal case in deciding whether the alien was convicted of a serious drug offense will not make the process more burdensome.[4]

b. Even if those principles did apply in this context, petitioner's money-laundering offense would qualify as a serious drug offense under the "modified categorical" approach. Petitioner was convicted of violating 18 U.S.C. 1956(a)(1). Pet. App. 2a. That provision makes it a crime to launder proceeds of "specified unlawful activity," a term defined in 18 U.S.C. 1956(c)(7)(A) (1994) to include offenses listed in 18 U.S.C. 1961(1) (1994). One of those is an offense involving "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical." 18 U.S.C. 1961(1)(D) (1994). As the court of appeals observed (Pet. App. 4a), the only count in the criminal information, which was part of the record before the IJ (see Pet. App. 20a), charged petitioner with "knowingly and willfully conduct[ing] and attempt[ing] to conduct a series of financial transactions * * * which involved the proceeds of specified unlawful activity, that is, the receiving, concealing, buying, selling and otherwise dealing in narcotic controlled sub-

[4] *In re Batista-Hernandez*, 21 I. & N. Dec. 955 (BIA 1997), on which petitioner also relies (Pet. 15-16), is also inapposite. That case addressed the question whether an alien convicted of being an accessory after the fact to a drug-trafficking crime was deportable by reason of having committed an offense relating to a controlled substance, 21 I. &. N. Dec. at 957-960, not whether the offense of conviction was sufficiently serious that the alien should be required to show unusual or outstanding equities in order to obtain relief under Section 212(c) in the exercise of the Attorney General's discretion. In any event, this Court does not grant certiorari to resolve conflicts between decisions of the BIA. See Sup. Ct. R. 10.

stances." Admin. R. 606. And the judgment of conviction reflects that petitioner pleaded guilty to that count. *Id.* at 602. As *Lara-Chacon* itself recognized, it is permissible to "look to the charging paper and judgment of conviction to determine if the actual offense the defendant was convicted of qualifies" as a covered offense. 345 F.3d at 1154 (quoting *Ye* v. *INS*, 214 F.3d 1128, 1133 (9th Cir. 2000)).

Indeed, insofar as the application of the "modified categorical" rule is concerned, this case is very much like *Johnson* v. *INS*, 971 F.2d 340 (1992), in which the Ninth Circuit ruled in favor of the INS, and which itself was distinguished in *Lara-Chacon*. *Johnson* held that the alien's conviction under the Travel Act, 18 U.S.C. 1952, was an offense relating to a controlled substance. *Lara-Chacon*, 345 F.3d at 1155. The Travel Act prohibits transacting in interstate commerce with the proceeds of any "unlawful activity," which is defined to include "any business enterprise involving * * * narcotics or controlled substances," and Johnson pleaded guilty to an information charging her with "travel[ing] in interstate commerce * * * with the intention of distributing the proceeds derived from the unlawful distribution of narcotics and controlled substances." *Id.* at 1155-1156. As the Ninth Circuit explained in *Lara-Chacon*, "[t]he terms of the conviction [thus] incorporated the controlled substance portion of the statute." *Id.* at 1156. The same is true here.[5]

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[5] At various points in the petition, petitioner contends, not only that his money-laundering offense is not a serious drug offense, but also that it is not an offense relating to a controlled substance. Pet. 9, 14. To the extent that petitioner is thereby claiming that his money-laundering conviction is not a basis for deportation, his claim comes too late. As petitioner acknowledges elsewhere in the peti-

3. Petitioner also renews his contention (Pet. 16-18) that the IJ incorrectly balanced the equities in denying discretionary relief under Section 212(c). Because there is no conceivable basis for characterizing that claim as a legal or constitutional claim, see REAL ID Act, § 106(a)(1), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)), it is plainly unreviewable under 8 U.S.C. 1252(a)(2)(B) and (C).[6] Because the court of appeals had no jurisdiction to decide the claim, it was not properly "in the court[] of appeals," 28 U.S.C. 1254, and thus this Court has no jurisdiction to decide it either. Petitioner cites no authority to the contrary; indeed he cites no authority at all. See Pet. 16-18. Even if the court of appeals did have jurisdiction, however, there would still be no reason for this Court to grant certiorari, because the claim is entirely fact-bound. See Sup. Ct. R. 10.

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tion, he "conceded removability" nearly a decade ago, when he first appeared before the IJ. Pet. 4. In the court of appeals, moreover, petitioner acknowledged that "deportability is not at issue in this case." Pet. C.A. Br. 11 n.4.

[6] Petitioner contends (Pet. 8-9, 17) that the IJ violated his due process rights. But "because discretionary relief is necessarily a matter of grace rather than of right, aliens do not have a due process liberty interest in consideration for such relief." *United States* v. *Torres*, 383 F.3d 92, 104 (3d Cir. 2004); accord, *e.g.*, *Jamieson* v. *Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005); *Ali* v. *Ashcroft*, 366 F.3d 407, 412 (6th Cir. 2004); *Dave* v. *Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004); *United States* v. *Wilson*, 316 F.3d 506, 510 (4th Cir.), cert. denied, 538 U.S. 1025 (2003); *United States* v. *Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003); *Oguejiofor* v. *Attorney Gen. of the United States*, 277 F.3d 1305, 1309 (11th Cir. 2002) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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