No. 08-605

In the Supreme Court of the United States

ROBINSON WLADIMIR GONZALEZ-MESIAS,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the denial of relief from removal under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), violates the equal protection component of the Due Process Clause, where an alien who is removable because he committed specific aggravated felonies is not being treated differently from other aliens who are similarly removable on grounds that have no statutory counterpart in the INA's grounds for inadmissibility.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-6) is reported at 529 F.3d 62. The orders of the Board of Immigration Appeals (Pet. App. 7-8) and the immigration judge (Pet. App. 9-14) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2008. On September 3, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including October 31, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. By its terms, Section 212(c) applied only to certain aliens in exclusion proceedings (*i.e.*, proceedings in which aliens were seeking to "be admitted" to the United States after "temporarily proceed[ing] abroad voluntarily"). In 1976, however, the Second Circuit determined that making that discretionary relief available to aliens who had departed the United States while denying it to aliens who remained in the United States violated equal protection. *Francis* v. *INS*, 532 F.2d 268, 273. The Board of Immigration Appeals (Board) adopted that rationale on a nationwide basis in *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976), so that Section 212(c) was generally construed as being available in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In applying the principle of treating those in deportation proceedings like those in exclusion proceedings, the Board has long maintained that an alien in deportation proceedings can obtain Section 212(c) relief only if the ground for his deportation has a comparable ground among the statutory grounds of exclusion. See, *e.g.*, *In re Wadud*, 19 I. & N. Dec. 182 (B.I.A. 1984); *In re Granados*, 16 I. & N. Dec. 726 (B.I.A. 1979). That practice is known as the "comparable ground" or "statutory counterpart" test, and it has been codified by regulation at 8 C.F.R. 1212.3(f)(5).

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress amended Section

212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including aggravated felonies. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety. IIRIRA also did away with "deportation" and "exclusion" proceedings, substituting "removal."

In *INS* v. *St. Cyr*, *supra*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony on the basis of a plea agreement that the alien made at a time when the alien would still have been eligible for Section 212(c) relief in spite of the resulting conviction. 533 U.S. at 314-326. Although some aliens necessarily benefitted from the conclusion that Section 212(c)'s repeal was not retroactively applicable, the Court did not suggest that they would not still be subject to any *pre-existing* limitations on their eligibility for relief under Section 212(c), including the "statutory counterpart" test.

As relevant to the circumstances of this case, the operation of that test was further clarified by the Board in *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005), and *In re Brieva-Perez*, 23 I. & N. Dec. 766 (B.I.A. 2005). Those cases held that a ground of exclusion is only a "comparable ground" to the charged ground of deportation if they both use similar language to describe "substantially equivalent categories of offenses." *Id*. at 771; *In re Blake*, 23 I. & N. Dec. at 728. In *In re Blake*, the Board held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal for having an aggravated felony con-

viction for sexual abuse of a minor (one of the two charges present in the instant case). *Id*. at 729. In *In re Brieva-Perez*, the Board similarly held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for a crime of violence (the other charge present in the instant case). 23 I. & N. Dec. at 773. Well before the Board published those precedent decisions, however, the analytical underpinnings of its interpretation were confirmed by, among others, the Ninth Circuit's decision in *Komarenko* v. *INS*, 35 F.3d 432 (1994).

In 2007, the Second Circuit disagreed with *Komarenko* and the "several other circuits" that had followed it. *Blake* v. *Carbone*, 489 F.3d 88, 103-104. Although the Second Circuit recognized that the statutory-counterpart test codified in 8 C.F.R. 1212.3(f)(5) did "nothing more than crystallize the agency's preexisting body of law and therefore [could not] have an impermissible retroactive effect," it held that, when analyzed on the basis of a "particular criminal offense[]," the ground of inadmissibility for a "crime involving moral turpitude" was sufficiently comparable to an aggravated felony of sexual abuse of a minor to permit retroactive relief under former Section 212(c). *Blake*, 489 F.3d at 98-99, 103.

2. Petitioner is a native and citizen of Chile. Pet. App. 2. He was admitted to the United States as a visitor and became a lawful permanent resident in 1979. *Ibid*. In 1985, after pleading guilty and no-contest, petitioner was convicted of one count of aggravated sexual battery (in violation of Va. Code § 18.2-67.3), and one count of sodomy (in violation of Va. Code § 18.2-67.1). Pet. App. 2-3. Those convictions were for engaging in cunnilingus with a 13-year-old girl "against her will by

force, threat and intimidation." *Id.* at 11. Petitioner was sentenced to concurrent ten-year terms of imprisonment on each charge, but the court suspended nine years and 335 days of each sentence. *Id.* at 3.

In 2005, petitioner was placed in removal proceedings on charges of being deportable under Section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. 1227(a)(2)(A)(iii), on account of having been convicted of an aggravated felony as defined in 8 U.S.C. 1101(a)(43)(A) ("sexual abuse of a minor") and of having been convicted of an aggravated felony as defined in 8 U.S.C. 1101(a)(43)(F) ("crime of violence"). Pet. App. 3. An immigration judge found him removable on both of those charged grounds. *Id.* at 10-11.[1] The immigration judge ordered petitioner removed and pretermitted his application for Section 212(c) relief, holding that he was ineligible for that relief because his two grounds of deportability did not have any statutory counterpart in the grounds of inadmissibility contained in Section 212(a) of the INA, 8 U.S.C. 1182(a). Pet. App. 12-13 (citing the Board's decisions in *In re Blake* and *In re Brieva-Perez*).

On August 2, 2007, the Board dismissed petitioner's appeal from the immigration judge's decision. Pet. App. 8. The Board reiterated its conclusion that discretionary relief under Section 212(c) is available only where a ground of deportability has "a comparable ground of inadmissibility." *Ibid.* The Board explained that its decisions in *In re Blake* and *In re Brieva-Perez* had not represented any change in the law but rather were an

[1] In the administrative record, the decisions of the Board and of the immigration judge both listed the charges against petitioner between the caption and the beginning of the decision. Those portions of the decisions are not included in the versions of the documents reprinted in the petition appendix. See Pet. App. 7, 9.

extension of a "long line of [prior] cases," and it declined to follow the Second Circuit's decision in *Blake* v. *Carbone, supra*, outside of the Second Circuit. *Ibid.* Petitioner sought review of the Board's decision in the court of appeals. *Id.* at 2.

3. The court of appeals denied petitioner's petition for review. Pet. App. 1-6. It observed that, in the absence of an intervening event, it was bound by its precedent in *Dalombo Fontes* v. *Gonzales*, 483 F.3d 115 (1st Cir. 2007), and *Kim* v. *Gonzales*, 468 F.3d 58 (1st Cir. 2006). Pet. App. 5. In those two cases, the court rejected the same arguments presented here, including the argument that the Board's interpretation is inconsistent with this Court's reasoning in *St. Cyr*. *Id.* at 6. The court noted that no other court of appeals has agreed with the Second Circuit's decision in *Blake*, whereas the Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits have each upheld the Board's statutory-counterpart test. Pet. App. 5 (citing *Caroleo* v. *Gonzales*, 476 F.3d 158 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363 (5th Cir. 2007); *Valere* v. *Gonzales*, 473 F.3d 757 (7th Cir. 2007); *Abebe* v. *Gonzales*, 493 F.3d 1092 (9th Cir. 2007), vacated, 514 F.3d 909 (9th Cir. 2008);[2] *Falaniko* v. *Mukasey*, 272 Fed. Appx. 742 (10th Cir. 2008); *Rubio* v. *United States Att'y Gen.*, 182 Fed. Appx. 925 (11th Cir. 2006)).

The court of appeals added that, even apart from its prior case law, it did not find petitioner's arguments "convincing," Pet. App. 5, and that, "[t]o the extent [petitioner] is making independent constitutional argu-

[2] As discussed below (see pp. 8-9, *infra*), after the court of appeals' decision (and the petition for a writ of certiorari) in this case, the Ninth Circuit issued an en banc decision in *Abebe*, and a petition for further rehearing of that decision remains pending before the Ninth Circuit.

ments, they are without merit," *id.* at 6. The court observed that the Board's decisions in *In re Blake* and *In re Brieva-Perez* were "not inconsistent with" prior Board precedent and had not been applied arbitrarily or capriciously to petitioner. *Ibid.* It also held that there was no equal protection violation here because petitioner "was treated the same as similarly situated aliens." *Ibid.* (citing *Dalombo Fontes*, 483 F.3d at 123, and *Kim*, 468 F.3d at 62).

ARGUMENT

Petitioner describes (Pet. 16-26) a split in the courts of appeals about an issue that he claims (Pet. 26-32) is of substantial importance because it results in differential treatment among aliens in immigration proceedings. He implicitly agrees (Pet. 16-18) with the Second Circuit's conclusion in *Blake* v. *Carbone*, 489 F.3d 88, 103-104 (2007), that it violates an alien's equal protection rights to look to the charged grounds for his deportation, rather than the circumstances of the underlying offenses, when determining whether the grounds of removal are sufficiently comparable to a ground of inadmissibility.[3] The court of appeals reached the correct result. The issue concerns a statutory section repealed more than 12 years ago, and every court of appeals to have addressed the question (except the Second Circuit) would deny petitioner relief. No further review is warranted.

1. As petitioner acknowledges (Pet. 21-24), the First, Third, Fifth, Seventh, and Eighth Circuits have concluded in published opinions that the Board's appli-

[3] A similar question is presented by the petition for a writ of certiorari in *Birkett* v. *Holder*, No. 08-6816, petition for cert. pending (filed Apr. 1, 2008).

cation of the statutory-counterpart test does not violate equal protection. See, *e.g.*, *Kim* v. *Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 162-163 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 371-372 (5th Cir. 2007); *Zamora-Mallari* v. *Mukasy,* 514 F.3d 679, 691-692 (7th Cir. 2008); *Vue* v. *Gonzales*, 496 F.3d 858, 860-862 (8th Cir. 2007).[4] After the petition for a writ of certiorari was filed, the Sixth Circuit added itself to that list by clearly upholding the constitutionality of the Board's statutory-counterpart test. See *Koussan* v. *Holder*, No. 07-4107, 2009 WL 330999, at *8-*10 (Feb. 12, 2009).

Petitioner also discusses (Pet. 18-21) the Ninth Circuit's decision in *Abebe* v. *Gonzales*, 493 F.3d 1092 (2007), vacated, 514 F.3d 909 (2008), which held that the statutory-counterpart test did not violate equal protection, but which was then vacated when the case was reheard by the court en banc. After the petition for a writ of certiorari in the instant case was filed, the en banc Ninth Circuit in *Abebe* issued its decision, holding that neither the Constitution nor this Court's decision in *St. Cyr* requires the government to make aliens in deportation proceedings eligible for the same form of discretionary relief under former Section 212(c) that is available to aliens in exclusion proceedings. *Abebe* v.

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[4] See *Falaniko* v. *Mukasey*, 272 Fed. Appx. 742, 746-749 (10th Cir. 2008) (unpublished decision "agree[ing] with the First, Third, Fifth, Seventh, Eighth, and Ninth Circuits that the statutorily prescribed basis of removal should be compared to the statutory grounds of inadmissibility for purposes of statutory counterpart analysis"); *Rubio* v. *United States Att'y Gen.*, 182 Fed. Appx. 925, 929 (11th Cir. 2006) (unpublished decision holding that the Board's application of the statutory-counterpart test is a "a reasonable interpretation of the relevant INA provisions" and does not conflict with *St. Cyr*).

Mukasey, 554 F.3d 1203, 1205-1207 (2009). The court thus rejected the antecedent principle driving petitioner's argument and the Second Circuit's decision in *Blake*.

The Ninth Circuit also stated, however, that its decision did not "cast[] any doubt on the regulation" that codifies the Board's statutory-counterpart test, while observing that its decision "might cause the government to reconsider the regulation, and eventually repeal it as no longer necessary." *Abebe*, 554 F.3d at 1207. A concurring opinion on behalf of three judges would have reaffirmed the Ninth Circuit's earlier decision in *Komarenko*, see *id.* at 1208-1213 (Clifton, J., concurring)—an approach under which petitioner in this case would also lose. Only Judge Thomas's dissenting opinion (joined by Judge Pregerson) would have followed petitioner's invitation to side with the Second Circuit's decision in *Blake*. *Id.* at 1217-1218. A petition for rehearing of the en banc decision in *Abebe* remains pending before the Ninth Circuit. At the court's request, the government filed a response to the rehearing petition (opposing further rehearing) on February 25, 2009.

Regardless of whatever else the Ninth Circuit does in *Abebe*, its recent en banc decision, by introducing an additional rationale (not advanced by the government), which could affect any further consideration that other courts of appeals give to the constitutional question or the Board's future applications of the statutory-counterpart test, has already refuted petitioner's claim (Pet. 26) that the issue on which he seeks this Court's review "has fully percolated." Other factors also make further review inappropriate at this time. The split within the circuits is heavily lopsided. And petitioner's question concerns an alien's eligibility for a form of discretionary

relief under a statute that was repealed more than 12 years ago and is only potentially applicable to him on the theory that he might have relied on being eligible for it had his removal proceedings been initiated before the 1996 enactments. See *INS* v. *St. Cyr*, 533 U.S. 289, 325 (2001). But the statutory-counterpart test to which petitioner objects is not new, see *Blake*, 489 F.3d at 98-99—indeed, it long predates the repeal of Section 212(c) in 1996, see p. 2, *supra*—and petitioner could easily have avoided its effects by departing the country voluntarily at any point before his removal proceedings were initiated in 2005.

In contending that this case presents an issue of exceptional importance, petitioner cites (Pet. 27) statistics estimating the number of non-citizens ordered deported "based on crimes categorized as 'aggravated felonies'" over a 15-year period. He also cites (Pet. 27 n.6) data pertaining to the number of lawful permanent residents "deported for criminal convictions" over a 10-year period. The number of aliens that could be affected by the outcome of this case, however, is necessarily a great deal smaller, because an alien would not become eligible for discretionary relief unless he or she met each of the following criteria: (1) lawful-permanent-resident status; (2) a conviction predating the repeal of Section 212(c); (3) a plea of guilty or no contest; (4) a removal charge flowing from an aggravated-felony conviction; and (5) a removal charge that has no comparable ground of inadmissibility.

2. Even under the view that aliens in removal proceedings are not barred outright from discretionary relief under former Section 212(c), the court of appeals reached the correct result in the instant case.

Petitioner essentially argues as follows: If he had left the United States and attempted to return, his aggravated sexual battery conviction would have subjected him to removal based on a charge of inadmissibility for having committed "a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), which would have rendered him eligible for Section 212(c) relief. Because he is within the United States and subject to removal based on charges of having committed aggravated felonies of sexual abuse of a minor and a crime of violence—both grounds that the Board holds are not comparable to the inadmissibility ground of having committed a crime involving moral turpitude—he is ineligible for Section 212(c) relief. Therefore, he asserts, his equal protection rights have been violated. That argument fails.

As this Court has repeatedly stated: "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Thus, whether an immigration provision is constitutional depends only on the existence of a "facially legitimate and bona fide reason" for its enactment. *Id.* at 794.

As a general matter, Congress has determined that the statutory regime that applies to an alien who has already been admitted to the country is different from the one that applies to an alien who is seeking admission. Compare 8 U.S.C. 1182, with 8 U.S.C. 1227. It is thus unsurprising that the categories of offenses that make an alien inadmissible are not always the same as those that may render an alien deportable from the country. That fundamental legislative choice shows that aliens

who are inadmissible are not similarly situated with aliens subject to removal on grounds of being deportable, even though there is some overlap between the conduct that renders an alien inadmissible and the conduct that renders an alien deportable. It is only where a ground that renders an alien deportable under the one regime has a statutory counterpart that renders an alien inadmissible under the other regime that the two aliens could be said to be similarly situated for equal protection purposes.

The reasoning employed in *Komarenko* v. *INS*, 35 F.3d 432 (9th Cir. 1994), which has since been endorsed by most of the other courts of appeals, is persuasive. In *Komarenko*, the court rejected a similar equal protection claim in finding that two groups of aliens convicted of different crimes were not similarly situated for purposes of eligibility for Section 212(c) relief. *Id.* at 435. The court concluded that the "linchpin of the equal protection analysis in this context is that the two provisions be 'substantially identical.'" *Ibid.*; see *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 952 (7th Cir. 1993). Komarenko claimed the court was required to "focus on the facts of his individual case and conclude that because he *could have been* excluded under the moral turpitude provision, he has been denied equal protection." *Komarenko*, 35 F.3d at 435. The court, however, refused "to speculate whether the I.N.S. would have applied this broad excludability provision to an alien in Komarenko's position," because engaging in such speculation "would extend discretionary review to every ground for deportation that could constitute 'the essential elements of a crime involving moral turpitude.'" *Ibid.* Such an approach would be tantamount to "judicial legislating," would "vastly overstep" the courts' "'limited scope of

judicial inquiry into immigration legislation,'" and "would interfere with the broad enforcement powers Congress has delegated to the Attorney General." *Ibid.* (quoting *Fiallo*, 430 U.S. at 792). Accordingly, the court "decline[d] to adopt a factual approach to * * * equal protection analysis in the context of the deportation and excludability provisions of the INA," and it "conclude[d] that Komarenko was not denied his constitutional right to equal protection of the law."[5] *Ibid.*

Thus, it is only when the ground for a deportable alien's removal from the country has a statutory counterpart in the grounds for inadmissibility that a deportable alien is arguably similarly situated to inadmissible aliens. See *Komarenko*, 35 F.3d at 435. The Seventh Circuit explained this point in *Leal-Rodriguez*, *supra*:

> [C]ertain deportable aliens may receive exclusion-type relief as if they were subject to exclusion rather than deportation. But that fiction requires that the aliens be excludable for the same reasons that render them deportable—a situation not necessarily true for all aliens facing deportations. Accordingly, section 212(c) relief was not extended to aliens whose deportability was based on a ground for which a comparable ground of exclusion did not exist.

990 F.2d at 949. The court then proceeded to find that an alien deportable for entering the United States without inspection was not eligible for Section 212(c) relief because there was no corresponding ground of inadmissibility to the deportation charge. *Id.* at 950.

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[5] The same rationale applies equally to 8 C.F.R. 1212.3(f)(5), which later codified the agency's longstanding practice of applying the statutory-counterpart test.

Similarly, in this case, petitioner's argument fails because his grounds of deportation for being convicted of the aggravated felonies of sexual abuse of a minor and a crime of violence are not "substantially equivalent" or "substantially identical" to a ground of inadmissibility under Section 212(a) of the INA. *Komarenko*, 35 F.3d at 435. As the Board correctly reasoned in *In re Blake* and *In re Brieva-Perez*, respectively, neither sexual abuse of a minor under 8 U.S.C. 1101(a)(43)(A) nor a crime of violence under 8 U.S.C. 1101(a)(43)(F) has a statutory counterpart in Section 212(a)'s grounds of inadmissibility. Although sexual abuse of a minor or a crime of violence *may* constitute "a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), the latter addresses a distinctly different and much broader category of offenses than a charge for an aggravated felony of sexual abuse of a minor or for an aggravated felony of a crime of violence. Thus, while the statutory-counterpart test does not require a perfect match, the ground of inadmissibility must address essentially the same category of offense on which the removal charge is based. Under the pertinent regulations and the Board's decisions, that test is not met merely by showing that some or many of the offenses included in the charged category could also be crimes involving moral turpitude. See, *e.g.*, *Zamora-Mallari,* 514 F.3d at 693 (holding that the aggravated felony of sexual abuse of a minor has no statutory counterpart); *Avilez-Granados* v. *Gonzales*, 481 F.3d 869, 871-872 (5th Cir. 2007) (same).[6] That analysis is firmly

[6] By contrast, the Board found in *In re Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991), that the deportability ground for a drug-trafficking-related aggravated felony did have a statutory counterpart at former Section 212(a)(23)(A) of the INA, which referred to convictions for

supported by the unanimous opinions of the courts of appeals holding that a firearms offense (which is a ground of removability under 8 U.S.C. 1227(a)(2)(C)), has no statutory counterpart under Section 212(a), even though "many firearms offenses may also be crimes of moral turpitude." *In re Blake*, 23 I. & N. Dec. 772, 728 (B.I.A. 2005).[7]

Thus, because petitioner is not similarly situated to inadmissible aliens who have been convicted of crimes involving moral turpitude, and because he is not being treated any differently from other aliens who are deportable upon grounds that themselves have no corresponding ground of inadmissibility, his equal protection claim fails.

"violation of, or conspiracy to violate, any law or regulation * * * relating to a controlled substance." 8 U.S.C. 1182(a)(23)(A) (1988). Both provisions addressed similar categories of offenses involving illicit trafficking in drugs.

[7] See, *e.g.*, *Adefemi* v. *Ashcroft*, 386 F.3d 1022, 1031 (11th Cir. 2004) (firearms offender ineligible for Section 212(c) relief); *Cato* v. *INS*, 84 F.3d 597, 599 (2d Cir. 1996) (same); *Gjonaj* v. *INS*, 47 F.3d 824 (6th Cir. 1995) (same); *Rodriguez* v. *INS*, 9 F.3d 408 (5th Cir. 1993) (same); *Campos* v. *INS*, 961 F.2d 309 (1st Cir. 1992) (same); *Cabasug* v. *INS*, 847 F.2d 1321 (9th Cir. 1988) (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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