No. 10-694

In the Supreme Court of the United States

JOEL JUDULANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly denied relief from removal under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted at 249 Fed. Appx. 499. The opinions of the Board of Immigration Appeals (Pet. App. 5a-9a) and the immigration judge (Pet. App. 11a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2007. A petition for rehearing was denied on August 26, 2010 (Pet. App. 21a). The petition for a writ of certiorari was filed on November 24, 2010. 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 Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion.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).[1]

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress amended Section 212(c) to render ineligible for discretionary relief any alien previously convicted of certain offenses, including an aggravated felony. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety. IIRIRA also did away with the distinction between "deportation" and "exclusion" proceedings, designating them both as "removal" proceedings. See §§ 303-306, 110 Stat. 3009-585.

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 guilty plea agreement that the alien entered into at a time when the sentence the alien received under the plea agreement would not have rendered him ineligible for relief under former Section 212(c), but a greater sentence (of five years or more) would have done so. 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 aliens would be exempt from any pre-existing

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[1] In pertinent part, 8 C.F.R. 1212.3(f) states:

> An application for relief under former section 212(c) of the Act shall be denied if: * * * (5) The alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

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), remanded, 489 F.3d 88 (2d Cir. 2007), and *In re Brieva-Perez*, 23 I. & N. Dec. 766 (B.I.A. 2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007). Those cases held that a statutory ground of exclusion is a "comparable ground[]" to the charged ground of deportation only if the two grounds use similar language to describe "substantially equivalent categories of offenses." *In re Brieva-Perez*, 23 I. & N. Dec. 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 of having an aggravated felony conviction for sexual abuse of a minor. *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. 23 I. & N. Dec. at 773. Well before the Board published those precedential decisions, however, the analytical underpinnings of its interpretation had been 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. See *Blake* v. *Carbone*, 489 F.3d 88, 103-104. 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"; but the Second Circuit 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 relief under former Section 212(c). *Blake*, 489 F.3d at 98-99, 101, 103.

2. Petitioner was born in the Philippines in 1966 and entered the United States in 1974. Pet. App. 2a, 14a. In 1989, petitioner was convicted of voluntary manslaughter in California state court, for which he received a suspended sentence of six years of imprisonment and four years of probation, conditioned on his spending 684 days in county jail. *Id.* at 4a, 15a, 31a-32a. In 2003, he was convicted of grand theft of property valued at more than $400. *Id.* at 14a. Based on the latter conviction, petitioner was placed in removal proceedings in 2005, though additional charges of removability were later lodged, based on his 1989 conviction and for having committed two or more crimes involving moral turpitude. *Id.* at 11a-12a, 33a-34a. In the initial proceedings, petitioner admitted that he was not a citizen of the United States. *Id.* at 14a.

On September 28, 2005, an immigration judge ruled that petitioner was subject to removal on three grounds: under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien who has been convicted of an aggravated felony (specifically, "a theft offense," as defined at 8 U.S.C. 1101(a)(43)(G)); as an alien convicted of an aggravated felony (specifically, a "crime of violence," as defined at 8 U.S.C. 1101(a)(43)(F)); and under 8 U.S.C. 1227(a)(2)(A)(ii) as an alien convicted of "two or more crimes involving moral turpitude." Pet. App. 14a-16a. The immigration judge found that petitioner was "not eligible for any

forms of relief," including under former Section 212(c), and ordered him removed to the Republic of the Philippines. *Id.* at 17a.

On February 3, 2006, the Board dismissed petitioner's appeal. Pet. App. 5a-9a. Before the Board, petitioner claimed that he had obtained derivative United States citizenship through his parents, but the Board found that the evidence did not bear out that claim. *Id.* at 6a-7a. The Board also determined that petitioner's voluntary manslaughter conviction rendered him removable, and further held that he was ineligible for discretionary relief from removal under former Section 212(c) because "the 'crime of violence' aggravated felony category has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act." *Id.* at 8a (citing *In re Brieva-Perez*, *supra*). Having determined that petitioner's manslaughter conviction was "sufficient, standing alone, to render him removable and ineligible for relief," the Board found it unnecessary to determine "whether his 2003 grand theft conviction would also constitute a valid factual predicate for deportability." *Id.* at 9a.

3. Petitioner sought judicial review of the Board's decision, and the Ninth Circuit denied his petition for review. Pet. App. 1a-4a. The court determined that petitioner "failed to create a genuine issue of material fact regarding his claim of citizenship." *Id.* at 4a. The court further concluded that petitioner's challenge to the Board's holding that he was ineligible for relief under the "statutory counterpart" theory was foreclosed by the panel decision in *Abebe* v. *Gonzales*, 493 F.3d 1092, 1104-1105 (9th Cir. 2007), which the court found to be "controlling." Pet. App. at 4a. (The panel decision in *Abebe* was later superseded by an en banc decision that

rested on somewhat different grounds. See *Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010)).[2]

4. Petitioner filed a petition for rehearing en banc, which—after the en banc proceedings in *Abebe* had concluded—was denied, with no member of the panel and no judge in regular active service requesting a poll. Pet. App. 21a.

ARGUMENT

The decision of the court of appeals is correct. The issue concerns a statutory section repealed almost 14 years ago, and is therefore of greatly diminished importance. Moreover, every court of appeals to have addressed the question (except the Second Circuit) would deny petitioner relief. This court has recently denied certiorari in a number of cases presenting a similar question. See *Ukofia* v. *Holder*, 131 S. Ct. 191 (2010) (No. 09-11395); *De la Rosa* v. *Holder*, 130 S. Ct. 3272 (2010) (No. 09-594); *Abebe* v. *Holder*, 130 S. Ct. 3272 (2010) (No. 09-600); *Birkett* v. *Holder*, 129 S. Ct. 2043 (2009) (No. 08-6816); *Gonzalez-Mesias* v. *Holder*, 129 S. Ct. 2042 (2009) (No. 08-605).[3] Further review is similarly unwarranted in this case.[4]

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[2] The en banc court's decision in *Abebe* is reprinted at Pet. App. 63a-94a.

[3] Petitioner suggests that this case is a better vehicle than were *De la Rosa* and *Abebe* because Justice Kagan would have been recused in those cases. See Pet. 5, 33. But the Court has already denied certiorari in another case, *Ukofia* v. *Holder*, *supra*, that did not involve such a recusal.

[4] A similar question is one of the questions presented in the petition for a writ of certiorari in *Johnson* v. *Holder*, No. 10-730 (filed Dec. 1, 2010).

1. As petitioner acknowledges (Pet. 13 n.7), the First, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have concluded in published opinions that the Board's application of the statutory-counterpart test constitutes a permissible interpretation of former Section 212(c) and 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); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009); *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679, 691-692 (7th Cir. 2008); *Vue* v. *Gonzales*, 496 F.3d 858, 860-862 (8th Cir. 2007); *De la Rosa* v. *Attorney General*, 579 F.3d 1327 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010).[5]

In addition, the Ninth Circuit's en banc decision in *Abebe* v. *Mukasey*, 554 F.3d 1203, 1206-1207 (2009), cert. denied, 130 S. Ct. 3272 (2010), essentially comports with those circuits with regard to the statutory-counterpart rule. Although *Abebe* disagreed with the proposition that there is any constitutional basis for applying former Section 212(c) to aliens in deportation (as opposed to exclusion) proceedings, it left in place the regulation implementing the statutory-counterpart test, which means that the Board's reasoning in *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005), still applies in the Ninth Circuit. See *Abebe*, 554 F.3d at 1207 (stating that the decision does not "cast[] any doubt on the regulation" that codified the Board's statutory-counterpart rule); see also *Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706

[5] As petitioner notes (Pet. 13 n.7), the Tenth Circuit has applied the statutory-counterpart rule in unpublished decisions. See *Alvarez* v. *Mukasey*, 282 Fed. Appx. 718, 723 (2008); *Falaniko* v. *Mukasey*, 272 Fed. Appx. 742, 746-748 (2008).

(9th Cir. 2010) (applying 8 C.F.R. 1212.3(f)(5) and finding alien ineligible for Section 212(c) relief because the grounds for his removal did not have statutory counterparts among the grounds of inadmissibility); *In re Moreno-Escobosa*, 25 I. & N. Dec. 114, 117 (B.I.A. 2009) ("[T]he Ninth Circuit's decision in *Abebe* v. *Mukasey* can be fairly read as rejecting the equal protection challenge to the application of the statutory counterpart rule.").[6]

Thus, despite petitioner's references to a three-way division in the circuits (Pet. 2, 4, 17, 18), there is no effective difference—in terms of sustaining the Board's application of the statutory-counterpart rule—between the Ninth Circuit's decision and the decisions of the seven other circuits that have agreed with the reasoning of the Board's decision in *In re Blake*. The only court of appeals to have reached a different result is the Second Circuit, in *Blake* v. *Carbone*, 489 F.3d 88, 103-104 (2007).

2. Contrary to petitioner's contention (Pet. 27-28), the statutory-counterpart rule applied by the Board does not violate the equal protection component of the Fifth Amendment's Due Process Clause.

Petitioner argues (Pet. 24) that the Board's decision in *In re Blake* "creates an irrational distinction between deportable [lawful permanent residents] who have traveled abroad and reentered and [those] who have not,

[6] Petitioner contends (Pet. 14 n.8) that the Ninth Circuit "has been inconsistent" in applying the holding of the en banc court in *Abebe* in some of its unpublished opinions. Even if that were true, this Court does not grant review to resolve intra-circuit disagreements, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), especially in unpublished decisions. And there is no doubt in this case that petitioner would not have prevailed under the rule followed in the great majority of the circuits, because the court of appeals' decision here (Pet. App. 4a) was based on the Board's decision in *In re Brieva-Perez* and the 2007 *panel* opinion in *Abebe*, which followed the majority approach.

contrary to Section 212(c) as it has consistently been interpreted and contrary to equal protection." Petitioner thus essentially contends as follows: If he had left the United States and attempted to return, his conviction for voluntary manslaughter could have subjected him to removal based on a charge of inadmissibility for having committed "a crime of moral turpitude" under Section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), and that would have made him eligible for Section 212(c) relief. Petitioner contends that it is irrational for him to be ineligible for Section 212(c) relief because he remained within the United States, and thus to be subject to removal based on the charge of having been convicted of a crime-of-violence aggravated felony—a ground that the Board holds is not comparable to the inadmissibility ground of having been convicted of a crime involving moral turpitude. *In re Brieva-Perez*, *supra*. That argument is without merit.

a. Petitioner contends that, until 2004, the Board "ruled that [lawful permanent residents] could seek waivers of deportation for aggravated felony convictions, including 'crimes of violence' under 8 U.S.C. §1101(a)(43)(F) and 'sexual abuse of a minor' under §1101(a)(43)(A)." Pet. 9-10 (footnotes omitted). But, of the fourteen decisions of the Board that petitioner cites (Pet. 10 nn.5-6), only two were precedential, and neither of them directly addressed the statutory-counterpart rule. The first, *In re Rodriguez-Cortes*, 20 I. & N. Dec. 587 (B.I.A. 1992), addressed only the issue of whether a sentence-enhancement provision (which permitted the imprisonment served to exceed the five years then required to bar relief under Section 212(c)) necessarily caused a conviction to constitute one involving a firearm. *Id.* at 590. The second decision, *In re A–A–*, 20 I. & N.

Dec. 492 (B.I.A. 1992), held that the alien had been convicted of an aggravated felony and served the term of imprisonment that barred him from Section 212(c) relief. *Id.* at 500-503. In each case, the underlying conviction was for murder, but neither Board decision specifically addressed or held, as petitioner suggests, that a crime involving moral turpitude under 8 U.S.C. 1182(a)(2)(A)(i)(I) is a ground of inadmissibility comparable to murder. Petitioner thus cites no precedential Board decision holding that an alien who had been convicted of a crime rendering him deportable as an aggravated felon on the ground of "sexual abuse of a minor" or a "crime of violence" was categorically eligible for Section 212(c) relief if his particular crime could have served as a basis for inadmissibility. Moreover, to the extent that the non-precedential decisions cited by petitioner are based on *In re Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991), the Board affirmatively distinguished that decision in its precedential decision in *In re Blake*. See 23 I. & N. Dec. at 724-728. *In re Blake* in turn was closely followed in *In re Brieza-Perez*, *supra*, which is the only precedential Board decision to have specifically addressed the question in the context of a crime-of-violence aggravated felony.

b. 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 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972)).

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 to the country 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 situated similarly to aliens who are 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 when 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 there could be any basis for concluding that the two aliens are similarly situated for equal protection purposes (and on that theory to warrant the application of former Section 212(c) to the category of aliens to whom it did not, by its own terms, apply).

The reasoning employed in *Komarenko* v. *INS*, 35 F.3d 432 (9th Cir. 1994)—which the Ninth Circuit had continued to endorse until the en banc opinion in *Abebe* (see Pet. App. 72a (Clifton, J., concurring)), and which has also 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. 35 F.3d 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 also *Leal-Rodriguez* v. *INS*, 990 F.2d

939, 952 (7th Cir. 1993). Komarenko contended that 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." *Ibid.*

Thus, under the rational-basis standard of review, Congress may draw lines on the basis of general categories of offenses as defined by statutes, without regard to the factual circumstances of a particular individual. See, *e.g.*, *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). It is only when the statutory 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. As the Seventh Circuit has explained:

> [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, [S]ection 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.

Leal-Rodriguez, 990 F.2d at 949 (emphasis added). The court in *Leal-Rodriguez* held that an alien who was 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 948, 950.

In this case, petitioner's argument similarly fails because his ground of deportation (for having been convicted of the aggravated felony of a crime of violence) is 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 Brieva-Perez*, a crime of violence under 8 U.S.C. 1101(a)(43)(F) lacks a statutory counterpart among the grounds of inadmissibility in Section 212(a). Although the circumstances underlying a crime of violence may also give rise to the conclusion in some circumstances that the alien has 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), the latter category addresses a distinctly different category of offenses than a charge for a crime-of-violence aggravated felony. 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 even many) of the aliens whose offenses are included in a given category could also have their crimes characterized as ones 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). That analysis is firmly supported by the unanimous decisions 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."[7] *In re Blake*, 23 I. & N. Dec. at 728.

Thus, because petitioner is not similarly situated to an inadmissible alien who has been convicted of a crime

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[7] For the same reason, petitioner's contention (Pet. 17) that the Board erroneously interpreted 8 C.F.R. 1212.3(f)(5) so as to "undermine" this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), rather than "implement" it, fails. Petitioner argues that the Board, in *In re Blake*, impermissibly interpreted 8 C.F.R. 1212.3(f)(5) inconsistently with its "prior rulings that [a lawful permanent resident alien] deportable for an aggravated felony conviction was eligible for Section 212(c) relief if the conviction would also fall under a counterpart inadmissibility provision." Pet. 29 (emphasis omitted). But petitioner's characterization of the Board's prior practice is flawed, because it overlooks the fact that the Board has always considered whether the charged ground of deportability compared with any ground of inadmissibility, and not whether the alien's crime could have formed the basis for a different charge of inadmissibility. See *In re Blake*, 23 I. & N. Dec. at 728. As a result, petitioner's assertions (Pet. 29, 31) about "retroactive application" of 8 C.F.R. 1212.3(f)(5) are unfounded.

involving moral turpitude, and because he is not being treated any differently than other aliens who are deportable upon grounds that themselves have no corresponding ground of inadmissibility, his equal protection claim is meritless.[8]

3. Although the Second Circuit has reached a different result, this case does not present a question of sufficient importance to warrant this Court's review. The Second Circuit is an outlier: eight other circuits, including the Ninth Circuit below, have approved the Board's approach in *In re Blake*. And this Court denied certiorari on this issue twice in 2009 and three more times in 2010, well after the Second Circuit had issued its deci-

[8] Petitioner contends (Pet. 28 & n.16) that the relevant comparison should be between deportable aliens who have left the country and those who have not, because a deportable alien who left the country could be treated as if he had been put into proceedings upon reentry such that relief was available *nunc pro tunc*. But the cases in which the Board has applied Section 212(c) or its predecessor provisions make clear that, although "[i]t has long been the administrative practice to exercise the discretion permitted by the foregoing provisions of law, *nunc pro tunc*," the Board does so only "where complete justice to an alien dictates such extraordinary action." *In re T–*, 6 I. & N. Dec. 410, 413 (B.I.A. 1954). Thus, while "the equitable power to grant orders *nunc pro tun*c is conceptually broad," *Ramirez-Canales* v. *Mukasey*, 517 F.3d 904, 910 (6th Cir. 2008), its application is wholly discretionary and is limited to extraordinary cases—not to every case where an alien would otherwise be eligible for relief. For the same reasons that petitioner is not similarly situated to an alien who departed and is seeking to re-enter, complete justice would not mandate the application of *nunc pro tunc* discretion.

Moreover, notwithstanding petitioner's attempt to discount its relevance (Pet. 16 n.10), his 2003 felony conviction for grand theft could be taken into account in evaluating whether such *nunc pro tunc* discretion should be exercised. It would also be relevant in deciding whether—if he were found eligible for it—he should be granted discretionary relief under former Section 212(c).

sion in *Blake* v. *Carbone*. See p. 7, *supra*. Moreover, the question petitioner raises concerns an alien's eligibility for a form of discretionary relief under a statute that was repealed almost 14 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—indeed, it long predates the repeal of Section 212(c) in 1996. See pp. 2-3, *supra*; *Blake*, 489 F.3d at 98-99. Petitioner could have easily avoided its effects by departing the country voluntarily at any point before his removal proceedings were initiated in 2005 (or at least between the end of his 1989 six-year suspended sentence for voluntary manslaughter and the offense leading to his 2003 conviction for grand theft). Cf. *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 (2006) ("It is therefore the alien's choice to continue his illegal presence * * * that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.").

In contending that his case presents an issue of exceptional importance, petitioner cites a statistic about 10,000 grants of Section 212(c) relief between 1989 and 1995. Pet. 32 (quoting *St. Cyr*, 533 U.S. at 296). That figure is of little relevance here, not only because of its age but also because Section 212(c) was still in effect between 1989 and 1995. In recent years, the number of grants of relief under former Section 212(c) has been smaller and declining. It went from 1905 grants in FY 2004 to 857 grants in FY 2010—a 55% decline. See Executive Office for Immigration Review, U.S. Dep't of

Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf; Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2010 Statistical Year Book* Table 15, at R3 (2011), http://www.justice.gov/eoir/statspub/fy10syb.pdf. Over that same period, the number of applications for relief under former Section 212(c) fell even more dramatically. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2010, there were 507. That reflects an 81% decline since FY 2004—and a 60% decline since FY 2008.[9]

Of course, the number of aliens who could be affected by the issue in this case would necessarily be even smaller, since an alien would not become eligible for discretionary relief under petitioner's theory unless he or she met, at a minimum, each of the following criteria: (1) the alien must have lawful-permanent-resident status; (2) the alien must have a conviction predating the repeal of Section 212(c); (3) that conviction must have

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[9] These figures, which are based on both published and unpublished statistics compiled by the Executive Office of Immigration Review through FY 2010, extend the FY 2009 figures cited in the government's briefs opposing certiorari in *Ferguson* v. *Holder*, No. 09-263, cert. denied, 130 S. Ct. 1735 (2010); *Molina-De La Villa* v. *Holder*, No. 09-640, cert. denied, 130 S. Ct. 1882 (2010); *De la Rosa* v. *Holder*, No. 09-594, cert. denied, 130 S. Ct. 3272 (2010); *Abebe* v. *Holder*, No. 09-600, cert. denied, 130 S. Ct. 3272 (2010); *Jerez-Sanchez* v. *Holder*, No. 09-1211, cert. denied, 131 S. Ct. 73 (2010); and *Canto* v. *Holder*, No. 09-1333, cert. denied, 131 S. Ct. 85 (2010). In *Molina-De La Villa*, *supra*, the petitioner's reply brief (at 6) noted that previous editions of the *Statistical Year Book* had reported lower numbers of 212(c) grants for some years. The higher figures in the more recent editions of the *Statistical Year Book* reflected a database conversion that more accurately captured the number of aliens with requests for relief under former Section 212(c).

resulted from a plea of guilty or no contest (rather than a trial);[10] (4) if it occurred after 1990, that conviction must have resulted in a sentence of less than five years; and (5) the charge of removal must have no comparable ground of inadmissibility except when considered on the basis of the facts of the underlying offense. Given the limited and diminishing nature of that class, petitioner's assertion (Pet. 31) that the case presents an issue of "[e]xceptional [a]nd [c]ontinuing [i]mportance" fails.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] In some circuits, *St. Cyr* has been applied to allow some aliens who were convicted after a trial to be eligible for relief under former Section 212(c). The Court most recently denied certiorari on that question in *Jerez-Sanchez*, *supra*; *Canto*, *supra*; *Ferguson*, *supra*; and *Molina-De La Villa*, *supra*.