No. 11-135

In the Supreme Court of the United States

MICHAEL FREDERICK, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a lawful permanent resident who has been convicted by guilty plea of an offense that renders him deportable and excludable, and who did not depart and re-enter the United States between the time of his conviction and the commencement of removal proceedings, is foreclosed from seeking discretionary relief from removal under former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), because the charged ground of deportability is not sufficiently comparable to a statutory ground of exclusion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 644 F.3d 357. The opinions of the Board of Immigration Appeals (Pet. App. 15a-18a) and the immigration judge (Pet. App. 19a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2011. The petition for a writ of certiorari was filed on August 1, 2011. 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 Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some lawful permanent resident aliens (LPRs) domiciled in the United States for seven consec-

utive 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"). *Ibid.* In 1976, however, the Second Circuit determined that making that discretionary relief available to deportable aliens who had departed the United States while denying it to deportable 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 (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, however, the Board has long maintained that an alien in a deportation proceeding 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 (1984); *In re Granados*, 16 I. & N. Dec. 726 (1979). That practice became known as the "comparable-ground" or "statutory-counterpart" rule, and, in 2004, it was codified by a regulation that states in pertinent part as follows:

> 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.

8 C.F.R. 1212.3(f)(5).

As relevant here, the Board applied the statutory-counterpart rule in *In re Blake*, 23 I. & N. Dec. 722 (2005), remanded, 489 F.3d 88 (2d Cir. 2007). In *Blake*, the Board explained that a statutory ground of exclusion is only a "comparable ground[]" to the charged ground of deportation if the two grounds use similar language to describe "substantially equivalent categories of offenses." *Id.* at 728. The Board specifically held that the "crime involving moral turpitude" ground of inadmissibility is not comparable to the ground of removal of having an aggravated felony conviction for sexual abuse of a minor. *Id.* at 729.

In 2007, the Second Circuit reviewed the Board's decision in *Blake*. See *Blake* v. *Carbone*, 489 F.3d 88 (2d Cir. 2007). The court rejected the argument that the Board's decision had an impermissible retroactive effect, because the 2004 regulations had done "nothing more than crystallize the agency's preexisting body of law." *Id.* at 98. The court nonetheless granted the alien's petition for review, holding that Section 212(c) eligibility should not turn on how the alien's "offense was categorized as a ground of deportation," but instead on the "particular criminal offense[]" itself. *Id.* at 102-103. "If the offense that renders [an LPR] deportable would render a similarly situated [LPR] excludable, the deportable [LPR] is eligible for a waiver of deportation." *Id.* at 103. The court 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). *Id.* at 98-99, 101, 103.

Every other court of appeals to have addressed the issue has upheld the Board's application of its statutory-counterpart rule as a reasonable interpretation of Section 212(c) that does not raise retroactivity concerns or violate the equal-protection component of the Fifth Amendment's Due Process Clause. 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); *Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010); *De la Rosa* v. *Attorney Gen.*, 579 F.3d 1327, 1335-1340 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010).[1]

2. a. Petitioner is a native and citizen of Germany who entered the United States as a lawful permanent resident at the age of four in 1961. In 1990, he was convicted, upon guilty pleas of two counts of aggravated criminal sexual abuse of a minor; one of the two victims was his step-daughter. He was sentenced to two four-year terms of imprisonment, to run concurrently. Pet. App. 3a.

In 2007, the Department of Homeland Security (DHS) placed petitioner in removal proceedings, on the charge that he is deportable under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien who has been convicted of an aggravated felony (specifically, "sexual abuse of a

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[1] The Tenth Circuit has upheld the Board's approach in unpublished decisions. See, *e.g.*, *Alvarez* v. *Mukasey*, 282 Fed. Appx. 718, 723 (2008).

minor," 8 U.S.C. 1101(a)(43)(A)). Pet. App. 3a-4a. On January 29, 2008, after a hearing, an immigration judge (IJ) determined that petitioner was subject to removal on the charged ground. *Id.* at 19a, 24a. Petitioner sought discretionary relief from removal under Section 212(c), but the IJ further concluded that petitioner was ineligible under the statutory-counterpart rule as applied in the Board's decision in *Blake* and in Seventh Circuit precedent to the same effect. *Id.* at 24a-26a.

b. On May 27, 2009, the Board dismissed petitioner's appeal. Pet. App. 15a-18a. The Board determined that petitioner was ineligible for discretionary relief from removal under Section 212(c) because the "sexual abuse of a minor" category of the aggravated-felony definition "has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the [INA]." *Id.* at 16a. The Board also noted that the Seventh Circuit had already rejected petitioner's various arguments to the contrary, including (1) that he could have been charged with being deportable under a different ground that has a statutory counterpart, (2) that the Board's decision in *Blake* had established a new rule that could not be retroactively applied to his 1990 conviction, (3) that the application of *Blake* violated his rights to equal protection and due process, and (4) that he is entitled to seek Section 212(c) relief under this Court's decision in *St. Cyr*. *Id.* at 17a-18a.[2]

c. Petitioner sought judicial review of the Board's decision, and the Seventh Circuit denied his petition for review. Pet. App. 1a-14a. The court noted that it was joined in its approach to the statutory-counterpart rule

[2] The Board relied on the Seventh Circuit's decision in *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679 (2008), which the Board misspelled as "*Ramora-Mallari*." Pet. App. 17a.

by the great majority of circuits to have considered the matter, *id*. at 9a, and that this Court had recently "granted certiorari to resolve the lopsided circuit split," *id*. at 9a-10a (citing *Judulang* v. *Gonzales*, 249 Fed. Appx. 499 (9th Cir. 2007), cert. granted, 131 S. Ct. 2093 (2011) (No. 10-694)). In response to petitioner's claim that he could have been charged with a different ground of removal, the court of appeals noted that it had no jurisdiction over "DHS's discretionary determination of what to charge as the basis for removal," *id*. at 13a, and that "what DHS *could* have charged as grounds for removal is irrelevant," *id*. at 11a. The court noted that it had twice rejected the argument that the Board's statutory-counterpart rule violates equal protection. *Id*. at 12a (citing *Zamora-Mallari*, *supra*; *Valere* v. *Gonzales*, 473 F.3d 757 (7th Cir. 2007)). The court also rejected petitioner's due process challenge, to the extent that it differed from his equal protection argument, noting that an alien "has no due-process right to a § 212(c) waiver," because that form of relief "is in the discretion of the Attorney General." *Id*. at 13a.

DISCUSSION

Petitioner seeks review (Pet. 5-27) of the court of appeals' determination that, under the Board's statutory-counterpart rule, he is ineligible for discretionary relief from removal under former Section 212(c) of the INA because his charged ground of deportability does not have a statutory counterpart among the grounds of excludability. As petitioner notes (Pet. 9), this Court granted certiorari "on the issue presented" on April 18, 2011. See *Judulang* v. *Holder*, No. 10-694 (oral argument scheduled for Oct. 12, 2011). Although petitioner attempts to distinguish his case from some earlier cases

on the ground that "he was deportable as well as excludable at the time of his guilty pleas," Pet. 16, he does not suggest that that fact distinguishes his case from that of the alien in *Judulang*, who also claims to have been deportable at the time of his guilty plea. See Merits Reply Br. at 11, *Judulang*, *supra*. The Court should hold this petition pending its decision in *Judulang* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Judulang* v. *Holder*, cert. granted, No. 10-694 (oral argument scheduled for Oct. 12, 2011), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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