No. 12-1126

In the Supreme Court of the United States

ODULENE DORMESCAR, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether res judicata bars the government from instituting removal proceedings against an alien under 8 U.S.C. 1227(a) based on a conviction that it did not use as a basis for a prior proceeding seeking to find the alien inadmissible to the United States under 8 U.S.C. 1182(a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Regulations: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 690 F.3d 1258. The decisions of the Board of Immigration Appeals (Board) and immigration judge (Pet. App. 27a-30a, 31a-34a), are unreported. Prior decisions of the Board and immigration judge (Pet. App. 47a-53a, 55a-57a, 67a-78a, 79a-82a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2012. A petition for rehearing was denied on October 17, 2012 (Pet. App. 35a). On December 19, 2013, Justice Thomas extended the time within which to file a petition for a writ of certiorari to March 16, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The immigration laws of the United States have "historically distinguished between aliens who have 'entered' the United States and aliens still seeking to enter (whether or not they are physically on American soil)." *Jama* v. *Immigration and Customs Enforcement*, 543 U.S. 335, 349 (2005) (citing *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958)). Prior to 1996, there were two distinct sets of proceedings depending on the status of the alien—exclusion or inadmissibility proceedings on the one hand, and deportation proceedings on the other. See *Judulang* v. *Holder*, 132 S. Ct. 476, 479 (2011). Under that regime, "[t]he deportation hearing [was] the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing [was] the usual means of proceeding against an alien outside the United States seeking admission." *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982); see *Judulang*, 132 S. Ct. at 479.

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 208, Div. C, 110 Stat. 3009-546. IIRIRA eliminated distinct "exclusion" and "deportation" proceedings and replaced them with a unified proceeding termed a "removal proceeding." See § 304(a)(3), 110 Stat. 3009-587; 8 U.S.C. 1229a; see also *Judulang*, 132 S. Ct. at 479; *Jama*, 543 U.S. at 349. At the same time, however, Congress retained separate statutory provisions with distinct grounds for inadmissibility and deportability. Compare 8 U.S.C. 1182(a) (grounds of inadmissibility) with 8 U.S.C. 1227(a) (grounds of deportability); see also *Judulang*, 132 S. Ct. at 479 ("[T]he statutory bases for excluding and deporting aliens have always varied. Now, as before, the immigration law

provides two separate lists of substantive grounds, principally involving criminal offenses, for these two actions.").

b. The Immigration and Nationality Act (INA) provides that in removal proceedings conducted under 8 U.S.C. 1229a, an immigration judge "shall conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. 1229a(a)(1). Removal proceedings under Section 1229a commence with the filing of a Notice to Appear (NTA) with the immigration court and service upon the alien. 8 U.S.C. 1229(a)(1); 8 C.F.R. 1239.1(a). The NTA is required to include, among other things, statements regarding the "nature of the proceeding against the alien," the "acts or conduct alleged to be in violation of law," and the "charges against the alien and the statutory provisions alleged to have been violated." 8 U.S.C. 1229(a)(1)(A) and (C)-(D). The Department of Homeland Security (DHS) may also, "[a]t any time during deportation or removal proceedings," lodge "additional or substituted charges of deportability and/or factual allegations[.]" 8 C.F.R. 1003.30.

2. a. Petitioner is a native and citizen of Haiti who was admitted to the United States as a lawful permanent resident on April 14, 1998. Pet. App. 48a. On November 29, 2006, he applied for admission to the United States following a trip to Haiti. *Id.* at 48a-49a. At that time, he was personally served with a NTA charging him with being inadmissible and subject to removal as an alien convicted of an offense relating to a controlled substance (8 U.S.C. 1182(a)(2)(A)(i)(II)) and an alien convicted of a crime involving moral turpitude (8 U.S.C. 1182(a)(2)(A)(i)(I)). Pet. App. 48a-49a. Those charges were based on the government's allegations that petitioner had been convicted of cocaine possession in

March 1992 and of misdemeanor battery and aggravated assault in February 1990, both in Florida state court. *Id.* at 49a.

In February 2007—after service of the NTA and initiation of removal proceedings—petitioner was convicted in federal court of "uttering and possessing a counterfeited and forged security of an organization" in violation of 18 U.S.C. 513(a). Pet. App. 49a; see Administrative Record (A.R.) 1060-1073. Petitioner was sentenced to 12 months' imprisonment for this offense, which resulted in a loss of $44,136.42 to the victim. Pet. App. 50a, 52a; see A.R. 1060-1061, 1063. DHS notified the immigration judge of the conviction, but it did not amend the NTA or file a supplement to include a charge of inadmissibility based on this conviction. See Pet. App. 51a.

On March 24, 2008, petitioner filed a motion to terminate the removal proceedings. Pet. App. 49a. He argued that the 1992 drug possession offense had been vacated and thus no longer qualified as a conviction for immigration purposes. *Ibid.* He also contended that he was convicted only of misdemeanor battery, not aggravated assault, and that a simple misdemeanor battery conviction was not a crime involving moral turpitude. *Ibid.*

b. On May 8, 2008, the immigration judge issued a written decision denying petitioner's motion to terminate his proceedings. Pet. App. 47a-53a. The immigration judge agreed with petitioner that his 1992 cocaine conviction did not constitute a conviction for immigration purposes because it had been vacated. *Id.* at 50a. The immigration judge also agreed that petitioner's 1990 conviction for misdemeanor battery was not a crime involving moral turpitude for purposes of remova-

bility. *Ibid.* But the immigration judge determined that petitioner's 2007 counterfeiting conviction could serve as the basis of removability. *Id.* at 50a-52a. The immigration judge thus found petitioner removable and ineligible for any relief from removal. *Id.* at 52a-53a.

c. Petitioner filed an administrative appeal with the Board. Pet. App. 56a. During the pendency of that appeal, DHS moved to remand proceedings to the immigration judge in order to allow the agency an opportunity to amend the NTA to more fully include petitioner's criminal history. *Ibid.*; see A.R. 872-875.

On September 9, 2008, the Board issued a brief order sustaining petitioner's administrative appeal and ordering proceedings terminated. Pet. App. 55a-57a. The Board held that the immigration judge had correctly concluded that the lodged charges of inadmissibility could not be sustained. *Id.* at 56a. Contrary to the immigration judge's conclusion, however, the Board determined that the 2007 counterfeiting conviction could not serve as the basis for removability, as that conviction had not been charged or alleged as a ground of removability in the NTA or any subsequent filing before the immigration judge. *Ibid.* The Board also denied DHS's motion to remand, finding that the request was too general in nature and lacked adequate explanation for why remand was warranted, what charge DHS would pursue if there were a remand, or why such allegations or charges were not previously lodged. *Id.* at 56a-57a.

3. a. On September 12, 2008, petitioner was personally served with a second NTA. Pet. App. 69a; A.R. 850-851. This NTA, based on petitioner's 2007 counterfeiting conviction, alleged that he was inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) as an alien convicted of a crime involving moral turpitude. Pet. App. 69a.

Petitioner again moved to terminate the removal proceedings. Pet. App. 69a. He argued, first, that he could not be charged with inadmissibility. *Id.* at 71a. According to petitioner, the effect of the Board's prior order terminating proceedings against him was to allow him to revert back to his prior status, *i.e.*, as an admitted lawful permanent resident. *Id.* at 71a-72a. He thus argued that any charge of removability would have to be made under 8 U.S.C. 1227, not 8 U.S.C. 1182, and that termination of the current proceedings was therefore warranted. Pet. App. 72a. Petitioner also argued that the second removal proceeding was barred by res judicata. See A.R. 805-806.

b. On November 18, 2008, the immigration judge denied the motion to terminate proceedings and ordered petitioner removed. Pet. App. 67a-78a. The immigration judge determined that petitioner was properly charged with inadmissibility because his 2007 conviction occurred during his ongoing application for admission, *i.e.*, prior to any final determination on his admissibility to the United States. *Id.* at 70a-72a. Having determined that petitioner was appropriately charged as inadmissible, the immigration judge also found him removable because the counterfeiting conviction was a crime of moral turpitude. *Id.* at 73a-76a.

The immigration judge, however, did not reach the issue of whether the second removal proceeding was itself barred by res judicata. Rather, he ordered proceedings certified to the Board so that it could address two issues: first, whether the Board's prior termination order encompassed all the potential charges of removability that could have been brought during the first proceeding, or simply the two charges actually lodged by DHS in the NTA; and second, whether the termina-

tion of petitioner's first removal proceeding effectively granted his application for admission. Pet. App. 76a-78a.

c. On March 23, 2009, the Board issued its decision on certification. Pet. App. 79a-82a. The Board explained that "[t]he doctrine of *res judicata* bars the filing of a claim when, *inter alia*, the same cause of action was involved in a prior proceeding." *Id.* at 80a. The Board explained that that prerequisite for application of *res judicata* was absent in this case because the "current proceedings * * * present a different basis for removability than the prior proceedings." *Ibid.* In particular, the second removal proceeding was based on a different allegation of removability, the 2007 counterfeiting conviction, than the first proceeding, which was based on petitioner's 1990 and 1992 criminal convictions for drug possession and misdemeanor battery. *Ibid.*

The fact that the immigration judge (erroneously) based his initial finding of removability on the 2007 conviction did not, according to the Board, mandate application of res judicata. Pet. App. 80a-81a. As the Board noted in its September 2008 decision, the 2007 conviction was not alleged by DHS in the NTA, and was thus not properly before the immigration judge. *Ibid.*; see *id.* at 56a. Moreover, the "fact that the DHS could have lodged the instant allegation in the prior proceedings does not preclude the DHS from filing it now." *Id.* at 81a; see *ibid.* ("The regulations provide that the DHS may, but is not required to, lodge additional allegations or charges during proceedings.") (citing 8 C.F.R. 1003.30).

The Board also determined that its denial of DHS's motion to remand in the first proceeding did not "have any *res judicata* effect on the current charge of remova-

bility." Pet. App. 81a. In denying that motion, the Board explained, it "did not implicitly consider the validity of a removal charge based on the respondent's 2007 conviction." *Ibid.* "To the contrary," the Board continued, it "denied the motion because the DHS did not meet its burden of showing a remand was warranted by sufficiently specifying what allegation or charge it would lodge as a basis for a remand at that stage of the proceeding." *Ibid.*

Although the Board concluded that the second proceeding was not barred by res judicata, it ordered proceedings remanded to the immigration judge for further consideration of petitioner's removability. Pet. App. 81a-82a. Specifically, the Board concluded that petitioner should be charged with deportability under 8 U.S.C. 1227, not inadmissibility under 8 U.S.C. 1182, as the charge of removability was not lodged until *after* the Board had terminated petitioner's prior proceedings and thereby resolved the issue of petitioner's admissibility. Pet. App. 81a-82a. Remand was thus required for the immigration judge to consider the merits of DHS's allegation of removability under the appropriate statutory section. *Id.* at 82a.

4. a. On remand, DHS withdrew the charge of inadmissibility and charged petitioner with being subject to removal as having been convicted of an aggravated felony offense relating to counterfeiting. Pet. App. 33a; see 8 U.S.C. 1101(a)(43)(R), 1227(a)(2)(A)(iii). Additionally, DHS changed the designation of petitioner on the NTA from arriving alien to an alien admitted to the United States. Pet. App. 33a.

Before the immigration judge, petitioner again moved to terminate proceedings, arguing that DHS could have lodged a charge based on the 2007 conviction

during the first inadmissibility proceeding, and that DHS was barred by res judicata from asserting that conviction as the basis for removal now. A.R. 527-530.

The immigration judge held a hearing in petitioner's case on June 16, 2010, at the conclusion of which he issued an oral decision denying the motion to terminate and finding petitioner removable as charged. Pet. App. 31a-34a.[1] First, the immigration judge determined that DHS was permitted to amend petitioner's status from arriving alien to an alien admitted to the United States. *Id.* at 33a-34a. That amendment was not prohibited by any regulatory provision and was otherwise consistent with the Board's directive to allow DHS to charge petitioner under an appropriate ground of removability. *Ibid.* Second, the immigration judge concluded that petitioner's renewed res judicata argument was foreclosed by the Board's March 2009 decision. *Id.* at 34a. Accordingly, the motion to terminate proceedings was denied, petitioner was found removable, and was ordered removed to Haiti. *Ibid.*

b. On November 24, 2010, the Board dismissed petitioner's administrative appeal. Pet. App. 27a-30a. The Board first held that DHS acted consistently with the

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[1] The immigration judge had previously issued an oral decision on January 7, 2010, but due to issues relating to the recording and transcription of the decision, the substance of that decision is not discernible. A.R. 141-142. Petitioner filed an administrative appeal of that decision with the Board, but the Board remanded proceedings to the immigration judge. Pet. App. 31a; A.R. 120. It noted that both the immigration judge's decision and the record of the hearings were indiscernible or missing. A.R. 120. The Board directed the immigration judge to take whatever steps were necessary in order to produce a full and complete transcription of the proceedings before him, and ordered the case to be certified to the Board upon the immigration judge's issuance of his decision. *Ibid.*

March 2009 remand order when it amended petitioner's designation. *Id.* at 28a. The Board further concluded that the amendment was not in violation of any statutory or regulatory provision. *Ibid.*

The Board also held that the second proceeding was not barred by res judicata, reiterating its rationale from its March 2009 decision. Pet. App. 29a-30a.

5. The court of appeals denied a petition for review. Pet. App. 1a-26a. The court stated that it need not decide "whether res judicata always or never applies in agency proceedings involving aliens who have been convicted of aggravated felonies because, even assuming that the defense generally does apply with full force in immigration proceedings, under the specific facts of this case it is not a bar to the removal order." *Id.* at 22a n.10.

The court of appeals explained that "a party asserting res judicata bears the burden of showing" four elements: "(1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action." Pet. App. 20a-21a (quoting *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir.), cert. denied, 534 U.S. 827 (2001)). The court further noted that "[o]nly if all four of those requirements are met" is it necessary to "consider 'whether the claim in the new suit was or could have been raised in the prior action.'" *Id.* at 21a (quoting *In re Piper Aircraft Corp.*, 244 F.3d at 1296).

The court of appeals concluded that the fourth prerequisite for application of res judicata was absent here because the two proceedings did not "involve the same 'cause of action' for res judicata purposes." Pet. App

22a. The first proceeding, based on 8 U.S.C. 1182(a), involved the question whether petitioner could be admitted to the United States in light of his 1990 and 1992 Florida convictions. Pet. App. 23a. The second proceeding, based on 8 U.S.C. 1227(a)(2)(A)(iii), involved the question whether petitioner (who had been "implicitly deemed admitted" at the end of the first proceeding) should be removed based on his 2007 counterfeiting conviction. Pet. App. 23a.

The court of appeals explained that "[r]emovability under § 1227(a) is a different charge from inadmissibility under § 1182(a), and [DHS] could not have successfully brought the charge under § 1227(a) until after [petitioner] was deemed admitted at the conclusion of" the first proceeding. Pet. App. 23a-24a. "Because the charge was unavailable during [the first proceeding], res judicata did not bar [DHS] from bringing it in the proceeding that followed." *Id.* at 24a.[2]

ARGUMENT

Petitioner renews his contention (Pet. 13-19) that res judicata barred DHS from instituting the removal proceeding in his case. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Assuming that preclusion rules developed for federal courts apply to administrative proceedings, cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524 (1978); Pet. App. 21a n.10; *Johnson* v.

[2] The court of appeals also rejected petitioner's argument that DHS "had no authority to change his designation in the second notice to appear from arriving inadmissible alien to admitted alien subject to removal[.]" Pet. App. 24a-25a.

Whitehead, 647 F.3d 120, 130-131 (4th Cir. 2011), cert. denied, 132 S. Ct. 1005 (2012); *Channer* v. *DHS*, 527 F.3d 275, 280 n.4 (2d Cir. 2008), the court of appeals correctly found those rules inapplicable to the "long and tortured administrative history of this case." Pet. App. 20a-24a, 31a.

a. As the court of appeals held, petitioner's first and second removal proceedings did not involve the same cause of action. Pet. App. 22a-24a. In the first proceeding, DHS charged petitioner with being "ineligible to be admitted to the United States" because he had been convicted of a crime involving moral turpitude and a crime relating to controlled substances. *Id.* at 49a; 8 U.S.C. 1182(a)(2)(A)(i)(I) and (II). In the second proceeding, DHS proceeded under an entirely different source of statutory authority, charging petitioner with being "deportable" because of his conviction of an "aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii); Pet. App. 33a. By its plain terms, that later provision is applicable only to an alien who has been admitted. 8 U.S.C. 1227(a)(2)(A)(iii).

As the court of appeals explained, petitioner could not have been charged as "deportable" in the first proceeding because his admissibility had not been resolved. Pet. App. 22a-23a. Only after petitioner was found to be an admitted alien at the conclusion of the first proceeding could DHS charge him with deportability. *Id.* at 23a. Accordingly, the two proceedings involved two distinct causes of action, and res judicata did not apply.

Petitioner contends that the relevant "cause of action" for purposes of res judicata is a removal proceeding, and that the court of appeals erred in deeming inadmissibility and deportability distinct causes of action.

Pet. 17-19. Petitioner's contention is inconsistent with the statute.

Although Congress unified "removal proceedings" in 1996, it retained distinct statutory grounds for alleging inadmissibility and deportability. See *Judulang* v. *Holder*, 132 S. Ct. 476, 479 (2011); pp. 2-3, *supra*. The statutory grounds are overlapping, but not identical, and each provision applies only to a mutually exclusive set of aliens—the inadmissibility grounds to those who have yet to be admitted, 8 U.S.C. 1182(a), and the deportability grounds to those "in and admitted to the United States," 8 U.S.C. 1227(a).

Moreover, there are different burdens of proof involved depending on the charge. An alien who has not yet been admitted to the United States must establish his admissibility, see 8 U.S.C. 1229a(c)(2)(A), while the government must establish the deportability of an alien who has been admitted to the United States, see 8 U.S.C. 1229a(c)(3)(A). Relief from removal may also be dependent on whether an alien is charged as being inadmissible or being deportable. See, *e.g.*, *Cabral* v. *Holder*, 632 F.3d 886, 890-894 (5th Cir. 2001) (waiver of inadmissibility under 8 U.S.C. 1182(h) available only to aliens charged with inadmissibility, not those charged with deportability). These distinctions provide further support for the court of appeals' conclusion that these are two distinct causes of action.

b. The court of appeals' conclusion was correct for a second independent reason that the court did not reach. The two proceedings involved different causes of action because they were based on different convictions. The first proceeding involved petitioner's 1990 Florida conviction for misdemeanor battery and felony aggravated assault and his 1992 Florida conviction for possession of

cocaine. Pet. App. 3a. The second proceeding involved petitioner's 2007 federal conviction for counterfeiting. *Id.* at 9a.

To determine whether a subsequent removal proceeding involves the same "cause of action" as a previous one, the courts should consider "whether the acts complained of were the same, whether the material facts alleged in each suit were the same, and whether the witnesses and documentation required to prove such allegations were the same." *Duhaney* v. *Attorney Gen.*, 621 F.3d 340, 348 (3d Cir. 2010), cert. denied, 131 S. Ct. 2961 (2011) (citation omitted). Applying those principles, the Third Circuit observed that when the criminal convictions underlying petitioner's first and second removal proceedings are different, "the critical acts and the necessary documentation [are] different for the two proceedings," and the proceedings therefore do not involve the same cause of action. *Id.* at 349.

The Third Circuit explained that its "pragmatic," transactional approach to res judicata in this setting was consistent with sound administration of the immigration laws. *Duhaney*, 621 F.3d at 351. Conversely, a "requirement that the [DHS] advance every conceivable basis for [removability] in the [Notice to Appear] * * * would needlessly complicate proceedings in the vast majority of cases." *Id.* at 350-351 (internal citation omitted) (brackets in original). The court also explained that its rule was consistent with congressional intent. "The fact that Congress has specifically chosen to amend the immigration laws to facilitate the removal of aliens who have committed aggravated felonies counsels against an overly rigid application of the res judicata doctrine." *Id.* at 351.

The Second Circuit reached the same conclusion in *Channer*, *supra*. In *Channer*, an immigration judge ordered an alien removed based on a federal firearms conviction, but that conviction was later vacated. 527 F.3d at 277-278. The government then issued a second notice to appear, alleging that the alien was removable on the basis of a Connecticut felony conviction that it had not previously asserted as a basis for removal, even though the alien was convicted of the Connecticut offense before the first removal proceeding. *Ibid.*

The Second Circuit held that res judicata did not preclude the government from relying on the Connecticut conviction as a basis for removal in the second proceeding because the alien "fail[ed] to demonstrate that the two proceedings * * * involve[d] the same claim or nucleus of operative fact." *Channer*, 527 F.3d at 281. The court noted that although "the INS could have alleged both the federal and state convictions during the [first] deportation proceeding," each proceeding "stemmed from a separate transaction" and "required different proof," and therefore "claim preclusion would not bar the INS from relitigating [petitioner's] deportation." *Ibid.*

c. Finally, even if petitioner were correct that res judicata would bar use of a basis for removal that could have been charged in a prior proceeding, his claim would still fail because the conviction in question here was entered *after* the prior removal proceedings began.

As the court of appeals explained in another case, "res judicata does *not* apply where the facts giving rise to the second case only 'arise after the original pleading is filed in the earlier litigation.'" *In re Piper Aircraft*, 244 F.3d 1289, 1298 (11th Cir. 2001) (quoting *Manning* v. *City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992)),

cert. denied, 534 U.S. 827 (2001). The court further explained that "the res judicata preclusion of claims that 'could have been brought' in earlier litigation" does not "include[] claims which arise after the original pleading is filed in the earlier litigation." *Ibid.* (quoting *Manning*, 953 F.3d at 1360). "Instead, * * * for res judicata purposes, claims that 'could have been brought' are claims *in existence at the time the original complaint is filed* or claims actually asserted . . . in the earlier action." *Ibid.* (quoting *Manning*, 953 F.2d at 1360) (emphasis in *In re Piper Aircraft*); accord *Aspex Eyewear, Inc.* v. *Marchon Eyewear, Inc.*, 672 F.3d 1335, 1345 (Fed. Cir. 2012); *Curtis* v. *Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000) ("The crucial date is the date the complaint was filed. The plaintiff has no continuing obligation to file amendments to the complaint to stay abreast of subsequent events; plaintiff may simply bring a later suit on those later-arising claims.").

In this case, petitioner was served with the NTA that began the first removal proceeding on November 29, 2006. Pet. App. 48a-49a. He was not convicted of the federal counterfeiting offense until February 2007. *Id.* at 49a. That later-arising conviction therefore could not be a basis for a finding of res judicata. The court of appeals' judgment was correct for this reason as well.

2. Petitioner contends that this case merits review because the court of appeals' judgment conflicts with a contrary decision by the Ninth Circuit. See Pet. 10-11 (citing *Bravo-Pedroza* v. *Gonzales*, 475 F.3d 1358 (9th Cir. 2007)). There is no conflict warranting review.

In *Bravo-Pedroza*, the government initiated removal proceedings against an alien for having committed two crimes involving moral turpitude, based on the alien's California convictions for robbery and burglary. 475

F.3d at 1358-1359. An immigration judge granted the alien relief from deportation under former Section 212(c) of the INA. *Id.* at 1359. The alien was later convicted of petty theft, which was a felony under state law because of the alien's prior criminal record. *Ibid.* The government obtained an order of removal against the alien based on the petty theft conviction, but while the alien's petition for review was pending, the Ninth Circuit held in a different case that petty theft was not an aggravated felony. *Ibid.* (citing *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002) (en banc)).

No longer having the aggravated felony ground available as a basis for removal, the government brought a third removal proceeding against the alien, this time asserting that the petty theft conviction was a crime involving moral turpitude, and that together with the robbery and burglary convictions that were the subject of the first removal proceeding, the alien was removable as an alien who had committed two or more crimes involving moral turpitude. *Bravo-Pedroza*, 475 F.3d at 1359. The Ninth Circuit held that res judicata barred the government from bringing the third removal proceeding. *Id.* at 1359-1360.

Bravo-Pedroza is clearly distinguishable from this case. First, unlike this case, *Bravo-Pedroza* did not involve an earlier proceeding for inadmissibility and a later proceeding for deportation. That distinction was dispositive for the court of appeals here, but *Bravo-Pedroza* had no occasion to address it. For that reason alone, there is no conflict between the decision below and *Bravo-Pedroza*.

In addition, the government's asserted bases for removal in Bravo-Pedroza's third removal proceeding were three criminal convictions that it had already as-

serted as grounds for removal in prior proceedings (although one of the three convictions had been charged under a different statutory ground of deportability). Indeed, the Ninth Circuit itself has characterized *Bravo-Pedroza* as a case in which the government had "merely relabeled Bravo-Pedroza's existing convictions 'crimes of moral turpitude' after a change of law." *Poblete Mendoza* v. *Holder*, 606 F.3d 1137, 1141 (9th Cir. 2010). In petitioner's case, by contrast, DHS had not previously charged petitioner's 2007 counterfeiting conviction as a basis for petitioner's removal.

3. This Court recently denied a petition for a writ of certiorari seeking review of the Third Circuit's decision in *Duhaney* and asserting the same alleged circuit conflict with *Bravo-Pedroza*. See 131 S. Ct. 2961 (2011) (No. 10-9039). There is no basis for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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