No. 11-144

In the Supreme Court of the United States

KHALID UMER, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a lawful permanent resident who has been convicted by guilty plea of an offense that renders him deportable, 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relief from removal under former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994) (repealed 1996), because the charged ground of deportability is not sufficiently comparable to a statutory ground of exclusion.

2. Whether a court of appeals must stay proceedings in a case when it presents at least one issue on which this Court has granted a petition for a writ of certiorari in another case.

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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 in 417 Fed. Appx. 403. The opinions of the Board of Immigration Appeals (Pet. App. 5a-14a) and the immigration judge (Pet. App. 15a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2011. A petition for rehearing was denied on May 9, 2011 (Pet. App. 24a-25a). 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 Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed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 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"). *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 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 (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 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.

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]

In *Judulang* v. *Holder*, No. 10-694 (argued Oct. 12, 2011), this Court is currently considering the validity of the Board's application of the statutory-counterpart rule to an aggravated-felony crime of violence (see 8 U.S.C. 1101(a)(43)(F)).

[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).

2. a. Petitioner is a native and citizen of Pakistan who was admitted to the United States as an LPR in 1983, when he was 28 years old. Pet. App. 17a; Admin. Record (A.R.) 451. In 1989, he was convicted in Texas state court of tampering with government records in the third degree, and in 1992, he was convicted, upon a guilty plea in Texas state court, of theft in the third degree, for which he was sentenced to a two-year term of imprisonment. Pet. App. 10a; A.R. 858.

In 2004, the Department of Homeland Security (DHS) placed petitioner in removal proceedings, on a charge that he was deportable under 8 U.S.C. 1227(a)(2)(A)(ii) as an alien who had been convicted of two crimes involving moral turpitude, and—as relevant here—on a charge that he was deportable under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien who had been convicted of an aggravated felony (specifically, a theft or burglary offense with a sentence of at least one year, see 8 U.S.C. 1101(a)(43)(G)). Pet. App. 17a. At a hearing before an immigration judge (IJ), petitioner conceded he was removable on both charges and sought discretionary relief from removal under Section 212(c), but failed to file the necessary application. *Id.* at 17a-18a. The IJ ruled the application withdrawn and ordered petitioner removed. The Board initially dismissed petitioner's appeal, but in 2007, it granted an unopposed motion to reopen based on ineffective assistance of counsel and remanded the case. *Id.* at 8a, 18a.

b. On June 3, 2008, the IJ concluded that petitioner is ineligible for relief under former Section 212(c) by application of the Board's statutory-counterpart rule because his aggravated-felony ground of deportability (for a theft offense) has no statutory counterpart in the grounds of excludability. Pet. App. 15a, 21a-22a. The IJ thus pretermitted petitioner's application for relief under former Section 212(c) and ordered that he be removed. *Id.* at 22a-23a.

c. On March 31, 2010, the Board dismissed petitioner's appeal. Pet. App. 5a-14a. As relevant here, the Board affirmed the IJ's conclusion that petitioner is ineligible for Section 212(c) relief under the Board's statutory-counterpart rule. *Id.* at 12a-13a (citing *In re Brieva-Perez*, *supra*; *In re Blake*, *supra*; and 8 C.F.R. 1212.3(f)(5)).

3. Petitioner sought judicial review of the Board's decision, and the court of appeals denied him relief. Pet. App. 1a-4a. In its March 11, 2011, decision, the court rejected petitioner's argument that he is eligible for Section 212(c) relief because his theft conviction was a crime of moral turpitude. Applying the statutory-counterpart rule that it had previously upheld, the court concluded that "there is no textual link" between the theft-offense ground of deportability and the crime-involving-moral-turpitude ground of excludability, and that petitioner is therefore ineligible for relief under former Section 212(c). *Id.* at 2a-3a.[2]

On April 18, 2011, this Court granted certiorari in *Judulang* v. *Holder*, 131 S. Ct. 2093. Two days later,

[2] The court also rejected petitioner's argument that his due process rights were violated by the IJ's refusal to allow him to withdraw his concession of removability, in part because he failed to show substantial prejudice. Pet. App. 3a. It rejected as merely a "conclusory assertion" petitioner's contention that DHS's decision to charge him under two grounds flowing from his theft conviction violated due process. *Id.* at 4a. The court also concluded that it lacked jurisdiction to address petitioner's unexhausted arguments that the court of appeals' application of the statutory-counterpart rule violates equal protection, and that petitioner's due process rights were violated when the IJ failed to allow him to apply for forms of relief other than under Section 212(c). *Ibid.*

petitioner filed a petition for rehearing and a motion to stay further proceedings pending this Court's decision in *Judulang*. The court of appeals denied the petition for rehearing (Pet. App. 24a-25a) and the motion for a stay of proceedings (*id.* at 26a-27a).

DISCUSSION

1. Petitioner seeks review (Pet. 12-25) 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 one of his charged grounds of deportability—his conviction for an aggravated-felony theft offense—does not have a statutory counterpart among the grounds of excludability. As petitioner acknowledges (Pet. 4, 12), the Court is already considering the appropriateness of the Board's statutory-counterpart rule in *Judulang* v. *Holder*, No. 10-694 (argued Oct. 12, 2011). With respect to this issue, the Court should hold this petition pending its decision in *Judulang* and then dispose of the petition as appropriate in light of that decision.[3]

[3] Petitioner suggests (Pet. 19, 24) that, even if the Court affirms the judgment in *Judulang*, it should still grant certiorari in this case "to resolve the three-way circuit split," because petitioner's conviction was for a theft offense, which he contends is "*always* considered a crime involving moral turpitude." Yet, if the Court in *Judulang* sustains the Board's rationale in *Blake* and *Brieva-Perez*—which focused in part on the difference in scope between the general exclusion provision dealing with crimes involving moral turpitude, and the narrower deportation provisions dealing with certain categories of aggravated felonies—then petitioner's contention will likely be irrelevant. Even if that conclusion is not clear from an opinion affirming the judgment in *Judulang*, it is unlikely that this Court would wish to be the first to determine whether petitioner might nevertheless be eligible to seek Section 212(c) re-

2. Petitioner also contends (Pet. 26) that the court of appeals erred by denying his motion to stay proceedings and his petition for panel rehearing after this Court had already granted certiorari in *Judulang*. Petitioner asserts that the court's refusal to stay proceedings "was error," because "this Court's answer to the question presented in *Judulang* would likely have been dispositive of three out of four" of the claims presented in his rehearing petition. Petitioner thus requests (*ibid.*) that the Court adopt a blanket rule that "in cases where this Court has granted [c]ertiorari," courts of appeals should be required to stay proceedings "until there is a final disposition of the case [in this Court]."

Even aside from the fact that it would be too late for petitioner to benefit from any such rule, the Court should decline petitioner's invitation. He provides no explanation or citation in support of a blanket rule governing stays of other cases after this Court has granted certiorari. A universal rule would be inconsistent with the recognition that decisions about whether to stay proceedings benefit from a "suppleness of adaptation to varying conditions." *Landis* v. *North Am. Co.*, 299 U.S. 248, 256 (1936). As the Court has explained:

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

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lief. Accordingly, if the Court does not deny certiorari in this case, its usual practices would counsel in favor of vacating the decision below and remanding for proceedings consistent with *Judulang*.

Id. at 254-255. Nor is there any settled practice in other circuits of holding proceedings in abeyance whenever this Court has granted certiorari on a potentially dispositive question.[4] The court of appeals did not abuse its discretion, or create a conflict with any other circuit, in denying petitioner's motion. Accordingly, with respect to this question, the Court should deny certiorari.

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[4] See, *e.g.*, *Teamsters Local Union No. 523* v. *NLRB*, 590 F.3d 849, 852 n.2, 855 (10th Cir. 2009) (deciding that the NLRB had statutory authority to act with two members and enforcing its order, though acknowledging that there was a circuit split and this Court had already "granted certiorari on this precise issue"), vacated and remanded, 131 S. Ct. 109 (2010); *Dunlap* v. *Litscher*, 301 F.3d 873, 876-877 (7th Cir. 2002) (adhering to circuit precedent requiring that three prisoners' Rule 60(b) motions be denied or dismissed even though this Court had already "granted certiorari to decide in what circumstances if any" such motions could be made), cert. denied, 537 U.S. 1140, 537 U.S. 1234, and 539 U.S. 962 (2003).

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending this Court's decision in *Judulang* v. *Holder*, No. 10-694 (argued Oct. 12, 2011), and then disposed of as appropriate in light of that decision. With respect to the second question, the petition should be denied.

Respectfully submitted.

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OCTOBER 2011