No. 11-1056

In the Supreme Court of the United States

TOMAS B. TORRES-RENDON, 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 IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an alien who has not been charged with deportability on the basis of fraudulent entry may nonetheless be eligible for the Attorney General's discretionary authority under former 8 U.S.C. 1251(f) (1988) (repealed 1990) to waive deportation for fraudulent entry into the United States, and thus be provided, *nunc pro tunc*, with lawful-permanent-resident status that would make the alien eligible for discretionary relief under former 8 U.S.C. 1182(c) (1994) (repealed 1996).

2. Whether the "stop-time" rule of 8 U.S.C. 1229b(d)(1) is triggered when an alien is convicted of a drug conviction or served with an order to show cause and therefore terminates an alien's accrual of ten years of continuous physical presence for purposes of eligibility for suspension of deportation under former 8 U.S.C. 1254(a)(2) (1994) (repealed 1996).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 656 F.3d 456. The opinions of the Board of Immigration Appeals (Pet. App. 14a-18a) and the immigration judge (Pet. App. 19a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2011. A petition for rehearing was denied on November 22, 2011 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on February 21, 2012 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Before 1996, the exclusion or removal of an alien from the United States was accomplished in one of

two ways: An alien seeking admission was placed in an "exclusion" proceeding, while an alien already present in the United States was placed in a "deportation" proceeding. *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982). As relevant in this case, the grounds of deportability under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, include having been convicted after entry of a violation of a controlled-substances law, 8 U.S.C. 1251(a)(11) (1988), and having been, "at the time of entry," among "one or more of the classes of aliens excludable by the law existing at the time of such entry," 8 U.S.C. 1251(a)(1) (1988).

b. Petitioner's case implicates three different forms of discretionary relief from deportation that were repealed by Congress between 1990 and 1996.

The first form of relief was contained in former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994), which expressly authorized some lawful-permanent-resident aliens (LPRs) domiciled in the United States for seven consecutive years to apply for a discretionary waiver of exclusion, unless they had been convicted of an aggravated felony and had served a term of imprisonment of at least five years.[1] By its terms, Section 212(c) applied only to LPRs in exclusion proceedings, but it was in practice also applied to many LPRs in deportation proceedings. See *Judulang* v. *Holder*, 132 S. Ct. 476, 480 (2011); *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). Eligibil-

[1] Like the petition and the decisions below, this brief generally refers to the three discretionary relief provisions by their former locations within the INA (Section 212(c), Section 241(f), and Section 244(a)(2)) rather than where they were codified (8 U.S.C. 1182(c) (1994), 8 U.S.C. 1251(f) (1988), and 8 U.S.C. 1254(a)(2) (1994), respectively). Other INA provisions are generally referred to by their United States Code citations. See Sup. Ct. R. 34.5.

ity, however, always depended on being an LPR at the time relief was sought. See *In re Garcia-Linares*, 21 I. & N. Dec. 254, 261 (B.I.A. 1996).

Although Section 212(c) was repealed in 1996, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, this Court held in *St. Cyr*, based on principles of non-retroactivity, that the repeal of Section 212(c) should not be construed to apply to certain aliens whose "convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326.

c. The second form of discretionary relief at issue in this case appeared in former Section 241(f) of the INA. See 8 U.S.C. 1251(f) (1988). Section 241(f) was repealed in 1990, but it continues to apply to deportation proceedings (like this one) for which notice was provided to the alien before March 1, 1991. See Immigration Act of 1990, Pub. L. No. 101-649, § 602(b)(1) and (d), 104 Stat. 5081, 5082.

Section 241(f) provided for a discretionary waiver of deportability for an alien who was excludable at the time of entry because of fraud or misrepresentation in the procurement of a visa or other documentation, including those who obtained LPR status through fraud. It provided, in relevant part, as follows:

> (1)(A) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure or have procured visas or other documentation, or entry into the United States, by fraud or misrepresentation,

whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in subsection (a)(19) of this section) who—

(i) is the spouse, parent, or child of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (14), (20), and (21) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(B) A waiver of deportation for fraud or misrepresentation granted under subparagraph (A) shall also operate to waive deportation based on the grounds of inadmissibility at entry described under subparagraph (A)(ii) directly resulting from such fraud or misrepresentation.

8 U.S.C. 1251(f) (1988).

d. The third form of discretionary relief at issue here appeared in former Section 244(a)(2) of the INA, 8 U.S.C. 1254(a)(2) (1994). Section 244(a)(2) is unavailable in proceedings initiated after its repeal became effective on April 1, 1997. See IIRIRA §§ 308(b)(7) and 309(a), 110 Stat. 3009-615, 3009-625. Under Section 244(a)(2), the Attorney General has discretion to suspend the deportation of an LPR who has been found deportable on certain grounds if the individual (1) "has been physically present in the United States for a continuous period of not less than ten years immediately

following the commission of an act, or the assumption of a status, constituting a ground for deportation," (2) proves he is "a person of good moral character," and (3) establishes that his deportation would "result in exceptional and extremely unusual hardship" to him or to his spouse, parent, or child, who is a United States citizen or LPR. 8 U.S.C. 1254(a)(2) (1994).

In the so-called "stop-time rule," Congress has provided that

> any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) * * * when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. 1229b(d)(1). Although the stop-time rule appears in the section dealing with "[c]ancellation of removal" (which applies to proceedings initiated after IIRIRA's 1997 effective date), Congress has clarified IIRIRA's transitional rules to specify that the stop-time rule applies, with exceptions inapplicable here, to *all* "orders to show cause * * * issued before, on, or after the date of the enactment of [IIRIRA]." See Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Tit. II, § 203(a)(1), 111 Stat. 2196 (1997). Accordingly, the Board of Immigration Appeals (Board) has held that the stop-time rule applies to all suspension-of-deportation applications pending as of 1996. See *In re Nolasco-Tofino*, 22 I. & N.

Dec. 632, 636 (B.I.A. 1999) (en banc) (observing that the Board applies "the stop time rule of cancellation of removal to all pending applications for suspension of deportation, unless expressly exempted from the general rule").

2. a. Petitioner was born in 1954 in Puebla, Mexico, and is a native and citizen of Mexico. Pet. App. 2a. He married Guillermina Gonzalez in Mexico, and they eventually had four children together. *Id.* at 2a-3a, 4a. Petitioner first entered the United States, without inspection, in 1977. *Id.* at 2a. Although he occasionally returned to Mexico and re-entered the United States, sometimes with his wife and children, petitioner spent most of the ensuing years in the United States. *Id.* at 2a-4a.

In 1982, petitioner married an American woman, Phyllis Ash, even though he was still married to Gonzalez (who was then living in Mexico). Pet. App. 3a. In 1983, Ash filed a Form I-130 (Petition for Alien Relative) on petitioner's behalf, which was predicated on their bigamous marriage. *Ibid.* The petition was approved, and petitioner was admitted to the United States on March 7, 1984, as an LPR. *Ibid.* Later, petitioner separated from and divorced Ash (with whom he had had one child), and he was joined in the United States by Gonzalez and their children. *Ibid.*

b. In 1987, petitioner was convicted of delivery of a controlled substance (cocaine and heroin) in violation of Illinois law and sentenced to six years of imprisonment. Pet. App. 3a, 16a. Based on that conviction, on March 14, 1988, the Immigration and Naturalization Service (INS) (whose functions have since been transferred to the Department of Homeland Security (DHS)) served petitioner with an order to show cause why he should

not be deported. *Id.* at 3a-4a. In the deportation proceedings initiated by that order, the INS charged petitioner with being deportable under 8 U.S.C. 1251(a)(4) (1988), for having been convicted of a crime involving moral turpitude committed within five years of entry, and under 8 U.S.C. 1251(a)(11) (1988), for having been convicted of violating a law related to a controlled substance. Pet. App. 3a-4a. In July 1988, petitioner's deportation proceedings were administratively closed at his request, because he was pursuing a direct appeal of his drug conviction. *Id.* at 4a. Petitioner's conviction was overturned on appeal and the criminal case remanded for a new trial. *Ibid.* In December 1991, petitioner pleaded guilty to delivery of cocaine and was sentenced to two years of imprisonment, with credit for time already served. *Ibid.* Despite the finality of petitioner's drug conviction, his deportation proceedings were not recalendared for more than 17 years. *Ibid.*

c. In 2009, when petitioner returned to the United States from a trip to Mexico, an immigration official discovered his 1991 conviction, which caused the government to recalendar the deportation proceedings. Pet. App. 4a. At hearings before an immigration judge (IJ) in August and September 2009, petitioner conceded through counsel that he was deportable for having been convicted of a controlled-substance offense, but indicated that he would seek a waiver of deportation under former Section 212(c). *Id.* at 5a, 22a. Petitioner's counsel later discovered that petitioner's adjustment to LPR status in 1984 had been based upon his bigamous marriage; accordingly, in October 2009, petitioner sought a waiver under former Section 241(f) for his fraudulent entry and also requested suspension of deportation under former Section 244(a)(2). *Id.* at 22a-23a; Gov't C.A.

Br. 9 n.5, 11; see *In re Koloamatangi*, 23 I. & N. Dec. 548, 549 (B.I.A. 2003) ("[A]n alien who acquires permanent resident status through fraud and misrepresentation has not made a lawful entry upon which to base eligibility for relief."). In petitioner's view, if he were to receive a Section 241(f) waiver for his fraudulent entry, that would retrospectively validate his LPR status, which would, in turn, be a necessary predicate for relief under Section 212(c). Pet. App. 6a, 26a; see *In re Sosa-Hernandez*, 20 I. & N. Dec. 758, 760-761 (B.I.A. 1993) ("[A] waiver of deportability under section 241(f) of the Act waives not only the exclusion ground but also waives the underlying fraud and renders the waiver recipient a lawful permanent resident from the time of his initial entry.").

d. The IJ granted the government's motion to pretermit petitioner's applications for discretionary relief and ordered that he be deported to Mexico. Pet. App. 19a-32a. With respect to the entry-fraud waiver under former Section 241(f), the IJ determined that the relevant "entry" was the 2009 entry that precipitated the recalendaring of petitioner's deportation proceedings. *Id.* at 28a. The IJ accordingly held that petitioner was ineligible for Section 241(f) relief because his 1991 drug conviction prevented him from being "otherwise admissible to the United States" upon his entry. *Id.* at 27a-29a. The IJ further found that, because petitioner could not establish his valid LPR status, he could not receive a waiver under former Section 212(c). *Id.* at 29a.

The IJ also found that petitioner was ineligible for suspension-of-deportation relief under former Section 244(a)(2). Pet. App. 29a-31a. The IJ determined that the stop-time rule applied to cut short the ten years of continuous physical presence that petitioner needed,

that petitioner's "period of physical presence ended upon [his] commission of the drug crime in 1986 * * * or at the issuance of the [order to show cause] in 1988," and that "a new ten year period" could not begin after the terminating event. *Id.* at 31a.

3. A three-member panel of the Board dismissed petitioner's appeal. Pet. App. 14a-18a. With respect to the entry-fraud waiver under former Section 241(f), the Board agreed that petitioner was ineligible, but its reasoning was different from that of the IJ. *Id.* at 14a-17a. The Board determined that "Section 241(f) of the Act clearly requires the alien to have been otherwise admissible at the time of his fraudulent entry, not any subsequent entry," and that the focus of the IJ and the parties on petitioner's 2009 entry was "misplaced." *Id.* at 16a & n.2. Nevertheless, the Board noted that it had already held that Section 241(f) relief is available to waive only charges that are "related to being excludable at the time of entry for having fraudulently procured documentation or entry." *Id.* at 17a (citing *In re Da Lomba*, 16 I. & N. Dec. 616 (B.I.A. 1978)). Because petitioner had never been charged with any such ground of deportability, the Board held that no Section 241(f) waiver was available to him. *Ibid.*

With respect to former Section 244(a)(2), the Board adopted and affirmed the IJ's decision finding petitioner ineligible for suspension of deportation. Pet. App. 17a. Petitioner was precluded from "obtaining the requisite 10 years of continuous physical presence," the Board concluded, because that period was terminated by both the "commission of his drug crime and the service of the Order to Show Cause." *Id.* at 17a-18a (citing *In re Mendoza-Sandino*, 22 I. & N. Dec. 1236 (B.I.A. 2000) (en banc)).

4. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-13a.

The court of appeals agreed with the Board that the "plain language" of Section 241(f) made petitioner ineligible for an entry-fraud waiver (which in turn made him ineligible for a Section 212(c) waiver). Pet. App. 7a-8a. The court observed that a waiver under Section 241(f) "applies to 'aliens within the United States *on the ground that they were excludable at the time of entry* as aliens who have sought to procure or have procured visas or other documentation, or entry into the United States, by fraud or misrepresentation.'" *Id.* at 8a (quoting and adding emphasis to 8 U.S.C. 1251(f)(1)(A) (1988)). The court observed that the government had charged petitioner only on "grounds based on his controlled substance offense" and that he had "never been charged or found deportable on grounds based on fraud." *Ibid.*[2]

The court of appeals rejected petitioner's contention that he was entitled to relief under the Board's decision in *Sosa-Hernandez*, *supra*. It found that petitioner's case was "critical[ly] distinguish[able]" from that of the alien in *Sosa-Hernandez*, who had been found by the IJ to be clearly and unequivocally deportable "as an alien who was excludable at the time of entry" under Section 241(a)(1) of the INA, and that decision had been affirmed by the Board. Pet. App. 10a. Here, by contrast, the court noted that "neither the [IJ] nor the [Board] made a finding regarding a charge of deportability

[2] The court also noted that the government "was not made aware of [petitioner's] bigamous marriage and his fraudulent [LPR] status until" October 2009, after it had "already amended the charging document" in light of the reopened proceedings and petitioner "had conceded deportability on the controlled substance ground." Pet. App. 8a-9a n.4.

based on fraud." *Ibid.* Because petitioner "is being deported for his drug offense," the court reasoned that he "cannot request that he be charged with additional grounds of deportability simply so that he can take advantage of a waiver unavailable to him otherwise." *Ibid.*

The court of appeals also affirmed the Board's determination that petitioner was not eligible for suspension of deportation under Section 244(a)(2). Pet. App. 11a-13a. The court found that "both the [Board] and other courts apply the stop-time rule to all applications for suspension of deportation." *Id.* at 12a (citing, *inter alia*, *Nolasco-Tofino*, 22 I. & N. Dec. at 641). The court thus rejected petitioner's contention that the stop-time rule should apply only to suspension of deportation under Section 244(a)(1), *ibid.*, and it held that petitioner's period of continuous physical presence ended when he committed his drug crime in 1987 or, in the alternative, when an order to show cause was issued in 1988, *id.* at 13a.

ARGUMENT

Petitioner contends that he is eligible for discretionary relief from deportability for fraudulent entry under former Section 241(f) of the INA (Pet. 15-25) and that the "stop-time rule" should not be applied to suspension of deportation under former Section 244(a)(2) (Pet. 25-29). The court of appeals correctly rejected both of those arguments, and petitioner does not assert that its decision conflicts with that of any other court of appeals. Instead, he asserts that aspects of the decision below conflict with a decision of the Board of Immigration Appeals, with an opinion *dissenting* from another Board decision, and with the general proposition (applied in *Judulang* v. *Holder*, 132 S. Ct. 476, 485 (2011)) that the

Board's decisions cannot be "arbitrary and capricious." Such alleged conflicts do not warrant this Court's review. Nor, in any event, are the questions presented of sufficient importance to warrant further review, as they involve provisions of the INA that were repealed long ago and are of continuing relevance for only a very limited subset of individuals in deportation proceedings that were initiated before 1991 or 1997.

1. a. The court of appeals correctly determined that petitioner cannot obtain an entry-fraud waiver under former Section 241(f), which, by its terms, is available to waive only "the deportation of aliens * * * on the ground that they were excludable at the time of entry" because of their "fraud or misrepresentation" and "deportation based on grounds of inadmissibility at entry * * * resulting from such fraud or misrepresentation." 8 U.S.C. 1251(f)(1)(A) and (B) (1988). Here, petitioner was not charged with any ground of deportation related to excludability or inadmissibility for entry fraud or misrepresentation—which makes Section 241(f) inapplicable. Accordingly, as this Court held in applying an earlier version of Section 241(f): "nothing in the waiver provision of § 241(f), which by its terms grants relief against deportation of aliens 'on the ground that they were excludable at the time of entry,' has any bearing on the case" when the government "does not rely on" a ground of exclusion but "instead reli[es] on [a] separate provision * * * which does not depend in any way upon the fact that an alien was excludable at the time of his entry." *Reid* v. *INS*, 420 U.S. 619, 623 (1975); see also *Persaud* v. *INS*, 537 F.2d 776, 779 (3d Cir. 1976) ("[T]he essence of *Reid* and [*INS* v.] *Errico*[, 385 U.S. 214 (1966),] is that § 241(f) will not be available when its application would permit an alien to avoid a basis for

deportation which is separate, independent and unrelated to the fraud.").[3]

b. Petitioner contends (Pet. 15-16) that the court of appeals' decision "contradict[s] th[is] Court's *Judulang* decision," because, he says, it effectively permits "individual Department of Homeland Security agents to selectively choose when to formally charge an alien" with an excludability ground—and that can subject an alien to the equivalent of "an arbitrary 'coin flip.'" There is no conflict with *Judulang*, which, the Court explained, was about the distinctly "text-free zone" that resulted from the government's application of Section 212(c) to deportation cases when that section "simply has nothing to do with deportation." 132 S. Ct. at 488. *Judulang* concluded that Section 212(c) does not authorize waiver of "a particular exclusion ground," but instead permits the Attorney General to waive "the simple denial of entry." *Id.* at 487. That is precisely the opposite of former Section 241(f), which expressly authorized the Attorney General to "waive[]" the "provisions of this section *relating to the deportation* of aliens within the United States *on the ground* that they were excludable at the time of entry as aliens who have sought to procure * * * entry

[3] After the decision in *Reid*, Section 241(f) was amended to ameliorate its terms and to permit a waiver to forgive additional wrongs, including failure to obtain labor certification. See Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 8, 95 Stat. 1616 (adding language specifying that the alien must be "otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (14), (20), and (21) of section 212(a) which were a direct result of that fraud or misrepresentation"). *Reid*'s rationale, however, still applies to those grounds of deportability not excepted by the version of Section 241(f) that remained in effect until it was repealed, effective in 1991.

into the United States, by *fraud or misrepresentation*." 8 U.S.C. 1251(f)(1)(A) (1988) (emphases added).[4]

Moreover, to the extent that *Judulang* expressed concern about "the happenstance of an immigration official's charging decision," 132 S. Ct. at 486, that concern arose in the context of a decision about how to charge an alien on account of a single criminal conviction that "may fall within a number of deportation grounds." *Ibid.* No such issue arose in this case, where petitioner could have been charged with different grounds of deportability based on entirely different acts (fraud at the time of his entry in 1984 or a drug conviction in 1991). Deciding whether to pursue charges of deportability involves an exercise of prosecutorial discretion that is reviewed by neither the IJ nor the Board. See, *e.g.*, *In re G-N-C-*, 22 I. & N. Dec. 281, 284 (B.I.A. 1998); *In re Ramirez-Sanchez*, 17 I. & N. Dec. 503, 505 (B.I.A. 1980); see also *Skelly* v. *INS*, 630 F.2d 1375, 1381 (10th Cir. 1980) (concluding that decision to charge alien with excludability for failure to obtain labor certification rather than based on a fraud ground was not problematic because alien's "violation of § 212(a)(14) is a separate and independent

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[4] Although petitioner does not ask the Court to grant certiorari, vacate the judgment below, and remand for further proceedings in light of this Court's decision in *Judulang*, he does suggest at one point (Pet. 24) that the court of appeals' decision is based on obsolete cases because one of its footnotes (Pet. App. 9a n.5) referred to circuit cases applying the statutory-counterpart rule (which *Judulang* invalidated). Petitioner fails to note that the same footnote also cited this Court's decision in *Reid*, which, like the statutory-counterpart cases, recognized that it may matter what grounds of deportability have been charged. See 420 U.S. at 623 (finding that Section 241(f) had no "bearing on the case" when the INS was not "seeking to deport petitioners on th[e] ground" that was made waivable by it).

basis for her deportation, not related to any potential charge of deportability for fraud under § 212(a)(19)").[5]

In any event, there is no evidence that the government chose to focus on petitioner's drug conviction to avoid the applicability of Section 241(f). To the contrary, at the time of its charging decision in 1988, and again when proceedings were recalendared in 2009, and again when it amended the charges in August 2009, the government was not even aware of the potential for an entry-fraud-related charge, because petitioner had not yet acknowledged that his LPR status had been based upon his bigamous marriage. See Pet. App. 8a n.4; Gov't C.A. Br. 9 n.5.[6]

d. Petitioner contends (Pet. 16-19) that the decision below concerning former Section 241(f) is inconsistent

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[5] In *In re Batista-Hernandez*, 21 I. & N. Dec. 955 (B.I.A. 1997) (en banc), which petitioner invokes (Pet. 22 n.6), the Board expressly declined to consider whether the alien was deportable for having a conviction for a crime involving moral turpitude, because he had been charged with being deportable only on the grounds that he had an aggravated-felony conviction and a controlled-substance violation. 21 I. & N. Dec. at 957.

[6] Petitioner speculates that the government "may have been aware of [petitioner's] fraud in 1988," because petitioner's written motion to close administrative proceedings "specifically referenced Guillermina Gonzalez as [petitioner's] wife," and the INS attorney could have looked at petitioner's file, which would have contained a copy of the 1984 visa petition, which would have identified Phyllis Ash as his wife. Pet. 11-12 n.4. Of course, even if that were true, the mere fact that petitioner had one wife in 1984 and another in 1988 would not necessarily mean that the 1984 marriage had been invalid, rendering the visa petition fraudulent. But petitioner's 1988 motion to close administrative proceedings did not refer to Gonzalez by name. Administrative Record (A.R.) 270-272. Instead, it simply said that he had "married an American citizen," A.R. 271, which could not have been a reference to Gonzalez, because she did not become a naturalized U.S. citizen until 1996, A.R. 204, 532.

with *In re Sosa-Hernandez*, 20 I. & N. Dec. 758 (B.I.A. 1993). Petitioner asserts that *Sosa-Hernandez* is indistinguishable from his case because he surmises that the IJ in *Sosa-Hernandez* reached beyond the charged grounds of deportability to find that the alien there was excludable at the time of entry, and then granted a Section 241(f) waiver. Pet. 16-17. The decision in *Sosa-Hernandez*, however, does not indicate that the IJ was *obligated* to search out additional grounds of deportability (as petitioner seems to believe). Nor does it say that the additional finding of deportability did not come at the government's behest (although the opinion does suggest that the ground was not included in the original order to show cause, see 20 I. & N. Dec. at 759).[7] To the contrary, the Board's opinion in *Sosa-Hernandez* suggests that the government did not object to the IJ's finding, as it states three times that the government did not appeal the "grant of a section 241(f) waiver." *Id.* at 760; see also *id.* at 763 ("[T]he Service did not appeal the immigration judge's grant of the respondent's request for a section 241(f) waiver."); *ibid.* (noting that the Service did not "appeal[] from the immigration judge's discretionary grant of section 241(f) relief"). Regardless of the basis for that determination in *Sosa-Hernandez*, the court of appeals still correctly observed that this case is different, because there was no express finding by the IJ or the Board that petitioner was deportable based on

[7] Under regulations in effect at the time of *Sosa-Hernandez*, an IJ would have been required to advise an alien of any "additional charges of deportability" that the Service sought to lodge after the original order to show cause. 8 C.F.R. 242.16(d) (1989). After giving the alien an opportunity to admit or deny "deportability under the charges," the IJ was authorized to determine whether "deportability *as charged* ha[d] been established." 8 C.F.R. 242.16(b) and (d) (1989) (emphasis added).

entry fraud. Pet. App. 10a. And even if the cases were not distinguishable, the conflict that petitioner alleges between the decision below and the Board's decision in *Sosa-Hernandez* is scarcely the kind of conflict that would justify certiorari.

e. Finally, petitioner cites (Pet. 21-23) several examples of contexts in which IJs look to uncharged conduct to determine whether that conduct bars an alien from seeking relief, or, once an alien is found to be statutorily eligible for relief, whether it weighs against granting discretionary relief. In each of petitioner's examples, however, uncharged conduct is potentially used to *restrict* the availability of relief. None of them involves a situation in which an alien may successfully seek, on the basis of uncharged conduct, to become *eligible* for a form of discretionary relief that is otherwise unavailable on the basis of charged conduct alone. See Pet. App. 10a ("[Petitioner] cannot request that he be charged with additional grounds * * * simply so that he can take advantage of a waiver unavailable to him otherwise.").

Accordingly, there is no basis for further review of the first question presented.

2. Petitioner also contends (Pet. 25-29) that the stop-time rule in 8 U.S.C. 1229b(d)(1) should not apply to applications for suspension of deportation under former Section 244(a)(2). The court of appeals correctly rejected that argument, noting that "the [Board] and other courts apply the stop-time rule to all applications for suspension of deportation." Pet. App. 12a; see *In re Nolasco-Tofino*, 22 I. & N. Dec. 632, 637 (B.I.A. 1999) (discerning "a clear legislative intent to apply the stop time rule to all applications for this particular type of relief, whether in the form of suspension of deportation or cancellation of removal"). That result is consistent

with IIRIRA's transitional rules (as amended by NACARA), which specify that the stop-time rule applies to all "orders to show cause," even if they were (like the one in this case) filed before IIRIRA. NACARA § 203(a)(1), 111 Stat. 2196. It is also consistent with the text of the stop-time rule itself, which expressly speaks to the point when "*any* period of * * * continuous physical presence in the United States shall be deemed to end." 8 U.S.C. 1229b(d)(1) (emphasis added). Petitioner's contrary rule—which would allow his continuous-presence clock to restart after his 1991 conviction and after his deportation proceeding began in 1988—would be inconsistent with Congress's intention "to remove the incentive for aliens to prolong their cases in the hope of remaining in the United States long enough to be eligible for relief from deportation." *In re Mendoza-Sandino*, 22 I & N. Dec. 1236, 1243 (B.I.A. 2000) (en banc). The court of appeals therefore correctly applied the stop-time rule to hold that petitioner could not continue to accrue physical presence after the commission of his criminal offense and service of the order to show cause, and while immigration proceedings, although administratively closed, were pending against him.

Petitioner's contention that the Board's application of the stop-time rule "essentially repeals" Section 244(a) (Pet. 28) is overstated. For example, an alien who committed certain firearms offenses could be deportable under 8 U.S.C. 1251(a)(2)(C) (1994), and could thus be potentially eligible for relief under former Section 244(a)(2), 8 U.S.C. 1254(a)(2) (1994). At the same time, because such a firearms offense would not be "an offense referred to in [8 U.S.C. 1182(a)(2) (2006 & Supp. IV 2010)]," it would not trigger the stop-time rule contained

in 8 U.S.C. 1229b(d)(1). In addition, NACARA—the same statute that amended IIRIRA's transitional rules to clarify the applicability of the stop-time rule to pre-IIRIRA proceedings—separately provided that the stop-time rule does not apply to certain aliens from certain countries who could meet certain criteria. See NACARA § 203(a)(1), 111 Stat. 2196 (amending Section 309(c)(5) of IIRIRA by adding a new clause, IIRIRA § 309(c)(5)(C)(i)); see also 8 C.F.R. 1240.64(b) (providing that in calculating continuous physical presence for suspension of deportation, the stop-time rule "shall not apply to" certain aliens); 8 C.F.R. 1240.65 (describing eligibility for suspension of deportation); *Sherifi* v. *INS*, 260 F.3d 737, 741 (7th Cir. 2001) (same).

Petitioner's entire argument about the stop-time rule (Pet. 27-28) is based on the dissenting opinion of Board Member Guendelsberger in *Mendoza-Sandino*. That opinion criticizes the logic of the Board's en banc majority, claiming that its decision "sweeps far too broadly" and that it will effectively keep any applicant for suspension from qualifying for relief under Section 244(a)(2). 22 I. & N. Dec. at 1246-1247. But petitioner's claim that the stop-time rule should not be extended to Section 244(a)(2) is inconsistent with the dissent's own implicit premise—that the same rule applies to both the seven-year physical-presence requirement under Section 244(a)(1) and the ten-year requirement under Section 244(a)(2). If the same reasoning did not apply to both, then the dissent would not have criticized the majority's ruling about the seven-year provision for its effects on the ten-year provision. See *id.* at 1246-1247.

3. Petitioner not only fails to allege any circuit split with respect to either of his two questions presented, he also provides no reason to believe that either ques-

tion is of great significance. Relief under former Section 241(f), at stake in the first question presented, is available only to aliens whose immigration proceedings began before March 1991, and the actual question would affect only the presumably quite small subset of those aliens who were not (but could have been) charged with entry fraud. Similarly, the second question concerns suspension of deportation under a provision that applies only to proceedings initiated before April 1, 1997.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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