No. 08-785

In the Supreme Court of the United States

MARIA SOCORRO AGASINO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress amended Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which had provided for a discretionary waiver of deportation, by making it unavailable to aliens convicted of aggravated felonies and then by repealing it altogether. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether the court of appeals violated due process by failing to address a non-jurisdictional argument that petitioner failed to raise in her opening brief or reply brief.

2. Whether, for purposes of the retroactive availability of relief under former Section 212(c), it violates the equal protection component of the Due Process Clause to distinguish between aliens who were deportable and those who were not when they pleaded guilty to a crime that was later retroactively made an aggravated felony.

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OPINIONS BELOW

The initial memorandum opinion of the court of appeals is not published in the *Federal Reporter* but is reprinted in 142 Fed. Appx. 309.[*] The opinion of the court of appeals on rehearing (Pet. App. 1-6) is not published in the *Federal Reporter* but is available at 2008 U.S. App. LEXIS 9824. The orders of the district court (Pet. App. 10-27), the Board of Immigration Appeals (Pet. App. 28-30), and the immigration judge (Pet. App. 31-33) are unreported.

[*] The petition appendix reprints the court of appeals' August 16, 2005 opinion (Pet. App. 7-9) but includes the notation (Pet. App. 7) that the August 16 opinion was withdrawn on August 24, 2005. On August 24, 2005, the opinion was reissued in materially identical form, with updated citations to a substituted opinion in *Cordes* v. *Gonzales*, 421 F.3d 889 (9th Cir. 2005). See 142 Fed. Appx. 309.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2008. A petition for rehearing was denied on September 17, 2008 (Pet. App. 51). The petition for a writ of certiorari was filed on December 16, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of an aggravated felony. See *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which now provides for a form of discretionary relief known as cancellation of removal. That relief is not available to many criminal aliens, including those who have been convicted of an aggravated felony.

In IIRIRA, Congress also expanded the definition of "aggravated felony." As relevant here, before IIRIRA, "a theft offense" met the definition only if it resulted in a term of imprisonment of at least five years. See 8 U.S.C. 1101(a)(43)(G) (1994). After IIRIRA, however, the term-of-imprisonment threshold for theft offenses was only one year. IIRIRA § 321(a)(3), 110 Stat. 3009-627; 8 U.S.C. 1101(a)(43)(G). Although IIRIRA was enacted on September 30, 1996, it generally did not take effect until April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. Nevertheless, Congress expressly made IIRIRA's revisions of the aggravated-felony definitions applicable "regardless of whether the conviction was entered before, on, or after" IIRIRA's date of enactment. IIRIRA § 321(b), 110 Stat. 3009-628; see 8 U.S.C. 1101(a)(43) (final sentence) ("Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996."); see also *St. Cyr*, 533 U.S. at 318-319 (identifying IIRIRA's "amendment of the definition of 'aggravated felony'" as a "specific provision[]" for which Congress "indicate[d] unambiguously its intention" that it be applied "retroactively").

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326. In particular, the Court in *St. Cyr* explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, not-

withstanding their convictions, they would still have some "likelihood of receiving § 212(c) relief" from deportation. *Id.* at 325.

2. a. Petitioner is a native and citizen of the Philippines who became a lawful permanent resident of the United States in 1970. Pet. App. 29. On March 10, 1997—after IIRIRA was enacted, but about three weeks before its effective date—she pleaded no contest to a charge of grand theft embezzlement and was sentenced to a three-year term of imprisonment. *Id.* at 10, 29. The former Immigration and Naturalization Service issued a Notice to Appear on May 6, 1998, which was served on petitioner on April 14, 1999, Admin. R. 100-101, alleging that petitioner was removable as an alien who had been convicted of an aggravated felony. Pet. App. 28; see 8 U.S.C. 1101(a)(43)(G), 1227(a)(2)(A)(iii).

On May 20, 1999, an immigration judge (IJ) found petitioner removable on the charged ground. Pet. App. 31, 46. The IJ held that petitioner was not "qualified" for cancellation of removal because of her aggravated-felony conviction. *Id.* at 32, 45-46. Because IIRIRA had repealed Section 212(c), the IJ also pretermitted petitioner's application for that relief. *Id.* at 46-47.

b. On October 25, 1999, the Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 28-30. The Board found (*id.* at 29) that petitioner had been convicted of an aggravated felony under 8 U.S.C. 1101(a)(43)(G), which defines "aggravated felony" as including "a theft offense * * * for which the term of imprisonment [is] at least one year." The Board also concluded that petitioner could not receive relief from deportation under Section 212(c) because that provision had been repealed by IIRIRA, and that her arguments against "retroactive application of certain aspects

of recent changes in the immigration laws" were inapplicable because her removal proceeding was initiated "well after the effective dates of the new laws." Pet. App. 29-30.

3. In June 2000, petitioner challenged her detention in a habeas corpus petition in the United States District Court for the Northern District of California and sought an emergency stay of removal. Pet. 7. The district court issued a temporary stay in September 2000 but lifted the stay in April 2004, in light of the Ninth Circuit's decision in *United States* v. *Velasco-Medina*, 305 F.3d 839 (2002), cert. denied, 540 U.S. 1210 (2004), which held that Section 212(c) relief was not available to an alien whose plea and conviction occurred after AEDPA but before IIRIRA. Pet. App. 10-11. As the district court explained, petitioner's argument against the retroactive application of IIRIRA's restrictions on Section 212(c) eligibility was "even weaker than Velasco-Medina's, because petitioner pled guilty after IIRIRA was passed," *id*. at 21, and she thus had notice at the time of her plea that she was being convicted of an offense that would, when IIRIRA took effect a few weeks later, be retroactively defined as an aggravated felony that made her both deportable and ineligible for relief from removal. See *id.* at 22 (noting that courts had "consistently held that Congress expressly directed that" IIRIRA's amendments to the aggravated-felony definition "operate[] retroactively"). The district court thus rejected petitioner's argument that the retroactive application of IIRIRA would violate her due process rights. *Id*. at 24-27. As the court explained in part, petitioner had no "settled expectations regarding the availability of [S]ection 212(c) relief" when she entered her plea, since she "had notice at the time of her plea that discretionary

relief would be unavailable because IIRIRA had already been passed." *Id.* at 26.

4. a. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, repeating her non-retroactivity arguments. See Pet. 8-9. While the appeal was pending, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302. Pet. 9 n.1. Pursuant to the REAL ID Act, which amended 8 U.S.C. 1252, the court of appeals converted the habeas appeal to a petition for review. Pet. 9 n.1.

b. At oral argument in April 2005, judges on the Ninth Circuit panel deciding petitioner's case raised an equal protection issue akin to one that was being argued in another case before the same panel on the same day. See Pet. 10, 13 (noting that the issue was raised by the court at oral argument); compare Pet. App. 1, 7 (listing April 11, 2005 argument date and panel members), with *Cordes* v. *Gonzales*, 421 F.3d 889, 889, 891 (9th Cir. 2005) (same), vacated, 517 F.3d 1094 (9th Cir. 2008).

c. In August 2005, the court of appeals decided both cases. In *Cordes*, it held that it would violate the equal protection component of the Due Process Clause to deny eligibility for Section 212(c) relief to certain aliens who pleaded guilty, after AEDPA was enacted, to offenses that were later made an aggravated felony by IIRIRA. See 421 F.3d at 893, 896-899. Judge Rymer dissented from the equal protection holding in *Cordes*. *Id*. at 899-900.

In petitioner's case, the court issued a memorandum disposition. Pet. App. 7-9. The majority found petitioner's case to be "materially indistinguishable from" that of the alien in *Cordes*, and it remanded to the Board "for reconsideration consistent with that opinion." *Id*. at 8-9. Judge Rymer dissented "for the same reasons" as in

Cordes and also "for the additional reason that [petitioner] does not raise an equal protection challenge on appeal." *Id.* at 9.

d. The government sought rehearing in this case and also asked that it be held while it sought rehearing en banc in *Cordes*. In February 2008, the court of appeals vacated its earlier decision in *Cordes* on the ground that it had lacked jurisdiction to decide the case at the time it issued its August 2005 opinion. See *Cordes* v. *Mukasey*, 517 F.3d 1094, 1095 (9th Cir. 2008).

e. On May 5, 2008, the panel in this case unanimously granted the government's rehearing petition and withdrew its August 2005 decision. Pet. App. 50. On the same day, it issued a new memorandum disposition denying petitioner relief. *Id.* at 1-6. The majority expressly addressed and rejected the arguments petitioner had made in her briefs on appeal, *id.* at 2, but it did not address the equal protection issue that had been raised by the court at oral argument and decided in the vacated opinion in *Cordes*.

Judge Ferguson dissented, contending that the panel should not "abandon [the] reasoning" of the "equal protection rationale that served as the foundation of [the court's] grant of relief" in the pre-vacatur *Cordes* opinion. Pet. App. 3.

ARGUMENT

Petitioner contends (Pet. 11-14) that the court of appeals violated her due process rights by failing to address an equal protection argument that she did not raise in her briefs but made only after the judges themselves raised the issue at oral argument. Petitioner also claims (Pet. 15-19) that, if the equal protection issue were to be addressed, she should prevail on the merits.

The court of appeals did not err in failing to address the issue petitioner had not presented in her briefs, and petitioner's equal protection argument in any event lacks merit. Moreover, petitioner has not identified, and cannot identify, any conflict in the courts of appeals on either issue.

1. Petitioner contends that the court of appeals "violated due process of law" (Pet. 12) by failing to resolve an argument that petitioner concedes (Pet. 10, 13) was first raised *by the court* during oral argument. It is, however, well established that courts of appeals are not compelled to address non-jurisdictional arguments that a party seeking appellate review forfeits by leaving them unmentioned in her briefs, see, *e.g.*, 16AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3974.1, at 232-243 & nn.13-19 (4th ed. 2008) (citing cases), and petitioner cites no contrary authority. Nor does she explain why that principle does not apply equally to a forfeited issue that a court initially chooses to address but then decides, upon rehearing, not to address.

Although petitioner says that the court of appeals here "gave no reason for overturning its previous findings respecting Equal Protection," Pet. 14, there is an obvious difference between exercising judicial discretion to remand on the basis of a forfeited argument that has actually been resolved by a published opinion in another case (as in the panel's initial decision), and choosing to address a forfeited argument when there is no other opinion on point (as petitioner claims should have happened upon rehearing). Accordingly, the court of appeals' failure to address petitioner's equal protection argument in its opinion on rehearing neither warrants further review nor departs "so far * * * from the ac-

cepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a).

2. Petitioner also contends (Pet. 15-19) that this Court should address the merits of the equal protection issue that went undecided in the court of appeals. "This Court, however, is one of final review, not of first view." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (internal quotation marks omitted). Moreover, petitioner's equal protection argument lacks merit and has not occasioned any conflict in the courts of appeals.

a. Petitioner argues (Pet. 15-19) that denying her eligibility for Section 212(c) relief violates equal protection because it rests on an irrational distinction among aliens on the basis of whether they were deportable at the time they pleaded guilty to crimes that later made them ineligible for Section 212(c) relief.

The only support petitioner invokes (Pet. 18) for her novel equal protection argument is the Ninth Circuit's opinion in *Cordes* v. *Gonzales*, 421 F.3d 889 (9th Cir. 2005), vacated, 517 F.3d 1094 (9th Cir. 2008). Petitioner notes (Pet. 18) that *Cordes* was vacated on other grounds, but this Court has made clear that a vacated decision still lacks precedential force. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 117 (1943). There is thus no conflict—not even an intra-circuit conflict—on the second question presented.

b. Nor does petitioner's underlying argument have merit. Petitioner concedes (Pet. 16) that "federal classifications distinguishing among groups of aliens * * * are valid unless 'wholly irrational.'" The *Cordes* majority had reasoned that it was irrational to distinguish between serious criminals who were eligible to seek Sec-

tion 212(c) relief under this Court's *St. Cyr* decision if they pleaded guilty before AEDPA was enacted, and less-serious criminals, like Cordes, who pleaded guilty before IIRIRA was enacted and retroactively made their crimes "aggravated felon[ies]." *Cordes*, 421 F.3d at 893, 896-899. Yet, as Judge Rymer explained when dissenting in *Cordes*:

> It is rational to distinguish between aliens who were deportable and those who were not when they entered a plea of guilty to a crime that IIRIRA retroactively makes an aggravated felony because those who * * * were not deportable could *not* have relied on the availability of § 212(c) relief, whereas those who * * * *were* deportable *could* have relied on that possibility.

Id. at 899.

c. Finally, even if there were some basis for the rationale of the vacated majority opinion in *Cordes*, petitioner's case would be a poor vehicle for reviewing that rationale because the facts of her case are readily and materially distinguishable even from those in *Cordes*. The purportedly irrational distinction in *Cordes* arose from allowing an alien who pleaded guilty before AEDPA to be eligible for Section 212(c) relief but denying such relief to an alien who pleaded guilty after AEDPA.

Although petitioner groups herself with aliens who pleaded "guilty to convictions that did not render them deportable at the time of conviction, but who later became deportable when their convictions were reclassified as aggravated felonies by IIRIRA," Pet. 17, she is not situated similarly to the aliens discussed in *Cordes*. Both Cordes and aliens (like those in *St. Cyr*) who en-

tered guilty pleas before AEDPA rendered Section 212(c) relief unavailable to them could arguably have been taken unaware by changes to Section 212(c) that were made after they entered their pleas. That is not, however, true for petitioner. To the contrary, as the district court explained in resolving petitioner's due process and retroactivity arguments, petitioner entered her plea after IIRIRA had already amended the definition of aggravated felony (and expressly stated that the revised definition would apply retroactively). Pet. App. 21-22, 26.

Because petitioner entered her guilty plea after IIRIRA was enacted, she was not denied eligibility for Section 212(c) relief "solely on the fortuity of whether [she was] deportable at the time that [she] pled guilty." Pet. 15; see also Pet. 18. At the time of her plea, she was on notice that the resulting theft conviction could render her deportable when IIRIRA's expressly retroactive definition of aggravated felony took effect a few weeks later. Thus, even if it were irrational—as the vacated *Cordes* opinion held—to distinguish between aliens who were deportable and those who were not when they entered a plea of guilty to a crime that IIRIRA retroactively made an aggravated felony, it would not be irrational to distinguish all of those aliens from the category of aliens who (like petitioner) were not yet deportable when they entered their pleas but already had reason to know that they shortly *would* be deportable. Because petitioner is thus not "similarly situated" with the aliens in *St. Cyr* or *Cordes*, there is no equal protection violation here. *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 63 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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