No. 12-152

In the Supreme Court of the United States

JOSE ERASMO DE LA ROSA, 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

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
DONALD E. KEENER
PATRICK J. GLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals abused its discretion by declining to recall the mandate in a case it decided on direct review of an order of removal, when the legal basis for that decision was rejected by the Supreme Court well after the court of appeals' decision became final.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Abebe v. *Holder*, 130 S. Ct. 3272 (2010) 9
Aguilar-Ramos v. *Holder*, 594 F.3d 701 (9th Cir. 2010) 3
Bell v. *Thompson*, 545 U.S. 794 (2005) 13
Birkett v. *Holder*, 556 U.S. 1184 (2009) 9
Blake, In re, 23 I. & N. Dec. 722 (B.I.A. 2005), remanded, 489 F.3d 88 (2d Cir. 2007) 2
Blake v. *Carbone*, 489 F.3d 88 (2d Cir. 2007) 3
Blakely v. *Washington*, 542 U.S. 296 (2004) 14
Calderon v. *Thompson*, 523 U.S. 538 (1998) 6, 7, 10, 17
Carachuri-Rosendo v. *Holder*, 130 S. Ct. 2577 (2010) 13
Caroleo v. *Gonzales*, 476 F.3d 158 (3d Cir. 2007) 3
Carrington v. *United States*, 503 F.3d 888 (9th Cir. 2007) 14
Conley v. *United States*, 323 F.3d 7 (1st Cir. 2003) 12, 13
De la Rosa v. *Holder*:
130 S. Ct. 3272 (2010) 4, 8
No. 09-594, 2012 WL 3761972 (Aug. 31, 2012) 5, 11
De la Rosa v. *United States Att'y Gen.*, 579 F.3d 1327 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010) 3
G-D-, In re, 22 I. & N. Dec. 1132 (B.I.A. 1999) 16

Cases—Continued: Page

Gondeck v. *Pan Am. World Airways*, 382 U.S. 25 (1965) 9
Gonzalez-Mesias v. *Holder*, 556 U.S. 1181 (2009) 9
Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238 (1944) 8
INS v. *Abudu*, 485 U.S. 94 (1988) 8
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 16
INS v. *Legalization Assistance Project*, 510 U.S. 1301 (1993) 16
INS v. *St. Cyr*, 533 U.S. 289 (2001) 2
James B. Beam Distilling Co. v. *Georgia*, 501 U.S. 529 (1991) 8
Judulang v. *Holder* (2011):
131 S. Ct. 2093 4
132 S. Ct. 476 ..... *passim*
Kim v. *Gonzales*, 468 F.3d 58 (1st Cir. 2006) 3
Koussan v. *Holder*, 556 F.3d 403 (6th Cir. 2009) 3
Kucana v. *Holder*, 130 S. Ct. 827 (2010) 17
Lenis v. *United States Att'y Gen.*, 525 F.3d 1291 (11th Cir. 2008) 17
Mancuso v. *Herbert*, 166 F.3d 97 (2d Cir.), cert. denied, 527 U.S. 1026 (1999) 15
Patterson v. *Haskins*, 470 F.3d 645 (6th Cir. 2006), cert. denied, 552 U.S. 816 (2007) 13
Richardson v. *Reno*:
175 F.3d 898 (11th Cir.), vacated and remanded, 526 U.S. 1142 (1999) 7, 11, 12
180 F.3d 1311 (11th Cir. 1999), cert. denied, 529 U.S. 1036 (2000) 12
Spence v. *Holder*, 414 Fed. Appx. 637 (5th Cir. 2011) 13, 14

Cases—Continued: Page

Teague v. *Lane*, 489 U.S. 288 (1989) 8
Ukofia v. *Holder*, 131 S. Ct. 191 (2010) 9
United States v. *Booker*, 543 U.S. 220 (2005) 14
United States v. *Crawford*, 422 F.3d 1145 (9th Cir. 2005) 14
United States v. *Saikaly*, 424 F.3d 514 (6th Cir. 2005) 14, 15
Vo v. *Gonzales*, 482 F.3d 363 (5th Cir. 2007) 3
Vue v. *Gonzales*, 496 F.3d 858 (8th Cir. 2007) 3
Weed v. *Bilbrey*, 400 U.S. 982 (1970) 10
X-G-W-, *In re*, 22 I. & N. Dec. 71 (B.I.A. 1998) 16
Zamora-Mallari v. *Mukasey*, 514 F.3d 679 (7th Cir. 2008) 3

Statutes, regulation and rule:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(43)(A) 3
8 U.S.C. 1182(c) (1994) (repealed 1996) (§ 212(c)) ..... *passim*
8 U.S.C. 1227(a)(2)(A)(iii) 3
8 U.S.C. 1227(a)(2)(E)(i) 3
8 C.F.R. 1003.2(a) 16
Sup. Ct. R. 10 12

Miscellaneous:

16 Charles Alan Wright et al., *Federal Practice and Procedure* (2d ed. 1996) 8

In the Supreme Court of the United States

No. 12-152

JOSE ERASMO DE LA ROSA, 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

OPINIONS BELOW

The order of the court of appeals denying petitioner's motion to recall the mandate (Pet. App. 43a-44a) is unreported. The opinion of the court of appeals denying the petition for review of petitioner's removal order (Pet. App. 1a-28a) is reported at 579 F.3d 1327. The opinions of the Board of Immigration Appeals (Pet. App. 29a-31a) and the immigration judge (Pet. App. 33a-36a, 37a-40a) are unreported.

JURISDICTION

The order of the court of appeals denying petitioner's motion to recall the mandate was entered on April 25, 2012. A petition for rehearing was returned to petitioner as untimely on July 5, 2012 (Pet. App. 45a). On July 18, 2012, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including

September 22, 2012, and the petition was filed on July 30, 2012. 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. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), the Court held that, based on principles of non-retroactivity, Congress's 1996 repeal of Section 212(c) should not be construed to apply to certain aliens who "would have been eligible for § 212(c) relief at the time" they pleaded guilty to aggravated felonies that made them removable. *Id.* at 326.

By its terms, former Section 212(c) applied only to 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," 8 U.S.C. 1182(c) (1994)), but it was in practice also applied to certain aliens in deportation proceedings (*i.e.*, proceedings against aliens who had already been admitted to the United States). See *St. Cyr*, 533 U.S. at 295. In determining Section 212(c)'s applicability in the deportation context, the Board of Immigration Appeals (Board) followed the "comparable-grounds" rule, under which an alien who was found to be deportable (and thus removable) would be eligible for Section 212(c) relief only if the applicable ground of deportation was sufficiently comparable to a statutory ground of exclusion (or inadmissibility). See *Judulang* v. *Holder*, 132 S. Ct. 476, 481-482 (2011); *In re Blake*, 23 I. & N. Dec. 722, 728 (B.I.A. 2005), remanded, 489 F.3d 88 (2d Cir. 2007); Pet. App. 5a-13a.

Between 2005 and 2009, the great majority of the courts of appeals upheld the Board's comparable-grounds approach.[1] In 2011, however, this Court's decision in *Judulang* rejected that approach as arbitrary and capricious, though it noted that its decision would not necessarily preclude the Board from devising a different approach to "limiting § 212(c)'s scope in deportation cases." 132 S. Ct. at 479, 485, 490.

2. Petitioner is a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident in 1989. Pet. App. 2a-3a, 29a-30a, 34a. In 1995, petitioner pleaded *nolo contendere* to the offense of committing a lewd act upon a child under the age of sixteen, in violation of Florida law. *Id.* at 3a, 30a, 34a. On the basis of that conviction, petitioner was placed in removal proceedings in 2004. *Id.* at 2a, 34a.

In 2007, an immigration judge (IJ) determined petitioner was removable under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien who had been convicted of an aggravated felony—specifically, "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A)—and under 8 U.S.C. 1227(a)(2)(E)(i), as an alien who has been convicted of a crime of child abuse. Pet. App. 34a-35a. The IJ denied petitioner's application for discretionary relief under former Section 212(c), finding that, under the Board's comparable-grounds approach, there was no ground of inadmis-

---

[1] 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. *United States Att'y Gen.*, 579 F.3d 1327, 1335-1340 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010); but see *Blake* v. *Carbone*, 489 F.3d 88, 103-104 (2d Cir. 2007).

sibility that was sufficiently comparable to petitioner's aggravated-felony ground of removal (sexual abuse of a minor). *Id.* at 35a. The IJ thus ordered petitioner's removal to the Dominican Republic. *Id.* at 36a.

In 2008, the Board considered petitioner's appeal and concluded that, in light of its comparable-grounds approach, the IJ had been correct in finding that petitioner was ineligible for Section 212(c) relief. Pet. App. 29a-31a. The court of appeals denied a motion to stay removal, *id.* at 41a-42a, and petitioner was removed to the Dominican Republic in October 2008, Pet. 5.

3. Petitioner sought review of the Board's decision in the court of appeals, which denied his petition for review in August 2009. Pet. App. 1a-28a. The court accepted the Board's comparable-grounds approach for determining whether a deportable alien was eligible for relief under former Section 212(c), *id.* at 18a-28a, and it found that the Board had properly found petitioner to be ineligible under that approach, *id.* at 28a.

Petitioner filed a petition for a writ of certiorari in this Court, expressly challenging the comparable-grounds approach. See Pet. at i, *De la Rosa* v. *Holder*, 130 S. Ct. 3272 (filed Nov. 13, 2009) (No. 09-594). On May 17, 2010, the Court denied certiorari, 130 S. Ct. 3272, rendering the judgment in petitioner's case final.

4. Eleven months later, on April 18, 2011, this Court granted certiorari in *Judulang* v. *Holder*, 131 S. Ct. 2093 (2011), to consider the validity of the Board's comparable-grounds approach.[2] On December 12, 2011, the Court decided *Judulang*, holding that the Board's use of the comparable-grounds approach was arbitrary and capricious. 132 S. Ct. at 479, 484-487.

---

[2] The counsel who filed the 2009 petition and the current petition on petitioner's behalf also represented the petitioner in *Judulang*.

5. On March 29, 2012, petitioner filed a motion in the court of appeals to recall the mandate associated with that court's August 2009 decision in his case in light of this Court's subsequent decision in *Judulang*. On April 25, 2012, the court of appeals denied that motion in an unpublished order that read in its entirety as follows:

> Petitioner's "Motion to Recall Mandate . . ." is DENIED, without prejudice to Petitioner's right to pursue whatever administrative remedies may be available to him. *See Calderon v. Thompson*, 523 U.S. 538, 549-550, 118 S. Ct[.] 1489, 1498 (1998) (power to recall mandate can be exercised only in extraordinary circumstances, and is one of last resort, to be held in reserve against grave, unforeseen contingencies); *Richardson v. Reno*, 175 F.3d 898 (11th Cir. 1999) (citing *Calderon*, denying motion to recall mandate even in light of issuance of Supreme Court opinion conflicting with this Court's decision).

Pet. App. 43a-44a. Petitioner filed a petition for rehearing en banc, which was treated as a "motion to reconsider" and denied as untimely. *Id.* at 45a.

6. Meanwhile, on May 25, 2012, petitioner filed a motion with the Board itself, seeking to reopen his removal proceeding in light of *Judulang*. As of October 29, 2012, that motion remains pending.

On July 31, 2012, petitioner filed two documents in this Court: the petition for a writ of certiorari in this case (No. 12-152), and a motion for leave to file an out-of-time petition for rehearing of this Court's May 2010 denial of certiorari in case No. 09-594. The Court denied the motion in case No. 09-594 on August 31, 2012.

ARGUMENT

Petitioner contends (Pet. 7-13) that the court of appeals erred in denying his 2012 motion to recall the mandate of its 2009 decision in light of this Court's 2011 decision in *Judulang* v. *Holder*, 132 S. Ct. 476. The court of appeals' order was not an abuse of that court's broad discretion with respect to the issuance and recall of its mandate. Because the court of appeals' concededly "cursory" (Pet. 8) order did not purport to announce or apply any firm limit on its power to recall the mandate in cases of legal error, there is no basis for petitioner's contention (*ibid.*) that it conflicts with decisions of other courts of appeals. Further review is unwarranted.

1. The courts of appeals "have an inherent power to recall their mandates, subject to review for an abuse of discretion." *Calderon* v. *Thompson*, 523 U.S. 538, 549 (1998). But, in light of the significant interests that courts and litigants have in finality, the power to recall the mandate once issued "can be exercised only in extraordinary circumstances." *Id.* at 550 (citation omitted). As the Court has explained, "[t]he sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Ibid.*[3]

---

[3] Petitioner attempts (Pet. 10) to distinguish *Calderon* as having a "limited" holding related only to the context of habeas cases involving disputes between state and federal courts. But he does not dispute the correctness of the principles quoted above—which were undisputed in this Court as well. See *Calderon*, 523 U.S. at 569 (Souter, J., dissenting) ("All would agree that the power to recall a mandate must be reserved for exceptional circumstances, in the interests of stable adjudication and judicial administrative efficiency, on which growing caseloads place a growing premium.") (citation and internal quotation marks omitted). In fact, petitioner concedes (Pet. 8) that a mandate may be recalled only in "extraordinary circumstances."

a. In this case, the court of appeals properly exercised its discretion in denying petitioner's April 2012 motion to recall the mandate of its August 2009 decision. The court of appeals denied petitioner's motion in a single sentence, which simply declared that his motion was "DENIED, without prejudice to [p]etitioner's right to pursue whatever administrative remedies may be available to him." Pet. App. 43a. That sentence was accompanied by two citations. The first was to *Calderon*, with a parenthetical stating that "power to recall mandate can be exercised only in extraordinary circumstances, and is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Ibid.* The second was to *Richardson* v. *Reno*, 175 F.3d 898 (11th Cir.), vacated and remanded, 526 U.S. 1142 (1999), with the following parenthetical explanation: "citing *Calderon*, denying motion to recall mandate even in light of issuance of Supreme Court opinion conflicting with this Court's decision." Pet. App. 43a-44a.

The court of appeals' citation to *Calderon* indicates that it did not believe that petitioner's case involves the sort of "extraordinary circumstances" or "grave, unforeseen contingencies" that would justify the exercise of its "last resort" power to recall the mandate of its 2009 decision. Pet. App. 43a. Its citation to *Richardson* additionally indicates the court of appeals' recognition that *Judulang*'s subsequent invalidation of the Board's comparable-grounds approach did not necessarily warrant recalling the mandate of its earlier decision.

Those conclusions are entirely consistent with the universal recognition that a court of appeals' power to recall its mandate is an extraordinary remedy because of the "'profound interests in repose' attaching to the mandate of a court of appeals." *Calderon*, 523 U.S. at

550 (quoting 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3938, at 712 (2d ed. 1996)). That is especially true in civil cases, in which "it has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule." *Teague* v. *Lane*, 489 U.S. 288, 308 (1989) (plurality opinion); see *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 541 (1991) (opinion of Souter, J.) ("Of course, retroactivity in civil cases must be limited by the need for finality; once suit is barred by res judicata, a new rule cannot reopen the door already closed.") (citation omitted); *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944) ("[I]n most instances society is best served by putting an end to litigation after a case has been tried and judgment entered."); see also 16 Wright, *Federal Practice and Procedure* § 3932, at 729 (outside of "special settings," "it is difficult to justify recall of a mandate, destroying finality and repose, simply on the ground that the court of appeals reached a wrong decision"). The interest in finality is, if anything, heightened in the context of immigration proceedings, where the Court has stressed that "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988).

The judgment in petitioner's civil removal case became final on May 17, 2010, when this Court denied certiorari to review the court of appeals' 2009 decision. See *De la Rosa* v. *Holder*, 130 S. Ct. 3272. During the course of his case, petitioner had a fully adequate and fair opportunity to pursue his claim that he was eligible for discretionary relief from removal. The court of ap-

peals did not abuse its discretion in concluding that the public interest would not be served by reopening petitioner's case more than two years after it became final simply on the basis of a change in the law that postdated the conclusion of his removal proceeding.

b. As petitioner notes (Pet. 8), this Court has, in very rare instances, recalled its own mandate after the time for rehearing had expired, but petitioner (correctly) refrains from alleging that his case is analogous to those cases. In *Gondeck* v. *Pan American World Airways*, 382 U.S. 25 (1965), the Court justified such a decision on the ground that it was necessary to ensure that the petitioner there would be able to receive compensation, as subsequent developments in other cases had permitted the other victims of the same accident to do. *Id.* at 27. Here, by contrast, petitioner's case and Judulang's did not arise out of the same underlying transaction or occurrence; they were separately ordered removed based on their own individual convictions.

Indeed, *Judulang* and other developments have not rendered petitioner an outlier even among a larger group of persons who are far less closely identified with each other than were the accident victims discussed in *Gondeck*. Other aliens were found ineligible for Section 212(c) relief under the comparable-grounds approach in proceedings that became final before *Judulang*. This Court denied certiorari in several other cases challenging the comparable-grounds approach before and after it denied review in petitioner's case.[4] And comparable-grounds-based decisions against still other aliens be-

---

[4] See, *e.g.*, *Ukofia* v. *Holder*, 131 S. Ct. 191 (2010) (No. 09-11395); *Abebe* v. *Holder*, 130 S. Ct. 3272 (2010) (No. 09-600); *Birkett* v. *Holder*, 556 U.S. 1184 (2009) (No. 08-6816); *Gonzalez-Mesias* v. *Holder*, 556 U.S. 1181 (2009) (No. 08-605).

came final when they failed to pursue review in this Court or the courts of appeals. See Pet. at 17, *Judulang supra* (No. 10-694) (contending that the validity of the comparable-grounds approach had "arisen in over 160 cases" before the Board or the courts of appeals since 2005); Pet. at 17, *De la Rosa*, *supra* (No. 09-594) (identifying 120 such cases one year earlier). Petitioner does not identify any circumstance, much less "extraordinary circumstances," *Calderon*, 523 U.S. at 550, that, uniquely among those cases, would warrant recall of the mandate in his case.

Petitioner's case is more analogous to *Weed* v. *Bilbrey*, 400 U.S. 982 (1970), in which the Court denied rehearing of its previous denial of certiorari. There, the Court had denied certiorari only three weeks before another petitioner sought certiorari in a similar suit arising from a separate incident, and the latter petitioner ultimately prevailed in this Court. *Id.* at 984 (Douglas, J., dissenting). As Justice Douglas explained in his dissent, the petitioner's loss in *Weed* was the result of the fact that certiorari had been denied in her case shortly before the Court received another case in which it later changed the law. *Ibid.* "All she ask[ed was] that the Court apply the law in her case that was applied in the one following hers." *Ibid.*

Similarly, in this case, petitioner's appeal to "the interests of justice" involves the contention that he should not suffer the consequences of removal "simply because he was unlucky in the timing of this Court's consideration of his petition for certiorari." Pet. 9, 11 n.3.[5] But

---

[5] Petitioner correctly notes (Pet. 10-11) that *Judulang* has invalidated the rationale of the earlier decisions finding him ineligible for discretionary relief under former Section 212(c). It does not, however, affect the correctness of the conclusion that he was remov-

Weed did not allow such concerns to trump the general principle of repose associated with its previously final decision. Accordingly, the court of appeals did not abuse its discretion in reaching a similar result here. Indeed, if it did, this Court presumably abused its own discretion on August 31, 2012, when it rejected petitioner's parallel attempt to seek rehearing of its 2010 denial of certiorari in case No. 09-594.

c. Petitioner acknowledges (Pet. 8) that the court of appeals' order is "cursory." He nevertheless contends that the court of appeals "appears" to have adopted a rule that its "mandate *should not be* recalled" when its decision conflicts with a subsequent Supreme Court decision. Pet. 8 (emphasis added). But petitioner overreads the court of appeals' order, which did not use the phrase "should not be recalled" or even purport to describe a generally applicable rule other than the recognition that a mandate may be recalled only in extraordinary circumstances. Instead, the court described its previous decision in *Richardson*, correctly, as a case in which a motion to recall the mandate was in fact denied, notwithstanding the presence of a later, conflicting opinion of this Court. Pet. App. 43a-44a.[6] Nor, despite peti-

---

able. Nor would it guarantee that he would necessarily be eligible for Section 212(c) relief, much less receive it. *Judulang* recognized that the Board may still "devise another * * * policy respecting eligibility for § 212(c) relief, so long as it comports with everything held in both this decision and *St. Cyr*." 132 S. Ct. at 490. Whether or not the Board adopts a different limitation on Section 212(c)'s applicability in the deportation context, it is by no means clear at this point that petitioner would be eligible for Section 212(c) relief.

[6] *Richardson* materially differs from this case in part because the alien there still had a petition for a writ of certiorari pending in this Court. See 175 F.3d at 899. The court of appeals noted that it "would welcome" the "opportunity" to revisit its decision in light of the

tioner's insinuation (Pet. 8), did the government contend that a supervening decision could never warrant a recall. Instead, it contended merely that petitioner "ha[d] not demonstrated that, under the particular facts of his case, th[e] change in law [effected by *Judulang*] constitutes an extraordinary circumstance that would justify recalling the mandate." Gov't C.A. Opp. to Mot. to Recall the Mandate 3.

Once the court of appeals' order is stripped of petitioner's unfounded recharacterization, any alleged error in that decision would consist, at most, of "the misapplication of a properly stated rule of law," which would not warrant this Court's review. Sup. Ct. R. 10.

2. Petitioner contends (Pet. 7-8) that the court of appeals' order conflicts with decisions from several other circuits (and three prior decisions from the Eleventh Circuit) which have acknowledged that a supervening change in law "may constitute" grounds to recall a mandate. But that asserted conflict depends on petitioner's mistaken imputation to the court of appeals of an inflexible rule that would affirmatively bar recall of the mandate in cases involving "supervening Supreme Court authority." Furthermore, each of the supposedly conflicting post-*Calderon* cases that petitioner invokes (Pet. 8-9) is readily distinguishable from this case.

a. Petitioner characterizes the First Circuit as finding *Calderon* "inapplicable" outside the context of habeas review of a state-court decision. Pet. 8 (quoting *Conley* v. *United States*, 323 F.3d 7, 14 (2003) (en banc)).

---

allegedly supervening Supreme Court decision if this Court were to grant certiorari, vacate, and remand. *Ibid.* That is what happened, though the court of appeals reached the same result after remand on the basis of narrower reasoning. See *Richardson* v. *Reno*, 180 F.3d 1311, 1313 (11th Cir. 1999), cert. denied, 529 U.S. 1036 (2000).

But he omits to mention that *Conley*—which involved the mandate of a decision on direct review in a federal criminal case, not a civil case—still explained that "recall of a mandate * * * threatens important interests in finality and is a step to be taken only in the most unusual circumstances," and that the court in *Conley* declined to withdraw its mandate. 323 F.3d at 14. There is thus no inconsistency between the First Circuit's approach and that of the decision below.

b. The Sixth Circuit's decision in *Patterson* v. *Haskins*, 470 F.3d 645 (2006), cert. denied, 552 U.S. 816 (2007), arose in the habeas context and recognized that mandates should be recalled only in exceptional circumstances. *Id.* at 662. The error in that case, however, involved a deviation from pre-existing practice, not something that proved to be incorrect in light of subsequent developments. *Id.* at 660. Moreover, the court concluded that *Calderon* and *Bell* v. *Thompson*, 545 U.S. 794 (2005), indicated that even "good-faith efforts" by appellate courts "to reach back in time to correct a decision that they later believed to be mistaken" may constitute an abuse of discretion. 470 F.3d at 665. It thus declined to recall the mandate in circumstances that shed little light on this case.

c. The only immigration decision that petitioner invokes—the unpublished decision in *Spence* v. *Holder*, 414 Fed. Appx. 637 (5th Cir. 2011)—did not, as petitioner suggests (Pet. 9), recall the mandate of an earlier decision simply because it had turned out to be wrong in light of this Court's subsequent decision in *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577 (2010). Instead, *Spence* explained that the alien in that case, who was proceeding pro se, had never received notice of the Fifth Circuit's earlier decision, because the clerk's office did

not send the decision to the address that the alien had timely provided, and he was thus unaware that his case was not still pending in the court of appeals when this Court decided *Carachuri-Rosendo*. See 414 Fed. Appx. at 640-641. Here, by contrast, petitioner sought precisely the kind of review from this Court (albeit unsuccessfully) that circumstances had denied to the alien in *Spence*, making that decision's reasoning inapposite.

d. The Ninth Circuit's decision in *United States* v. *Crawford*, 422 F.3d 1145 (2005), involved the mandate from a decision on direct review of a criminal sentence, not a civil case like petitioner's. Although the court recalled its mandate, it did so because the sentencing judge had "expressed explicit reservations" about the sentence required by the then-mandatory Sentencing Guidelines and because, even before the mandate was issued, this Court had already decided *Blakely* v. *Washington*, 542 U.S. 296 (2004), which "foreshadow[ed]" the invalidation of the mandatory nature of the federal Sentencing Guidelines in *United States* v. *Booker*, 543 U.S. 220 (2005). 422 F.3d at 1145-1146. In addition, the motion to recall the mandate was made before the time for seeking certiorari had expired, meaning that the judgment was not even final. See *Carrington* v. *United States*, 503 F.3d 888, 892 (9th Cir. 2007) (discussing *Crawford*). Here, there was no foreshadowing about the comparable-grounds approach before the mandate in petitioner's case was released, and he did not seek to have the mandate recalled before it had become final. Notwithstanding *Crawford*, the Ninth Circuit has refused to recall its mandates to entertain claims of *Booker* error by "defendants whose direct appeals were final at the time that decision was rendered." *Carrington*, 503 F.3d at 893; see *United States* v. *Saikaly*, 424 F.3d

514, 517-518 (6th Cir. 2005) (adopting similar rule and citing cases from other circuits doing the same). Because the decision in petitioner's case had long been final when *Judulang* was decided, his case is more analogous to *Carrington* than to *Crawford*, which thus provides no indication that he would prevail in the Ninth Circuit.

e. The decision in *Mancuso* v. *Herbert*, 166 F.3d 97 (2d Cir.), cert. denied, 527 U.S. 1026 (1999), did in fact acknowledge, as petitioner states (Pet. 9), that "[o]ne circumstance that *may* justify recall of a mandate is [a] supervening change in governing law that calls into serious question the correctness of the court's judgment." 166 F.3d at 100 (citation and internal quotation marks omitted; emphasis added). But the court found that the allegedly supervening decision did not "definitely establish" that its earlier decision was erroneous. *Id.* at 101. It therefore did not recall its mandate and cannot substantiate petitioner's contention that the court of appeals abused its discretion by failing to do so here.

In short, petitioner has identified no decision from another court of appeals in which circumstances like his were found to meet the high standard necessary to justify recalling a court's mandate for a decision that has already become final—much less any indication that the failure to recall a mandate in such circumstances would constitute an abuse of discretion.

3. Finally, this case would be a poor vehicle for addressing whether the court of appeals abused its discretion in denying petitioner's motion "without prejudice to [p]etitioner's right to pursue whatever administrative remedies may be available to him." Pet. App. 43a. Although petitioner suggests (Pet. 13) that action from this Court would be the only way to get his case back

before the Board, he fails to mention that, on March 25, 2012, he filed a motion with the Board to reopen his removal proceedings in light of *Judulang*. The Board has not yet acted on that motion.

The Board is in fact the most appropriate forum for the relief petitioner requests, because it has established a framework for determining when it should invoke its *sua sponte* authority to reopen a proceeding (see 8 C.F.R. 1003.2(a)), which includes consideration of whether "a change in law is sufficiently compelling" to justify such an "extraordinary intervention." *In re G-D-*, 22 I. & N. Dec. 1132, 1134-1136 (B.I.A. 1999); see *In re X-G-W-*, 22 I. & N. Dec. 71, 73 (B.I.A. 1998) (en banc) (exercising *sua sponte* reopening authority following an amendment to the statutory definition of "refugee" that "made relief available to the applicant on the basis of the same asylum application he filed initially, and he [had] filed his motion promptly following the new developments"). The Board is the appropriate entity to determine whether petitioner's long-final order of removal should be reopened based on the subsequent change in law represented by *Judulang*. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("judicial deference to the Executive Branch is especially appropriate in the immigration context"); *INS* v. *Legalization Assistance Project*, 510 U.S. 1301, 1304-1306 (1993) (O'Connor, J., in chambers) (granting government's motion for a stay pending appeal where the district court's order represented "an improper intrusion by a federal court into the workings of a coordinate branch of the Government"). That result is especially appropriate in the circumstances of this case, because *Judulang* itself acknowledged that the Board may still identify a rationale other than the comparable-grounds rule that

might prevent deportable aliens from being eligible for relief under Section 212(c). See 132 S. Ct. at 485, 490.

If the Board determines that petitioner should be eligible to seek relief under former Section 212(c) in the wake of *Judulang*, it can craft an appropriate remedy on the basis of its own authority to reopen proceedings.[7] There is therefore no basis for concluding that the court of appeals abused its discretion in finding that this case does not present the "grave" and "extraordinary" circumstances that would warrant invoking the power "of last resort" (*Calderon*, 523 U.S. at 550) to recall the mandate of its 2009 decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
DONALD E. KEENER
PATRICK J. GLEN
Attorneys

OCTOBER 2012

---

[7] If the Board declines to exercise its *sua sponte* authority to reopen petitioner's proceeding, that decision would not be reviewable under current Eleventh Circuit precedent. See *Lenis* v. *United States Att'y Gen.*, 525 F.3d 1291, 1293-1294 (2008); see also *Kucana* v. *Holder*, 130 S. Ct. 827, 839 n.18 (2010) (noting the conclusion of 11 courts of appeals that a Board decision declining to reopen a case *sua sponte* is unreviewable, but "express[ing] no opinion" on that issue).