No. 06-935

In the Supreme Court of the United States

RIGOBERTO LAZO, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENE
FRANCIS W. FRASER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, when an immigration judge (IJ) finds an alien removable but grants discretionary relief from removal, the Board of Immigration Appeals has authority to order the alien removed upon overturning the IJ's grant of discretionary relief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 462 F.3d 53. The decisions of the immigration judge (Pet. App. 10-23) and the Board of Immigration Appeals (Pet. App. 7-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2006. The petition for a writ of certiorari was filed on November 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides for removal of an alien from the United States upon entry of an order of removal. See 8 U.S.C. 1227(a) (2000 & Supp. IV 2004); 8 U.S.C.

1231(a). The INA defines an "order of deportation"—now an "order of removal"—as follows:

> (A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.
>
> (B) The order described under subparagraph (A) shall become final upon the earlier of—
>
> (i) a determination by the Board of Immigration Appeals affirming such order; or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

8 U.S.C. 1101(a)(47).[1]

2. Petitioner, a native and citizen of El Salvador, first came to the United States in 1981, and became a lawful permanent resident in 1990. Pet. App. 10, 12. On January 24, 1994, petitioner was convicted on a plea of guilty of sexual abuse of a child less than 11 years old, in violation of New York law. *Id.* at 11. He was sentenced to 60 days of imprisonment and five years of probation. *Id.* at 11-12.

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[1] Because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, "did away with the previous legal distinction among deportation, removal, and exclusion proceedings," *United States* v. *Pantin*, 155 F.3d 91, 92 (2d Cir. 1998), cert. denied, 525 U.S. 1086 (1999), the term "order of removal" includes statutory references to "order of deportation" and "order of exclusion," see *id.* at 93.

Petitioner last arrived in the United States on June 24, 1998, and requested permission to return as a lawful permanent resident. Pet. App. 10-11. On June 25, 1998, petitioner was placed in removal proceedings and was charged with being inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) as a person convicted of a crime involving moral turpitude. Pet. App. 11. Petitioner conceded the factual allegations of the Notice to Appear and conceded the charges against him, but applied for a discretionary waiver of removal under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994). Pet. App. 11.[2]

3. The immigration judge (IJ) issued her decision on May 29, 2003. The IJ observed that "respondent through counsel conceded service [of the Notice to Appear], conceded the allegations, conceded the charge. He seeks at this point relief under Section 212(c) and a

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[2] Under former Section 212(c), a permanent resident alien with "a lawful unrelinquished domicile of seven consecutive years" could apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). The applicant for relief bore the burden of demonstrating that his application merited favorable consideration. *In re Marin*, 16 I. & N. Dec. 581 (BIA 1978). "When considering a 212(c) application, an immigration judge 'must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of Section 212(c) relief appears in the best interests of this country.'" *Lovell* v. *INS*, 52 F.3d 458, 461 (2d Cir. 1995) (quoting *In re Marin*, 16 I. & N. Dec. at 584) (listing factors for consideration)). In IIRIRA, Congress repealed 8 U.S.C. 1182(c) (1994), see Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, and replaced it with 8 U.S.C. 1229b, which provides for a new form of discretionary relief known as cancellation of removal. Relief under former Section 212(c) nonetheless remains available for aliens, such as petitioner, whose convictions were obtained through a plea agreement and who would have been eligible for relief under the law then in effect. See *St. Cyr*, 533 U.S. at 314-326.

waiver of the grant of inadmissibility." Pet. App. 11. The IJ determined that petitioner was eligible for relief under Section 212(c) in light of this Court's decision in *St. Cyr*. *Ibid*. She then concluded that, "[b]alancing the length of time [since petitioner's conviction] without any other problem, the fact that it is only one, and the other equities in the record, * * * [petitioner] has demonstrated the requisite hardship and equities and rehabilitation." *Id*. at 23. The IJ therefore granted relief under former Section 212(c) in the exercise of discretion.[3]

On August 31, 2004, the Board of Immigration Appeals (BIA) sustained the government's appeal of the IJ's grant of relief from removal. Pet. App. 7-9. The BIA noted the equities in petitioner's favor, *i.e.*, "his status as a legal permanent resident of the United States for 14 years and his United States citizen child." *Id*. at 9. The BIA also reviewed "the seriousness of [petitioner's] crime," in that he had "sexually abused a 10 year old girl while she was sleeping." *Ibid*. The BIA "weigh[ed] the positive and negative factors" and determined that, "[g]iven the particular seriousness of his criminal record," petitioner did not "merit[] a favorable exercise of discretion." *Ibid*. The BIA therefore ordered petitioner removed to El Salvador. *Ibid*.

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[3] The IJ did not make an explicit finding that petitioner is removable. See 8 U.S.C. 1229a(c)(1)(A) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States."). The IJ's grant of a waiver of removal under Section 212(c), however, presupposes that she had found petitioner removable. The court of appeals accordingly addressed the case on the understanding that the IJ had "found [petitioner] removable." Pet. App. 2. Petitioner does not dispute that understanding but instead agrees that the "Immigration Judge found the Petitioner removable," Pet. 1.

4. The court of appeals denied the petition for review. Pet. App. 1-6. The court rejected petitioner's argument that the BIA had exceeded its authority by ordering that petitioner be removed rather than remanding the proceedings to the IJ for entry of an order of removal. The court declined to decide whether the BIA has authority to issue an order of removal in the first instance. *Id.* at 4, 5 n.1. The court instead concluded that, regardless of whether the BIA has authority to issue an order of removal in the first instance, the statutory requirement for an order of removal is "satisfied when—as here—the IJ *either* orders removal or concludes that an alien is removable." Pet. App. 4.

The court explained that its conclusion was compelled by the language of 8 U.S.C. 1101(a)(47)(A), which defines an "order of deportation" in the disjunctive as an order of a special inquiry officer "concluding that the alien is deportable *or* ordering deportation." *Ibid.* (emphasis added); see 8 C.F.R. 1.1(l) (1996) (providing that an IJ is a "special inquiry officer"). The court explained that the BIA therefore had not ordered petitioner removed in the first instance, but had instead, by overturning the IJ's grant of relief from removal under former Section 212(c), "removed an impediment to the removal that was ordered by the IJ." Pet. App. 4. The court observed that its understanding was consistent with that of three of the four courts of appeals that had previously considered the question. *Id.* at 5 (citing *Solano-Chicas* v. *Gonzales*, 440 F.3d 1050, 1053-1054 (8th Cir. 2006); *Del Pilar* v. *United States Att'y Gen.*, 326 F.3d 1154, 1156 (11th Cir. 2003); and *Delgado-Reynua* v. *Gonzales*, 450 F.3d 596, 601 (5th Cir. 2006). The court further observed that, although the Ninth Circuit had reached a contrary conclusion in *Molina-*

Camacho v. *Ashcroft*, 393 F.3d 937, 940-941 (2004), that court had not considered the definition of an order of removal in 8 U.S.C. 1101(a)(47)(A), which "equates a finding of removability with an order of removal." Pet. App. 5.

ARGUMENT

1. Petitioner contends (Pet. 3-8) that the BIA exceeded its authority in ordering that petitioner be removed, and that the BIA instead was required to remand to the IJ for entry of an order of removal. The court of appeals correctly rejected that argument. As the court explained, the INA defines an order of removal as "the order of the [IJ] * * * concluding that the alien is deportable *or* ordering deportation." 8 U.S.C. 1101(a)(47)(A) (emphasis added); see Pet. App. 4 ("[T]he statutory requirement of an order of removal is satisfied when—as here—the IJ either orders removal or concludes that an alien is removable."). In this case, the IJ found that petitioner is removable, but then granted discretionary relief from removal under former Section 212(c). *Id.* at 2; see note 3, *supra*. The IJ's determination that petitioner is removable constituted an order of removal within the meaning of 8 U.S.C. 1101(a)(47)(A). Accordingly, when the BIA overturned the IJ's grant of Section 212(c) relief, the BIA "removed an impediment to the removal" that had already been "ordered by the IJ." Pet. App. 4. There is no need for the BIA to remand for entry of an order of removal in that situation. Instead, the BIA, as it did in this case, can order removal based upon the order of removal already entered by the IJ. *Id.* at 4-5.

Petitioner errs in relying (Pet. 7) on 8 C.F.R. 1240.13(d). That regulation provides: "If the immigra-

tion judge decides that the respondent is removable *and orders the respondent to be removed*, the immigration judge shall advise the respondent of such decision, and of the consequences for failure to depart under the order of removal." 8 C.F.R. 1240.13(d) (emphasis added). Petitioner contends that the IJ failed to provide the requisite warnings in this case. The IJ was not required to do so, however, because he did not order petitioner removed, but instead granted petitioner a waiver of removal under former Section 212(c).[4]

2. Petitioner observes (Pet. 3, 6-7) that the courts of appeals have issued conflicting decisions on whether the BIA can order an alien's removal when, as in this case, an IJ finds an alien removable but grants discretionary relief and the BIA subsequently overturns the grant of discretionary relief. That conflict does not warrant this Court's review.

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[4] Petitioner appears to suggest (Pet. 4) that the BIA's order that he be removed is inconsistent with 8 U.S.C. 1229a(a)(3), which provides that, "unless otherwise specified in this chapter," removal proceedings conducted by an IJ "shall the sole and exclusive procedure for determining whether an alien may be * * * removed from the United States." In this case, the IJ conducted a removal proceeding and found that petitioner was removable, which, as explained, qualifies as an order of removal under 8 U.S.C. 1101(a)(47)(A). Petitioner's argument also fails to acknowledge that the INA recognizes exceptions to the "sole and exclusive procedure." 8 U.S.C. 1229a(a)(3). For example, the INA authorizes the Attorney General to conclude that aliens are removable, to order their removal, and to delegate authority to any administrative officer other than an IJ. See 8 U.S.C. 1101(a)(47)(A); 8 U.S.C. 1103(a)(1), 1103(g) (2000 & Supp. IV 2004). The Attorney General has delegated that authority to the BIA. See, *e.g.*, 8 C.F.R. 1241.31 (power to issue removal orders), 1003.1(d)(3)(ii)(authority to conduct *de novo* review), 1003.1(d)(6) (2004) (power to issue final decisions).

Four courts of appeals, in agreement with the court below, have concluded that the BIA has authority to order removal in the circumstances of this case because an IJ's finding that an alien is removable qualifies as an order of removal within the meaning of 8 U.S.C. 1101(a)(47)(A). See *Guevara* v. *Gonzales*, 472 F.3d 972, 975-976 (7th Cir. 2007), petition for cert. pending, No. 06-1369 (filed Apr. 9, 2007); *Delgado-Reynua* v. *Gonzales*, 450 F.3d 596, 600-601 (5th Cir. 2006); *Solano-Chicas* v. *Gonzales*, 440 F.3d 1050, 1054 (8th Cir. 2006); *Del Pilar* v. *United States Att'y Gen.*, 326 F.3d 1154, 1156 (11th Cir. 2003). Although the Ninth Circuit has issued a decision reaching the contrary conclusion, *Molina-Camacho* v. *Ashcroft*, 393 F.3d 937, 940 (2004), that opinion did not discuss or consider that the definition of "order of removal" in 8 U.S.C. 1101(a)(47)(A) encompasses an order finding that an alien is removable. See *Molina-Camacho*, 393 F.3d at 941 ("There is no statutory authority * * * that supports the assertion that a finding that a petitioner is removable is the same thing as an order of removal and, indeed, the Government points to none on appeal."). Moreover, the status of the Ninth Circuit's holding in *Molina-Camacho* is unclear: The Ninth Circuit has granted en banc review to reconsider the issue in *Lolong* v. *Gonzales*, 452 F.3d 1027 (2006) (granting en banc rehearing).

In *Lolong*, the IJ found that the alien was removable but granted her application for asylum. The BIA sustained the government's appeal, vacated the IJ's grant of asylum, and ordered the alien removed. See *Lolong* v. *Gonzales*, 400 F.3d 1215, 1218 (9th Cir. 2005). A panel of the Ninth Circuit granted the alien's petition for review, found that substantial evidence supported her eligibility for asylum, and remanded for the Attorney Gen-

eral to exercise his discretion concerning whether to grant asylum. See *id.* at 1225. After the government filed a petition for rehearing en banc, the Ninth Circuit issued an order directing the parties to address, *inter alia*, whether the court had jurisdiction to decide the petition for review under its decision in *Molina-Camacho*, in light of that decision's holdings that the BIA exceeds its authority by ordering an alien removed and that the court of appeals lacks jurisdiction over a petition for review in that situation because no final order of removal has been entered. App., *infra*, 1a-2a; see 8 U.S.C. 1252(a)(1) (conferring jurisdiction in the court of appeals to review a "final order of removal"). The court also asked the parties to address, *inter alia*, whether the en banc court should revisit the panel disposition in *Molina-Camacho*. App., *infra*, 2a. The government responded that the court lacked jurisdiction under its decision in *Molina-Camacho*, and that the court should reconsider that decision en banc. The Ninth Circuit subsequently granted en banc rehearing. 452 F.3d 1027 (2006). Because the Ninth Circuit, as part of its en banc proceedings in *Lolong*, presumably will consider whether to overturn the panel disposition *Molina-Camacho*, there is no warrant for this Court to grant review of the conflict raised by the petition.[5]

Finally, any decision by this Court to the effect that the BIA was required to remand the case to the IJ to issue an order of removal would not change the conclusion of the IJ that petitioner is removable (a conclusion that petitioner has not disputed, see Pet. App. 3). And the BIA has already determined that petitioner does not

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[5] The Ninth Circuit heard oral argument en banc in *Lolong* on October 10, 2006, but the court has not issued its decision.

warrant discretionary relief from removal under former Section 212(c). Accordingly, a decision by this Court would not ultimately affect petitioner's removal from the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENE
FRANCIS W. FRASER
Attorneys

APRIL 2007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-72384
Agency No. A77-427-355

MARJORIE KONDA LOLONG, PETITIONER,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

Filed: Oct. 4, 2005

ORDER

Before: B. FLETCHER, NOONAN, and THOMAS, Circuit Judges:

Although both parties assert that we have jurisdiction, the court has an independent obligation to determine whether it has jurisdiction. We now require simultaneous supplemental briefing and request the parties address the following issues:

(1) Whether we have jurisdiction to decide the merits of the above-captioned matter in light of *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), which held that the BIA had "acted *ultra vires* in issuing a deportation order instead of remanding to the IJ" and

that we lacked jurisdiction on appeal because there is no final order of removal to review, *see id.* at 941;

(2) Whether, in light of the Real ID Act of 2005, which removed jurisdiction from the district court to entertain habeas appeals from an order of removal, *see* 8 U.S.C. § 1252(a)(5), and in light of *Molina-Camacho*'s holding, there is any remedy available to the petitioner in this court;

(3) Whether, if no remedy is available in this court or the district court, the lack of a remedy raises constitutional problems that are appropriate and necessary for us to address in this appeal, including whether we should ask an en banc court to revisit our decisions in *Molina-Camacho* and *Noriega-Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003).

Simultaneous supplemental briefs shall be filed on or before October 25, 2005. The briefs shall not exceed twenty-five (25) pages. Fifty (50) copies shall be submitted to the Clerk of the Court.