No. 10-694

In the Supreme Court of the United States

JOEL JUDULANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, and who did not depart and re-enter the United States between the time of his conviction and the commencement of removal proceedings, is foreclosed from seeking discretionary relief from removal under former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted in 249 Fed. Appx. 499. The opinions of the Board of Immigration Appeals (Pet. App. 5a-9a) and the immigration judge (Pet. App. 11a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2007. A petition for rehearing was denied on August 26, 2010 (Pet. App. 21a). The petition for a writ of certiorari was filed on November 24, 2010, and granted on April 18, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Before it was repealed, 8 U.S.C. 1182(c) (1994) provided in relevant part as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)).

Other relevant provisions are reprinted in an appendix to petitioner's brief (at 1a-21a).

STATEMENT

1. In the immigration laws, Congress has "long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry." *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958). 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). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, made extensive revisions to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*. Among other things, IIRIRA abolished the distinction between "deportation" and "exclusion" proceedings, and instituted a new form of proceeding known as "removal."

See 8 U.S.C. 1229, 1229a; *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005).

Notwithstanding that unified procedure, Congress maintained, as before, two separate lists of the substantive grounds for removal, with one still defining those that render an alien excludable (or, in the term the statute now uses, "inadmissible"), see 8 U.S.C. 1182(a) (2006 & Supp. III 2009), and the other defining those that render an alien "deportable," see 8 U.S.C. 1227(a) (2006 & Supp. III 2009). See also 8 U.S.C. 1229a(e)(2) (specifying that an alien is "removable" if "inadmissible" or "deportable"). Because the lists differ, an alien may be inadmissible without being deportable, and vice versa.

IIRIRA also refashioned the terms on which an alien found to be removable may apply for relief in the Attorney General's discretion. Among other steps, Congress repealed former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994), which had expressly authorized some lawful-permanent-resident aliens (LPRs) domiciled in the United States for seven consecutive years to apply for discretionary relief from certain grounds of exclusion, and, as discussed below, had also been applied to some aliens in deportation proceedings.[1] See IIRIRA § 304(b), 110 Stat. 3009-597. A new form of discretionary relief, known as "[c]ancellation of removal," replaced prior provisions, including Section 212(c); it may be granted "in the case of an alien who is inadmissible or deportable," but it is not available to aliens who have been convicted of aggravated felonies. 8 U.S.C. 1229b(a)(3). In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this

[1] This brief generally refers to "Section 212(c)" by its location within the INA, rather than where it was codified (8 U.S.C. 1182(c)) between 1952 and 1996. Other INA provisions are generally referred to by their United States Code citations. See Sup. Ct. R. 34.5.

Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to certain aliens whose aggravated felony "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." *Id.* at 326.

2. The statutory predecessor to Section 212(c)—the Seventh Proviso to Section 3 of the Immigration Act of 1917, ch. 29, 39 Stat. 878—provided that, notwithstanding mandatory grounds of exclusion, an alien returning to an unrelinquished domicile in the United States of seven years after a temporary absence "may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe." 39 Stat. 878; see 8 U.S.C. 136(p) (1925). That discretion was transferred to the Attorney General in 1939. See Reorganization Plan No. V, 54 Stat. 1238.

In 1940, the Attorney General—in a matter referred to him by the Board of Immigration Appeals (Board or B.I.A.)—invoked the Seventh Proviso in a deportation proceeding. See *In re L-*, 1 I. & N. Dec. 1 (A.G. 1940). The alien had been convicted of larceny in 1924, which did not make him deportable but would make him excludable on an attempt to enter the United States. *Id.* at 4. In 1939, he left the United States and was readmitted by an inspector unaware of the conviction. *Ibid.* In the subsequent deportation proceeding, the Attorney General concluded that the Seventh Proviso could be applied "*nunc pro tunc*," as "little more than a correction of a record of entry," because "the only ground for deportation is one that might have been removed by discretionary action" had the alien been denied admission upon his earlier re-entry. *Id.* at 5-6.

In 1952, Congress replaced the Seventh Proviso with Section 212(c) of the INA, which provided as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)–(25), (30), and (31) of subsection (a) of this section.

8 U.S.C. 1182(c) (1952). Section 212(c) contained three limits that had not been present in the Seventh Proviso: (1) it required the alien to be an LPR; (2) it required the temporary absence to be voluntary and not under a deportation order; and (3) it limited the waiver power to certain enumerated grounds of exclusion in Section 1182(a).

As with the Seventh Proviso, the Board applied Section 212(c) to some LPRs in deportation proceedings, on a *nunc-pro-tunc* basis, when they had previously reentered the United States and would have been eligible for relief from exclusion. See *In re G-A-*, 7 I. & N. Dec. 274, 275 (B.I.A. 1956). The Board nevertheless recognized that, under Section 212(c), relief was "no longer a discretion which may be used generally," and was "confined" to "enumerated" "grounds of inadmissibility." *In re T-*, 5 I. & N. Dec. 389, 390 (B.I.A. 1953). Thus, aliens being deported on grounds that were not comparable to enumerated grounds of inadmissibility were ineligible for Section 212(c) relief. See, *e.g.*, *ibid.* (deportable for having entered without inspection). The Board also refused to extend Section 212(c) to aliens in deportation proceedings who had not left and re-entered the United

States after they became deportable. See, *e.g.*, *In re Arias-Uribe*, 13 I. & N. Dec. 696 (B.I.A. 1971), aff'd, 466 F.2d 1198 (9th Cir. 1972).

In *Francis* v. *INS*, 532 F.2d 268 (1976), the Second Circuit held that the Board's practice of making Section 212(c) relief available on a *nunc-pro-tunc* basis to deportable aliens who had departed and re-entered the United States, but not to deportable aliens who had remained here, constituted an equal-protection violation. It found no rational basis to distinguish between "two classes of aliens identical in every respect except for the fact that members of one class have departed and returned to this country at some point after they became deportable." *Id.* at 272.

Shortly after the Solicitor General decided against seeking certiorari in *Francis*, the Board acquiesced in the decision on a nationwide basis. In *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976), it concluded that Section 212(c) relief could be granted to an LPR "in a deportation proceeding regardless of whether he departs the United States following the act or acts which render him deportable." *Id.* at 29-30.

3. After *Silva*, the Board continued to find that Section 212(c) applies in a deportation proceeding only when the ground of deportation is comparable to an enumerated ground of inadmissibility. See *In re Granados*, 16 I. & N. Dec. 726, 728 (B.I.A. 1979). Thus, when an LPR was deportable on the charge of having committed a crime involving moral turpitude within five years of entry, the Board found he was eligible for relief, because having committed a crime involving moral turpitude was "also a ground of inadmissibility." *In re Salmon*, 16 I. & N. Dec. 734, 736-737 (B.I.A. 1978). By contrast, the LPR in *In re Wadud*, 19 I. & N. Dec. 182 (B.I.A. 1984),

was charged with being deportable under 8 U.S.C. 1251(a)(5) (1982) (for a conviction relating to fraud and misuse of visas or other entry permits). 19 I. & N. Dec. at 183. Because there was "no comparable ground of excludability" for that ground of deportation, the Board found it immaterial whether the underlying conviction was "one involving moral turpitude." *Id.* at 185. It "decline[d] to expand the scope of section 212(c) relief in cases where the ground of deportability charged is not also a ground of inadmissibility." *Ibid.*

In 1990, the Board attempted to eliminate the requirement that the ground of deportability be comparable to a ground of exclusion, but the Attorney General disapproved its opinion. See *In re Hernandez-Casillas*, 20 I. & N. Dec. 262 (B.I.A. 1990; A.G. 1991).[2] Without "evaluating the correctness of" the equal-protection rationale of *Francis* and *Silva*, the Attorney General concluded that "deviation from the literal terms of section 212(c)" should be kept "to what [those cases] understood as the constitutionally mandated minimum," which was "only that discretionary relief * * * be made available in deportation proceedings in which the asserted ground for deportation is also a ground for exclusion expressly subject to waiver under that section." *Id.* at 287-288.

4. Congress made having an aggravated-felony conviction a ground of deportability in 1988. See 8 U.S.C. 1251(a)(4)(B) (1988). At the time, it defined "aggravated felony" to include murder, certain drug- and weapons-trafficking offenses, and related attempts and conspira-

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[2] The Board's approach in *Hernandez-Casillas* would still have denied eligibility where the ground of deportation was "comparable to the exclusion grounds expressly excluded by section 212(c)." 20 I. & N. Dec. at 266.

cies. 8 U.S.C. 1101(a)(43) (1988). In the Immigration Act of 1990 (1990 Act), Congress added money-laundering offenses and "any crime of violence (as defined in [18 U.S.C. 16] * * *) for which the term of imprisonment imposed * * * is at least 5 years." Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 5048; 8 U.S.C. 1101(a)(43) (Supp. II. 1990).[3] Congress expanded the definition substantially further in 1994 and 1996. As relevant here, IIRIRA reduced the term-of-imprisonment threshold for a "crime of violence" from five years to one year (whether or not that term was suspended). 8 U.S.C. 1101(a)(43)(F) and (48)(B). And it expressly made the new definition applicable "regardless of whether the conviction was entered before, on, or after September 30, 1996." 8 U.S.C. 1101(a)(43).

As Congress expanded the definition of aggravated felony, it also limited the availability of Section 212(c) relief. In 1990, it made Section 212(c) inapplicable to any alien who was convicted of an aggravated felony and served a term of imprisonment of at least five years. See 8 U.S.C. 1182(c) (1994). In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d)(2), 110 Stat. 1277, it expanded that bar to include any aggravated-felony conviction, irrespective of the length of the sentence served. Finally, IIRIRA repealed Section 212(c). See p. 3, *supra*.

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[3] A "crime of violence" is defined in 18 U.S.C. 16 as follows:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

5. In 1991, two months after the Attorney General's decision in *Hernandez-Casillas* reaffirmed that Section 212(c) was available in a deportation proceeding only when the deportation ground had a comparable ground of exclusion, the Board applied that standard to an aggravated-felony charge. In *In re Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991), the alien had been convicted of a drug-related aggravated felony. The Board noted there was no "aggravated felony" ground of exclusion, but it looked to the "specific category of aggravated felony at issue in th[e] case," and found that it comprised "trafficking offenses, most, if not all, of which would also be encompassed within" the ground of exclusion applicable to aliens convicted of drug trafficking (or believed to be drug traffickers). *Id.* at 259. It therefore held that the alien was "not precluded from establishing eligibility for section 212(c) relief." *Ibid.* Until Section 212(c)'s repeal, the Board's precedential decisions continued to find that relief was unavailable when a deportation ground did not have "a statutory counterpart among the exclusion grounds waivable by section 212(c)." *In re Jimenez-Santillano*, 21 I. & N. Dec. 567, 574 (B.I.A. 1996) (en banc).

In 2004, in response to this Court's decision in *St. Cyr* finding that former Section 212(c) remained available to some aliens in post-IIRIRA proceedings, the Department of Justice promulgated regulations providing procedures for handling Section 212(c) claims. Those regulations specify that relief is not available when "[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act." 8 C.F.R. 1212.3(f)(5).

In 2005, the Board decided two cases that applied the statutory-counterpart rule to the definition of "aggravated felony." The alien in *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005), remanded, 489 F.3d 88 (2d Cir. 2007), was found to be deportable (and thus removable) as an alien convicted of sexual abuse of a minor, which is an aggravated felony under 8 U.S.C. 1101(a)(43)(A). The alien contended that that ground was comparable to the ground of exclusion for crimes involving moral turpitude (8 U.S.C. 1182(a)(2)(A)(i)(I)), but the Board found that "the moral turpitude ground of exclusion addresses a distinctly different and much broader category of offenses than the aggravated felony sexual abuse of a minor charge." 23 I. & N. Dec. at 728.

In *In re Brieva-Perez*, 23 I. & N. Dec. 766 (B.I.A. 2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007), the alien was found to be deportable (and thus removable) on account of a conviction of a crime of violence. In considering Section 212(c) eligibility, the Board explained that "the relevant question is whether the 'crime of violence' aggravated felony ground * * * is substantially equivalent to a ground of inadmissibility in section 212(a) of the Act." *Id.* at 772. Upon analyzing the definition of "crime of violence," and observing that "[s]ome of the most common crimes falling within [that] definition * * * do not necessarily involve moral turpitude," the Board found that the category was not substantially equivalent to the crime-involving-moral-turpitude ground of inadmissibility. *Id.* at 772-773.

In 2007, the Second Circuit reviewed the Board's decision in *Blake*. See *Blake* v. *Carbone*, 489 F.3d 88 (2d Cir. 2007). The court rejected the argument that the decision had an impermissible retroactive effect, because the 2004 regulations had done "nothing more than

crystallize the agency's preexisting body of law." *Id.* at 98. The court nonetheless granted the alien's petition for review, holding, in light of *Francis*, that Section 212(c) eligibility should not turn on how the alien's "offense was categorized as a ground of deportation," but instead on the "particular criminal offense[]" itself. *Id.* at 102-103. "If the offense that renders [an LPR] deportable would render a similarly situated [LPR] excludable, the deportable [LPR] is eligible for a waiver of deportation." *Id.* at 103. The court recognized that its reading conflicted with that of "several other circuits," and that "much of th[e] confusion" about Section 212(c) could be attributed in "hindsight" to the decision in *Francis*, but it found itself "bound to finish what our predecessors started." *Id.* at 103, 105. It remanded for a determination of whether the alien's conviction could "form the basis of exclusion as a crime involving moral turpitude." *Id.* at 105.

6. a. Petitioner was born in the Philippines in 1966 and admitted for lawful permanent residence upon entry to the United States in 1974. Pet. App. 2a, 14a, 37a.

In 1988, the Los Angeles District Attorney filed an information in California state court charging petitioner with one count of murder and one count of attempted murder. Administrative Record (A.R.) 152-154. Petitioner pleaded guilty to a lesser-included offense of voluntary manslaughter and received a suspended sentence of six years of imprisonment and four years of probation, conditioned on his spending 684 days in county jail. Pet. App. 4a, 15a, 31a-32a.

Voluntary manslaughter was generally recognized as a crime involving moral turpitude. See, *e.g.*, *In re Rosario*, 15 I. & N. Dec. 416, 417 (B.I.A. 1975). But petitioner's conviction did not make him deportable then,

because the relevant ground applied to a conviction of "a crime involving moral turpitude committed *within five years after entry*," or to convictions "at any time after entry * * * of *two* crimes involving moral turpitude." 8 U.S.C. 1251(a)(4) (1988) (emphases added). In 1996, however, IIRIRA expanded the "crime of violence" portion of the aggravated-felony ground of deportability and made it retroactively applicable. See p. 8, *supra*.[4]

In 2003, petitioner was charged in California state court with two counts of grand theft of personal property valued at more than $400, based on allegations that he had stolen and pawned two diamond rings. A.R. 143, 146. Petitioner pleaded guilty to one count, and was sentenced to 32 months of imprisonment and ordered to pay $9250 in restitution. Pet. App. 14a; A.R. 144.

b. In 2005, while petitioner was still incarcerated, the Department of Homeland Security (DHS) placed him in removal proceedings on the charge that he was deportable under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien who had been convicted of an aggravated felony (specifically, "a theft offense" for which the term of imprisonment was at least one year, 8 U.S.C. 1101(a)(43)(G)). Pet. App. 11a-13a. DHS later lodged two additional charges of removability that depended on petitioner's 1989 voluntary-manslaughter conviction. *Id.* at 33a-34a. One charged that petitioner had been convicted of "two or more crimes involving moral turpitude," which would make him deportable under 8 U.S.C. 1227(a)(2)(A)(ii). The other charged petitioner with being deportable under 8 U.S.C. 1227(a)(2)(A)(iii), because he had been convicted of an aggravated felony (specifi-

[4] Petitioner's conviction preceded the 1990 addition of "crime of violence," which applied only prospectively. See 1990 Act § 501(b), 104 Stat. 5048.

cally, a "crime of violence" for which the term of imprisonment was at least one year, 8 U.S.C. 1101(a)(43)(F)).

On September 28, 2005, after a hearing, an immigration judge (IJ) ruled that petitioner was subject to removal on all three charged grounds. Pet. App. 14a-16a. The IJ further concluded that petitioner was "not eligible for any forms of relief," including under Section 212(c), and ordered him removed to the Philippines. *Id.* at 16a-17a.

c. On February 3, 2006, the Board dismissed petitioner's appeal. Pet. App. 5a-9a. It found that the evidence did not support his claim to have obtained derivative United States citizenship through his parents. *Id.* at 6a-7a. The Board also determined that petitioner's 1989 conviction for voluntary manslaughter rendered him removable, and that he was ineligible for discretionary relief from removal under former Section 212(c) because "the 'crime of violence' aggravated felony category has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act." *Id.* at 8a (citing *Brieva-Perez*). Having determined that petitioner's manslaughter conviction was "sufficient, standing alone, to render him removable and ineligible for relief," the Board found it unnecessary to determine "whether his 2003 grand theft conviction would also constitute a valid factual predicate for deportability." *Id.* at 9a.[5]

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[5] Petitioner has argued that his 2003 grand-theft conviction should not qualify as an aggravated felony under 8 U.S.C. 1101(a)(43)(G). See Pet. 16 n.10; Pet. C.A. Br. 37-39; A.R. 8-16. He has not, however, contested that his 1989 voluntary-manslaughter conviction was a crime-of-violence aggravated felony under 8 U.S.C. 1101(a)(43)(F). See Pet. App. 8a. And he has not suggested that either conviction fails to qualify as a crime involving moral turpitude.

7. Petitioner sought judicial review of the Board's decision, and the Ninth Circuit denied his petition for review. Pet. App. 1a-4a. As relevant here, the court concluded that petitioner's challenge to the Board's holding that he was ineligible for Section 212(c) relief under the statutory-counterpart rule was foreclosed by the panel decision in *Abebe* v. *Gonzales*, 493 F.3d 1092, 1104-1105 (2007), reh'g granted, 514 F.3d 909 (2008), superseded on reh'g, 554 F.3d 1203 (9th Cir. 2009) (en banc), cert. denied, 130 S. Ct. 3272 (2010). In *Abebe*, the panel sustained the Board's application of the statutory-counterpart rule in *Blake* and *Brieva-Perez*, finding that the Board's approach is supported by a rational basis and that it does not give rise to retroactivity concerns, because "the BIA's published cases * * * have consistently held § 212(c) relief to be unavailable to aliens deportable on grounds that lack comparable grounds of exclusion whether or not their conduct could also be characterized as involving moral turpitude." *Id.* at 1104-1105. In light of *Abebe*, the court held that "[t]he aggravated felony/crime of violence ground for deportation is not substantially similar to any ground for exclusion in the former § 212(a)." Pet. App. 4a (citing *Brieva-Perez*).

Petitioner sought rehearing. After he did so, the *Abebe* panel decision was superseded by an en banc decision that rested on different reasoning but still rejected challenges to the Board's application of its statutory-counterpart rule. See *Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010). After the en banc proceedings had concluded (and after this Court had denied certiorari) in *Abebe*, the court of appeals denied petitioner's rehearing petition. Pet. App. 21a.

SUMMARY OF ARGUMENT

A. The Board's statutory-counterpart rule is entitled to deference because it reflects a reasonable construction of the statute.

1. Because Section 212(c) expressly authorizes the waiver only of grounds of inadmissibility, the Board has reasonably required, in the context of a deportation proceeding, that there be a categorical similarity between the charged ground of deportability and a waivable ground of inadmissibility.

2. The Board reasonably concluded that the ground of deportability here (a crime-of-violence aggravated felony) is not comparable to the ground of inadmissibility petitioner invokes (a crime involving moral turpitude). Those categories overlap but they are not identical. Many common crimes of violence are often not treated as morally turpitudinous in the absence of aggravating factors.

3. The statutory-counterpart rule does not make Section 212(c) eligibility depend on travel abroad, but rather on whether an alien has been charged with being inadmissible or deportable. Petitioner's contrary argument depends on an obsolete understanding of *nunc-pro-tunc* relief.

B. The Board's 2005 cases applying the statutory-counterpart rule to aggravated-felony grounds of deportability did not reflect a change in the law.

1. Before 2005, there were no precedential opinions of the Board (or the courts of appeals) holding that a crime-of-violence aggravated felony satisfied the statutory-counterpart rule. The cases petitioner identifies as holding to the contrary either failed to address the question or were unpublished and nonprecedential.

2. More generally, the Board had long used a grounds-based approach to analyze comparability, under which it evaluated whether an alien's ground of deportability was comparable to a ground of exclusion. It had repeatedly rejected requests (like petitioner's) to analyze instead whether the conviction underlying a ground of deportability would also happen to trigger a ground of inadmissibility.

C. The Board's application of the statutory-counterpart rule is not impermissibly retroactive. Its 2005 cases did not reflect an abrupt reversal of prior practice, but rather the application of pre-existing general principles to a specific context. Moreover, petitioner cannot show reliance on the basis of his guilty plea because he was not even deportable at the time of his conviction, and thus had no need to rely on the statutory-counterpart rule for Section 212(c) relief. And petitioner's approach would increase costs to the government and lead to delays.

D. The Board's interpretation does not raise equal-protection concerns. The statutory-counterpart rule does not distinguish between deportable aliens on the basis of whether they have traveled abroad, and it is not irrational for the Board to distinguish between inadmissible and deportable aliens on a categorical basis. Making discretionary relief available on more favorable terms during an admissibility inquiry creates an incentive for deportable aliens to bring themselves to the attention of immigration officials. There is thus a facially legitimate and bona fide reason for the rule. Even if there were equal-protection concerns, the appropriate remedy would be to limit rather than expand Section 212(c)'s applicability to deportable aliens with aggravated-felony convictions.

ARGUMENT

THE DEPARTMENT OF JUSTICE HAS REASONABLY DECLINED TO EXTEND SECTION 212(c) ELIGIBILITY TO ALIENS WHOSE GROUND OF DEPORTABILITY IS NOT COMPARABLE TO ANY GROUND OF INADMISSIBILITY

Petitioner concedes he is deportable. But he contends he should be eligible for relief under former Section 212(c), which, by its terms, was available to allow the discretionary waiver of only certain grounds of exclusion contained in 8 U.S.C. 1182(a) (1994). (Since 1996, Section 1182(a) has called them grounds of "inadmissibility.") With the exception of the Second Circuit, every court of appeals to have addressed the issue has upheld the Board's application of its statutory-counterpart rule as a reasonable interpretation of Section 212(c) that does not raise retroactivity concerns or violate the equal-protection component of the Fifth Amendment's Due Process Clause. See, *e.g.*, *Kim* v. *Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 162-163 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 371-372 (5th Cir. 2007); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009); *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679, 691-692 (7th Cir. 2008); *Vue* v. *Gonzales*, 496 F.3d 858, 860-862 (8th Cir. 2007); *Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010); *De la Rosa* v. *Attorney Gen.*, 579 F.3d 1327, 1335-1340 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010); but see *Blake* v. *Carbone*, 489 F.3d 88, 103-104 (2d Cir. 2007).[6]

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[6] The Tenth Circuit has upheld the Board's approach in unpublished decisions. See, *e.g.*, *Alvarez* v. *Mukasey*, 282 Fed. Appx. 718, 723 (2008).

Like the Board and the Attorney General, nearly all of those courts have acquiesced in the Second Circuit's conclusion in *Francis* v. *INS*, 532 F.2d 268 (1976), that, in light of equal-protection concerns, Section 212(c) eligibility should not turn solely on whether an LPR in deportation proceedings has previously left and re-entered the United States.[7] But the statutory-comparability rule that petitioner challenges has long co-existed with *Francis*, precisely because it makes eligibility turn on something other than prior travel. The rule ensures that an alien found to be *deportable* on a particular ground is sufficiently comparable to an *inadmissible* alien to warrant the application of Section 212(c). It is therefore faithful to Section 212(c)'s reference to waiving certain grounds of inadmissibility.

The great majority of the courts of appeals have recognized that the earlier step away from the statutory terms licensed by *Francis* does not warrant the substantial additional step that petitioner now urges. See, *e.g.*, *De la Rosa*, 579 F.3d at 1340 ("Extending [the statute's applicability] once does not empower a court to extend it *ad infinitum*, without any foundation in the statute or case law.").

This Court, too, should decline to find that the statute compels the Board to take that additional step.

A. The Board's Statutory-Counterpart Rule Reflects A Reasonable Application Of The Statute

It is well established that "the BIA is entitled to [*Chevron*] deference in interpreting ambiguous provi-

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[7] The only exception is the Ninth Circuit, which has concluded that constitutional avoidance did not justify its earlier decisions following *Francis*. See *Abebe* v. *Mukasey*, 554 F.3d 1203, 1205-1207 (2009) (en banc), cert. denied, 130 S. Ct. 3272 (2010).

sions of the INA." *Negusie* v. *Holder*, 129 S. Ct. 1159, 1163 (2009). Thus, if Congress has "directly spoken to the precise question at issue," "that is the end of the matter," but if the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation must be upheld if it is "a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). Petitioner concedes the applicability of that framework by acknowledging (Br. 44 n.16) that *Chevron*'s second step is the "same" as the standard he urges in the course of arguing that the Board's position is "arbitrary and capricious" under the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

Although Section 212(c), by its terms, permitted the Attorney General to waive only certain enumerated grounds of exclusion (or inadmissibility), this Court has previously recognized the Board's longstanding practice of allowing certain aliens "to apply for a discretionary waiver from deportation." *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). Moreover, Congress was undoubtedly aware of the Board's practice of applying Section 212(c) to at least some categories of aliens in deportation proceedings, but it neither codified nor limited that specific practice for several decades. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

In 1996, however, Congress amended the text of Section 212(c) so that it would not be available to aliens who are "*deportable by reason of* having committed any criminal offense covered in" several grounds of deportability (including the aggravated-felony ground). AEDPA § 440(d)(2), 110 Stat. 1277 (emphasis added). That refer-

ence constituted a strong indication that Section 212(c) relief was available to at least some aliens in deportation proceedings.[8] Nevertheless, because that amendment merely cut off relief to one category of aliens in such proceedings (*i.e.*, those deportable by reason of certain crimes), it still did not speak to the viability of the Board's long-established statutory-counterpart rule, or to its specific contours.

As a result, former Section 212(c) is "ambiguous with respect to [that] specific issue," *Chevron*, 467 U.S. at 843, and the Board is entitled to deference in applying the statutory-counterpart rule and thus "giv[ing] ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (internal quotation marks omitted). See *De la Rosa*, 579 F.3d at 1335, 1340 (applying *Chevron* in upholding statutory-counterpart rule); *Vue*, 496 F.3d at 859-860 (same); *Caroleo*, 476 F.3d at 166, 168 (same).[9]

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[8] Petitioner describes (Br. 29-30) two 1990 statutory changes as being "predicated on the availability of Section 212(c) relief in deportation proceedings." Neither of those changes was limited to aliens in deportation proceedings, leaving some doubt whether Congress had squarely ratified Section 212(c)'s applicability in deportation proceedings. See *In re Hernandez-Casillas*, 20 I. & N. Dec. 262, 291 n.14 (A.G. 1991); but see 56 Fed. Reg. 50,033 (1991) (preamble to INS rulemaking stating that one of the amendments showed that "Congress explicitly recognized the applicability of section 212(c) relief to deportation proceedings").

[9] Although the Second Circuit declined to apply *Chevron* in *Blake* v. *Carbone*, its reasons were unpersuasive. The court suggested (489 F.3d at 100) that the statute is unambiguous in its *in*applicability to LPRs who are "deportees" when they seek Section 212(c) relief, because the statute applies to an LPR "who temporarily proceeded abroad voluntarily and not under an order of deportation," 8 U.S.C. 1182(c) (1994).

1. Given the statute's reference to waiving grounds of inadmissibility, it is reasonable to require an alien's charged ground of deportability to be categorically comparable to a ground of inadmissibility before it can be waived

Petitioner contends (Br. 45) that "[t]here is no reason to believe that a comparison between" Congress's descriptions of "who is excludable and deportable" should determine who is "eligible for relief under Section 212(c)." In his view, any alien in a deportation proceeding who would also be excludable on the basis of the same conviction should be eligible for Section 212(c) relief. But Section 212(c) itself was phrased in terms of waiving statutorily specified grounds of exclusion, and the Attorney General and the Board have reasonably concluded that the statute's language should not be construed to be as elastic as petitioner would have it—that there must be a closer connection between a charge of deportability that initiates a proceeding and the ground of inadmissibility that could justify the exercise of discretionary relief at the end of that proceeding.

But the concluding phrase, referring to being "under an order of deportation," explained the "voluntar[y]" nature of the travel that preceded the admissibility decision, and did not necessarily bar relief to all aliens "under an order of deportation." Petitioner, of course, does not embrace the Second Circuit's view that he "clearly fall[s] outside the statute's reach." 489 F.3d at 100. The court also said it would not defer to the agency because the statutory-counterpart rule is "a creature of constitutional avoidance" born of the court's decision in *Francis*. *Ibid.* As discussed below, however, the statutory-counterpart rule is distinct from *Francis*'s concern about the mere presence or absence of foreign travel, and nearly all of petitioner's arguments are independent of his suggestion (Br. 51-53) of constitutional doubt—which, in any event, depends on there being ambiguity in the statute. The Board is entitled to deference if its construction is reasonable.

a. Although the Board has long made Section 212(c) relief available to *some* aliens in deportation proceedings, it has also repeatedly recognized that Section 212(c) relief cannot be divorced altogether from the statutory text. Shortly after the INA was enacted, the Board acknowledged that Section 212(c) was narrower than its predecessor, such that its authorization was "no longer a discretion which may be used generally," but was "confined to the grounds of inadmissibility enumerated" in certain paragraphs of Section 212(a). *In re T-*, 5 I. & N. Dec. 389, 390 (B.I.A. 1953). Even after the Board acquiesced on a nationwide basis in the Second Circuit's decision in *Francis*, *supra*, the Board continued to recognize that *Francis* had "not increase[d] the *statutory grounds* to which section 212(c) relief may be applied." *In re Granados*, 16 I. & N. Dec. 726, 728 (B.I.A. 1979) (emphasis added).

At the one point when the Board decided to depart from its previous course and adopt a more permissive interpretation, the Attorney General reversed the Board, expressly stating that "the Attorney General may not waive a ground for deportation if it is not a ground for exclusion at all," and that lifting that limit "would take immigration practice even further from the statutory text, which refers only to grounds for exclusion." *In re Hernandez-Casillas*, 20 I. & N. Dec. 262, 287 (A.G. 1991). Thus, *Hernandez-Casillas* held that Section 212(c) relief would "be made available in deportation proceedings in which the asserted ground for deportation *is also a ground for exclusion* expressly subject to waiver under that section." *Id.* at 288 (emphasis added).

That was a reasonable construction of the statute, which was codified in the 2004 regulations stating that

relief under former Section 212(c) is not available when "[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act." 8 C.F.R. 1212.3(f)(5). The 2005 Board decisions to which petitioner objects are a straightforward application of that approach in the context of the aggravated-felony ground of deportability that was first added in 1988 and repeatedly expanded between 1990 and 1996. As the Board explained in *In re Brieva-Perez*, 23 I. & N. Dec. 766 (B.I.A. 2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007): "[T]he relevant question is whether the 'crime of violence' aggravated felony ground * * * is substantially equivalent to a ground of inadmissibility in section 212(a) of the Act." *Id.* at 772.

In other words, the Board has determined that when a statutory ground of deportability is not categorically comparable to a statutory ground of exclusion, a deportation proceeding is not sufficiently analogous to an exclusion proceeding to warrant a waiver that, by its terms, is tied to grounds of inadmissibility. That conclusion represents a reasonable interpretation of the statutory language in light of its long history of administrative and judicial implementation.

b. Petitioner contends (Br. 46) it is "particularly irrational" of the Board to "compare[] the language of the exclusion provision (INA § 212(a)) not to the language of the relevant *deportation provision* itself (INA § 237(a)), but to the *subcategory* of 'aggravated felony' listed in the INA's general definitions provision." Petitioner suggests (Br. 37) that "the relevant comparator" should instead be "the deportation provision's" generic reference to "aggravated felony."

It is, however, quite reasonable for the Board to have considered the aggravated-felony definition in subcategories—as it has consistently done since its first precedential opinion involving application of the statutory-counterpart rule to the then-relatively-new definition of aggravated felony. See *In re Meza*, 20 I. & N. Dec. 257, 259 (B.I.A. 1991). That approach simply takes account of the fact that Congress chose to set forth an extensive definition of the term once, in Section 1101(a)(43), so that it can be used throughout the INA without having to re-itemize each subpart of the definition at each place the term "aggravated felony" appears in the INA, including in the list of grounds of deportability in Section 1227(a).[10] Any insistence to the contrary would exalt form over substance. In practical terms, an alien is charged with being deportable based on a specific subcategory (or subcategories) of the aggravated-felony definition, and DHS must prove deportability with respect to that specific part of the definition. See, *e.g.*, Pet. App. 5a, 11a-12a (listing charges against petitioner; specifying that one aggravated-felony charge is "as defined in" Section 1101(a)(43)(G) and the other is "as defined in" Section 1101(a)(43)(F)).

c. Petitioner contends (Br. 35, 36 n.12, 49) that the Board's insistence on a match between the ground of deportability and a ground of exclusion articulated in the statute itself is inconsistent with the Board's practice of extending relief from a ground of exclusion, *once granted*, to grounds of deportability. It is true that the Justice Department has specified, first in Board deci-

[10] Many other INA provisions rely on the aggravated-felony definition. See, *e.g.*, 8 U.S.C. 1158(b)(2)(B)(I) (asylum), 1182(a)(9)(A)(ii) (readmission following removal), 1229b(a)(3) and (b)(1)(C) (cancellation of removal), 1229c(b)(1)(C) (voluntary departure).

sions, and then in regulations, that a waiver may be valid with respect to grounds of deportability as well as exclusion. See, *e.g.*, *In re G-A-*, 7 I. & N. Dec. 274, 275 (B.I.A. 1956) ("[I]f [Section 212(c)] is exercised to waive a ground of inadmissibility based upon a criminal conviction, a deportation proceeding cannot thereafter be properly instituted based upon the same criminal conviction unless, of course, the Attorney General has revoked the previous grant of relief."); 8 C.F.R. 212.3(d), 1212.3(d).[11] But petitioner overstates the logical import of that practice. There is a clear difference between deciding, on one hand, that the waiver of a ground of exclusion that has already been granted will have the effect of waiving a comparable deportation ground, and refusing, on the other hand, to waive in the first instance a ground of deportability that is insufficiently like a ground of inadmissibility to comport with the statute.

Petitioner further contends (Br. 49-50) that the Board's statutory-counterpart rule would "absurd[ly] and unfair[ly]" allow an alien to receive Section 212(c) relief "from *exclusion* because of a conviction," but still be susceptible to "a deportation charge * * * based on the same conviction and brought the very next day."

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[11] It is possible to conceive of a system in which the grant of a Section 212(c) waiver for a returning LPR did not prevent the government from seeking deportation on similar grounds. Congress could well think that an LPR who is both inadmissible and deportable should not remain in the country indefinitely, even if he could be allowed to return to his U.S. domicile before being subject to deportation proceedings, thus giving him an opportunity to organize his affairs and making him "the beneficiary of the procedural protections and the substantive rights" associated with deportation (but not exclusion) hearings. *Landon* v. *Plasencia*, 459 U.S. 21, 27 (1982). Nevertheless, it was reasonable for the Board to determine, long ago, that a waiver, once it was actually granted, would be more durable.

Petitioner claims that possibility is foreclosed by Board decisions (Br. 35, 49), but the cases he cites involved grounds of deportability with comparable grounds of exclusion. *In re Balderas*, 20 I. & N. Dec. 389, 390 (B.I.A. 1991) (crimes involving moral turpitude); *In re Mascorro-Perales*, 12 I. &. N. Dec. 228 (B.I.A. 1967) (same); *G-A-*, 7 I. & N. Dec. at 275 (drug conviction). They therefore did not address whether a non-comparable ground of deportability could be waived, and one of them (*Balderas*) expressly noted the statutory-counterpart requirement, 20 I. & N. Dec. at 390 n.1. Moreover, although petitioner's hypothetical result is possible, any alien who has actually received a favorable exercise of discretion under Section 212(c) would—in the absence of new, or previously undisclosed, grounds of deportability—be unlikely to be subjected to a new removal proceeding, the initiation of which would require another exercise of discretion.

2. In applying a grounds-based approach, it is reasonable to distinguish crimes of violence from crimes involving moral turpitude

Petitioner criticizes the Board's implementation of the categorical, grounds-based comparison only glancingly, asserting (Br. 46-47 n.17) that "it is hard to imagine that there are many *aggravated felonies* that are crimes of *violence* * * * that somehow involve no moral turpitude or are petty offenses." The Board acknowledged there is overlap between the two categories, but it properly recognized that there are in fact crimes of violence that do not involve moral turpitude, which prevents the two grounds from being categorically comparable. *Brieva-Perez*, 23 I. & N. Dec. at 772.

The Board observed that the offense at issue in *Brieva-Perez* (unauthorized use of a motor vehicle) was "not generally considered a crime involving moral turpitude," even though it *was* "an aggravated felony crime of violence" (because "the nature of the offense" involved a substantial risk that physical force would be used to cause damage to property). 23 I. & N. Dec. at 770, 772. The Board explained that the same thing was true for "[s]ome of the most common crimes falling within the definition of a 'crime of violence,'" given that burglary and assault offenses, in the absence of aggravating factors, are often not treated as morally turpitudinous. *Id.* at 772.

The Board was well-situated to evaluate the degree of overlap between the two categories, as it routinely applies both definitions in individual immigration cases and knows that the inquiries are distinct. For instance, in *In re Sweetser*, 22 I. & N. Dec. 709 (B.I.A. 1999) (en banc), it was undisputed that the offense in question (criminally negligent child abuse) "was not a crime involving moral turpitude." *Id.* at 710. Yet the Board needed to conduct in-depth categorical analysis of the relevant state statute before it could determine that the offense was not a crime-of-violence aggravated felony. *Id.* at 712-717.

It was therefore reasonable for the Board to conclude, in comparing the crime-of-violence ground of deportability with the crime-involving-moral-turpitude ground of inadmissibility, that those grounds are not sufficiently alike as a categorical matter to warrant the

extension of Section 212(c) to provide discretion to waive the ground of deportability.[12]

3. The statutory-counterpart rule does not make Section 212(c) eligibility depend solely on whether an alien has left the United States

Petitioner contends (Br. 47) that the Board's application of the statutory-counterpart rule is "arbitrary" because it "recreates the * * * distinction based on travel abroad that the BIA abandoned years ago in *Silva*." That contention is based on petitioner's statement (Br. 47) that "[t]here is no question that LPRs with excludable convictions who travel abroad and reenter are eligible for Section 212(c) relief *nunc pro tunc* in later-commenced deportation proceedings." See also Pet. Br. 51 ("*Blake* * * * revived the distinction between LPRs in deportation proceedings who previously traveled abroad (who can seek relief *nunc pro tunc*) and LPRs who did not."). In drawing those conclusions, petitioner assumes that such an LPR could qualify for *nunc-pro-tunc* Section 212(c) relief without satisfying

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[12] See *Dalombo Fontes* v. *Gonzales*, 483 F.3d 115, 123 (1st Cir. 2007) ("Aggravated felonies and crimes of violence are both categories of crimes or types of crimes; depending on the scope of the phrase 'moral turpitude,' it would include some but not necessarily all of those crimes and would surely encompass others not on the list of defined crimes.") (citations omitted), cert. denied, 553 U.S. 1055 (2008); *Calderon-Minchola* v. *Attorney Gen.*, 258 Fed. Appx. 425, 428-429 (3d Cir. 2007) (finding that crimes of violence in 18 U.S.C. 16(a) "would appear to require none of the vileness, depravity, or reprehensible acts deliberately committed that we have held are characteristic of moral turpitude"); cf. *Quintero-Salazar* v. *Keisler*, 506 F.3d 688, 692-694 & n.4 (9th Cir. 2007) (finding that, although California statutory-rape offense was "crime of violence" under Sentencing Guidelines, it was not "crime of moral turpitude" for immigration purposes).

the statutory-counterpart rule. In support, he cites only the Board's 1956 decision in *G-A-*, *supra*.

Petitioner's assumption, however, about the interaction of *nunc-pro-tunc* relief and comparable-grounds analysis was nullified more than 25 years ago. In *In re Wadud*, 19 I. & N. Dec. 182 (1984), the Board described *In re Tanori*, 15 I. & N. Dec. 566 (B.I.A. 1976), which predated *Silva* and "stated that a waiver of inadmissibility may be granted in deportation proceedings if the alien was excludable at his last entry as a result of the same facts which formed the basis of his deportability." *Wadud*, 19 I. & N. Dec. at 185 n.3. That is the *nunc-pro-tunc* principle petitioner assumes is good law, but the Board affirmatively "withdr[e]w from that language * * * to the extent that it [was] inconsistent with" the holding in *Wadud* that Section 212(c) "can only be invoked in a deportation hearing where the ground of deportation charged is also a ground of inadmissibility." *Id*. at 184, 185 n.3.

As a result, in deportation proceedings, the same statutory-counterpart requirement applies to the LPR who traveled abroad and subsequently re-entered as to the LPR who never traveled. There is no difference in treatment between the two classes in deportation proceedings, though LPRs who travel abroad may be treated differently if they find themselves in *exclusion* proceedings (because there is no need to satisfy the statutory-counterpart rule to be eligible for relief from a ground of *exclusion*).

Thus, under the statutory-counterpart rule, the question is not "whether the LPR previously traveled abroad" (Pet. Br. 48), but whether the LPR is charged with being excludable or deportable. If the LPR is charged with deportability, *Francis* and *Silva* continue

to make irrelevant whether he or she has departed the country. The LPR still, however, must have a ground of deportability that is comparable to one of the grounds of excludability to which Section 212(c), by its terms, applies.

B. The Board's 2005 Decision Applying Its Statutory-Counterpart Rule To The Crime-Of-Violence Aggravated Felony Ground Of Deportability Did Not Reflect A Change In The Law

The principal thrust of many of petitioner's arguments is that the Board's application of the statutory-counterpart rule in *Blake* and *Brieva-Perez* marked an "abrupt departure" from its prior practice. Pet. Br. 41. To that end, petitioner contends that (1) before 2005, "many cases and authorities held" that "LPRs deportable for 'crime of violence' * * * aggravated felony convictions" were not "categorically barred from relief under the statutory counterpart requirement" (Br. 37); and (2) the Board's pre-2005 published cases and its regulations called for an underlying-conviction-based comparison rather than a statutory-grounds-based comparison (Br. 34-37). Petitioner is incorrect on both counts.

1. There was no established pre-2005 practice of treating the crime-of-violence aggravated felony ground of deportability as comparable to a ground of inadmissibility

Petitioner contends (Br. 32-38) that the Board's application of the statutory-counterpart rule in its 2005 decisions in *Blake* and *Brieva-Perez* constituted a dramatic change or reversal in Board practice, rather than a natural step in the "process of case-by-case adjudication" by which the Board construes and applies the INA. *Aguirre-Aguirre*, 526 U.S. at 425. But petitioner has not

identified a single published opinion of the Board (or of any court of appeals) holding that an alien deportable on the basis of a crime-of-violence aggravated felony satisfies the statutory-counterpart rule for Section 212(c) eligibility.

a. Petitioner cites five published opinions—three by courts of appeals and two by the Board—that purportedly "held that LPRs could seek [Section 212(c)] waivers of aggravated felony convictions, including 'crimes of violence,' in deportation proceedings." Pet. Br. 32 (cross-referencing Pet. Br. 17-18 & n.4).[13] None of those cases contains a holding or even dicta to that effect.

Neither of the two published Board decisions on which petitioner relies involved a crime-of-violence aggravated felony, making it impossible for them to have "held" (Pet. Br. 32) anything about whether that ground of deportability had a comparable ground of exclusion. In the first of those cases, *In re A-A-*, 20 I. & N. Dec. 492 (B.I.A. 1992), the alien entered the United States in 1982 and was convicted in 1985 of murder. *Id.* at 493. He was charged with being deportable under 8 U.S.C. 1251(a)(4) (1988) "as an alien convicted of a crime involving moral turpitude within 5 years after entry." 20 I. & N. Dec. at 493. The Board's comparable-grounds analysis consisted of a single sentence noting that the

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[13] Petitioner also quotes parenthetically (Br. 19) a statement in a published concurring opinion of a Board Member to the effect that an alien "found guilty of murder or manslaughter alone * * * would be eligible for a section 212(c) waiver." *In re Montenegro*, 20 I. & N. Dec. 603, 610 (B.I.A. 1992) (Heilman, Board Member, concurring). Even if it had appeared in a controlling opinion, that passing and unexplained assertion would have been merely dictum. It thus proves nothing, especially because murder is in a different category of aggravated felony, separate from crimes of violence. See 8 U.S.C. 1101(a)(43)(A).

crime-involving-moral-turpitude charge of deportability was "analogous to the exclusion ground at * * * 8 U.S.C. § 1182(a)(9) (1988)." 20 I. & N. Dec. at 500. That ground of exclusion—which the Board noted (*id.* at 500 n.19) had been revised and redesignated as 8 U.S.C. 1182(a)(2)(A)(i)(I), where it still is today—applied to "a crime involving moral turpitude." Because both the ground of exclusion and the ground of deportability turned in critical part on the very same statutory phrase ("crime involving moral turpitude"), the Board's conclusion that they were comparable grounds was unremarkable. See *In re Salmon*, 16 I. & N. Dec. 734 (B.I.A. 1978).

Although petitioner is correct that *A-A-* discussed whether the alien's murder conviction had been for an aggravated felony (Br. 18, 32), that discussion had nothing to do with comparable-grounds analysis, because the alien there had not been charged with being deportable as an aggravated felon.[14] More importantly, the Board made it clear that the "aggravated felony" ground in question was "murder" and that it could *not* have been a "crime of violence" because that component of the aggravated-felony definition did not apply to offenses, like A-A-'s, committed before November 29, 1990. See 20 I. & N. Dec. at 500.

The Board's decision in the second case petitioner cites, *In re Rodriguez-Cortes*, 20 I. & N. Dec. 587 (B.I.A. 1992), is no more helpful to him. The alien there had

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[14] The Board's aggravated-felony discussion was necessary to its separate determination that the alien was precluded from receiving Section 212(c) relief by the 1990 provision barring such relief to aliens who had "been convicted of an aggravated felony" and "served a term of imprisonment of at least 5 years." *A-A-*, 20 I. & N. Dec. at 501 (quoting 1990 Act § 511(a), 104 Stat. 5052).

been convicted of "attempted murder in the second degree" and sentenced to a five-year term, which was enhanced by an additional year because a firearm had been used in the offense. *Id.* at 588. She was charged with being deportable on two grounds: for having an aggravated-felony conviction, and for having a conviction of a firearms violation. The Board concluded that the one-year enhancement she had received did not constitute a "conviction for a firearm offense," thus eliminating that ground of deportability. As a result, the lack of a comparable ground of exclusion for the firearm-based ground of deportability became irrelevant, and the alien was not barred from seeking Section 212(c) relief. *Id.* at 590-591.

Rodriguez-Cortes did not address whether there was a comparable ground of exclusion for the aggravated-felony ground of deportability. That alone prevents it from supporting petitioner except by negative implication. But it does not even do that, because the Board made clear that the component of the aggravated-felony definition at issue was not the definition's reference to "crime of violence" but rather its reference to "murder * * * or any attempt * * * to commit any such act." 8 U.S.C. 1101(a)(43) (Supp. III 1991). That is evident because the Board cited *A-A-* in its one-sentence footnote about the aggravated-felony ground of deportation, *Rodriguez-Cortes*, 20 I. & N. Dec. at 589 n.1, and the alien's crime was committed well before the date on which *A-A-* had held that the crime-of-violence component of the aggravated-felony definition became applicable. See *id.* at 588; *A-A-*, 20 I. & N. Dec. at 500.[15]

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[15] For the same reason, petitioner's reference to "authoritative treatises" is unavailing. See Br. 41 (cross-referencing citation at Pet.

b. Contrary to petitioner's suggestion (Br. 18), the three court of appeals opinions that he cites do not "specifically note[] that the LPRs satisfied the statutory counterpart requirement." They do not mention that requirement, much less explain whether it was satisfied.

In *Hem* v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006), the alien was charged with a crime-of-violence aggravated felony, and the court (like the IJ and the Board) discussed whether he was ineligible for Section 212(c) because, unlike the alien in *St. Cyr*, he had not pleaded guilty to his crime of conviction. *Id.* at 1187-1189. The court never mentioned the statutory-counterpart rule.

In *De Araujo* v. *Gonzales*, 457 F.3d 146 (1st Cir. 2006), the alien was charged with, *inter alia*, a crime-of-violence aggravated felony, but the IJ found him ineligible for Section 212(c) relief for reasons related to his other convictions, and the Board dismissed his appeal. *Id.* at 148. The Board then denied his motion to reopen proceedings, and "further found" that, "even if it were to reopen [the] case, it would not grant his request for [Section 212(c)] relief." *Id.* at 150. The court of appeals affirmed without discussing statutory comparability. *Id.* at 151-155.

In *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004), the alien mounted a collateral attack on a prior removal proceeding in which he had been charged with being removable on the basis of an

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Br. 19 to 6 Charles Gordon et al., *Immigration Law and Procedure* § 74.04[1][a] and [2][g] (rev. ed. 2011)). Petitioner describes (Br.19) the Gordon treatise as noting that "murder and rape convictions can be waived." But murder and rape are each defined in a subcategory of aggravated felony separate from crimes of violence. See 8 U.S.C. 1101(a)(43)(A). The Gordon treatise discusses the statutory-counterpart rule at § 74.04[2][e], at 74-47 to 74-49.

attempted-burglary (not crime-of-violence) aggravated felony under Section 1101(a)(43)(G). *Id.* at 1045-1046. The alien claimed that the proceeding had been constitutionally infirm because the IJ had failed to inform him that "he may be eligible" for Section 212(c) relief. *Id.* at 1048. The Ninth Circuit held that the alien had shown prejudice because there was "a 'plausible' ground for relief," but the only potential bar to eligibility that the court discussed was the fact that petitioner's offense had not been an aggravated felony at the time of his guilty plea. *Id.* at 1050. It did not consider whether 8 U.S.C. 1101(a)(43)(G) is comparable to a ground of exclusion.

c. Petitioner also cites nine unpublished decisions of the Board in support of the proposition that LPRs charged with crime-of-violence aggravated felonies had "satisfied the statutory counterpart requirement." Pet. Br. 18 & n.4. An unpublished decision—often issued by an individual member, rather than a three-member panel, or the en banc tribunal—is, of course, not precedential. See 8 C.F.R. 1003.1(g); *Ajdin* v. *Bureau of Citizenship & Immigration Servs.*, 437 F.3d 261, 264-265 (2d Cir. 2006) (finding the Board's "apparent inconsistency" with one of its prior decisions to be "of no moment because unpublished opinions of the BIA have no precedential value").

In any event, the unpublished decisions petitioner cites generally contain too little discussion to establish that crime-of-violence aggravated felonies were well-understood as having a comparable ground of exclusion. In one of those cases, the alien was charged with being *inadmissible* (not deportable) for an extortion conviction that was a crime involving moral turpitude, making

it entirely inapposite.[16] One case involved a burglary conviction, which was addressed primarily as an aggravated felony under 8 U.S.C. 1101(a)(43)(G), though the Board noted it was also a crime of violence.[17] In three others, the decision did not specify whether robbery convictions were charged as crimes of violence, but stated that they could have been aggravated felonies under Section 1101(a)(43)(F) or (G).[18] Two cases involved offenses that could have been charged (but were not) under other parts of the aggravated-felony definition, which may have altered the comparability analysis.[19] To be sure, two of the decisions involved a determination that a crime-of-violence aggravated felony did have a comparable ground of exclusion.[20] But at least

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[16] *In re Orrosquieta*, No. A92 799 659, 2003 WL 23508672 (B.I.A. Dec. 19, 2003).

[17] *In re Martinez*, No. A22 166 294, 2004 WL 1167082 (B.I.A. Feb. 18, 2004).

[18] *In re S-Lei*, No. A38 139 424 (B.I.A. May 27, 2004) (Pet. App. 57a-58a); *In re Loney*, No. A35 770 136, 2004 WL 1167256, at *1 (B.I.A. Feb. 10, 2004); *In re Rowe*, No. A37 749 964 (B.I.A. May 9, 1993) (Pet. App. 41a-44a).

[19] *In re Caro-Lozano*, No. A90 870 395, 2004 WL 1398661, at *1-*2 (B.I.A. Apr. 22, 2004) (attempted rape charged as crime of violence under Section 1101(a)(43)(F), but could possibly have been charged under Sections 1101(a)(43)(A) and (U)); *In re Hussein*, No. A26 416 298, 2004 WL 1059601 (B.I.A. Mar. 15, 2004) (indecency with a child charged as crime of violence, but Board acknowledged it could also satisfy Section 1101(a)(43)(A)). The Board has since made clear that the *possibility* of a charge on a different aggravated-felony ground should not affect the analysis. See *Brieva-Perez*, 23 I. & N. Dec. at 772 n.4.

[20] *In re Reyes Manzueta*, No. A93 022 672, 2003 WL 23269892, at *2 (B.I.A. Dec. 1, 2003) (first-degree manslaughter); *In re Munoz*, No. A35 279 774, 28 Immig. Rptr. B1-1 (B.I.A. Aug. 7, 2003) (Pet. App. 45a-55a) (aggravated assault on peace officer).

one other unpublished opinion from a few months later reached exactly the opposite conclusion.[21]

Accordingly, the unpublished opinions do not support petitioner's assertion (Br. 37) that "many cases and authorities" before 2005 "held" that LPRs deportable for crime-of-violence aggravated felonies were not "categorically barred from relief under the statutory counterpart requirement." Taken as a whole, they merely show that the Board had not yet settled how its long-standing comparability analysis applied to crime-of-violence aggravated felonies. Only a published decision of the Board could supply the precedent necessary to resolve the issue authoritatively.

d. Petitioner refers (Br. 23 n.7, 32) to a handful of unpublished Board decisions, and one court of appeals brief, in which he says the government or the Board has "admi[tted]" that the Board's decisions in *Blake* and *Brieva-Perez* represented a retroactive "change in the law." Some of the Board decisions, however, merely referred to the fact that, after the IJ issued the opinion on appeal, there had been an "intervening" precedential opinion of the Board, which is one of the itemized bases on which a single Board member is authorized to reverse

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[21] See *In re Patarroyo-Sanchez*, No. A42 279 463, 2004 WL 1739093 (B.I.A. June 18, 2004) (holding that burglary, when charged as crime-of-violence aggravated felony, was not ground of deportability sufficiently comparable to ground of inadmissibility to permit Section 212(c) relief because of "the existence of a significant variance between the types of offenses that may give rise to deportability and inadmissibility" under Sections 1101(a)(43)(F) and 1182(a)(2)(A)(i)(I); noting that Board had allowed alien to apply for Section 212(c) waiver when same conviction was charged only under 8 U.S.C. 1101(a)(43)(G)).

a decision on appeal. See 8 C.F.R. 1003.1(e)(5).[22] Petitioner highlights (Br. 23, 32, 38) a casual reference to *Blake* as a "change in the law" in another cursory opinion remanding for further proceedings. *In re Cardona*, No. A40 065 318, 2005 WL 3709244 (B.I.A. Dec. 27, 2005). But the Board's later opinion in that same case (which was, again, unpublished) explained that "[o]ur decision in *Matter of Blake* was not based upon any change in the law; rather, it is simply an extension of our long line of cases holding that section 212(c) relief is only available where there is a corresponding ground of inadmissibility." *In re Cardona*, No. A40 065 318 (B.I.A. Jan. 24, 2008) (reprinted in App., *infra*, 1a-3a).

Petitioner quotes (Br. 32) a brief the government filed as a respondent in the Ninth Circuit, which, in the course of discussing the effect of an earlier district court order that an IJ should allow the alien to apply for Section 212(c) relief, said that the IJ had correctly found that res judicata principles were inapplicable because *Blake* and *Brieva-Perez* "constituted an intervening change in the law." Resp. Br. at 16, *Paulo* v. *Holder*, No. 07-71198 (9th Cir. filed Nov. 12, 2010). The Ninth Circuit, however, flatly rejected that proposition: "[I]t is clear to us that *Blake* and *Brieva* did not effect a change of law." *Paulo* v. *Holder*, No. 07-71198, 2011 WL 1663572, at *8 (May 4, 2011).

Petitioner's collection of stray references to a "change" is overwhelmed by the reality that *Blake* and *Brieva-Perez* constituted an ordinary step in the case-by-case development of the Board's jurisprudence. Although petitioner twice invokes (Br. 23 & n.7, 41) the

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[22] See *In re Banuelos-Delena*, No. A92 789 794, 2006 WL 901335 (B.I.A. Mar. 2, 2006); *In re Gomez-Perez*, No. A37 447 529, 2006 WL 901334 (B.I.A. Mar. 1, 2006).

Eleventh Circuit's reference to *In re Blake* as "a watershed moment in § 212(c) jurisprudence," *De la Rosa*, 579 F.3d at 1332, that court held that the Board has been "consistent[]" in following a "categorical approach that focuses on the charged ground of deportability rather than the underlying offense," and that *Blake* "did not represent a departure from prior BIA practice." *Id.* at 1336.

Even the Second Circuit's decision in *Blake* held that "[t]he statutory counterpart rule" had not "changed the law," because it did "nothing more than crystallize the agency's preexisting body of law and therefore cannot have an impermissible retroactive effect." 489 F.3d at 98-99. In fact, no court of appeals has accepted the claim that the Board's 2005 decisions represented a "change" in the relevant sense. See, *e.g.*, *Zamora-Mallari*, 514 F.3d at 689 ("[T]he Board in *Blake* did not establish a new rule of law, but rather applied the previously well-established comparability standard in a different factual context."); *Vo*, 482 F.3d at 370 (finding the Board's interpretation of the statutory-counterpart rule was not "irrational or arbitrary and capricious" because there had been no "substantial shift in agency practice"); *Caroleo*, 476 F.3d at 163 (concluding that the "statutory counterpart" principle "has been firmly in place *and consistently applied* since at least 1991") (emphasis added); *Valere* v. *Gonzales*, 473 F.3d 757, 761-762 (7th Cir. 2007) (finding "application of *Blake* * * * is not impermissibly retroactive" because "the rule itself is not new," although "the *Blake* decision marked the first time the BIA applied the rule to the crime of sexual assault of a minor").

2. *The Board, more generally, had long used a grounds-based approach in analyzing comparability and had rejected petitioner's conviction-based approach*

As just discussed, petitioner errs in contending that there were pre-2005 published opinions of the Board addressing whether a crime-of-violence aggravated felony satisfied the statutory-counterpart rule. But his more general claims about the Board's pre-2005 methodology are also mistaken.

a. Petitioner contends that the Board's decisions in *Blake* and *Brieva-Perez* "altered [the] fundamental character" of the statutory-counterpart rule because they looked to the "language" used in the statute to describe the charge of deportability, rather than simply "determining whether the deportable conviction triggered inadmissibility." Pet. Br. 37 (emphasis omitted). Petitioner thus argues that, until 2005, "what mattered was whether the aggravated felony '*conviction* . . . could also form the basis for excludability.'" Pet. Br. 34 (quoting *Meza*, 20 I. & N. Dec. at 259) (emphasis supplied by petitioner). Petitioner also relies (Br. 36) on a sentence from *Granados*, *supra*, which said that a "[c]onviction for possession of a concealed sawed-off shotgun is not a specified section 212(a) ground of excludability, nor a crime involving moral turpitude that would render the respondent excludable." 16 I. & N. Dec. at 728.

Whenever such an articulation of the rule was presented to the Board, however, it rejected the proposition that statutory comparability depends on the attributes of an alien's underlying "conviction" rather than the charged statutory ground of deportability. For instance, in 1984, an alien quoted the sentence above from *Granados*, and the Board rejected it as "dictum which is not controlling." *Wadud*, 19 I. & N. Dec. at 185. The Board

found it unnecessary to determine whether the alien's "conviction was one involving moral turpitude," because it "decline[d] to expand the scope of section 212(c) relief in cases where the *ground* of deportability charged is not also a *ground* of inadmissibility." *Ibid.* (emphases added).

The Board repeatedly made similar determinations in later cases, reiterating that it would not expand Section 212(c) "to include cases where the ground of deportability charged is not also a ground of inadmissibility, even where the alien's conviction would also cause him to be excludable for having been convicted of a crime involving moral turpitude." *In re Gabryelsky*, 20 I. & N. Dec. 750, 754 (B.I.A. 1993). As the Board explained in 1992:

> It is important to recognize that the relief provided by section 212(c) is the waiver of a particular *ground* of exclusion or deportation, not a waiver of the particular offense which forms the basis for that ground of exclusion or deportation. The focus * * * is not whether the deportable alien's particular offense * * * could form the basis for a ground of exclusion and therefore be waivable; rather the focus is whether the ground of deportation against the alien has a comparable ground of exclusion.

In re Esposito, 21 I. & N. Dec. 1, 7 (B.I.A. 1992); see also, *e.g.*, *In re Jimenez-Santillano*, 21 I. & N. Dec. 567, 574 (B.I.A. 1996) (en banc); *In re Montenegro*, 20 I. & N. Dec. 603, 605 (B.I.A. 1992).

Petitioner also suggests (Br. 37) that *Blake* and *Brieva-Perez* departed from earlier practice by analyzing "*subcategories*" of the definition of aggravated felony. But the Board's decision in *Meza* recognized that

the definition "refers to several types or categories of offenses." 20 I. & N. Dec. at 259. It expressly focused on "[t]he specific category of aggravated felony at issue" in that case (the one dealing with drug-trafficking crimes) and found it to be comparable to a drug-trafficking ground of exclusion. *Ibid.* Accordingly, *Brieva-Perez* did nothing novel in focusing on the crime-of-violence component of the definition of aggravated felony when conducting its comparable-grounds analysis.

The Board's pre-2005 case law therefore does not support petitioner's vision of the statutory-counterpart rule.

b. Petitioner also characterizes (Br. 10) the "long-standing regulations still in force today" as authorizing the "waiver" under Section 212(c) of an alien's "conviction." But the regulations belie that description. They do not authorize the waiver of a *conviction* for immigration purposes. Instead, they specify that when Section 212(c) relief is granted, it will be valid as to the "specific *grounds* of excludability, deportability, or removability that were described in the application." 8 C.F.R. 1212.3(d) (emphasis added); see 8 C.F.R. 212.3(d); see also *In re Balderas*, 20 I. & N. Dec. 389, 391 n.2 ("[T]he use of phrases such as, 'the conviction was waived under section 212(c),' is misleading.").

The regulations therefore bolster, rather than contradict, the Board's view—well-established both before and after 2005—that the statutory-counterpart analysis is grounds-based rather than conviction-based.

c. Finally, petitioner relies (Br. 29-31, 44-46) on the notion of congressional acquiescence. But, given the firmly rooted nature of the Board's grounds-based application of the statutory-counterpart rule, and its repeated rejection of the conviction-based view, congres-

sional acquiescence, to the extent that it plays a role here, cuts against petitioner and in favor of the Board.

C. The Board's Application Of Its Statutory-Counterpart Rule Is Not Impermissibly Retroactive

Petitioner contends that the Board's application of its statutory-counterpart rule in *Blake* and *Brieva-Perez* was impermissibly retroactive because it changed the law and "attach[ed] new consequences to guilty pleas entered in reliance on the prior regime." Pet. Br. 31. To that end, he relies (Br. 39-40) on *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947), and the more specific five-factor test articulated in *Retail, Wholesale & Department Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972). With respect to one of the *Retail* case's factors (the fourth), petitioner does suffer some "burden" (Pet. Br. 42) because he is ineligible for discretionary relief under former Section 212(c). But, assuming *arguendo* that it would be appropriate to apply the approach in the *Retail* case here, none of its other factors points in his direction.

1. The mainstay of petitioner's retroactivity argument is his contention (Br. 40-42), with respect to the first two factors, that the Board made an "abrupt departure" with respect to a question that was not "one of first impression." Yet, as discussed at length above, that is not true. Contrary to petitioner's declaration (Br. 42), *Blake* and *Brieva-Perez* did represent "a situation in which the [Board] * * * had to apply an evolving line of decisions to a new factual situation." There were no precedential opinions on point. See pp. 30-39, *supra*. But there were general principles in the Board's precedents that are consistent with the Board's current approach and do not support petitioner's proposed revision

of the statutory-counterpart rule. See pp. 40-43, *supra*. This case therefore lacks the principal features that raise "judicial hackles." *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.).

2. Petitioner's claim of impermissible retroactivity suffers from another fundamental problem, in that he cannot show, with respect to the third factor, that an alien in his circumstances would have reasonably relied on the statutory-counterpart rule at the relevant time.

As petitioner acknowledges (Br. 42), when this Court found an impermissible retroactive effect in *St. Cyr*, it placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*." 533 U.S. at 321. *St. Cyr* thus focused on the prospect of detrimental reliance by an alien who pleaded guilty to an aggravated felony between 1990, when Congress enacted the bar to Section 212(c) relief for aliens who served more than five years on a sentence for an aggravated felony, and 1996, when Congress repealed Section 212(c) altogether. See 533 U.S. at 293, 297.

When St. Cyr pleaded guilty, his controlled-substance offense was an aggravated felony that made him deportable. See 8 U.S.C. 1101(a)(43)(B) (1994) (including "illicit trafficking in a controlled substance" in definition of aggravated felony); 8 U.S.C. 1251(a)(2)(A)(iii) (1994). An alien in those circumstances concerned about preserving eligibility for Section 212(c) relief would have had an incentive to enter into a plea agreement that provided for a sentence of five years or less, rather than go to trial and risk a longer (and disqualifying) sentence, and accordingly might have developed reasonable reliance interests. See *St. Cyr*, 533 U.S. at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a

sentence of less than five years); see also *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 43-44 (2006) (explaining that *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* * * * which in practical terms was valued in light of the possible discretionary relief, a focus of expectation and reliance") (internal quotation marks and citations omitted).

Petitioner asserts that "the BIA's ruling here retroactively altered the terms of" his plea bargain (Br. 42), but that is implausible. Petitioner's 1989 voluntary-manslaughter conviction neither made him deportable nor exposed him to the not-yet-created aggravated-felony bar on Section 212(c) relief. See pp. 11-12, *supra*. He did not become deportable until IIRIRA was enacted in 1996.[23] As a result, in considering whether to plead guilty, he was not making a choice "between facing possible deportation and facing certain deportation." *St. Cyr*, 533 U.S. at 325. It is accordingly unreasonable to infer that an alien in his circumstances would have negotiated his plea agreement with a focus on Section 212(c) relief—much less on being able to satisfy the statutory-counterpart rule.[24] Indeed, the Second Circuit in *Blake* concluded that it would be "illogical" to say that aliens "relied on the law in effect at the time of their guilty plea[s]" when they would not "have been deportable at the time of their plea[s], making it impossible for

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[23] As *St. Cyr* recognized, Congress "unambiguously" indicated that "IIRIRA's amendment of the definition of 'aggravated felony' " would apply retroactively to earlier convictions. 533 U.S. at 318-319.

[24] Although petitioner may have known at the time of his guilty plea that the resulting conviction (of a crime involving moral turpitude for purposes of the INA) would render him excludable, the statutory-counterpart rule does not limit Section 212(c) eligibility for an LPR who is only excludable and not deportable.

them to even think they would need a § 212(c) waiver to stay in the country." 489 F.3d at 99 n.8; see also *Dalombo Fontes*, 483 F.3d at 123 n.4 (finding "no retroactivity problem" where the crime-of-violence aggravated felony ground of deportability "did not exist" when the alien pleaded nolo contendere).

3. For purposes of the fifth factor—pertaining to the government's potential interests in the Board's application of its statutory-counterpart rule—petitioner asserts (Br. 43) that this Court would "ultimately do[] no harm to the enforcement scheme" by rejecting the Board's reasonable interpretation and application of Section 212(c) in *Blake* and *Brieva-Perez* "because actual relief on the merits" under former Section 212(c) would "remain[] *discretionary*." He says (Br. 44) that "[a]ll [he] seeks is that an IJ *consider* his application under the agency's established standards for Section 212(c) relief," and the Department of Justice "has very little (if any) 'statutory interest' in refusing to do even *that*." But the Board plainly does have an interest in a sound interpretation of Section 212(c) and in not extending relief beyond what it has concluded that Congress authorized.

Moreover, the government does not have unlimited resources, and petitioner's proposed rule would be far from costless. Even before IJs reached the point of considering the merits of Section 212(c) applications, petitioner's approach would likely increase the costs of deciding who is eligible for relief, because he acknowledges the validity of the statutory-counterpart rule (but just asks that it be applied at a different level of generality). The Board has decided that eligibility can be determined on a category-by-category, rather than an offense-by-offense, basis, which currently allows a single precedential decision to dictate whether an entire category of

aggravated felonies (such as crimes of violence) satisfies the statutory-counterpart rule. Under petitioner's approach, however, the decision about eligibility would need to be made many times over—not just with respect to each kind of crime of violence, but also, for purposes of each generic crime within that category (such as manslaughter), with respect to various statutes of conviction in different States (and countries), to determine whether the offense is a crime involving moral turpitude that would render the alien inadmissible.

In every case in which petitioner's proposed application of the statutory-counterpart rule would require an exercise of the agency's discretion about whether to grant relief, DHS, IJs, and the Board would devote scarce agency resources to litigating and then making a multi-factor balancing judgment about whether the alien warrants relief. See *In re Arreguin*, 21 I. & N. Dec. 38, 39 (B.I.A. 1995). An IJ's denial of relief could be appealed to the Board, which would conduct an "independent review of the record" and engage in de novo review of the exercise of discretion. *Id.* at 40; see 8 C.F.R. 1003.1(d)(3)(ii).

Such procedures would consume not only agency resources, but also time. And significant delays could occur even in cases where a favorable exercise of discretion was essentially inconceivable at the outset. As this Court has repeatedly observed: "[A]s a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Stone* v. *INS*, 514 U.S. 386, 399-400 (1995) (quoting *INS* v. *Doherty*, 502 U.S. 314, 323 (1992)).[25]

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[25] Petitioner's own case illustrates that point. The Board issued its decision more than five years ago, Pet. App. 5a, but even if petitioner

In light of the foregoing, the Board's 2005 cases applying the statutory-counterpart rule do not have an impermissibly retroactive effect. There is accordingly no reason for this Court to "vacate and remand" to enable the Board to provide further explanation for its decision, as petitioner requests (Br. 53-55) in the alternative.

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prevails in this Court, there is a reasonable likelihood that he will ultimately be ineligible for relief on grounds independent of the statutory-counterpart rule. As he notes, the Board did not rely on his 2003 grand-theft conviction in finding him removable (Pet. Br. 25 n.8), but it would not be precluded from considering that conviction on remand. Petitioner has argued it was not an aggravated felony as defined in 8 U.S.C. 1101(a)(43)(G), but he has not denied that it was a crime involving moral turpitude. See note 5, *supra*; see also *Garcia-Lopez* v. *Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003) (recognizing grand theft under California law as a crime involving moral turpitude). Because his manslaughter conviction was also a crime involving moral turpitude, the Board could determine that petitioner has been convicted of "two or more crimes involving moral turpitude" and affirm the IJ's finding that he is removable under 8 U.S.C. 1227(a)(2)(A)(ii). Because that other ground of removability turns on a guilty plea and conviction that occurred well after Section 212(c) was repealed by IIRIRA, relief under former Section 212(c) would not be independently available for that ground. See *Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010) (holding there was no "authority to waive the second ground for Aguilar's removal—conviction of *two* crimes involving moral turpitude—because Aguilar did not plead to the second crime involving moral turpitude until *after* Congress repealed section 212(c)"); 8 C.F.R. 1212.3(h)(3). Cf. *Duhaney* v. *Attorney Gen.*, 621 F.3d 340, 351, 354 (3d Cir. 2010) (prior grant of Section 212(c) relief did not preclude new removability charge "based on a ground * * * that did not even become available until after [the alien] was granted a § 212(c) waiver"), cert. denied, No. 10-9039 (June 6, 2011).

D. The Statutory-Counterpart Rule Does Not Raise Equal-Protection Concerns

Petitioner contends that the Board's application of the statutory-counterpart rule "raises serious equal protection concerns." Br. 51 (capitalization modified). It does not.

1. As this Court has repeatedly stated: "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Whether an immigration provision is constitutional depends only on the existence of a "facially legitimate and bona fide reason" for its enactment. *Id.* at 794 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972)). The Board's statutory-counterpart rule satisfies that highly deferential standard.[26]

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[26] Petitioner asserts (Br. 52 n.19) that the "facially legitimate and bona fide reason" standard applies only to "initial admission decisions" and not to "longstanding residents." But the cases he cites do not draw that distinction, and *Fiallo* was based on the recognition that "the power to *expel* or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." 430 U.S. at 792 (quoting *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953)) (emphasis added); see also *id.* at 793 n.4 ("Policies pertaining to the entry of aliens and *their right to remain here* are peculiarly concerned with the political conduct of government.") (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)) (emphasis added). In *Galvan*, the alien being deported had resided in the United States for 36 years. 347 U.S. at 523. Thus, the *Fiallo* standard is akin to rational-basis review, but recognizes that "legislative distinctions in the immigration area need not be as carefully tuned to alternative considerations as those in the domestic area." 430 U.S. at 799 n.8 (quotation marks and citation omitted).

2. Petitioner is incorrect in asserting (Br. 52) that "[t]he BIA's distinction in *Blake* is identical to the one discredited in *Francis*." In *Francis* (and *Silva*), the LPRs' drug-trafficking ground of deportability was comparable to the drug-trafficking ground of exclusion, see *Francis*, 532 F.2d at 269-270 & n.2; *Silva*, 16 I. & N. Dec. at 27, which meant that their failure to travel outside the United States was all that prevented them from being eligible for the *nunc-pro-tunc* Section 212(c) relief that was available to those who had. Here, the statutory-counterpart rule does not distinguish between deportable LPRs who are similarly situated in every respect except whether they have traveled abroad or remained in the United States.

Petitioner also errs in contending (Br. 52) that the Board's application of the statutory-counterpart rule "distinguish[es] between two LPRs deportable under the same deportation provision due to the same criminal conviction." See also Pet. Br. 48. As explained above, that contention is rooted in an obsolete understanding of the interaction between the *nunc-pro-tunc* practice and comparable-grounds analysis. See pp. 28-30, *supra*. The statutory-counterpart rule does not in fact distinguish between LPRs who are deportable under the "same deportation provision." Rather, it makes a distinction between LPRs who are removable on *different* grounds of deportability (*e.g.*, when one has a comparable ground of exclusion and one does not).

Because of those distinctions, the statutory-counterpart rule ensures that the alien who is ineligible for relief is not "similarly situated" with the one who is eligible, thus foreclosing any equal-protection violation. See, *e.g.*, *Frederick* v. *Holder*, 644 F.3d 357, 363 (7th Cir. 2011) ("[T]he statutory-counterpart rule can hardly vio-

late equal protection because it is itself the test for an equal-protection violation."), petition for cert. pending, No. 11-135 (filed Aug. 1, 2011).

3. In any event, it is not irrational for the Board to distinguish between inadmissible and deportable aliens on a categorical basis. There are, needless to say, countless such distinctions in the INA. See pp. 2-3, *supra*. Although petitioner contends (Br. 52) that it is "irrational[]" to give "worse treatment to those [LPRs] who did not leave and who therefore have stronger ties to this country," he overlooks a sensible reason to make discretionary relief available to aliens who take actions to place themselves in exclusion rather than deportation proceedings.

The aliens affected by the operation of the statutory-counterpart rule are LPRs who are deportable (and often also excludable). As several courts have concluded, making discretionary relief available on more favorable terms to aliens who are in admission rather than deportation proceedings can provide an "incentive for deportable aliens to leave the country * * * without their having to be ordered to leave at the government's expense." *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999) (quoting *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000)); see also *Abebe*, 554 F.3d at 1206 ("By encouraging such self-deportation, the government could save resources it would otherwise devote to arresting and deporting these aliens."); *Thap* v. *Mukasey*, 544 F.3d 674, 680 (6th Cir. 2008); *Vo*, 482 F.2d at 371; *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1153 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000).

Petitioner questions (Br. 48 n.18) whether Congress's actions are all consistent with an intention of

encouraging self-*deporting* by LPRs. But he cannot deny that the government has an important interest in enforcing the immigration laws against such individuals—or at least in knowing enough about them to determine how best to exercise discretion in enforcing the immigration laws, whether that discretion comes at the stage of bringing charges or granting relief from grounds of inadmissibility or deportability. The Board's statutory-counterpart rule is more likely to serve those ends by promoting self-*reporting*, because it gives LPRs an incentive to be applicants for admission rather than respondents in deportation proceedings; and that can be accomplished either by seeking to enter the United States or by filing an Application For Advance Permission To Return To Unrelinquished Domicile (Pet. Br. App. 22a-23a). Petitioner's rule, by contrast, would create a disincentive to coming forward, because LPRs could try to evade immigration officials for as long as possible and simply plan on being eligible to seek Section 212(c) relief if caught and placed in deportation proceedings. The positive incentives created by the Board's rule constitute a "facially legitimate and bona fide reason" for it. *Fiallo*, 430 U.S. at 794.

4. Even if the Court were to determine that the Board's application of the statutory-counterpart rule raised serious equal-protection concerns, that still would not compel the remedy petitioner requests ("constru[ing] the statute and regulations to permit grants of discretionary relief to LPRs like [p]etitioner," Pet. Br. 53). Because "unequal treatment * * * may as logically be attributed to the disparately generous provision * * * as to the disparately parsimonious one," *Miller* v. *Albright*, 523 U.S. 420, 458 (1998) (Scalia, J., concurring in the judgment), any constitutional violation, or serious

constitutional doubt, could be eliminated by contracting the availability of Section 212(c) relief rather than expanding it. The choice between those two remedies is dictated by Congress's presumed intentions. See, *e.g.*, *Nguyen* v. *INS*, 533 U.S. 53, 72 (2001); *Miller*, 523 U.S. at 489 (Breyer, J., dissenting).

In the context of Section 212(c), there is good reason to believe that Congress would prefer to contract rather than expand the availability of relief to criminal aliens. Congress acted repeatedly between 1990 and 1996 to cut back on the provision's applicability: first barring it to those who had been convicted of aggravated felonies and served at least five years of imprisonment (1990 Act § 511(a), 104 Stat. 5052), then barring it altogether to those "deportable by reason of" various criminal grounds, including aggravated-felony convictions (AEDPA § 440(d)(2), 110 Stat. 1277), and then repealing it entirely (IIRIRA § 304(b), 110 Stat. 3009-597). In fact, Congress has already provided a clear illustration of what it would do if it were to design a mechanism for discretionary relief from removal that needed to apply equally to LPRs who are inadmissible and LPRs who are deportable: Under the provision that authorizes the Attorney General to cancel removal for an LPR "who is inadmissible or deportable," relief is not available to *any* alien who has "been convicted of any aggravated felony." 8 U.S.C. 1229b(a)(3).

In light of such evidence of congressional intent, there is no justification for expanding former Section 212(c) to encompass categories of aliens who were embraced by neither unambiguous statutory text nor the agency's longstanding practice, which, in light of the statute's roots in grounds of exclusion, extended eligibility only to aliens in deportation proceedings who were far

more analogous to aliens in exclusion proceedings than is petitioner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2011

APPENDIX

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A40 065 318 - Seattle, WA

Date: [JAN 24, 2008]

In re: SALVADOR CARDONA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Stephanie Thorpe, Esquire

ON BEHALF OF DHS:
Marci L. Ellsworth
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]—Convicted of aggravated felony as defined in section 101(a)(43)(F), I&N Act [8 U.S.C. § 1101(a)(43)(F)]

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]—Convicted of aggravated felony as defined in section 101(a)(43)(A), I&N Act [8 U.S.C. § 1101(a)(43)(A)]

APPLICATION: Section 212(c) waiver

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BlA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). We are not persuaded by the respondent's arguments on appeal relating to the propriety of our decision in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), and its application to the respondent's proceedings. It is well established that section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), is limited to charges of deportability for which there is a comparable ground of inadmissibility. Our decision in *Matter of Blake* was not based upon any change in the law; rather, it is simply an extension of our long line of cases holding that section 212(c) relief is only available where there is a corresponding ground of inadmissibility. We recognize that the United States Court of Appeals for the Second Circuit disagrees with the Board's analysis in *Matter of Blake*, but we decline to follow the Second Circuit's holding in cases arising outside of that Circuit. *See Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007). Additionally we point out that the other ground upon which the respondent is removable, for having been convicted of a crime of violence aggravated felony, also lacks a comparable ground of inadmissibility. *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). The respondent is therefore unable to waive either of his grounds of removability under section 212(c) of the Act.

We only additionally note that the Department of Homeland Security filed its motion to reconsider our August 18, 2005, decision in this case on September 15, 2005; thus, it was timely filed. The respondent's objections to this motion to reconsider were considered by the Board in the December 27, 2005, order that granted the motion. Accordingly, the appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD