No. 09-594

In the Supreme Court of the United States

JOSE ERASMO DE LA ROSA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ANDREW C. MACLACHLAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Blank Page

QUESTION PRESENTED

Whether the denial of relief from removal under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), violates the equal protection component of the Due Process Clause, when an alien who is removable because he committed a specific aggravated felony is not being treated differently from other aliens who are similarly removable on grounds that have no statutory counterpart in the INA's grounds for inadmissibility.

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued Page

Cases—Continued Page

Constitution, statutes and regulation:

Statutes and regulation—continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 09-594

JOSE ERASMO DE LA ROSA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 579 F.3d 1327. The opinions of the Board of Immigration Appeals (Pet. App. 29a-31a) and the immigration judge (Pet. App. 33a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2009. The petition for a writ of certiorari was filed on November 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to

apply for discretionary relief from exclusion. By its terms, Section 212(c) applied only to certain aliens in exclusion proceedings (*i.e.*, proceedings in which aliens were seeking to "be admitted" to the United States after "temporarily proceed[ing] abroad voluntarily"). In 1976, however, the Second Circuit determined that making that discretionary relief available to aliens who had departed the United States while denying it to aliens who remained in the United States violated equal protection. *Francis* v. *INS*, 532 F.2d 268, 273. The Board of Immigration Appeals (Board) adopted that rationale on a nationwide basis in *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976), so that Section 212(c) was generally construed as being available in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In applying the principle of treating those in deportation proceedings like those in exclusion proceedings, the Board has long maintained that an alien in deportation proceedings can obtain Section 212(c) relief only if the ground for his deportation has a comparable ground among the statutory grounds of exclusion. See, *e.g.*, *In re Wadud*, 19 I. & N. Dec. 182 (B.I.A. 1984); *In re Granados*, 16 I. & N. Dec. 726 (B.I.A. 1979). That practice is known as the "comparable ground" or "statutory counterpart" test, and it has been codified by regulation at 8 C.F.R. 1212.3(f)(5).[1]

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110

---

[1] In pertinent part, 8 C.F.R. 1212.3(f) states:

> An application for relief under former section 212(c) of the Act shall be denied if: * * * (5) The 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.

Stat. 1277, Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including aggravated felonies. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety. IIRIRA also did away with the distinction between "deportation" and "exclusion" proceedings, designating them both as "removal" proceedings. See §§ 303-306, 110 Stat. 3009-585; Pet. App. 2a n.2.

In *INS* v. *St. Cyr*, *supra*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony on the basis of a plea agreement that the alien made at a time when the alien would still have been eligible for Section 212(c) relief in spite of the resulting conviction. 533 U.S. at 314-326. Although some aliens necessarily benefitted from the conclusion that Section 212(c)'s repeal was not retroactively applicable, the Court did not suggest that aliens would not still be subject to any pre-existing limitations on their eligibility for relief under Section 212(c), including the "statutory counterpart" test.

As relevant to the circumstances of this case, the operation of that test was further clarified by the Board in *In re Blake*, 23 I. & N. Dec. 722 (2005), remanded, 489 F.3d 88 (2d Cir. 2007), and *In re Brieva-Perez*, 23 I. & N. Dec. 766 (2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007). Those cases held that a statutory ground of exclusion is only a "comparable ground[]" to the charged ground of deportation if the two grounds use similar language to describe "substantially equivalent categories of offenses." *Brieva-Perez*, 23 I. & N.

Dec. at 771; *In re Blake*, 23 I. & N. Dec. at 728. In *In re Blake*, the Board held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for sexual abuse of a minor. *Id.* at 729. In *Brieva-Perez*, the Board similarly held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for a crime of violence. 23 I. & N. Dec. at 773. Well before the Board published those precedential decisions, however, the analytical underpinnings of its interpretation had been confirmed by, among others, the Ninth Circuit's decision in *Komarenko* v. *INS*, 35 F.3d 432 (1994).

In 2007, the Second Circuit disagreed with *Komarenko* and the "several other circuits" that had followed it. *Blake* v. *Carbone*, 489 F.3d 88, 103-104. The Second Circuit recognized that the statutory-counterpart test codified in 8 C.F.R. 1212.3(f)(5) did "nothing more than crystallize the agency's preexisting body of law and therefore [could not] have an impermissible retroactive effect"; but the Second Circuit held that, when analyzed on the basis of a "particular criminal offense[]," the ground of inadmissibility for a "crime involving moral turpitude" was sufficiently comparable to an aggravated felony of sexual abuse of a minor to permit relief under former Section 212(c). *Blake*, 489 F.3d at 98-99, 101, 103.

2. Petitioner is a native and citizen of the Dominican Republic who was admitted in lawful permanent resident status in 1989. Pet. App. 3a, 29a. In 1995, petitioner pleaded *nolo contendere* to the offense of committing a lewd act upon a child under the age of sixteen, in violation of Florida law. *Id.* at 3a. Based on that convic-

tion, petitioner was placed in removal proceedings in 2004, and on March 16, 2007, an immigration judge ruled that petitioner was subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien who has been convicted of an aggravated felony (specifically, "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A)), and under 8 U.S.C. 1227(a)(2)(E)(i), as an alien who has been convicted of a crime of child abuse. Pet. App. 3a, 29a-30a, 34a. The immigration judge denied petitioner's application for relief under former Section 212(c), finding that there was no ground of inadmissibility that was sufficiently comparable to the aggravated-felony ground of removal, and ordered him removed to the Dominican Republic. *Id.* at 35a-36a.

On June 10, 2008, the Board dismissed petitioner's appeal. It agreed with the immigration judge that, pursuant to the Board's reasoning in *In re Blake*, petitioner was statutorily ineligible for relief under former Section 212(c), because the charge of deportability on the basis of a conviction for sexual abuse of a minor has no statutory counterpart among the grounds of inadmissibility. Pet. App. 29a-31a. The Board rejected the application of the Second Circuit's reasoning in *Blake* v. *Carbone*, observing that three other circuits had accepted the Board's holding in *In re Blake*. *Id.* at 30a-31a. The Board also observed that the Eleventh Circuit—the court of appeals with jurisdiction over this case—had "expressly ratified" "the rationale underlying [*In re*] *Blake*." *Id.* at 31a (citing *Farquharson* v. *United States Att'y Gen.*, 246 F.3d 1317, 1324-1325 (11th Cir. 2001), and *Rodriguez-Padron* v. *INS*, 13 F.3d 1455, 1458-1460 (11th Cir. 1994)).

3. Petitioner sought judicial review of the Board's decision, and the Eleventh Circuit denied his petition for

review. Pet. App. 1a-28a. Joining the First, Third, Fifth, Sixth, Seventh, and Eighth Circuits, the court accepted the Board's decision in *In re Blake* and rejected the Second Circuit's contrary ruling in *Blake* v. *Carbone*. *Id.* at 13a-14a, 17a & n.11. The court also noted that the Ninth Circuit, in *Abebe* v. *Mukasey*, 554 F.3d 1203, 1206-1207 (2009) (en banc), petition for cert. pending, No. 09-600 (filed Nov. 16, 2009), had adopted a different approach that repudiated the equal protection reasoning of the Second Circuit in *Francis* v. *INS*, *supra*, upon which *Blake* v. *Carbone* was based, and that would also foreclose relief to aliens like petitioner. Pet. App. 16a-18a.

At the outset, the court of appeals disagreed with petitioner's interpretation of Board and circuit court precedent prior to *Blake*, observing that statutory-counterpart analysis had long been the law, and that, as early as 1984, the Board had rejected eligibility for a waiver under Section 212(c) when the underlying offense, but not the ground for removal, was a crime involving moral turpitude. Pet. App. 19a (citing cases). The court concluded that the Board's "focus" in *In re Blake* "on the charged grounds of deportation instead of the underlying offense did not represent a departure from prior [Board] practice." *Ibid.*

Although petitioner did not directly challenge the Board's statutory-counterpart rule on equal-protection grounds, the court of appeals addressed and rejected what it considered to be the "implicit [equal-protection] argument underpinning his position." Pet. App. 22a. The court rejected the Second Circuit's "more expansive view of equal protection" in *Blake* v. *Carbone*, explaining that it felt "bound by the canons of deference and judicial restraint to respect the law's contemporary termi-

nus," and reiterating its "aversion to 'stretch[ing] [§ 212(c)] beyond its language.'" *Id.* at 22a-23a (brackets in original) (quoting *Farquharson*, 246 F.3d at 1325); see also *id.* at 27a ("We * * * hew to the maxim that courts are charged with adjudication, not legislation.").

The court of appeals specifically stressed that it adhered to the equal-protection reasoning in *Francis*,[2] and —applying logic articulated by the Third, Seventh, and Ninth Circuits—distinguished it from the offense-based approach that the Second Circuit later adopted in *Blake* v. *Carbone*, *supra*. Pet. App. 23a-27a. As the court of appeals explained, unless a ground for exclusion and a ground of deportation are counterparts, "a deportable alien usually is not similarly situated to an excludable alien * * * because Congress delineated different grounds for deportation and exclusion." *Id.* at 24a. Moreover, relief from removal under Section 212(c) refers only to the identity of the statutory ground of removal, not to the underlying crime. *Id.* at 25a-26a. "[T]he underlying crime for which [the petitioner] was convicted plays no role in this inquiry. It is therefore irrelevant that [his] conviction . . . *could* have subjected him to removal as an alien convicted of a crime of moral turpitude under INA § 237(a)(2)(A)(i)." *Id.* at 26a (quoting *Caroleo* v. *Gonzales*, 476 F.3d 158, 168 (3d Cir. 2007)) (brackets in original).

The court of appeals concluded that, "if courts were to look beyond the charged grounds of deportation to the underlying criminal offense to determine whether the criminal offense could have been treated as a crime of moral turpitude, that would greatly expand the role

[2] The panel noted that the circuit's long-standing endorsement of *Francis* prevented the panel from considering the Ninth Circuit's approach in *Abebe*. Pet. App. 22a n.14.

Congress assigned the judiciary in immigration cases." Pet. App. 26a-27a (quoting *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679, 692 (7th Cir. 2008)). "An alien is no more entitled to section 212(c) relief when charged with a ground of removal that has no statutory counterpart under the INA's inadmissibility provisions than a defendant is entitled to a sentencing range consistent with the least serious crime with which he could have been charged." *Id.* at 27a (quoting *Abebe*, 554 F.3d at 1212 (Clifton, J., concurring)). Therefore, because there is no ground of inadmissibility for sexual abuse of a minor, the panel held that relief under former Section 212(c) is available only to those aliens charged as deportable on a ground that is comparable to a ground of exclusion. *Id.* at 28a.

ARGUMENT

The decision of the court of appeals is correct. The issue concerns a statutory section repealed more than 13 years ago, and that therefore is of greatly diminished importance. Moreover, every court of appeals to have addressed the question (except the Second Circuit) would deny petitioner relief. This court has recently denied certiorari in two cases presenting a similar question. See *Birkett* v. *Holder*, 129 S. Ct. 2043 (2009) (No. 08-6816); *Gonzalez-Mesias* v. *Holder*, 129 S. Ct. 2042 (2009) (No. 08-605). Further review is similarly unwarranted in this case.

1. As petitioner acknowledges (Pet. 15), the First, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have concluded in published opinions that the Board's application of the statutory-counterpart test constitutes a permissible interpretation of former Section 212(c) and does not violate equal protection. 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); Pet. App. 23a-28a (11th Cir. 2009).[3]

In addition, the Ninth Circuit's en banc decision in *Abebe* v. *Mukasey*, 554 F.3d 1203, 1206-1207 (2009), petition for cert. pending, No. 09-600 (filed Nov. 16, 2009), essentially comports with those circuits with regard to the statutory-counterpart rule. Although *Abebe* disagreed with the proposition that there is any constitutional basis for applying former Section 212(c) to aliens in deportation (as opposed to exclusion) proceedings, it left in place the regulation implementing the statutory-counterpart test, which means that the Board's reasoning in *In re Blake*, 23 I & N. Dec. 722 (2005), still applies in the Ninth Circuit. See *Abebe*, 554 F.3d at 1207 (stating that the decision does not "cast[] any doubt on the regulation" that codified the Board's statutory-counterpart rule); see also *Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010) (applying 8 C.F.R. 1212.3(f)(5) and finding alien ineligible for Section 212(c) relief because the grounds for his removal did not have statutory counterparts among the grounds of inadmissibility); *In re Moreno-Escobosa*, 25 I. & N. Dec. 114, 117 (B.I.A. 2009) ("[T]he Ninth Circuit's decision in *Abebe* v. *Mukasey* can be fairly read as rejecting the equal pro-

---

[3] As petitioner notes (Pet. 15 n.9), the Tenth Circuit has applied the statutory-counterpart rule in an unpublished decision. *Alvarez* v. *Mukasey*, 282 Fed. Appx. 718, 723 (2008).

tection challenge to the application of the statutory counterpart rule.").

Thus, despite petitioner's (and the court of appeals') references to a three-way division in the circuits (Pet. 2, 15, 18; Pet. App. 17a), there is no effective difference —in terms of sustaining the Board's application of the statutory-counterpart rule—between the Ninth Circuit's decision and the decisions of the seven other circuits that have agreed with the reasoning of the Board's decision in *In re Blake*. The only court of appeals to have reached a different result is the Second Circuit, in *Blake* v. *Carbone*, 489 F.3d 88, 103-104 (2007).[4]

2. Contrary to petitioner's contention (Pet. 21-30), the statutory-counterpart rule applied by the Board does not violate the equal protection component of the Fifth Amendment's Due Process Clause.

Petitioner argues (Pet. 22) that the Board's decision in *In re Blake* "creates an irrational distinction between [lawful permanent residents] who have traveled abroad and [those] who have not, contrary to Section 212(c) as it has consistently been interpreted and contrary to equal protection." Petitioner thus essentially contends as follows: If he had left the United States and attempted to return, his conviction for committing a lewd act upon a child could have subjected him to removal based on a charge of inadmissibility for having committed "a crime involving moral turpitude" under Section

---

[4] Presumably because of the underlying consistency between the result of the Ninth Circuit's decision and that in all other Circuits (except the Second), the petition for a writ of certiorari in *Abebe* recognizes that the disposition of this case—which the petition in *Abebe* characterizes as having "more fully developed" issues—would "affect the outcome" of *Abebe*. See Pet. at 30, *Abebe* v. *Holder*, petition for cert. pending, No. 09-600 (filed Nov. 16, 2009).

212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), and that would have made him eligible for Section 212(c) relief. Petitioner contends that it is irrational for him to be ineligible for Section 212(c) relief because he remained within the United States and thus be subject to removal based on the charge of having committed the aggravated felony of sexual abuse of a minor—a ground that the Board holds is not comparable to the inadmissibility ground of having committed a crime involving moral turpitude. This argument is without merit.

a. As an initial matter, petitioner errs in contending that:

> Before 2005, the [Board] consistently held that [a lawful permanent resident] deportable on the basis of an aggravated felony conviction for "sexual abuse of a minor" or a "crime of violence" was eligible for Section 212(c) relief from removal if the underlying conviction would have been a basis for inadmissibility (*e.g.*, as a "crime involving moral turpitude" under [8 U.S.C. 1182(a)(2)(A)(i)]).

Pet. 21 (citing Pet. 11-12 nn.6-7). In fact, of the thirteen decisions of the Board that petitioner cites (Pet. 11-12 nn.6-7), only two were precedential. The first of those, *In re Rodriguez-Cortes*, 20 I. & N. Dec. 587 (B.I.A. 1992), addressed only the issue of whether a sentence-enhancement provision (which permitted the imprisonment served to exceed the five years then required to bar relief under Section 212(c)) necessarily caused a conviction to constitute one involving a firearm. *Id.* at 590. The second decision, *In re A–A–*, 20 I. & N. Dec. 492 (B.I.A. 1992), held that the alien had been convicted of an aggravated felony and served the term of imprisonment that barred him from Section 212(c) relief. *Id.*

at 500-503. In each case, the underlying conviction was for murder, but neither Board decision specifically addressed or held, as petitioner suggests, that a crime involving moral turpitude under 8 U.S.C. 1182(a)(2)(A)(i) is a ground of inadmissibility comparable to murder. Petitioner thus cites no precedential Board decision holding that an alien who has been convicted of a crime rendering him deportable as an aggravated felon on the ground of "sexual abuse of a minor" or a "crime of violence" is categorically eligible for Section 212(c) relief if his particular crime could have served as a basis for inadmissibility. Moreover, to the extent that the nonprecedential decisions cited by petitioner are based on *In re Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991), the Board affirmatively distinguished that decision in *In re Blake*, which is the only precedential decision to have specifically addressed sexual abuse of a minor. See 23 I. & N. Dec. at 724-728.

b. 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)). Thus, 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 (1992)).

As a general matter, Congress has determined that the statutory regime that applies to an alien who has already been admitted to the country is different from the one that applies to an alien who is seeking admission. Compare 8 U.S.C. 1182, with 8 U.S.C. 1227. It is thus unsurprising that the categories of offenses that make

an alien inadmissible are not always the same as those that may render an alien deportable from the country. That fundamental legislative choice shows that aliens who are inadmissible are not similarly situated with aliens subject to removal on grounds of being deportable, even though there is some overlap between the conduct that renders an alien inadmissible and the conduct that renders an alien deportable. It is only where a ground that renders an alien deportable under the one regime has a statutory counterpart that renders an alien inadmissible under the other regime that the two aliens could be said to be similarly situated for equal protection purposes (and thus warrant the application of former Section 212(c) to the category of aliens to whom it did not, by its own terms, apply).

The reasoning employed in *Komarenko* v. *INS*, 35 F.3d 432 (9th Cir. 1994), which was quoted by the court of appeals below (Pet. App. 24a-25a) and has also been endorsed by most of the other courts of appeals, is persuasive. In *Komarenko*, the court rejected a similar equal protection claim in finding that two groups of aliens convicted of different crimes were not similarly situated for purposes of eligibility for Section 212(c) relief. *Id.* at 435. The court concluded that the "linchpin of the equal protection analysis in this context is that the two provisions be 'substantially identical.'" *Ibid.*; see also *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 952 (7th Cir. 1993). Komarenko claimed the court was required to "focus on the facts of his individual case and conclude that because he *could have been* excluded under the moral turpitude provision, he has been denied equal protection." *Komarenko*, 35 F.3d at 435. The court, however, refused "to speculate whether the I.N.S. would have applied this broad excludability provision to an

alien in Komarenko's position," because engaging in such speculation "would extend discretionary review to every ground for deportation that could constitute 'the essential elements of a crime involving moral turpitude.'" *Ibid.* Such an approach would be tantamount to "judicial legislating," would "vastly overstep" the courts' "limited scope of judicial inquiry into immigration legislation," and "would interfere with the broad enforcement powers Congress has delegated to the Attorney General." *Ibid.* (quoting *Fiallo*, 430 U.S. at 792). Accordingly, the court "decline[d] to adopt a factual approach to * * * equal protection analysis in the context of the deportation and excludability provisions of the INA," and it "conclude[d] that Komarenko was not denied his constitutional right to equal protection of the law." *Ibid.*

Thus, under the rational-basis standard of review, Congress may draw lines on the basis of general categories without regard to the circumstances of a particular individual. See, *e.g.*, *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). It is only when the statutory ground for a deportable alien's removal from the country has a statutory counterpart in the grounds for inadmissibility that a deportable alien is arguably similarly situated to inadmissible aliens. See *Komarenko*, 35 F.3d at 435. As the Seventh Circuit has explained:

> [C]ertain deportable aliens may receive exclusion-type relief as if they were subject to exclusion rather than deportation. But that fiction requires that the aliens be excludable *for the same reasons* that render them deportable—a situation not necessarily true for all aliens facing deportations. Accordingly, [S]ection 212(c) relief was not extended to aliens whose

> deportability was based on a ground for which a comparable ground of exclusion did not exist.

Leal-Rodriguez, 990 F.2d at 949 (emphasis added). The court in *Leal-Rodriguez* held that an alien who was deportable for entering the United States without inspection was not eligible for Section 212(c) relief because there was no corresponding ground of inadmissibility to the deportation charge. *Id.* at 948, 950.

In this case, petitioner's argument similarly fails because his ground of deportation (for having been convicted of the aggravated felony of sexual abuse of a minor) is not "substantially equivalent" or "substantially identical" to a ground of inadmissibility under Section 212(a) of the INA. *Komarenko*, 35 F.3d at 435. As the Board correctly reasoned in *In re Blake*, sexual abuse of a minor under 8 U.S.C. 1101(a)(43)(A) lacks a statutory counterpart among the grounds of inadmissibility in Section 212(a). Although sexual abuse of a minor may constitute "a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), the latter category addresses a distinctly different and much broader category of offenses than a charge for an aggravated felony of sexual abuse of a minor. Thus, while the statutory-counterpart test does not require a perfect match, the ground of inadmissibility must address essentially the same category of offense on which the removal charge is based.

Under the pertinent regulations and the Board's decisions, that test is not met merely by showing that some (or even many) of the aliens whose offenses are included in a given category could also have their crimes characterized as ones involving moral turpitude. See, *e.g.*, *Zamora-Mallari*, 514 F.3d at 693 (holding that the aggravated felony of sexual abuse of a minor has no statu-

tory counterpart); *Avilez-Granados* v. *Gonzales*, 481 F.3d 869, 871-872 (5th Cir. 2007) (same). That analysis is firmly supported by the unanimous opinions of the courts of appeals holding that a firearms offense (which is a ground of removability under 8 U.S.C. 1227(a)(2)(C)) has no statutory counterpart under Section 212(a), even though "many firearms offenses may also be crimes of moral turpitude."[5] *In re Blake*, 23 I. & N. Dec. at 728.

Thus, because petitioner is not similarly situated to an inadmissible alien who has been convicted of a crime involving moral turpitude, and because he is not being treated any differently from other aliens who are deportable upon grounds that themselves have no corresponding ground of inadmissibility, his equal protection claim is meritless.[6]

---

[5] For the same reason, petitioner's contention (Pet. 28) that the Board erroneously interpreted 8 C.F.R. 1212.3(f)(5) so as to "confine" this Court's decision in *St. Cyr*, rather than "implement" it, fails. Petitioner argues that the Board, in *In re Blake*, impermissibly interpreted 8 C.F.R. 1212.3(f)(5) inconsistently with its "prior rulings that [a lawful permanent resident alien] deportable for an aggravated felony was eligible for Section 212(c) relief if the conviction would also fall under a counterpart inadmissibility provision." Pet. 29 (emphasis omitted). But petitioner's characterization of the Board's prior practice is flawed, because it overlooks the fact that the Board has always considered whether the charged ground of deportability compared with any ground of inadmissibility, and not whether the alien's crime could have formed the basis for a different charge of inadmissibility. See *In re Blake*, 23 I. & N. Dec. at 728. As a result, petitioner's assertions (Pet. 30) about "retroactive application" of 8 C.F.R. 1212.3(f)(5) are unfounded.

[6] Petitioner contends (Pet. 28 & n.17) that the relevant comparison should be between deportable aliens who have left the country and those who have not, because a deportable alien who left the country could be treated as if he had been put into proceedings upon reentry such that relief was available *nunc pro tunc*. But, other than *Blake* v. *Carbone*, the authority he offers is *In re L–*, 1 I. & N. Dec. 1 (B.I.A.

3. Although the Second Circuit has reached a different result, this case does not present a question of sufficient importance to warrant this Court's review. The Second Circuit is an outlier: eight other circuits, including the Eleventh Circuit below, have approved the Board's approach in *In re Blake*. And this Court denied certiorari twice last year, well after the Second Circuit had issued its decision in *Blake* v. *Carbone*. See *Birkett*, *supra*; *Gonzalez-Mesias*, *supra*. Moreover, petitioner's question concerns an alien's eligibility for a form of discretionary relief under a statute that was repealed more than 13 years ago and is only potentially applicable to him on the theory that he might have relied on being eligible for it had his removal proceedings been initiated before the 1996 enactments. See *INS* v. *St. Cyr*, 533 U.S. 289, 325 (2001). But as the court of appeals observed below, the statutory-counterpart test to which petitioner objects is not new—indeed, it long predates the repeal of Section 212(c) in 1996 (see p. 2, *supra*; Pet.

1940), which addressed "the power to retroactively grant the Attorney General's discretion to permit an alien to reapply for admission after being deported and subsequently reentering the country." *Ramirez-Canales* v. *Mukasey*, 517 F.3d 904, 910 (6th Cir. 2008). The cases in which the Board has applied Section 212(c) or its predecessor provisions make clear that, although "[i]t has long been the administrative practice to exercise the discretion permitted by the foregoing provisions of law, *nunc pro tunc*," the Board does so only "where complete justice to an alien dictates such extraordinary action." *In re T–*, 6 I. & N. Dec. 410, 413 (B.I.A. 1954). Thus, while "the equitable power to grant orders *nunc pro tunc* is conceptually broad," *Ramirez-Canales*, 517 F.3d at 910, its application is wholly discretionary and it is limited to extraordinary cases—not every case where an alien is otherwise eligible for relief. For the same reasons that petitioner is not similarly situated to an alien who departed and is seeking to re-enter, complete justice would not mandate the application of *nunc pro tunc* discretion.

App. 7a-11a; *Blake*, 489 F.3d at 98-99)—and petitioner could have easily avoided its effects by departing the country voluntarily at any point before his removal proceedings were initiated in 2004. Cf. *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 (2006) ("It is therefore the alien's choice to continue his illegal presence * * * that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.").

In contending that his case presents an issue of exceptional importance, petitioner cites a statistic about 10,000 grants of Section 212(c) relief between 1989 and 1995. Pet. 31 (quoting *St. Cyr*, 533 U.S. at 296). That figure is of little relevance here not only because of its age but also because Section 212(c) was still in effect between 1989 and 1995. In recent years, the number of grants of relief under former Section 212(c) has been smaller and declining. It went from 1905 grants in FY 2004 to 858 grants in FY 2009—a 55% decline. See Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf; Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2009 Statistical Year Book* Table 15, at R3 (2010), http://www.justice.gov/eoir/statspub/fy09syb.pdf. Over that same period, the number of applications for relief under former Section 212(c) fell even more dramatically. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2009, there were 576. That reflects a 78% decline since FY 2004—and a 55% decline since FY 2008.[7]

---

[7] These figures, which are based on both published and unpublished statistics compiled by the Executive Office of Immigration Review,

Of course, the number of aliens who could be affected by the outcome of this case will necessarily be even smaller, since an alien would not become eligible for discretionary relief under petitioner's theory unless he or she met, at a minimum, each of the following criteria: (1) lawful-permanent-resident status; (2) a conviction predating the repeal of Section 212(c) that (3) resulted from a plea of guilty or no contest (rather than a trial);[8] and (4) a removal charge that has no comparable ground of inadmissibility except when considered on the basis of the facts of the underlying offense. Given the limited nature of that class, petitioner's assertion (Pet. 30) that the case presents an issue of "[e]xceptional [a]nd [c]ontinuing [i]mportance" fails.

---

were also cited in the government's briefs opposing certiorari in *Ferguson* v. *Holder*, cert. denied, No. 09-263 (Mar. 8, 2010), and *Molina-De La Villa* v. *Holder*, cert. denied, No. 09-640 (Mar. 22, 2010). In *Molina-De La Villa*, the petitioner's reply brief (at 6) noted that previous editions of the *Statistical Year Book* had reported lower numbers of 212(c) grants for some years. The higher figures in the more recent editions of the *Statistical Year Book* reflected a database conversion that more accurately captured the number of aliens with requests for relief under former Section 212(c).

[8] In some circuits, *St. Cyr* has been applied to allow some aliens who were convicted after a trial to be eligible for relief under former Section 212(c). The Court most recently denied certiorari on that question in *Ferguson*, *supra*, and *Molina-De La Villa*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ANDREW C. MACLACHLAN
Attorneys

MARCH 2010