No. 09- 09-594 NOV 13 2009

IN THE
Supreme Court of the United States

JOSE ERASMO DE LA ROSA,
Petitioner,

v.

ERIC J. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than 25 years, the Board of Immigration Appeals (BIA) held that a legal permanent resident (LPR) who is deportable due to a criminal conviction could seek a discretionary waiver of removal under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), provided that the conviction also would have constituted a waivable basis for exclusion. In 2005, the BIA abruptly changed course, adding a requirement that the LPR be deportable under a statutory provision that used "similar language" to an exclusion provision. Deportable LPRs who departed and reentered the United States after their conviction, however, may seek Section 212(c) relief under a longstanding "*nunc pro tunc*" procedure that does not turn on similar language between deportation and exclusion provisions. Thus, under the BIA's current view, an LPR who pled guilty to an offense that renders him both deportable and excludable, but under provisions that use dissimilar phrasing, will be eligible for Section 212(c) relief from deportation if he departed and reentered the United States after his conviction, but ineligible if he did not depart. The circuits are split three ways on the lawfulness of the BIA's new interpretation.

The question presented is:

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, but who did *not* leave the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the INA.

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OPINIONS BELOW

The court of appeals issued its decision and entered judgment on August 20, 2009. The decision of the court of appeals is reported at 579 F.3d 1327 and reproduced at App. 1a-28a.

The oral decision of the Immigration Judge ordering Petitioner deported to the Dominican Republic is unreported. App. 33a-36a. The decision of the Board of Immigration Appeals affirming the deportation order is likewise unreported. App. 29a-31a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be ... deprived of life, liberty, or property, without due process of law[.]"

2. The following provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, are set forth in relevant part in the Appendix hereto:

a. 8 U.S.C. § 1101(a)(43) (App. 55a-56a);

b. 8 U.S.C. § 1182(a) (App. 53a);

c. 8 U.S.C. § 1182(c) (1996) (repealed Apr. 1, 1997) (App. 54a); and

d. 8 U.S.C. § 1227(a) (App. 54a-55a).

3. 8 C.F.R. § 1212.3(f)(5) is reproduced at App. 57a.

INTRODUCTION

This case presents an important question of immigration law on which the courts of appeals have split three ways. Prior to 2005, the BIA had repeatedly held that individuals in Petitioner De la Rosa's position could seek discretionary relief from removal under former Section 212(c) of the Immigration and Nationality Act (INA). In Petitioner's own case, government

counsel conceded that Petitioner appeared to be "eligible" for relief under Section 212(c). App. 43a.[1]

In 2005, however, reacting to this Court's reaffirmance of the availability of Section 212(c) relief to certain aliens (*see INS* v. *St. Cyr*, 533 U.S. 289, 294-298 (2001)), the BIA sought to curtail Section 212(c) relief in a way that disqualified numerous previously eligible individuals, including Petitioner. Purporting to interpret a 2004 regulation promulgated to implement *St. Cyr*, the BIA ruled that deportable lawful permanent residents (LPRs) who had *not* traveled abroad after their convictions could only seek discretionary relief if the government charged them under a deportation provision in the INA that used *similar language* to an exclusion provision. *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005). The BIA has acknowledged that *Blake* was a "change in law." *E.g.*, *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb. 22, 2008).

The practical result was suddenly to foreclose Section 212(c) relief for large numbers of LPRs whose at-

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[1] Before April 1, 1997, the INA distinguished between deportation proceedings, applicable to individuals already present in the United States, and exclusion proceedings, applicable to individuals seeking to enter the United States. The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 304, 110 Stat. 3009-548, 3009-589 (1996) (IIRIRA), replaced both with "removal" proceedings and also replaced the term "excludable" with "inadmissible." Nonetheless, the statutory distinction between the two categories of individuals remains. *Compare* 8 U.S.C. § 1182(a) (defining class of inadmissible individuals) *with* 8 U.S.C. § 1227(a) (defining class of deportable individuals). The terms "deportation" and "exclusion" and their variants are used where necessary to the analysis under former Section 212(c).

tachment to the United States was so strong that they had not left the country at all following their conviction. Meanwhile, under an established BIA practice that Congress has long accepted, Section 212(c) relief remains available to similarly situated LPRs who *did* leave the country following their conviction, reentered the United States, and were subsequently placed in removal proceedings. Such individuals have been able to seek Section 212(c) relief "*nunc pro tunc*" for nearly sixty years, as long as their conviction was for an offense that would have rendered them inadmissible upon reentry.

The Second Circuit has correctly rejected the BIA's new position, because it creates an irrational distinction inconsistent with equal protection. The Ninth Circuit, in a sharply divided en banc decision, held that Section 212(c) does not apply to deportable LPRs at all—a position that neither the BIA nor the government has endorsed. The other circuits to address the question, including the Eleventh Circuit in this case, have affirmed the BIA's new approach.

Although Section 212(c) was repealed in 1996, it remains of critical importance to numerous longstanding residents of this country, many of whom—like Petitioner De la Rosa—are rehabilitated, have worked hard for decades, are supported by U.S. citizen family members, have U.S. citizen children, and have made valuable contributions to their communities. The BIA would now deny them the right to apply for relief that this Court reaffirmed in *St. Cyr*, based solely on the arbitrary nature of their travel history. The fact that Mr. De la Rosa did *not* leave the United States after 1995 is no reason to deprive him of an opportunity to seek discretionary relief from removal—relief that he would in all likelihood receive were he allowed to apply for it.

This Court should grant certiorari to review the judgment of the Eleventh Circuit and bring much-needed uniformity to this important question.

STATEMENT

A. Factual Background

Petitioner Jose Erasmo De la Rosa, a native of the Dominican Republic, entered the United States through New York as an LPR in 1989, when he was sixteen years old. App. 2a-3a. He resided continuously in the United States for nearly twenty years. *See* App. 39a. He is married and is the father of three U.S. citizen children. Mr. De la Rosa owns a home in Orlando, Florida and has had a consistent work history. *See id.* His parents and siblings all live in the Orlando area; his father and five of his six siblings are U.S. citizens, and his mother and eldest brother are LPRs. *See id.*

In 1993, when Mr. De la Rosa was twenty years old, he had a relationship with a girlfriend who was fourteen years old. C.A. A.R. 69-70. According to the charge sheet filled out by police, the two had sexual intercourse twice during an approximately eight month relationship. *Id.* The charge sheet does not assert any coercion or violence. In 1995, Mr. De la Rosa pleaded *nolo contendere* to "committing a lewd act upon a child." App. 3a (citing Fla. Stat. § 800.04(3)). Mr. De la Rosa was sentenced to three years of supervised probation and served no jail time. C.A. A.R. 67. In 1998, Mr. De la Rosa applied for naturalization.

On May 17, 2004, the government placed Mr. De la Rosa in removal proceedings, charging that his 1995 conviction qualified as: (1) an aggravated felony relating to "sexual abuse of a minor" under Section 237(a)(2)(A)(iii) of the INA (8 U.S.C.

§ 1227(a)(2)(A)(iii)); and (2) a crime of domestic violence or child abuse under Section 237(a)(2)(E)(i) (8 U.S.C. § 1227(a)(2)(E)(i)). App. 3a.

Mr. De la Rosa was released on bond while his removal proceedings were pending. An immigration judge (IJ) rejected the government's appeal from the bond order, finding that Mr. De la Rosa "has lived in and established positive ties in the Orlando community for many years ... has the support of his family in the United States, a good work history, and it appears that *[he] has been rehabilitated.*" App. 39a (emphasis added).

At an initial hearing on February 15, 2005, Mr. De la Rosa conceded his removability and applied for discretionary relief from removal under Section 212(c). App. 43a. Government counsel stated that Mr. De la Rosa "appears eligible" for Section 212(c) relief. *Id.* The IJ scheduled a merits hearing for March 1, 2007. During the intervening two years, the BIA radically altered its approach to Section 212(c).

B. Availability Of Discretionary Relief Before 2005

Prior to its repeal in 1996, Section 212(c) provided: "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[.]" 8 U.S.C. § 1182(c).

Although the terms of Section 212(c) envision relief only for *excludable* LPRs, it has long been applicable to persons who, like Mr. De la Rosa, are *deportable* due to convictions that would also render them excludable.

1. Section 212(c)'s predecessor was the Seventh Proviso to Section 3 of the Immigration Act of 1917, which permitted a discretionary waiver of exclusion for "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." Pub. L. No. 64-301, 39 Stat. 874, 878. "Although that provision applied literally only to exclusion proceedings, and although the deportation provisions of the statute did not contain a similar provision, the INS relied on [the Seventh Proviso] to grant relief *in deportation proceedings* involving aliens who had departed and returned to this country after the ground for deportation arose." *St. Cyr*, 533 U.S. at 294 (emphasis added). The law treated the deportable LPR as if he had been placed in exclusion proceedings upon reentry, such that relief was available *"nunc pro tunc."* *Matter of L-*, 1 I. & N. Dec. 1, 5-6 (Att'y Gen. 1940).[2]

2. Section 212 of the Immigration and Nationality Act of 1952 "replaced and roughly paralleled § 3 of the 1917 Act." *St. Cyr*, 533 U.S. at 294. Its discretionary relief provision, Section 212(c), closely tracked the Seventh Proviso. The BIA soon ruled that Section 212(c) permitted relief for LPRs in deportation proceedings who had traveled abroad after their conviction and before being placed in deportation proceedings. *Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956). The BIA also made clear that, if Section 212(c) "is exercised to waive a ground of inadmissibility based upon a criminal con-

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[2] The Attorney General determined that Congress did not intend the Seventh Proviso to operate in a "capricious and whimsical" fashion to deny an eligible LPR relief merely because the government had failed to place the LPR in exclusion proceedings upon reentry. *L-*, 1 I. & N. Dec. at 5.

viction, a deportation proceeding cannot thereafter be properly instituted based upon the same criminal conviction." *Id.* at 275.

The BIA initially refused to permit deportable LPRs who had *not* traveled abroad after their conviction to seek Section 212(c) relief. *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 697-698 (BIA 1971). In 1976, the Second Circuit rejected that approach, ruling that LPRs who had traveled abroad and those who had not were "in like circumstances, but for irrelevant and fortuitous factors," and therefore equal protection required that they be "treated in a like manner." *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). The Second Circuit noted that the government had proffered no reason to distinguish between LPRs based on a "failure to travel abroad following ... conviction" and concluded that "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return[.]" *Id.* The BIA and all of the courts of appeals followed *Francis*.[3]

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[3] *See St. Cyr*, 533 U.S. at 295; *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *see also Anwo* v. *INS*, 607 F.2d 435, 436 n.3 (D.C. Cir. 1979) (per curiam); *Lozada* v. *INS*, 857 F.2d 10, 11 n.1 (1st Cir. 1988); *Katsis* v. *INS*, 997 F.2d 1067, 1070 (3d Cir. 1993); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 248 n.1 (4th Cir. 1981); *Carrasco-Favela* v. *INS*, 563 F.2d 1220, 1221 n.3 (5th Cir. 1977) (per curiam); *Rodriguez-Reyes* v. *INS*, 1993 WL 8150, at *2 (6th Cir. Jan. 15, 1993) (unpublished); *Variamparambil* v. *INS*, 831 F.2d 1362, 1364 n.1 (7th Cir. 1987); *Varela-Blanco* v. *INS*, 18 F.3d 584, 586 (8th Cir. 1994) (per curiam); *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981), *overruled*, *Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam); *Vissian* v. *INS*, 548 F.2d 325, 328 n.2 & n.3 (10th Cir. 1977); *Yeung* v. *INS*, 76 F.3d

Consequently, for nearly twenty years before Mr. De la Rosa pled guilty, Section 212(c) relief was available to deportable LPRs who *could have* sought relief *nunc pro tunc* had they left the United States and returned, regardless of whether they had actually done so. *See, e.g., Cabasug* v. *INS*, 847 F.2d 1321, 1327 (9th Cir. 1988) (Wallace, J., concurring) (explaining that it would violate equal protection "to distinguish between *aliens who had committed the same crime* on the basis of whether they traveled abroad recently" (emphasis added)).

Although *Francis* made Section 212(c) relief available to many deportable LPRs, it did not apply to LPRs who were deportable for convictions that *did not* make them inadmissible. Persons in that situation would not have been eligible for Section 212(c) relief *nunc pro tunc* even if they *had* traveled abroad, and there was accordingly no irrational distinction in denying relief in such cases. *See, e.g., Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 574-575 (BIA 1996) (stating that Section 212(c) relief was not available "to an alien in deportation proceedings when that same alien would not have occasion to seek such relief were he in exclusion proceedings instead").

That limitation came to be known as the "statutory counterpart" rule: Section 212(c) relief was available in removal proceedings if the LPR was deportable for a conviction that fell under a "counterpart" exclusion

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337, 340 n.4 (11th Cir. 1995); *accord Tapia-Acuna* v. *INS*, 449 U.S. 945 (1980) (vacating and remanding in light of Solicitor General's change of position); *Abebe*, 554 F.3d at 1214-1215 (Thomas, J., dissenting) (noting government's concession in *Tapia-Acuna* that *Francis* was correct).

provision. Because most crimes that are grounds for deportation are also grounds for exclusion, the statutory counterpart rule was satisfied by all but a limited group of LPRs—generally, only those deportable for certain firearms convictions[4] and entry without inspection.[5] The Attorney General stated as much in 1991, when he identified only "two grounds for deportation [that] have no analogue in the grounds for exclusion," namely entry without inspection and firearms offenses. *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991); *see also* Aleinikoff, Martin, & Motomura, *Immigration: Process & Policy* 703-704 (3d ed. 1995) ("The two most significant deportation grounds without comparable exclusion grounds are entry without inspection and firearms violations.").

3. In 1996, Congress repealed Section 212(c). Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-548, 3009-597 (1996) (IIRIRA). In 2001, this Court held that the repeal was prospective only and that LPRs who were deportable on account of convictions obtained through guilty pleas prior to April 1, 1997 (IIRIRA's

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[4] *See, e.g., Drax* v. *Reno*, 338 F.3d 98, 101, 108-109 (2d Cir. 2003); *Cato* v. *INS*, 84 F.3d 597, 600 (2d Cir. 1996); *Gjonaj* v. *INS*, 47 F.3d 824, 825, 827 (6th Cir. 1995); *Campos* v. *INS*, 961 F.2d 309, 311-314 (1st Cir. 1992); *Matter of Esposito*, 21 I. & N. Dec. 1, 9-10 (BIA 1995); *Matter of Montenegro*, 20 I. & N. Dec. 603, 605-606 (BIA 1992); *Matter of Granados*, 16 I. & N. Dec. 726, 728-729 (BIA 1979).

[5] *See, e.g., Farquharson* v. *U.S. Attorney General*, 246 F.3d 1317, 1325 (11th Cir. 2001); *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 948, 952 (7th Cir. 1993); *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 281, 286-287 (Att'y Gen. 1991).

effective date) could still seek Section 212(c) relief. *See St. Cyr*, 533 U.S. at 326.

In 2004, the Department of Justice (DOJ) promulgated a regulation implementing *St. Cyr* and setting out the criteria for Section 212(c) relief. The regulation included a statutory counterpart requirement. 8 C.F.R. § 1212.3(f)(5) ("An application for relief under former section 212(c) of the Act shall be denied if ... [t]he alien is deportable ... on a ground which does not have a statutory counterpart in section 212 of the Act.").

4. Up to and including 2004, the BIA repeatedly held that persons deportable for certain "aggravated felonies" (*see* 8 U.S.C. § 1227(a)(2)(A)(iii)) satisfied the "statutory counterpart" requirement, generally because the crime of conviction was also a "crime involving moral turpitude" that would render the LPR inadmissible under Section 212(a)(2)(A)(i). Although the provisions governing inadmissibility did not list aggravated felonies as a basis for exclusion, the BIA held that a Section 212(c) waiver was "not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, 'convicted of an aggravated felony.' " *Matter of Meza*, 20 I. & N. Dec. 257, 259 (BIA 1991). The BIA accordingly ruled that LPRs could seek waivers of deportation for aggravated felony convictions, including "crimes of violence" under 8 U.S.C. § 1101(a)(43)(F)[6]

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[6] *See, e.g., Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-591 (BIA 1992) (noting that an LPR convicted of attempted murder "is not barred from applying for section 212(c) relief"); *Matter of A-A-*, 20 I. & N. Dec. 492, 500-501 (BIA 1992) (concluding that an LPR convicted of murder was not disqualified from seeking Section 212(c) relief on that basis); *Matter of S-Lei*, No. A38139424 (BIA May 27, 2004) (App. 79a-80a) (affirming grant of

and "sexual abuse of a minor" under § 1101(a)(43)(A).[7] The courts of appeals likewise noted the availability of Section 212(c) relief to persons convicted of such crimes. *See e.g.*, *Hem* v. *Maurer*, 458 F.3d 1185, 1187-1189 (10th Cir. 2006) (crime of violence); *De Araujo* v.

Section 212(c) relief to an LPR convicted of attempted robbery, a crime of violence); *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003) (affirming a Section 212(c) waiver of a conviction for voluntary manslaughter, a crime of violence); *see also Matter of Caro-Lozano*, 2004 WL 1398661 (BIA Apr. 22, 2004) (reaching the merits of a Section 212(c) application in a crime of violence case); *Matter of Hussein*, 2004 WL 1059601 (BIA Mar. 15, 2004) (remanding for consideration of Section 212(c) relief where conviction was a crime of violence); *Matter of Martinez*, 2004 WL 1167082 (BIA Feb. 18, 2004) ("[I]t does appear that Section 212(c) could waive the burglary offense[.]"); *Matter of Loney*, 2004 WL 1167256 (BIA Feb. 10, 2004) (an LPR convicted of a crime of violence was "not precluded" from seeking Section 212(c) relief where the crime was also a crime involving moral turpitude); *Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003) (recognizing that a petitioner deportable for extortion, a crime of violence, would be "entitled" to seek Section 212(c) relief); *Matter of Munoz*, No. A35279774, 28 Immig. Rptr. B1-1 (BIA Aug. 7, 2003) (App. 59a-69a) (remanding for consideration of Section 212(c) relief where the crime of violence was also a crime involving moral turpitude); *Matter of Rowe*, No. 37749964 (BIA May 9, 2003) (App. 75a-78a) (rejecting government's argument that a crime of violence was not waivable).

[7] *See, e.g.*, *Hussein*, 2004 WL 1059601 (an LPR convicted of indecency with a child was eligible for Section 212(c) relief because he could have been excluded due to a crime involving moral turpitude); *Matter of Rodriguez-Symonds*, 2004 WL 880246 (BIA Mar. 9, 2004) (remanding for consideration of whether an LPR convicted of a lewd act upon child was eligible for Section 212(c) relief because the conviction was also a crime involving moral turpitude); *Matter of Ashley*, 2003 WL 23521830 (BIA Nov. 4, 2003) (noting apparent Section 212(c) eligibility for an LPR convicted of a sexual offense against a child).

Gonzales, 457 F.3d 146, 154-155 (1st Cir. 2006) (crime of violence); *United States* v. *Ortega-Ascanio*, 376 F.3d 879, 886-887 (9th Cir. 2004) (sexual battery); *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1051 (9th Cir. 2004) (burglary). This Court also recognized the importance of Section 212(c) in aggravated felony "crime of violence" cases. *St. Cyr*, 533 U.S. at 295-296 & n.4.[8]

C. The BIA Changes Course In 2005

On April 6, 2005—fewer than two months after the government conceded that Mr. De la Rosa appeared eligible for Section 212(c) relief—the BIA, purporting to interpret the 2004 DOJ regulation, abruptly changed the rules. In *Blake*, the BIA decided that an LPR who was deportable for a "sexual abuse of a minor" aggravated felony was categorically ineligible for Section 212(c) relief, regardless of whether the crime would provide a basis for inadmissibility as a crime involving moral turpitude. 23 I. & N. Dec. at 727-728. Without addressing its numerous decisions upholding discretionary waivers in similar circumstances, the BIA held that the "statutory counterpart" requirement could only be satisfied if the LPR was deportable under a

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[8] Although Congress imposed limits on Section 212(c) relief prior to its 1996 repeal, Congress never sought to limit it to excludable LPRs only. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052 (providing that LPRs convicted of aggravated felonies could seek Section 212(c) relief only if they did not serve a term of imprisonment of five years or more); 136 Cong. Rec. S6586, S6604 (daily ed. May 18, 1990) (statement of Sen. Dole) ("Section 212(c) provides relief from exclusion, and by court decision from deportation[.] This discretionary relief is obtained by numerous excludable and deportable aliens[.]").

subsection of INA § 237 that was *phrased* similarly to an inadmissibility subsection in INA § 212(a). *Id.* at 728. Purporting to rest its conclusion on decisions of the Second Circuit, the BIA barred the LPR in *Blake* from applying for relief because the words "sexual abuse of a minor" do not appear in any inadmissibility provision. *Id.* at 728-729. The BIA did not consider whether Blake's conviction would render him excludable and therefore eligible to seek Section 212(c) relief *nunc pro tunc* had he left the country and returned. Shortly thereafter, the BIA applied the same reasoning to "crime of violence" aggravated felonies. *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (BIA 2005).

The BIA acknowledged that *Blake* was a retroactive change in its Section 212(c) jurisprudence—a fact that was confirmed by the BIA's later reversal of decisions to grant relief under the BIA's prior (correct) approach to Section 212(c). In one case, the BIA itself had affirmed an IJ's decision granting relief to an LPR convicted of a "sexual abuse of a minor" crime, but then vacated its decision on the government's motion, referring to *Blake* as "a *change in law* that appears to preclude a grant of 212(c) relief." *Cardona*, 2005 WL 3709244; *see also Matter of Gomez-Perez*, 2006 WL 901334 (BIA Mar. 1, 2006) (vacating IJ's decision to grant Section 212(c) waiver because LPR is "no longer eligible for relief"), *appeal docketed*, No. 07-72569 (9th Cir. June 27, 2007); *Matter of Rangel-Zuazo*, No. A90640428 (BIA May 25, 2005) (App. 71a-73a) (reversing IJ's decision to grant relief because "intervening precedent renders the respondent statutorily ineligible for section 212(c) relief"), *appeal docketed*, No. 07-72316 (9th Cir. June 11, 2007); *Matter of Banuelos-Delena*, 2006 WL 901335 (BIA Mar. 2, 2006) (reversing IJ's de-

cision to grant Section 212(c) waiver based on "intervening Board precedent").

D. The Circuit Split

The courts of appeals have divided three ways in response to *Blake*. Although the BIA claimed to base *Blake* on Second Circuit precedent, that court reversed the BIA in *Blake* itself. *Blake* v. *Carbone*, 489 F.3d 88, 103 (2d Cir. 2007). In 2008, the Second Circuit heard 28% of the total number of appeals from the BIA. *See* Judicial Business of the United States Courts: 2008 Annual Report of the Director, Table B-3 (2009), *at* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf (2008 Annual Report). Eight other courts of appeals, which together heard 25% of all appeals from the BIA (*id.*), have affirmed the *Blake* rule.[9] And the Ninth Circuit, which heard 45% of the appeals from the BIA (*id.*), recently discarded *Francis* altogether, ruling that Section 212(c) relief is unavailable to deportable LPRs—a position neither the government nor the BIA advocated. *Abebe* v. *Mukasey*, 554 F.3d 1203, 1207 (9th Cir.) (en banc) (per curiam), *reh'g and full court reh'g en banc denied*, 577 F.3d 1113 (9th Cir. 2009).[10]

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[9] *Kim* v. *Gonzales*, 468 F.3d 58, 63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 167-168 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 368-369 (5th Cir. 2007); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009), *reh'g and reh'g en banc denied* (May 29, 2009); *Valere* v. *Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007); *Vue* v. *Gonzales*, 496 F.3d 858, 862-863 (8th Cir. 2007); *Falaniko* v. *Mukasey*, 272 Fed. Appx. 742, 746-748 (10th Cir. 2008) (unpublished); App. 25a-28a.

[10] The Ninth Circuit in *Abebe* suggested that LPRs could still seek relief under the 2004 regulation (*see* 554 F.3d at 1207), and

E. Proceedings Below

In 2007, at the merits hearing on Mr. De la Rosa's Section 212(c) application, the government argued that Mr. De la Rosa was categorically ineligible for Section 212(c) relief based on the BIA's *Blake* decision. App. 44a. The IJ agreed and ordered Petitioner removed. App. 36a. The BIA affirmed. App. 31a.

Mr. De la Rosa sought review in the Eleventh Circuit and moved to stay his order of removal; the government cross-moved for summary affirmance. The court of appeals found that no "binding precedent" directly resolved the case and denied the government's motion for summary affirmance, but it also refused to stay Mr. De la Rosa's removal order. App. 41a-42a. The government removed Mr. De la Rosa to the Dominican Republic on or about October 16, 2008.[11]

The court of appeals summarized Mr. De la Rosa's arguments on the merits as follows: (1) the BIA's decision violated his due process right to equal protection of the laws; and (2) the BIA's decision in *Blake* departed from prior agency and federal court precedent, which permitted LPRs convicted of aggravated felonies that are crimes involving moral turpitude to apply for Section 212(c) relief. App. 19a-22a. The government did not deny that Mr. De la Rosa's conviction was for a crime involving moral turpitude that would provide a basis for inadmissibility. Resp. C.A. Br. 12.

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the BIA has agreed (*Matter of Moreno-Escobosa*, 25 I. & N. Dec. 114, 116-117 (BIA 2009)).

[11] Mr. De la Rosa's removal does not moot his Section 212(c) request. *See, e.g., Spina* v. *DHS*, 470 F.3d 116, 124-125 (2d Cir. 2006); *Moore* v. *Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001).

The Eleventh Circuit denied Mr. De la Rosa's petition for review. The court recognized that *Blake* was a "watershed moment in § 212(c) jurisprudence." App. 12a. Nonetheless, the court stated that *Blake* "did not represent a departure from prior BIA practice" (App. 19a) and concluded that "De la Rosa's implicit equal protection argument fails" (App. 28a). The panel acknowledged the "three-way circuit split" on the issue. App. 17a.

REASONS FOR GRANTING THE PETITION

Section 212(c) continues to be an important source of relief for numerous legal permanent residents. *See St. Cyr*, 533 U.S. at 296 n.6. In the four and one-half years since *Blake*, the issue has arisen in over 120 cases and produced published opinions in almost every circuit. App. 45a-52a (listing representative circuit and BIA cases in which *Blake* or its progeny have been addressed). Ten circuits, which overall hear 98% of the petitions for review from the BIA (*see* 2008 Annual Report at Table B-3) are irreconcilably split three ways on the proper application of Section 212(c) to LPRs deportable as a result of an aggravated felony conviction. This Court's guidance is urgently needed to restore a uniform application of Section 212(c).

The BIA's novel and unprecedented reinterpretation of the statutory counterpart test in *Blake*—ostensibly based on a 2004 regulation designed to implement this Court's ruling in *St. Cyr*—was in fact an evident effort to undermine *St. Cyr* and accomplish through agency and judicial decision what Congress had *not* done through legislation. The BIA's new approach, ratified by the Eleventh Circuit, creates an arbitrary and capricious distinction that is inconsistent with the settled interpretation of Section 212(c) and

resurrects the unconstitutional practice of discriminating between similarly situated LPRs on the irrelevant basis of travel history. It also improperly gives retroactive effect to an (erroneous) interpretation of the 2004 regulation. The Court should grant certiorari and reverse the judgment of the Eleventh Circuit.

I. THE THREE-WAY CIRCUIT SPLIT ON THE APPLICATION OF SECTION 212(c) TO DEPORTABLE LEGAL PERMANENT RESIDENTS IS DEEPLY ENTRENCHED AND THE ISSUE HAS FULLY PERCOLATED

Since the BIA's 2005 decision in *Blake*, ten courts of appeals have considered whether and under what circumstances an LPR who is deportable on the basis of an "aggravated felony" conviction is eligible for Section 212(c) relief. In answering this question, the courts of appeals have split three ways. App. 17a (acknowledging the "three-way circuit split").

First, the Second Circuit has recognized that the BIA's decision in *Blake* revived the equal protection problem—first identified in *Francis*—of giving *worse* treatment to LPRs who had *not* departed the United States. *Blake* v. *Carbone*, 489 F.3d at 102-104. To cure the BIA's constitutional violation, the Second Circuit restored the law to its pre-2005 posture: Section 212(c) relief is available if the "particular offense" that rendered the LPR deportable "would render a similarly situated [LPR] excludable." *Id.* at 103. As the Second Circuit observed, "what makes one alien similarly situated to another is his or her act or offense, which is captured in the INA as either a ground of deportation or exclusion." *Id.* at 104 (explaining that equal protection principles "require[] [the court] to examine the circumstances of the deportable alien, rather than the language Congress used to classify his or her status").

The Second Circuit left to the BIA in the first instance the task of determining whether a particular aggravated felony would render an LPR excludable. *Id.*[12]

Second, eight other courts of appeals, including the Eleventh Circuit below, affirmed the BIA's formulaic approach in *Blake*. Instead of determining whether the underlying offense would also make the deportable LPR inadmissible, those circuits compare only the words used in the particular deportation provision charged by the government to the words used in the inadmissibility provisions of Section 212(a). *See, e.g.*, *Caroleo* v. *Gonzales*, 476 F.3d 158, 164-165 (3d Cir. 2007). Under this "rather mechanical reading of the law" (*Kim* v. *Gonzales*, 468 F.3d 58, 63 (1st Cir. 2006)), Section 212(c) relief is only available if one of the inadmissibility provisions uses language that is substantially identical to the deportation provision charged. *E.g.*, App. 24a. Because the inadmissibility provisions do not use the words "sexual abuse of a minor" or "crime of violence," LPRs who are charged as deportable under those provisions are held categorically ineligible for a waiver of removal, even if the underlying criminal conviction would render them inadmissible for having committed a "crime involving moral turpitude." *See, e.g.*, *Caroleo*, 476 F.3d at 164-165.

However, if LPRs with such convictions leave the country, they *can* seek Section 212(c) relief—either

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[12] Judges in other circuits have praised the Second Circuit's reasoning. *See, e.g.*, *Abebe*, 554 F.3d at 1217-1219 (Thomas, J., joined by Pregerson, J., dissenting); *Vue*, 496 F.3d at 863 (Bye, J., concurring); *Abebe* v. *Gonzales*, 493 F.3d 1092, 1108-1109 (9th Cir. 2007) (Berzon, J., concurring), *vacated*, *Abebe* v. *Mukasey*, 514 F.3d 909 (9th Cir. 2008).

upon return if they are charged as inadmissible or *nunc pro tunc* if they are charged as deportable—as long as their conviction is for a crime that would make them inadmissible, such as a crime involving moral turpitude. *See G-A-*, 7 I. & N. Dec. at 276; *see also Lovan* v. *Holder*, 574 F.3d 990, 996 & n.5 (8th Cir. 2009) (noting that under the *nunc pro tunc* analysis, "the focus is on whether the [LPR] when he returned from a trip abroad was in fact excludable *for any reason*, including prior conviction of a crime involving moral turpitude").[13]

Third, the Ninth Circuit (in a fractured en banc decision) recently overruled decades of agency decisions and its own precedent to hold that Section 212(c) does not apply to deportable LPRs at all. *Abebe*, 554 F.3d at 1207. Under that view, Section 212(c) relief should not even be available as a *nunc pro tunc* correction for deportable LPRs who traveled abroad between their convictions and the initiation of deportation proceedings. As the concurring and dissenting opinions observed, the Ninth Circuit majority failed to observe *stare decisis*, ignored consistent agency practice applying Section 212(c) relief to deportable LPRs, and disregarded Congress's acceptance of that settled construction of the statute. *See id.* at 1209-1211 (Clifton, J., concurring); *id.* at 1213-1217 (Thomas, J., dissenting). Seven judges dissented from the Ninth Circuit's denial of

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[13] Although eight circuits have adopted *Blake*, their number is misleading in terms of the significance of the present three-way circuit split. In 2008, those circuits heard only 25% of the total number of petitions for review from the BIA, whereas the Second Circuit alone heard 28%. *See* 2008 Annual Report at Table B-3.

Abebe's request for full court rehearing en banc. *Abebe* v. *Holder*, 577 F.3d 1113 (9th Cir. 2009).[14]

II. THE ELEVENTH CIRCUIT AND THE BIA INCORRECTLY AND UNCONSTITUTIONALLY RESTRICTED THE SCOPE OF SECTION 212(c) RELIEF

The Eleventh Circuit was correct in one respect: the BIA's *Blake* decision "proved to be a watershed moment in [Section] 212(c) jurisprudence." App. 12a. Before 2005, the BIA consistently held that an LPR 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 INA § 212(a)(2)(A)(i)). *See supra* nn.6-7.

In *Blake*, however, the BIA sought to change the law retroactively by eliminating Section 212(c) relief for LPRs who were charged under a deportation provision that used language that was not similar to the language of an inadmissibility provision. By doing so, the BIA (and the Eleventh Circuit below) categorically foreclosed large categories of previously eligible individuals from seeking Section 212(c) relief, even though relief *is* available *nunc pro tunc* to otherwise similarly situated persons who have left the country and reentered before

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[14] The Fourth and D.C. Circuits have yet to address the question presented, but those courts hear only a tiny fraction of the total number of petitions for review from the BIA. Between September 30, 2005 and September 29, 2008, the Fourth Circuit heard less than 2.7% of all BIA appeals, and the D.C. Circuit heard none at all. *See* 2008 Annual Report at Table B-3.

the removal proceeding commenced. The decision below should be reversed.

1. The BIA's *Blake* decision creates an irrational distinction between LPRs who have traveled abroad and LPRs who have not, contrary to Section 212(c) as it has consistently been interpreted and contrary to equal protection.

Congress has long accepted the BIA's application of Section 212(c) to deportable LPRs who traveled abroad after their convictions and before the initiation of proceedings. When Congress enacted Section 212(c) in 1952, the BIA had interpreted its predecessor—the Seventh Proviso to Section 3 of the Immigration Act of 1917—to provide relief to an LPR in deportation proceedings who had previously traveled abroad, just as it would have applied if he had been placed in exclusion proceedings at the border. *L-*, 1 I. & N. Dec. at 5-6; *see also St. Cyr*, 533 U.S. at 294 (noting that the INS "relied on [the Seventh Proviso] to grant relief *in deportation proceedings* involving aliens who had departed and returned to this country after the ground for deportation arose" (emphasis added)).

Congress is presumed to have been aware of the BIA's interpretation of the discretionary waiver as applicable to deportable LPRs. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). As the BIA explained shortly after Section 212(c)'s enactment, Congress conducted a "comprehensive study" of the Seventh Proviso before enacting Section 212, "[y]et there is nothing to indicate that Congress wished to cut off this unique relief in deportation proceedings." *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1955). Congress thus "effectively ratified" the BIA's practice of granting discretionary relief from deportation as well as from exclusion. *FDA* v.

Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000); *see also Boeing Co.* v. *United States*, 537 U.S. 437, 456-457 (2003) (Congress's failure to override a seven-year-old regulation when amending relevant statutory provisions "serves as persuasive evidence that Congress regarded that regulation as a correct implementation of its intent").[15]

Following the Second Circuit's 1976 decision in *Francis*, the BIA and all of the courts of appeals agreed that deportable LPRs who had *not* traveled abroad were constitutionally entitled to the same treatment under Section 212(c) as LPRs who had. *Francis*, 532 F.2d at 273 (ruling that LPRs who had not traveled abroad were "in like circumstances, but for irrelevant and fortuitous factors," to LPRs who had and therefore should be "treated in a like manner"); *see supra* n.3. The BIA implemented *Francis* using the "statutory counterpart" test, which meant that Section 212(c) relief was available to LPRs who were deportable for a conviction that fell under a "counterpart" *exclusion* provision.

Section 212(c) relief was widely available to LPRs charged with being deportable on the basis of aggravated felony convictions, including convictions for crimes involving "sexual abuse of a minor," because most such convictions are also grounds for exclusion—

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[15] The Ninth Circuit, which recently held Section 212(c) inapplicable to deportable LPRs (*Abebe*, 554 F.3d at 1207), ignored congressional acquiescence in the BIA's interpretation of Section 212(c) as applicable to deportable LPRs. Indeed, under the Ninth Circuit's rationale, Mr. St. Cyr would have been ineligible for Section 212(c) relief because he was charged as deportable. 533 U.S. at 293.

"crimes involving moral turpitude" under INA § 212(a)(2)(A)(i). The BIA and numerous court of appeals decisions recognized the proper application of Section 212(c) relief in such aggravated felony cases. *See supra* pp. 11-13, nn.6-7. Although Congress amended the INA after *Francis*, it has not cast doubt on that consistent interpretation of Section 212(c). *See supra* n.8.

After the 1996 repeal of Section 212(c), the BIA attempted to apply the repeal retroactively to LPRs who had pled guilty before the repeal was enacted. *E.g.*, *St. Cyr* v. *INS*, 229 F.3d 406, 409 (2d Cir. 2000) (observing that the BIA denied St. Cyr's application for Section 212(c) relief "specifically" because IIRIRA repealed that provision), *aff'd*, 533 U.S. 289 (2001). After this Court reversed that practice in *St. Cyr*, the BIA tried another tack, claiming for the first time that eligibility "turns on whether Congress has employed *similar language* to describe substantially equivalent categories of offenses." *Blake*, 23 I. & N. Dec. at 728 (emphasis added). While acknowledging that "there may be considerable overlap" between deportation provisions like "sexual abuse of a minor" offenses and inadmissibility provisions like "crime[] involving moral turpitude," the BIA claimed that the "two categories of offenses [were] not statutory counterparts." *Id.*

The BIA has admitted that this was "a change in law." *Cardona*, 2005 WL 3709244. It was also contrary to the settled interpretation of Section 212(c) acknowledged in the BIA's own decisions. The BIA never attempted to explain why differences in the wording of deportation and inadmissibility provisions—most of which were independently amended at different times—should control whether an LPR is eligible for Section 212(c) relief. *See Blake* v. *Carbone*, 489 F.3d at

102 ("Congress did not employ similar terms when writing the grounds of exclusion and grounds of deportation because it had no need to, making it an exercise in futility to search for similar language to gauge whether equal protection is being afforded."). Indeed, the BIA held decades ago that a waiver of *exclusion* based on a particular criminal conviction also waived any basis for *deportation* based on "the same criminal conviction," without regard to the language of the statutory subsections. *G-A-*, 7 I. & N. Dec. at 275; *see Abebe*, 493 F.3d at 1109 (Berzon, J., concurring).

The BIA's new approach, like that of the Eleventh Circuit below, draws an arbitrary and irrational line based on recent travel abroad. LPRs who pled guilty to a pre-1997 offense that qualifies as both a "sexual abuse of a minor" aggravated felony and a "crime involving moral turpitude" may still seek Section 212(c) relief if they depart the country and return, by invoking the *nunc pro tunc* procedure. But under *Blake*, identically-situated LPRs who did *not* depart the country are categorically ineligible for relief. Making Section 212(c) relief turn on whether a person has or has not left the country, in the face of consistent and contrary judicial and agency decisions before 2005, is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). That is particularly the case given that Section 212(c) is designed to *favor* those LPRs who have strong ties to the United States. *See Francis*, 532 F.2d at 273; *see also Rosario* v. *INS*, 962 F.2d 220, 225 (2d Cir. 1992) (noting the government's position that Section 212(c)'s purpose is to provide relief to "aliens who have developed such strong ties to this country that exclusion or deportation

would be unjustly harsh" (internal quotation marks omitted)).[16]

The BIA's new approach is also inconsistent with the guarantee of equal protection in the Due Process Clause of the Fifth Amendment, which protects LPRs as well as citizens. *Mathews* v. *Diaz*, 426 U.S. 67, 77-78 (1976); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896). The BIA may not make discretionary waivers of deportation available only to a subcategory of similarly situated deportable LPRs on the basis of an irrational classification, such as recent travel abroad. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation ... will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886) ("Though the law itself be fair on its face ... if it is applied and administered by public authority ... so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights,

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[16] *Blake* is also arbitrary and capricious in that it gives the government an exclusive right to determine whether Section 212(c) relief will be available in many cases. Because a criminal conviction can often render an individual deportable under more than one provision—*e.g.*, assault may be both a "crime involving moral turpitude" (waivable under *Blake*) and a "crime of violence" (not waivable under *Blake* and *Brieva-Perez*)—the BIA's new rule places Section 212(c) eligibility entirely under the government's control. In applying *Blake*, courts of appeals have conceded that certain LPRs would be eligible for a Section 212(c) waiver if the government had chosen to assert a criminal conviction as a crime involving moral turpitude rather than an aggravated felony. *See Dalombo Fontes* v. *Gonzales*, 483 F.3d 115, 122 (1st Cir. 2007); *see also Kim*, 468 F.3d at 62-63.

the denial of equal justice is still within the prohibition of the constitution.").

Mr. De la Rosa's conviction is indisputably for a crime involving moral turpitude (*see Ramsey* v. *INS*, 55 F.3d 580, 582 (11th Cir. 1995)), which is a ground of inadmissibility that would have allowed him to seek Section 212(c) relief *nunc pro tunc* had he left the country. Neither the government nor the decision below suggested otherwise. Yet the Eleventh Circuit offered no rational reason for affording *worse* treatment to an LPR like Mr. De la Rosa who *never* left the country after his arrival than to LPRs who did. *See Mathews*, 426 U.S. at 83 (noting that it is "of greatest importance" in the equal protection analysis that "those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not").

The Second Circuit's approach, by contrast, is faithful to the BIA's longstanding and accepted interpretation of Section 212(c), and it avoids the irrational distinction inherent in the Eleventh Circuit's decision. As the Second Circuit held, an LPR should be eligible to apply for Section 212(c) relief "if his or her particular aggravated felony offense could form the basis of exclusion under § 212(a) as a crime of moral turpitude." *Blake* v. *Carbone*, 489 F.3d at 104.

That approach, which the BIA and the courts followed for nearly thirty years under *Francis*, does not create any distinction based on departure from the United States. Rather, it simply continues the long-accepted rule that an LPR who would be entitled to seek relief *nunc pro tunc* from deportation, had he departed, remains eligible if he did not depart. *See, e.g.*, *Matter of Fuentes-Campos*, 21 I. & N. Dec. 905, 913

(BIA 1997) ("In *Francis* ... [the Second Circuit] concluded that the Board violated the constitutional requirement of equal protection when it permitted one alien in deportation proceedings to apply for a waiver but denied permission to another alien in deportation proceedings, based solely on the fact that one had departed and returned prior to the deportation proceedings while the other had not.").[17]

The Second Circuit accordingly directed the BIA to determine whether the LPR's conviction was a "crime involving moral turpitude" that would have been waivable *nunc pro tunc* had he departed the United States and returned, and, if it was, to consider the Section 212(c) application on the merits. 489 F.3d at 105. The BIA's failure to do likewise in Mr. De la Rosa's case was arbitrary and capricious, inconsistent with the settled interpretation of Section 212(c), and unconstitutional.[18]

2. The BIA's *Blake* decision was also an improper retroactive application of an erroneous interpretation of the 2004 DOJ regulation, which sought to implement *St. Cyr*, not to confine it. The regulation provides that Section 212(c) relief "shall be denied if ... [t]he alien is deportable under former section 241 of the Act or re-

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[17] The Ninth Circuit performed the wrong comparison: it compared deportable LPRs with inadmissible LPRs. *Abebe*, 554 F.3d at 1206. The correct comparison is between two groups of *deportable* LPRs: one group that has left the country and reentered, and one that has not. *Blake* v. *Carbone*, 489 F.3d at 95; *Francis*, 532 F.2d at 273.

[18] On remand from the Second Circuit, an IJ found Mr. Blake eligible for a Section 212(c) waiver and granted relief. The government did not appeal.

movable under [S]ection 237 of the Act on a ground which does not have a statutory counterpart in [S]ection 212 of the Act." 8 C.F.R. § 1212.3(f)(5). On its face, this regulation is consistent with the BIA's prior rulings that an LPR deportable for an aggravated felony conviction was eligible for Section 212(c) relief if the *conviction* would also fall under a counterpart inadmissibility provision.

In *Blake*, the BIA purported to interpret the regulation differently, not based on anything in the regulation itself, but on an anonymous commenter's opinion, cited in the preamble to the final regulation, that Section 212(c) relief should be denied " 'if there is no comparable ground of inadmissibility for the specific *category* of aggravated felony charged. ... [F]or example, the rule should not apply to aggravated felons charged with deportability under specific types or categories of aggravated felonies such as "*Murder, Rape, or Sexual Abuse of a Minor*" or "*Crime of Violence*" aggravated felonies.' " 23 I. & N. Dec. at 726 (quoting 69 Fed. Reg. 57,826, 57,831 (Sept. 28, 2004)).

The commenter misinterpreted the statutory counterpart test by focusing on the category of aggravated felony charged rather than the underlying offense. The commenter did not identify a single decision forbidding an LPR with a conviction in any of the identified aggravated felony categories from seeking Section 212(c) relief. As noted above, the statutory counterpart rule affected LPRs with convictions for firearms offenses or entry without inspection. *See supra* p. 10, n.4 & n.5; *Hernandez-Casillas*, 20 I. & N. Dec. at 282 n.4. And contrary to the commenter's assertion, Section 212(c) can be used to waive deportation for crimes such as murder and rape, although such serious offenses require a heightened showing in order to warrant a fa-

vorable exercise of discretion. *See* 6 Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure* § 74.04[1][a], [2][g] (2007).[19]

But even if the commenter's interpretation were correct and constitutional (and it is neither), the BIA cannot use an adjudicatory proceeding to apply a regulation retroactively, when no statutory or regulatory language envisions retroactive application. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208-209 (1988) ("[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result. ... Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.").

III. This Case Presents An Issue Of Exceptional And Continuing Importance To Numerous Legal Permanent Residents

The LPRs most affected by the BIA's decision in *Blake* include many who have strong claims for a discretionary waiver of removal. As this Court has observed, Section 212(c) relief is granted based on criteria including "the seriousness of the offense, evidence of either rehabilitation or recidivism, the duration of the alien's residence, the impact of deportation on the fam-

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[19] The DOJ, in the "supplementary information" accompanying the final regulation, agreed that " 'an alien who is deportable or removable on a ground that does not have a corresponding ground of exclusion or inadmissibility is ineligible for section 212(c) relief.' " *Blake*, 23 I. & N. Dec. at 726-727 (quoting 69 Fed. Reg. 57,831). It did not, however, take any position on the commenter's enumeration of the various offenses that the commenter believed lacked a statutory counterpart.

ily, the number of citizens in the family, and the character of any service in the Armed Forces." *St. Cyr*, 533 U.S. at 296 n.5 (citing *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978)). Mr. De la Rosa's offense, which took place when he was twenty (he is now 36), did not involve coercion or violence. An IJ found him to be "rehabilitated." App. 39a. He lived in the United States for nearly twenty years, has three U.S. citizen children aged three, seven, and ten who depend on him, and has a U.S. citizen father and several U.S. citizen siblings, nieces, and nephews. The record is replete with supporting statements and financial information attesting to his strong work ethic and good standing in his community. C.A. A.R. 100-169.

Mr. De la Rosa is not alone. Because deportable "aggravated felony" offenses have been defined broadly and "without regard to how long ago they were committed[,] ... the class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted." *St. Cyr*, 533 U.S. at 295-296 (noting that from 1989 to 1995, "§ 212(c) relief was granted to over 10,000 aliens"). Despite its repeal in 1996, Section 212(c) continues to provide critical relief to numerous LPRs who were convicted of a crime long ago, but are otherwise deserving members of their local United States communities. *See id.* at 296 n.6 (noting increased importance of Section 212(c) relief following 1996 expansion of "aggravated felony" definition to include "more minor crimes which may have been committed many years ago").

Petitioner does not contend that he has a legal *right* to relief; Section 212(c) remains and has always been a discretionary provision. But he does have a right to

have the agency exercise that discretion following an evidentiary hearing on the merits—a hearing that he was entitled to as of February 2005 and was only denied because of the BIA's retroactive "change in law." *Cardona*, 2005 WL 3709244; *see also* App. 43a-44a.

Absent this Court's intervention, numerous deserving legal immigrants will be unlawfully denied relief from removal based only on an accident of geography—the jurisdiction in which their immigration proceedings happened to be held. *See* App. 45a-52a (non-exhaustive list of cases affected by BIA's decision in *Blake*). But for Mr. De la Rosa's and his wife's decision to raise their family in Florida rather than New York, this "rehabilitated" individual would most likely still be working productively and supporting his U.S. citizen children and family.[20]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[20] This Court denied certiorari in *Gonzalez-Mesias* v. *Holder*, 129 S. Ct. 2042 (2009), but at that time the Eleventh Circuit had not addressed the issue (*see* App. 1a (noting that the question presented was "an issue of first impression")), and the Ninth Circuit was still considering the petition for full court rehearing in *Abebe*. The views of those circuits are now known and have only deepened the circuit split, and no further percolation among the circuits should be expected. Moreover, the petition in *Gonzalez-Mesias* may not have fully apprised the Court of the frequency with which the issue arises. App. 45a-52a. We submit that this issue is now fully ripe for this Court's review.

Respectfully submitted.

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