No. 08-1356

IN THE
Supreme Court of the United States

SUNGWOOK KIM,

Petitioner,

v.

ERIC H. HOLDER, JR.

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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September 2009

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Certiorari should be granted to resolve a persistent disagreement among the circuits on an important question of immigration law. As Respondent acknowledges, the courts of appeals are split 4-1 on the question presented. Contrary to the government's assertion, there is no reason to think that the issue will benefit from further "percolation" in the lower courts of appeals, and further delaying review by this Court would frustrate the federal policy favoring uniform application of immigration laws.

1. Respondent acknowledges that the question presented has been addressed by five courts of appeals in published opinions. Op. 8-9 (citing decisions of the Third, Fourth, Sixth, Eighth, and Ninth Circuits). As the government recognizes, the split in the circuits has widened in the relatively short time since the petition for certiorari was filed. *Id.* at 8. In *Stolaj* v. *Holder*, the Sixth Circuit acknowledged the disagreement among the circuits and joined the controversy on the side of the Eighth and other Circuits, recognizing that its decision was contrary to that of the Third Circuit. 2009 U.S. App. LEXIS 18567 at *12 (6th Cir. Aug. 19, 2009). The Sixth Circuit also joined the Fourth and Eighth Circuits, and disagreed with the Third Circuit, in holding that if the statute were ambiguous, it would defer to the Attorney General's interpretation under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 2009 U.S. App. LEXIS 18567 at *13.

The government nevertheless argues that review by this Court would be "premature." Op. 9. The government's arguments in support of this conclusion are unpersuasive.

a. Respondent suggests that the Third Circuit may decide to "revisit[]" the question presented "in response to the decisions of other courts of appeals." Op. 9. Recent developments indicate that this is unlikely to happen. Earlier this year, the Third Circuit reaffirmed its position in *Garcia* v. *Attorney General*, 553 F.3d 724 (3d Cir. 2009). In *Garcia*, the Third Circuit considered the effect of the 1996 amendments to § 1256(a) and held that they do not undermine the court's earlier decision in *Bamidele* v. *INS*, 99 F.3d 557 (3d Cir. 1996). *See Garcia*, 553 F.3d at 728. *Garcia* thus answers the government's contention that because *Bamidele* was decided before the 1996 amendments it is "unclear whether the Third Circuit would reach the same result after those amendments." Brief for the Respondent in Opposition, *Asika* v. *Ashcroft*, No. 04-256 (Dec. 2004). In *Garcia*, moreover, the Third Circuit adhered to its position even though it had the benefit of the Fourth and Ninth Circuit decisions issued since *Bamidele*. In addition, the Third Circuit denied the government's petition for rehearing en banc in *Garcia* by a vote of 10-2. *See* Order Denying Rehearing En Banc, *Garcia* v. *Attorney General*, (3d Cir. Feb. 4, 2009). Having so recently decided to adhere to its position despite the disagreement of other circuits, and having decisively rejected the government's petition for rehearing, it is unlikely

that the Third Circuit will decide to revisit the issue.[1]

b. The government also asserts that "[f]urther percolation is appropriate" to allow other courts of appeals to consider the 1996 amendments to Section 1256(a). Op. 9. But four of the five circuits that have decided the question in published opinions have done so *after* the 1996 amendment to Section 1256(a). *See Stolaj*, 2009 U.S. App. LEXIS 18567; *Kim* v. *Holder*, 560 F.3d 833 (8th Cir. 2009); *Garcia*, 553 F.3d 724 (3d Cir. 2009); *Asika* v. *Ashcroft*, 362 F.3d 264, 270-71 (4th Cir. 2004). The fifth court of appeals—the Ninth Circuit—held in an unpublished opinion that "[t]he 1996 amendment essentially codified our holding in *Monet* v. *Immigration & Naturalization Service*, 791 F.2d 752, 754 (9th Cir. 1986), that the pre-1996 statute did not bar deportation proceedings against an adjusted alien after the statute of limitations expired." *Trinidad-Contreras* v. *Gonzales*, 202 Fed. Appx. 943, 945 (9th Cir. 2006).[2] There is no reason to delay resolution of

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[1] In another case currently pending before this Court, the government has argued that "the mere possibility" that a court of appeals "might in the future decide that it erred . . . is not a sound basis for denying review." Reply Brief for the Petitioner, *Astrue* v. *Ratliff*, No. 08-1322 at 6 (August 2009). In this case, as in *Astrue*, a court of appeals acknowledged "that its holding conflicts with the decisions of the majority of courts to have addressed the issue," and denied a petition for rehearing en banc. *Id.* In *Astrue*, the government argues that those factors *favor* of a grant of certiorari. *Id.* The same is true in this case.

[2] The Ninth Circuit has applied *Monet* several times since 1996 in unpublished opinions. *See*, *e.g.*, *Cardenas-Mendoza* v. (continued…)

a persistent circuit split on an important issue to allow more courts of appeals to consider the relevance of a 13-year old amendment to the statute.[3]

2. The government contends in a footnote that this case may be distinguishable from the Third Circuit's decisions in *Garcia* and *Bamidele* because the government "did not become aware of petitioner's ineligibility until more than five years after the adjustment of status." Op. 9 n.5. That is incorrect. Mr. Sustaire, the corrupt INS officer, turned himself in on February 9, 1998. *See* United States' Motion for Downward Departure, *United States* v. *Sustaire*, No. CR-98-20117 (N.D. Cal. Jan. 26, 2000), C.A. App. 376. The government initiated deportation proceedings against Mr. Kim on March 21, 2003. Pet. App 21a; C.A. App. 621. The government thus

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Holder, 320 Fed. Appx. 525, 527 (9th Cir. 2009) (unpublished); *Trinidad-Contreras*, 202 Fed. Appx at 945; *Valente-Narcizo* v. *Gonzales*, 139 Fed. Appx. 878, 880 (9th Cir. 2005) (unpublished).

[3] The government also suggests that certiorari should be denied because the circuit split is lopsided. Op. 8. The Court has often granted certiorari where a circuit split favored the respondent more heavily than the petitioner, and has also resolved "lopsided" splits in favor of the minority position. *See, e.g.*, *Chambers* v. *United States*, 129 S.Ct. 687 (2009) (resolving 6-1 split in favor of minority position); *United States* v. *Santos*, 128 S.Ct. 2020 (2008) (resolving 3-1 split in favor of minority position); *Watson* v. *United States*, 552 U.S. 74 (2008) (resolving in 6-3 split in favor of minority position); *see also Bloate* v. *United States*, 556 U.S. __ (April 20, 2009) (granting certiorari where 8-2 split favors respondent).

waited more than five years after it learned about Sustaire's bribery scheme before initiating proceedings against Mr. Kim. Thus, even assuming that the five-year limitations period of Section 1256(a) was tolled until the government learned of the bribery scheme, the proceedings against Mr. Kim were initiated outside the limitations period.

The government also contends that the this case can be distinguished from *Garcia* and *Bamidele* because those cases involved fraudulent representations by the applicants, while this case involves bribery. Op. 8 n.9. The Third Circuit's decisions in *Garcia* and *Bamidele* were not dependent on the petitioners' misrepresentations in those cases. Moreover, the facts of this case present an even stronger case for enforcing the limitations period than the Third Circuit cases: The Immigration Judge here found that Mr. Kim had no knowledge of any wrongdoing in connection with his application.[4] Pet. App. 27a.

3. The question presented by the Petition is important and recurring. The government argues

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[4] The government incorrectly states (Op. 5) that the list prepared by the corrupt INS officer Sustaire was "sorted by alien number." The list was not sorted in any discernable manner. *See* C.A. App. 384-88. To the extent the government takes issue with Petitioner's assertion (Pet. 7 n.3) that the number alleged to be Mr. Kim's alien number, 72 095 200, could also be read as 72 *098* 200, it is worth noting that the page on which Mr. Kim's number allegedly appears contains alien numbers beginning with both 72 095 and 72 098, and like the other pages is not sorted. C.A. App. 387.

that the question does not arise frequently enough to warrant this Court's review, but it admits that the issue has been addressed by no fewer than five circuits in published decisions, including three in the past year. *See* Op. 8-9. The issue has also arisen in numerous unpublished decisions in the courts of appeals in recent years. *See* Pet. 18 & n. 7 (collecting cases). The government quibbles over some of these examples, but it does not dispute that the issue arose on the facts of most of these cases. *See* Op. 10-11 & nn.7-8. The published and unpublished cases thus demonstrate that the issue arises with increasing regularity. [5]

The government does not dispute that deportation can have enormous and devastating consequences for individuals who have built their lives and families in the United States. It asserts, however, that no alien "who has obtained his permanent status unlawfully or fraudulently" has a "reasonable basis to rely on that status." Op. 11. This ignores the fact that Congress enacted a five-year limitations period applicable to rescission of grants of permanent resident status and did not

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[5] The Sustaire bribery scheme alone involved some 275 individuals. Most of these individuals, like Petitioner, appear to have been unaware of any impropriety in their adjustment of status. *See* John M. Glionna, *Victims of Green Card Scam in 1990s Being Deported*, Los Angeles Times, Feb. 22, 2005 at B3 (quoting immigration broker convicted in the scheme stating that the individuals "were completely in the dark."); *see also* John M. Glionna, *Lawmakers, Religious Leaders Fight Deportations Linked to Fraud Case*, Los Angeles Times, Feb. 7, 2003 at Metro Desk p. 6.

include an exception for aliens who have obtained that status unlawfully or fraudulently. The government also ignores the Immigration Judge's finding that Petitioner was unaware of the alleged bribery in this case, and so had no reason to think that his permanent resident status was in jeopardy. *See* Pet. App. 27a.

Immigration laws "often affect individuals in the most fundamental ways," and therefore "to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide." *Jaramillo* v. *INS*, 1 F.3d 1149, 1155 (11th Cir. 1993); *see also Rosendo-Ramirez* v. *INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National uniformity in the immigration and naturalization laws is paramount"); Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384 (1986) ("It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and *uniformly*." (emphasis added)). Absent review by this Court, individuals in Petitioner's circumstances will be subject to deportation in the in the Fourth, Sixth, Eighth, and Ninth Circuits, but not in the Third Circuit. That divergence on an important question of immigration law should not be allowed to persist.

4. The government does not dispute that this case also implicates a second circuit split on the applicability of *Chevron* to the Attorney General's interpretation of Section 1256(a). Op. 9-10. The Second and Third Circuits have held that *Chevron* deference is not warranted where the question is a legal one, like the statute of limitations question

here, upon which the agency has no particular expertise. *See* Pet. 16-17 & n.6. The Fourth, and Eighth Circuits, now joined by the Sixth Circuit, *see Stolaj*, 2009 U.S. App. LEXIS 18567 at *13, have applied *Chevron* in those circumstances. While the government asserts that *Chevron* should apply because the limitations period applies to the Attorney General rather than to the immigrant (Op. 15), it advances no reason for such a distinction. Indeed, in determining the scope of a limitations period it makes little sense to defer to the party who is limited by the statute. Moreover, as noted in the brief of amici curiae, deferring to the agency's interpretation would be contrary to the canon that ambiguities in immigration statutes are resolved against deportation. *See* CAIR Br. at 13 (collecting cases).

5. The government's arguments that the Eighth Circuit's decision in this case is correct are unpersuasive. As the Third Circuit recognized, when five years have elapsed since the grant of permanent resident status, permitting a deportation proceeding on the ground that permanent resident status was improperly granted effectively construes the limitations period of Section 1256(a) out of existence. *Bamidele*, 99 F.3d at 564. The government postulates four reasons why Congress might have intended this result, but none is convincing.

First, the government argues that the text of Section 1256(a) refers only to rescission, and that the 1996 amendment shows that rescission and deportation are separate. Op. 12. But the statute mentions both rescission and removal proceedings. 8

U.S.C. § 1256(a). Indeed, by stating that rescission is not necessary before instituting removal and that a deportation order is "sufficient to rescind the alien's status," the 1996 amendment made it clear that a removal order effectively results in rescission of the alien's permanent resident status. *Id.*

Second, the government invokes "the evolution of the broader statutory scheme," arguing that the 1952 revisions to the Immigration and Nationality Act, which eliminated the limitations period for deportation and created a five-year limitations period for rescission, support its interpretation. Op. 12. These revisions actually support the opposite conclusion. By eliminating the statute of limitations for deportation proceedings generally but creating a new limitations period for rescission, Congress intended that permanent residents should have immigration peace after five years *even if* it appeared thereafter to the Attorney General that they were not entitled to the status at the time it was granted. Permitting a deportation end-run around the rescission procedure frustrates Congress's purpose.

Third, the government contends that "strange policy consequences" would arise from enforcing the limitations period because immigrants who initially enter as permanent residents (and thus never undergo an adjustment of status) would not benefit from the limitations period. Op. 12-13. But limiting rescission relief to immigrants who have adjusted their status makes sense because applications for adjustment of status are processed entirely by the Department of Homeland Security ("DHS"), while immigrant petitions from individuals who are not

already in the United States are processed by the State Department. *See* 8 U.S.C. § 1201(a)(1)(A), (g). It is entirely reasonable to limit the time allowed for DHS to reconsider its own decision on an adjustment of status. The limitations period encourages DHS to review the application thoroughly and accurately in the first instance and to act promptly on any errors.

The same is not true of aliens who enter the country as permanent residents. When an alien enters the country on an immigrant visa, DHS is not responsible for conducting a full investigation of the alien's qualifications. *See id.* If DHS later receives information indicating that the State Department overlooked relevant information or made a mistake, it is reasonable to permit DHS initiate removal proceedings based on proof that the alien was not entitled to the immigrant visa at the outset.

Fourth, the government relies on the Attorney General's 1962 opinion stating that differences between the "informal" rescission procedure and the more formal deportation procedure justify a statute of limitations on one but not the other. Op. 13-14. The government admits, however, that the Attorney General noted that "in practice under the governing regulation there is little difference between the safeguards afforded an alien in deportation and that afforded him in rescission." *Id.* at 14 n.9 (quoting *Matter of S--*, 9 I. & N. Dec. 548 (Att'y Gen. 1952). The government argues that the adoption of equivalent administrative protections does not elucidate the statutory scheme. But by the time Congress amended Section 1256(a) in 1996, the protections had been in existence more than 40 years

and Congress is presumed to have been aware of them. *See*, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978). The 1996 amendment recognized and codified that a removal order has the effect of rescinding the alien's permanent resident status. Where the deportation is based on grounds that the Attorney General is time-barred from pursuing in rescission, the limitation applies equally to the deportation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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