No. 08-

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

PETITION FOR A WRIT OF CERTIORARI

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May 2009

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QUESTION PRESENTED

Section 1256(a) of Title 8, U.S. Code, imposes a five-year limitations period during which the Attorney General may rescind an alien's permanent resident status upon a finding that the alien was not eligible for the status at the time it was granted. The question presented is:

Whether the five-year limitations period of 8 U.S.C. § 1256(a) permits the government to initiate removal proceedings after the five-year period has passed based solely on the alien's ineligibility for permanent resident status at the time it was granted, where the final removal order rescinds the alien's permanent resident status.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sungwook Kim respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit's decision exacerbates a split in authority among the courts of appeals on an important and recurring immigration question. The Third Circuit has held that under the Immigration and Nationality Act's five-year limitations period for rescission of an alien's permanent resident status for lack of initial eligibility, the government may not bring removal proceedings after the five-year period has elapsed against a permanent resident based on such ineligibility. 8 U.S.C. § 1256(a). The Eighth Circuit held, in accord with two other circuits, that the limitations period applies only to rescission actions and not removal actions, even though "an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status." *Id.* Certiorari should be granted to resolve the split in the circuits.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-13a, is reported at 560 F.3d 833. The opinion of the Bureau of Immigration Appeals, App., *infra*, 14a-20a, and the decision of the Immigration Judge, App., *infra*, 21a-27a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2009. App., *infra*, 1a. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1256(a) of Title 8, U.S. Code states:

> If, at any time within five years after the status of a person has been otherwise adjusted . . . to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

STATEMENT

This case presents an important and recurring question upon which the federal courts of appeals are divided: Whether a lawful permanent resident may be stripped of his permanent resident status in removal proceedings brought after the statutory five-year limitations period for rescission of permanent resident status has run, where the basis for the removal is the same as the time-barred basis for rescission.

Petitioner Sungwook Kim, a native citizen of South Korea, entered the United States in 1988 at the age of 18 on an F-1 student visa. App. 2a. In 1992, after completing his bachelor's degree in the United States, Mr. Kim applied to become a lawful permanent resident. *Id.* Mr. Kim had been hired by a company in San Jose, California that agreed to sponsor his application for permanent resident status. C.A. App. 153. He was to work for the San Jose company doing translations to and from Korean, which he could do from his home in the St. Louis area. *Id.* at 153-54. At his employer's direction, he went to San Jose, California to fill out the required paperwork to adjust his status. App. 2a.

Mr. Kim provided his employer with copies of his educational records and other documents his employer requested. C.A. App. 161-62. In San Jose, he met with two men he believed were attorneys, and signed numerous copies of several different forms. *Id.* at 155-56, 162-63. He was told that the legal fees for the application process would be $10,000, of which $2,000 was paid in San Jose and the

remainder was to be withheld from his paychecks. App. 2a. Mr. Kim was approved for lawful permanent resident status in August, 1992. *Id.* at 2a, 25a.

Mr. Kim subsequently earned a Masters of Business Administration from St. Louis University and a Masters of Finance at the University of Illinois. App. 24a. Mr. Kim has lived and worked in the United States during the 17 years since he was granted lawful permanent resident status. He has never been convicted of any crime. Mr. Kim has a two-year old son, who is a U.S. citizen.

Until 2003, Mr. Kim traveled to South Korea once a year to visit family. App. 2a. After each visit, Mr. Kim returned to the United States and was permitted to enter the country with his Korean passport and his permanent resident card. C.A. App. 166-68. On March 4, 2003, nearly 11 years after he was first granted lawful permanent resident status, Mr. Kim returned to the United States from one such trip abroad. App. 2a. Unlike his previous trips, however, on this occasion Mr. Kim was interviewed and detained by agents of the Immigration and Naturalization Service.[1] *Id.* The agents told Mr. Kim that his permanent resident card was improperly issued and was not valid. Mr. Kim believed there was some mistake. C.A. App. 168.

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[1] The functions of the INS are now included within the Department of Homeland Security.

The government's charges stemmed from a criminal matter, five years earlier, involving an INS officer, Leland Sustaire. App. 3a. Sustaire was a Supervisory District Adjudication Officer for the INS's San Jose California office in 1992, when Mr. Kim's application was approved. *Id.* In 1998, Sustaire admitted to accepting bribes in exchange for issuing green cards. *Id.* The government alleged that Mr. Kim's permanent resident card was issued based on an insufficient immigration record because of a bribe to Sustaire. *Id.*

Mr. Kim was permitted to enter the United States but was later served with a Notice To Appear charging that his permanent resident card was issued based on a "legally and factually baseless" immigration record. App. 3a. The government stated in the notice that Mr. Kim had arrived "as a returning resident alien," but because his permanent resident card was allegedly invalid, the government charged him as an arriving *non-resident* alien. C.A. App. 617, 622. The government charged that Mr. Kim was subject to removal based on three grounds of inadmissibility: (1) that he was an "alien present in the United States without being admitted or paroled" under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i); (2) that he was an immigrant who is applying for admission without a valid travel document under INA § 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I); and (3) that he was an alien who seeks or has sought an immigration benefit by fraud or willful misrepresentation," INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i). App. 2a-3a; 14a.

Mr. Kim denied the government's charges that he was inadmissible or removable. Mr. Kim also argued that he was not subject to removal based on grounds of inadmissibility: Because Mr. Kim was in possession of a valid permanent resident card, he was entitled to the presumption that he was a returning resident, rather than an arriving non-resident alien seeking admission. 8 U.S.C. § 1101(a)(13)(C).[2] As a returning resident, Mr. Kim could only be deported if the government proved grounds of deportability, not grounds of inadmissibility. In the alternative to his arguments that he was not removable, Mr. Kim applied for cancellation of removal under INA § 240A(a), 8 U.S.C. § 1229b(a).

At Mr. Kim's hearing before the Immigration Judge, the government introduced several exhibits and offered the testimony of Officer Lesley Brown to connect Mr. Kim to Leland Sustaire, the corrupt INS officer. App. 3a. The exhibits included various materials from the criminal proceedings against Sustaire and others who were involved in the bribery case, such as the judgments obtained against Sustaire and other defendants, C.A. App. 348-72, a government motion submitted in the case that

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[2] Under 8 C.F.R. § 235.3(b)(5), if an arriving alien's claim to be a lawful permanent resident is verified through Homeland Security's data systems or otherwise, and that status has not been terminated, whether the individual is seeking admission the United States is determined under 8 U.S.C. § 1101(a)(13)(C). That section states that a lawful permanent resident "shall not be regarded as seeking an admission" unless one of six conditions applies, none of which were asserted by the government. 8 U.S.C. § 1101(a)(13)(C).

summarized the bribery scheme, C.A. App. 375-82, and a transcript of Sustaire's testimony, C.A. App. 389-517. Mr. Kim's name did not appear in any of these materials. *See* C.A. App. 348-517. Rather, his alien identification number allegedly appeared on a copy of a handwritten list of alien identification numbers that was purportedly introduced in Sustaire's trial and referred to in his testimony as a list of the aliens whose green cards he had issued illegally. App. 22a; C.A. App. 387.[3]

In addition to the evidence from the Sustaire criminal matter, the government offered an I-213 Record of Deportable/Inadmissible Alien, consisting mostly of the government's conclusions that Mr. Kim's adjustment of status was linked to the Sustaire bribery case. C.A. App. 346-47. The government also offered the testimony of Officer Brown, who testified that the government concluded that Mr. Kim's permanent resident card was issued illegally based on three factors: (1) the government was unable to locate Mr. Kim's file (and Sustaire said he had destroyed the files involved in his bribery case); (2) the government concluded that Mr. Kim did not qualify at that time for adjustment of status; and (3) Mr. Kim's number was on Sustaire's list. C.A. App. 123-149. Officer Brown's testimony was not

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[3] The list consists of five pages. C.A. App. 384-88. The first three pages contain case numbers with names and dates; the final two pages contain columns of numbers without names or dates. *Id.* Mr. Kim's case number 72 095 200 allegedly appears on the fourth page, but the entry could also be read as 72 098 200. *Id.* at 387.

based on personal knowledge of the Sustaire case, but on what she had learned from others who had interviewed Sustaire. *See id.* Officer Brown also testified about the normal requirements for adjustment of status, though she did not testify as to any knowledge of the procedures or requirements in effect at the San Jose office in 1992. *See id.* Mr. Kim's objections to this evidence—on hearsay, lack of foundation, and relevance grounds—were overruled. App. 3a.

1. The Immigration Judge's Decision. The Immigration Judge credited Officer Brown's testimony that in order to get the employment-based lawful permanent resident card Mr. Kim received, a labor certification, medical certificate, and copies of the applicant's degrees were required to be submitted. App. 22a-23a. The Immigration Judge acknowledged that Mr. Kim's file from 1992 was not available, but nevertheless relied on the fact that Mr. Kim had not presented evidence of these materials from his application. App. 22a-23a, 24a-25a. The Immigration Judge also acknowledged that Mr. Kim had a bachelor's degree and is a native Korean speaker but found that Mr. Kim could have adjusted his status only if he had a degree in Korean languages, and that Mr. Kim would have had to have worked full time as a translator, although his recollection was that he worked part-time. App. 23a.

The Immigration Judge also found that it was "unusual" that Mr. Kim would travel to California to apply for his permanent residence because he lived in St. Louis, and that the fee Mr. Kim paid was "excessive." App. 23a.

On this basis, the Immigration Judge found, by "clear and convincing evidence," that "as a result of a legally and factually baseless immigration record" Mr. Kim was "improperly issued a Form I-551, resident alien card by the Immigration and Naturalization Service." App. 25a. The Immigration Judge concluded that Mr. Kim was inadmissible as "an alien present in the U.S. without being admitted or paroled," and as "an immigrant who is applying for admission without a valid travel document" under Sections 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act. App. 26a; 8 U.S.C. §§ 1182(a)(6)(A)(i), (a)(7)(A)(i)(I).

The Immigration Judge found that "an alien who acquired permanent resident status through fraud or misrepresentation has never been lawfully admitted for permanent residence and is therefore ineligible for cancellation of removal under Section 240A(a) of the Immigration and Nationality Act." App. 26a.

The Immigration Judge did not sustain the government's charge that Mr. Kim "sought an immigration benefit by fraud or willful misrepresentation" under INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i). App. 27a. The Immigration Judge stated, "I do not believe [Mr. Kim] was perpetuated with fraud or willfully misrepresenting a material fact." App. 27a. "It's clear to the Court that what occurred [was] that he was a naïve person and was very young and did not understand the legalities in becoming a lawful permanent resident." *Id.* The court concluded, "I do not find that [he] bears any fault or that he committed any fraud." *Id.* Rather,

the Court believed that "it was some agents who acted for him who did this." *Id.*

2. The Board Of Immigration Appeals' Decision. Mr. Kim appealed the Immigration Judge's order. App. 14a-20a. The Board affirmed the Immigration Judge's holding that Mr. Kim was inadmissible as an immigrant who is applying for admission without a valid travel document under INA § 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I), but did not rule on the second ground of inadmissibility. App. 18a & n.5.

Mr. Kim argued that under Section 246(a) of the Immigration and Nationality Act, 8 U.S.C. § 1256(a), the government was not permitted to place him in removal proceedings based on a purported lack of eligibility for adjustment of status because the five-year statutory period for rescission of his permanent resident status had expired. App. 18a-19a. Mr. Kim relied on the Third Circuit's decision in *Bamidele* v. *INS*, 99 F.3d 557 (3d Cir. 1996), in which the court held that a permanent resident may not be deported after the five-year period where the sole grounds for deportation related to a fraud in connection with the adjustment of status. App. 19a & n.6.

The Board rejected Mr. Kim's argument, holding that while the government must initiate rescission proceedings within five years if it wishes to rescind the status, "there is no statute of limitations applicable to the initiation of removal proceedings." App. 19a. The Board rejected *Bamidele* on the ground that it was decided before a

1996 amendment to Section 1256(a) that added the following language to the statute: "Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status." App. 19a (quoting 8 U.S.C. § 1256(a)). The Board cited a contrary Fourth Circuit decision holding that Section 1256(a)'s limitations period applies to the government's power to rescind an adjustment of status, but not to a deportation action based on an erroneous grant of permanent resident status. App. 19a (citing *Asika* v. *Ashcroft*, 362 F.3d 264, 269-71 (4th Cir. 2004)).

The Board also rejected Mr. Kim's argument that he should have been treated as a returning resident, rather than as an arriving non-resident alien seeking admission. App. 17a-18a. The Board relied on a prior Board decision holding that "an alien is deemed, *ab initio*, never to have obtained lawful permanent resident status once his original ineligibility therefor is determined in proceedings." *In re Koloamatangi*, 23 I. & N. Dec. 548, 551 (B.I.A. 2003). The Board held that under *Koloamatangi*, Mr. Kim could be charged as an arriving alien applying for admission even though his ineligibility had not been determined in any prior proceeding. App. 18a.[4]

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[4] The Board also affirmed the Immigration Judge's evidentiary rulings and denial of cancellation of removal. App. 15a, 20a.

3. The Court Of Appeals' Decision. The Eighth Circuit affirmed the Board's decision. App. 1a-13a. The court acknowledged the Third Circuit's view "that this limitations period [of 8 U.S.C. § 1256(a)] applies to removal proceedings, not just rescission of status adjustments," but declined to adopt that view. App. 7a.

The court of appeals noted that in 1962 the Attorney General issued an opinion that Section 1256 "appl[ies] only to the rescission of status adjustments, not removal proceedings." App. 8a, citing *Matter of S--*, 9 I. & N. Dec. 548 (Att'y Gen. 1962). The court interpreted the 1996 revision to Section 1256 as supporting this interpretation because it "makes clear that the legislature viewed rescission and removal as separate, and applied the five-year limitations period to rescission only." App. 8a. The court held that to the extent there was any doubt, it would apply *Chevron* deference to the Attorney General's interpretation. App. 9a, citing *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

The court of appeals also rejected Mr. Kim's argument that he was improperly denied the presumption that he was a returning resident rather than an arriving non-resident alien. The court held that the Immigration Judge properly treated Mr. Kim as an arriving alien because he found that Mr. Kim's status was not legally conferred. App. 10a. For the same reason, the court held that Mr. Kim was not eligible for cancellation of removal. App. 11a-12a.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split On Whether Section 1256(a)'s Limitations Period Applies To Removal Proceedings Based On Lack Of Eligibility To Have Obtained Lawful Permanent Resident Status.

The Eighth Circuit's opinion in this case recognizes the split among the circuits over whether the government may bring a deportation action against a lawful permanent resident based on his eligibility to have obtained that status after the five-year limitations period in 8 U.S.C. § 1256(a) has run. App. 7a (declining to adopt the Third Circuit's view); 8a (citing decisions of the Fourth and Ninth Circuits). Other courts and judges have also noted the split. *E.g.*, *Garcia* v. *Att'y Gen. of the United States*, 553 F.3d 724, 728 (3d Cir. 2009); *id.* at 731 (Fuentes, J., dissenting); *Asika*, 362 F.3d at 267. Respondent, in a brief filed in this Court, has also acknowledged the "conflict" between the Fourth Circuit and "a previous decision of the Third Circuit, *Bamidele* v. *INS*." *Asika* v. *Ashcroft*, No. 04-256, Brief of the United States in Opposition ("*Asika* Op.") at 7.

In *Bamidele* v. *INS*, the Third Circuit concluded that when the government seeks to deport an individual who has obtained lawful permanent resident status more than five years after the status was granted, on the "sole grounds of his misconduct in obtaining his adjustment of status," that action is barred by Section 1256(a)'s statute of limitations. 99 F.3d 557, 558 (3d Cir 1996). The court rejected

the government's view "that, although § 246(a) proscribes an untimely rescission of an alien's status adjustment, it has no effect on the INS's ability to deport that same immigrant on the *very same* grounds the INS claims render the original adjustment of status improper." *Id.* at 563. To accept this view, "in practical effect, would be construing [Section 1256(a)] out of existence." *Id.* at 564.

The Third Circuit held that the Attorney General's construction of Section 1256(a) was not entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, Inc., 467 U.S. 837 (1984). 99 F.3d at 561-62. The court held that Section 1256(a) is a statute of limitations, the construction of which "is not a matter within the particular expertise of the INS." *Id.* at 561. Rather, the court considered it "'a clearly legal issue that courts are better equipped to handle.'" *Id.* (quoting *Dion* v. *Sec'y of Health & Human Servs.*, 823 F.2d 669, 673 (1st Cir. 1987)). The court held that the construction of Section 1256(a) did not concern matters that would be "bolstered by [] reliance on the expertise of the INS." *Id.* at 562.

Earlier this year, the Third Circuit reaffirmed its decision in *Bamidele*. *Garcia* v. *Att'y Gen. of the United States*, 553 F.3d 724 (2009). In *Garcia*, the government argued that the 1996 amendment to Section 1256(a) undermined the holding in

Bamidele.[5] *Id.* at 727. The amendment added the following language to Section 1256(a):

> Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

8 U.S.C. § 1256(a). The Third Circuit held that the amendment did not undermine its decision in *Bamidele*. 553 F.3d at 728. The court reasoned that the amendment's two provisions were (1) to permit removal without a prior rescission, and (2) to make an order of removal sufficient to rescind the alien's status. *Id.* The court found it "significant" that the amendment does not modify the five-year limitations period. *Id.* The court found "no justification" for permitting a removal proceeding on the same grounds that are protected from rescission after five years. *Id.* The amended statute "still contemplates relief from deportation." *Id.*

In conflict with the Third Circuit, three courts of appeals now hold the contrary view that an alien

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[5] In its brief before the court of appeals, the government argued that because of this amendment it was unclear whether the Third Circuit would continue to adhere to *Bamidele*. Resp. C.A. Br. at 28. The government made the same argument in its brief to this Court opposing the petition for certiorari in *Asika*. *Asika* Op. at 13.

may have his permanent resident status rescinded through removal proceedings on the ground that his adjustment of status was improper, even after the Attorney General may no longer directly rescind his status.

The Eighth Circuit's decision in this case directly rejected *Bamidele* and *Garcia*. App. 7a & n.4 (declining "to adopt the Third Circuit's view that this limitations period applies to removal proceedings, not just rescission of status adjustments."). The Fourth Circuit has likewise rejected the claim that Section 1256(a) bars a removal proceeding based on the alien's lack of eligibility for his adjustment of status. *Asika* v. *Ashcroft*, 362 F.3d 264, 270-71 (4th Cir. 2004). The Ninth Circuit has also held "that section 1256 does not apply to bar deportation proceedings against an adjusted alien." *Monet* v. *INS*, 791 F.2d 752, 754 (9th Cir. 1986); *see also Biggs* v. *INS*, 55 F.3d 1398, 1401 (9th Cir. 1995); *Oloteo* v. *INS*, 643 F.2d 679, 682-83 (9th Cir. 1981).

The Fourth and Eighth Circuits' decisions conflict with the Third Circuit's decisions in *Garcia* and *Bamidele* in a second respect. The Third Circuit held that the government's view of Section 1256(a) was not entitled to *Chevron* deference because "[a] statute of limitations is not a matter within the particular expertise of the INS," and is instead "a clearly legal issue that the courts are better equipped to handle." *Bamidele*, 99 F.3d at 561. In contrast, both the Eighth and Fourth Circuits concluded that *Chevron* deference should be afforded to the Attorney General's interpretation of Section 1256(a). *Compare Garcia*, 553 F.3d at 727 *with* App. 8a-9a, *Asika*, 362

F.3d at 267 ("[W]e must defer, under *Chevron*, to the INS's longstanding interpretation of its removal power as being unrestricted by such a statute of limitations.").[6]

The circuit split in this case merits the Court's review. In its opposition to the petition for certiorari in *Asika*, the government acknowledged that the decision conflicted with *Bamidele*, but asserted two reasons why certiorari should nevertheless be denied. *Asika* Op. at 13-14. The government asserted that the issue "has not recurred with frequency" and that "[i]t is unclear whether the Third Circuit would reach the same result" as it did in *Bamidele* after the amendment to Section 1256(a). *Id.* at 13.

The government's latter objection to review by this Court has now been removed. In *Garcia*, the Third Circuit reaffirmed its decision in *Bamidele*. The Third Circuit also denied the government's petition for rehearing en banc in *Garcia*, with only two votes in favor. *See* Order Denying Rehearing En Banc, *Garcia* v. *Attorney General*, (3d Cir. Feb. 4,

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[6] The split in authority over the applicability of *Chevron* deference provides an additional reason to grant certiorari here. In accord with the Third Circuit, the Second Circuit has held, in a case considering another limitations period under the Immigration and Nationality Act, that interpretation of the limitations period is "a question purely of statutory construction," which "avoid[s] the danger of venturing into areas of special agency expertise, concerning which courts owe special deference under the *Chevron* doctrine." *Iavorski* v. *INS*, 232 F.3d 124, 133 (2d Cir. 2000).

2009). The Third Circuit is thus unlikely to revisit its opinion again. Without this Court's intervention, the split in authority is likely to persist.

Contrary to the government's position in *Asika*, the issue is also recurring. The issue has so far been decided in published opinions of two courts of appeals this year, and also arose in an unpublished decision in the Ninth Circuit. *Cardenas-Mendoza* v. *Holder*, 2009 U.S. App. LEXIS 5919 (9th Cir. Mar. 20, 2009). In addition to the published cases forming the split, the issue has arisen directly or was implicated by the facts of numerous other cases in the courts of appeals in recent years.[7]

The issue is also important. For longtime permanent residents like Mr. Kim, deportation is a severe crisis. It entails removing an individual from the community in which he or she has built a family over many years and placing the individual in a country with which he or she may have few or no

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[7] *E.g.*, *Lopez-Avalos* v. *Mukasey*, 273 Fed. Appx. 684 (9th Cir. 2008) (unpublished); *Omar* v. *INS*, 266 Fed. Appx. 37, 38 (2d Cir. 2008) (unpublished); *De Guzman* v. *Att'y Gen. of the United States*, 263 Fed. Appx. 222, 226 (3d Cir. 2008) (unpublished); *Tinoco-Garcia* v. *Gonzales*, 227 Fed. Appx. 615, 616 (9th Cir. 2007) (unpublished); *Savoury* v. *United States Att'y Gen.*, 449 F.3d 1307, 1310 (11th Cir. 2006); *Arellano-Garcia* v. *Gonzales*, 429 F.3d 1183, 1187 (8th Cir. 2005); *Valente-Narcizo* v. *Gonzales*, 139 Fed. Appx. 878, 880 (9th Cir. 2005) (unpublished); *Sanchez* v. *Winfrey*, 134 Fed. Appx. 720, 722 (5th Cir. 2005) (unpublished); *Kim* v. *Ashcroft*, 95 Fed. Appx. 418, 422 (3d Cir. 2004) (unpublished).

remaining ties. "Aliens who obtain adjusted status have a legitimate expectation that their immigration will be permanent." *Choe* v. *INS*, 11 F.3d 925, 930 (9th Cir. 1993). While permanent residents may face removal for violating the law, "adjusted aliens are still entitled to some minimal sense of security in their permanent resident status." *Id.* Permanent residents like Mr. Kim create networks of family, friendship, and work relationships in this country. By enacting Section 1256's bar to rescission of permanent resident status, Congress recognized that after five years, permanent residents are entitled to rely on their status without fear that they will be deported. Because Section 1256(a) provides permanent residents with "immigration peace," they can enthusiastically pursue greater and deeper ties to this country and their community, ultimately contributing more to society than an individual who views himself as only a transitory resident who may be asked to leave at any time.

This case is a good vehicle to decide the question presented and demonstrates the troubling way in which the government's interpretation has led it to implement Section 1256(a). There is no dispute that Mr. Kim's permanent resident status was granted more than five years before removal proceedings were brought against him or that he was found removable based on ineligibility for that status at the time it was granted. Despite acknowledging that it could not rescind that status after five years, the government was permitted to proceed as if Mr. Kim had never received that status at all. When Mr. Kim attempted to use a valid, government-issued permanent resident card to enter the country as he

had done for ten years, he was treated as if he had arrived in the country for the first time with no documentation whatsoever. Indeed, the charge sustained by the Board was that Mr. Kim was an alien who arrived without any valid entry document.

II. Section 1256(a)'s Limitations Period Applies To Removal Proceedings Based On Lack Of Eligibility To Have Obtained Lawful Permanent Resident Status.

The lower court decisions holding that the Attorney General may accomplish the rescission of an alien's lawful permanent resident status beyond the five-year limitations period of Section 1256(a)—simply by initiating removal proceedings on the ground that the individual was not eligible to receive that status—are not persuasive. The effect of those decisions is to construe Section 1256(a) out of existence.

Section 1256(a) creates a statutory bar to rescinding a lawful permanent resident's status based on initial ineligibility once five years have elapsed after that status was granted. 8 U.S.C. § 1256(a). The limitation in Section 1256(a) is a narrow one: It applies "'only where a deportation is based on an attack on the adjustment itself.'" *Garcia*, 553 F.3d at 728 (quoting *Bamidele*, 99 F.3d at 564). The decisions of the Fourth, Eighth, and Ninth Circuits, however, permit the Attorney General to avoid the statutory bar simply by instituting removal proceedings charging that the permanent resident status should never have been granted in the first place. If the limitation in Section

1256(a) is to be effective, it must also apply to rescission accomplished through removal proceedings attacking the initial adjustment of status.

Two of the circuits on the other side of the circuit split have acknowledged the force of this argument. The Ninth Circuit found "appealing" the argument that when the government seeks to deport an individual "on the ground of a fraudulent immigration status obtained" outside the statutory period "that action amount[s] to a rescission of the adjustment of [the] immigrant status." *Biggs* v. *INS*, 55 F.3d 1398, 1401 n.3 (9th Cir. 1995). The Fourth Circuit likewise agreed that there is "some force" to the argument that reading Section 1256(a) not to apply to deportation proceedings permits the government "to rescind an alien's status through the deportation process, notwithstanding the passage of the five-year statute of limitations on rescission actions," and that construction "would 'construe [section 1256(a)] out of existence.'" *Asika*, 362 F.3d at 270 (quoting *Bamidele*, 99 F.3d at 564).

The government has also acknowledged the troublesome import of its position. In 1962, the Board of Immigration Appeals referred the issue of Section 1256(a)'s application to deportation and exclusion proceedings for a decision of the Attorney General. *Matter of S--*, 9 I. & N. Dec. 548 (Att'y Gen. 1962). The Board of Immigration Appeals had held that Section 1256(a)'s limitations period barred exclusion proceedings based on an improper adjustment of status, holding that there is "no logical reason" why Congress would "protect this status by a

statute of limitations, even though the status had been acquired by one who was not eligible" yet "withdraw that protection because the alien had left the country and reapplied for admission on the basis of the very adjustment of status which they had protected." *Id.* at 550.[8]

The Attorney General disagreed with the Board, but noted that under his interpretation Section 1256(a) "may be of little practical value to the alien." *Id.* at 555. The Attorney General's narrow interpretation was that the statute of limitations "prevents the Attorney General from returning the alien to the category of a nonimmigrant" after the five-year period, but acknowledged that this "entails no real benefit to the alien since the same conduct nevertheless can be utilized independently as a ground for his deportation or exclusion." *Id.* The Attorney General admitted that his interpretation "makes it difficult to ascertain precisely why Congress enacted the time limitation." *Id.*

In this case, the court of appeals relied on the fact that Section 1256(a) "only discusses the five year statute of limitations in terms of rescinding a status

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[8] As here, *Matter of S--* involved a permanent resident who sought to reenter the country. At the time, INS agreed that the statute of limitations applied to deportation proceedings, though not to exclusion proceedings. 9 I. & N. Dec. at 549 ("The Service apparently agrees that where there has been no rescission of the adjustment of status there can be no expulsion of an alien (who did not depart after the adjustment) on grounds which made the alien ineligible for the adjustment.").

adjustment." App. 8a. But Section 1256(a) also discusses removal proceedings as a means of rescinding an alien's status, stating that "an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status." 8 U.S.C. § 1256(a). The text of the statute thus shows that the limitations period applies to both rescission actions and removal proceedings when they are based on initial ineligibility for adjustment of status.

The government's reliance on the 1996 amendment to Section 1256(a) is also misplaced. The language of the amendment permits the government to bring a removal action without first having rescinded the permanent resident's status, and states that a final order of removal is sufficient to rescind an alien's permanent resident status. 8 U.S.C. § 1256(a). According to the court of appeals, "This amendment makes clear that the legislature viewed rescission and removal as separate, and applied the five-year limitations period to rescission only." App. 8a; *see also Garcia*, 553 F.3d at 730 (Fuentes, J., dissenting).

This puts more weight on the 1996 amendment than it can bear. The language of the amendment does not say that rescission and removal proceedings are "separate." To the contrary, the amendment allows for rescission and removal to be combined in a single proceeding. If an alien whose permanent resident status is subject to rescission is also removable, the government need not complete the rescission before initiating removal proceedings. Instead, the government may proceed directly to removal proceedings, and a final removal order will

have the effect of rescinding the alien's permanent resident status. The amendment thus serves to eliminate any argument that a permanent resident alien is not subject to removal because his or her adjustment was not first rescinded. If the removal action is successful, the final order rescinds the alien's status just as a rescission order would have done. Accordingly, the limitations period applicable to rescission actions is likewise applicable to rescissions accomplished in deportation proceedings.

Chevron deference is not warranted here because the statute is clear. Moreover, the Second and Third Circuits are correct that interpretation of a statute of limitations is the type of matter well within the courts' expertise to decide without any expert assistance from the agency.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2009