No. 10-694

In the Supreme Court of the United States

JOEL JUDULANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR FORMER IMMIGRATION OFFICIALS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE

Amici are former officials from the Immigration and Naturalization Service (INS), U.S. Immigration and Customs Enforcement (ICE), and the Department of Justice (DOJ) who had responsibility for the interpretation and enforcement of the Nation's immigration laws before the BIA's recent decision in *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005).[1]

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission;

As former INS, ICE, and DOJ officials, amici made daily decisions concerning the initiation and conduct of proceedings to exclude or deport aliens. Amici continue to practice in the immigration field and are therefore familiar with the aftermath of the BIA's decision in *Blake*.

Amicus Paul W. Virtue served as general counsel of the INS from 1998 to 1999; as acting executive associate commissioner for programs from 1997 to 1998; and as deputy general counsel from 1988 to 1997. As general counsel, he was responsible for overseeing the INS's legal proceedings more generally and for supervising the hundreds of INS attorneys who represented the government in exclusion and deportation proceedings in the immigration courts. In addition, he was responsible for advising the Attorney General, the Commissioner of the INS, and others on all aspects of immigration policy. Notably, as deputy general counsel, he developed government policy, and wrote an important opinion, on the issue of eligibility for discretionary relief in deportation proceedings. He is currently a partner in the Washington office of the law firm of Baker & McKenzie LLP.

Amicus Bo Cooper served as general counsel of the INS from 1999 to 2003. In that capacity, like Mr. Virtue, he was responsible for overseeing the INS's legal proceedings and for advising other government officials on all aspects of immigration policy. He is currently a partner in the Washington office of the law firm of Berry Appleman & Leiden LLP.

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and no person other than amici or their counsel made such a monetary contribution. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

The remaining amici served as trial attorneys with the INS, ICE, or DOJ, and in those capacities represented the government with respect to applications for discretionary relief of the type at issue here. Those amici are Stephen Klapisch (1980-1987); Kerry Bretz (1991-1994); Elizabeth J. Dobosiewicz (1993-1999); Rolando R. Velasquez (1994-2001); Kurt R. Saccone (1994-1999); Thomas Ragland (1995-2004); Stan Weber (1996-2009); Parisa Karaahmet (1996-2000); Daniel Brown (1996-1999); Chartrisse A. Adlam (1997-2008); Kyle D. Brown (1998-2001); and Ricardo Vega (2002-2010). All of those amici continue to work in the immigration field as private practitioners.

Amici strongly support the enforcement of the Nation's immigration laws and worked diligently throughout their government service to improve the government's practices regarding the exclusion and deportation of aliens. Amici file this brief to provide the Court with additional insights, based on their own experience, concerning the availability of discretionary relief in deportation proceedings before the BIA's decision in *Blake*.

SUMMARY OF ARGUMENT

Until the BIA's recent decision in *Blake*, aliens in deportation proceedings whose criminal convictions predated the repeal of former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), were generally thought to be eligible to apply for discretionary relief, subject only to a narrow set of exceptions. Of course, the mere availability of discretionary relief did not mean that such relief was routinely granted. Instead, the determination of whether an alien should be granted discretionary relief was typically based on the merits of the application, taking into account such factors as the alien's ties to the

country and efforts at rehabilitation, rather than the technicalities of the alien's criminal record. In *Blake*, however, the BIA suddenly changed course, taking the position that aliens in deportation proceedings could be eligible for discretionary relief under Section 212(c) only if the statutory basis for deportation closely corresponds linguistically with a statutory basis for exclusion. As amici will explain in this brief, *Blake* represents a dramatic departure from the well-settled and longstanding approach to discretionary relief.

ARGUMENT

THE BIA'S DECISION IN *BLAKE* DRAMATICALLY ALTERED THE AVAILABILITY OF DISCRETIONARY RELIEF FOR LONG-TIME PERMANENT RESIDENTS SUBJECT TO DEPORTATION

A. For Nearly 65 Years Before The BIA's Decision In *Blake*, The Government Granted Discretionary Relief In Deportation Proceedings For A Wide Variety Of Convictions And Without A Close Comparison Of The Grounds For Deportation And Exclusion

1. As is relevant here, the concept of "discretionary relief" in deportation proceedings originates from a predecessor statute to Section 212(c)—the so-called "Seventh Proviso" to Section 3 of the Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 878 (8 U.S.C. 136(p) (1946)) (repealed 1952). That statute provided that "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe." *Ibid.* Although the statute by its terms seemingly applied only to aliens seeking "admi[ssion]" to the United States upon "returning after a temporary absence," immigration officials soon construed it to apply to

aliens who were not then in proceedings concerning their admissibility (*i.e.*, exclusion proceedings).

Immigration officials first permitted certain aliens who had never left the United States to apply for advance permission to depart the country voluntarily and "thence to make immediate application for readmission." *In re L-*, 1 I. & N. Dec. 1, 5 (Att'y Gen. 1940); see *In re B-*, 1 I. & N. Dec. 204, 207 (B.I.A. 1942). In essence, that mechanism permitted the "[a]dvance exercise" of the power to grant discretionary relief—and thereby "enabled an applicant to obtain in one proceeding" both "permission to depart the U.S. voluntarily" and "a waiver of the ground of exclusion arising upon subsequent application for admission to the U.S." Lory D. Rosenberg & Denyse Sabagh, *A Practitioner's Guide to INA § 212(c)*, 93-04 Immigr. Briefings 1 (1993) (noting that the "advance exercise" procedure dates from 1935). As a result, discretionary relief was effectively available to any alien, whether excludable or deportable, who could satisfy the requirement of at least seven years of continuous domicile in the United States, even if the alien had not previously left the country for a "temporary absence."

Immigration officials later extended the availability of "discretionary relief" under the Seventh Proviso to certain aliens in deportation proceedings. In 1940, the BIA took up the question of whether an alien in deportation proceedings could seek discretionary relief under the Seventh Proviso, even though the alien had previously been readmitted to the country after a "temporary absence." See *L-*, 1 I. & N. Dec. at 2-3. The alien in question had been convicted of larceny in 1924, left the United States for two months in 1939, and been readmitted without showing his record of conviction. See *id.* at 4. Immigration officials initiated deportation proceedings

on the ground that the alien had reentered the country despite a conviction for a "crime involving moral turpitude" (which could also have served as a basis for exclusion). See *ibid.*

The BIA referred the matter to the Attorney General, and then-Attorney General Robert Jackson determined that discretionary relief should be available to such an alien in deportation proceedings—even though the statute by its terms seemingly afforded discretionary relief only in *exclusion* proceedings. See *L-*, 1 I. & N. Dec. at 5. The Attorney General reasoned that, because the "advance exercise" of the power to grant discretionary relief was a "long-established and useful practice" of the INS, the "later, corrective exercise of the authority" was also proper, since it "amounts to little more than a correction of [the] record of entry." *Id.* at 6. The Attorney General added that it would be "capricious and whimsical" to leave an alien in deportation proceedings worse off than an alien in exclusion proceedings; whether an alien receives a "fresh judgment" on eligibility to live in the United States, he concluded, "ought not to depend upon the technical form of the proceedings." *Id.* at 5.

In so determining, the Attorney General recognized that granting such a waiver on a *nunc pro tunc* basis—*i.e.*, as if the request for a waiver had been made in the course of earlier *exclusion* proceedings—would have the effect of barring the alien's *deportation*, even though the earlier conviction rendered the alien deportable "under the literal terms" of the 1917 Immigration Act. *L-*, 1 I. & N. Dec. at 6. The Attorney General reasoned that the deportation and exclusion provisions should be "read together," with the Seventh Proviso making discretionary relief available in deportation proceedings just as it would have been in any earlier exclusion proceedings. *Ibid.* Subsequent BIA decisions confirmed the availabili-

ty of *nunc pro tunc* discretionary relief in deportation proceedings. See, *e.g.*, *In re L-*, 3 I. & N. Dec. 767, 768 (B.I.A. 1949); *In re V-*, 2 I. & N. Dec. 340, 345 (B.I.A. 1945).

2. In 1952, Congress enacted the INA, which comprehensively overhauled the Nation's immigration laws. In codifying the Seventh Proviso as Section 212(c) of the INA, however, Congress left its language virtually untouched. Section 212(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to" various provisions setting out grounds for exclusion. 8 U.S.C. 1182(c) (1994) (repealed 1996). Although the BIA had consistently interpreted the Seventh Proviso to make discretionary relief available on a *nunc pro tunc* basis to aliens in deportation proceedings, and although that practice was "well known" to Congress at the time, *In re S-*, 6 I. & N. Dec. 392, 394 (B.I.A. 1954), Congress made no effort in the INA to abrogate that practice and limit the availability of discretionary relief to aliens in exclusion proceedings.

In litigating and deciding cases during this period concerning the availability of discretionary relief for aliens in deportation proceedings, immigration officials were primarily concerned with factors such as whether the alien had been appropriately admitted for permanent residence and had spent the requisite time in the United States, see, *e.g.*, *S-*, 6 I. & N. Dec. at 393-394, and whether the equities counseled for or against the exercise of discretion, see, *e.g.*, *In re A-*, 5 I. & N. Dec. 546, 550-551 (B.I.A. 1953). Considering those factors, immigration officials regularly awarded relief on a *nunc pro tunc* ba-

sis to aliens in deportation proceedings. See, *e.g.*, *In re Farinas*, 12 I. & N. Dec. 467, 474 (B.I.A. 1967); *In re Edwards*, 10 I. & N. Dec. 506, 511 (B.I.A. 1963); *In re K-*, 9 I. & N. Dec. 585, 586 (B.I.A. 1962); *In re G-A-*, 7 I. & N. Dec. 274, 275-276 (B.I.A. 1956); *In re F-*, 6 I. & N. Dec. 537, 537-538 (B.I.A. 1954); *In re T-*, 6 I. & N. Dec. 410, 414 (B.I.A. 1954); *S-*, 6 I. & N. Dec. at 397; *In re M-*, 5 I. & N. Dec. 598, 600 (B.I.A. 1954); p. 7, *supra* (citing cases awarding relief under the Seventh Proviso). Immigration officials also took an expansive view of what constituted *nunc pro tunc* relief, awarding relief in one case to an alien who had briefly departed the country nearly twenty years earlier. See *M-*, 5 I. & N. Dec. at 600.

Notably, during this period, the BIA granted discretionary relief on a *nunc pro tunc* basis to aliens with numerous types of convictions which, if discovered at the border, would have rendered them excludable. Accordingly, immigration officials determined that aliens who had been convicted of a wide range of offenses were eligible for relief. See, *e.g.*, *In re Tanori*, 15 I. & N. Dec. 566, 567-568 (B.I.A. 1976) (drug possession); *Farinas*, 12 I. & N. Dec. at 473-474 (burglary); *K-*, 9 I. & N. Dec. at 586 (breaking and entering); *In re A-*, 7 I. & N. Dec. 128, 132 (B.I.A. 1956) (counterfeiting); *F-*, 6 I. & N. Dec. at 537 (petit larceny); *T-*, 6 I. & N. Dec. at 413-414 (perjury); *V-*, 2 I. & N. Dec. at 345 (petty theft). The BIA suggested that aliens convicted of violent offenses such as murder could also be eligible. See *In re H-R-*, 4 I. & N. Dec. 742, 744 (B.I.A. 1952). To the extent that the BIA excluded certain aliens as ineligible, that category largely consisted of aliens who had unlawfully entered the country. See, *e.g.*, *In re Loza-Bedoya*, 10 I. & N.

Dec. 778, 779-780 (B.I.A. 1964); *In re T-*, 5 I. & N. Dec. 389, 390 (B.I.A. 1953).[2]

3. Prior to 1976, although the BIA made discretionary relief available to aliens in deportation proceedings, it limited the class of eligible aliens to those who had temporarily left the country after the conviction for which deportation was being sought. See, *e.g.*, *In re Arias-Uribe*, 13 I. & N. Dec. 696, 698 (B.I.A. 1971). In 1976, however, the Second Circuit held that it was irrational to treat aliens who had temporarily left the country differently from aliens who had not. See *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). The court reasoned 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 from time to time." *Ibid.*

Immigration officials quickly adopted the rule of *Francis* nationwide and made discretionary relief available not just on a *nunc pro tunc* basis to aliens who had temporarily left the country, but also to aliens who had not. See, *e.g.*, *In re Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976).[3] Other circuits likewise followed the Second Circuit's lead and held that discretionary relief was available to both classes of aliens. See *Anwo* v. *INS*, 607 F.2d

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[2] In one case, the BIA denied eligibility to an alien who had been convicted of certain drug offenses partly because, at the time the alien applied for relief, the offenses in question did not constitute a basis for exclusion. See *In re S-R-*, 6 I. & N. Dec. 405, 408-409 (B.I.A. 1954).

[3] In *Silva*, the BIA suggested that, in cases in which the alien had not temporarily left the country, discretionary relief could be viewed as the equivalent of an advance waiver of inadmissibility, which immigration officials had long granted. See 16 I. & N. Dec. at 27.

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*, No. 92-3305, 1993 WL 8150, at *2 (6th Cir. Jan. 15, 1993); *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); *Vissian* v. *INS*, 548 F.2d 325, 328 nn.2-3 (10th Cir. 1977); *Yeung* v. *INS*, 76 F.3d 337, 340 n.4 (11th Cir. 1996). Although the Ninth Circuit had previously held that discretionary relief was unavailable to an alien who had not temporarily left the country after being convicted of a drug-related offense, it reversed course after the Solicitor General informed this Court that such a rule did "not reflect the government's current position" and that "it is sufficient for the proper administration of the Nation's immigration program that the fact and nature of a drug conviction be taken into account in the discretionary aspect of the determination whether Section [212(c)] relief should be granted." Cert. Resp. Br. at 6, *Tapia-Acuna* v. *INS*, 449 U.S. 945 (1980) (No. 80-74); see *Tapia-Acuna* v. *INS*, 640 F.2d 223, 225 (9th Cir. 1981).[4]

Although *Francis* extended the category of deportable aliens who could seek discretionary relief, immigration officials did not understand it to mandate a close

[4] More recently, in *Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc), the Ninth Circuit cast doubt on the availability of discretionary relief under Section 212(c) for aliens in deportation proceedings. Subsequently, however, the Ninth Circuit assured that, notwithstanding its decision in *Abebe*, discretionary relief "remains available as a remedy from deportation." *Pascua* v. *Holder*, 641 F.3d 316, 319 n.2 (9th Cir. 2011).

comparison of the statutory bases for deportation and exclusion as a prerequisite for discretionary relief. To the contrary, the BIA noted that, although "the language [in the comparable exclusion provision] is not exactly the same as the language [in the applicable deportation provision], * * * drawing such a distinction would run counter to the rationale of *Francis*." *In re Salmon*, 16 I. & N. Dec. 734, 736 (B.I.A. 1978).

Consistent with that understanding, immigration officials continued to take the position that aliens in deportation proceedings were generally eligible for discretionary relief, with two notable exceptions: (1) cases involving immigration violations and (2) cases involving convictions for firearms offenses. See *Bedoya-Valencia* v. *INS*, 6 F.3d 891, 897 (2d Cir. 1993). Those categories of cases were distinct because individuals in those two categories would not have been excludable.

As noted above, the first exception—for cases involving immigration violations—predated the Second Circuit's decision in *Francis*. See pp. 8-9, *supra*. Aliens who had unlawfully entered the country had long been understood to be ineligible for discretionary relief, and immigration officials adhered to that understanding in the wake of *Francis*. See, *e.g.*, *In re Jimenez-Santillano*, 21 I. & N. Dec. 567, 572 (B.I.A. 1996) (fraud and misuse of visas); *In re Hernandez-Casillas*, 20 I. & N. Dec. 262, 281, 286-287 (Att'y Gen. 1991) (entering without inspection), aff'd, 983 F.2d 231 (5th Cir. 1993); *In re Duran*, 20 I. & N. Dec. 1, 4 (B.I.A. 1989) (entering without inspection); *In re Wadud*, 19 I. & N. Dec. 182, 183, 185 (B.I.A. 1984) (aiding and abetting the fraudulent procurement of a visa). Those aliens, however, typically possessed an alternative remedy: an alien who otherwise met the requirements for discretionary relief but had unlawfully entered could simply obtain leave voluntarily

to depart the country and then reenter (because prior entry without inspection would not constitute a ground for exclusion of a permanent resident). See *T-*, 5 I. & N. Dec. at 413.

The second exception—for cases involving convictions for firearm offenses—was initially recognized in *In re Granados*, 16 I. & N. Dec. 726 (B.I.A. 1979). The BIA based that exception on the principle that an alien in deportation proceedings is eligible for discretionary relief under Section 212(c) only when the "ground of deportation is also a ground of inadmissibility." *Id.* at 728. Because the offense of conviction for which deportation was being sought—possession of a concealed sawed-off shotgun—did not constitute a statutory ground for exclusion, the BIA concluded that the alien was ineligible for discretionary relief. *Ibid.* The BIA repeatedly applied that exception in subsequent cases. See, *e.g.*, *In re Esposito*, 21 I. & N. Dec. 1, 10 (B.I.A. 1995); *In re K-L-*, 20 I. & N. Dec. 654, 659 (B.I.A. 1993); *In re Chow*, 20 I. & N. Dec. 647, 651 (B.I.A. 1993); *In re Montenegro*, 20 I. & N. Dec. 603, 605 (B.I.A. 1992). As with aliens who had committed immigration violations, however, aliens who had committed firearms offenses typically had other avenues for relief: an alien with a prior firearms offense could also obtain leave voluntarily to depart the country and then reenter (because a prior firearms offense would not constitute a ground for exclusion), see, *e.g.*, *In re Moreno-Guerrero*, No. A036-607-145, 2007 Immig. Rptr. LEXIS 10763, at *4-*5 (B.I.A. May 21, 2007), or could couple a request for discretionary relief with an application for adjustment of status, see, *e.g.*, *In re Gabryelsky*, 20 I. & N. Dec. 750, 752-756 (B.I.A. 1993); *In re Valadez-Estrada*, No. A036-046-377, 2005 Immig. Rptr. LEXIS 18520, at *2-*3 (B.I.A. Mar. 15, 2005). Accordingly, the practical significance of the two exceptions to the availa-

bility of discretionary relief in deportation proceedings was relatively slight.

Aside from the newly recognized exception for firearms offenses, immigration officials continued to take largely the same approach in considering whether to grant discretionary relief to aliens in deportation proceedings after *Francis*. Immigration officials continued to focus on factors such as whether the alien had been appropriately admitted for permanent residence and had spent the requisite time in the United States and whether the equities counseled for or against the exercise of discretion.[5] Immigration officials also continued to take the view that aliens who had been convicted of a wide range of offenses, including violent offenses, were eligible for discretionary relief.[6] And where relief was denied, it was usually on the merits, based on a weighing of the equities.[7]

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[5] See, *e.g.*, *In re Rivera-Rioseco*, 19 I. & N. Dec. 833, 835 (B.I.A. 1988); *In re Diaz-Chambrot*, 19 I. & N. Dec. 674, 675-676 (B.I.A. 1988); *In re Sanchez*, 17 I. & N. Dec. 218, 221 (B.I.A. 1980); *In re Kim*, 17 I. & N. Dec. 144, 145-146 (B.I.A. 1979); *In re Newton*, 17 I. & N. Dec. 133, 136-137 (B.I.A. 1979); *In re Anwo*, 16 I. & N. Dec. 293, 295 (B.I.A. 1977); *In re Carrasco*, 16 I. & N. Dec. 195, 196-197 (B.I.A. 1977); *In re Lok*, 15 I. & N. Dec. 720, 721 (B.I.A. 1976).

[6] See, *e.g.*, *In re Gordon*, 20 I. & N. Dec. 52, 56 (B.I.A. 1989) (robbery); *In re Khalik*, 17 I. & N. Dec. 518, 520-521 (B.I.A. 1980) (issuing checks without sufficient funds); *In re Rodriguez-Vera*, 17 I. & N. Dec. 105, 107 (1979) (murder); *Salmon*, 16 I. & N. Dec. at 738-739 (criminal trespass and robbery); *In re Leyva*, 16 I. & N. Dec. 118, 122 (B.I.A. 1977) (sexual perversion and burglary).

[7] See, *e.g.*, *In re Lozada-Duenas*, No. A034-622-043, 8 Immig. Rptr. B1-99 (B.I.A. Aug. 29, 1990); *In re Buscemi*, 19 I. & N. Dec. 628, 635 (B.I.A. 1988); *In re Baig*, No. A020-636-907, 4 Immig. Rptr. B1-57 (B.I.A. Jan. 6, 1987); *In re Mendez*, No. A030-730-909, 3 Im-

The Justice Department's benchbook for immigration judges confirms that immigration officials took an expansive approach during this period in determining eligibility for discretionary relief under Section 212(c). In its list of eligibility requirements, the first printed edition of the benchbook made no reference to whether a comparable ground for exclusion existed, noting only that immigration judges "may also terminate deportation proceedings pursuant to Section 212(c)." U.S. Dep't of Justice, *Immigration Judge Benchbook*, ch. 7, at 7-9 (1st ed. 1986). The second edition of the benchbook did state that, in order to be eligible for discretionary relief under Section 212(c), "concurrent grounds of excludability" must exist. U.S. Dep't of Justice, *Immigration Judge Benchbook*, ch. 7, at 7-11 (2d ed. 1988) (*Benchbook II*). The Justice Department, however, went on to identify only the two categories discussed above—cases involving immigration violations and cases involving convictions for firearms offenses—as categories that failed to satisfy that requirement. *Id*, ch. 7, at 7-11 to 7-12. By contrast, the Justice Department noted that broad categories such as "crimes, narcotics, or smuggling" did satisfy that requirement—and that "waiver[s] may be granted in deportation proceedings" in all of those cases. *Id*, ch. 7, at 7-11.

Moreover, the second edition of the benchbook included an eleven-page model decision for cases in which an alien was seeking discretionary relief in deportation proceedings. See *Benchbook II*, ch. 7, app. 15-1. The model decision walked through several issues that an immigration judge should consider in determining

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mig. Rptr. B1-129 (B.I.A. Feb. 13, 1986); *Rodriguez-Vera*, 17 I. & N. Dec. at 107.

whether to grant discretionary relief, including (1) whether the alien was deportable by clear and convincing evidence; (2) whether the alien was "statutorily eligible" for discretionary relief because the alien had been appropriately admitted for permanent residence and had spent the requisite time in the United States; and (3) whether the alien "merit[ed] the favorable exercise of discretion" based on rehabilitation, family ties, and other equitable considerations. *Ibid.* The model decision did not even mention as a relevant issue whether a comparable ground for exclusion existed—much less whether the statutory basis for deportation was sufficiently close linguistically to a statutory basis for exclusion. That silence reflects the prevailing understanding that only aliens with prior immigration violations or firearms convictions were disqualified for seeking discretionary relief.

4. In 1990, Congress amended the INA and eliminated the Attorney General's discretion to grant Section 212(c) waivers to aliens who had been convicted of an "aggravated felony" and had served five years in prison. See Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052. At the same time, Congress redefined "aggravated felony" to include crimes of violence that carried a sentence of at least five years. See *id.* § 501, 104 Stat. 5048. Congress thereby implicitly recognized that immigration officials would have the discretion to grant relief to those aliens who had been convicted of "aggravated felonies" but had ultimately served shorter sentences. The amendments strongly suggest that Congress intended to ratify the longstanding practice of permitting aliens in deportation proceedings to seek Section 212(c) waivers, because "aggravated felonies" had previously been added to the INA as a categorical statutory basis for *deportation* but not for exclusion. See An-

ti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344, 102 Stat. 4470-4471.

Accordingly, amici and others who interpreted and enforced the immigration laws understood that Congress had sanctioned the preexisting approach to determining eligibility for discretionary relief under Section 212(c). See, *e.g.*, *In re Roberts*, 20 I. & N. Dec. 294, 298 n.2 (B.I.A. 1991); *In re Meza*, 20 I. & N. Dec. 257, 259 (B.I.A. 1991). In an opinion written by amicus (and then-Deputy General Counsel) Paul W. Virtue, the INS Office of General Counsel stated that "Section 212(c) provides relief from exclusion, and by court decision from deportation, to persons who have had unrelinquished domicile in the United States for seven years and are excludable for all but certain subversive reasons." U.S. Dep't of Justice, INS, Office of General Counsel, *Availability of 212(c) Relief for LPRs Who Are Excludable Under 212(a)(6)(E)(i)*, Genco Op. No. 93-23 (INS), available at 1993 WL 1503970 (Mar. 16, 1993) (quotation marks omitted).

If a close linguistic comparison of the statutory bases for deportation and exclusion had been a prerequisite for discretionary relief, the 1990 amendment to the INA would have effected a major change in the availability of discretionary relief. Congress left discretionary waivers under Section 212(c) available for aliens who had been convicted of "aggravated felonies" but had *not* served five years in prison—despite the absence of a corresponding statutory category of "aggravated felonies" that served as a basis for exclusion. If a close linguistic comparison were required, immigration officials would surely have argued that, because there was no precise corresponding category for purposes of exclusion, an alien who had been convicted of an "aggravated felony" was categorically ineligible for discretionary relief in deportation proceedings. Such an argument would potentially

have enabled immigration officials to defeat requests for discretionary relief at the threshold in a substantial number of cases.

To the contrary, and again consistent with their prior practice, immigration officials were generally unconcerned with analyzing whether a comparable ground for exclusion existed in cases involving convictions for "aggravated felonies," despite the wide variety of offenses that fell within that category. Immigration officials broadly assumed that, "[f]or aliens who are established in this country as longtime lawful permanent residents, relief from deportation under [S]ection 212(c) * * * may be available *notwithstanding the conviction of an aggravated felony*." *In re K-*, 20 I. & N. Dec. 418, 425 (B.I.A. 1991) (emphasis added).

In the majority of cases involving "aggravated felonies," therefore, the BIA based its determination of whether discretionary relief should be granted on the merits of the application, rather than on the threshold issue of eligibility.[8] In cases in which the BIA determined that aliens who had been convicted of "aggravated felonies" were ineligible for discretionary relief, it did so for reasons other than the deportation grounds for which they had been charged. For example, the BIA found that some aliens had not spent the requisite seven years in the United States,[9] and that others were ineligible be-

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[8] See, *e.g.*, *In re D-*, 20 I. & N. Dec. 915, 919 (B.I.A. 1994); *In re Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-591 (B.I.A. 1992); *In re Ramirez-Somera*, 20 I. & N. Dec. 564, 567 (B.I.A. 1992); *In re Silva-Rodriguez*, 20 I. & N. Dec. 448, 450 (B.I.A. 1992); *Roberts*, 20 I. & N. Dec. at 303.

[9] See, *e.g.*, *In re D-*, 20 I. & N. Dec. 827, 830 (B.I.A. 1994); *In re Reyes*, 20 I. & N. Dec. 789, 790 (B.I.A. 1994); *In re Monterrosa-*

cause they had served more than five years in prison for an "aggravated felony."[10] In the rare cases involving convictions for "aggravated felonies" in which the BIA considered whether a comparable ground for exclusion existed, it concluded that the alien was eligible for discretionary relief.[11] The BIA departed from this understanding only when the alien was also deportable for conduct triggering one of the two exceptions to the availability of discretionary relief.[12]

5. In 1996, Congress repealed Section 212(c) altogether. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597. The BIA initially took the position that Congress had eliminated discretionary relief under Section 212(c) even for aliens who had pleaded guilty to criminal offenses before IIRIRA's enactment. See, *e.g.*, *In re Truong*, 22 I. & N. Dec. 1090, 1097-1098 (B.I.A. 1999). In some circuits, where the law continued to permit those aliens to seek discretionary relief, immigration officials continued to make other arguments as to why the aliens were ineligible. See, *e.g.*, *Mezrioui* v. *INS*, 154 F. Supp. 2d 274, 275-276 (D. Conn. 2001); *In re Davis*, 22 I. & N. Dec. 1411, 1414 (B.I.A. 2000). Immigration officials, however, continued to be

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Maitland, No. A014-818-584, 12 Immig. Rptr. B1-57 (B.I.A. Aug. 3, 1993).

[10] See, *e.g.*, *In re Llerenas-Ceballos*, No. A034-011-098, 14 Immig. Rptr. B1-87 (B.I.A. Apr. 18, 1995); *In re Gomez-Giraldo*, 20 I. & N. Dec. 957, 963-964 (B.I.A. 1995).

[11] See, *e.g.*, *In re Garbiras-Gandica*, No. A036-438-625, 12 Immig. Rptr. B1-141 (B.I.A. Nov. 5, 1993); *Meza*, 20 I. & N. Dec. at 259-260.

[12] See, *e.g.*, *In re K-L-*, 20 I. & N. Dec. 654, 658 (B.I.A. 1993); *In re Chow*, 20 I. & N. Dec. 647, 651 (B.I.A. 1993).

largely unconcerned with whether a comparable ground for exclusion existed, even in cases involving convictions for "aggravated felonies." See, *e.g.*, *Mezrioui*, 154 F. Supp. 2d at 279-280.

6. In 2001, this Court held that it would have been impermissibly retroactive for Congress to have eliminated discretionary relief for aliens who had relied on its availability when pleading guilty to an offense. See *INS* v. *St. Cyr*, 533 U.S. 289, 326 (2001). As a result of that decision, discretionary relief remained available to aliens in deportation proceedings whose criminal convictions predated IIRIRA. And as to those aliens, immigration officials continued to take the same general approach in determining whether aliens who had pleaded guilty before the repeal were eligible for discretionary relief. In cases involving immigration violations or convictions for firearms offenses, the BIA continued to determine that aliens were ineligible for relief. See, *e.g.*, *In re Phom*, No. A027-394-995, 2004 WL 2952183, at *1 (B.I.A. Nov. 4, 2004); *In re Ortiz-Campas*, No. A036-913-872, 2004 WL 2375114, at *1 (B.I.A. Sept. 23, 2004). On the other hand, the BIA generally continued to treat aliens who had been convicted of "aggravated felonies" as eligible.[13] The vast majority of applications for discretionary relief continued to be decided on the merits,[14] including in cas-

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[13] See, *e.g.*, *In re Hussein*, No. A026-416-298, 2004 WL 1059601, at *1 (B.I.A. Mar. 15, 2004); *In re Reyes Manzueta*, No. A093-022-672, 2003 WL 23269892, at *2 (B.I.A. Dec. 1, 2003); *In re Munoz*, No. A035-279-774, 28 Immig. Rptr. B1-1 (B.I.A. Aug. 7, 2003) (Pet. App. 45a-55a); but see *In re Patarroyo-Sanchez*, No. A042-279-463, 2004 WL 1739093, at *4 (B.I.A. June 18, 2004).

[14] See, *e.g.*, *In re Ranglin*, No. A041-458-034, 2005 Immig. Rptr. LEXIS 20724, at *3 (B.I.A. Mar. 15, 2005); *In re Brienza-Schettino*, No. A037-194-060, 2005 Immig. Rptr. LEXIS 21294, at *3 (B.I.A.

es involving convictions for violent offenses.[15] Some of those applications, moreover, were ultimately successful. See, *e.g.*, *In re S-Lei*, No. A038-139-424 (B.I.A. May 27, 2004) (Pet. App. 57a-58a) (second-degree attempted robbery); *In re Reyes Manzueta*, No. A093-022-672, 2003 WL 23269892, at *2 (B.I.A. Dec. 1, 2003) (first-degree manslaughter).

Mar. 14, 2005); *In re Valdez*, No. A041-299-144, 2005 Immig. Rptr. LEXIS 8076, at *3 (B.I.A. Mar. 2, 2005); *In re Guzman*, No. A040-522-914, 2005 Immig. Rptr. LEXIS 9375, at *7 (B.I.A. Jan. 19, 2005); *In re Je Young Joung*, No. A035-003-510, 2004 WL 2375124, at *1 (B.I.A. Sept. 28, 2004); *In re Nunez-Soto*, No. A091-330-661, 2004 WL 1398703, at *1 (B.I.A. Apr. 15, 2004); *In re Miller*, No. A030-343-525, 2004 WL 848531, at *1 (B.I.A. Mar. 1, 2004); *In re Garza*, No. A090-967-482, 2004 WL 2374468, at *2 (B.I.A. July 20, 2004); *In re Reyes-Hernandez*, No. A037-202-672, 2004 WL 1059596, at *2 (B.I.A. Mar. 15, 2004); *In re Ogunde*, No. A028-398-927, 2003 WL 23521885, at *1 (B.I.A. Nov. 10, 2003); *In re Pacheco*, No. A012-007-546, 25 Immig. Rptr. B1-46 (B.I.A. Mar. 29, 2003); *In re Cammack*, No. A030-756-066, 26 Immig. Rptr. B1-25 (B.I.A. July 9, 2002); *In re Das Nevas Cale*, No. A013-167-371, 24 Immig. Rptr. B1-264 (B.I.A. Feb. 8, 2002).

[15] See, *e.g.*, *In re Segoviano-Mendoza*, No. A091-577-720, 2004 WL 2374479, at *4 (B.I.A. July 27, 2004) (third-degree rape); *In re Caro-Lozano*, No. A090-870-395, 2004 WL 1398661, at *1-*2 (B.I.A. Apr. 22, 2004) (attempted rape); *Hussein*, 2004 WL 1059601, at *1 (indecency with a child); *In re Loney*, No. A035-770-136, 2004 WL 1167256, at *1 (B.I.A. Feb. 10, 2004) (robbery); *In re Vongvixay*, No. A023-882-967, 2003 WL 23216741, at *1 (B.I.A. Sept. 29, 2003) (first-degree sexual assault); *In re Munoz*, No. A035-279-774, 28 Immig. Rptr. B1-1 (B.I.A. Aug. 7, 2003) (Pet. App. 45a-55a) (aggravated assault on a peace officer); *In re Rowe*, No. A037-749-964 (B.I.A. May 9, 2003) (Pet. App. 41a-44a) (second-degree robbery); *In re Lopez-Jimenez*, No. A036-410-813, 25 Immig. Rptr. B1-125 (B.I.A. Mar. 24, 2002) (attempted robbery).

B. In *Blake*, The BIA Applied A New And Considerably More Stringent Test For Determining When An Alien Is Entitled To Discretionary Relief In Deportation Proceedings

When the longstanding approach to determining eligibility for discretionary relief under Section 212(c) is taken as the starting point, the BIA's decision in *Blake* represents a radical departure. In *Blake*, the alien had been convicted of first-degree sexual abuse of a person under 11 years old—an offense that made him deportable for "sexual abuse of a minor." Such convictions had previously been treated as a valid basis for discretionary relief on the ground that the offense was comparable to "crimes involving moral turpitude"—a statutory ground for exclusion. 23 I. & N. Dec. at 727; see *In re Hussein*, No. A026-416-298, 2004 WL 1059601, at *3 (B.I.A. Mar. 15, 2004).

The BIA nevertheless concluded that the alien was ineligible for discretionary relief. See *Blake*, 23 I. & N. Dec. at 729. The BIA reasoned that "whether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses." *Id.* at 728. Applying that "similar language" standard, the BIA concluded that, "although there may be considerable overlap between offenses categorized as sexual abuse of a minor and those considered crimes of moral turpitude, these two categories of offenses are not statutory counterparts." *Ibid.* The BIA subsequently extended that standard to other types of "aggravated felonies." See *In re Brieva-Perez*, 23 I. & N. Dec. 766, 773 (B.I.A. 2005).

The BIA's new approach in *Blake*—under which an alien is eligible for discretionary relief only when the sta-

tutory basis for deportation closely corresponds linguistically with a statutory basis for exclusion—"came as a veritable shock to immigration law practitioners." Gerald Seipp, *Criminal and Related Grounds of Inadmissibility and Deportability—Similarities, Differences, and Anomalies with an Attitude*, 08-03 Immigr. Briefings 1 (2008). The Eleventh Circuit described *Blake* as a "watershed moment in [Section] 212(c) jurisprudence." *De la Rosa* v. *Attorney General*, 579 F.3d 1327, 1332 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010). And the BIA itself acknowledged *Blake* as "announc[ing]" a new standard, see *In re Umer*, No. A038-802-967, 2010 WL 1606998, at *3 (B.I.A. Mar. 31, 2010), and precipitating a "change in law" that may "preclude a grant of 212(c) relief" in some cases, *In re Cardona*, No. A040-065-318, 2005 WL 3709244, at *1 (B.I.A. Dec. 27, 2005).

In the experience of amici, the BIA's new approach has had dramatic real-world consequences for aliens who are longtime residents of the United States. In *In re Paredes-Osuna*, No. A038-975-297, 2006 Immig. Rptr. LEXIS 12680 (B.I.A. Aug. 1, 2006), the alien had been convicted of voluntary manslaughter. See *id.* at *2. As the BIA recognized, if the alien had sought discretionary relief upon entering the United States, he would have been eligible on the ground that "voluntary manslaughter is a crime involving moral turpitude." *Ibid.* Before the BIA's decision in *Blake*, moreover, immigration officials had recognized that aliens who had been convicted of voluntary manslaughter were eligible for discretionary relief—and, indeed, had even awarded relief to such aliens. See, *e.g.*, *In re Reyes Manzueta*, No. A093-022-672, 2003 WL 23269892, at *2 (B.I.A. Dec. 1, 2003). In *Paredes-Osuna*, however, the BIA concluded that, under the standard articulated in *Blake*, the alien was not eligible for discretionary relief. See 2006 Immig. Rptr.

LEXIS 12680, at *2. Similarly, in other cases, the BIA vacated or reversed the decisions of immigration judges in light of its decision in *Blake*. See, *e.g.*, *In re Banuelos-Delena*, No. A092-789-794, 2006 WL 901335, at *1 (B.I.A. Mar. 2, 2006); *In re Gomez-Perez*, No. A037-447-529, 2006 WL 901334, at *1-*2 (B.I.A. Mar. 1, 2006); *In re Rangel-Zuazo*, No. A090-640-428 (B.I.A. May 25, 2005) (Pet. App. 59a-61a).

If the BIA's new approach is allowed to stand, the eligibility of aliens for discretionary relief will turn on the fortuity of whether they happen to have been charged with inadmissibility or deportability—and, indeed, on whether they happen to have been placed into removal proceedings before or after *Blake*'s harsh new rule came into effect. As then-Attorney General Jackson determined more than seventy years ago, however, whether an alien receives a "fresh judgment" on eligibility to live in the United States "ought not to depend upon the technical form of the proceedings." *L-*, 1 I. & N. Dec. at 5. For the reasons given by petitioner, the BIA's dramatic limitation on the availability of discretionary relief is arbitrary and impermissibly retroactive. This Court should reaffirm the availability of discretionary relief for aliens in deportation proceedings whose criminal convictions predated the repeal of Section 212(c), and reinstitute the preexisting and well-established standards for determining eligibility for that relief.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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JULY 2011

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