No. 10-694

IN THE

Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The government does not dispute that the question presented has split the circuits, has been fully aired, and is critically significant to hundreds of lawful permanent residents (LPRs), nor that this case is an ideal vehicle. It instead argues that the decision below "is correct" (Opp. 7), which is both wrong and not a reason to deny review where the circuits are irretrievably split. The petition should be granted.

ARGUMENT

1. Petitioner indisputably would have been eligible for Section 212(c) relief had his case originated in the Second Circuit. The government disparages that court as an "outlier" (Opp. 16)—a term hardly befitting

a circuit that in 2010 heard nearly one-fifth of all immigration cases. *See* Duff, *Judicial Business of the United States Courts: 2010 Annual Report of the Director*, tbl. B-3 (2011), *at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf. And the government does not defend the extreme reasoning of the Ninth Circuit, contending instead (Opp. 8) that the Ninth Circuit's position "essentially comports" with that of other circuits—a revisionist interpretation rejected by the courts involved. *E.g.*, *De la Rosa* v. *U.S. Att'y Gen.*, 579 F.3d 1327, 1337 n.14 (11th Cir. 2009) (Eleventh Circuit's refusal to follow "the route taken by the Ninth Circuit"); *Abebe* v. *Mukasey*, 554 F.3d 1203, 1211 (9th Cir. 2009) (en banc) (Clifton, J., concurring) (Ninth Circuit majority "create[d] a three-way circuit split").[1] Ultimately, it does not matter whether the circuits are split two ways or three; what matters is that outcomes differ by circuit.

The government does not dispute that the question presented has arisen in over 160 circuit and BIA cases since 2005 (Pet. App. 95a-105a)—a figure that does not include unreported decisions of immigration judges.[2]

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[1] Contrary to the government's assertion, the Ninth Circuit has ruled, albeit inconsistently, that *Abebe* rendered deportable LPRs categorically ineligible for Section 212(c) relief (*Sito* v. *Holder*, 387 F. App'x 700 (9th Cir. 2010) (unpublished)), and the government itself has so argued. *E.g.*, Appellee's Br. 17, *United States* v. *Magana-Cancino*, 2010 WL 3950080 (9th Cir. Feb. 11, 2010) (arguing that petitioner "was facing deportation and not inadmissibility" and "did not have a right to" Section 212(c) relief (citing *Abebe*)). This is relevant not to show an "intra-circuit" split (Opp. 9 n.6), but to confirm that the Ninth Circuit's approach has differed from that of any other circuit.

[2] Additional cases have arisen since the petition was filed. *See, e.g.*, *De Nobrega* v. *U.S. Attorney General*, 2010 WL 5174955

Nor does a decline in Section 212(c) grants between 2004 and 2009 (Opp. 17) help the government, because that decline coincides with the BIA's 2005 decision in *Matter of Blake*, 23 I. & N. Dec. 722, *rev'd*, 489 F.3d 88 (2d Cir. 2007). It is hardly surprising that Section 212(c) grants dropped immediately after the BIA's unexpected "change in law," which eliminated Section 212(c) relief for hundreds of LPRs who previously were eligible for it. *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb. 22, 2008); Pet. 9-12 & nn.5-6.

The government's claim that Section 212(c) *applications* have decreased since 2004—a claim supposedly based on unidentified "published and unpublished statistics" (Opp. 18 & n.9)—is similarly unavailing. LPRs in circuits governed by *Blake* are less likely to apply for Section 212(c) relief or to be informed by counsel or an immigration judge that they may do so. Moreover, the government's statistics likely understate the frequency with which the issue arises, because Section 212(c) requests that, like Petitioner's, are "pretermitted" under *Blake* may not be recorded as "applications." Pet. App. 12a ("APPLICATIONS: None submitted; no eligibility established"), 18a-19a (no notation that Petitioner sought Section 212(c) relief). And even the government admits that 857 LPRs were granted Section 212(c) relief in 2010. Opp. 17. A form of relief that allows over 800 people to avoid removal each year is far from unimportant.

(11th Cir. Dec. 22, 2010) (unpublished); *Ramos-Ruiz* v. *Holder*, 2010 WL 5158569 (9th Cir. Dec. 15, 2010) (unpublished); *Castro* v. *Holder*, 2010 WL 4683882 (9th Cir. Nov. 19, 2010) (unpublished); *Matter of Paniagua Zavala*, 2011 WL 585614 (BIA Feb. 3, 2011).

Nor does Section 212(c)'s prospective repeal in 1996 reduce its importance as a present-day avenue for relief. For many LPRs who have lived here lawfully for decades, the issue only arises when they apply for naturalization. *E.g.*, *Lovan* v. *Holder*, 574 F.3d 990, 992 (8th Cir. 2009). Section 212(c) thus still affects hundreds if not thousands of people—a fact underscored by this Court's receipt of six other petitions raising this issue in 2009 and 2010. Opp. 7. This case, however, is an ideal vehicle: the issue has fully percolated; no Member of the Court is recused; and, unlike in *Ukofia* v. *Holder*, 131 S. Ct. 191 (2010) (No. 09-11395), Petitioner is represented by counsel.

The BIA has essentially undone this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), repealing Section 212(c) for any LPR outside the Second Circuit who is deportable for a non-drug aggravated felony—unless the LPR fortuitously left the United States and returned. That erroneous constriction of Section 212(c) implicates undeniably powerful interests: deportation "may result … in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922); *see also Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1486 (2010) (describing "[t]he severity of deportation" as "the equivalent of banishment or exile" (internal quotation marks omitted)). Petitioner's removal would consign him to a country where he does not speak the language and has no employment prospects and would deprive his U.S. citizen family—including his elderly mother and his daughter—of his companionship and support. These circumstances warrant this Court's review.

2. The government's merits arguments depend on distorting both the law and Petitioner's position.

a. The government argues that the BIA's sudden about-face in 2005 was not retroactive. Opp. 15 n.7; *accord* Opp. 10. Yet the government identifies no pre-2005 case—not one—holding that an LPR who was deportable for a "crime of violence" or "sexual abuse of a minor" offense was ineligible for Section 212(c) relief. Petitioner, by contrast, identified many contrary examples, including cases in which relief was granted but then withdrawn after *Blake* changed the law. Pet. 9-12 nn.5-6.

The government cavils that BIA decisions granting relief were not "precedential" (Opp. 10-11), without explaining why that should matter. Consistent uniform decisions, published or not, indicate agency practice. *See Cruz* v. *Attorney General*, 452 F.3d 240, 246 & n.3 (3d Cir. 2006) (noting "routine[]" BIA practice based on "ten unpublished opinions" with no contrary decision). If anything, non-publication shows that the decisions were uncontroversial and did not involve the "alteration, modification, or clarification of an existing rule of law." BIA Practice Manual § 1.4(d)(i)(A) (rev. July 30, 2004). The "unbroken string of unpublished opinions" also "underline[s] the correctness" of similar reasoning in published decisions. *Perez-Enriquez* v. *Gonzales*, 463 F.3d 1007, 1013 (9th Cir. 2006) (en banc).[3]

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[3] In 1992, the BIA held that an LPR convicted of attempted murder (a crime of violence) could apply for Section 212(c) relief, distinguishing firearms cases in which the LPR lacked "a comparable ground of excludability." *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 589-590. The BIA's remand "to afford the [LPR] an opportunity to apply for a [Section 212(c)] waiver" (*id.* at 591) would have been futile if all crimes of violence lacked statutory counterparts. And contrary to the government's claim (Opp. 11), the BIA in *Matter of A-A-*, 20 I. & N. Dec. 492 (1992), specifically

The BIA's approach before 2005 mirrors contemporaneous court of appeals decisions, none of which the government addresses. Pet. 10-11. Even the government itself, when opposing Section 212(c) relief for an LPR convicted of a crime of violence, did not argue that relief was unavailable due to lack of a statutory counterpart. Appellees' Br. 11-12, *Cordes* v. *Gonzales*, No. 04-15988 (9th Cir. Oct. 12, 2004). Such an argument, were it correct, would have easily resolved the case in the government's favor; instead, the LPR prevailed. *Cordes* v. *Gonzales*, 421 F.3d 889, 893, 898-899 (9th Cir. 2005), *vacated on other grounds sub nom. Cordes* v. *Mukasey*, 517 F.3d 1094 (9th Cir. 2008). And the government argued in 2002 that "Congress could rationally have decided to eliminate [Section 212(c)] relief altogether for all aliens convicted of … crimes of violence"—a contention that only made sense because LPRs with "crime of violence" convictions *were* eligible for relief. Appellee's Br. *13, *United States* v. *Ubaldo-Figueroa*, 2002 WL 32254035 (9th Cir. Oct. 10, 2002). The government's advocacy was not inadvertent; it reflected the universal understanding before 2005 that "crime of violence" and "sexual abuse of a minor" offenses were waivable under Section 212(c). *See also* Pet. App. 38a (immigration judge acknowledging that Section 212(c) "could have been applied to [Petitioner's] manslaughter conviction").

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addressed the statutory counterpart doctrine, finding that an LPR convicted of murder was "deportable under a deportation provision analogous to the exclusion ground at section 212(a)(9)" (crime involving moral turpitude) and was "therefore not disqualified from relief … on this account." *Id.* at 500-501.

Given this uniform practice, the government's suggestion that Petitioner could "have easily avoided" removal "by departing the country voluntarily at any point before his removal proceedings were initiated in 2005" is incomprehensible. Opp. 17. Before 2005, no immigration lawyer, judge, or even government lawyer would have told Petitioner that his Section 212(c) eligibility depended on departing the country. For decades, the BIA and every circuit had agreed that deportable aliens need *not* depart, and the Solicitor General acquiesced in that view. Pet. 6-7 & n.2. The government's suggestion that Petitioner should have anticipated that the BIA would reverse course in 2005 is untenable.[4]

The government's assertion that the statutory counterpart test is "not new" (Opp. 17) is similarly misdirected. Before 2005, the BIA consistently held that LPRs like Petitioner *satisfied* the test because their offenses had a statutory counterpart, namely "crime involving moral turpitude" (CIMT). The two main deportation bases that categorically failed the test were "entry without inspection and firearms violations." Aleinikoff et al., *Immigration: Process & Policy* 703-704 (3d ed. 1995); *see also Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991).

The government weakly claims (Opp. 4) that "the analytical underpinnings of its interpretation" were found in *Komarenko* v. *INS*, 35 F.3d 432 (9th Cir. 1994), *abrogated by Abebe*, 554 F.3d 1203. The BIA did not think so; it treated LPRs deportable for "crime of vio-

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[4] Equally untenable is the suggestion that Petitioner's presence was "'illegal.'" Opp. 18 (quoting *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 (2006)). Petitioner entered as and remained a lawful permanent resident. Pet. App. 37a.

lence" and "sexual abuse" offenses as eligible for Section 212(c) relief well after *Komarenko*, including in cases arising in the Ninth Circuit. *Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003) (San Diego); *Cardona*, 2005 WL 3709244 (Seattle). The Ninth Circuit did too. *Cordes*, 421 F.3d at 893, 898-899.[5]

Try as the government might, it cannot rewrite history. Before 2005, deportable LPRs with the same conviction as Petitioner were eligible to seek Section 212(c) relief regardless of whether they had left the country and reentered. The BIA's later contrary ruling was an unjustified, retroactive, arbitrary and capricious "change in law."

b. As Petitioner demonstrated, the BIA's new position distinguishes between (1) *deportable* LPRs who traveled abroad, were readmitted, and subsequently were placed in *deportation* proceedings, and (2) LPRs *deportable* on the same charge who never departed. Pet. 24. The government admits as much when it suggests that Petitioner's eligibility for relief turned on departure (Opp. 17), yet it points to no rational basis for treating a deportable LPR who did *not* travel abroad less favorably than a deportable LPR who did. Pet. 26; *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976); *Matter of L-*, 1 I. & N. Dec. 1, 6 (Att'y Gen. 1940)

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[5] *Komarenko* was an unremarkable application of the statutory counterpart rule to a firearms offense, namely assault with a deadly weapon under Cal. Penal Code § 245(a)(2), which is *not* an excludable CIMT. *Carr* v. *INS*, 86 F.3d 949, 951 (9th Cir. 1996). Even if Komarenko had departed, he could not have sought Section 212(c) relief. The opposite is true of Petitioner.

("To require [petitioner] to go to Canada and reenter will make him no better resident of this country.").[6]

Instead of addressing Petitioner's argument, the government attacks a strawman, claiming that Petitioner "essentially" contends that he should be treated like an LPR charged with "inadmissibility." Opp. 10. Petitioner made no such argument. Rather, the correct comparison is to a *deportable* LPR who had previously traveled abroad and whose offense of conviction qualifies as a CIMT. Pet. 19-20. Such persons are eligible for Section 212(c) relief in deportation under the longstanding *nunc pro tunc* procedure. Pet. 6-8; *see also De la Rosa*, 579 F.3d at 1338 (recognizing that an LPR who "is convicted of a deportable offense, travels abroad, returns to the United States, and then is placed in deportation proceedings" is eligible under Section 212(c)).

The government may well wish that Petitioner had challenged a distinction between persons who have "already been admitted to the country" and persons "seeking admission." Opp. 12. But that has never been Petitioner's argument. Rather, the inequality results from an irrational distinction among *deportable* LPRs, all of whom have "already been admitted to the country." As noted, the government does not even try to articulate a rational basis for distinguishing (especially

[6] The government contends (Opp. 11) that Congress's "enactment" of an "immigration provision" is constitutional if there is a "facially legitimate and bona fide reason" for it. Petitioner does not challenge any congressional "enactment," but an unconstitutional distinction created by a *BIA decision* that is inconsistent with the longstanding application of Section 212(c). Rational-basis review applies.

retroactively) between deportable LPRs based only on whether they previously departed the country.

The government acknowledges Petitioner's actual argument once, in a footnote (Opp. 16 n.8), and even then its response is off-point. Contrary to the government's insinuation, grants of relief *nunc pro tunc* to deportable LPRs who traveled abroad are far from extraordinary. They represent a "long-established administrative practice" reflected in numerous BIA decisions. *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 698 (BIA 1971), *aff'd*, 466 F.2d 1198 (9th Cir. 1972); *see also Matter of K-*, 9 I. & N. Dec. 585, 586 (BIA 1962); *Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956); *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1954); *Hernandez-Casillas*, 20 I. & N. Dec. at 284 n.6 (refusing to overrule *G-A-* and *S-*). The government cites no case in which a deportable LPR's case was held insufficiently "extraordinary" for Section 212(c) relief *nunc pro tunc*.[7]

The government's suggestion that an equal protection claim fails unless the LPR can identify an inadmissibility subsection that contains "similar language" and is "substantially identical" to his deportation subsection (Opp. 4, 14) is baseless. An equal protection challenge to an irrational governmental distinction (prior travel) that appears nowhere in the relevant statute (Section 212(c)) cannot be defeated by pointing to semantic variations in completely *different* statutory subsections (the inadmissibility provisions of Section 212(a) and the deportability provisions of Section 237). As the Second

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[7] The government references Petitioner's 2003 theft conviction as bearing on the *merits* of a Section 212(c) application (Opp. 16 n.8), but does not dispute its irrelevance to the question presented, which concerns only his eligibility to *apply* for relief.

Circuit reasoned, the government's "emphasis on similar language is strange." *Blake* v. *Carbone*, 489 F.3d 88, 102 (2d Cir. 2007). Congress plainly did not draft Section 212(a) and Section 237 on the theory that discrepancies in their terminology would determine the availability of relief under Section 212(c).

Nor is it an answer that Petitioner is "not being treated any differently from other aliens" denied relief under *Blake* (Opp. 16), any more than discrimination against red-headed people could be defended by pointing out that all redheads were treated alike. The government "cannot deflect an equal protection challenge by observing that … all those within the burdened class are similarly situated. The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps." *Williams* v. *Vermont*, 472 U.S. 14, 27 (1985); *see also Rinaldi* v. *Yeager*, 384 U.S. 305, 308-309 (1966) (equal protection "imposes a requirement of some rationality in the nature of the class singled out").

The government cites the Ninth Circuit's now-abrogated decision in *Komarenko* as "persuasive." Opp. 12. The relative persuasiveness of the circuits' differing views is the very issue this Court should resolve on certiorari. For now, it suffices to note that Komarenko's offense was not held to be a CIMT and, accordingly, raised a different (and less compelling) equal protection issue, as the government recognizes. *Id.* (*Komarenko* considered whether "two groups of aliens *convicted of different crimes*" were similarly situated (emphasis added)). This case, by contrast, involves the BIA's sudden decision in 2005 to start treating deportable LPRs convicted of the *same crime* and deportable under the *same charge* differently depending on whether they previously left the country.

The Second Circuit addressed that very question and answered it correctly. It did not "vastly overstep" the judicial role or require consideration of "the facts" of particular cases (Opp. 13, 19); it simply required that the BIA decide the legal question whether a particular offense is a CIMT as well as an aggravated felony. *Blake* v. *Carbone*, 489 F.3d at 105. Federal courts, including this Court, routinely review such determinations. *E.g.*, *Jordan* v. *De George*, 341 U.S. 223, 223-224, 232 (1951) ("conspiracy to defraud the United States of taxes on distilled spirits" is a CIMT). Often, as here, the issue is not even disputed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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