No. 10-694

IN THE
Supreme Court of the United States

JOEL JUDULANG,
Petitioner,
v.
ERIC H. HOLDER, JR.,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

THE BIA'S NEW POLICY IS ARBITRARY AND CAPRICIOUS

In 2005 the Board of Immigration Appeals (BIA) departed from consistent agency practice to hold that lawful permanent residents (LPRs) deportable for certain aggravated felonies were categorically ineligible for discretionary relief under Section 212(c). That novel interpretation is impermissibly retroactive, arbitrary and capricious, constitutionally doubtful, and inadequately explained. The government's arguments to the contrary are off-point and unsupported, and they ignore the reality of immigration practice before 2005.

A. *Blake* And *Brieva-Perez* Were Impermissibly Retroactive

1. The BIA changed the law

Petitioner and amici presented detailed evidence that, before the BIA's decisions in *Matter of Blake*, 23 I. & N. Dec. 722 (2005), and *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (2005), LPRs convicted of aggravated felony crimes of violence could seek Section 212(c) relief. To some of the evidence, the government responds with fine distinctions that bear little relation to actual agency practice. To the rest, the government offers no response at all.

1. The government's position is that, by adding the "crime of violence" subcategory to the "aggravated felony" deportation provision in 1990 without adding a similarly-phrased exclusion provision, Congress rendered a broad swath of LPRs categorically ineligible for Section 212(c) relief. But it nowhere confronts the necessary implication of that position: that Congress imposed this dramatic effect without saying a word about it—though it *simultaneously* used express terms to restrict Section 212(c)'s application to other LPRs, including aggravated felons who served long sentences. Pet. Br. 14-15, 29-30, 44-46. Nothing in the 1990 amendment remotely suggests that Congress meant to render *every* LPR convicted of a "crime of violence" aggravated felony (regardless of sentence) ineligible for relief. The government has no response.[1]

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[1] The government does not defend the Ninth Circuit's holding that Section 212(c) does not apply to deportable aliens at all. Pet. Br. 28-31.

The government's treatment of *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262 (Att'y Gen. 1991), the leading decision on the statutory-counterpart rule, is similarly evasive. While the government twice quotes the statement that Section 212(c) relief is available when "the asserted ground for deportation is also a ground for exclusion" (Br. 7, 22), it does not even mention Attorney General Thornburgh's statement of how that principle operates *in practice*. The Attorney General identified only "two grounds for deportation hav[ing] no analogue in the grounds for exclusion," namely illegal entry and firearms possession. *Hernandez-Casillas*, 20 I. & N. Dec. at 282 n.4; *see also id.* at 288 (identifying LPRs "convict[ed] for a firearm offense" and "illegal entrants" as unable to satisfy the statutory-counterpart requirement). The Attorney General also approved *Matter of Granados*, which had held an LPR ineligible for relief because his "*[c]onviction* for possession of a concealed sawed-off shotgun is not a specified section 212(a) ground of excludability, *nor a crime involving moral turpitude that would render the respondent excludable*." 16 I. & N. Dec. 726, 728 (BIA 1979) (emphasis added). The Attorney General's unqualified endorsement of *Granados* and articulation of only non-excludable conduct (illegal entry and firearms convictions) as lacking a statutory counterpart demonstrate that *Granados* correctly stated the law. *Hernandez-Casillas*, 20 I. & N. Dec. at 288.

Matter of Wadud, 19 I. & N. Dec. 182 (BIA 1984), is not to the contrary. Wadud was deportable due to a conviction under 18 U.S.C. §1546, which the BIA had previously held non-excludable in a case *Wadud* cites. *Matter of R-G-*, 8 I. & N. Dec. 128, 129 (BIA 1958) ("there is no specific paragraph of section 212(a) which requires the applicant's exclusion"). Accordingly,

Wadud is no different from cases involving non-excludable firearms offenses (*Granados*) or illegal entry (*Hernandez-Casillas*), because the LPR could not seek Section 212(c) relief in any setting. The BIA later confirmed that *Wadud* turned on the fact that a Section 1546 conviction was not an excludable crime involving moral turpitude (CIMT). *Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 572 (BIA 1996) (explaining that *Wadud* reasoned that "no ground of inadmissibility enumerated in section 212(a) of the Act at the time was comparable to *18 U.S.C. §1546*, including section 212(a)(9), the CIMT provision" (emphasis added)). And the Attorney General himself reaffirmed that the touchstone of Section 212(c) eligibility was whether a conviction could form the basis for excludability, stating that an LPR "subject to deportation must have *the same opportunity to seek discretionary relief* as an alien who has temporarily left this country and, upon reentry, *been subject to exclusion.*" *Hernandez-Casillas*, 20 I. & N. Dec. at 287 (emphasis added); *see also Matter of Meza*, 20 I. & N. Dec. 257, 259 (BIA 1991) ("[A]s the respondent's conviction … clearly could also form *the basis for excludability* …, he is not precluded from establishing eligibility for section 212(c) relief based on his conviction for an aggravated felony." (emphasis added)).[2]

[2] The government's other decisions ruled only that LPRs deportable for firearms convictions could not seek relief—an uncontroversial proposition irrelevant to this case. *E.g.*, *Matter of Gabryelsky*, 20 I. & N. Dec. 750, 753 (BIA 1993) (LPR "could not use Section 212(c) … to waive deportability for his firearms conviction"); *Matter of Esposito*, 21 I. & N. Dec. 1, 10 (BIA 1995) (Section 212(c) cannot "waive deportability on the ground of a firearms offense").

2. The government concedes (Br. 36) that two BIA decisions in aggravated felony cases support Petitioner's position. In fact, at least *eight* unpublished decisions ruled that LPRs deportable for crimes of violence could seek Section 212(c) relief (and some granted it); *three* did likewise for sexual-abuse-of-a-minor aggravated felonies. Pet. Br. 18-19 nn.4-5.[3] These decisions apply the long-settled principle—reaffirmed by *Granados* and *Hernandez-Casillas*—that a deportable conviction satisfies the statutory-counterpart rule if it is also an excludable CIMT. In the BIA's own words, "there is a 'corresponding' ground of inadmissibility" if a crime-of-violence conviction "could make the [LPR] inadmissible … as an alien convicted of a [CIMT]." *Matter of Munoz*, 28 Immigr. Rep. B1-1 (BIA Aug. 7, 2003) (Pet. App. 52a-53a). Similarly, relief is available where "the aggravated felony at issue …, namely a crime of violence, would be [a CIMT]." *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003) (granting relief in voluntary manslaughter case).

The government asks this Court to disregard these rulings because the BIA declined to publish them—a contention based on one circuit decision forgiving an "apparent inconsistency" with "one" unpublished opinion. Br. 35. But the BIA's unpublished decisions "reveal the interpretation put upon the statute by the agency." *Hanover Bank* v. *C.I.R.*, 369 U.S. 672, 686 (1962); *see also Boesche* v. *Udall*, 373 U.S. 472, 482-483 (1963) (citing string of unpublished agency decisions for

[3] Although *Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003), involved an inadmissibility charge, the BIA stated that an aggravated felony crime of violence under 8 U.S.C. §1101(a)(43)(F)—a *deportation* provision—is Section 212(c)-eligible.

the proposition that "[f]rom the beginnings of the Mineral Leasing Act the Secretary has conceived that he had the power drawn in question"). There is "no earthly reason why the mere fact of nonpublication should permit [the BIA] to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases." *Davila-Bardales* v. *INS*, 27 F.3d 1, 5-6 (1st Cir. 1994); *see also Shardar* v. *Att'y Gen.*, 503 F.3d 308, 315 (3d Cir. 2007); *Perez-Vargas* v. *Gonzalez*, 478 F.3d 191, 193 n.3 (4th Cir. 2007). That is particularly true where, as here, *several* unpublished decisions follow on and apply the Attorney General's and BIA's prior articulation of the law. *Cruz* v. *Att'y Gen.*, 452 F.3d 240, 250 (3d Cir. 2006).

The government's treatment of the *published* decisions in *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587 (BIA 1992), and *Matter of A-A-*, 20 I. & N. Dec. 492 (BIA 1992), is off-point. The government does not dispute that those LPRs were deportable for convictions that would qualify as aggravated felony "crimes of violence"—attempted murder and murder—or that both LPRs were eligible for relief. Instead, it asserts only that they were not *charged* with deportability for an aggravated felony crime of violence. Br. 32-33. That is without significance, because the BIA has long held that, once a waiver is granted, "it would be clearly repugnant to say that the respondent remains deportable *because of the same conviction*." *Matter of G-A-*, 7 I. & N. Dec. 274, 275-276 (BIA 1956) (emphasis added). Accordingly, *Rodriguez-Cortes* and *A-A-* demonstrated that LPRs deportable for murder or attempted murder convictions could seek a waiver of exclusion that, if granted, would protect them from deportation due to those *convictions*. Indeed, *A-A-* expressly reaffirmed that the context in which the waiver is obtained is ir-

relevant. 20 I. & N. Dec. at 502 n.22 ("[A]n application for section 212(c) relief filed in the context of deportation proceedings is equivalent to one made at the time an alien physically seeks admission into the United States.").

The government speculates (Br. 36) that the possibility that some crime-of-violence convictions "could have been charged" as aggravated felony theft, 8 U.S.C. §1101(a)(43)(G), or "sexual abuse of a minor," *id.* §1101(a)(43)(A), "may have altered" the comparability analysis. A similar argument is made as to murder, which can be charged as "murder, rape, or sexual abuse of a minor." *Id.* §1101(a)(43)(A); Br. 32-33 & n.15. But the government conspicuously fails to assert that *Blake* allows LPRs charged under subsections (A) or (G) to seek Section 212(c) relief. In fact, *Blake* held the exact opposite for "sexual abuse of a minor" under subsection (A), and the BIA held likewise for theft offenses under subsection (G). *In re Valette*, 2010 WL 3536705 (BIA Aug. 24, 2010). As for murder, *Blake* was premised on comments asserting that "aggravated felonies such as 'Murder, Rape, or Sexual Abuse of a Minor'" are *not* waivable. Pet. Br. 21-22. The government's apparent agreement that LPRs charged under those subsections were previously eligible for Section 212(c) relief, whereas the BIA now holds otherwise, confirms that *Blake* was a sea change.

Perhaps the strongest indications that the BIA believed itself to be changing the law are its decisions changing pre-*Blake grants* of relief into *denials* in the same case. Pet. Br. 23 & n.7. When its guard was down, the BIA admitted that its about-face represented a "change in law." *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005) (per curiam). The BIA's later attempt to retract that candid admission (Br. 38)

only highlights the BIA's failure even to acknowledge, much less explain, its U-turn.

3. The government cannot point to a single contemporaneous account consistent with its revisionist view.[4] By contrast, numerous amici who counseled *both* the government and LPRs during the relevant period—including two former INS General Counsels—have advised the Court of their understanding that aggravated felony crimes of violence were waivable provided they triggered excludability. Immigration Officials' Br. 8, 11; NACDL Br. 8-9; NIJC/AILA Br. 2-4, 11-12.

This understanding of the statutory-counterpart requirement was so well-established that the government often did not raise the issue when opposing Section 212(c) relief in crime-of-violence cases. *E.g.*, Appellee's Br. 8-12, *Cordes* v. *Gonzales*, No. 04-15988 (9th Cir. Oct. 12, 2004). LPRs in such cases were granted relief or at least allowed to seek it without any challenge based on the statutory-counterpart requirement. *E.g.*, *Hem* v. *Maurer*, 458 F.3d 1185, 1187-1189 (10th Cir. 2006); *De Araujo* v. *Gonzales*, 457 F.3d 146, 154 (1st Cir. 2006) ("the BIA clearly considered De Araujo for discretionary relief"); *Cordes* v. *Gonzales*, 421 F.3d 889, 893, 898-899 (9th Cir. 2005), *vacated on other grounds*, 517 F.3d 1094 (9th Cir. 2008).

The government argues that these decisions do not "mention" the statutory-counterpart requirement (Br.

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[4] The government cites *Matter of Patarroyo-Sanchez*, 2004 WL 1739093 (BIA June 18, 2004), which shows at most that the BIA sought to change course slightly earlier than *Blake*. *Patarroyo-Sanchez*, like *Blake*, does not even acknowledge, much less explain, the BIA's deviation from its prior consistent practice.

34), but that is precisely the point: the government apparently failed even to raise such an argument, though it easily would have prevailed under *Blake*'s new rule. Indeed, the government sometimes made arguments directly contrary to *Blake*'s view that Section 212(c) relief was categorically unavailable for crime-of-violence aggravated felonies. *See* Appellee's Br., *United States* v. *Ubaldo-Figueroa*, No. 01-50376, 2002 WL 32254035, at *13 (9th Cir. Oct. 10, 2002) (although "Congress could rationally have decided to eliminate [Section 212(c)] relief altogether for … crimes of violence," it actually chose a "less expansive approach"). As for its explicit recognition that *Blake* was a "change in the law" (Resp. Br. 16, *Paulo* v. *Holder*, No. 07-71198 (9th Cir. Nov. 12, 2010)) the government responds only that the Ninth Circuit disagreed (Br. 38). That does not make the government's (correct) concession any less revealing.

4. The government addresses the agency's binding regulations only briefly, asserting that a waiver is valid as to the "specific *grounds* of excludability, deportability or removability that were described in the application." Br. 42 (quoting 8 C.F.R. §1212.3(d)). But this language proves Petitioner's point. LPRs seeking relief are not asked to "describe[] in the application" any specific excludability, deportability, or removability *subsections*; indeed, the form does not mention deportability at all. Rather, the application seeks the "reasons" the LPR believes he or she is "inadmissible" and specifies that "if the application is made because you may be inadmissible due to *a conviction of a crime, state … the crime* [in the application]." Pet. Br. App. 23a, 24a. Accordingly, when the regulations refer to "grounds," they refer unambiguously to excludable *convictions* that can be "described in the application."

2. The BIA unreasonably applied *Blake* and *Brieva-Perez* retroactively

Each of the five *Retail*, *Wholesale* factors—which the government does not dispute appropriately implement this Court's balancing test (Br. 43)—recommends against retroactive application of the BIA's new policy.

1. The government grudgingly concedes, but seeks to minimize, the burden of retroactivity on Petitioner. Br. 43. Mandatory deportation is a terrifying sanction for LPRs who came to America as children; few if any civil orders are more harmful to an individual than deportation from the country that he and his family have called home for decades. Pet. Br. 42-43; *INS* v. *St. Cyr*, 533 U.S. 289, 325 (2001) ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation").

2. As demonstrated above (at pp. 2-9), *Blake* and *Brieva-Perez* represented and were acknowledged as an abrupt change in law. The suggestion that the BIA in 2005 encountered only a "new factual situation" (Br. 43) is plainly incorrect: several prior BIA decisions considered whether LPRs deportable for excludable crimes of violence satisfied the statutory-counterpart rule and confirmed that they did—a conclusion consistent with Attorney General Thornburgh's articulation of the law in 1991. *See supra* pp. 3-5.

Moreover, in considering the "ill effect" or "inequity" of retroactivity, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); *Retail, Wholesale & Dep't Store Union* v. *NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972), the question is not whether the government can cleverly reinterpret BIA decisions in hindsight, but whether LPRs would reasonably have "belie[ved] in their continued eligibility" *at the time*. *St. Cyr*, 533 U.S. at 323. As explained

above and by amici, an LPR would have reasonably relied on the availability of relief for a "crime of violence" conviction; that is what the criminal defense bar, the immigration bar, two INS General Counsels and several trial attorneys in the two administrations immediately preceding *Blake* would have advised. The government agreed, when it suited its purposes. *See supra* p. 9. In these circumstances—where the regulated individuals and their counsel would reasonably perceive a change in law—retroactivity is most inequitable.

The government asserts that the issue was "evolving," because there were "no precedential opinions on point." Br. 43. That is incorrect; several published opinions strongly supported Petitioner's understanding of the statutory-counterpart requirement, including *Hernandez-Casillas*, *Meza*, *Granados*, and others described below at pp. 16-17. Moreover, the Court should not allow the government to dismiss the numerous unpublished decisions applying those precedents favorably to LPRs in utterly indistinguishable cases—a rule that would allow the agency to evade APA review by manipulating its publication practices.

3. The government argues that retroactive application is appropriate because an LPR in Petitioner's *particular* position would not have relied on the prior state of the law as he supposedly "did not become deportable" until 1996. Br. 45. This argument, raised for the first time in the government's merits brief, is wrong for four reasons.

First, Petitioner was deportable when he pled guilty. He traveled to the Philippines in 1987 for his grandmother's funeral; his 1989 plea thus made him deportable for conviction of a CIMT committed within five years after entry. 8 U.S.C. §1251(a)(4) (1988).

Second, the government's invocation of individual reliance is misplaced, because the BIA adopted a *categorical* approach that applies regardless of any individual's particular situation. The government cannot justify the policy's retroactivity as to *all* LPRs by questioning a specific LPR's reliance. And looking to the "great number of defendants in [Petitioner's] position," *St. Cyr*, 533 U.S. at 323, there will be many who reasonably would have relied on Section 212(c) availability as the *quid* for the *quo* of a plea bargain. *See* Br. 44 (conceding reasonable reliance interest of certain LPRs).

Third, an LPR who pleaded guilty before 1996 to an offense that was excludable but not deportable could reasonably have relied on the availability of Section 212(c) in the event that Congress expanded the category of deportable offenses, which Congress had already done in 1988. *See St. Cyr*, 533 U.S. at 295-296 (describing broadening of set of deportable offenses, including through the Anti-Drug Abuse Act of 1988). Before *Blake*, the agency allowed an LPR with an excludable offense to apply for Section 212(c) relief *at any time*, whether in exclusion proceedings, deportation proceedings, or no proceeding (Pet. Br. App. 22a-23a (Form I-191); 8 C.F.R. §212.3(a), (b) (2003)) and recognized that a grant of relief in *any* context would preclude deportation based on the same conviction alone. *See Matter of Mascorro-Perales*, 12 I. & N. Dec. 228, 230 (BIA 1967). Thus, in pleading guilty, an LPR could reasonably have relied on the present *excludability* of

the offense as sufficient to preserve effective relief from future deportation.[5]

Indeed, the government's assertion that reliance is only possible where the LPR's plea triggers immediate deportability makes no sense. An LPR pleading guilty could not possibly know what deportation charges might someday be lodged; as the government acknowledges (Br. 35-36), many crimes meet multiple deportation provisions, which have been amended repeatedly. Nor could the LPR know whether an *as yet unenacted* deportation provision would have similar language or scope to an exclusion provision. But the LPR *could* know whether the crime qualified as a waivable CIMT. Before *Blake*, that was all that was needed to preserve eligibility for relief if the conviction later became a basis for deportation. *See* Pet. Br. 17-19; NACDL Br. 8 (*Blake* "is contrary to how these lawful permanent resident defendants were advised in connection with their pre-1996 guilty pleas").

Fourth, LPRs in Petitioner's situation could separately have relied on pre-*Blake* law by not leaving the country—a fact that was irrelevant before *Blake*, but that, under the government's view, now makes all the difference. Cert. Opp. 17; *see also* Br. 51-52 (suggesting that LPRs should also report themselves as inadmissible). But LPRs should not be penalized for failing to take that step before the BIA suggested it was needed, especially given the BIA's longstanding holding that

[5] Even current agency regulations make Section 212(c) relief available to LPRs who pleaded guilty to qualifying offenses regardless of whether the plea triggered deportability at the time. 8 C.F.R. §§1212.3(f)(4)(ii), 1212.3(h)(1).

prior departures are unimportant. *Matter of Silva*, 16 I. & N. Dec. 26, 30 (1976).

4. This is the rare case in which the government's interest in retroactive application is minimal because ultimate relief remains discretionary. Pet. Br. 43. The government's two responses are unpersuasive.

First, the government argues that the BIA has an interest in ensuring that its supposedly "sound interpretation" prevail. Br. 46. That interest, which agencies can assert in *every* case, does not compel retroactive application of a policy in the face of weighty countervailing interests. The agency's interest is also unusually attenuated here because, even without retrospective application of *Blake*, relief still "depends on the discretion of the Attorney General." *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010).

Second, the government claims that application of the statutory-counterpart rule "at a different level of generality" would "increase the costs of deciding who is eligible." Br. 46. But the only additional analysis required is whether the deportable crime is also excludable, a question on which routine agency consideration has produced decades of settled law, leaving it often—as here—undisputed. Br. 11 (admitting voluntary manslaughter is an excludable CIMT).

In any event, the administrative costs in adjudicating applications (Br. 47) do not outweigh the other factors. The *balance* here is clear: the change was sudden and complete; the reliance interests are serious; the burden imposed is severe; and the statutory interest in retroactivity is attenuated at best. There is no ade-

quate reason to apply the BIA's new policy retroactively.[6]

B. *Blake* And *Brieva-Perez* Are Arbitrary And Capricious On Their Own Merits

Even without regard to retroactivity, the BIA's policy is arbitrary and capricious.

1. By making eligibility "turn[] on whether Congress has employed similar language to describe substantially equivalent categories of offenses" in specific deportation or exclusion subsections, *Blake*, 23 I. & N. Dec. at 728, the BIA is manifestly "rel[ying] on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Congress nowhere suggested that its choice of language in deportation and exclusion provisions determined Section 212(c) eligibility. Pet. Br. 44-46. And Congress twice expressly limited Section 212(c) relief *without* suggesting that LPRs deportable for aggravated-felony crime-of-violence convictions were categorically ineligible. *Supra* p. 2; Pet. Br. 14-17.

The government has refused to address this point *at all*, instead venturing a plain-text argument based not on Section 212(c)'s plain text, but on a paraphrase. Section 212(c) is not "phrased in terms of waiving statutorily specified grounds of exclusion." Br. 21. Rather, it provides that certain LPRs "may be admitted in the discretion of the Attorney General without regard to [many of] the provisions of subsection (a)."

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[6] The government does not deny that, if *Blake* changed the law, the BIA neither acknowledged nor explained the change. Pet. Br. 53-55.

8 U.S.C. §1182(c) (1994). The straightforward application of that text in deportation cases is to treat a deportable LPR as eligible for relief if the LPR is inadmissible under any of the enumerated "provisions of subsection (a)." Attorney General Thornburgh stated as much: "an alien subject to deportation must have the same opportunity to seek discretionary relief as an alien who has temporarily left this country and, upon reentry, been subject to exclusion." *Hernandez-Casillas*, 20 I. & N. Dec. at 287. Certainly nothing in Section 212(c) directs the BIA to compare the terminology of exclusion and deportation provisions, which are crafted to determine who is excludable and deportable, not who is eligible for Section 212(c) relief. *Blake* v. *Carbone*, 489 F.3d 88, 102 (2d Cir. 2007) (BIA's focus on the language of removability provisions is "strange"). Yet the government offers no other justification for *Blake*.

2. Petitioner demonstrated that the BIA's policy revives the distinction between deportable LPRs who traveled abroad and returned (and could seek relief from exclusion *nunc pro tunc*) and LPRs who did not—a distinction the agency disavowed 35 years ago in *Silva*. In its brief opposing certiorari, the government agreed, representing that "Petitioner could have easily avoided [*Blake*'s] effects by departing the country voluntarily at any point before his removal proceedings were initiated." Cert. Opp. 17.

The government's petition-stage position is correct. As Attorney General Jackson explained in *Matter of L-*, 1 I. & N. Dec. 1, 5 (1940), an LPR should not be in a "worse position because he was admitted without challenge …, so that his appeal to discretion must be presented in deportation rather than in exclusion proceedings." Thus, an LPR in deportation proceedings who

reentered following an excludable offense may seek relief *nunc pro tunc* as though in exclusion proceedings, and "if [Section 212(c)] is exercised to waive a ground of inadmissibility based upon a criminal conviction, a deportation proceeding cannot thereafter be properly instituted *based upon the same criminal conviction*." *G-A-*, 7 I. & N. Dec. at 275 (emphasis added); *see also Mascorro-Perales*, 12 I. & N. Dec. at 230.

In its merits brief, however, the government ventures yet another change in the law, arguing that *L-* and *G-A-* were "nullified" by a footnote in *Wadud*. Br. 29 (citing 19 I. & N. Dec. at 185 n.3). That argument—which the government has not previously raised—is surprising, given that *Wadud* does not even cite *L-* or *G-A-*, let alone purport to overrule them. The government points to the BIA's withdrawal from "language" in another decision, *Matter of Tanori*, 15 I. & N. Dec. 566 (BIA 1976), but that language appeared to allow an LPR to argue that the egregiousness of the "facts" of his offense could turn a conviction for a non-excludable crime (such as a firearms offense) into an excludable CIMT. *E.g.*, *Komarenko* v. *INS*, 35 F.3d 432, 435 (9th Cir. 1994) (rejecting LPR's argument that the "factual basis" for a firearms conviction could affect Section 212(c) eligibility); *Jimenez-Santillano*, 21 I. & N. Dec. at 572 (noting that Wadud contended he was Section 212(c)-eligible because "the crime underlying his conviction under 18 U.S.C. §1546 and his deportability under section 241(a)(5) was arguably a CIMT"). *Wadud* nowhere disturbed the longstanding ruling of *G-A-* that an LPR deportable for *a conviction* that constitutes a CIMT and who departed and returned may obtain a waiver of inadmissibility, which then operates as relief from deportation based on that conviction.

That *L-* and *G-A-* are still good law was confirmed when, over six years after *Wadud*, the government asked the Attorney General to "reconsider[]" the *nunc pro tunc* practice established by "*Matter of L-*, *Matter of S-*, [6 I. & N. Dec. 392 (BIA 1954)], and *Matter of G-A-*," and he "*decline[d] to do so*." *Hernandez-Casillas*, 20 I. & N. Dec. at 284 n.6, 286 (emphasis added). On the contrary, he reaffirmed that practice: an LPR who had been "inadvertently permitted … to reenter this country notwithstanding his excludability" is "permitted … to raise any claim for discretionary relief that the alien otherwise could have raised had he been excluded." *Id.* at 283-284. By denying non-departing LPRs the discretionary relief available to returning LPRs under *Hernandez-Casillas* and *G-A-*, the BIA has revived the very distinction the agency has repeatedly rejected.

The government asserts, without citation, that there is a "clear difference" between giving a waiver of exclusion "that has already been granted" the effect of waiving deportation and "waiv[ing] in the first instance a ground of deportability that is insufficiently like a ground of inadmissibility." Br. 25. Whatever that "clear difference" might be—the government does not identify it—the agency has never recognized it. Rather, the BIA has stated the opposite: "if a single act can be the basis of both excludability and deportability, and excludability is waived …, then that act, without more, cannot be the basis of a deportation charge." *Mascorro-Perales*, 12 I. & N. Dec. at 230. Indeed, Section 212(c) applications, even those submitted in deportation proceedings, are always framed as requests for waivers of "inadmissib[ility]." Pet. Br. App. 23a (directing LPRs to list "[r]easons" why they "may be inadmissible"); 8 C.F.R. §1212.3(a), (e). Once the waiver is granted, it remains "valid indefinitely for all proceedings, including both de-

portation and exclusion proceedings." *Matter of Balderas*, 20 I. & N. Dec. 389, 393 (BIA 1991).

3. The government strikingly concedes that, under its theory, it "is possible" for an LPR to "receive Section 212(c) relief from exclusion because of a conviction but still be susceptible to a deportation charge based on the same conviction and brought the very next day." Br. 25-26 (internal quotation marks and alterations omitted). But even the agency has found this bizarre result "clearly repugnant." *G-A-*, 7 I. & N. Dec. at 275-276; *see also Balderas*, 20 I. & N. Dec. at 393; *Mascorro-Perales*, 12 I. & N. Dec. at 230. There is nothing more irrational than adopting a rule while stridently condemning its logical consequences.

Recognizing this, the government obliquely promises to solve the problem through unilateral, unreviewable exercises of prosecutorial restraint (with no assurance such restraint would be consistently required or followed). Br. 26. The agency cannot address one level of arbitrariness by interposing another. The government's need to resort to such a *deus-ex-machina* solution should be taken as an admission that *Blake*, on its own, is irrational.

4. The government's submission reveals a further irrationality in the BIA's new policy: deportable aggravated felony crimes of violence in fact *do* overlap substantially, if not totally, with excludable CIMTs. The government concedes that the BIA's regime does not require "perfect symmetry" between deportation and exclusion provisions, *Brieva-Perez*, 23 I. & N. Dec. at 773; it suffices that they be "sufficiently analogous" or "sufficiently alike." Br. 23, 27. The government does not explain what level of likeness is "sufficient[]" or by what standard "analogousness" is assessed, yet it de-

fends the BIA's ultimate conclusion that aggravated-felony crime-of-violence offenses do not "sufficiently" overlap with CIMTs. Br. 26-28.

In reality, most, if not all, aggravated felony crimes of violence are also CIMTs. A "'felony,' … is a 'serious crime'" and "an 'aggravated' offense is one 'made worse or more serious by circumstances such as violence, … a deadly weapon, or the intent to commit another crime.'" *Carachuri-Rosendo*, 130 S. Ct. at 2585. And "[t]he ordinary meaning" of crime of violence "suggests a category of *violent, active crimes*." *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004) (emphasis added). Such offenses will almost invariably involve "reprehensible conduct committed with some degree of scienter," thus qualifying them as CIMTs as well. *Matter of Louissaint*, 24 I. & N. Dec. 754, 757 (BIA 2009).

The government's attempt to identify counterexamples proves this point. The BIA's example of "unauthorized use of a motor vehicle," *Brieva-Perez*, 23 I. & N. Dec. at 769-770, 772-773, is bad law: it relies on a Fifth Circuit decision—since abandoned by that circuit—that wrongly accounted that offense an aggravated felony. *See Serna-Guerra* v. *Holder*, 354 Fed. App'x 929 (2009) (holding, after remand from this Court, that unauthorized use is *not* an aggravated felony). As for burglary (Br. 27), the BIA recently held that "unlawful entry into the dwelling of another with the intent to commit *any crime* therein is a [CIMT]," and it measured the moral turpitude of that burglary offense by the risk of *violence*. *Louissaint*, 24 I. & N. Dec. at 760; *see also* 23 A.L.R. Fed. 480, §2[a] ("Where crimes against the person are involved, the presence or absence of unjustified violence is usually considered to be the measure of the crime's moral turpitude"). And even if some burglary or assault crimes could qualify as

not involving moral turpitude because they arise "in the absence of *aggravating factors*" (Br. 27 (emphasis added)), it is unclear how such offenses would still constitute *aggravated* felonies. Indeed, the government concedes that its final example ("criminally negligent child abuse") was *neither* a CIMT nor an aggravated felony crime of violence. Br. 27.

Even if the government could identify isolated aggravated felony crimes of violence that were not also morally turpitudinous, they would constitute a slim minority of the offenses captured by the aggravated felony crime-of-violence provision—a minority that could be dealt with by ruling *those* crimes Section 212(c)-ineligible because (like firearms offenses) they do not trigger excludability. It is utterly irrational to treat the crime-of-violence and CIMT provisions as *categorically* dissimilar where their overlap is extensive and potentially total. The government has shown no reason for giving a ton of weight to what is at most an ounce of difference.[7]

C. *Blake* And *Brieva-Perez* Create Serious Equal Protection Concerns

The government does not attempt to justify treating deportable LPRs differently based on travel history. Instead, it denies that the BIA has recreated such a distinction, repeating its erroneous view that

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[7] The government does not defend *Blake*'s holding that aggravated-felony sexual-abuse-of-a-minor convictions categorically fail to qualify as CIMTs. Br. 26. That is likely because the set of *aggravated* felonious sex crimes perpetrated against minor children that involve no moral turpitude is either null or vanishingly small.

Wadud overruled *G-A-* and other longstanding agency precedent. Br. 50. As demonstrated above (pp. 16-18), the government misreads *Wadud*. Under *G-A-*, which remains good law, LPRs seeking *nunc pro tunc* relief remain Section 212(c)-eligible if their crime was excludable at their last entry, while *Blake* applies a more restrictive rule to non-departing LPRs. The irrationality of that distinction is manifest, as the BIA has recognized since *Silva*.[8]

Unable to justify that distinction, the government tries to make its task easier by discussing a distinction between LPRs in deportation proceedings and LPRs in *exclusion* proceedings. Br. 52. To begin with, neither Congress nor the BIA has ever suggested that Section 212(c) should be implemented to "give[] LPRs an incentive to be applicants for admission" (*id.*); on the contrary, the BIA has stated that Section 212(c) applications are equivalent whether submitted in exclusion or deportation proceedings. *See A-A-*, 20 I. & N. Dec. at 502 n.22; Pet. Br. 8-11 (discussing agency regulations). But more importantly, the government addresses the wrong distinction: the LPRs *in deportation proceedings* who remain eligible under *G-A-* to apply for relief *nunc pro tunc* did not "self-report[]" or "com[e] forward." Br. 52. In fact, the only incentive created by *Blake* is an incentive to travel abroad before proceedings begin (*see* Cert.

[8] The government's suggestion that *Silva* rested on a comparison between deportation and exclusion provisions is belied by *Silva* itself, which turns not on linguistic comparisons, but on the fact that the conviction triggered inadmissibility. *Silva*, 16 I. & N. Dec. at 27-28; *see also Hernandez-Casillas*, 20 I. & N. Dec. at 287 ("Under *Francis* and *Silva*," a deportable LPR "must have the same opportunity to seek discretionary relief" as a similarly-situated inadmissible LPR.).

Opp. 17). Favoring one deportable LPR over another on the basis of a short trip to Canada is precisely the irrational distinction not defended by the government.

Finally, the government urges this Court to remedy any constitutional violation "by contracting the availability of Section 212(c) relief rather than expanding it." Br. 53. That argument—another that the government has not raised before—fails. First, "ordinarily extension, rather than nullification, is the proper course." *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984) (internal quotation marks omitted). Second, the government is unable to articulate *how* the Court could "contract[]" Section 212(c) relief. A ruling that relief is unavailable to *all* deportable LPRs (*cf. Abebe* v. *Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009)) is manifestly contrary to Congress's intent and settled agency interpretations. Br. 19 (acknowledging that Section 212(c) relief is available in deportation proceedings). And denying relief to any LPR "convicted of any aggravated felony" (Br. 53 (internal quotation marks omitted)) is contrary to *St. Cyr*, which recognized that LPRs who pled guilty to such offenses before Section 212(c)'s repeal (including Mr. St. Cyr's aggravated felony drug conviction) remain Section 212(c)-eligible. 533 U.S. at 326. Congress did not repeal Section 212(c) retroactively; the government cannot repeal it in the guise of remedying the irrational distinction that the BIA's new approach has created.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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