IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-76201

YEWHALASHET ABEBE,

Petitioner,

v.

ALBERTO GONZALES,
U.S. ATTORNEY GENERAL,

Respondent.

On Petition for Review of a Decision of
the Board of Immigration Appeals

PETITIONER'S PETITION FOR REHEARING *EN BANC*

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STATEMENT PURSUANT TO FRAP 35

This case should be reheard *en banc* because it presents an issue of exceptional importance, affecting hundreds – if not thousands – of lawful permanent residents of this country. Fed. R. App. P. 35. Moreover, the panel's decision in this case directly conflicts with an authoritative decision of the United States Court of Appeals for the Second Circuit. *See Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007).

INTRODUCTION

Thirty years ago, the Board of Immigration Appeals ("the BIA" or "the Board") acquiesced to the Second Circuit's decision in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) and held that in assessing an alien's eligibility for relief under former INA § 212(c), 8 U.S.C. § 1182(c) ("§ 212(c)"), "no distinction [can] be made between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens." *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976). Five years later, this Court agreed. *See Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981). "Thus charged, immigration courts across the country were to consider the merits of section 212(c) requests from lawful permanent residents in deportation proceedings who were similarly situated to persons in exclusion proceedings." *Blake v. Carbone*, 489 F.3d 88, 95 (2d Cir. 2007), *citing Silva,*

supra.

"With the equal protection problem identified, the difficult task became one of implementation," most importantly, "[h]ow to decide whether a deportee was 'similarly situated' to an excludee?" *Blake*, 489 F.3d at 95, *quoting Matter of Wadud*, 19 I. & N. Dec. 182, 184 (BIA 1984). In answering that question, both this Court and the BIA "ultimately settled upon the comparable grounds test," which asks whether the "ground of deportation charged is also a ground of inadmissibility." *Id.* As the panel majority noted, *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994) "explicitly limited the constitutional holding in *Tapia-Acuna* to cases involving aliens facing deportation on a basis which 'is identical to a statutory ground for exclusion for which discretionary relief would be available." *Abebe v. Gonzales*, 493 F.3d 1092, 1104 (9th Cir. 2007). As Judge Berzon noted in her concurring opinion, however, *Komarenko* "was wrongly decided, in large part for the reasons that the Second Circuit recently explained in a thorough analysis of the equal protection issue underlying this case." *Abebe*, 493 F.3d at 1106 (Berzon, J., concurring), *citing Blake, supra*.

The fallacy of *Komarenko* is aptly illustrated by this case. Both the BIA and this Court have found the petitioner, Yewhalashet Abebe ("Mr. Abebe"), ineligible for § 212(c) relief because the ground of deportability with which he is charged –

the aggravated felony ground of deportation for aliens who have been convicted of "sexual abuse of a minor" – has no identical ground of exclusion.[1] If Mr. Abebe had departed the United States, however, he could have – and almost certainly would have – been charged, upon his return, with being inadmissible under INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien who has been convicted of a crime involving moral turpitude.[2] If he had been so charged, Mr. Abebe would have been eligible to seek a waiver under § 212(c) and, if granted such a waiver, he would no longer have been deportable for the offense that made him excludable, i.e. his conviction under Cal. Penal Code § 288(a). *Abebe*, 493 F.3d at 1109 (Berzon, J., concurring); *see also Matter of Azurin*, 23 I. & N. Dec. 695 (BIA 2005).

Allowing Mr. Abebe to avail himself of the protections of § 212(c) only if he has departed the United States, however, is completely irrational. Because "permanent residents who are in like circumstances, but for irrelevant and

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[1] On March 3, 1992, Mr. Abebe pled guilty to two counts of lewd and lascivious acts upon a child in violation of Cal. Penal Code § 288(a). A.R. 83-84, 157. He is charged with deportability under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who has been convicted of an aggravated felony.

[2] Without a doubt, Mr. Abebe's conviction is one involving moral turpitude. *See Matter of Garcia*, 11 I. & N. Dec. 521 (BIA 1966); *Matter of M–*, 7 I. & N. Dec. 144 (BIA 1956).

fortuitous factors, [must] be treated in a like manner," *Francis*, 532 F.3d at 273, this Court should rehear this case, overrule its decision in *Komarenko,* and find Mr. Abebe eligible for a § 212(c) waiver.

THE RELEVANT HISTORY OF SECTION 212(c)

"Until 1996, the government could expel a lawful permanent resident from the United States in one of two ways: (1) deportation proceedings after entry under INA § 241, 8 U.S.C. § 1251(a) or (2) exclusion proceedings upon reentry under INA § 212, 8 U.S.C. § 1182(a)." *Blake*, 489 F.3d at 93-94. The grounds of deportation and the grounds of exclusion are different; "[s]ome grounds overlap; some do not. Some acts render a person deportable but not excludable and vice versa." *Id.*

Former § 212(c) grants the Attorney General discretion to waive exclusion for "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years . . ." 8 U.S.C. § 1182(c) (repealed 1996).[3] Although the literal language of § 212(c)

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[3] The Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, significantly restricted the availability of § 212(c) relief, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, repealed § 212(c) in its entirety. In *INS v. St. Cyr,* 533 U.S. 289 (2001), however, the Supreme Court

encompasses only aliens in exclusion proceedings, "the BIA has allowed certain lawful permanent residents [in deportation proceedings] to seek a 212(c) waiver *nunc pro tunc* for over sixty years." *Blake*, 489 F.3d at 94. Thus, for more than half a century, § 212(c) relief has been "available to lawful permanent residents who commit an excludable offense in the United States, depart and return to the United States after commission of the offense, have not been put in exclusion proceedings upon return, but later end up in deportation proceedings." *Id.*; *Matter of G-A-*, 7 I. & N. Dec. 274 (BIA 1956); *Matter of F-*, 6 I. & N. Dec. 537 (BIA 1955); *Matter of S-*, 6 I. & N. Dec. 392 (BIA 1954; AG 1955). With *nunc pro tunc* relief, a lawful permanent resident subject to exclusion upon reentry is eligible for a § 212(c) waiver even if border officials fail to challenge his reentry and then, later, place him in deportation proceedings. *See Matter of G-A-*, 7 I. & N. Dec. at 276.

"Fifteen years after *Matter of G-A-*, a lawful permanent resident who never left the United States sought a 212(c) waiver from the BIA." *Blake*, 489 F.3d at

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recognized that immigrants are "acutely aware" of the immigration consequences when they decide whether to go to trial or accept a plea, and rely on the law governing discretionary relief when making these critical decisions in their criminal cases . Accordingly, the Court concluded that applying the repeal to immigrants who pled guilty before the new law's enactment would be impermissibly retroactive. *See* 533 U.S. at 322-26.

94, *citing Matter of Arias-Uribe*, 13 I. & N. Dec. 696 (BIA 1971), *aff'd sub nom. Arias-Uribe v. INS*, 466 F.2d 1198 (9th Cir. 1972). Although the BIA acknowledged "that it had expanded the scope of a 212(c) waiver beyond the statute's plain language in *Matter of G-A-*," it declined to extend it further, reasoning that "a waiver only should be available to those persons who actually depart and reenter the country." *Id.*, *citing Matter of Arias-Uribe*, 13 I. & N. Dec. at 698. On appeal, this Court sustained that conclusion. *Arias-Uribe*, *supra.*

In *Francis*, however, the Second Circuit came to the opposite conclusion. 532 F.2d at 268. Although the petitioner in *Francis* had not left the United States after his conviction for a deportable narcotics offense, he "argued the guarantee of equal protection implicit in the Due Process Clause of the Fifth Amendment would be violated if a § 212(c) waiver was available to lawful permanent residents who departed and returned to the United States yet unavailable to those who never left the country when the two classes of persons were identical in every other respect." *Blake*, 489 F.3d at 95, *citing Francis*, 532 F.2d at 272. The Second Circuit agreed and concluded that the BIA "was discriminating between lawful permanent residents who had traveled abroad temporarily and those who had not – a classification requiring a rational justification." *Blake*, 489 F.3d at 95, *citing Francis*, 532 F.3d at 273. Finding no justification for such discrimination, the

Second Circuit concluded 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." *Id.* "Rather than resolve the constitutional dilemma by striking the statute, [the Second Circuit] extended its reach, making 212(c) relief available to deportable lawful permanent residents who differed from excludable lawful permanent residents only in terms of a recent departure from the country." *Id.*

Soon thereafter, the BIA acquiesced to the Second Circuit's decision in *Francis* and concluded that it could no longer distinguish "between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens." *Matter of Silva,* 16 I. & N. Dec. at 30. Five years later, this Court agreed. *See Tapia-Acuna, supra.* Thereafter, "immigration courts across the country were to consider the merits of section 212(c) requests from lawful permanent residents in deportation proceedings who were similarly situated to persons in exclusion proceedings." *Id.*

With the equal protection problem identified, the difficult task became one of implementation," most importantly, "[h]ow to decide whether a deportee was 'similarly situated' to an excludee?" *Blake*, 489 F.3d at 95, *quoting Matter of Wadud*, 19 I. & N. Dec. at 184. In answering that question, the BIA "ultimately

settled upon the comparable grounds test," which asks whether the "ground of deportation charged is also a ground of inadmissibility." *Id.* This Court followed suit in *Komarenko*, holding, as a matter of constitutional law, that "for deportable aliens, the 'linchpin' § 212(c) availability is not the nature of the alien's offense but rather the similarity between the statutory text of a 'ground' for exclusion and a 'ground' for deportation." *Abebe*, 493 F.3d at 1106, *quoting Komarenko*, 35 F.3d at 435; *see also* 493 F.3d at 1104 ("*Komarenko* explicitly limited the constitutional holding in *Tapia-Acuna* to cases involving aliens facing deportation on a basis which 'is identical to a statutory ground for exclusion for which discretionary relief would be available.'")(citations omitted). Accordingly, the Court concluded "that for crimes that fall under different grounds of deportation and exclusion, the distinction between a deportable alien who travels and one who does not is not arbitrary – even if both aliens would also be excludable and eligible for 212(c) relief upon reentering the country." *Abebe*, 493 F.3d at 1107 (Berzon, J., concurring), citing *Komarenko*, 35 F.3d at 435. The *Komarenko* Court "decline[d] to speculate whether the [former Immigration and Naturalization Service] would have applied [the crimes involving moral turpitude] excludability provision to an alien in Komarenko's position," 35 F.3d at 435, reasoning that "if it analyzed Komarenko's offense to determine whether it triggered excludability as

well as deportability, it would have to review far more deportation orders in order to determine whether the offenses properly qualified as crimes involving moral turpitude." *Abebe*, 493 F.3d at 1107, *citing Komarenko*, *supra*. "Such judicial legislating," the Court said, "would vastly overstep '[its] limited scope of judicial inquiry into immigration legislation,' and would interfere with the broad enforcement powers Congress has delegated to the Attorney General, *see* 8 U.S.C. § 1103(a)." *Komarenko*, 35 F.3d at 435 (citations omitted), *quoting Fiallo v. Bell,* 430 U.S. 787, 792 (1977).

This Court's approach in *Komarenko* has meant that § 212(c) relief is available only to aliens whose offenses fall under grounds of deportation that – as a matter of statutory text – are described with similar language as, or largely overlap with, categories of excludable offenses. Consequently, in this case, the panel majority found Mr. Abebe ineligible for § 212(c) relief, stating:

> Abebe faces deportation for committing an aggravated felony/sexual abuse of a minor offense. Had he left the United States and returned after his conviction, he could not have been excluded on a "sexual abuse of a minor" theory because no such ground of inadmissibility exists. It is simply beside the point that the government *could have* sought to exclude him on the CIMT ground. All that *Francis* and *Tapia-Acuna* require is that the government give the same benefit (the waiver of a particular ground of inadmissibility) to aliens whether or not they depart the United States. *Komarenko* establishes that "the linchpin of the equal protection analysis in this context is that the [deportation and exclusion] provisions be substantially identical." 35 F.3d at 435. As noted above,

> the aggravated felony/sexual abuse of a minor ground under which Abebe was found deportable is not substantially identical to the CIMT ground of exclusion. *Komarenko* therefore settles the issue.

493 F.3d at 1105.

GROUNDS FOR GRANTING REHEARING *EN BANC*

As the Second Circuit explained in *Blake*, the BIA's – and this Court's – "emphasis on similar language is strange." 489 F.3d at 102. The Court noted:

> The touchstone in *Francis* was the irrelevant and fortuitous circumstance of traveling abroad recently; the decision did not consider whether equal protection requires that all or even most offenses falling under a particular ground of deportation must also fall under the counterpart ground of exclusion. In short, eligibility for relief in *Francis* turned on whether the lawful permanent resident's offense could trigger § 212(c) were he in exclusion proceedings, not how his offense was categorized as a ground of deportation.

Id. at 102 (citations and quotation marks omitted). In other words, "what makes one alien similarly situated to another is his or her act or offense," not the grounds the government chooses to use to deport the aliens. *Id.* at 104 (emphasis added). Accordingly, the Second Circuit reached, what Judge Berzon later described as "the only permissible result after *Francis* and *Tapia-Acuna*: '[E]ach petitioner, a deportable lawful permanent resident with an aggravated felony conviction, is eligible for a § 212(c) waiver if his or her particular aggravated felony offense could form the basis of exclusion.'" *Abebe*, 493 F.3d at 1108 (Berzon, J.,

concurring), *quoting Blake*, 489 F.3d at 104. "And this is the only permissible result even if one is not sure that *Francis* and *Tapia-Acuna* are analytically correct." *Id.*, *citing Blake*, 489 F.3d at 104 ("*Francis* expanded the sweep of § 212(c); Congress's only response was to limit and then repeal the statute; and the task of reconciliation unfortunately fell on the BIA. While hindsight might pin much of this confusion on *Francis*, we are bound to finish what our predecessors started.").

"*Komarenko*'s alternative approach – based on grounds of deportation rather than offenses – is troublesome not only because it imperfectly solves the *Francis* problem, but also because it creates new problems." *Abebe*, 493 F.3d at 1108 (Berzon, J. Concuring). As Judge Berzon explained in *Abebe:*

> *Francis* and *Tapia-Acuna* identified as arbitrary – and thus unconstitutional – the distinction between deportable aliens who were alike except that one had left the United States temporarily and was trying to return, and the other had not. The comparable grounds test has made the availability of 212(c) relief turn on an equally arbitrary distinction, between two groups of deportable aliens who would both have been excludable had they sought to return after leaving. Under this test, alien A who is deportable and excludable because he committed assault with a deadly weapon is not eligible for relief from deportation because his offense falls into a category of deportable offenses – "aggravated felonies" – that is different from the relevant category of excludable offenses – crimes involving moral turpitude – even though he would, in fact, have been eligible for relief had he been intercepted at the border. *See Komarenko*, 35 F.3d at 435. On the other hand, alien B who is deportable because he committed a drug offense is eligible for

> relief simply because drug offenses were described with similar words in the deportation and exclusion statutes. *See Tapia-Acuna*, 640 F.2d at 224-25. No rational purpose can be served by this distinction.

Abebe, 493 F.3d at 1108-09 (Berzon, J., concurring).

Moreover, as Judge Berzon noted in *Abebe*, "[t]he comparable grounds test is strangely at odds with how § 212(c) relief operates once it is granted." *Abebe*, 493 F.3d at 1109 (Berzon, J., concurring). "The BIA has consistently held that when an alien receives a waiver of excludability under 212(c) or other waiver provisions, that alien can no longer be excluded or deported solely due to the offense that made him excludable – even if there is a category of deportable crimes that applies to his offense and that is different from the category that permitted the waiver." *Id.*, *citing Matter of Balderas*, 20 I. & N. Dec. 389, 392 (BIA 1991); *Matter of Gordon*, 20 I. & N. Dec. 52, 56 (BIA 1989); *Matter of Mascorro-Perales*, 12 I. & N. Dec. 228, 229-32 (BIA 1967); *Matter of G-A-*, 7 I. & N. Dec. at 275-76; *see* generally *Molina-Amezcua v. INS*, 6 F.3d 646, 647-48 (9th Cir. 1993) (per curiam). Thus, if Mr. Abebe had departed the United States, he could have – and almost certainly would have – been charged, upon his return, with being inadmissible under INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien who has been convicted of a crime involving moral turpitude. If he had been so charged, Mr. Abebe would have been eligible to seek

a waiver under § 212(c), and if granted such a waiver, he would no longer have been deportable for the offense that made him excludable, i.e. his conviction under Cal. Penal Code § 288(a). *Abebe*, 493 F.3d at 1109 (Berzon, J., concurring). *See also Matter of Azurin*, 23 I. & N. Dec. 695 (BIA 2005).

As noted above, however, making Mr. Abebe's eligibility for 212(c) relief hinge on whether he has departed the United States is completely irrational. Because "permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, [must] be treated in a like manner," *Francis*, 532 F.3d at 273, this Court should rehear this case, overrule its decision in *Komarenko,* and find Mr. Abebe eligible for a § 212(c) waiver.

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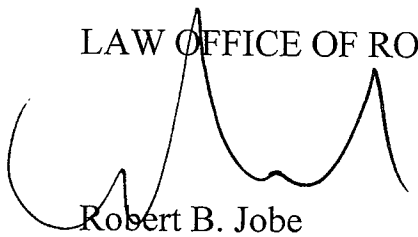
CONCLUSION

The impact of the panel's decision in this case affects hundreds – if not thousands – of lawful permanent residents of this country who, but for their failure to depart the U.S., would be otherwise eligible for relief under former 8 U.S.C. § 1182(c). Because the decision presents an issue of exceptional importance, i.e. a serious equal protection problem, and directly conflicts with the Second Circuit's decision in *Blake*, the Court should grant rehearing *en banc*.

Dated: September 17, 2007

Respectfully submitted,

LAW OFFICE OF ROBERT B. JOBE



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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Yewhalashet ABEBE Petitioner, v. Alberto R. GONZALES Respondent.	Case No. 05-76201 DHS File No. A26-810-941

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING EN BANC

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I. INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 29 and Circuit Rule 29-2, amici curiae file this brief in support of Petitioner Mr. Abebe's petition for rehearing en banc. Undersigned counsel represent the National Immigration Project of the National Lawyers Guild, Immigration Law Clinic of the School of Law at the University of California, Davis, and Immigrant Legal Resource Center.

In this brief, amici provide additional context regarding the exceptional importance of this case for hundreds of lawful permanent residents ("LPRs") and provide specific examples of how the panel's decision in Abebe creates an irrational distinction between LPRs who travel and those who do not. As such, amici show in more detail the inherent Equal Protection violation at issue in this case.

II. STATEMENT OF AMICI

Undersigned counsel represent amici curiae: the NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, the IMMIGRATION LAW CLINIC OF THE SCHOOL OF LAW AT THE UNIVERSITY OF CALIFORNIA, DAVIS, and the IMMIGRANT LEGAL RESOURCE CENTER. These three organizations regularly advise, represent, and support noncitizens appearing before immigration agencies

within the Department of Homeland Security ("DHS"), the Executive Office of Immigration Review, and the federal courts. Amici have a direct and specific interest in this issue since many of their clients would be eligible for relief from removal under 8 U.S.C. § 1182(c), as a matter of law and discretion, but for the panel's prior decision in Abebe v. Gonzales, 493 F.3d 1092 (9th Cir. 2007).[1]

III. ARGUMENT

A. SECTION § 212(c) REMAINS A CRITICAL AVENUE OF RELIEF FROM REMOVAL FOR LONG-TIME LAWFUL PERMANENT RESIDENTS.

Despite the fact that 8 U.S.C. § 1182(c), INA § 212(c), was significantly amended on April 24, 1996 and nominally repealed on April 1, 1997, it continues to have significant importance to those whose criminal convictions (or deportation cases) pre-date its amendment and repeal. See 8 U.S.C. § 1182(c), INA § 212(c) (1996); INS v. St. Cyr, 533 U.S. 289, 295-96 (2001). Both long-pending, and newly arising, cases will continue to

[1] Amici were previously granted permission by the panel to submit a brief in support of Petitioner's principal brief on appeal. Their prior motion to file an amici brief contains more information about amici and their specific interests in this issue. Both parties have also consented to the filing of this amici brief in support of the Petition for Rehearing En Banc. See Attached Declaration of Zachary Nightingale.

depend on the application and interpretation of § 212(c) law.[2]

In 2001, the Supreme Court held that § 212(c) relief continues to be available to LPRs convicted by plea on a date when § 212(c) was available to them under the law existing at that time. St. Cyr, 533 U.S. at 326. In 2004, DHS issued regulations purporting to implement this decision. See 69 Fed. Reg. at 57,835; 8 C.F.R. § 1212.3. The regulations include provisions for reopening of proceedings for those previously denied relief on statutory eligibility grounds before St. Cyr. See 8 C.F.R. § 1003.44.

Large numbers of individuals with deportation/removal orders have taken advantage of those provisions, having their cases reopened and remanded to the Immigration Court for consideration of the merits of their

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[2] There is no clear data available regarding the removal of lawful permanent residents and the reasons for their removal. However, according to the Transactional Records Access Clearinghouse ("TRAC"), which has conducted a comprehensive study of cases, an estimated 300,000 non-citizens have been ordered deported from the United States in the last decade and a half based on crimes categorized as "aggravated felonies." See TRAC, "New Data on the Processing of Aggravated Felonies (Jan. 5, 2007)," available at http://trac.syr.edu/immigration/reports/175/ (last viewed on Sept. 27, 2007). The number of removal orders issued for "aggravated felons" has been increasing progressively each year. Id. Notably, most persons subject to removal as "aggravated felons" face administrative removal procedures, under which they do not receive a hearing before an Immigration Judge and no ability to apply for relief from removal. Id. For 2006, it is estimated that only 45% of persons, whose crimes have been deemed "aggravated felonies" received a removal hearing prior to the issuance of a removal order. Id. Among these persons are LPRs removed for aggravated felonies, who are the concern of this case.

waiver applications. Immigration Judge are now hearing such cases, with inherent completion delays due to court calendars full for months (or years). Under Matter of Blake, 23 I. & N. Dec. 722 (BIA 2005), and the panel's decision in Abebe, such individuals now face re-denial on statutory eligibility grounds.

Other individuals have equally old convictions, but more recent removal cases. The unfairness is not lessened. Individuals with ten-year old convictions (often minor), subsequent rehabilitation, and otherwise good records of moral character may choose affirmatively to bring themselves to the attention of DHS. They may do so, for example by applying to renew an expiring alien residence card or an application for citizenship.

In both of these latter contexts, the LPR may have never left the United States since his pre-1996 conviction, or may have even left and re-entered the country several times without ever being charged with a ground of inadmissibility, even if subject to such grounds, due to government oversight. An affirmative application would generate a background investigation that would include the voluntary presentation by the LPR of his or her prior criminal convictions.[3] In many cases, these convictions are

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[3] See 8 C.F.R. § 316.10 (enumerating the good moral character requirements); § 335.2(b) (naturalization application requires completion of FBI "full criminal background check"); see also DHS, Office of Inspector

sufficient to cause DHS to initiate removal proceedings against the applicant, with an allegation of a conviction for an aggravated felony.[4]

In this manner, long-time LPRs with pre-1996 convictions may now find themselves in removal proceedings despite no action by the government in the intervening decade to otherwise attempt to remove them or deny them admission due to the conviction. For most of these individuals, § 212(c) is the only relief from removal that would be available to them.[5]

Availability of relief is a significant issue for individuals in this situation. Not only have § 212(c) cases historically been granted in high numbers[6], but these cases by definition will have many of the positive equity factors that contribute to a favorable exercise of discretion, as individuals now eligible will have been LPRs for at least ten years and will have been

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General, "A Review of U.S. Citizenship and Immigration Services' Alien Security Checks" (November 2005) at 1-5 & Appendix C, available at http://www.aila.org/Content/default.aspx?docid=18137 (last viewed Sept. 27, 2007).

[4] An aggravated felony conviction will almost always require denial of naturalization (8 C.F.R. § 316.10(b)(1)) and can always be used to deny in discretion (8 C.F.R. §§ 316.10(b)(2), (b)(3)).

[5] Aggravated felony convictions bar eligibility for virtually all forms of relief. See e.g., 8 U.S.C. § 1158(b)(2)(B)(i) (asylum); § 1182(h) (waiver of inadmissibility under INA § 212(h)); § 1229a(a)(3) (cancellation of removal for LPRs)§ 1229a(b) (cancellation of removal for non-LPRs). Only someone with a visa immediately available to them (from a United States citizen spouse or child over 21) could obtain relief. See Matter of Azurin, 23 I. & N. Dec. 695 (BIA 2005). As a practical matter, this is not always possible either.

[6] St. Cyr, 533 U.S. at 296, n.5 & 6.

convicted of their crimes at least ten years ago. See Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978) (enumerating positive discretionary factors). Many individuals have had their residence for much longer and from a very young age.[7] Generally, these individuals who remain eligible for relief are ones who have not re-offended since 1996, as later convictions would largely eliminate their eligibility for relief as a statutory matter. Therefore, these affirmative applicants will have had at least ten years of lawful residence, crime-free, with the attendant accumulation of family ties, community ties, and other positive equities and contributions to the community. Yet, like the

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[7] Other data analyzed by TRAC shows that persons removed for aggravated felonies demonstrate many of the characteristics of persons who are likely to be found eligible for relief under INA § 212(c). According to TRAC, based on a study of 156,713 persons charged with aggravated felonies,

> [b]y and large individuals who have been charged [as aggravated felons] are long time residents of the United States – on average they have been in the country 15 years. The median time ... was 14 years. For 25%, the average time between their original date of entry and when deportation proceedings were started in immigration court is 20 years or longer, and for 10% it was more than 27 years.

See TRAC, "How Often is the Aggravated Felony Statute Used?," available at http://trac.syr.edu/immigration/reports/158/ (last viewed Sept. 27, 2007). All of these individuals must have entered the United States legally in order to be charged with grounds of removal, which suggests that many have family and employment ties to the United States. Id. Moreover, "[o]verall, 45% [of these persons] recorded English as the language they spoke." Id. This figure does not correlate necessarily with the countries of origin, and thereby reflects the extent of their integration into the United States. Id.

applicants noted in St. Cyr, they would be barred from relief despite their high likelihood of being granted discretionary relief. See St. Cyr, 533 U.S. at 296 & n.6 (noting that the expansion of aggravated felony definition and passage of time suggests an increasing percentage of applicants will merit relief); see also Abebe, 493 F.3d at 1110 (Berzon, concurring) ("...§ 212(c) continues to provide a vital lifeline for qualifying aliens.").

B. PRACTICAL EXAMPLES OF THE EQUAL PROTECTION CONCERNS RAISED BY THE PANEL'S DECISION IN ABEBE.

1. The aggravated felony ground of deportation contains numerous different kinds of offenses.

The number of different offenses that could be charged as an aggravated felony (or potentially another ground of deportability that has not been found to have a counterpart in the grounds of inadmissibility) is quite large, causing many different individuals to be swept up in this dire situation, often unexpectedly.

For example, the following offenses would constitute aggravated felonies:

- Theft of goods valued at $500, with a one-year suspended sentence. 8 U.S.C. § 1101(a)(43)(G).
- A misdemeanor or felony conviction for conspiracy (or attempt) to defraud by submitting false information when

applying for a loan of $12,000, where no money is actually lost, any restitution is paid in full, and no jail time is imposed. 8 U.S.C. § 1101(a)(43)(M); Matter of Onyido, 22 I. & N. Dec. 552 (BIA 1999); Matter of Small, 23 I. & N. Dec. 448 (BIA 2002) (misdemeanor can be aggravated felony).

- Conviction under Cal. Penal Code § 261.5(c) of a 21 year old for engaging in consensual sex with a 17 year old, even if probation imposed with no jail time. 8 U.S.C. § 1101(a)(43)(A); Afridi v. Gonzales, 442 F.3d 1212 (9th Cir. 2006); Estrada-Espinoza v. Gonzales, _ F.3d _, Case no. 05-75850 (9th Cir. Aug. 16, 2007) (petitioner and minor were married with consent of their parents).

See also St. Cyr, 533 U.S. at 295 n.4; 8 U.S.C. § 1101(a)(43).

2. An example of how such convictions result in an unjust deportation.

Consider the case of a LPR born in Mexico, Mr. Lopez, who legally immigrated with his family in 1977 at the age of two years. In 1992 at the age of 17, he is charged as an adult for having participated (perhaps only as a co-conspirator) in one of the offenses above.[8] He enters a plea, and, perhaps in light of his age and lack of record, he is not required to spend any time incarcerated. In 2006, having completed probation successfully, the rehabilitated 31 year old is married to another LPR (born in China, with no knowledge of Mexico or the Spanish language), and has two United States citizen children under the age of five.

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[8] See Cal. Welfare & Institutions Code § 602 (permitting minors under 18 to be charged as adults).

Three possible scenarios illustrate how "capricious and fortuitous," the panel's decision in Abebe makes the application of immigration law:

a. Scenario 1: Mr. Lopez is charged as removable on the basis of his conviction when he affirmatively presents himself to DHS.

Mr. Lopez may reasonably decide that he has turned his life in a positive direction, could show five years of good moral character, and thus he applies for naturalization, revealing his single youthful offense. His naturalization application not only must be denied as a matter of law, but he would be placed in removal proceedings for an aggravated felony conviction. See 8 U.S.C. §§ 1427(d); 1101(f)(8); 1227(a)(2)(A)(iii); 1228.[9] Moreover, he would be ineligible for any relief from removal due to the aggravated felony conviction under Matter of Blake and this panel's prior decision in Abebe. He would be ordered removed from the United States, and such removal would be permanent. See 8 U.S.C. § 1182(a)(2). This certainly brings to mind the Supreme Court's admonition:

> Deportation can be the equivalent of banishment or exile. The stakes are indeed high and momentous for the alien who has

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[9] Even if Mr. Lopez chose not to apply for naturalization, he would need to eventually renew his alien residence card, which could result in the same background check and the same initiation of removal proceedings. See "A Review of U.S. Citizenship and Immigration Services' Alien Security Check," supra.

> acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized.

Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (citing Bridges v. Wixon, 326 U.S. 135, 147 (1945)).

b. Scenario 2: Mr. Lopez travels outside of the United States and is charged as inadmissible at the border on the basis of his conviction.

Alternatively, if Mr. Lopez had traveled outside the United States, a completely different result would apply. Upon his return to the United States, he would be faced with the prospect of being considered to be an alien seeking admission. See Rosenberg v. Fleuti, 374 U.S. 449 (1963), as cited in Camins v. Gonzales, _ F.3d _, Case no. 05-70291 (9th Cir. Aug. 28, 2007). As a practical matter, the DHS officer at the point of entry would have access to Mr. Lopez's criminal and immigration records,[10] and would be able to question Mr. Lopez as to the circumstances of his departure and return. Such information would then likely result in the initiation of removal

[10] See e.g., United States Customs and Border Protection ("CBP"), "Immigration Inspection Program," available at http://www.cbp.gov/xp/cgov/border_security/port_activities/overview.xml (last viewed on Sept. 27, 2007) (CBP uses biometric technology to search electronic databases and identify criminal histories of those requesting admission to the United States).

proceedings based on inadmissibility for a conviction of a conviction involving moral turpitude ("CIMT"). See 8 U.S.C. § 1182(a)(2)(A)(i). DHS has taken the position that he could not be admitted into the United States because his admission would contravene the inadmissibility laws. Under such DHS practice, then, he therefore would be paroled, and/or placed in removal proceedings.

In removal proceedings, charged with inadmissibility, he would be eligible to apply for a waiver under § 212(c). That waiver, by definition, applies to inadmissibility and remains available to Mr. Lopez to waive his inadmissibility, as Matter of Blake is inapplicable. See Matter of Azurin, 23 I. & N. Dec. 695, 699 (BIA 2005). As Mr. Lopez was convicted before 1996 through a plea, and was eligible for that waiver at the time of his plea, he remains eligible for that relief to waive inadmissibility today. He would have a good chance of being granted the waiver, based on his strong equities, and thereby avoid removal.

Once granted, § 212(c) eliminates inadmissibility and any deportability. Id. He thus would not be in danger of later being charged with removability or inadmissibility due solely to that conviction. See Abebe, 493 F.3d at 1109 (Berzon, concurring) (and cases cited therein). It is permanently waived.

c. Scenario 3: Mr. Lopez travels outside of the United States, is admitted back into the United States, affirmatively presents himself to DHS, and then is charged with removal on the basis of his conviction.

To further illustrate the inherent unfairness of the Matter of Blake rule, consider that Mr. Lopez might travel outside of the United States but with different results. It may be that the particular officer at the border or point of entry fails to investigate, or ask Mr. Lopez about, his prior criminal record.

Thus, despite having affirmatively presented himself to DHS (potentially to risk a removal proceeding), Mr. Lopez is admitted to the country. He is still at risk of being charged in removal proceedings with a ground of deportability. He could potentially be charged (1) with the aggravated felony deportation ground, or (2) with deportability under 8 U.S.C. § 1227(a)(1)(A) as one who was inadmissible at the time of entry. In either case, Mr. Lopez is charged based on a conviction that DHS would have charged as making him inadmissible at the time of his prior entry, even though DHS failed to so charge him at the time of that entry. If charged in the former manner, he would no longer be eligible for the § 212(c) waiver under the Matter of Blake precedent, even though he would have been eligible for that waiver at the time of his entry, and even though long-

standing BIA case law indicates that if he were charged in the latter manner, § 212(c) would still remain available.[11]

Again, the distinction between this third scenario (travel and return, with subsequent charge of deportability) and the prior second scenario (travel and charge of inadmissibility upon return) is extremely minor. In both, the individual with the same conviction travels outside the United States; the difference is whether DHS initiates the removal proceeding at the time of entry, or subsequently. Alternatively, the difference is whether DHS initiates removal proceedings the first time Mr. Lopez presents himself

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[11] As the BIA has previously noted, the § 212(c) waiver is explicitly grantable nunc pro tunc. 8 C.F.R. § 1212.3(d); see also Matter of Silva, 16. I. & N. Dec. 26, 27-28 (BIA 1976); Blake v. Carbone, 489 F.3d 88, 94 (2nd Cir. 2007). The BIA did acknowledge that its long-standing practice had been to allow eligibility for § 212(c) relief (to be granted nunc pro tunc back to the prior entry) to those charged with a ground of deportability who – subsequent to the conviction that was the basis of the deportability -- traveled outside the United States and returned (voluntarily and not under an order of deportation) to an "unrelinquished domicile of seven years." Matter of Silva, 16. I. & N. Dec. at 27-28. This position does not appear to ever have been overturned or otherwise withdrawn. Therefore, a § 212(c) waiver could be granted to Mr. Lopez after his entry into the United States, for example if he were charged in scenario #3 with a ground of deportability for having been inadmissible at the time of his entry. The grant of the § 212(c) waiver nunc pro tunc back to the admission date would eliminate his removability. However, again, it should not matter in this example if he happened to be charged under this ground of removability or the substantive one based on his conviction. If he is eligible for the § 212(c) waiver in one context, he should be eligible for it in the other. Again, this was the substance of the BIA's long standing analysis on this issue. See e.g., Matter of G-A-, 7 I. & N. Dec. 274 (BIA 1956).

voluntarily (at the border), or the second time he does so (inside the United States). This issue again bears no relation to the merits of the waiver application, is not something Mr. Lopez would have any control over, and is a difference that the BIA long ago determined should not effect the question of whether a waiver is statutorily available. See Matter of L-, 1 I. & N. Dec. 1 (AG 1940), Matter of G-A-, 7 I. & N. Dec. 274 (BIA 1956).

d. Equal protection requires the same outcome in these cases, yet in practice this is not the case.

These alternative scenarios of similarly situated individuals demonstrate the inconsistency between the BIA's reasoning in Matter of Blake and the underlying equal protection and due process concerns that first motivated the BIA and the Circuit Courts to find that § 212(c) relief is not limited just to those seeking actual re-admission.

Scenarios #1 and #2 differ in only one respect: whether or not Mr. Lopez happened to travel outside the United States; or put another way, how Mr. Lopez chose to make himself and his prior record known to DHS – either through travel outside the United States, or through an affirmative application inside the United States.

Scenarios #1 and #3 also differ in only one respect: whether or not Mr. Lopez happened to travel outside the United States, at some point before

affirmatively bringing himself to DHS' attention.

Scenarios #2 and #3 similarly differ in only one respect: whether, after returning to the United States, Mr. Lopez is charged at the time of arrival, or subsequently.

Such a minor detail as travel (or affirmative application without travel) bears no relevance to the merits of a waiver, and in fact, this situation perversely gives more benefits to the one who travels rather than to the one whose ties to the United States are so strong the he never departs, but rather expresses a desire to naturalize. This exact difference was found long ago by this Court and other Courts of Appeals to lack fundamental fairness, and to violate the constitutional guarantee of equal protection (and hence due process). See Tapia-Acuna v. INS, 640 F.2d 223, 225 (9th Cir. 1981); Matter of Silva, 16 I. & N. Dec. at 29-30; Francis v. INS, 532 F.2d 268, 271-73 (2nd Cir. 1976). Moreover, the Second Circuit has now reaffirmed this basic principle of equal protection: that the basis for treatment (disparate or otherwise) must be the crime at issue, not the timing or the manner in which it is charged on the NTA. See Blake, 489 F.3d at 104 ("[W]hat makes one alien similarly situated to another is his or her act or offense, which is captured in the INA as either a ground of deportation or ground of exclusion"). The distinction of how the offense is charged is one that bears

no rational relationship to the object of the statute or to any "legitimate governmental interest." Francis, 532 F.2d at 273; Blake, 489 F.3d at 103-104.

Similarly, under the panel's decision in Abebe, the Mr. Lopez of scenario #2 would be eligible for § 212(c) relief, but the Mr. Lopez of scenarios #1 and #3 would not (unless he happened to be charged as being inadmissible at time of entry, so he could be granted relief nunc pro tunc).

Notably, in this case, while the panel found itself bound by Komarenko, 35 F.3d 432 (9th Cir. 1994), the Second Circuit, reviewing the BIA's decision in the Blake case itself, found that the Komarenko analysis should not be followed as it conflicted with the basic principle of ensuring that "permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner." Blake, 489 F.3d at 104 (citing Francis, 532 F.2d at 273). This not only presents a conflict among the Circuits but highlights the fundamental equal protection violation at issue here.

IV. CONCLUSION

Based on the aforementioned reasons presented by amici, and those in Mr. Abebe's principal petition, the Court en banc should rehear this case.

Date submitted: September 27, 2007

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YEWHALASHET ABEBE,

Petitioner,

v.

ALBERTO GONZALES,

Respondent.

No. 05-76201

On Petition for Review of a Final Decision of the Board of Immigration Appeals

BRIEF *AMICUS CURIAE* OF JOEL JUDULANG IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2, Joel Judulang respectfully submits this brief *amicus curiae* in support of the petition for rehearing *en banc*. Counsel for both parties have consented to the filing of this brief.

Mr. Judulang has a strong interest in this case. The Board of Immigration Appeals (BIA) ordered Mr. Judulang deported to the Philippines—a country he has visited only once since he was eight years old—on account of a 1989 conviction for voluntary manslaughter pursuant to Cal. Penal Code § 192(a).[1] Mr. Judulang seeks a waiver under section 212(c) of the Immigration and Nationality Act (8 U.S.C. § 1182(c) (repealed 1996)) and is confident that, if given an evidentiary hearing, he would merit section 212(c) relief. However, this Court dismissed Mr. Judulang's petition for review, concluding that his manslaughter conviction—a "crime of violence" aggravated felony (*id.* § 1101(a)(43)(F))—cannot be waived under section 212(c) because "[t]he aggravated felony / crime of violence ground for deportation is not substantially similar to any ground for exclusion."

[1] Mr. Judulang's conviction arose from a fight in which another person shot and killed the victim. Mr. Judulang cooperated with the authorities, pled guilty, was given a suspended sentence and credit for time served in county jail, and was immediately released on probation following his plea. He was 22 years old at the time of the incident; he is now 41.

Judulang v. Gonzales, No. 06-70986, 2007 WL 2733726, at *2 (9th Cir. Sept. 17, 2007). The Court based this conclusion on the *Abebe* panel's decision. *See id.*

Mr. Judulang fully supports the arguments made in the petition for rehearing. This separate *amicus* submission expands upon two additional points supporting *en banc* review. First, the panel's decision is contrary to the constitutional analysis of two seminal section 212(c) decisions of this Court—*Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981), and *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988)—and also ignores several decisions in which the BIA and this Court have held that aliens convicted of "crime of violence" aggravated felonies may seek section 212(c) relief. Second, the panel erred in its interpretation of *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994). Properly understood, *Komarenko* does not apply to cases like Mr. Abebe's or Mr. Judulang's, where the deportable offense is clearly also an excludable offense waivable under section 212(c). While this Court should hold that section 212(c) is available to Mr. Abebe, it need not overrule *Komarenko* to do so.[2]

[2] Mr. Judulang intends to file a petition for rehearing in No. 06-70986. In the event that the Court grants rehearing in this case, Mr. Judulang will move that the two cases be consolidated for rehearing.

ARGUMENT

I. THE PANEL'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *TAPIA-ACUNA* AND *CABASUG*, AS WELL AS WITH DECISIONS RECOGNIZING THE AVAILABILITY OF SECTION 212(C) RELIEF IN "CRIME OF VIOLENCE" CASES

As Petitioner Abebe explains, the panel's decision squarely conflicts with the Second Circuit's decision in *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007), which is reason enough to grant rehearing *en banc*. Rehearing is further warranted because the panel's decision cannot be reconciled with this Court's critical section 212(c) decisions or with decisions that acknowledge the availability of, and in many cases actually grant, section 212(c) relief in "crime of violence" aggravated felony cases.[3]

The panel decision in this case makes section 212(c) eligibility for a lawful permanent resident in deportation proceedings turn solely on whether the alien left the country after conviction or not—the very arbitrary and unjustifiable distinction that this Court held violated equal protection in *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981). Had Mr. Abebe left the United States following his conviction, returned to the United States, and

[3] Although Mr. Abebe was held deportable for a "sexual abuse of a minor" aggravated felony (8 U.S.C. § 1101(a)(43)(A)), not a "crime of violence" like Mr. Judulang (*id.* § 1101(a)(43)(F)), the panel stated that its holding applied in "crime of violence" cases as well. *Abebe v. Gonzales*, 493 F.3d 1093, 1095 n.3 (9th Cir. 2007).

subsequently been placed in deportation proceedings, he would have been able to seek section 212(c) relief through the *nunc pro tunc* procedure described in the panel decision. *See Abebe v. Gonzales*, 493 F.3d 1092, 1098-1099 (9th Cir. 2007); *id.* at 1109 (Berzon, J., concurring). Had that happened, the conviction would have been treated as an excludable "crime involving moral turpitude" (CIMT) subject to waiver under section 212(c) and, had a waiver been granted *nunc pro tunc*, that waiver would have provided protection not only from exclusion for a CIMT, but also from deportation for an aggravated felony. But because Mr. Abebe did not leave the country, the panel's decision denied him any opportunity to seek a waiver. As Judge Berzon recognized, "[n]o rational purpose can be served by this distinction." *Id.* at 1109 (Berzon, J., concurring).

Although the panel acknowledged *Tapia-Acuna*'s holding that distinctions between groups of aliens must be supported by a "rational basis," (*Abebe*, 493 F.3d at 1104 (citing *Tapia-Acuna*)), it nowhere identified any rational basis for treating Mr. Abebe less favorably than an alien convicted of the same crime who left the United States, returned, and then sought section 212(c) relief in deportation proceedings through the *nunc pro tunc* procedure. The absence of a rational basis is understandable, given *Tapia-Acuna*'s holding that "no purpose would be served by giving

less consideration to the alien whose ties with this country are so strong that he has never departed after his initial entry than to the alien who may leave and return from time to time." *Tapia-Acuna*, 640 F.2d at 225 (internal quotation marks omitted); *see also Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) ("The government has failed to suggest any reason why this petitioner's failure to travel abroad following his conviction should be a crucial factor in determining whether he may be permitted to remain in this country.").[4]

The panel's decision is also irreconcilable with the "counterpart ground" doctrine as set forth in *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988).[5] Cabasug was convicted of carrying a sawed-off shotgun, an offense that rendered him deportable but not excludable. In holding that *Tapia-*

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[4] The purposes of the immigration law justify *better* treatment for aliens within the United States. *See Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1198 (9th Cir. 2002) ("Our immigration law has generally treated aliens who are already on our soil (and who are therefore deportable) more favorably than aliens who are merely seeking admittance (and who are therefore excludable)."); *see also Cordes v. Gonzales*, 421 F.3d 889, 897-898 (9th Cir. 2005) (stating that the Government acts unconstitutionally when it grants "relief from removal to those permanent residents in exclusion proceedings who left the United States temporarily and sought return, but not to those permanent residents in deportation proceedings who had never left the United States").

[5] The Department of Justice cited *Cabasug* in support of the inclusion of the "counterpart" doctrine in the new regulation governing section 212(c) applications. *See* 69 Fed. Reg. 57,826, 57,831 (Sept. 28, 2004) (discussing 8 C.F.R. § 1212.3(f)(5)).

Acuna did not govern Cabasug's case, the Court relied on the nature of Cabasug's offense, not the differing terminology of the relevant exclusion and deportation provisions: "[T]here exists *no class of persons alike in carrying sawed-off shotguns or machine guns*, and deportable or not depending on the irrelevant circumstance of whether at some previous time they took a temporary trip out of the country." *Id.* at 1326 (emphasis added). *Cabasug* thus made clear that, in determining whether equal protection required that a deportable alien be allowed to seek section 212(c) relief, the question was whether the alien's deportable *offense* also constituted a basis for exclusion, such that he could have sought relief *nunc pro tunc* following departure and return.

Cabasug's offense-based analysis is confirmed by the Court's observation that "conspiracy to distribute cocaine" would constitute a waivable "*ground* under both [deportation and exclusion] statutes." *Id.* (discussing *Gutierrez v. INS*, 745 F.2d 548 (9th Cir. 1984)) (emphasis added). "Conspiracy to distribute cocaine" is an *offense*, not a deportation or exclusion provision in the INA. By identifying the word "ground" with an offense, instead of a statutory subsection, *Cabasug* teaches that section 212(c) eligibility turns on whether deportable aliens convicted of the same

offense would be permitted to apply for section 212(c) relief *nunc pro tunc* if they departed from the United States and were readmitted.[6]

Contrary to *Cabasug*, the *Abebe* panel did not consider whether Mr. Abebe's deportable offense—"lewd/lascivious conduct upon a child" (Cal. Penal Code § 288(a))—made Mr. Abebe excludable as well as deportable, such that he would have been eligible for a 212(c) waiver *nunc pro tunc* had he departed the country and returned. The panel believed that this was "simply beside the point" because the terminology of the statutory subsection under which he would be deportable ("sexual abuse of a minor") is drafted differently from the subsection under which he would be excludable (CIMT). *Abebe*, 493 F.3d at 1105. But *Cabasug* nowhere limited its analysis under section 212(c) to the words that Congress used in drafting the exclusion and deportation statutes. On the contrary, *Cabasug* recognized that equal protection extended section 212(c) relief to deportable aliens who had not left the country as long as the *offense* that rendered them

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[6] Judge Wallace's concurrence focused even more clearly on the offense. *See Cabasug*, 847 F.2d at 1327 (Wallace, J., concurring) (stating that it was a violation of equal protection "to distinguish between *aliens who had committed the same crime* on the basis of whether they traveled abroad recently, and reach a different result depending on whether they were in a deportation or exclusion proceeding" (emphasis added)); *id.* at 1328 ("Cabasug has committed *a crime distinct and different* from any of those *crimes or actions* that are *grounds for exclusion*." (emphasis added)).

deportable (which *Cabasug* called a "ground" of deportation) was also an excludable offense waivable under section 212(c). *See also Blake*, 489 F.3d at 103 ("If the offense that renders a lawful permanent resident deportable would render a lawful permanent resident excludable, the deportable lawful permanent resident is eligible for a waiver of deportation.").

Consistent with *Tapia-Acuna* and *Cabasug*, the BIA and this Court have repeatedly held that section 212(c) relief is available to aliens convicted of "crime of violence" aggravated felonies—holdings that cannot be squared with the *Abebe* panel's decision. In 1992, the BIA noted that an alien convicted of murder—the quintessential "crime of violence"—was "deportable under a deportation provision analogous to the exclusion ground" regarding CIMT and "is therefore not disqualified from relief under section 212(c) of the Act on this account." *Matter of A-A-*, 20 I. & N. Dec. 492, 500-501 (BIA 1992). That same year, the BIA reversed an immigration judge's determination that an alien convicted of attempted murder was ineligible for a section 212(c) waiver, concluding that the alien "is not barred from applying for section 212(c) relief" and remanding "to afford the respondent an opportunity to apply for a waiver of inadmissibility pursuant to section 212(c) of the Act." *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-591 (BIA 1992).

In many subsequent cases, the BIA expressly rejected the very reasoning accepted by the *Abebe* panel. In 2003, the BIA affirmed a grant of section 212(c) relief to an alien convicted of voluntary manslaughter. *See Matter of Reyes Manzueta*, No. A93022672, 2003 WL 23269892 (BIA Dec. 1, 2003).[7] The BIA noted that "a conviction for first degree manslaughter is considered to be a crime involving moral turpitude" and concluded: "Thus, we do not find that the respondent is statutorily barred from establishing eligibility for section 212(c) relief." *Id.*; *see also Matter of Hussein*, No. A26416298, 2004 WL 1059601 (BIA Mar. 15, 2004) (reversing immigration judge's determination that an alien removable for a "crime of violence" conviction was categorically ineligible for section 212(c) relief and remanding for consideration of relief request); *Matter of Loney*, No. A35770136, 2004 WL 1167256 (BIA Feb. 10, 2004) (holding that an alien convicted of robbery, a "crime of violence," is "not precluded from establishing eligibility" under section 212(c)); *Matter of S-Lei*, No.

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[7] This Court has taken account of unpublished BIA decisions when "an unbroken string" of decisions "serve[s] to underline the correctness of" published decisions. *Perez-Enriquez v. Gonzales*, 463 F.3d 1007, 1013-1014 (9th Cir. 2006) (discussing four unpublished BIA decisions supporting the Court's reading of a published BIA decision). The multitude of unpublished decisions allowing section 212(c) applications by persons convicted of crimes of violence "underline[s] the correctness" of *A-A-* and *Rodriguez-Cortes*. Copies of unpublished materials relied upon are annexed to this brief.

A38139424 (BIA May 27, 2004) (same); *Matter of Rowe*, No. 37749964 (BIA May 9, 2003) (same); *Matter of Munoz*, No. A35279774, 28 Immig. Rptr. B1-1, at *3-*4 (BIA Aug. 7, 2003) (reversing immigration judge's holding that an alien convicted of "aggravated assault on a peace officer" was ineligible for section 212(c) relief and holding that there was a "corresponding" exclusion ground because the "offense also could make the respondent inadmissible ... as an alien convicted of a [CIMT]"); *see also Matter of Caro-Lozano*, No. A90870395, 2004 WL 1398661 (BIA Apr. 22, 2004) (evaluating section 212(c) claim on the merits for an alien convicted of a "crime of violence"); *Matter of Martinez*, No. A22166294, 2004 WL 1167082 (BIA Feb. 18, 2004) (stating that "it does appear that section 212(c) could waive the burglary offense" and, in footnote 1, that burglary is a "crime of violence"); *Matter of Orrosquieta*, No. A92799659, 2003 WL 23508672 (BIA Dec. 19, 2003) (noting that alien "would still be entitled to seek a waiver of inadmissibility under former section 212(c)" for an extortion conviction, which is a "crime of violence"); *cf. Matter of Montenegro*, 20 I. & N. Dec. 603, 610 (BIA 1992) (Heilman, Board Member, concurring) (noting that, had the respondent been held removable for murder or voluntary manslaughter, "he would be eligible for a section 212(c) waiver").

This lengthy agency practice squarely refutes the *Abebe* panel's statement (493 F.3d at 1105) that the BIA's holding in this case "do[es] not represent a change in the law."[8]

Indeed, this Court itself has acknowledged the availability of section 212(c) relief in crime of violence cases. In *Cordes v. Gonzales*, 421 F.3d 889, 893, 898-899 (9th Cir. 2005), this Court reinstated an immigration judge's grant of relief to a person convicted of "dissuading a witness from testifying with threat of force."[9] This Court similarly held that aliens convicted of attempted burglary and burglary were eligible for section

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[8] Despite its acknowledgement that *Chevron* deference is inappropriate where the BIA "interpreted the comparable grounds test one way and then reversed course without adequate explanation" (493 F.3d at 1102), the panel did not discuss the BIA's extensive practice in "crime of violence" cases. The panel addressed only *Rodriguez-Cortes*, regarding which the panel stated that "there is no indication that the Board even considered the comparable grounds issue." *Id.* at 1104. This is simply incorrect. The BIA's reversal of the immigration judge's decision in *Rodriguez-Cortes* was precisely because the judge had mistakenly believed that the alien's offense (attempted murder) qualified as a non-excludable firearms offense and therefore had no counterpart exclusion ground. The BIA cited *Cabasug* and other decisions for the proposition that entry without inspection and firearms offenses had "no comparable ground of exclusion." *Rodriguez-Cortes*, 20 I. & N. Dec. at 589. Had aliens convicted of "crime of violence" aggravated felonies been categorically barred from seeking section 212(c) relief, as the *Abebe* panel held, the reversal and remand in *Rodriguez-Cortes* would have been futile and incorrect.

[9] The offense at issue in *Cordes* was a "crime of violence" aggravated felony. *See* Petitioner-Appellant's Principal Brief at *5, *Cordes*, 2004 WL 2402984 (9th Cir. filed Sept. 10, 2004).

212(c) relief. *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1051 (9th Cir. 2004) (vacating conviction for illegal reentry); *United States v. Leon-Paz,* 340 F.3d 1003, 1007 (9th Cir. 2003) (same). In none of these cases did the Court suggest that the "statutory counterpart" doctrine was an obstacle to section 212(c) relief. *See also Hem v. Maurer*, 458 F.3d 1185, 1187-1189 (10th Cir. 2006) (reinstating grant of section 212(c) relief to an alien removable for aggravated assault, a "crime of violence").

The Government's own briefing in this Court demonstrates that crime of violence convictions are waivable under section 212(c). In *Ubaldo-Figueroa*, the Government argued that "Congress could rationally have decided to eliminate [section 212(c)] discretionary relief altogether for all aliens convicted of theft and burglary crimes *or crimes of violence*"[10]—a statement that would have been nonsensical if deportable aliens convicted of "crimes of violence" were already ineligible for section 212(c) relief. In *Leon-Paz*, the Government argued at length that an alien convicted of robbery was ineligible for a section 212(c) waiver, but solely on the basis of changes in the law wrought by 1996 legislation.[11] The Government never

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[10] Brief for Appellee United States at *13, *Ubaldo-Figueroa*, 2002 WL 32254035 (9th Cir. filed Oct. 10, 2002) (emphasis added).

[11] *See* Brief of Appellee at *10-*11, *Leon-Paz*, 2003 WL 22113524 (9th Cir. filed Mar. 5, 2003).

argued that section 212(c) relief was categorically unavailable for want of a "counterpart ground"—an argument that, were it correct, would have easily resolved the case in the Government's favor. The same is true of *Cordes*.[12]

The availability of section 212(c) relief in crime of violence cases is also confirmed by the Supreme Court's recognition that the extension of section 212(c) relief to deportable aliens had "great practical importance" because recent legislation defined deportable "aggravated felonies" broadly. *INS v. St. Cyr*, 533 U.S. 289, 295 (2001). The Court specifically listed the "crime of violence" provision among the "aggravated felony" categories that enlarged the section 212(c) applicant pool. *See id.* at 295 n.4. Authoritative commentary also observes that section 212(c) "could waive heinous crimes such as murder and rape." 6 Gordon, Mailman, & Yale-Loehr, *Immigration Law and Procedure* § 74.04[1][b] (2006).

The panel's decision therefore conflicts with the longstanding understanding of section 212(c) as voiced by the BIA, this Court, the government itself, the Supreme Court, and academic commentary. These several sources demonstrate that, under the constitutional holdings of *Tapia-Acuna* and *Francis*, section 212(c) relief is available where the deportable

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[12] *See* Brief for Appellees at 11-12, *Cordes* (9th Cir. filed Oct. 12, 2004).

"crime of violence" is also an excludable CIMT, notwithstanding any differences in terminology between the deportation and exclusion provisions. The petition for rehearing should be granted in order to restore uniformity in this Court's decisions, to resolve the conflict with the Second Circuit's decision in *Blake*, and to correct the panel's erroneous analysis.

II. THE COURT NEED NOT OVERRULE *KOMARENKO* IN ORDER TO REACH THE CORRECT OUTCOME IN THIS CASE

The panel purported to rest its holding on *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994). If the panel were correct that *Komarenko* compelled dismissal of Mr. Abebe's challenge, then *Komarenko* should indeed be overruled. Mr. Judulang respectfully suggests, however, that *Komarenko* does not govern this case.

Komarenko involved a firearms offense, and it was at best "speculat[ive]" whether Komarenko's crime would have rendered him inadmissible. 35 F.3d at 435. Indeed, this Court has specifically held that Komarenko's offense—assault with a deadly weapon under Cal. Penal Code § 245(a)(2)—is not an excludable CIMT. *See Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996). Accordingly, *Komarenko* is an unremarkable application of the counterpart ground doctrine to a firearms case: because Komarenko's offense was not excludable, he could not have sought a section 212(c)

waiver *nunc pro tunc* after leaving the country and returning. Equal protection therefore did not require that he be permitted to seek section 212(c) relief without having left.

Komarenko's holding does not control here, as Mr. Abebe's offense (like Mr. Judulang's) *is* a CIMT that would be waivable *nunc pro tunc* following departure and return—a fact that the *Abebe* panel appears to have overlooked. The panel stated only that Mr. Abebe "could not have been excluded on a 'sexual abuse of a minor' theory because no such ground of inadmissibility exists" (493 F.3d at 1105)—a statement that, while true, misconstrues the equal protection comparison of *Tapia-Acuna* and *Francis*. The relevant comparison in those cases is not merely to excludable aliens, but to aliens deportable *under the same deportation subsection as the petitioner* who, because they have left the country and returned, may seek a *nunc pro tunc* waiver in deportation proceedings that, if granted, will "preclude deportation." *Francis*, 532 F.2d at 271. The fact that Mr. Abebe could not have been excluded "on a 'sexual abuse of a minor' theory" does not change the fact that, had he left the country and returned, he could have sought a *nunc pro tunc* waiver as to his *offense*, which would have applied to all grounds of removal (not just exclusion grounds) based on that offense.

See Abebe, 493 F.3d at 1109 (Berzon, J., concurring) ("[R]elief under § 212(c) is itself offense-specific[.]").[13]

Contrary to the panel's view, *Komarenko* did not "explicitly limit[]" this constitutional reasoning. 493 F.3d at 1104. *Komarenko* followed *Tapia-Acuna* and *Francis* and at no point sought to alter or confine them. *See Komarenko*, 35 F.3d at 434. Moreover, *Komarenko* must be understood in light of *Cabasug*, which *Komarenko* cites several times. As is discussed in Part I above, *Cabasug* did not merely compare statutory subsections, but also determined whether the particular deportable *offense* would render the alien inadmissible after departure and return and therefore eligible *in deportation proceedings* for section 212(c) relief *nunc pro tunc*. Although *Komarenko* rejected what it called a "factual approach" to equal protection claims (*id.* at 435), that discussion responded to the alien's invitation that the Court examine the particular circumstances of his conduct, rather than his offense of conviction, in order to identify whether Mr. Komarenko had acted with "moral turpitude" (even though his crime was not, as a categorical matter, a CIMT). The Court refused to "speculate" whether the government

[13] *See also United States v. Ortega-Ascanio*, 376 F.3d 879, 882 (9th Cir. 2004) (if an alien receives section 212(c) relief, "the deportation proceedings would be terminated and the alien would remain a permanent resident"); *Matter of G-A-*, 7 I. & N. Dec. 274, 275-276 (BIA 1956).

would have charged Mr. Komarenko's conduct as involving moral turpitude (*id.*), but it did not suggest that the Court should turn a blind eye to equal protection claims when the alien's offense is clearly a waivable CIMT subject to *nunc pro tunc* relief.[14]

Nor does *Komarenko* discard the traditional rational basis inquiry into governmental classifications simply because of disparities in the language of statutory subsections. Such an approach would be contrary to established equal protection principles; Congress cannot insulate irrational distinctions from constitutional attack simply by placing them in different statutory subsections and using different words. Here, the panel's decision clearly creates a "distinction" in the treatment of persons convicted of, and deportable for, the *same* offense depending on "the irrelevant circumstance of whether at some previous time they took a temporary trip out of the country," which is the "gravamen of [an] equal protection violation." *Cabasug*, 847 F.2d at 1326. *Komarenko* did not articulate any rational basis for allowing an alien who has left the country and returned to apply for *nunc pro tunc* relief from deportation for a "crime of violence," yet denying an otherwise-identical alien that relief if he did not leave the country. The fact

[14] In both *Abebe* and *Judulang*, the government expressly charged the relevant crimes as CIMTs as well as aggravated felonies, thereby removing any doubt as to their eligibility for *nunc pro tunc* relief from deportation.

that this Court and the BIA have granted section 212(c) relief in several crime of violence cases since 1994 (*see supra* Part I) demonstrates that *Komarenko* does not stand for the proposition advanced by the panel here.[15]

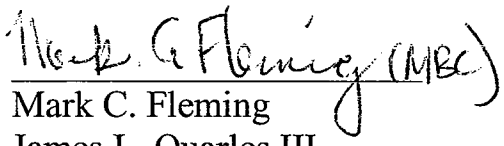
Accordingly, the Court may and should rule in Mr. Abebe's favor, but it need not overrule *Komarenko* to do so. Because there is no doubt that Mr. Abebe's offense of conviction is a waivable CIMT, *Komarenko* does not apply, and the basic equal protection principles and offense-based analysis of *Tapia-Acuna* and *Cabasug*—recognized and applied in numerous cases before and after *Komarenko*—make clear that section 212(c) relief is available here.

[15] Judge Berzon acknowledged this understanding of *Komarenko* as "at least arguable," but concluded that the panel's reading was "the better one," even though she believed that the panel's reading compelled an unconstitutional outcome. *Abebe*, 493 F.3d at 1107 n.4 (Berzon, J., concurring). Mr. Judulang respectfully submits that a reading of a judicial opinion that leads to an unconstitutional outcome is not "better" if another plausible reading exists that does not lead to constitutional error.

CONCLUSION

The petition for rehearing *en banc* should be granted.

Respectfully submitted,



September 27, 2007

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 29-2

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 29-2(c)(2), the attached *amicus curiae* brief in support of petition for rehearing *en banc* is proportionately spaced, has a typeface of 14 points or more and contains 4,166 words, which is below the word limit of 4,200 words.

Date: September 27, 2007

Mark C. Fleming (MBC)
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CERTIFICATE OF SERVICE

I, Mary Beth Caswell, hereby certify that, on September 27, 2007, I caused one (1) original and fifty (50) copies of the Brief *Amicus Curiae* for Joel Judulang in Support of Petition for Rehearing *En Banc* to be filed with the Court by dispatching said documents to a commercial carrier for delivery within 3 calendar days to the Clerk of Court at the following address:

Clerk, United States Court of Appeals for the Ninth Circuit
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I also certify that, on September 27, 2007, I caused two (2) copies of the Brief *Amicus Curiae* for Joel Judulang in Support of Petition for Rehearing *En Banc* to be served on counsel for the parties by dispatching said documents to a commercial carrier for delivery within 3 calendar days to the following addresses:

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No. 05-76201

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YEWHALASHET ABEBE,
Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General,[1]
Respondent.

RESPONDENT'S RESPONSE AND OPPOSITION TO PETITIONER'S PETITION FOR REHEARING EN BANC

INTRODUCTION

Respondent hereby opposes the instant petition and asks this Court not to rehear this case. The panel upheld the "statutory counterpart analysis" employed by the Board of Immigration Appeals ("Board" or "BIA") whereby section 212(c) relief is "available only to those aliens charged as deportable on a ground comparable to a ground of exclusion."[2] Abebe v. Gonzales, 493 F.3d 1092, 1101

[1] Under Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Mr. Mukasey is automatically substituted for Alberto R. Gonzales.

[2] Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), "excludability" was the equivalent term for the post-IIRIRA "inadmissibility."

(9th Cir. 2007). In doing so, the panel rejected Petitioner's "offense-based" theory that 212(c) relief is available to an alien charged as deportable so long as his criminal conviction could also form the basis for a ground of exclusion. The panel accepted the Board's "grounds-based" analysis that the comparison must run between the grounds of deportation and exclusion, not the crimes or offenses committed. The panel's decision does not conflict with any Ninth Circuit or Supreme Court precedent. Although it does conflict with the Second Circuit's decision in Blake v. Carbone, 489 F.3d 88 (2d Cir. 2007) ("Blake II"), en banc rehearing is not warranted because the panel's decision is correct.

BACKGROUND

Petitioner pled guilty and was convicted of "committing lewd/lascivious conduct upon a child" in 1992. A.R. 154-58, 192-94. The immigration judge found him deportable for having been convicted of an aggravated felony/sexual abuse of a minor.[3] A.R. 41, 65-66; see 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1101(a)(43)(A);. Id. There is no ground of exclusion for aggravated felony/sexual abuse of a minor. See 8 U.S.C. § 1182(a) (1992). Petitioner sought

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[3] Although Petitioner was also charged with having committed two crimes involving moral turpitude (CIMT), there was no finding by any adjudicator that Petitioner's conviction for an aggravated felony/sexual abuse of a minor was itself a CIMT. See Amicus Brief of Joel Judulang ("Judulang Amicus") at 17 n. 14.

several forms of relief, including a discretionary waiver of inadmissibility pursuant to former section 212(c). Id. Relying on Matter of Blake, 23 I&N Dec. 722 (BIA 2005), and a recently promulgated regulation, 8 C.F.R. § 1212.3(f)(5),[4] the Board affirmed. A.R. 2-3. Matter of Blake held that 212(c) relief was not available because the ground of deportation – aggravated felony/sexual abuse of a minor – was not also a ground of exclusion. Matter of Blake, at 727-29. The Board rejected Petitioner's argument that Matter of Blake violated his constitutional right to due process and equal protection of the law, noting that well-established jurisprudence in the Ninth Circuit has affirmed the "statutory counterpart" approach to interpretation of former section 212(c) and consistently rejected the same constitutional arguments raised by Petitioner. Id. The Board expressly observed that former section 212(c) did not waive crimes, but rather, "waived grounds of inadmissability, some of which arose from crimes." A.R. 3 (emphasis in original).

A panel of this Court affirmed the judgment of the Board and denied the petition for review. The Court expressly joined the First, Third, Fifth and Seventh Circuits in endorsing the rationale of Matter of Blake and rejected the Second

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[4] The regulation states that an alien's application for 212(c) relief shall be denied if the alien is deportable or removable on ground for which there is no statutory counterpart in INA section 212, 8 U.S.C. § 1182. 8 C.F.R. § 1212.3(f).

Circuit's approach in Blake II. The Court noted that in Komarenko v. INS, 35 F3d 432 (9th Cir. 1994), it had rejected a virtually identical claim that the Board's approach violated the principles of equal protection because the conduct underlying the conviction could have rendered the alien excludable as an alien convicted of a CIMT. Abebe, 493 F.3d 1104-05. The Court noted that "Komarenko explicitly limited the constitutional holding in [Tapia-Acuna v. INS, 640 F.2d 223 (9th Cir. 1981)] to cases involving aliens facing deportation on a basis which 'is identical to a statutory ground for exclusion for which discretionary relief would be available.'"[5] Id. (quoting Komarenko, 35 F.3d at 434) (emphasis in original)). The Court observed that Petitioner would not have been excludable if he had left the United States and returned because there was no ground of excludability for sexual abuse of a minor. Id. Accordingly, the Court found that it was irrelevant that the Government could have sought to exclude Petitioner on the CIMT ground. Id. at 1105.

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[5] The Court observed that Tapia-Acuna had adopted the Second Circuit's decision in Francis v. INS, 532 F.2d 268 (2d Cir. 1976), which compared two classes of aliens: (1) an alien who became deportable, left the United States , returned, and was then deported on a ground for which he could have been excluded upon his last re-entry, and was thus eligible for 212(c) relief; and (2) an alien who became deportable but never left the United States and thus had no opportunity for relief. Id. (emphasis in original). As the panel noted, the Second Circuit found no rational basis for this distinction. Id.

ARGUMENT

I. THERE IS NO INTRA-CIRCUIT OR SUPREME COURT CONFLICT FOR AN EN BANC COURT TO RESOLVE

Judulang Amicus claims that the panel's decision conflicts with this Court's prior decisions in Tapia-Acuna and Cabasug v. INS, 847 F.2d 1321 (9th Cir. 1988).[6] See Judulang Amicus at 3-13. However, contrary to Petitioner's claim, both Tapia -Acuna and Cabasug expressly addressed grounds of deportation, not the actual offense. The Court's analysis in both cases was based on the express language of the immigration statute as it existed at the time of the Tapia-Acuna and Cabasug decisions in the 1980s. Compare 8 U.S.C. §§ 1251(a)(14) (making deportable any alien convicted of possessing or carrying "a weapon commonly called a sawed-off shotgun") and 1251(a)(11) (making deportable any alien convicted of violating "any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana. . . .") (1982). Thus, in contrasting shotgun offenses (the offense at issue in Cabasug) with narcotics offenses (the offense at issue in Tapia-Acuna), the Cabasug Court was referring to the actual language employed by Congress to define a specific ground of deportation and not to the

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[6] In his petition for rehearing en banc, Petitioner does not assert any conflict with the Supreme Court or within this circuit regarding the comparable grounds analysis. Instead, Petitioner merely argues that the Court's decision in Komarenko was erroneous and should be overruled. Pet. at 2, 10-13.

petitioner's crime or offense. See Cabasug, 847 F.2d at 1325. Moreover, the class of persons to which Cabasug referred concerned aliens deportable under former 8 U.S.C. § 1251(a)(14) (1982). Id. The contours of that class – and the Court's analysis – was governed by how Congress defined the class. Accordingly, Judulang Amicus's assertion that "Cabasug did not merely compare statutory subsections, but also determined whether the particular deportable offense would render the alien inadmissible after departure" misapprehends the fact that the Cabasug Court's analysis was tied directly to the statutory language chosen by Congress to set forth the specific grounds for deportation. See Judulang Amicus at 6-7, 16.

Additionally, as the Court noted in Cabasug, both Francis and Tapia-Acuna involved a ground of deportation – possession of illegal drugs – that was substantially identical to a ground of exclusion and thus left undecided the question of whether 212(c) relief had to be afforded to aliens who were deportable for offenses that had no comparable ground under the exclusion statute. Cabasug, 847 F.2d at 1326. Cabasug, which involved a ground of deportation – possession of a sawed off shotgun – for which there was no comparable ground of exclusion, therefore, presented the Court with its first opportunity to decide whether 212(c) relief applied to cases in which there was no comparable ground under the

exclusion statute. Cabasug held that 212(c) relief was not available because the ground of deportation – a firearms offense – was not also a ground of exclusion. Cabasug, 847 F.2d at 1326-27. Accordingly, the Abebe panel did not depart from circuit precedent when it held that the lack of a comparable ground foreclosed 212(c) relief.

In Komarenko the Court was first presented with the argument that because the factual basis for the alien's conviction that made him deportable as an alien convicted of a firearms offense could also have rendered him excludable as an alien convicted of a CIMT, he was eligible for 212(c) relief. Komarenko, 35 F.3d at 435. In Komarenko, the Court observed that it had not previously employed a factual approach to these types of cases, but had instead "examined the classes of persons created by the excludability and deportation provisions to determine whether they created a distinction that lacks a rational basis." Id. (internal citations and quotations omitted). Noting that other circuits had employed the same approach, the Komarenko court declined to change its approach. Id. Accordingly, as the Abebe panel correctly recognized, whether the government could have sought to exclude Petitioner on some other ground is irrelevant under the approach set forth in Komarenko. Abebe, 493 F.3d at 1105. Moreover, Cabasug did not set forth a requirement that courts consider whether an alien

would be excludable under some other ground – such as a CIMT – as that argument was never made in Cabasug.[7] Thus, contrary to Judulang Amicus's assertion, the Abebe panel did not err by failing to consider whether Petitioner's deportable offense – lewd/lascivious conduct upon a child – would render him excludable for having been convicted of a CIMT. Judulang Amicus at 7.

Judulang Amicus raises three additional arguments that are without merit. First, citing to a number of unpublished Board decisions, Judulang Amicus argues that the Board has "expressly rejected the very reasoning accepted by the Abebe panel." Id. at 9-11. However, because such decisions are unpublished, were issued prior to the Board's precedential decisions in Blake and Matter of Brieva-Perez, 23 I. & N. Dec. 766 (BIA 2005), and conflict with long-standing published Board and Circuit Court decisions, they have no applicability here. 8 C.F.R. § 1003.1(g) (discussing precedent decisions).[8] Second, Judulang Amicus asserts

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[7] Petitioner in Cabasug argued that Congress could not have meant to treat firearms offenses more seriously than CIMTs such as murder or rape for which 212(c) relief is available. Cabasug, 847 F.2d at 1326-27. The Court rejected the argument, finding that Congress had "almost plenary" power in that area. Id.

[8] The Court's analysis of the Board's published decision in Matter of Rodriguez-Cortes, 20 I. & N. Dec. 587 (BIA 1992), was correct. See Judulang Amicus at 11 n.8. The Board in that case determined that the alien had not been convicted of a firearm violation within the meaning of 8 U.S.C. § 1251(a)(2)(C) because the deportation charge was based on a sentence enhancement resulting

(continued...)

that this Court has acknowledged the availability of section 212(c) relief in crime of violence cases. Judulang Amicus at 11-12. However, these cases were decided on other grounds and this Court has never specifically held that aliens convicted of crimes of violence are broadly eligible to apply for § 212(c) relief because their crimes are also CIMTs.[9] Third, Judulang Amicus asserts that the Supreme Court confirmed the availability of 212(c) relief in crime of violence cases in INS v. St. Cyr, 533 U.S. 289, 295 (2001). Id. at 13. However, the Supreme Court did not address the comparability test because there was a comparable ground of excludability for the alien's drug offense. See St. Cyr, 229 F.3d at 408; Matter of Meza, 20 I. & N. Dec. 257, 259 (BIA 1991). Thus, the Supreme Court had no occasion to address the comparability test at issue in this case.

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[8](...continued)
from her co-defendant's use of a firearm during the underlying crime (attempted murder). Rodriguez-Cortes, at 590. Having determined that the alien had not been convicted of a firearms offense, the Board did address the comparability test. Id.

[9] See Cordes v. Gonzales, 421 F.3d 889 (9th Cir. 2005); United States v. Ubaldo-Figueroa, 364 F.3d 1042 (9th Cir. 2004); United States v. Leon-Paz, 340 F.3d 1003 (9th Cir. 2003).

II. THE PANEL'S CONFLICT WITH THE SECOND CIRCUIT'S BLAKE DECISION DOES NOT WARRANT EN BANC REHEARING BECAUSE THE PANEL'S DECISION IS CORRECT

Petitioner argues that en banc rehearing is warranted because the panel's decision conflict's with Blake II and the issue affects hundreds, or even thousands, of lawful permanent residents throughout the United States. Pet. at 1, 1-3; see Amicus Brief for the National Immigration Project, et al. ("Immigration Project Amicus") at 1.[10] En Banc rehearing is unnecessary, however, because the result reached by the panel is correct.[11] The weight of circuit authority overwhelmingly supports the result reached by the panel. The Board issued Matter of Blake in April 2005. Until the Second Circuit rejected the Board's position in June 2007, this circuit and every circuit to squarely address the issue – 8 in total – endorsed the Board's interpretation. See Dung Tri Vo v. Gonzales, 482 F.3d 363 (5th Cir. 2007); Caroleo v. Gonzales, 476 F.3d 158 (3d Cir. 2007); Valere v. Gonzales, 473 F.3d 757 (7th Cir. 2007); Soriano v. Gonzales, 489 F.3d 909 (8th Cir. 2006) (per

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[10] Petitioner and Immigration Project Amicus neglect to state any estimate of how many aliens in the Ninth Circuit are affected by this issue. See Pet. at 1; Immigration Project Amicus at 1-7.

[11] Petitioner and Judulang Amicus disagree as to whether Komarenko controls the this case. Pet. at 2, 10-13; Judulang Amicus at 14-15. The Government agrees with the panel majority and Judge Berzon's concurrence that Komarenko settles the issue.

curiam); Kim v. Gonzales, 468 F.3d 58 (1st Cir. 2006); Gjonaj v. INS, 47 F.3d 824, 827 (6th Cir. 1995); Komarenko, 35 F.3d 432; Rodriguez-Padron v. INS, 13 F.3d 1455, 1459 (11th Cir. 1994). Since the Second Circuit's decision in Blake II, only one additional circuit has squarely addressed the issue for the first time. Like the Abebe panel, that circuit – the Eighth – rejected the Second Circuit's approach and endorsed the Board's position." Kao Vue v. Gonzales, 496 F.3d 858 (8th Cir. 2007). In short, no court of appeals has "indicated approval" of the position of Blake II either before, or after, the Second Circuit's decision and a decision by the en banc Court would not resolve the existing circuit split.

There is no need for the Court to aggravate the split among the circuits by rehearing this case and agreeing with the Second Circuit because the Second Circuit's decision in Blake II is erroneous and the panel's decision is correct. At the outset, Blake II expands the availability of section 212(c) relief years after Congress indicated its intent to eliminate such relief. See Abebe, 493 F.3d at 1101 ("By its [1990] amendment, Congress clearly intended to further limit § 212(c) relief rather than to expand its availability."); Kim, 468 F.3d at 63 (Blake II "would . . . enlarge the frustration of Congress' own policy preference. Given the possible breadth of the moral turpitude concept, almost anyone could argue that although found deportable for a serious unwaivable crime, waiver authority should

be interpolated because the crime was also one of moral turpitude. Indeed, the worse the crime, the stronger the argument would be."). It is not, therefore, reasonable to infer that Congress intended that aliens removable for aggravated felonies under IIRIRA's newly-expanded definition be eligible for section 212(c) relief when Congress had eliminated it for aggravated felons only several months earlier.

Moreover, equal protection is satisfied because Petitioner is being treated similarly to other aliens whose ground of deportation has no corresponding ground of exclusion. See, e.g., Valere, 473F.3d at 762; Kim, 468 F.3d at 61-63. It is significant that the statute as written unambiguously applied only to excludable aliens. See 8 U.S.C. § 1182(c) . "Congress never itself created waiver authority for those deported for aggravated felonies or crimes of violence (this resulted from judicial decision and administrative action), and Congress' own views on the subject of waivers are reflected in its repeal of section 212(c) in its entirety . . . ." Kim, 468 F.3d at 63. Thus, where the statute clearly applies only to aliens in exclusion proceedings, it was not irrational for the Board to limit 212(c)'s availability to those grounds of deportation that have a comparable ground of exclusion.

Finally, the Second Circuit in Blake II examined the equal protection aspect with reference to its own precedent, including Francis, without considering whether the distinction at issue meets equal protection scrutiny under current law. "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." Heller v. Doe, 509 U.S. 312, 321 (1993). The Second Circuit also failed to address the extent to which customary equal protection standards are applicable to distinctions drawn within a class of deportable aliens. After Francis, the Supreme Court indicated that Fifth Amendment protections for aliens may be substantially narrower than for citizens. See Mathews v. Diaz, 426 U.S. 67, 81-82 (1976).

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CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Rehearing En Banc.

Respectfully submitted,

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