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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 10-694, Judulang v. Holder.

Mr. Fleming.

ORAL ARGUMENT OF MARK C. FLEMING

ON BEHALF OF THE PETITIONER

MR. FLEMING: Mr. Chief Justice, and may it please the Court:

In Hernandez-Casillas, the Attorney General confirmed that a lawful permanent resident subject to deportation, quote, "must have the same opportunity to seek discretionary relief as an alien who has temporarily left this country and upon reentry been subject to exclusion."

Two months later in its published decision in Matter of Meza, the BIA again confirmed that an immigrant deportable for an aggravated felony could seek relief because his conviction could also form the basis for excludability. Immigrants in situations indistinguishable from Mr. Judulang's applied for and received relief under this rule.

The BIA's decision in Blake changed the law. Without explaining or even initially acknowledging that it was doing so, the Blake rule was impermissibly

1 retroactive, and it is arbitrary and capricious on its
2 own merits. We would submit the evidence --

3 JUSTICE SCALIA: How do you explain -- I
4 mean, I think that is a principal point, whether Blake
5 and Brieva changed the law. How do you explain the
6 language in Matter of Wadud, which antedates by a good
7 deal those two cases, 1984, which says: "Section 212(c)
8 can only be invoked in a deportation hearing where the
9 ground of deportation charged is also a ground of
10 inadmissibility." It seems to me that that's -- that's
11 the basic point.

12 MR. FLEMING: Two responses to that,
13 Justice Scalia: I agree, Matter of Wadud is the
14 principal response that the Government has, and it does
15 not help them at all. Wadud was deportable for a
16 conviction under 18 U.S.C. 1546, and the BIA had held,
17 in a case called Matter of R-G- in 1958, that that
18 conviction did not render him excludable.

19 And that's confirmed later in the case of
20 Matter of Jimenez-Santillano, which also involved a 1546
21 conviction, where the BIA says that if Mr. Jimenez had
22 left the country and returned, it appears that he would
23 not have been inadmissible, and compares that situation
24 to someone convicted of a firearms offense, which the
25 board and the Attorney General had always said were not

1 waivable.

2 To the extent there's any ambiguity in the
3 language that Your Honor read, it could not have
4 survived the Attorney General's decision in
5 Hernandez-Casillas, which I just quoted at the beginning
6 of the presentation, which said that what one looks to
7 is whether the alien in exclusion proceedings would be
8 able to invoke section 212(c) relief. And when the
9 board then addressed the case of the aggravated felony
10 in Matter of Meza, it did not even address Wadud or view
11 it as binding at all. It looked to the conviction and
12 whether it formed a basis for excludability.

13 And the BIA then followed up with no fewer
14 than eight decisions in crime of violence cases,
15 indistinguishable from this case, where the -- the BIA
16 cited, not Wadud, not any of the other cases that the
17 Government is relying on, but cited Meza as articulating
18 the doctrine that the focus of analysis is on the
19 conviction. And the Court has the briefs of several
20 former immigration officials, including two INS general
21 counsel and several INS trial attorneys, confirming that
22 that was the position and the basis on which the
23 government litigated these cases --

24 JUSTICE KAGAN: Mr. --

25 MR. FLEMING: -- and in fact -- yes, Justice

1 Kagan.

2 JUSTICE KAGAN: Please finish.

3 MR. FLEMING: If I may, I was just going to
4 say that a number of these cases, crime of violence
5 cases, reached the merits in both the BIA and the courts
6 of appeals without the government even suggesting that
7 there was a statutory counterpart problem. In fact,
8 when it has suited its purposes the government and the
9 BIA have admitted that Blake was a change, including in
10 a brief filed in the Ninth Circuit less than a year ago.

11 JUSTICE KAGAN: You cite some cases. You
12 say there was a dramatic change in the law. The
13 Government cites some cases, and it says there was no
14 change in the law. What if the truth lies someplace in
15 the middle? What if, in fact, when you look before
16 Blake, what you see is some amount of confusion? That
17 the board sometimes was following the Blake rule, but
18 that at other times individual judges or maybe the board
19 itself were doing something different, because the
20 individual circumstances suggested that they should, or
21 just because they weren't so clear on the difference
22 between these two approaches.

23 And then Blake comes along, and what Blake
24 does is neither to change something dramatically nor to
25 just reaffirm what was there, but in some sense to

1 create a little bit of order out of chaos. What would
2 that do to your argument if that's the way one
3 understood Blake?

4 MR. FLEMING: Obviously, Justice Kagan, we
5 don't think that is the proper way to understand Blake.
6 But to answer the question, for purposes of the
7 retroactivity analysis, the Court uses what the Court in
8 St. Cyr called "considerations of fair notice,
9 reasonable reliance, and settled expectations." And we
10 would submit that reliance was more than reasonable and
11 expectations more than settled as to how the board was
12 addressing crime of violence aggravated felony
13 convictions prior to Blake, as is shown by the evidence
14 that I cited a minute ago, namely the position that the
15 government itself was taking in these cases and the way
16 that immigrants would have been advised by both criminal
17 defense counsel and immigration counsel, including, for
18 that matter, INS trial counsel.

19 JUSTICE SCALIA: Well, reliance on confused
20 law is certainly not reasonable reliance. I mean, if
21 you accept the -- the premise that Justice Kagan
22 operates from, how can you say that -- that you're
23 reasonably relying on confused law?

24 MR. FLEMING: I don't accept the premise at
25 all, Justice Scalia --

1 JUSTICE SCALIA: Well, that's a --

2 MR. FLEMING: -- that the law was confused.

3 JUSTICE SCALIA: That's a different point.

4 MR. FLEMING: But even if -- even if there
5 was some lack of clarity in the law, and we don't think
6 there was, I think the record in this -- before the
7 Court is very clear, that people were advised by
8 competent counsel and that the government itself took
9 the same position in front of the immigration courts and
10 the courts of appeals that someone with a crime of
11 violence aggravated felony conviction could seek relief
12 because that conviction would make him or her
13 excludable. And the availability of relief in
14 deportation proceedings is meant to be the same as it
15 would be in exclusion proceedings.

16 CHIEF JUSTICE ROBERTS: I understand the
17 advice of counsel, but what is the reasonable
18 expectation of that's been altered?

19 MR. FLEMING: The reasonable expectation
20 that once someone pleads guilty, Mr. Chief Justice, to
21 an excludable offense, one that would be waivable in
22 exclusion proceedings, that a waiver may be sought in
23 subsequent deportation proceedings on exactly the same
24 basis. And that is --

25 CHIEF JUSTICE ROBERTS: So, you're saying --

1 MR. FLEMING: -- a published policy of the
2 BIA.

3 CHIEF JUSTICE ROBERTS: -- that the
4 expectation is when he pleads guilty to a violent
5 felony, that he expects, well, if I'm deported because
6 of that I am going to be able to seek discretionary
7 waiver?

8 MR. FLEMING: Yes, that's quite correct,
9 Mr. Chief Justice. That's the ruling in St. Cyr, that
10 when someone is -- when someone pleads guilty to an
11 offense that is eligible for relief under section
12 212(c), there is reliance on the possibility -- not a
13 guarantee of a waiver, obviously --

14 CHIEF JUSTICE ROBERTS: What is the --

15 MR. FLEMING: -- but the avoidance of
16 mandatory deportation --

17 CHIEF JUSTICE ROBERTS: Right. Okay.

18 MR. FLEMING: -- by appealing to the
19 discretion of the Attorney General.

20 CHIEF JUSTICE ROBERTS: How often are these
21 waivers granted?

22 MR. FLEMING: Quite frequently, I think.
23 The Court had pointed out in St. Cyr that they are
24 frequent. And now, because the category of people who
25 are eligible involves people who have very old

1 convictions, they necessarily pled before 1996, they are
2 usually minor convictions, they involve people who have
3 been in this country for a long time. They frequently
4 have property. They have families. They're -- they can
5 show rehabilitation. Often they only come to the
6 attention of the immigration authorities by applying for
7 naturalization or by renewing their green cards, and
8 they get thrown into deportation on the basis of these
9 old convictions that, at the time of the plea, would
10 have been eligible for a waiver. And it is simply
11 unfair to change the law, as Blake did, and impose that
12 change on people who relied on it in pleading guilty.

13 CHIEF JUSTICE ROBERTS: But in terms of the
14 expectation interest, we have to visualize someone who
15 is facing a serious charge and is entering a plea
16 bargain, where presumably the consideration of what he's
17 pleading to, how much of a sentence he's going to get,
18 all that, are dominant considerations. And he's also
19 going to say: Well, I've been advised that I will be
20 able to apply for a discretionary waiver. So, I'm going
21 to plead guilty.

22 That's a fairly unlikely scenario, isn't it?

23 MR. FLEMING: On the contrary,
24 Mr. Chief Justice. The Court in *St. Cyr* made very clear
25 that's a very likely situation. It cited a couple of

1 cases at that time that specifically involved that
2 colloquy. The NIJC amicus brief, which is before the
3 Court in this case, identifies a couple of situations,
4 including the case of Mr. Ronald Bennett, who was
5 advised by his lawyer that when he pled guilty, it would
6 not be a problem for him for his immigration status
7 because he could seek 212(c) protection.

8 CHIEF JUSTICE ROBERTS: No, no. I'm not
9 questioning the fact that he was advised, but presumably
10 the lawyer will also advise him: Oh, and you also have
11 to pay the \$250, you know, restitution, whatever, fee.

12 I am just questioning how significant that
13 advice will be when someone's determining whether to
14 plead guilty or not to a violent felony.

15 MR. FLEMING: I -- I understand,
16 Mr. Chief Justice. It is quite significant for people
17 whose ability to stay in this country is highly
18 important to them. They have family here. They've
19 lived here for decades. But the risk that they're going
20 to be --

21 JUSTICE GINSBURG: And the violent felony --
22 the violent felony in this case, he had a suspended
23 sentence, didn't he?

24 MR. FLEMING: He was sentenced to -- to time
25 served essentially for this conviction. That's right.

1 JUSTICE ALITO: Now, if he had been
2 convicted of a lesser offense that was not a crime
3 involving moral turpitude, he would not be eligible for
4 the waiver; isn't that right?

5 MR. FLEMING: That -- if -- if the offense
6 would not have been waivable in the exclusion
7 proceedings, he would not be eligible. That's correct,
8 Justice Alito --

9 JUSTICE ALITO: Isn't that --

10 MR. FLEMING: -- but there might be other
11 forms of relief that he --

12 JUSTICE ALITO: But isn't that strange?
13 Suppose you have somebody who's charged with a lesser
14 offense that -- that doesn't involve moral turpitude and
15 a greater offense that does, and the defense attorney
16 comes to the client and says: I've got great news; the
17 prosecutor will take a plea to the lesser offense and
18 drop the greater one.

19 I guess that would be -- that would be bad,
20 potentially bad advice, because he ought to plead to the
21 more serious offense because then he would be eligible
22 for a waiver.

23 MR. FLEMING: He would be eligible for a
24 waiver under section 212(c), Justice Alito --

25 JUSTICE ALITO: Right.

1 MR. FLEMING: But that is not the only form
2 of relief that someone who pleads guilty to a crime
3 could potentially seek. And people who plead to
4 non-inadmissible offenses, offenses that do not lead to
5 their exclusion, had other avenues at the time that they
6 could have pursued. For instance, they could have
7 pursued adjustment of status. That's the -- the BIA's
8 decision in Matter of Gabryelsky. In order to -- to
9 adjust status, all that matters is that you not be
10 inadmissible to the country. And even if you are
11 inadmissible, you can seek a 212(c) waiver during that
12 process. Whether you are deportable or not doesn't
13 matter.

14 So, there are many other ways. Looking at
15 section 212(c) on its own, it might appear anomalous.
16 But looking at the immigration law as it was before
17 1996, there are other options.

18 JUSTICE SCALIA: But that -- what you say
19 even further reduces the significance of the 212(c)
20 possibility of waiver to the person pleading guilty.
21 You're saying -- you're saying, yes, even though -- even
22 though you couldn't get it under 212(c), there are a lot
23 of other ways you might have gotten it.

24 MR. FLEMING: I'm sorry, Justice Scalia.
25 Maybe I wasn't clear. The people who could get the

1 other relief are people who pled guilty to crimes that
2 do not involve moral turpitude, which was Justice
3 Alito's hypothetical. But people who plead to crimes
4 involving moral turpitude potentially don't have that --
5 that avenue open to them.

6 JUSTICE SCALIA: But --

7 MR. FLEMING: For them, section 212(c) is
8 very important, and they could rely on its availability,
9 and did.

10 JUSTICE SCALIA: Okay, but there's a large
11 category of people who -- who plead guilty to crimes
12 that do not involve moral turpitude and yet are not
13 otherwise excludable under 212(c), right?

14 MR. FLEMING: I don't know which category
15 Your Honor is thinking of. But, certainly, you can
16 plead guilty to a crime that does not involve moral
17 turpitude; then you would not be eligible for section
18 212(c) relief; but there might be some other way that
19 you can -- that you can get at it.

20 But that is not this category of people.
21 The category of people at issue here are people who pled
22 before 1996 to aggravated felony crimes of violence,
23 almost all of which, if not all of which, are going to
24 be crimes involving moral turpitude that are excludable
25 and therefore eligible for a waiver. It doesn't

1 necessarily mean they'll get it; but it at least means
2 they have the right to ask the Attorney General to
3 exercise his discretion.

4 And I would submit that, as this Court
5 indicated in *St. Cyr*, the private interest in avoiding
6 mandatory deportation is very strong. We have what I
7 believe is a sudden and abrupt change in the law in
8 *Blake*. And it could not have been foreseen; in fact, it
9 wasn't foreseen by advocates on both sides of the "v" in
10 these cases.

11 The remaining question for purposes of the
12 retroactivity analysis is only the strength of the
13 agency's interest in applying the rule retroactively.
14 I'd submit that that interest here is no stronger than
15 it is in the ordinary mine run of cases, and in fact it
16 is weaker, because all that we are talking about is the
17 opportunity to submit an application for adjudication on
18 the merits, which is subject to the discretion of the
19 agency. Mr. Judulang would have the burden of
20 convincing an immigration judge and the Board of
21 Immigration Appeals that he deserves relief in the
22 exercise of discretion. And so, under *Chenery* --

23 JUSTICE GINSBURG: When you say a sharp
24 change, I think that this is a very confusing set of
25 decisions. And the *Wadud* case that was brought up

1 before has a footnote that says that -- that the board
2 had stated a waiver of inadmissibility may be granted in
3 deportation if the alien was excludable as a result of
4 the same facts. And then that footnote ends: "We shall
5 withdraw from that language in each of these cases."

6 MR. FLEMING: That's correct, Justice
7 Ginsburg, and the operative language there is "as a
8 result of the same facts."

9 What Wadud was arguing was that recognizing
10 that his conviction would not make him excludable
11 because it was not a crime involving moral turpitude, he
12 said: Nonetheless, you should look to the facts of my
13 conduct, because what I did was so turpitudinous that
14 the government would surely have charged me as
15 excludable.

16 And the board said: We are not going to do
17 that, and to the extent our prior decisions suggested
18 that, we're withdrawing from that language.

19 It did not say, however, that the board
20 would not look to convictions to determine
21 excludability. And, in fact, in Meza, which is after
22 Wadud, it did just that. And when the Court came to
23 crime of violence cases subsequently to that, the
24 precedent that it relied on was Meza, which focuses on
25 the conviction. I agree it does not focus on the facts,

1 but I don't think the language that Your Honor read
2 undermines our position at all.

3 JUSTICE ALITO: That is so bizarre it makes
4 me -- that he's pleading to prove that what he did was
5 really turpitudinous. It makes me think that maybe the
6 en banc Ninth Circuit was right, that this whole line of
7 cases has gone off along the wrong track quite a while
8 ago.

9 MR. FLEMING: So -- I mean, the notion that
10 this form of relief is available in deportation
11 proceedings is long settled.

12 JUSTICE ALITO: Yes, yes.

13 MR. FLEMING: It's the premise of this
14 Court's decision in *St. Cyr*. The agency has never
15 undermined it or suggested that it was going to retreat
16 from it. No party before this Court is suggesting that
17 *St. Cyr* should have been overruled on that basis. So, I
18 -- and I think it's very clear that Congress, after the
19 relief had been extended to deportation proceedings,
20 enacted provisions in 1990 and 1996 that would have no
21 operative effect if relief was not available in
22 deportation proceedings.

23 JUSTICE KENNEDY: Well, a lot -- a lot of
24 the statutory changes in the policies of the INS date
25 back -- was it the Second Circuit's case in *Francis*,

1 which talked about the equal protection component of the
2 two classes comprised of those in exclusion proceedings
3 and those in what were then called deportation
4 proceedings?

5 Do we just accept that? It -- it seems to
6 me that that whole equal protection rationale is quite
7 doubtful.

8 MR. FLEMING: Well, there -- there are two
9 responses to that, Justice Kennedy. The first is the
10 agency has accepted that in Matter of Silva as a correct
11 interpretation of the statute, and that has been on the
12 books for 35 years now, approximately, and Congress has
13 never suggested any disapproval of it. Rather, on the
14 contrary, it has assumed that that is the law. And
15 that's after the Solicitor General refused to seek
16 certiorari of that decision. The comparison also was
17 not between people in exclusion and people in
18 deportation. It was between two --

19 JUSTICE KENNEDY: So, if we thought that
20 they had gone down the wrong path originally, there's
21 nothing we can do about it, and we just say we're in
22 this wilderness and we can't get out?

23 MR. FLEMING: I think, Justice Kennedy,
24 Congress at this point has not only acquiesced but
25 indicated its understanding of the -- of the way that

1 the agency has applied the law. And, honestly, I think
2 this is a -- a question for the Government, because the
3 agency has never suggested that there was any basis for
4 retreating from that position at this late date.

5 Unless the Court has further questions on
6 retroactivity, I would move quickly to our substantive
7 position, which is that even without regard to
8 retroactivity, the Blake rule is arbitrary and
9 capricious. And there are two basic reasons for that:
10 First, that it rests on improper factors; and, second,
11 that it leads to results that the BIA itself has
12 disavowed.

13 First of all, Congress has never suggested
14 that the words that it chooses in deportation provisions
15 are somehow a key to eligibility for section 212(c)
16 relief. And, yet, that is largely everything that the
17 board relied on in Blake, was a comparison of the choice
18 of words in deportation provisions to the choice of
19 words in exclusion provisions. But the -- the
20 provisions of the deportation statute are not some
21 enigmatic code from which the BIA can discern section
22 212(c) eligibility. They determine who's deportable,
23 but they have nothing to say about who is eligible for
24 section 212(c).

25 Section 212(c) eligibility turns on whether

1 you are inadmissible. That's what 212(c) by its terms
2 refers to. And that's driven home, I believe, by the
3 addition of the "crime of violence" language in 1990 as
4 a basis for deportation.

5 Aggravated felonies were added in 1990 at a
6 time when it's, I believe, clear that most of them, if
7 not all of them, were already bases for exclusion. So,
8 there was no need for Congress to say crimes of violence
9 are excludable. They already were because they were
10 crimes involving moral turpitude. It would have been
11 redundant to put the same words in the exclusion
12 statute. Congress didn't do it. Congress simply wanted
13 to make clear that these people were now going to be
14 deportable based on the length of their sentence.

15 JUSTICE GINSBURG: What about the
16 comparability of the crime involved in St. Cyr? That
17 was a drug offense. Does the inadmissibility
18 criterion -- does that accord with the one for
19 deportation?

20 MR. FLEMING: Yes, it does, Justice
21 Ginsburg, and -- because Mr. St. Cyr would have been
22 both deportable and excludable for his offense. That's
23 the logic.

24 JUSTICE GINSBURG: So that -- there the
25 linguistic comparison works, right?

1 MR. FLEMING: Well, the board in Blake
2 concluded that that was -- that the linguistic
3 comparison worked there so that it did not have to find
4 itself at odds with this Court's decision in St. Cyr.
5 That's true. But when the Court -- when the
6 board originally made that decision in Matter of Meza,
7 they didn't just look to the linguistic comparison.

8 I agree that if there's a perfect linguistic
9 match, then you might not need to go to look at the
10 conviction, because someone who falls under one will
11 necessarily fall under the other. But just because
12 Congress uses different words in the deportation
13 subsection that's asserted against a particular alien
14 doesn't mean that the analysis stops there, because the
15 conviction might well make the person excludable such
16 that the application that they're able to file in
17 deportation proceedings should give them the same relief
18 as they would have in exclusion proceedings.

19 So, what happened in 1990 when "crime of
20 violence" was added, according to the Government, is
21 that that was a radical change in section 212(c)
22 eligibility stealthily and silently, because of course
23 while Congress was amending 212(c) at that time, saying
24 it was no longer available to deportable aliens who
25 didn't show up for certain hearings and no longer

1 available for aggravated felons who were deportable who
2 had served more than 5 years in prison, it had said
3 nothing suggesting that people who had committed
4 aggravated felony crimes of violence were all of a
5 sudden ineligible for section 212(c) relief, even though
6 it could have said that. The notion that one can infer
7 or decode those provisions as shutting out section
8 212(c) relief for this group of people silently, even
9 though the overlap is perfect if not near perfect, is,
10 we would submit, simply unreasonable. The arbitrariness
11 comes through in another way which is that --

12 JUSTICE KAGAN: Mr. Fleming, the Government
13 says that it has an interest in treating people in
14 deportation proceedings less favorably, if you will,
15 than people in exclusion proceedings. Do you dispute
16 that broad premise that the government could develop a
17 system which treated those two groups differently?

18 MR. FLEMING: That is not the way that the
19 agency has ever treated permanent resident aliens. In
20 fact, if that is the Government's position, that is
21 clearly a change in the law. The BIA said going back to
22 Silva, but in Matter of A-A-, a 1992 published decision,
23 that it is the long -- the, quote, "long established
24 view of the Attorney General and the Federal courts that
25 an application for section 212(c) relief filed in the

1 context of deportation proceedings is equivalent to one
2 made at the time an alien physically seeks admission
3 into the United States." That's footnote 22 of Matter
4 of A-A-.

5 So, the agency's longstanding position, at
6 least since Silva, has been that there is no difference
7 between an application filed in deportation and one
8 filed in exclusion. And that I think is consistent with
9 what Attorney General Thornburgh said in the Matter of
10 Hernandez-Casillas.

11 I'd submit one last point, which is the
12 arbitrariness of what the BIA is doing shines through in
13 that it has led to consequences that the BIA has itself
14 repudiated as inconsistent with the statute. And the
15 most salient example is the one that the Government
16 admits on page 26 of its brief, which is that the --
17 there's a possibility that someone could get a waiver of
18 inadmissibility one day for a given conviction and then
19 be deported the next day for the very same conviction.

20 Now, the BIA in 1956 in Matter of G-A- said
21 that was clearly repugnant. Now, the agency cannot have
22 it both ways. The statute cannot mean X and not X. If
23 it does, that is the hallmark of arbitrariness. The
24 Government's only answer, as far as I know, is that it
25 will exercise its prosecutorial discretion to avoid that

1 situation. I would submit that an agency cannot defend
2 an arbitrary policy by saying that it is going to be
3 enforced in a capricious way and that it will all
4 balance out in the end.

5 This Court should evaluate the Blake rule on
6 its own merits, and if it is arbitrary, as it clearly
7 is, it should be disapproved. The other indication of
8 arbitrariness is that the Blake -- the Blake rule
9 revives the distinction between deportable aliens,
10 Justice Kennedy, who traveled abroad and returned and
11 other deportable aliens who did not travel aboard and
12 return.

13 JUSTICE KAGAN: The Government says that's
14 not the case. The Government says that it does not
15 treat those two groups differently.

16 MR. FLEMING: The Government's only --

17 JUSTICE KAGAN: Do you have evidence to the
18 contrary?

19 MR. FLEMING: Yes. Yes, Justice Kagan. The
20 evidence is the Attorney General's position -- opinion
21 in Hernandez-Casillas. The Government's only citation
22 for that is a footnote in Wadud arguing that supposedly
23 the nunc pro tunc doctrine is not still good law. But 5
24 years after Wadud, in Hernandez-Casillas, Attorney
25 General Thornburgh was asked by the INS to disapprove

1 Matter of L- -- Justice Jackson's decision as Attorney
2 General, and Matter of G-A- and the nunc pro tunc
3 doctrine that is set out in those decisions, and he
4 expressly declined to do so. On the contrary, he
5 reaffirmed that in cases where the alien has left and
6 come back, the Attorney General and the board have
7 permitted the alien to raise any claim for discretionary
8 relief that the alien could otherwise have raised had he
9 been excluded. So, nunc pro tunc clearly is still good
10 law, and the Government seemed to agree with that as
11 recently as its brief in opposition to certiorari.

12 As for the travel distinction itself the
13 Government, to its credit, does not try to defend it,
14 and with good reason. The agency in Silva has long held
15 that there is no distinction or no rational way to
16 distinguish under the statute between people who are in
17 deportation proceedings who have left and come back and
18 people in deportations who have not.

19 Unless the Court has further questions, I'd
20 reserve of the remainder of my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Gannon.

23 ORAL ARGUMENT OF CURTIS E. GANNON

24 ON BEHALF OF THE RESPONDENT

25 MR. GANNON: Mr. Chief Justice, and may it

1 please the Court:

2 Petitioner does not dispute that some
3 comparability analysis must be applied to prevent relief
4 under former section 212(c) from being extended to
5 certain grounds of deportability. But his methodology
6 of asking whether his offense could have made him
7 excludable is inconsistent with established cases from
8 the board that long predated the ones at issue here
9 involving firearms offenses and visa fraud.

10 Justice Scalia brought up the case in Wadud.
11 That was a visa fraud case. It was a prosecution under
12 18 U.S.C. 1546. That's a provision that penalizes
13 fraudulent and other misuse of visas and other
14 immigration documents. It's a very broad criminal
15 provision. It's long been a ground of deportability.
16 And at the time, the alien argued that this is fraud.
17 It's a crime involving moral turpitude, and, therefore,
18 I would be subject to exclusion. In Wadud, the board
19 rejected that analysis.

20 JUSTICE BREYER: That's true, but -- but it
21 may save a little time at least if -- we're in an arcane
22 area of the law, to me. It was created by Robert
23 Jackson, Attorney General, and by Thornburgh, Attorney
24 General. And if we're starting with that, what that
25 says is we have a list over here of excludable things,

1 and we have a list of deportable things. And if you're
2 deported for a reason that shows up on that first list,
3 than the AG could waive it. That's basically the
4 outline I have. And also I have, which isn't quite
5 right, that in that first list there's something called
6 -- big letters -- CIMT or something, crime of moral
7 turpitude. And all the things on this second list, the
8 big issue is, is it a crime of moral turpitude?

9 And, as I looked through the opinions, this
10 is what I got out of them. And This is tentative. I
11 got out, just as you say, there are two things in the
12 second list which are not crimes of moral turpitude.
13 They consist of illegal entry crimes and gun crimes.
14 And there are special reasons for the first, and the
15 second is debatable; but they've been consistent with
16 that.

17 Then there are things that are on both
18 lists, they are a crime of moral turpitude. I counted
19 at least eight cases saying, for example, rape,
20 burglary, manslaughter, second-degree robbery, indecency
21 with a child, and probably some others are all crimes of
22 moral turpitude. So, it clicks in, okay?

23 Then I find Blake, and Blake says sexual
24 abuse of a minor is not a crime of moral turpitude.
25 That's a little surprising. But it gives us a reason:

1 Because -- and this was the problem here. It talks
2 about there has to be substantial -- there has to be
3 similar language in the two lists. I don't know where
4 that one came from. It had certainly not been in the
5 earlier cases.

6 And now we have this case, which is
7 voluntary manslaughter. I would have thought that
8 voluntary manslaughter is right at the heart of the
9 lists that they said the things are crimes of moral
10 turpitude, and not like visa crimes or gun crimes, if I
11 had read the cases.

12 So, where do I end up? Well, what I end up
13 with this, and this is what I would like you to reply
14 to. Justice Brandies once said something like we have
15 to know before we can say whether an agency opinion is
16 right or wrong, what they're talking about. I felt
17 perplexity after I had read through these decisions. In
18 other words, I don't understand it.

19 So, I would like you to explain to me why
20 this all fits together and how, if you can do that. I
21 couldn't get that clear explanation from the brief, and
22 I suspect it is not your fault.

23 MR. GANNON: Well, I agree that the history
24 and the law here is relatively complicated, and it has
25 had a lot of moving pieces over the years. But I think

1 that the board has been very consistent, especially
2 beginning in the 1984 Wadud decision that was picked up
3 in the Jimenez-Santillano decision and also in firearms
4 offenses. Justice Breyer, you talked about the fact
5 that the board had been consistent in firearms offenses.
6 And Petitioner does not dispute that firearms offenses
7 are ones that do not have a comparable ground --

8 JUSTICE BREYER: Yes, yes. The one that was
9 worrying me: rape, burglary, manslaughter,
10 second-degree robbery, indecency with a --

11 MR. GANNON: If I could go back to --

12 JUSTICE BREYER: All those cases -- there
13 are about seven or eight of them.

14 MR. GANNON: If I could go back to -- just
15 for a second, to firearms offenses. The board there has
16 continued to say that there is no comparable ground for
17 firearms offenses, even if your firearms offense would
18 be something that could have been considered a crime
19 involving moral turpitude.

20 If you look at the board's 1992 decision in
21 Montenegro, that was a case that was assault with a
22 firearm. And so, it wasn't merely possession of a
23 handgun or an automatic weapon or a sawed-off shotgun --

24 JUSTICE GINSBURG: Is -- is there any
25 aggravated felony crime of violence that is not a crime

1 involving moral turpitude?

2 MR. GANNON: Yes, Justice Ginsburg. The
3 board pointed out in the Brieva-Perez decision that
4 minor but relatively common crimes of violence,
5 including simple assaults and burglary, generally are
6 not considered to be crimes involving moral turpitude.

7 In the reply brief, Petitioner points to a
8 board opinion in Louissaint saying that the -- that the
9 record is muddled on burglary, but that opinion only
10 showed that residential burglary isn't a crime involving
11 moral turpitude, and a crime of violence, in the
12 definition, is one that involves the use of physical
13 force against person or property of another.

14 And so, it doesn't need to be aggravated in
15 any other sense. It doesn't need to be --

16 JUSTICE GINSBURG: Was Judulang's crime a
17 crime involving violence?

18 MR. GANNON: Yes, it was a crime --

19 JUSTICE GINSBURG: I mean a crime of moral
20 turpitude.

21 MR. GANNON: Yes, it was. But what I'm
22 trying to say, Justice Ginsburg, is that Petitioner's
23 approach of looking to the conviction is inconsistent
24 with the board's repeated --

25 JUSTICE BREYER: Don't look to the

1 conviction. That may be his approach. My approach is
2 look to the category.

3 MR. GANNON: And, Justice Breyer --

4 JUSTICE BREYER: Look to the category. And
5 the category here is not -- you know, the category isn't
6 crime; the category is what kind of a crime. And this
7 is a crime of violence. In the statute, or if you look
8 at what was charged, it's called voluntary manslaughter.
9 Either way, I would think those categories as categories
10 fall within "crime of moral turpitude."

11 MR. GANNON: Well, but the category that is
12 relevant is the crime of violence. And as I just
13 discussed with Justice Ginsburg, there are indeed crimes
14 of violence that satisfy the statutory definition in 18
15 U.S.C. 16 --

16 JUSTICE SOTOMAYOR: But you're not -- you're
17 not --

18 JUSTICE SCALIA: Can I hear his answer? I
19 was very interested in the question. It seemed to make
20 a good point.

21 MR. GANNON: Well, if I --

22 JUSTICE BREYER: Thank you.

23 MR. GANNON: If I could finish up on the
24 firearms analogy, I think that this is responsive,
25 Justice Breyer, to your point about looking at the

1 category, and that in Montenegro, the board specifically
2 concluded that this offense, assault with a firearm --
3 it's a firearms offense, but because we've already
4 concluded that as a categorical matter, firearms
5 offenses aren't on the list of exclusion crimes; we
6 don't care and we're not going to ask ourselves whether
7 it could have been a crime involving moral turpitude.

8 The board applied that same reasoning again
9 in a 1995 opinion, in Espinoza. We quote all of these
10 opinions on page 41 of our brief.

11 And so, in these two categories, firearms
12 offenses and visa fraud offenses, both of which could
13 often involve moral turpitude on an -- in any individual
14 case -- that such offenses could involve moral
15 turpitude, just like a crime of violence may well
16 involve moral turpitude. And yet, the board concluded
17 that because as a categorical matter, this is not
18 comparable to any ground of exclusion, it was going to
19 say that it was not going to extend this relief, that --

20 JUSTICE GINSBURG: What -- what --

21 CHIEF JUSTICE ROBERTS: Let's let Justice
22 Sotomayor jump in now with her question.

23 JUSTICE SOTOMAYOR: I -- I go back to
24 Justice Breyer's question. What you just said made
25 logical sense; the category of gun possession doesn't go

1 in. Visa fraud doesn't become a crime of moral
2 turpitude. But we have cases that have said,
3 generically, manslaughter, which involves violence, is a
4 crime of moral turpitude. Others have qualified sexual
5 abuse of a minor. I don't know of anyone who would
6 think that that category of crimes, whether you call it
7 indecency, touching, or -- we've already said touching
8 alone may not qualify, but my point is you now are
9 saying, I think -- and correct me if I'm wrong -- that
10 aggravated violent felons is an entire category, and
11 anything that falls under that label can't be a ground
12 of exclusion.

13 MR. GANNON: No --

14 JUSTICE SOTOMAYOR: That's how I read your
15 categorical comparison now.

16 MR. GANNON: No, the board has made it clear
17 from as early as the Meza decision that it would look
18 into the specific category within the definition of
19 aggravated felony --

20 JUSTICE SOTOMAYOR: All right. So, now --

21 MR. GANNON: -- in order to do a categoric --

22 JUSTICE SOTOMAYOR: -- why is manslaughter
23 not a crime of moral turpitude?

24 MR. GANNON: Because that's not the category
25 in the aggravated felony definition that we're talking

1 about. What we're talking about is crimes of violence.
2 That's the category. And so --

3 JUSTICE KAGAN: But, Mr. Gannon, suppose
4 this: Suppose that on the exclusion side, you have this
5 category of crimes of moral turpitude, and suppose on
6 the deportation side, which I think is right, you have a
7 category called crimes of violence, and you also have a
8 category called crimes of moral turpitude. There's a
9 time limit on that.

10 MR. GANNON: We do have that category here.
11 Right.

12 JUSTICE KAGAN: That's right. Suppose that
13 you -- the government could have slotted manslaughter
14 into either of those categories on the deportation side.
15 And I understand that there's a dispute about whether it
16 could have, but let's suppose it could have. So, if
17 manslaughter is categorized on the deportation side as a
18 crime of violence, you say it doesn't match with the
19 category on the exclusion side.

20 But if the same crime is categorized in a
21 different way by the government, then it does match on
22 the exclusion side. So, what sense does that make? The
23 government's decision about how to categorize a given
24 offense on the deportation side is going to determine
25 whether a person gets relief.

1 MR. GANNON: Well, I think that there's no
2 dispute about that between us and Petitioner. If
3 somebody had a firearms offense --

4 JUSTICE KAGAN: The Petitioner just says --

5 MR. GANNON: -- it could have been charged
6 either way.

7 JUSTICE KAGAN: The Petitioner just says we
8 look to manslaughter, and we ask whether that qualifies
9 a person for relief on the exclusion side --

10 MR. GANNON: And what I'm trying --

11 JUSTICE KAGAN: But you're saying, no,
12 first, we have to put manslaughter in a category on the
13 deportation side, and then we have to match that to the
14 category on the exclusion side. And what I'm asking you
15 is kind of what sense does that make? Doesn't
16 everything depend on which category you put manslaughter
17 into?

18 MR. GANNON: Well, what it -- the reason it
19 makes sense is because the statute only provides for
20 relief from grounds of inadmissibility or exclusion.

21 By its terms --

22 JUSTICE KAGAN: You are so far from the
23 statute, Mr. Gannon, you can't even tell what's closer
24 to the statute. I mean, you are miles away from the
25 statute.

1 MR. GANNON: Well, the way -- the way this
2 doctrine developed, Justice Kagan, is that it developed
3 in the context where the board recognized that the
4 statute only applied to waiver of grounds of
5 excludability, and it extended that to deportation cases
6 when it was on the basis of the same grounds that could
7 have been presented in an exclusion proceeding.

8 And so, that's all we're trying to do here,
9 is to continue without --

10 JUSTICE GINSBURG: But what your position
11 means that it's up to the agency -- up to the person who
12 makes the charge, because take Mr. Judulang, he could
13 have been categorized as deportable because he committed
14 a crime involving moral turpitude, or he could have been
15 categorized as somebody who committed an aggravated
16 felony. It is then totally in the hands of the person
17 who is making the charge whether there will be a match
18 or not.

19 MR. GANNON: The reason why that's so is
20 because the thing that is going to be waived at the end
21 of the proceeding is the -- is the ground of
22 deportation. And so, if the ground of deportation is
23 for an aggravated felony crime of violence, then it
24 needs to be one for which there's 212(c) eligibility.
25 The same would be true if it were a firearms offense.

1 If it were --

2 JUSTICE GINSBURG: But that doesn't -- if
3 the -- if the officer labels the manslaughter in this
4 case a crime involving moral turpitude, then there's a
5 match --

6 MR. GANNON: That's --

7 JUSTICE GINSBURG: And if he labels it
8 aggravated felony crime of violence, then there's no
9 match. So, it's up to the charger whether there will be
10 this match or not.

11 MR. GANNON: That's true. It's also true in
12 the firearms offense cases and the visa fraud offense
13 cases, because those are all instances in which,
14 depending on the circumstance of the offense and
15 depending upon what it was charged, the board has
16 concluded that the 1546 offense is divisible. Some of
17 those crimes are involving moral turpitude; some of them
18 are not. And I -- and so --

19 JUSTICE KAGAN: But this isn't a question
20 about the history, Mr. Gannon. Even if we assume that
21 you are right about the history, this is a question
22 about whether this is an arbitrary system, and where
23 you're devising it from and what lies behind it.

24 MR. GANNON: And I think that this is not
25 only consistent with the history; it's consistent with

1 the text of the regulation that Petitioner is invoking
2 here, which makes it clear that what is being waived is
3 a ground of exclusion or deportability or removability.

4 And so, what's relevant is whether the
5 ground of removability is the aggravated felony crime of
6 violence ground or the crime involving moral turpitude
7 ground. Depending on which ground it is, that's what
8 he's seeking relief for --

9 JUSTICE GINSBURG: Then -- then you have to
10 say, yes, you can have somebody who would get a waiver
11 of inadmissibility for a crime and the very next day be
12 put in deportation without any waiver for that same
13 crime.

14 MR. GANNON: Well, we have no cases in which
15 that has happened. And the cases in which the board
16 said that that result would be clearly repugnant were
17 ones in which there was a comparable ground. The board
18 was saying that if you get 212(c) relief --

19 JUSTICE GINSBURG: But I'm giving you --

20 MR. GANNON: -- on a ground of exclusion --

21 JUSTICE GINSBURG: -- these categories --

22 MR. GANNON: Pardon?

23 JUSTICE GINSBURG: These categories.

24 MR. GANNON: No, there -- there are no cases
25 that address that principle in the context where there

1 is no comparable ground. And if -- if I could just make
2 one point about this claim of Petitioner's in his reply
3 brief, that he could have been subject to a charge of
4 deportability on the basis of a crime involving moral
5 turpitude, I would caution the Court against relying on
6 that for two reasons, one factual and one legal.

7 One is that there's no factual basis in the
8 administrative record to -- to talk about this 1987 trip
9 to the Philippines. We do have evidence from outside
10 the record that makes us believe that it occurred, but
11 the statute that provides for judicial review here of
12 the order of removability in 8 U.S.C. 1252(b)(4)(A)
13 specifically says that the determination needs to be
14 made on the basis of the administrative record. And the
15 only evidence in the record about that trip is actually
16 a statement from Petitioner's mother that says that it
17 occurred in 1989, the year after the crime.

18 But even assuming that -- that the trip
19 happened, in light -- as I said, we do believe on the
20 basis of evidence outside the record that it did occur
21 -- there's a legal reason why I would caution the Court
22 against assuming that that means the Petitioner could
23 have been deportable for a crime involving moral
24 turpitude, and that's the so-called Fleuti doctrine.
25 Under this Court's 1963 decision in *Rosenberg v. Fleuti*,

1 which is actually relevant to a case on which you
2 granted certiorari a couple of weeks ago, this Court
3 concluded that if an LPR takes a brief, casual, and
4 innocent trip outside the country and returns to the
5 United States, that will not trigger an entry upon his
6 return to the United States.

7 And so, I think it's very likely that under
8 Ninth Circuit precedent, in 1989 when Petitioner was
9 pleading guilty to his voluntary manslaughter charge, he
10 wouldn't have had any reason to think that he was doing
11 so within 5 years of when he committed -- when he
12 entered the country for purposes of the statute.

13 I think it's also --

14 JUSTICE BREYER: Can we go back to second
15 on this very interesting -- suppose I say, okay, I
16 concede. I'd only do it for the sake of this question.
17 You're absolutely right in your categorization. The
18 right category is crime of violence. And then I look at
19 the statute, which is 8 U.S.C. 1101(43), which you
20 probably know by heart, and I look at the definition of
21 gun crimes, and I look at crime of violence.

22 My non-schooled reaction is, well, gun
23 crimes, I can see why they said that wasn't really a
24 crime of moral turpitude, because there are a lot of
25 registration requirements, there are all kinds of

1 different things that drug -- gun dealers have to do,
2 and you could commit that crime in various ways that
3 don't involve moral turpitude. I can understand that,
4 sort of. At least, I could see how somebody else might
5 have understood it that way.

6 Now, I think crimes of violence, I say, hey,
7 I am having trouble here. Why don't you try to list a
8 few crimes of violence that when they come into the
9 country you're going to say, oh, that wasn't a crime of
10 moral turpitude? And by the way, I am not asking you to
11 list specific examples; I am asking you to list
12 categories. List categories of crimes of violence that
13 when the person comes in, you're going to say, hmm, no
14 moral turpitude there.

15 MR. GANNON: The chief examples are the ones
16 that the board gives in the Brieva-Perez opinion, which
17 are simple assault, which has --

18 JUSTICE BREYER: That's not a crime of --
19 that's not a moral turpitude, simple assault? You're
20 going to just hit somebody?

21 MR. GANNON: That's correct. It is not a
22 crime involving moral turpitude.

23 Neither is non-residential burglary which
24 involves force against -- against property, which would
25 therefore satisfy the definition. This is an opinion

1 that --

2 JUSTICE BREYER: Burglary -- isn't burglary
3 where it might be an occupied building?

4 MR. GANNON: If it were an occupied
5 building, if it were a dwelling --

6 JUSTICE BREYER: Well, no, no. A warehouse.
7 I am being a little quibbling now. Of course, my basic
8 concern --

9 MR. GANNON: In the Ninth Circuit, burglary
10 of a residential dwelling that's occupied is not a crime
11 involving moral turpitude.

12 JUSTICE BREYER: Oh, really? Okay.

13 MR. GANNON: In -- in a case that's cited in
14 the concurring opinion --

15 JUSTICE BREYER: So, there are some. There
16 are some.

17 MR. GANNON: There certainly are.

18 JUSTICE BREYER: This is a little odd, but
19 what I'm afraid of --

20 MR. GANNON: They tend to be minor -- minor
21 -- more minor offenses.

22 JUSTICE BREYER: Okay. What I'm afraid of
23 is this: That once you put this in your category, that
24 you say crimes of violence are not crimes of moral
25 turpitude, then to a large extent you have said

1 good-bye, Justice or Attorney General Robert Jackson.

2 MR. GANNON: I --

3 JUSTICE BREYER: You're saying good-bye to
4 Jackson and Thornburgh, because you have driven such a
5 wedge between these two statutes that there's hardly
6 anybody who would be able to qualify for the Jackson-
7 Thornburgh approach to this statute.

8 MR. GANNON: I just --

9 JUSTICE BREYER: I overstate slightly, but
10 you see my point.

11 MR. GANNON: I see your point,
12 Justice Breyer, and if you look at all of the cases that
13 predate the era that we're talking about here, they all
14 -- almost all involve two categories of offenses, drug
15 trafficking or controlled substance offenses and crimes
16 involving moral turpitude, things that were actually
17 charged under the ground of deportation for crimes
18 involving moral turpitude.

19 And here, Congress added aggravated felonies
20 to the deportation side of the ledger but didn't add it
21 to the exclusion side of the ledger. And then it
22 repeatedly expanded the definition of "aggravated
23 felony" between 1988 and 1996 in ways that made these
24 offenses treatable in different ways for purposes of
25 deportation than they were for exclusion.

1 And as a category --

2 JUSTICE SOTOMAYOR: Well, I keep going back
3 to my question. There's only one category now,
4 aggravated violent felony. That's the only category
5 you're looking at. It doesn't matter, in your judgment.
6 That -- that is your test.

7 MR. GANNON: That's -- I disagree, Justice
8 Sotomayor. If --

9 JUSTICE SOTOMAYOR: If it qualifies as an
10 aggravated violent felon, it cannot be a crime of moral
11 turpitude.

12 MR. GANNON: I disagree with that -- the
13 fact that that's the category we're looking at.

14 We're looking inside the definition of
15 aggravated felony, to the particular ground which is
16 crimes of violence. And then what we are saying is that
17 the analysis needs to be done at a categorical level.
18 And the board has said that you cannot get a 212(c)
19 waiver from a ground of deportability unless that ground
20 of deportability is substantially equivalent to a
21 waivable ground of exclusion.

22 JUSTICE SOTOMAYOR: Let's go back to a
23 concrete example following Justice Ginsburg's example.
24 Someone is charged with a crime of violence, voluntary
25 manslaughter. And would an officer at the airport say

1 you're not admittable; that's a crime involving moral
2 turpitude? Could the officer say that?

3 MR. GANNON: Yes, the officer could say
4 that, and --

5 JUSTICE SOTOMAYOR: And could he then waive
6 that ground under 212(c)?

7 MR. GANNON: Generally, yes. I mean,
8 there's --

9 JUSTICE SOTOMAYOR: Now --

10 MR. GANNON: We're talking about pre-1996
11 offenses.

12 JUSTICE SOTOMAYOR: Now let's assume that he
13 did, that he waives that crime of moral turpitude.
14 Would the government now put that individual in
15 deportation and say this voluntary manslaughter doesn't
16 meet the statutory counterpart test. So, for that very
17 crime, we're going to deport you, even though we let you
18 in, because it's a crime involving violence.

19 MR. GANNON: We don't have any examples like
20 that, and --

21 JUSTICE SOTOMAYOR: Would you? Can you?

22 MR. GANNON: I --

23 JUSTICE SOTOMAYOR: Is that where your test
24 leads you?

25 MR. GANNON: Well, ultimately, even the

1 durability of the 212(c) waiver wouldn't necessarily
2 have protected somebody against a subsequent proceeding.

3 JUSTICE GINSBURG: Mr. Gannon, in your
4 brief, I thought you'd conceded that.

5 MR. GANNON: We --

6 JUSTICE GINSBURG: That -- just the example
7 that Justice Sotomayor gave. Somebody is declared
8 inadmissible because it's a crime. This manslaughter or
9 aggravated felony crime of violence is on the
10 admissibility side a crime involving moral turpitude.
11 So, he's allowed in. And then he's in and he's declared
12 deportable, and he can't get a waiver because there's no
13 analogue. I thought your brief said, yes, that's the
14 consequence of our argument; however, prosecutors would
15 not seek deportation if inadmissibility had been waived.

16 MR. GANNON: Well, we -- the brief did say
17 that this is hypothetically possible. I'm aware of --

18 JUSTICE GINSBURG: Right.

19 MR. GANNON: -- no instances in which it has
20 happened, and we don't have a board decision about what
21 the effect of the earlier waiver would be on a
22 non-comparable ground in a subsequent deportation
23 proceeding. And I do think, however, that, regardless
24 of the prosecutorial discretion point here, even if the
25 board were to conclude that the 212(c) waiver carried

1 across and would prevent this alien from being
2 deportable in a subsequent proceeding, an important
3 purpose would still be served by encouraging the alien
4 to get himself into exclusion proceedings at the
5 beginning, because that is what several courts have
6 concluded would be a rational basis for differential
7 treatment in encouraging aliens to seek 212(c) waivers
8 in the exclusion context.

9 Congress -- when it adopted the aggravated
10 felony definition and repeatedly expanded it, it was
11 concerned about criminal aliens in this country and ways
12 to get them out of the country. And so, to the extent
13 that 212(c) relief still is available for certain LPRs
14 who meet certain threshold criteria and are being
15 deported on the basis of crimes that would have made
16 them inadmissible, if an alien then wants to seek 212(c)
17 relief, he can get himself into an exclusion proceeding,
18 or he could seek advanced parole on the I-191 form that
19 Petitioner reprints at --

20 JUSTICE BREYER: You're also telling me
21 that -- I didn't know this; I learn something in every
22 argument -- that if we have Jack the cat burglar who was
23 burgling dozens of office buildings -- and abroad -- and
24 assaults people and hits them over the head or whatever
25 with his -- I guess with his fists, that we have no way

1 of excluding that person, should he try -- I've heard
2 criticisms of our immigration policy, but this seems
3 surprising to me, that we have no way of excluding that
4 person who is filled with simple burglary of office
5 buildings and assaults.

6 MR. GANNON: Well, there was a separate
7 ground which is two crimes, any two criminal offenses.

8 JUSTICE BREYER: All right. He has only
9 done it once; we have to let him in.

10 MR. GANNON: If he has only done it once,
11 then it may well be that it wouldn't qualify. But the
12 board has repeatedly declined to consider whether such a
13 crime, which would be -- could potentially be a ground
14 for exclusion, would automatically guarantee that --
15 that the alien could receive a waiver of any ground of
16 deportability based on the same conviction. And -- and
17 when my friend --

18 JUSTICE BREYER: I take it they haven't
19 decided. So --

20 MR. GANNON: No, I'm saying that the board
21 repeatedly declined to apply this analysis in the
22 context of firearms offenses and visa fraud offenses,
23 where aliens said: My offense is a crime involving
24 moral turpitude; I could have been charged with being --
25 I could have been excluded on the basis of my visa fraud

1 offense or my assault with a firearm, because assault
2 with a firearm is a crime involving moral turpitude.

3 JUSTICE SOTOMAYOR: Could I ask just a
4 practical question? Does this issue go away finally
5 when there are no more St. Cyr people? Meaning is there
6 any -- there's no 212(c) anymore.

7 MR. GANNON: Well, there -- there's a new
8 provision, cancellation of removal, which indisputably
9 just simply is unavailable to anyone with a aggravated
10 felony conviction.

11 JUSTICE SOTOMAYOR: Exactly.

12 MR. GANNON: And -- and --

13 JUSTICE SOTOMAYOR: And so, really the issue
14 that we have at the moment is whether your decision to
15 effect what has happened now in the past, to do what
16 Congress has done moving forward, and to avoid St. Cyr,
17 is just to say, if it's an aggravated crime of violence,
18 it just doesn't qualify anymore.

19 That's what you are doing. You're not
20 giving 212(c) to anybody anymore.

21 MR. GANNON: Well, we're giving it to aliens
22 like this, aliens who -- who have older convictions,
23 pre-1996 guilty pleas --

24 JUSTICE SOTOMAYOR: But you were just saying
25 if they're aggravated -- if they've committed an

1 aggravated crime of violence, they're not getting it
2 anymore.

3 MR. GANNON: That -- that is if it's a crime
4 that was -- a conviction that occurred after 212(c) was
5 repealed. So, for instance, in this case, if on remand
6 the board considers one of the other charge grounds of
7 deportation --

8 JUSTICE SOTOMAYOR: But this whole thing
9 goes away once all the St. Cyr people have.

10 MR. GANNON: Yes, because 212(c) only lives
11 on by virtue of St. Cyr right now. And I -- but -- but
12 I do want to stress that this -- I think Justice Kagan
13 was correct to point out that this was clarifying a
14 previous state of the law. We believe that there were
15 very clear principles in the cases that are cited on
16 page 41 of our brief, that the board had refused to do
17 the analysis on -- on a conviction level as opposed to a
18 categorical level. And my friend keeps quoting Attorney
19 General Thornburgh's opinion in Hernandez-Casillas for
20 his re-adoption of the nunc pro tunc doctrine, but I
21 would like to point out that the Attorney General there
22 made it very clear in his holding that he was
23 reaffirming the statutory counterpart doctrine as it
24 existed at the time, and at page 291 of his opinion, he
25 says that he rejects the board's attempts to extend

1 212(c) to, quote, "grounds of deportation that are not
2 analogous to the grounds for exclusion listed in section
3 212(c)."

4 JUSTICE GINSBURG: But he also said that
5 there are only two grounds for deportation that have no
6 analogue in the grounds for exclusion.

7 MR. GANNON: That's -- you're --

8 JUSTICE GINSBURG: Entry without inspection
9 and firearms conviction.

10 MR. GANNON: That -- that is what footnote 4
11 of the opinion says. That's clearly an under-inclusive
12 list because it doesn't include visa fraud offenses,
13 which had already been recognized in Wadud as being a
14 category that did not have a comparable ground, and --
15 and that was reaffirmed later in the Jimenez-Santillano
16 opinion.

17 My friend quotes the Jimenez-Santillano
18 opinion in -- in his reply brief for the proposition
19 that Wadud was really about the facts. This was his
20 answer to you, Justice Scalia. But if you look at the
21 Jimenez summary of what actually happened in Wadud, the
22 other half of the sentence that's being quoted there
23 says the board in Wadud, quote, "observed that we did
24 not need to decide whether Respondent's 1546 offense was
25 a crime involving moral turpitude because no ground of

1 inadmissibility enumerated in section 212(a) of the Act
2 was comparable to section 1546." And so --

3 JUSTICE ALITO: Do you know potentially how
4 many people may be affected by the decision in this
5 case?

6 MR. GANNON: I don't have a good estimate of
7 that because we don't know how many offenders with
8 pre-1996 guilty pleas will end up being picked up by
9 immigration authorities and -- and charged under these
10 circumstances. You know, Petitioner is somebody who, at
11 -- at the time he committed his offense, wasn't even an
12 aggravated felon. It's only by virtue of the
13 retroactive applicability of the definition that he
14 became an aggravated felon. And so, that makes the sort
15 of St. Cyr question about his reliance a -- a bit
16 perplexing here.

17 At the time when he was pleading guilty to
18 voluntary manslaughter, because it wasn't within 5 years
19 of -- of entry, it wouldn't have been a crime involving
20 moral turpitude, and, therefore, it wouldn't have been a
21 ground for deportability. And it also was not yet an
22 aggravated felony. So, he had no reason to think he was
23 pleading guilty to a deportable offense at the time.

24 JUSTICE ALITO: But do you know how many
25 times this has come up in cases over, let's say, the

1 past 5 years?

2 MR. GANNON: I don't know how many times
3 that -- all of the cases that are cited in Petitioner's
4 brief and -- and the amicus brief, there's a gap between
5 1996 and about 2003, because of the repeal of 212(c) and
6 St. Cyr and the regulations. There was about a 7-month
7 period after the regulations before the board decided
8 Blake and Brieva-Perez.

9 There are on the order of several hundred
10 212(c) applications that are being granted by the board
11 each year right now, but that's with a backlog of cases,
12 some of which have been pending for -- for an incredibly
13 long time.

14 JUSTICE KAGAN: You said, Mr. Gannon, the
15 government no longer treats people differently depending
16 on whether they've left the country and returned or
17 haven't left at all. Mr. Fleming points out that you
18 said the opposite in your brief opposing cert. He said
19 that --

20 MR. GANNON: I -- I appreciate your chance
21 to let me clarify, Justice Kagan. In our brief in
22 opposition, we stated that an alien could avoid the
23 statutory counterpart rule by leaving the country. That
24 meant that by getting himself into an exclusion
25 proceeding, the statutory counterpart rule then would

1 not be applicable. It didn't mean that had he left the
2 country, come back, evaded an exclusion proceeding, and
3 been put in a subsequent deportation proceeding, that
4 the statutory counterpart rule wouldn't apply.

5 CHIEF JUSTICE ROBERTS: Thank you, Mr.
6 Gannon.

7 Mr. Fleming, you have 6 minutes remaining.

8 REBUTTAL ARGUMENT OF MARK C. FLEMING
9 ON BEHALF OF THE PETITIONER

10 MR. FLEMING: Thank you, Mr. Chief Justice.

11 I would begin simply by following up on the
12 questions that Justices Ginsburg and Kagan asked to my
13 brother about whether my client could have been charged
14 as deportable with his conviction treated as a crime
15 involving moral turpitude. In fact, he was. If one
16 looks at the decisions in the appendix to the petition
17 for certiorari, specifically at page 11a, it's clear
18 that his conviction is asserted not only as an
19 aggravated felony crime of violence, but also as a crime
20 involving moral turpitude, and the immigration judge
21 found that he was in fact deportable with that
22 conviction forming a crime involving moral turpitude.

23 So, there's no dispute here that Mr.
24 Judulang's conviction falls into both categories. On
25 the issue of the factual basis of my client's

1 deportability at the time of the plea, Mr. Gannon is
2 correct; there's nothing in the administrative record
3 that says that, and that is why this Court typically
4 does not countenance arguments based on the facts by the
5 respondents that are raised only in the brief on the
6 merits. If anyone had suggested that this was an issue
7 on which a factual record needed to be developed, we
8 could have done it; it would not have been hard.

9 I also want to comment on one point that Mr.
10 Gannon made, which is that the thing that -- that is
11 waived under 212(c) is a ground of deportation. That's
12 not correct. Section 212(c) provides relief from
13 inadmissibility. It says that clearly in its text; that
14 is how the regulations and the decisions have always
15 treated it. The form that immigrants are instructed to
16 fill out, Form I-191, which is appended to our blue
17 brief, specifically says: State the reasons you may be
18 inadmissible to the United States.

19 If a waiver of inadmissibility is granted,
20 that waiver protects the immigrant from subsequent
21 deportation based on the same conviction. That is the
22 language of Matter of G-A-, which the Government itself
23 excerpts in its brief; and Justice Ginsburg is correct,
24 that is -- they admit that a waiver is durable in that
25 sense. If it is granted to waive inadmissibility, it

1 protects the alien from deportation on any deportation
2 subsection based on that same conviction.

3 I thought it was telling, Justice Breyer, in
4 reaction to your question which -- which was seeking an
5 explanation of how this scheme is reasonable, the answer
6 that counsel for the Government gave was that the BIA
7 has been consistent with firearms and visa fraud cases,
8 but there was no explanation as to how the Blake rule as
9 it is now drawn is in any way a reasonable application
10 of the law. I would submit for the reasons that Your
11 Honor pointed out, which is that we have a number of --
12 whether one calls them convictions or whether one calls
13 them categories of crimes -- voluntary manslaughter,
14 aggravated burglary -- recall that we're talking about
15 aggravated felony crimes of violence.

16 I recognize that if we talk about
17 third-degree burglary, which could be charged on the
18 basis of someone opening an unlocked door and walking
19 across the threshold, maybe that's not a crime involving
20 moral turpitude, but it is probably not an aggravated
21 felony crime of violence either, certainly not in this
22 Court's decision in Leocal.

23 So, I would submit that the Government has
24 not identified a crime that would be both an aggravated
25 felony crime of violence and yet not a crime involving

1 moral turpitude. The overlap is, I would submit, total.
2 And even if it's not total, that is not the end of our
3 argument because the board itself has said you, don't
4 need a perfect match; you just need substantial overlap.
5 And the overlap is at the very least substantial, if not
6 complete.

7 The crime that was charged in Brieva-Perez
8 itself, unauthorized use of a vehicle under Texas law,
9 has subsequently been held by the Fifth Circuit not to
10 be an aggravated felony at all. So, Brieva-Perez on its
11 own terms is no longer good law, as we point out in our
12 reply brief.

13 The interest that Mr. Gannon asserted at one
14 point about getting immigrants to put themselves into
15 exclusion proceedings -- this is a very important point.
16 The agency has never suggested that that is the way that
17 it runs the railroad. On the contrary, it has expressly
18 said the opposite.

19 It does not matter whether the 212(c)
20 application is filed in exclusion proceedings, in
21 deportation proceedings, or outside of proceedings
22 entirely by sending a letter to the district director
23 saying: Please give me an advance waiver before I
24 travel abroad.

25 The regulations make very clear and the

1 decisions make very clear -- I quoted Matter of A-A- in
2 my opening argument -- that an application is identical
3 and the relief that is given is identical, regardless of
4 the proceedings.

5 For Mr. Gannon to stand up and say that the
6 agency is now creating a sharp distinction, saying that
7 applications filed in exclusion are omnipotent, and
8 applications filed in deportation proceedings are
9 meaningless is a clear change in the law, and it is
10 unfair to apply it against immigrants like Mr. Judulang
11 and others who relied on the availability of section
12 212(c) as protection from removal, whether exclusion or
13 deportation in the future, when they pled guilty.

14 Justice Sotomayor, your question about how
15 many people are involved here, it is difficult to
16 identify specific numbers because very often these cases
17 are decided at the immigration judge level that are not
18 reported. In the appendix to our petition for
19 certiorari, we identified over 160 people who have been
20 subject -- who have suffered under the Blake rule since
21 Blake was decided in 2005.

22 And part of the problem is that we are
23 talking about a group of people who have been in the
24 country for a long time, whose convictions are dated,
25 who are law-abiding, who are reformed, and may only come

1 to the attention of the authorities subsequently through
2 perfectly law-abiding conduct such as applying for
3 naturalization or renewing a green card so that they --

4 JUSTICE SOTOMAYOR: If they weren't
5 law-abiding, they would have committed a new felony that
6 would render them inadmissible and --

7 MR. FLEMING: That would potentially --
8 potentially subject them to removal, exactly. Now --
9 and there might be other forms of relief, as Mr. Gannon
10 mentioned. But -- that's certainly right. But a good
11 number of the people here who have been harmed by the
12 Blake rule are people who are the most deserving
13 candidates for relief. And the NIJC brief, I think,
14 sets that out I think quite convincingly.

15 We would submit that the only reasonable
16 approach here is the one that the agency took for years
17 under Meza and under the eight decisions that Justice
18 Breyer referenced, where the immigration judges knew the
19 rule, they applied it, they looked to the conviction,
20 they figured out whether the conviction would trigger
21 excludability; if it did, then the alien was entitled to
22 apply on the same basis and with the same effect as if
23 he had found himself in exclusion proceedings.

24 The judgment should be reversed, and Mr.
25 Judulang should be entitled to file his application for

1 adjudication on the merits.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Counsel.

4 The case is submitted.

5 (Whereupon, at 12:08 p.m., the case in the
6 above-entitled matter was submitted.)

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