

**“IN LIKE CIRCUMSTANCES, BUT FOR
IRRELEVANT AND FORTUITOUS FACTORS”:
THE AVAILABILITY OF SECTION 212(C)
RELIEF TO DEPORTABLE LEGAL PERMANENT
RESIDENTS**

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The discretionary waiver of removal found at former section 212(c) of the Immigration and Nationality Act, though repealed by Congress in 1996, remains available to certain eligible legal permanent residents (LPR) convicted by a plea entered prior to April 24, 1996. By its plain language, the waiver was limited to LPRs who, returning to the United States after a temporary departure, faced exclusion from admission to the United States under a ground of inadmissibility found at section 212(a). Sixty years of administrative and judicial decisions have seen the expansion of the waiver into the deportation context. The Board of Immigration Appeals and federal courts have held that the constitutional guarantee of equal protection requires that LPRs in deportation proceedings who are “similarly situated” to LPRs in exclusion proceedings, and who differ only in terms of a recent departure from the country, be treated equally with regard to their applications for section 212(c) relief. A three-way split has emerged among the U.S. courts of appeals in determining the appropriate test to decide whether deportable LPRs are similarly situated and thus eligible for section 212(c). This Note explores the complex history of the availability of the section 212(c) waiver in deportation proceedings, particularly for LPRs convicted of aggravated felonies, and urges the U.S. Supreme Court to adopt the offense-specific test utilized by the Second Circuit, as it is the only approach that safeguards the guarantee of equal protection for LPRs in deportation proceedings.

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“It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards.”

— Judge Learned Hand in *Di Pasquale v. Karnuth*.¹

INTRODUCTION

Congress has plenary authority to regulate the admission and removal of aliens² to and from the United States,³ and in 1952, it enacted the Immigration and Nationality Act (INA) pursuant to this authority.⁴ The INA describes certain conduct that may render aliens inadmissible or subject to deportation.⁵ The grounds of inadmissibility found at INA section 212(a) govern aliens who seek admission at a port-of-entry or who are apprehended within the United States and have not been lawfully admitted.⁶ The grounds of deportation found at section 237(a) govern aliens who are already within the United States after a lawful admission.⁷ Under the INA, criminal activity—especially conviction of an aggravated felony—carries serious immigration consequences.⁸ Criminal aliens

1. 158 F.2d 878, 879 (2d Cir. 1947).

2. An “alien,” as defined by Congress in the Immigration and Nationality Act (INA), refers to “any person not a citizen or national of the United States.” INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2006).

3. U.S. CONST. art. I, § 8, cl. 4; *see also* *INS v. Chadha*, 462 U.S. 919, 940 (1983) (“The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question . . .”); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

4. 8 U.S.C. § 1101.

5. INA § 212(a), 8 U.S.C. § 1182(a) (2006) (listing grounds of inadmissibility); INA § 237(a), 8 U.S.C. § 1227(a) (2006) (listing grounds for deportation).

6. 8 U.S.C. § 1182(a). Until 1996, grounds of inadmissibility were called “exclusion grounds.” Exclusion grounds governed aliens who had not physically entered the United States, while grounds of deportation governed aliens who had physically entered the United States, whether lawfully or unlawfully. Thus, aliens who entered the country illegally, without inspection, were subject to the grounds of deportation, while aliens who were refused admission upon self-presentation before border authorities were subject to the grounds of exclusion. This exclusion–deportation distinction based on “entry” created an anomaly because of the greater procedural protections available in deportation proceedings. In 1996, Congress amended the INA with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.). IIRIRA redefined the traditional exclusion–deportation distinction, adopting lawful admission, instead of mere entry, as the relevant distinguishing factor. *Id.* Thus, the INA now distinguishes between inadmissibility and deportation, the exclusion grounds having been renamed “grounds of inadmissibility.”

7. 8 U.S.C. § 1227(a).

8. INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2006) (providing for the exclusion of aliens falling under one of the criminal grounds of inadmissibility); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006) (providing for the removal of aliens falling under one of the criminal grounds of deportation).

may be denied admission to the United States or, once admitted, be deported via removal proceedings.⁹

The law is settled that aliens, including criminal aliens in removal proceedings, are entitled to the constitutional promise of equal protection of the laws.¹⁰ Although the Supreme Court has held that “[d]eportation can be the equivalent of banishment or exile,”¹¹ a permanent resident alien’s right to remain in the United States is not considered a “fundamental right” and, therefore, classifications touching on it are not subject to strict judicial scrutiny.¹² Instead, distinctions between classes of deportable permanent resident aliens that touch on their right to remain in the country are subject to minimal judicial scrutiny—or rational basis review.¹³ Minimal judicial scrutiny requires that distinctions between different classes of people be “reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”¹⁴

Under current U.S. immigration law, however, LPRs¹⁵ who have committed the same criminal offense are nonetheless treated differently in removal proceedings based on arbitrary classifications unrelated to the object of the legislation. The test currently employed by the Board of Immigration Appeals (BIA) and the majority of the U.S. courts of appeals to determine eligibility for the discretionary waiver of removal found at former section 212(c) of the INA¹⁶ creates arbitrary distinctions between similarly situated LPRs in deportation proceedings.¹⁷ These arbitrary classifications do not have a “fair and substantial” relation to the object of the waiver and, thus, violate LPRs’ constitutional right to equal protection.

9. See generally YULE KIM & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY, RL 32480, at 1 (updated Jan. 15, 2009). In 1996, Congress, through IIRIRA, consolidated the proceedings for exclusion (now inadmissibility) and deportation, formerly found at INA section 212, 8 U.S.C. § 1182(a) and INA section 241, 8 U.S.C. § 1251(a), respectively, into “removal proceedings,” found at INA § 240, 8 U.S.C. § 1229a (2006).

10. See *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (guarantee of equal protection applies to aliens); *Noel v. Chapman*, 508 F.2d 1023, 1028 (2d Cir. 1975) (reaffirming the applicability of equal protection to aliens in removal proceedings)).

11. *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947).

12. *Francis*, 532 F.2d at 272.

13. *Id.* Under rational basis review, a classification must bear a rational relation to some legitimate government interest in order to avoid running afoul of the constitutional guarantee of equal protection. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993).

14. *Francis*, 532 F.2d at 272 (quoting *Stanton v. Stanton*, 421 U.S. 7, 14 (1975)).

15. A legal permanent resident is an alien who has “been lawfully accorded the privilege of residing permanently in the United States as an immigrant.” INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2006).

16. INA § 212(c), 8 U.S.C. § 1182(c) (1994), *repealed by* IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

17. See, e.g., *Vo v. Gonzales*, 482 F.3d 363 (5th Cir. 2007).

The section 212(c) waiver, although repealed in 1996, remains available to certain LPRs convicted by a plea entered prior to April 24, 1996.¹⁸ The waiver was limited by its plain language to LPRs who, returning to the United States after a temporary departure, faced exclusion from admission to the United States under section 212(a).¹⁹ However, sixty years of administrative and judicial decisions have seen the expansion of the Attorney General's (AG) authority to grant section 212(c) relief from exclusion to include similar authority to grant relief from deportation under certain circumstances.²⁰ Even so, under the plain language of the statute, an LPR convicted of a criminal offense who temporarily departed and reentered the United States would be eligible for section 212(c) relief in inadmissibility proceedings, while another LPR convicted of the same offense who simply remained in the country would be deemed ineligible for the waiver in deportation proceedings.²¹ In *Francis v. INS*, the Second Circuit recognized this harsh and arbitrary distinction and held that the constitutional guarantee of equal protection required that the section 212(c) waiver be made available to LPRs in deportation proceedings who differed from LPRs in exclusion proceedings only in terms of a recent departure from the country.²² Following the decision, the Board of Immigration Appeals (BIA) mandated that deportable LPRs who were "similarly situated" to excludable LPRs be treated equally with regard to their applications for section 212(c) relief.²³

Since then, two tests have emerged to determine whether a deportable LPR is "similarly situated" to an excludable LPR. A majority of the circuits, applying the "comparable grounds" analysis created and developed by the BIA,²⁴

18. In 1996, Congress limited the availability of the waiver with the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.). One year later, Congress repealed the waiver with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.). Despite this legislation, pursuant to the U.S. Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), the section 212(c) waiver remains available to certain LPRs convicted by a plea entered prior to April 24, 1996 (the AEDPA enactment date), or in certain limited situations, April 1, 1997 (the IIRIRA enactment date).

19. INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996) ("Aliens 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, may be admitted in the discretion of the Attorney General . . .").

20. See *Blake v. Carbone*, 489 F.3d 88, 94 (2d Cir. 2007); *Francis v. INS*, 532 F.2d 268, 271 (2d Cir. 1976); see also discussion *infra* Part II.

21. See *Francis*, 532 F.2d at 271; *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 700 (B.I.A. 1971), *aff'd*, 466 F.2d 1198 (9th Cir. 1972).

22. *Francis*, 532 F.2d 268.

23. *Matter of Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976).

24. See *Matter of Granados*, 16 I. & N. Dec. 726, 728 (B.I.A. 1979) (holding that the test of whether a deportee is similarly situated to an excludable depends upon whether the "ground of deportation [charged] is also a ground of inadmissibility," i.e., whether there are comparable grounds). The test was further developed by cases such as *Matter of Wadud*, 19 I. & N. Dec. 182 (B.I.A. 1984); *Matter of Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991); and *Bedoya-Valencia v. INS*, 6 F.3d 891 (2d Cir. 1993). It was finally codified, with slightly

have held that a section 212(c) waiver is available only if the LPR's ground of deportation employs substantially similar language to, or has a statutory counterpart in, a ground of exclusion.²⁵ On the other hand, the Second Circuit, in *Blake v. Carbone*, held that a section 212(c) waiver is available to a deportable LPR if his underlying criminal offense could form the basis of a ground of exclusion.²⁶

The comparable grounds analysis is at the heart of the current circuit split concerning the availability of section 212(c) relief to deportable LPRs convicted of an aggravated felony.²⁷ The Supreme Court must address the differing approaches of the circuits in finding section 212(c) eligibility for LPRs convicted of aggravated felonies in order to safeguard the Constitution's guarantee of equal protection for LPRs in deportation proceedings. The Supreme Court should adopt the Second Circuit's analysis, discarding the BIA's interpretation of the comparable grounds test and focusing on the deportee's particular *offense*, instead of the statutory grounds for deportation, in determining eligibility for a section 212(c) waiver. The Second Circuit's focus on the particular criminal offense fulfills *Francis's* mandate to ensure that LPRs who are similarly situated but for "irrelevant and fortuitous factors" are treated similarly.²⁸ It is arbitrary to distinguish deportable LPRs from excludable LPRs who differ only in terms of a recent departure from the country. However, the comparable grounds test employed by the majority of the circuits turns on equally arbitrary grounds. There is no rational basis for requiring that an LPR's ground of deportation have a substantially identical statutory counterpart in a ground of inadmissibility in order for the LPR to be similarly situated to an excludable LPR. This reliance on linguistic similarity between grounds of deportation and grounds of inadmissibility

different language, by the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) at 8 C.F.R. § 1212.3(f)(5) (2004).

25. *See, e.g., Vo v. Gonzales*, 482 F.3d 363 (5th Cir. 2007) (section 212(c) eligibility denied in deportation proceedings because LPR's crime of unauthorized use of a motor vehicle lacked a statutory counterpart in the crimes involving moral turpitude (CIMT) ground of inadmissibility or any other ground of inadmissibility under INA section 212(a)).

26. 489 F.3d 88, 101–04 (2d Cir. 2007) (LPR deportable on aggravated felony ground of deportation found eligible for section 212(c) waiver because his particular offense, sexual abuse of a minor, could form the basis of the ground of exclusion for crimes involving moral turpitude).

27. Currently, there is a three-way circuit split between the majority of the U.S. courts of appeals, the Second Circuit, and the Ninth Circuit. *Compare Alvarez v. Mukasey*, 282 F. App'x 718 (10th Cir. 2008) (unpublished), *Falaniko v. Mukasey*, 272 F. App'x 742 (10th Cir. 2008) (unpublished), *Avilez-Granados v. Gonzales*, 481 F.3d 869 (5th Cir. 2007), *Birkett v. Att'y Gen. of the U.S.*, 252 F. App'x 516 (3d Cir. 2007) (unpublished), *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007), *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007), *Dalombo Fontes v. Gonzales*, 483 F.3d 115 (1st Cir. 2007), *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007), *Vo*, 482 F.3d 363, *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007), *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006), *Rubio v. U.S. Att'y Gen.*, 182 F. App'x 925 (11th Cir. 2006) (unpublished), *and Soriano v. Gonzales*, 489 F.3d 909 (8th Cir. 2006) (per curiam), *with Blake*, 489 F.3d 88, *and with Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (per curiam).

28. *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976).

creates new arbitrary distinctions and thus violates the constitutional guarantee of equal protection.

The Supreme Court must act immediately to rectify this split, as the section 212(c) waiver provides crucial relief to many LPRs in deportation proceedings. Naturally, eligibility for the waiver will slow and eventually become obsolete over the next couple of decades as the pool of eligible aliens—those convicted by a plea entered prior to April 24, 1996—decreases. However, current application for the waiver in deportation and removal proceedings, as well as the number of LPRs affected by section 212(c) jurisprudence, are significant.²⁹ Use of the waiver will continue and will provide much-needed relief to many LPRs for at least the next decade, as the Department of Homeland Security has initiated many more removal proceedings in its effort to tighten its enforcement of the immigration laws after the September 11, 2001 terrorist attacks. The urgency of the issue is further illustrated by a recent Ninth Circuit decision. Once at the forefront of the majority of circuits applying the BIA's comparable grounds test, the Ninth Circuit reheard its leading case en banc and parted ways with the majority of circuits, creating a three-way circuit split.³⁰

Part I of this Note explains removal proceedings, the criminal grounds of removal, and the availability of discretionary relief from removal. Part II provides the historical background and development of the section 212(c) waiver and explains why the waiver, eliminated over ten years ago, continues to affect LPRs in removal proceedings. Part III describes the current circuit split in the application of the comparable grounds test and frames the issue in equal protection terms. Finally, Part IV argues that considerations of equal protection require the U.S. Supreme Court to adopt the Second Circuit's offense-specific test for determining section 212(c) eligibility.

I. REMOVAL

A. Grounds for Removal

The Immigration and Nationality Act is the primary body of law governing immigration and citizenship in the United States.³¹ As such, the INA specifies the grounds of inadmissibility and the grounds of deportation under which aliens may be removed from the country.³² Aliens seeking entry to the

29. For example, section 212(c) relief was granted to 2110 LPRs between fiscal years 2003 and 2007. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FISCAL YEAR 2007 STATISTICAL YEAR BOOK R3 tbl.15 (2008), available at <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf>. Note, however, that this figure does not include those LPRs who were determined to be eligible for the waiver but were ultimately denied relief by the immigration judge or BIA based on discretionary factors. The factors for deciding when deportation is appropriate for an LPR who is eligible for section 212(c) relief have been set forth in several BIA cases, the most prominent of which is *Matter of Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978).

30. See *Abebe v. Mukasey*, 554 F.3d 1203.

31. INA, 8 U.S.C. § 1101 (2006).

32. INA § 212(a), 8 U.S.C. § 1182(a) (2006) (grounds of inadmissibility); INA § 237(a), 8 U.S.C. § 1227(a) (2006) (grounds for deportation); see also KIM & GARCIA,

United States who fall under the grounds of inadmissibility listed in section 212(a) are “ineligible to receive visas and ineligible to be admitted to the United States.”³³ Aliens already in the United States after an initial lawful admission who fall within one of the grounds of deportation provided in section 237(a) are subject to removal.³⁴ Most aliens who are removable under section 212(a) or section 237(a) are placed in section 240 “removal proceedings,” where they have the opportunity to be heard by an immigration judge.³⁵

Currently, there are forty-six grounds of inadmissibility and thirty-three grounds of deportation.³⁶ The grounds of inadmissibility and deportation are similar, but not identical, and they contain both criminal and noncriminal bases for removal.³⁷ The commission of a criminal offense may have serious consequences for aliens attempting to enter or remain in the United States and may also negatively affect other immigration proceedings beyond removal.³⁸ The criminal grounds of inadmissibility and deportation cover activity in violation of federal, state, or foreign criminal law.³⁹

Instead of specifying particular crimes or criminal codes, sections 212(a) and 237(a) classify criminal activity under broad categories.⁴⁰ The major classifications include: aggravated felonies, crimes involving moral turpitude

supra note 9, at 1. In 1996, Congress amended the INA and adopted the term “removal” to refer to and encompass the concepts of exclusion (now admissibility) and deportation. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.). Thus, while there are still separate grounds of inadmissibility and deportability in sections 212(a) and 237(a), respectively, all the grounds are generally and collectively referred to as “grounds of removal.” In addition, IIRIRA consolidated the proceedings for exclusion and deportation, formerly found at INA section 212, 8 U.S.C. § 1182(a) and INA section 241, 8 U.S.C. § 1251(a), respectively, into “removal proceedings,” found at INA section 240, 8 U.S.C. § 1229a (2006).

33. INA § 212(a), 8 U.S.C. § 1182(a) (2006).

34. INA § 237(a), 8 U.S.C. § 1227(a) (2006).

35. J. Ryan Moore, Note, *Reinterpreting the Immigration and Nationality Act’s Categorical Bar to Discretionary Relief for “Aggravated Felons” in Light of International Law: Extending Beharry v. Reno*, 21 ARIZ. J. INT’L & COMP. L. 535, 557 (2004).

36. INA § 212(a), 8 U.S.C. § 1182(a) (2006) (grounds of inadmissibility); INA § 237(a), 8 U.S.C. § 1227(a) (2006) (grounds of deportation).

37. Mary E. Kramer, *Practicing Before the Immigration Court: Crimes and Other Grounds of Removal and Applications for Relief* (ALI-ABA Course of Study, May 4–5, 2006), SL010 A.L.I.-A.B.A. 239, 246 (2006).

38. KIM & GARCIA, *supra* note 9, at 7. For example, an alien convicted of an aggravated felony is, *inter alia*: (1) presumed to be deportable; (2) ineligible for asylum, cancellation of removal, or voluntary departure; (3) barred from most forms of relief; and (4) subject to mandatory detention without bond. Kramer, *supra* note 37, at 253; Moore, *supra* note 35, at 536–38.

39. KIM & GARCIA, *supra* note 9, at 1–2. While some federal crimes are included and described in the INA itself, not all violations of the INA are crimes. For example, an “illegal alien,” one who is present in the United States without legal permission, is not a “criminal alien.” *Id.*

40. INA § 212(a), 8 U.S.C. § 1182(a) (2006); INA § 237(a), 8 U.S.C. § 1227(a) (2006); *see also* KIM & GARCIA, *supra* note 9, at 3.

(CIMT), controlled substance violations, firearms offenses, crimes involving domestic offenses, money laundering, and export violations.⁴¹ Although some classifications overlap, no two classes are coextensive.⁴² A brief explanation of the CIMT and aggravated felony grounds is necessary, as the circuit split cases deal primarily with these two classifications.

1. Crimes Involving Moral Turpitude

The INA does not define CIMTs;⁴³ instead, courts have determined the types of crimes constituting CIMTs on a case-by-case basis, depending on the statutory elements of the particular state or federal crime.⁴⁴ Despite the lack of clarity concerning CIMTs, generally, a crime involves moral turpitude if the underlying conduct is “inherently base, vile, or depraved” and “contrary to the accepted rules of society.”⁴⁵ CIMTs are acts that are wrong in themselves, as opposed to wrong based on prohibition.⁴⁶ Commission of a CIMT may form the basis for both inadmissibility and deportation.⁴⁷

2. Aggravated Felonies

The definition of “aggravated felony” is found at section 101(a)(43), which lists both criminal categories and specific crimes.⁴⁸ The broadest categories of aggravated felonies are: crimes of violence for which the term of imprisonment is at least one year; crimes of theft or burglary for which the term of imprisonment is at least one year; and illegal trafficking in drugs, firearms, or destructive

41. INA § 212(a), 8 U.S.C. § 1182(a) (2006); INA § 237(a), 8 U.S.C. § 1227(a) (2006).

42. KIM & GARCIA, *supra* note 9, at 3. In addition, these broad categories are further modified for the specific purposes of either section 212(a) or section 237(a). For example, CIMTs that may make an alien inadmissible are different from those that may render an alien deportable. Compare INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A) (2006), with INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A) (2006).

43. Brian C. Harms, *Redefining “Crimes of Moral Turpitude”: A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 259 (2001).

44. Kramer, *supra* note 37, at 252.

45. *Id.* at 252–53.

46. *Id.* at 253.

47. Under section 212(a), an alien who is convicted of or admits to committing a CIMT is inadmissible, unless: (1) the alien committed only one crime; and (2)(a) committed it when under eighteen years of age and more than five years before the date of application for admission, or (b) the maximum penalty for the crime did not exceed one year’s imprisonment, and the alien, if convicted, was not sentenced to more than six months. INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A) (2006). Under section 237(a), an alien who has been convicted of a single CIMT committed within five years of admission and punishable by a sentence of at least one year in prison is deportable. INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2006). Furthermore, an alien convicted of multiple CIMTs not arising from a single scheme of misconduct at any time after admission is deportable. INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2006).

48. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006).

devices.⁴⁹ Unlike CIMTs, aggravated felonies are a ground of deportation only; the term “aggravated felony” is not found at section 212(a).

Since 1988, Congress has designated certain crimes as aggravated felonies and has made it difficult for aliens convicted of such crimes to remain in the United States.⁵⁰ In 1996, Congress amended the INA by enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)⁵¹ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),⁵² which significantly expanded the definition of “aggravated felony” and severely limited the availability of various types of discretionary relief.⁵³

B. Relief from Removal

Aliens who find themselves in removal proceedings may be eligible for certain forms of relief. Mandatory relief, such as withholding of removal,⁵⁴ may be available depending on the alien’s statutory eligibility.⁵⁵ Discretionary relief may be available upon an affirmative exercise of discretion by the AG and a finding of statutory eligibility.⁵⁶ For example, section 212(h) gives the AG discretionary authority to waive certain criminal grounds of inadmissibility.⁵⁷ Furthermore, under section 240A, the AG may, in certain circumstances, cancel the removal of an inadmissible or deportable LPR.⁵⁸

Section 240A relief was created in 1996 when Congress, through AEDPA and IIRIRA, consolidated and restricted two types of discretionary relief for LPRs—former section 212(c) waiver for excludability⁵⁹ and former section 244

49. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2006) (crimes of violence); INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2006) (theft and burglary); INA §§ 101(a)(43)(B)–(C), 8 U.S.C. §§ 1101(a)(43)(B)–(C) (2006) (illegal trafficking); KIM & GARCIA, *supra* note 9, at 4. Specific crimes listed as aggravated felonies include, *inter alia*, murder, rape, sexual abuse of a minor, alien smuggling, and reentry after deportation for an aggravated felony. INA §§ 101(a)(43)(A), (N), (O), 8 U.S.C. §§ 1101(a)(43)(A), (N), (O) (2006).

50. KIM & GARCIA, *supra* note 9, at 3–4.

51. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

52. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

53. Moore, *supra* note 35, at 536–37. For an explanation of discretionary relief, see discussion *infra* Part I.B.

54. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006).

55. Moore, *supra* note 35, at 561. Mandatory relief does not involve an exercise of discretion by the AG and must be provided if the alien is eligible under the statute.

56. *Id.* Forms of discretionary relief include: adjustment of status, former suspension of deportation, registry (amnesty), voluntary departure, naturalization, cancellation of removal, asylum, temporary protected status, and waiver under INA section 212. See *id.* at 563–66.

57. INA § 212(h), 8 U.S.C. § 1182(h) (2006).

58. INA § 240A, 8 U.S.C. § 1229(b) (2006).

59. INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

suspension of deportation⁶⁰—into a new remedy called “cancellation of removal.”⁶¹ Despite this consolidation and repeal of section 212(c), the waiver remains retroactively available to certain LPRs in removal proceedings.⁶² Due to AEDPA and IIRIRA’s expansion of the definition of “aggravated felony” and restriction of the availability of relief, aliens convicted of an aggravated felony are “generally statutorily ineligible for discretionary relief and, in some cases, also disqualified from receiving mandatory relief.”⁶³ Because of these new restrictions, the section 212(c) waiver is extremely important to certain LPRs in removal proceedings—especially those convicted of an aggravated felony—because eligibility for relief is based on pre-AEDPA and -IIRIRA definitions and standards.

II. THE SECTION 212(C) WAIVER

Under former section 212(c), Congress provided relief from inadmissibility to certain LPRs in immigration court proceedings.⁶⁴ The provision granted the AG discretion to waive the exclusion of LPRs returning to a domicile of seven consecutive years after a temporary departure abroad.⁶⁵ The deportation counterpart to the section 212(c) waiver—section 244 “suspension of deportation”—allowed the AG to suspend the deportation of a convicted LPR who: (1) had been physically present in the United States for at least ten years after the commission of a deportable offense, (2) possessed “good moral character,” and (3) whose deportation would “result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child”⁶⁶ Section 212(c), which was available to any LPR who achieved seven consecutive years of domicile, was more generous than section 244, which required ten years to pass between commission of the criminal offense and the deportation proceedings.⁶⁷

The section 212(c) waiver was limited by its plain language to LPRs who, returning to the United States after temporary departure, faced exclusion from admission to the United States under section 212(a).⁶⁸ However, through more than sixty years of administrative and judicial decisions, the AG’s authority to

60. INA § 244, 8 U.S.C. § 1254 (1994), *repealed by* IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

61. KIM & GARCIA, *supra* note 9, at 12. In addition, IIRIRA consolidated the proceedings for exclusion and deportation, formerly found at INA section 212, 8 U.S.C. § 1182(a) and INA section 241, 8 U.S.C. § 1251(a), respectively, into “removal proceedings,” found at INA section 240, 8 U.S.C. § 1229a.

62. *See* INS v. St. Cyr, 533 U.S. 289, 326 (2001).

63. Moore, *supra* note 35, at 561.

64. INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996); Kramer, *supra* note 37, at 273.

65. INA § 212(c), 8 U.S.C. 1182(c) (1994) (repealed 1996) (“Aliens 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, may be admitted in the discretion of the Attorney General . . .”).

66. INA § 244, 8 U.S.C. 1254(a)(2) (1994) (repealed 1996); Blake v. Carbone, 489 F.3d 88, 94 (2d Cir. 2007).

67. *Blake*, 489 F.3d at 94.

68. *Id.*

grant section 212(c) relief from exclusion has carried with it a similar authority to grant relief from deportation under certain circumstances.⁶⁹ In order to comprehend the current equal protection issues arising from the section 212(c) comparable grounds test, it is necessary to fully understand the history of the section 212(c) waiver and its availability in the deportation context.

A. The History and Development of the Section 212(c) Waiver

1. The Seventh Proviso and the Creation of the Section 212(c) Waiver

Section 212(c) has its origins in the Seventh Proviso to section 3 of the Immigration Act of 1917.⁷⁰ The Seventh Proviso allowed “aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years . . . [to] be admitted in the discretion of the Secretary of Labor” despite membership in an excludable class.⁷¹ In doing so, the Proviso reduced the risks faced by LPRs seeking reentry after travel abroad. The Proviso was originally intended to provide relief in exclusion proceedings conducted at the border at the time of entry.⁷² It was subsequently expanded to provide relief in deportation proceedings because of the overlap between certain exclusion and deportation provisions.⁷³

The first significant expansion took place in *Matter of L-*.⁷⁴ There, a Yugoslavian LPR was convicted of a CIMT, which, under the law then in effect, made him inadmissible but not deportable.⁷⁵ Years later, the LPR traveled abroad for two months and then returned to the United States.⁷⁶ Upon reentry, the LPR’s inadmissibility was not detected and he was permitted to return.⁷⁷ Several months later, he was placed in deportation proceedings under a provision of the 1917 Act that rendered removable any alien convicted of a CIMT prior to entry.⁷⁸ Had the LPR’s inadmissibility been detected upon reentry, he would have been eligible for Seventh Proviso relief. Instead, the failure of the immigration officials to challenge the LPR’s reentry converted his ground of excludability (which was triggered by his travel abroad) into a ground of deportation for which Seventh Proviso relief was unavailable.⁷⁹ Realizing that the fate of the LPR’s future in the United States depended solely on the technical form of the proceedings, the AG determined that

69. *Id.*; *Francis v. INS*, 532 F.2d 268, 271 (2d Cir. 1976).

70. Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952); see *Francis*, 532 F.2d at 270.

71. Immigration Act of 1917, ch. 29, 39 Stat. 878; see *INS v. St. Cyr*, 533 U.S. 289, 294 (2001).

72. *Francis*, 532 F.2d at 270.

73. See *Matter of L-*, 1 I. & N. Dec. 1 (B.I.A. 1940) (approved by Att’y Gen. 1940).

74. *Id.*

75. *Id.* at 1–3.

76. *Id.* at 2.

77. *Id.*

78. *Id.* at 1–2.

79. *Id.* at 5–6 (Att’y Gen. opinion).

he had authority during deportation proceedings to enter a *nunc pro tunc*⁸⁰ correction of the record of the LPR's last entry to reflect a grant of Seventh Proviso relief.⁸¹ As a result of this retroactive relief from inadmissibility, the LPR no longer needed to be deported—the only ground of deportation being one that might have been removed by discretionary action at the time of the LPR's last entry and one that was effectively removed by the *nunc pro tunc* relief.⁸² Important to the AG's decision to extend the Seventh Proviso was the fact that the ground of inadmissibility for which relief was granted was essentially identical to the ground of deportation.⁸³

In 1952, Congress enacted the INA⁸⁴ and effectively replaced the Seventh Proviso with INA section 212(c).⁸⁵ Like the Seventh Proviso, the section 212(c) waiver was facially limited to exclusion proceedings.⁸⁶ However, the BIA continued its pre-1952 practice of extending relief to the deportation context and extended the new waiver to deportees when there was a close connection between the corresponding grounds of excludability and deportability.⁸⁷

In the first of such cases, *Matter of G-A-*, a Mexican LPR who pled guilty to an excludable offense temporarily departed and returned to the United States, and was subsequently placed in deportation proceedings.⁸⁸ The BIA, relying on its decision in *Matter of L-*, allowed the LPR to seek a section 212(c) waiver *nunc pro tunc*.⁸⁹ The Board reasoned that because the LPR would have been eligible for section 212(c) relief had he been denied reentry by border officials, he should be eligible for such relief in subsequent deportation proceedings despite the plain language of section 212(c) and the unavailability of relief under section 244.⁹⁰ Thus, the Board avoided the “administrative predicament created by the disparities between §§ 212(c) and 244”⁹¹

In keeping with the rationale of *Matter of L-*, *Matter of G-A-*, and several other cases, LPRs seeking section 212(c) relief in deportation proceedings were

80. “*Nunc pro tunc* relief is a legal fiction that corrects the erroneous denial of relief in the past by providing such relief now.” *Blake v. Carbone*, 489 F.3d 88, 94 n.5 (2d Cir. 2007) (citing *Edwards v. INS*, 393 F.3d 299, 308 (2d Cir. 2004)).

81. *Matter of L-*, 1 I. & N. Dec. at 5–6 (Att’y Gen. opinion). The AG refused to conclude that it was Congress’s intent to strictly limit the Seventh Proviso to exclusion proceedings, stating that any such operation of the immigration laws would be “capricious and whimsical.” *Id.* at 5.

82. *Id.* at 6.

83. Other early cases also extended Seventh Proviso relief from exclusion to the deportation context where there was a close connection between the corresponding grounds of excludability and deportability. *See, e.g., Matter of A-*, 2 I. & N. Dec. 459, 459 (B.I.A. 1946) (approved by Att’y Gen. 1947).

84. INA, 8 U.S.C. § 1101 (2006).

85. *Francis v. INS*, 532 F.2d 268, 270–71 (2d Cir. 1976).

86. INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

87. *See, e.g., Matter of G-A-*, 7 I. & N. Dec. 274, 274 (B.I.A. 1956).

88. *Id.* at 274–75.

89. *Id.* at 276.

90. *See Francis*, 532 F.2d at 271 (discussing *Matter of G-A-*, 7 I. & N. Dec. 274).

91. *Blake v. Carbone*, 489 F.3d 88, 94 (2d Cir. 2007).

required to have temporarily departed and returned, and be facing exclusion, in order to be eligible for the waiver.⁹² In *Matter of Arias-Uribe*, an LPR who had never left the United States sought section 212(c) relief from deportation.⁹³ The BIA denied section 212(c) relief, finding that the *nunc pro tunc* procedure developed in *Matter of L-* was not possible, as the LPR never left the country and never faced exclusion.⁹⁴ Although acknowledging that it had expanded the scope of the section 212(c) waiver beyond the statute's plain language in earlier cases, the BIA refused to further extend the waiver to those who never left the country after becoming deportable.⁹⁵ In support, the BIA pointed to the change in language between the Seventh Proviso, which required that the LPR be "returning after a temporary absence," and section 212(c), which required that the LPR have "temporarily proceeded abroad voluntarily and not under an order of deportation."⁹⁶ The BIA claimed that Congress, by this change in language, intended to require an actual departure and return to the United States.⁹⁷ The Ninth Circuit affirmed this construction of the statute.⁹⁸

Thus, under the Immigration Act of 1917, an LPR who had not departed the country after becoming deportable could still invoke the Seventh Proviso.⁹⁹ Under the Immigration and Nationality Act of 1952, however, this procedure was not available to LPRs in deportation proceedings.¹⁰⁰ Because of this, an LPR seeking relief under section 212(c) was required to leave the country after becoming deportable.¹⁰¹ If unchallenged upon reentry, the LPR could then invoke section 212(c) relief in later deportation proceedings using the *nunc pro tunc* procedure.¹⁰² If the LPR simply remained in the country after becoming deportable, section 212(c) relief was not available in deportation proceedings.¹⁰³

92. *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 698 (B.I.A. 1971), *aff'd*, 466 F.2d 1198 (9th Cir. 1972).

93. *Id.* at 696–97 (LPR faced deportation for narcotics conviction under former section 241(a)(11) ground of deportation, which corresponded to former section 212(a)(23) ground of excludability).

94. *Id.* at 697–98.

95. *Id.* at 698.

96. *Id.* at 699–700 & n.2 (quoting the Seventh Proviso of Section 3 of the Immigration Act of 1917, ch. 29, 39 Stat. 878 (repealed 1952); INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996)).

97. *Id.* at 700.

98. *Arias-Uribe v. INS*, 466 F.2d 1198 (9th Cir. 1972) (per curiam).

99. In such cases, the LPR would be given advance permission (if eligible) to depart voluntarily and return. Upon reentry, the LPR's excludability would then be waived under the Seventh Proviso. See *Matter of A-*, 2 I. & N. Dec. 459, 461–63 (B.I.A. 1946) (approved by Att'y Gen. 1947); *Matter of L-*, 1 I. & N. Dec. 1, 5–6 (B.I.A. 1940) (approved by Att'y Gen. 1940).

100. *Matter of Arias-Uribe*, 13 I. & N. Dec. at 700.

101. *Id.*; *Francis v. INS*, 532 F.2d 268, 271 (2d Cir. 1976).

102. *Matter of G-A-*, 7 I. & N. Dec. 274 (B.I.A. 1956).

103. *Francis*, 532 F.2d at 271; *Matter of Arias-Uribe*, 13 I. & N. Dec. at 700.

2. *Equal Protection: Francis v. INS*

In 1976, the Second Circuit upheld a constitutional challenge to the BIA's interpretation of section 212(c).¹⁰⁴ In *Francis v. INS*, an LPR who remained in the United States after committing a deportable narcotics offense appealed the BIA's denial of discretionary relief under section 212(c).¹⁰⁵ In line with the rationale of *Matter of Arias-Uribe*, the BIA denied section 212(c) consideration because Francis had not actually departed and returned to the United States.¹⁰⁶ On appeal to the Second Circuit, Francis claimed that the BIA's construction of the statute deprived him of the equal protection of the laws as guaranteed by the Fifth Amendment.¹⁰⁷ Francis argued that "the statute as so applied create[d] two classes of aliens identical in every respect except for the fact that members of one class have departed and returned to this country at some point after they became deportable."¹⁰⁸

The Second Circuit agreed with Francis and held that the disparate treatment violated his right to equal protection.¹⁰⁹ In so holding, the court reiterated the well-established view that the constitutional promise of equal protection applies to both citizens and aliens, including those in removal proceedings.¹¹⁰ In withholding section 212(c) consideration, Congress was discriminating between LPRs who had temporarily traveled abroad and those who had remained in the United States¹¹¹—a distinction that was not rationally related to any legitimate purpose of the statute, as required under the applicable rational basis test.¹¹² The court reasoned that "an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time."¹¹³ Instead of striking the statute, the court extended its reach, making the

104. See *Francis*, 532 F.2d at 273.

105. *Id.* at 269–70.

106. *Id.* at 269.

107. *Id.* at 272.

108. *Id.*

109. *Id.* at 273.

Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner. We do not dispute the power of the Congress to create different standards of admission and deportation for different groups of aliens. However, once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest.

Id.

110. *Id.* at 272 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (guarantee of equal protection applies to aliens); *Noel v. Chapman*, 508 F.2d 1023, 1028 (2d Cir. 1975) (reaffirming the applicability of equal protection to aliens in removal proceedings)).

111. *Blake v. Carbone*, 489 F.3d 88, 95 (2d Cir. 2007).

112. *Francis*, 532 F.2d at 272–73.

113. *Id.* at 273.

section 212(c) waiver available “to deportable [LPRs] who differed from excludable [LPRs] only in terms of a recent departure from the country.”¹¹⁴

Notwithstanding its own decision in *Matter of Arias-Uribe*, the BIA soon acquiesced in the Second Circuit’s interpretation in *Matter of Silva*.¹¹⁵ There, the BIA held that due process and equal protection required “that no distinction shall be made between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens.”¹¹⁶ With respect to applications for discretionary relief under section 212(c), LPRs in deportation proceedings who were “similarly situated” to LPRs in exclusion proceedings were to be treated equally by immigration courts.¹¹⁷

3. Comparable Grounds Test

Although the BIA expanded the availability of section 212(c) relief to deportable LPRs who had not temporarily proceeded abroad, it nonetheless required a close connection between the charged ground of deportation and the ground of excludability that could have been waived under section 212(c) had the alien departed and reentered the United States. *Francis* and *Matter of Silva* expanded the class of aliens to whom the section 212(c) waiver is available, but they did not expand the statutory grounds to which it may be applied.¹¹⁸ Deciding whether a close connection existed—or whether a deportee was “similarly situated” to an excludee, as required in *Matter of Silva*—proved to be a difficult task.¹¹⁹

The BIA ultimately settled upon a “comparable grounds” test to aid immigration judges with such determinations.¹²⁰ Under the comparable grounds test, as laid out in *Matter of Granados*, a deportee is similarly situated to an excludee if the “ground of deportation [charged] is also a ground of inadmissibility.”¹²¹ Since 1979, the BIA has routinely denied section 212(c) relief where the ground of deportation lacks a comparable ground of excludability.¹²²

114. *Blake*, 489 F.3d at 95 (citing *Francis*, 532 F.2d at 273).

115. See *Matter of Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976). The Ninth Circuit subsequently followed suit in *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981). However, in its latest opinion, the Ninth Circuit overruled *Tapia-Acuna*’s holding that there is no rational basis for providing section 212(c) relief from inadmissibility but not deportation. *Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (per curiam); see discussion *infra* Part III.A.

116. *Matter of Silva*, 16 I. & N. Dec. at 30.

117. *Id.*

118. *Matter of Granados*, 16 I. & N. Dec. 726, 728 (B.I.A. 1979).

119. *Blake*, 489 F.3d at 95.

120. *Id.*

121. 16 I. & N. Dec. at 728.

122. *Vo v. Gonzales*, 482 F.3d 363, 367 (5th Cir. 2007). For example, aliens charged with deportability for certain weapons offenses (*Komarenko v. INS*, 35 F.3d 432, 433–34 (9th Cir. 1994); *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988); *Matter of Granados*, 16 I. & N. Dec. at 727), immigration document fraud (*Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 573–74 (B.I.A. 1996); *Matter of Wadud*, 19 I. & N. Dec. 182, 183 (B.I.A. 1984)), and entry without inspection (*Leal-Rodriguez v. INS*, 990 F.2d

Although the comparable grounds analysis worked in most cases, complications arose when the ground of deportation was an aggravated felony.¹²³ In *Matter of Meza*,¹²⁴ an LPR deportable under former INA section 241(a)(4)(B)¹²⁵ for conviction of an aggravated felony appealed the immigration judge's denial of discretionary relief under section 212(c). Former section 241(a)(4)(B) rendered deportable any alien who was "convicted of an aggravated felony at any time after entry."¹²⁶ Since there is no ground of exclusion that speaks in terms of "aggravated felonies,"¹²⁷ the immigration judge held that the comparable grounds test did not allow discretionary relief under section 212(c).¹²⁸

In its decision, the BIA acknowledged that there was not a ground of exclusion based specifically on the fact that an LPR has been "convicted of an aggravated felony."¹²⁹ However, the BIA did not find this to be fatal to an LPR's eligibility for the section 212(c) waiver.¹³⁰ To find a corresponding ground of exclusion to the broad aggravated felony ground of deportation, the BIA looked to the specific criminal offenses enumerated in the definition of aggravated felony in section 101(a)(43).¹³¹ In fact, both section 101(a)(43)¹³² and section 212(a)(23)¹³³ described drug trafficking offenses. The BIA noted that section 101(a)(43) was "comprised of trafficking offenses, most, if not all, of which would also be encompassed within the scope of section 212(a)(23) of the Act."¹³⁴ Because the LPR's conviction for a drug-related aggravated felony could also "form the basis

939, 952 (7th Cir. 1993); *Matter of M-*, 5 I. & N. Dec. 642, 648 (B.I.A. 1954); *Matter of T-*, 5 I. & N. Dec. 389, 389-90 (B.I.A. 1953)), have all been held ineligible for section 212(c) relief for this reason. In *Matter of Hernandez-Casillas*, the BIA attempted to expand the availability of the section 212(c) waiver to "aliens deportable under any ground of deportability except those where there is a comparable ground of exclusion which has been specifically excepted from section 212(c)." 20 I. & N. Dec. 262, 266 (B.I.A. 1990) (disapproved by Att'y Gen. 1991) (emphasis added), *aff'd*, 983 F.2d 231 (5th Cir. 1993). The Attorney General rejected this interpretation and reaffirmed the comparable grounds test as set forth in *Matter of Granados* and subsequent caselaw. *Id.* at 286-88.

123. *Blake*, 489 F.3d at 95.

124. 20 I. & N. Dec. 257, 257-58 (B.I.A. 1991).

125. INA § 241(a)(4)(B), 8 U.S.C. § 1251(a)(4)(B) (1988) (current version at INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2006)).

126. *Id.*

127. See discussion *infra* Part I.A.2.

128. *Matter of Meza*, 20 I. & N. Dec. at 258.

129. *Id.*

130. *Id.* at 259 ("[A] waiver under section 212(c) is not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, 'convicted of an aggravated felony,' as in section 241(a)(4)(B) of the Act.>").

131. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (West Supp. 1991); see *Blake v. Carbone*, 489 F.3d 88, 96 (2d Cir. 2007).

132. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (West Supp. 1991).

133. INA § 212(a)(23), 8 U.S.C. § 1182(a)(23) (1988) (current version at INA § 212(a)(2)(A)(i)(II), (C), 8 U.S.C. 1182(a)(2)(A)(i)(II), (C) (2006)).

134. *Matter of Meza*, 20 I. & N. Dec. at 259.

for excludability,” the BIA held that the LPR was eligible for discretionary relief under section 212(c).¹³⁵

B. The 1996 Acts: Restriction and Repeal of Section 212(c) Relief

While the BIA and the courts developed and clarified the comparable grounds test, Congress began to limit the availability of the section 212(c) waiver to LPRs convicted of criminal offenses.¹³⁶ In the 1990s, Congress severely limited and eventually eliminated section 212(c) relief through a series of amendments.¹³⁷ The first of the amendments restricting section 212(c) relief was the Immigration Act of 1990 (IMMACT).¹³⁸ With IMMACT, Congress removed the AG’s discretion to grant section 212(c) waivers to aliens who had been convicted of an aggravated felony and had served five or more years in prison.¹³⁹

Six years later, on April 24, 1996, Congress enacted AEDPA.¹⁴⁰ Section 440(d) of AEDPA included a new, broader list of offenses that rendered an LPR ineligible for section 212(c) relief.¹⁴¹ Among other things, AEDPA eliminated section 212(c) relief for LPRs convicted of an aggravated felony, regardless of the length of the sentence.¹⁴² In addition, AEDPA significantly expanded the definition of aggravated felony to encompass many more criminal offenses, further narrowing eligibility for section 212(c) relief.¹⁴³ One author noted that AEDPA “went a step further and recategorized most crimes involving moral turpitude as aggravated felonies, thereby eliminating Section 212(c) relief for all but the most minor criminal offenses.”¹⁴⁴ Section 440(a) of AEDPA also eliminated judicial review for aliens deportable for aggravated felony convictions.¹⁴⁵

135. *Id.*

136. *Blake*, 489 F.3d at 96.

137. *Id.*

138. Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, 104 Stat. 4978 (1990).

139. *Id.* § 511.

140. See AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

141. *INS v. St. Cyr*, 533 U.S. 289, 297 (2001) (citing AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (1996) (amending 8 U.S.C. § 1182(c))). Section 440(d) of AEDPA stripped section 212(c) eligibility from any LPR deportable because of a conviction for an aggravated felony, for a drug conviction, for multiple convictions involving CIMTs, and for certain weapons or national security violations. *Id.* at 297 n.7 (citing AEDPA § 440(d)).

142. AEDPA § 440(d).

143. Moore, *supra* note 35, at 544 (citing CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 74.04(b) (rev. ed. 2003)).

144. Anthony Distinti, Note, *Gone But Not Forgotten: How Section 212(c) Relief Continues to Divide Courts Presiding over Indictments for Illegal Reentry*, 74 FORDHAM L. REV. 2809, 2821 n.103 (2006) (citing Julie K. Rannik, Comment, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. MIAMI INTER-AM. L. REV. 123, 129 (1996)).

145. Rannik, *supra* note 144, at 129 (citing AEDPA § 440(a)).

In enacting AEDPA, Congress intended to facilitate the prosecution of accused terrorists and the deportation of alien criminals.¹⁴⁶ Instead, the Act created numerous problems, including “effectively eliminat[ing section 212(c)] discretionary relief for almost all classes of aliens.”¹⁴⁷ In fact, after signing AEDPA into law, President Clinton acknowledged that it made “major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.”¹⁴⁸

On February 21, 1997, then-U.S. Attorney General Janet Reno issued a decision in *Matter of Soriano*¹⁴⁹ reversing the BIA and ruling section 440(d) of AEDPA, which expanded the definition of aggravated felony, to be retroactive.¹⁵⁰ Reno concluded that section 440(d) served as a retroactive bar to section 212(c) relief for LPRs who had not been granted the waiver prior to AEDPA’s enactment date on April 24, 1996.¹⁵¹ These LPRs were barred from section 212(c) relief even if they were already in deportation proceedings or had applied for the section 212(c) waiver before the enactment date.¹⁵²

On September 30, 1996, five months after the passage of AEDPA, Congress enacted yet another major immigration law reform, IIRIRA,¹⁵³ in order to further expedite the deportation of immigrants convicted of crimes.¹⁵⁴ IIRIRA repealed section 212(c) relief entirely for proceedings commenced on or after April 1, 1997.¹⁵⁵ It also replaced section 212(c) relief with a much narrower relief mechanism called “cancellation of removal.”¹⁵⁶ Cancellation of removal explicitly

146. Distinti, *supra* note 144, at 2821 (citing Yen H. Trinh, Note, *The Impact of New Policies Adopted After September 11 on Lawful Permanent Residents Facing Deportation Under the AEDPA and IIRIRA and the Hope of Relief Under the Family Reunification Act*, 33 GA. J. INT’L & COMP. L. 543, 548 (2005)).

147. Rannik, *supra* note 144, at 129.

148. Trinh, *supra* note 146, at 549–50 (quoting Statement by President William J. Clinton upon signing S. 735, 32 Weekly Comp. Pres. Doc. 718, Apr. 29, 1996, reprinted in 1996 U.S.C.C.A.N. 961-1, 961-3).

149. 21 I. & N. Dec. 516, 533 (B.I.A. 1996) (disapproved by Att’y Gen. 1997).

150. *Id.* at 517.

151. Moore, *supra* note 35, at 544 (citing *Matter of Soriano*, 21 I. & N. Dec. at 540).

152. *Id.* The AG’s ruling in *Matter of Soriano* gave rise to extensive federal court litigation. See Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 66 Fed. Reg. 6436, 6437–39 (Jan. 22, 2001). In January 2001, the Department of Justice issued a rule (the “Soriano rule”) allowing aliens who had been placed in deportation proceedings before April 24, 1996, to seek section 212(c) relief under the pre-AEDPA standards. Moore, *supra* note 35, at 544 (citing DOJ Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 8 C.F.R. § 1003.44 (2004)).

153. IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

154. Moore, *supra* note 35, at 544.

155. IIRIRA § 304(a)(3), (b).

156. INA § 240A, 8 U.S.C. § 1229(b) (2006) (created by IIRIRA § 304(a)(3)); Vashti D. Van Wyke, Comment, *Retroactivity and Immigrant Crimes Since St. Cyr: Emerging Signs of Judicial Restraint*, 154 U. PA. L. REV. 741, 749 (2006). The Act also “replaced the term ‘deportation’ with ‘removal,’ making ‘cancellation of removal’ the semantic equivalent of a ‘waiver of deportation.’” *Id.* at 749 n.45 (citing IIRIRA

denies the AG discretion to cancel the removal of an LPR who is convicted of an aggravated felony.¹⁵⁷

Like AEDPA, IIRIRA redefined “aggravated felony” to encompass many new offenses, including misdemeanors and low-level felonies.¹⁵⁸ Furthermore, Congress made the new definition of aggravated felony retroactive to crimes committed before the enactment of IIRIRA.¹⁵⁹ In effect, IIRIRA rendered most criminal aliens in exclusion or deportation proceedings statutorily ineligible to apply for relief from deportation.¹⁶⁰

C. Reinstatement of Section 212(c) Relief: St. Cyr and DOJ’s Final Rule

I. INS v. St. Cyr

Following Attorney General Reno’s order in *Matter of Soriano*,¹⁶¹ the BIA interpreted the 1996 amendments to apply retroactively to LPRs who had pled guilty to an aggravated felony—regardless of when they entered their plea.¹⁶² Several federal courts rejected this interpretation, however, holding that Congress did not intend for AEDPA to apply retroactively to cases pending when it was enacted.¹⁶³ In 2000, the Second Circuit took this one step further, holding that the 1996 amendments did not apply to LPRs who pled guilty to an offense that would affect their immigration status before the amendments were enacted.¹⁶⁴

In 2001, the U.S. Supreme Court agreed with the Second Circuit’s conclusion.¹⁶⁵ In its landmark decision in *INS v. St. Cyr*, the Supreme Court held that the section 212(c) waiver remains available to certain LPRs who pled guilty prior to April 1, 1997, the IIRIRA enactment date, and who were otherwise eligible for section 212(c) relief at the time of their plea.¹⁶⁶ Although the Supreme Court addressed only the retroactivity of the IIRIRA amendment, the effect of the decision was also to restore eligibility to LPRs who pled guilty prior to April 24,

§ 304(a)(3)). In addition, IIRIRA consolidated the proceedings for exclusion and deportation, formerly found at INA section 212, 8 U.S.C. § 1182(a) and INA section 241, 8 U.S.C. § 1251(a), respectively, into “removal proceedings,” found at INA section 240, 8 U.S.C. § 1229a. See *Blake v. Carbone*, 489 F.3d 88, 96 n.6 (2d Cir. 2007).

157. INA § 240A(a), 8 U.S.C. § 1229b(a) (2006) (created by IIRIRA § 304(b)); see also *Blake*, 489 F.3d at 96.

158. *Ponnapula v. Ashcroft*, 373 F.3d 480, 486 (3d Cir. 2004); *Van Wyke*, *supra* note 156, at 749 (citing IIRIRA § 321 (codified at 8 U.S.C. § 1101(a)(43))).

159. *Van Wyke*, *supra* note 156, at 749 (citing 8 U.S.C. § 1101(a)(43) (2000)).

160. *Rannik*, *supra* note 144, at 130.

161. 21 I. & N. Dec. 516, 534 (B.I.A. 1996) (Att’y Gen. 1997).

162. *Distinti*, *supra* note 144, at 2822–23, 2845 n.11.

163. See, e.g., *Goncalves v. Reno*, 144 F.3d 110, 133–34 (1st Cir. 1998); *Henderson v. INS*, 157 F.3d 106, 130 (2d Cir. 1998).

164. *St. Cyr v. INS*, 229 F.3d 406, 420 (2d Cir. 2000) (“AEDPA . . . and IIRIRA . . . have an impermissible retroactive effect as applied to pre-enactment guilty pleas.”).

165. See *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

166. *Id.*

1996, the AEDPA enactment date.¹⁶⁷ Thus, the determining factor of the applicability of the 1996 amendments is the date of the plea agreement.¹⁶⁸ According to the Court, “applying IIRIRA . . . to aliens who pleaded guilty or *nolo contendere* to crimes on the understanding that, in so doing, they would retain the ability to seek discretionary § 212(c) relief would retroactively unsettle their reliance on the state of the law at the time of their plea agreement” and therefore violate due process.¹⁶⁹

2. DOJ's Final Rule

After the Supreme Court's ruling in *St. Cyr*, the Department of Justice (DOJ) was left with the task of writing regulations to implement the decision.¹⁷⁰ In August 2002, the DOJ proposed amendments to its regulations concerning former section 212(c) relief.¹⁷¹ Among other things, the DOJ proposed that applicants for section 212(c) relief must, at a minimum, be “deportable or removable on a ground that has a corresponding ground of exclusion or inadmissibility.”¹⁷² The final rule, published on September 28, 2004, codified the comparable grounds analysis with slightly different language: an LPR is ineligible for section 212(c) relief if “[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a *statutory counterpart* in section 212 of the Act.”¹⁷³

In 2005, the BIA had its first opportunity to apply the new DOJ rules. In *Matter of Blake*, the BIA held that the aggravated felony ground of deportation for sexual abuse of a minor did not have a statutory counterpart in the most analogous ground of inadmissibility—CIMTs.¹⁷⁴ The BIA reasoned that “although there may be considerable overlap between offenses categorized as sexual abuse of a minor and those considered crimes of moral turpitude,” the statutory counterpart test should turn on “whether Congress has employed *similar language* to describe substantially equivalent categories of offenses.”¹⁷⁵ Acknowledging that the “coverage of the offenses described need not be a perfect match in order to be ‘statutory counterparts,’” the BIA nonetheless held that the two grounds lacked sufficiently similar language and denied section 212(c) eligibility to Blake.¹⁷⁶

167. Moore, *supra* note 35, at 545 (citing *Attwood v. Ashcroft*, 260 F.3d 1, 3 (1st Cir. 2001) (holding that, in light of *St. Cyr*, an LPR who pled guilty prior to AEDPA and who was placed into proceedings prior to IIRIRA is eligible for § 212(c) relief)); *see also* Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. 52,627, 52,628 (proposed Aug. 13, 2002).

168. *St. Cyr*, 533 U.S. at 325 n.55, 326.

169. *Id.* at 325 n.55.

170. Kramer, *supra* note 37, at 275.

171. Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. 52,627.

172. *Id.* at 52,628–29.

173. 8 C.F.R. § 1212.3(f)(5) (2004) (emphasis added).

174. 23 I. & N. Dec. 722, 729 (B.I.A. 2005), *vacated and remanded*, 489 F.3d 88 (2d Cir. 2007).

175. *Id.* at 728 (emphasis added).

176. *Id.* at 729.

In *Matter of Brieva-Perez*, another 2005 case, the BIA further clarified the statutory counterpart analysis.¹⁷⁷ There, the BIA denied section 212(c) eligibility to an LPR deportable for committing a crime of violence, specifically, the unauthorized use of a motor vehicle.¹⁷⁸ The BIA held that the aggravated felony “crime of violence” ground of deportation lacked a statutory counterpart in the CIMT ground of inadmissibility because of the “distinctly different terminology used to describe the two categories of offenses and the significant variance in the types of offenses covered by [the] two provisions.”¹⁷⁹

III. CIRCUIT SPLIT: AVAILABILITY OF SECTION 212(C) RELIEF FROM REMOVAL TO LPRs CONVICTED OF AN AGGRAVATED FELONY

The comparable grounds analysis is at the heart of the current circuit split concerning the availability of section 212(c) relief from removal to LPRs convicted of an aggravated felony.¹⁸⁰ A majority of the circuits, relying on the BIA’s interpretation of the comparable grounds or statutory counterpart tests, have recently denied section 212(c) relief to LPRs convicted of an aggravated felony because no comparable ground of inadmissibility could be found that was substantially identical to the aggravated felony ground of deportation.¹⁸¹ The

177. 23 I. & N. Dec. 766, 770–73 (B.I.A. 2005), *aff’d*, 482 F.3d 356 (5th Cir. 2007).

178. *Id.* (relying on controlling Fifth Circuit precedent in *United States v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999), which held that a conviction under the Texas statute prohibiting “unauthorized use of a motor vehicle” was a crime of violence under a provision of the United States Sentencing Guidelines).

179. *Id.* at 773.

180. *Compare* *Alvarez v. Mukasey*, 282 F. App’x 718 (10th Cir. 2008) (unpublished), *Falaniko v. Mukasey*, 272 F. App’x 742 (10th Cir. 2008) (unpublished), *Avilez-Granados v. Gonzales*, 481 F.3d 869 (5th Cir. 2007), *Birkett v. Att’y Gen. of the U.S.*, 252 F. App’x 516 (3d Cir. 2007) (unpublished), *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007), *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007), *Dalombo Fontes v. Gonzales*, 483 F.3d 115 (1st Cir. 2007), *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007), *Vo v. Gonzales*, 482 F.3d 363 (5th Cir. 2007), *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007), *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006), *Rubio v. U.S. Att’y Gen.*, 182 F. App’x 925 (11th Cir. 2006) (unpublished), *and Soriano v. Gonzales*, 489 F.3d 909 (8th Cir. 2006) (per curiam), *with* *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007), *and with* *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (per curiam).

181. The majority of circuits have held that the aggravated felony ground of deportability (based on the commission of a variety of offenses, depending on the particular case) is not substantially identical to, and lacks a statutory counterpart in, the CIMT ground of inadmissibility. *Dalombo Fontes*, 483 F.3d 115 (convicted of crime of violence, to wit, “first degree sexual assault”); *Kim*, 468 F.3d 58 (convicted of crime of violence, to wit, “manslaughter”); *Caroleo*, 476 F.3d 158 (convicted of “theft or burglary offense” and crime of violence, to wit, “attempted murder”); *Birkett*, 252 F. App’x 516 (convicted of crime of violence, to wit, “robbery”); *Brieva-Perez*, 482 F.3d 356 (convicted of crime of violence, to wit, “unauthorized use of a vehicle”); *Avilez-Granados*, 481 F.3d 869 (convicted of sexual abuse of a minor); *Vo*, 482 F.3d 363 (convicted of crime of violence, to wit, “unauthorized use of a motor vehicle”); *Valere*, 473 F.3d 757 (convicted of indecent assault of a minor); *Soriano*, 489 F.3d 909 (convicted of sexual abuse of a minor); *Vue*, 496 F.3d 858 (convicted

Second Circuit, on the other hand, has held that the BIA's comparable grounds analysis fails to comport with the equal protection principle set forth in *Francis* and has extended section 212(c) eligibility to certain deportable LPRs convicted of aggravated felonies.¹⁸² According to the Second Circuit, eligibility for section 212(c) relief must turn on the LPR's particular criminal offense.¹⁸³ Thus, a deportable LPR with an aggravated felony conviction is eligible for a section 212(c) waiver if his particular underlying aggravated felony offense could form the basis of a ground of exclusion.¹⁸⁴ The following sections will explain the equal protection arguments for and against extending section 212(c) eligibility to deportable LPRs convicted of an aggravated felony, as articulated by each side of the circuit split.

A. Comparable Grounds Analysis: First, Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits

A majority of the circuits that have considered the issue utilize the BIA's comparable grounds test to determine whether a deportable LPR is eligible for discretionary relief under section 212(c).¹⁸⁵ If the LPR's ground of deportation is not substantially identical or does not have a statutory counterpart in a ground of inadmissibility, the court denies eligibility for the section 212(c) waiver.¹⁸⁶ Each circuit case dealing with this issue has presented essentially the same set of facts. In each case, the LPR petitioner claimed eligibility because the conduct underlying his deportability as an aggravated felon (e.g., sexual abuse of a minor or unauthorized use of a motor vehicle) could also be classified under CIMT, which is both a ground of inadmissibility under section 212(a) and a ground of deportation waivable under section 212(c) as a statutory counterpart to the section 212(a) ground.¹⁸⁷ And in each case, the petitioner claimed that the BIA's denial of section 212(c) eligibility violated the principle of equal protection (as set forth by

of crime of violence, to wit, "first degree assault"); *Falaniko*, 272 F. App'x 742 (convicted of crime of violence, to wit, "forcible sexual abuse"); *Alvarez*, 282 F. App'x 718 (convicted of crime of violence, to wit, "second degree assault"); *Rubio*, 182 F. App'x 925 (convicted of burglary).

182. *Blake*, 489 F.3d at 101–04 (holding that LPRs could be eligible for discretionary waiver if their particular aggravated felony offenses—here, "first degree sexual abuse of a minor," "federal racketeering," "first degree manslaughter," and "murder in the second degree"—could form the basis of exclusion as crimes of moral turpitude).

183. *Id.* at 103.

184. *Id.* at 104.

185. *Alvarez*, 282 F. App'x 718; *Falaniko*, 272 F. App'x 742; *Avilez-Granados*, 481 F.3d 869; *Birkett*, 252 F. App'x 516; *Brieva-Perez*, 482 F.3d 356; *Caroleo*, 476 F.3d 158; *Dalombo Fontes*, 483 F.3d 115; *Valere*, 473 F.3d 757; *Vo*, 482 F.3d 363; *Kim*, 468 F.3d 58; *Rubio*, 182 F. App'x 925; *Soriano*, 489 F.3d 909; *Gjonaj v. INS*, 47 F.3d 824 (6th Cir. 1995) (alien deportable for firearm offense); *Vue*, 496 F.3d 858.

186. *See, e.g., Caroleo*, 476 F.3d at 162–63.

187. *See Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (per curiam); *Alvarez*, 282 F. App'x 718; *Falaniko*, 272 F. App'x 742; *Avilez-Granados*, 481 F.3d 869; *Birkett*, 252 F. App'x 516; *Blake*, 489 F.3d 88; *Brieva-Perez*, 482 F.3d 356; *Vo*, 482 F.3d 363; *Caroleo*, 476 F.3d 158; *Dalombo Fontes*, 483 F.3d 115; *Valere*, 473 F.3d 757; *Vue*, 496 F.3d 858; *Kim*, 468 F.3d 58; *Rubio*, 182 F. App'x 925; *Soriano*, 489 F.3d 909.

the Second Circuit in *Francis*¹⁸⁸ and adopted by the BIA in *Matter of Silva*¹⁸⁹, because had the petitioner left the country and sought readmission, he would have been eligible to apply for a waiver of his aggravated felony.¹⁹⁰ Thus, according to the petitioners, the comparable grounds analysis as set forth in *Matter of Blake* creates classes of LPRs who are treated differently without any rational justification.¹⁹¹

The majority of the circuits have disagreed with this interpretation of the comparable grounds analysis.¹⁹² To these circuits, it is irrelevant that the government *could have* sought to exclude the LPR on a CIMT ground of inadmissibility had the LPR left the country and returned after his conviction.¹⁹³ The circuits refuse to “adopt [such] a factual approach.”¹⁹⁴ Instead, they examine and compare the classes of aliens created by the removal provisions.¹⁹⁵ According to the First Circuit in *Dalombo Fontes v. Gonzales*, *Francis*’s equal protection analysis requires only that “any statutory waiver opportunity available to an excludable person must be available to a deportable person.”¹⁹⁶ In each of the representative cases, the LPR petitioner was found to be deportable under the “aggravated felony” or “crime of violence” grounds of deportation.¹⁹⁷ As “aggravated felony” and “crime of violence” are not statutory grounds of exclusion, the exclusion statute did not provide the authority for waivers corresponding to those grounds.¹⁹⁸ And because Congress did not provide waivers of exclusion for those grounds, it need not provide waivers of deportation on those grounds.¹⁹⁹ In keeping with this line of reasoning, a majority of the circuits claim that the LPR petitioners do not even present an equal protection claim.²⁰⁰

Clarifying and enforcing the requirements of the statutory counterpart analysis as set forth in *Matter of Blake*²⁰¹ and *Matter of Brieva-Perez*,²⁰² the

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188. *Francis v. INS*, 532 F.2d 268, 272–73 (2d Cir. 1976).
 189. 16 I. & N. Dec. 26, 30 (B.I.A. 1976).
 190. *See, e.g., Vo*, 482 F.3d at 371.
 191. *See, e.g., Blake*, 489 F.3d 88.
 192. *See Alvarez*, 282 F. App’x 718; *Falaniko*, 272 F. App’x 742; *Avilez-Granados*, 481 F.3d 869; *Birkett*, 252 F. App’x 516; *Brieva-Perez*, 482 F.3d 356; *Caroleo*, 476 F.3d 158; *Dalombo Fontes*, 483 F.3d 115; *Valere*, 473 F.3d 757; *Vo*, 482 F.3d 363; *Vue*, 496 F.3d 858; *Kim*, 468 F.3d 58; *Rubio*, 182 F. App’x 925; *Soriano*, 489 F.3d 909.
 193. *E.g., Caroleo*, 476 F.3d at 168.
 194. *Id.* at 166 (quoting *Komarenko v. INS*, 35 F.3d 432, 435 (9th Cir. 1994)).
 195. *See, e.g., id.* at 168.
 196. *Dalombo Fontes*, 483 F.3d at 123 (citing *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976)).
 197. *See id.*; *Alvarez*, 282 F. App’x 718; *Falaniko*, 272 F. App’x 742; *Avilez-Granados*, 481 F.3d 869; *Birkett*, 252 F. App’x 516; *Brieva-Perez*, 482 F.3d 356; *Caroleo*, 476 F.3d 158; *Valere*, 473 F.3d 757; *Vo*, 482 F.3d 363; *Vue*, 496 F.3d 858; *Kim*, 468 F.3d 58; *Rubio*, 182 F. App’x 925; *Soriano*, 489 F.3d 909.
 198. *Dalombo Fontes*, 483 F.3d at 123.
 199. *Id.*
 200. *E.g., id.*
 201. 23 I. & N. Dec. 722, 728 (B.I.A. 2005), *vacated and remanded*, 489 F.3d 88 (2d Cir. 2007).

majority of the circuits have rejected the argument that a deportable LPR satisfies the statutory counterpart test because his particular criminal convictions (e.g., sexual abuse of a minor) could constitute “crimes involving moral turpitude,” one of the grounds of inadmissibility under section 212(a).²⁰³ Instead, the “linchpin” of the statutory counterpart and equal protection analyses is that the *grounds* of deportation and inadmissibility be substantially identical, utilizing similar language.²⁰⁴ As the Third Circuit explained in *Caroleo v. Gonzales*:

In an application for § 212(c) relief—i.e. a discretionary waiver of removal, the alien’s removability has already been established—i.e., it has already been determined that the underlying crime for which he has been convicted falls within one of INA § 237’s grounds for removal. The relevant statutory counterpart inquiry then looks—not to the underlying criminal conviction—but rather to the statutory ground for removal contained in INA § 237 and whether it has a counterpart in the statutory ground for exclusion provisions of INA § 212(a).²⁰⁵

Thus, there is a difference between the preliminary question of deportability under section 237 and the statutory counterpart test for discretionary relief under section 212(c).²⁰⁶ Because the statutory ground for deportation—“aggravated felony”—does not have a substantially identical counterpart in any ground of inadmissibility, the majority of the circuits have held that the removable LPR is not similarly situated to an inadmissible, returning alien for purposes of claiming an equal protection right to apply for section 212(c) relief.²⁰⁷

B. Offense-Specific Analysis: Second Circuit

In contrast to the majority of the circuits, the Second Circuit has found no reason to defer to the BIA’s interpretation of the statutory counterpart test and, in *Blake v. Carbone*, held that the test failed to comport with the equal protection

202. 23 I. & N. Dec. 766, 770–73 (B.I.A. 2005), *aff’d*, 482 F.3d 356 (5th Cir. 2007).

203. See *Alvarez v. Mukasey*, 282 F. App’x 718, 723 (10th Cir. 2008) (unpublished); *Falaniko v. Mukasey*, 272 F. App’x 742, 748–49 (10th Cir. 2008) (unpublished); *Avilez-Granados v. Gonzales*, 481 F.3d 869, 872 (5th Cir. 2007); *Birkett v. Att’y Gen. of the U.S.*, 252 F. App’x 516, 518 (3d Cir. 2007) (unpublished); *Brieva-Perez v. Gonzales*, 482 F.3d 356, 362 (5th Cir. 2007); *Caroleo v. Gonzales*, 476 F.3d 158, 168 (3d Cir. 2007); *Dalombo Fontes*, 483 F.3d at 123; *Valere v. Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007); *Vo v. Gonzales*, 482 F.3d 363, 371–72 (5th Cir. 2007); *Vue v. Gonzales*, 496 F.3d 858, 860–63 (8th Cir. 2007); *Kim v. Gonzales*, 468 F.3d 58, 62–63 (1st Cir. 2006); *Rubio v. U.S. Att’y Gen.*, 182 F. App’x 925, 929 (11th Cir. 2006) (unpublished).

204. *Caroleo*, 476 F.3d at 165, 168 (quoting *Komarenko v. INS*, 35 F.3d 432, 435 (9th Cir. 1994)).

205. *Id.* at 164 (emphasis omitted).

206. *Id.*

207. *Alvarez*, 282 F. App’x at 723; *Falaniko*, 272 F. App’x at 748–49; *Avilez-Granados*, 481 F.3d at 872; *Birkett*, 252 F. App’x at 518–19; *Brieva-Perez*, 482 F.3d at 362; *Caroleo*, 476 F.3d at 168; *Dalombo Fontes*, 483 F.3d at 123; *Valere*, 473 F.3d at 762; *Vo*, 482 F.3d at 371–72; *Vue*, 496 F.3d at 860; *Kim*, 468 F.3d at 62–63; *Rubio*, 182 F. App’x at 929; *Soriano v. Gonzales*, 489 F.3d 909, 909 (8th Cir. 2006) (per curiam).

principles set forth in *Francis*.²⁰⁸ The court rejected the government's argument for deference, which rested on the U.S. Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁰⁹ requiring "a court to defer to an agency's interpretation of a statute it is charged with enforcing should the court conclude the agency has provided a reasonable interpretation of an *ambiguous* statute."²¹⁰

Although the Second Circuit acknowledged that the BIA does indeed enforce and interpret the INA, it held that the BIA was not entitled to *Chevron* deference because the court was not dealing with an ambiguous statute.²¹¹ In fact, it found the language of section 212(c) to be unambiguous: the AG lacks authority to grant a waiver to an LPR who is "under an order of deportation."²¹² Therefore, the court held that the LPR petitioners, as deportees, were outside the reach of the statute.

According to the Second Circuit, the only ambiguity arose not from the statutory language but "from the BIA's gloss on *Francis*."²¹³ The court claimed that the statutory counterpart rule was a "creature of constitutional avoidance," arising not from an agency's expertise and experience in a particular realm of delegated lawmaking but from the constitutional ramifications of *Francis*.²¹⁴ In *Francis*, the court interpreted section 212(c) so as to avoid its unconstitutional application: LPRs should receive similar treatment under section 212(c) regardless of whether they are in deportation or exclusion proceedings.²¹⁵ The obligation to uphold and implement that decision and the guarantee of equal protection rests with the court, and therefore, deference to an agency's determination of equal protection is inappropriate.²¹⁶

In *Blake*, the BIA held that the LPR petitioners were ineligible for section 212(c) relief due to the lack of substantially similar language in the grounds of deportation and exclusion. The Second Circuit found this emphasis on similar language to be strange because Congress designed section 212(c) only to waive grounds of exclusion; it never conceived of the possibility that its grounds of exclusion would have anything to do with the grounds of deportation.²¹⁷ The expansion of section 212(c) relief into the deportation context was not what Congress drafted or intended with the statute.²¹⁸ Rather, this expansion was compelled by the Constitution and mandated in *Francis*. As a result, Congress had no need to employ similar language in the grounds of deportation and exclusion.²¹⁹

208. 489 F.3d 88, 100 (2d Cir. 2007).

209. 467 U.S. 837 (1984).

210. *Blake*, 489 F.3d at 100 (citing *Chevron*, 467 U.S. at 842–43) (emphasis added).

211. *Id.*

212. INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

213. *Blake*, 489 F.3d at 100.

214. *Id.*

215. *Id.* at 100–01.

216. *Id.* at 100.

217. *Id.* at 102.

218. *Id.*

219. *Id.*

Thus, according to the court, the statutory counterpart's search for similar language is "an exercise in futility."²²⁰

The Second Circuit addressed the BIA's concern about "incidental overlap" between grounds of exclusion and deportation.²²¹ Agreeing that mere incidental overlap between grounds is not sufficient for section 212(c) relief eligibility, the court found that the other extreme—requiring that all of the offenses under a particular ground of deportation must also fall under the counterpart ground of exclusion—had no support in precedent.²²² According to the court, the focus of *Francis* was the "irrelevant and fortuitous" circumstance of traveling abroad and returning.²²³ *Francis* did not decide whether all or most of the offenses encompassed under a particular ground of deportation must fall under the counterpart ground of exclusion.²²⁴ Rather, it held that eligibility for section 212(c) relief depended on "whether the [LPR's] offense could trigger § 212(c) were he in exclusion proceedings, not how his offense was categorized as a ground of deportation."²²⁵

In conclusion, the Second Circuit held that the LPR petitioners' eligibility for section 212(c) relief must depend on their particular criminal offenses (here, sexual abuse of a minor, racketeering, first-degree manslaughter, and second-degree murder) and not on the statutory ground of deportation (here, aggravated felony) under which the offenses are encompassed.²²⁶ Thus, a deportable LPR is eligible for section 212(c) relief if the offense that forms the basis for his deportation would make a similarly situated LPR inadmissible.²²⁷ This is in keeping with *Francis*'s mandate to ensure that LPRs who are similarly situated, but for "irrelevant and fortuitous factors," are treated similarly.²²⁸ Therefore, according to the Second Circuit, it is the LPR's particular act or offense, classified in the INA under a ground of deportation or exclusion, that makes one LPR similarly situated to another.²²⁹

Using this formulation of the analysis required by *Francis*, the Second Circuit held that Blake and his fellow petitioners, each deportable as an aggravated felon, were eligible for section 212(c) relief if their particular aggravated felony offenses could form the basis of exclusion under section 212(a) as CIMTs.²³⁰ The court highlighted the fact that its decision was limited to the equal protection principle articulated in *Francis*²³¹ and did not extend the AG's discretion beyond the statutory grounds of exclusion, did not make section 212(c) relief available to

220. *Id.*

221. *Id.* (citing *Matter of Brieva-Perez*, 23 I. & N. Dec. 766, 773 (B.I.A. 2005), *aff'd*, 482 F.3d 356 (5th Cir. 2007)).

222. *Id.*

223. *Id.* (quoting *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976)).

224. *Id.*

225. *Id.*

226. *Id.* at 103.

227. *Id.*

228. *Francis*, 532 F.2d at 273.

229. *Blake*, 489 F.3d at 104.

230. *Id.*

231. *Id.*

all deportable aggravated felons, and did not put deportees in a better position than excludées.²³²

C. Rejection of Francis and Section 212(c) Relief in Deportation Proceedings: Ninth Circuit

The Ninth Circuit, once at the forefront of the circuits applying the statutory counterpart test to determine eligibility for section 212(c) relief in deportation proceedings, has since dramatically reversed course by rejecting the equal protection analysis mandated in *Francis* and by refusing to employ the BIA's comparable grounds test.²³³ In *Abebe v. Mukasey*, an Ethiopian LPR petitioner was deportable as having committed "sexual abuse of a minor," an aggravated felony.²³⁴ Both the immigration judge and BIA found the LPR ineligible for a section 212(c) waiver of deportation.²³⁵ Utilizing the "substantially identical" statutory counterpart test adopted in *Komarenko*, the original Ninth Circuit three-judge panel affirmed, holding that the LPR's aggravated felony ground of deportation was not substantially identical to the most analogous ground of inadmissibility—CIMT.²³⁶

Rehearing the case en banc in 2008, the Ninth Circuit rejected *Francis* and overruled its holding in *Tapia-Acuna* that "there's no rational basis for providing section 212(c) relief from inadmissibility, but not deportation."²³⁷ Employing a standard of "bare rationality," the court identified a rational basis for granting more immigration relief to aliens who temporarily depart and attempt to reenter the country than to those aliens who simply remain: Congress could have limited the availability of section 212(c) relief to those aliens seeking to enter the United States to encourage so-called "self-deportation."²³⁸ By creating an incentive for deportable LPRs to voluntarily leave the United States, the government could save scarce resources—"a legitimate congressional objective."²³⁹ The court concluded that the LPR petitioner's right to equal protection was not violated when he was denied eligibility for the waiver.²⁴⁰ The court reasoned that because the waiver, by its plain language, only provides relief from inadmissibility, the LPR

232. *Id.*

233. *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (per curiam). Note that the court had originally adopted *Francis*' equal protection analysis in *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981), and adopted the BIA's comparable grounds test in *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994).

234. 554 F.3d at 1204.

235. *Id.* at 1204–05.

236. *Abebe v. Gonzales*, 493 F.3d 1092, 1104–05 (9th Cir. 2007), *vacated*, 514 F.3d 909 (9th Cir. 2008), *reh'g en banc sub nom. Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (per curiam).

237. *Abebe v. Mukasey*, 554 F.3d at 1207. Furthermore, as a necessary extension of overruling *Tapia-Acuna*, the court discarded *Komarenko* as a "dead letter." *Id.* According to the majority, *Komarenko*'s "only purpose was to fill a gap created by *Tapia-Acuna*." *Id.*

238. *Id.* at 1206.

239. *Id.*

240. *Id.* at 1207.

was not eligible for section 212(c) relief in the first place, and thus no equal protection violation could have occurred when he was denied such relief.²⁴¹

In a concurring opinion, Judge Richard Clifton argued that the court could have reached the same result as the original three-judge panel by simply applying the court's existing precedent in *Komarenko*, i.e., acknowledging the equal protection issue identified in *Francis* and adopted in *Tapia-Acuna* and utilizing the statutory counterpart test to extend section 212(c) relief to LPRs in deportation proceedings.²⁴² On the other hand, Judge Sidney Thomas, in a dissenting opinion, rejected the substantially identical statutory counterpart test and argued that the offense-specific analysis adopted by the Second Circuit in *Blake* is "the only constitutional interpretation of the statute."²⁴³ In any case, both judges shared concern with the majority overruling more than twenty-seven years of the Ninth Circuit's own precedent and over sixty years of agency precedent in granting discretionary relief to LPRs in deportation or removal proceedings.²⁴⁴ In addition to overruling established precedent, the majority held "that sixty-eight years of agency practice was contrary to the will of Congress and in violation of the plain language of the statute the agency is charged with interpreting."²⁴⁵ Furthermore, Judge Clifton attacked the "rational basis" the majority identified as justifying the provision of section 212(c) relief from inadmissibility, but not deportation, as speculation, "tortured construct," and based "on a tenuous chain of inferences."²⁴⁶ One thing is for sure: the majority has now created a three-way circuit split among the majority of the circuits (interpreting *Francis* and the comparable grounds test to require a statutory counterpart analysis), the Second Circuit (interpreting *Francis* and the comparable grounds test to require an offense-specific analysis), and the Ninth Circuit (rejecting *Francis*, the comparable grounds analysis, and the extension of the section 212(c) waiver to deportable aliens in removal proceedings).²⁴⁷

IV. EQUAL PROTECTION REQUIRES A RESOLUTION OF THE CIRCUIT SPLIT IN FAVOR OF THE SECOND CIRCUIT'S OFFENSE- SPECIFIC ANALYSIS

In order to safeguard the Constitution's guarantee of equal protection for LPRs in deportation proceedings, the Supreme Court must address the differing approaches of the circuits regarding section 212(c) eligibility for deportable LPRs convicted of aggravated felonies. The Court should adopt the Second Circuit's analysis, discarding the comparable grounds test and focusing on the deportee's particular *offense* in determining eligibility for section 212(c) relief. Unlike the comparable grounds test, the Second Circuit's focus on the particular criminal offense is in keeping with *Francis*'s mandate to ensure that LPRs who are

241. *Id.*

242. *Id.* at 1208 (Clifton, J., concurring).

243. *Id.* at 1218–19 (Thomas, J., dissenting).

244. *Id.* at 1208 (Clifton, J., concurring); *id.* at 1213 (Thomas, J., dissenting).

245. *Id.* at 1210 (Clifton, J., concurring).

246. *Id.*

247. *Id.* at 1211.

similarly situated, but for “irrelevant and fortuitous factors,” are treated similarly.²⁴⁸

Furthermore, the Second Circuit’s analysis is “one with which the BIA has much experience, having performed a similar analysis in a number of deportees’ § 212(c) waiver requests.”²⁴⁹ For example, in *Matter of Meza*, the BIA held that a section 212(c) waiver “is not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, ‘convicted of an aggravated felony.’”²⁵⁰ In that case, the BIA looked to the particular criminal offense (a controlled substance violation) that made the LPR deportable as an aggravated felon and determined that it could also form the basis for excludability under section 212(a)(23).²⁵¹ Therefore, Meza was not precluded from establishing eligibility for section 212(c) relief.

LPRs in removal proceedings are entitled to the constitutional guarantee of equal protection as incorporated by the Due Process Clause.²⁵² Distinctions between classes of deportable LPRs that touch on their right to remain in the country are subject to rational basis review.²⁵³ Thus, any such distinctions or classifications cannot be arbitrary, but must be reasonable, bearing a rational relation to some legitimate government interest.²⁵⁴

Under the comparable grounds analysis currently employed by a majority of the circuits, LPRs who have committed the same criminal offense are treated differently in removal proceedings based on arbitrary classifications unrelated to the purpose of the section 212(c) waiver.²⁵⁵ In the words of the *Francis* court, LPRs who are similarly situated, but for “irrelevant and fortuitous factors,” are *not* treated similarly under this approach.²⁵⁶ This unconstitutional result can be avoided only by employing the Second Circuit’s section 212(c) eligibility analysis. Immigration courts must focus on a deportee’s particular offense and not the ground of deportation in determining eligibility for a section 212(c) waiver. Although the majority of circuits believe they are correctly interpreting *Francis* by employing the BIA’s comparable grounds and statutory counterpart analysis, section 212(c) eligibility should hinge on whether the LPR’s particular aggravated felony offense could have formed the basis of exclusion under section 212(a) as a CIMT.

248. *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976).

249. *Blake v. Carbone*, 489 F.3d 88, 104 (2d Cir. 2007) (citing as examples, *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (B.I.A. 2005), *aff’d*, 482 F.3d 356 (5th Cir. 2007); *Matter of Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991)).

250. 20 I. & N. Dec. 257, 259 (B.I.A. 1991).

251. *Id.*

252. *See* cases cited *supra* note 10.

253. *See Francis*, 532 F.2d at 272.

254. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993); *Francis*, 532 F.2d at 272 (citing *Stanton v. Stanton*, 421 U.S. 7, 14 (1975)).

255. *Compare Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007), *with Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007).

256. *Francis*, 532 F.2d at 273.

A. The Equal Protection Analysis in Francis Requires an Offense-Specific Solution

In a concurring opinion in *Abebe v. Gonzales*, Ninth Circuit Judge Marsha Berzon provides three compelling reasons why the equal protection analysis set forth in *Francis* requires an offense-specific solution, rather than the ground-specific analysis.²⁵⁷ First, *Francis* identified the arbitrary and unconstitutional distinction between deportable LPRs who were similarly situated except for the fact that one had departed and attempted to reenter the country, and the other had remained. The comparable grounds test has made the availability of section 212(c) relief dependent on an equally arbitrary distinction—a distinction between two groups of deportable LPRs, both of which would have been excludable had they sought to reenter after leaving the country.²⁵⁸ Under the comparable grounds test, an LPR who is deportable and excludable for a particular criminal offense may not be eligible for section 212(c) relief from deportation because the ground of deportation that encompasses his offense does not have a linguistic or statutory counterpart in a ground of exclusion. However, another LPR who is deportable and excludable for a different criminal offense is eligible for section 212(c) relief simply because his offense is encompassed by a ground of deportation that uses similar words to a ground of exclusion. Judge Berzon is correct in concluding that this distinction serves no rational purpose: “Although important policy considerations inform decisions about which offenses trigger deportability and excludability, the size, scope, and overlap of categories of deportable offenses and categories of excludable offenses reflect no rational judgment about which individuals deserve to stay in or enter the country.”²⁵⁹

Second, the comparable grounds test is at odds with how section 212(c) relief operates once it has been granted to an LPR. It is established that when an LPR is granted a waiver of excludability under section 212(c), the LPR cannot later be excluded or deported due solely to the particular criminal offense that rendered him excludable, even if there is a ground of deportation that applies to the offense and is different than the original ground that permitted the section 212(c)

257. 493 F.3d 1092, 1108–10 (9th Cir. 2007) (Berzon, J., concurring), *vacated*, 514 F.3d 909 (9th Cir. 2008), *reh’g en banc sub nom. Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (per curiam). Judge Berzon wrote separately because she disagreed with the equal protection analysis used by the majority. She would have decided the case as the Second Circuit decided *Blake* were she not constrained by Ninth Circuit precedent in *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994). According to Judge Berzon, *Komarenko*, which held that the “linchpin” of section 212(c) eligibility is not the LPR’s offense but rather the similarity between the statutory text of grounds of exclusion and grounds of deportation, was wrongly decided. *Abebe v. Gonzales*, 493 F.3d at 1106. It is important to note, as mentioned in Part III.A, *supra*, that the Ninth Circuit has since abrogated the reasoning behind its holding in *Abebe v. Gonzales*, essentially creating a three-way circuit split. *See Abebe v. Mukasey*, 554 F.3d 1203. However, Judge Berzon’s concurring opinion remains as relevant and significant as ever in the current circuit split. In fact, Judge Berzon’s opinion may have even gained momentum as the Ninth Circuit declared *Komarenko*—precedent by which Judge Berzon felt constrained—to be moot, or “dead letter.” *Id.* at 1207.

258. *Abebe v. Gonzales*, 493 F.3d at 1108–09.

259. *Id.* at 1109.

waiver.²⁶⁰ So, in fact, section 212(c) relief “is itself offense-specific, *not* ground-specific, and the BIA is thus entirely inconsistent in its application of ground-specific and offense-specific analysis.”²⁶¹ The departure that the comparable grounds test makes from the reality of how section 212(c) relief operates once again creates inexplicable distinctions in the treatment of similarly situated LPRs.

Third, although the Supreme Court has not directly ruled on the issue at hand, it has assumed a position consistent with the Second Circuit’s approach. In *St. Cyr*, the Supreme Court noted that “[t]he extension of § 212(c) relief to the deportation context has had great practical importance, because deportable offenses have historically been defined broadly.”²⁶² The Court went on to give an example of the crimes that could be waived under section 212(c), citing a large and growing category of deportable offenses called “aggravated felon[ies].”²⁶³ However, it is exactly this category of offenses that the majority of the circuits are most likely to render unwaivable under section 212(c).²⁶⁴

B. Deference to the BIA’s Comparable Grounds/Statutory Counterpart Test Is Inappropriate

The majority of circuits have deferred to the BIA’s interpretation of DOJ’s final statutory counterpart rule, as set forth in *Matter of Blake*²⁶⁵ and *Matter of Brieva-Perez*.²⁶⁶ However, the Supreme Court should not defer to the BIA’s comparable grounds test to resolve the circuit split because it: (1) conflicts with past BIA interpretations of the comparable grounds test; (2) is not entitled to deference under *Chevron* analysis; and (3) raises serious constitutional equal protection concerns.

The BIA’s *Blake/Brieva-Perez* statutory counterpart rule adopted by the majority of the circuits conflicts with past BIA interpretations of the comparable grounds test and therefore deserves “considerably less deference.”²⁶⁷ In *INS v. Cardoza-Fonseca*, a case dealing with the BIA’s interpretation of an asylum provision, the Supreme Court rejected the government’s request for heightened deference because of the inconsistency of the BIA’s positions on the matter through the years.²⁶⁸ According to the Court, “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is

260. *Id.* (citing *Molina-Amezcuca v. INS*, 6 F.3d 646, 647–48 (9th Cir. 1993) (per curiam); *Matter of Balderas*, 20 I. & N. Dec. 389, 392 (B.I.A. 1991); *Matter of Gordon*, 20 I. & N. Dec. 52, 56 (B.I.A. 1989); *Matter of Mascorro-Perales*, 12 I. & N. Dec. 228, 229–32 (B.I.A. 1967); *Matter of G-A-*, 7 I. & N. Dec. 274, 275–76 (B.I.A. 1956)).

261. *Id.*

262. *INS v. St. Cyr*, 533 U.S. 289, 295 (2001).

263. *Id.* at 295 & n.4.

264. *Abebe v. Gonzales*, 493 F.3d at 1110.

265. 23 I. & N. Dec. 722 (B.I.A. 2005), *vacated and remanded*, 489 F.3d 88 (2d Cir. 2007).

266. 23 I. & N. Dec. 766 (B.I.A. 2005), *aff’d*, 482 F.3d 356 (5th Cir. 2007).

267. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

268. *Id.*

‘entitled to considerably less deference’ than a consistently held agency view.²⁶⁹ Here, contrary to the assertions of the majority of the circuits, the BIA has not been consistent in its provision of the section 212(c) waiver in the deportation context.²⁷⁰ For decades the BIA has alternated between versions of a statutory counterpart test and an offense-specific inquiry.²⁷¹ Although the BIA’s most recent interpretation of the test in *Matter of Blake* and *Matter of Brieva-Perez* clearly adopts the comparable grounds approach, historically this has not always been the case. In fact, several landmark BIA decisions—including *Matter of L*²⁷² (the first extension of Seventh Proviso relief into the deportation context), *Matter of G-A*,²⁷³ and *Matter of Silva*²⁷⁴ (in which the BIA acquiesced in *Francis*’s equal protection requirements)—appear to adopt an offense-specific analysis.²⁷⁵ Additionally, in several cases, while purporting to use a comparable grounds analysis, the BIA actually utilized what appears to be an offense-specific inquiry.²⁷⁶ Because of this inconsistency, the BIA’s interpretation of the comparable grounds test is entitled to substantially less deference, and the majority of circuits should not have adhered to its interpretation on the basis of BIA precedent alone. Similarly, the Supreme Court should not defer to the BIA’s interpretation.

The agency’s final rule and regulation and the BIA’s *Blake/Brieva-Perez* interpretation of the statutory counterpart rule are not entitled to deference under *Chevron* analysis. The familiar administrative deference doctrine in *Chevron* requires a court to defer to an agency’s interpretation of a statute it is charged with enforcing if: (1) the court finds the statute is ambiguous and (2) the agency has provided a reasonable or permissible interpretation.²⁷⁷ However, if the statutory language is unambiguous, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”²⁷⁸ Courts agree that *Chevron* analysis applies when a court reviews the BIA’s interpretation of the INA.²⁷⁹ Through delegated power from the AG, the BIA has the authority to interpret and enforce the INA and to fill any statutory gaps.²⁸⁰ There is no ambiguity here, however, as the language of section 212(c) is clear: the AG may not grant a waiver to LPRs who are “under an order of

269. *Id.* (quoting *Watt*, 451 U.S. at 273).

270. For a thorough and compelling analysis of the inconsistency of BIA section 212(c) jurisprudence, see Sarah Koteen Barr, *C Is for Confusion: The Tortuous Path of Section 212(c) Relief in the Deportation Context*, 12 LEWIS & CLARK L. REV. 725, 729–49 (2008).

271. *See id.*

272. 1 I. & N. Dec. 1 (B.I.A. 1940) (approved by Att’y Gen. 1940).

273. 7 I. & N. Dec. 274 (B.I.A. 1956).

274. 16 I. & N. Dec. 26 (B.I.A. 1976).

275. *See* Barr, *supra* note 270.

276. *See Matter of Granados*, 16 I. & N. Dec. 726 (B.I.A. 1979); *Matter of Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991); Barr, *supra* note 270, at 737–39.

277. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

278. *Id.*

279. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

280. INA § 103(g), 8 U.S.C. § 1103(g) (2006).

deportation.”²⁸¹ Deportable LPRs are outside the reach of section 212(c) discretionary relief under the plain meaning of the statute. Because the statute is unambiguous, the BIA’s interpretation (i.e., the statutory counterpart test) is not entitled to deference under *Chevron* analysis, and the Supreme Court should not and need not reach the question of its reasonableness under step two of the *Chevron* analysis.

As stated by the Second Circuit, the only difficulty in interpreting section 212(c) arises “from the BIA’s gloss on *Francis*”—not from the statutory language.²⁸² The statutory counterpart test is a “creature of constitutional avoidance” that arose not from the BIA’s expertise and experience in a particular realm of delegated lawmaking but from the constitutional ramifications of *Francis*.²⁸³ The Supreme Court has established that courts will and should interpret statutes to avoid constitutional infirmities: “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”²⁸⁴ In *Francis*, the Second Circuit interpreted section 212(c) so as to avoid its unconstitutional application.²⁸⁵ The obligation to uphold the constitutional guarantee of equal protection and ensure the compliance of the executive and legislative branches rests with the courts, and, therefore, deference to an agency’s determination of the guarantee of equal protection is inappropriate.²⁸⁶

C. The Second Circuit’s Offense-Specific Inquiry Comports with Supreme Court Equal Protection Jurisprudence

In resolving the circuit split, instead of deferring to the BIA as the majority of the circuits have done, the Supreme Court must look to its own equal protection jurisprudence. The BIA’s interpretation of the DOJ’s final statutory counterpart rule, as set forth in *Matter of Blake*²⁸⁷ and *Matter of Brieva-Perez*²⁸⁸ and adopted by the majority of the circuits, is unconstitutional because it fails to provide equal protection to a class of deportable LPRs. The Supreme Court should adopt the Second Circuit’s offense-specific inquiry, as it comports with both *Francis* and Supreme Court equal protection jurisprudence.

281. INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

282. *Blake v. Carbone*, 489 F.3d 88, 100 (2d Cir. 2007).

283. *Id.*

284. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499–501, 504 (1979)).

285. *Blake*, 489 F.3d at 100.

286. *Id.*; see also *Williams v. Babbitt*, 115 F.3d 657, 661–63 (9th Cir. 1997) (allowing “constitutional narrowing” to displace the presumption of *Chevron* deference where an agency interpretation raises serious and grave constitutional concerns or objections).

287. 23 I. & N. Dec. 722, 729 (B.I.A. 2005), *vacated and remanded*, 489 F.3d 88 (2d Cir. 2007).

288. 23 I. & N. Dec. 766 (B.I.A. 2005), *aff’d*, 482 F.3d 356 (5th Cir. 2007).

As noted above, criminal aliens in removal proceedings are entitled to the constitutional guarantee of equal protection.²⁸⁹ Although a permanent resident alien's right to remain in the United States is not a "fundamental right" subject to strict judicial scrutiny,²⁹⁰ "[d]eportation can be the equivalent of banishment or exile."²⁹¹ Thus, classifications touching on the right of permanent resident aliens to remain in the United States are subject to rational basis review.²⁹² Under rational basis review, a classification must bear a rational relation to some legitimate government interest in order to avoid running afoul of the constitutional guarantee of equal protection.²⁹³ Such scrutiny requires that distinctions between different classes of people be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."²⁹⁴ The rational basis test is a relatively relaxed and deferential standard. The legitimate government interest does not have to be the government's actual interest or purpose in enacting the statute, but may simply be a conceivable, post hoc interest.²⁹⁵ However, a challenged classification scheme that is arbitrary—having no rational relationship to that legitimate government interest—violates the constitutional guarantee of equal protection under the rational basis standard.²⁹⁶ Likewise, a classification scheme based on grounds that are entirely irrelevant to the achievement of the government's interest may violate equal protection.²⁹⁷

The respective classification schemes created by the Ninth Circuit in *Abebe v. Mukasey* and by the majority of the circuits employing the BIA's substantially identical statutory counterpart analysis fail the rational basis test and thus violate the constitutional guarantee of equal protection. In contrast, the Second Circuit's offense-specific analysis better comports with the Supreme Court's equal protection jurisprudence. It does not create an arbitrary classification scheme based on the "irrelevant and fortuitous" circumstance of traveling abroad²⁹⁸—the touchstone of *Francis*—and it is the only constitutional application of section 212(c) relief in the deportation context.

In *Abebe v. Mukasey*, the Ninth Circuit rejected *Francis* and overruled *Tapia-Acuna's* holding "that there's no rational basis for providing section 212(c) relief from inadmissibility, but not deportation."²⁹⁹ The rational basis the court identified for limiting section 212(c) relief to LPRs in exclusion proceedings was

289. See cases cited *supra* note 10.

290. *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976).

291. *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

292. *Francis*, 532 F.2d at 272.

293. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993).

294. *Francis*, 532 F.2d at 272 (quoting *Stanton v. Stanton*, 421 U.S. 7, 14 (1975)).

295. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

296. See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 502 (1979); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

297. See *Clements v. Fashing*, 457 U.S. 957 (1982); *Harris v. McRae*, 448 U.S. 297, 322 (1980).

298. *Francis*, 532 F.2d at 273.

299. *Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (per curiam).

Congress's desire to encourage the self-deportation of deportable LPRs in order to save the government (and taxpayers) scarce resources that would otherwise be used to arrest and deport such aliens.³⁰⁰ Although saving scarce resources may be "a legitimate congressional objective,"³⁰¹ the classification scheme the court implements is arbitrary and based on grounds that are entirely irrelevant to the achievement of the government's objective. Judge Clifton is justified in attacking the majority's rational basis analysis as being a "tortured construct" of Congressional intent, relying "on a tenuous chain of inferences," and lacking "rational bounds."³⁰² Although it is true that the court is not required to cite the actual rationale for the legislation in question, it is worth noting that the majority found it necessary to acknowledge that its inquiry "focuses on whether a *hypothetically* rational Congress" could have adopted the given legislation.³⁰³

In fact, there is no rational basis for the unequal treatment created by the majority's holding. As illustrated by Judge Thomas in his dissent, the majority's rational basis reasoning is flawed for two reasons.³⁰⁴ First, there is no support for the contention that self-deportation would actually further the government's interest in saving scarce resources. No fewer government resources are expended if a deportable LPR leaves the country, is deemed inadmissible at a port of entry, and is given the opportunity to apply for a section 212(c) waiver from within the country (as is usually the case), than if the LPR simply applies for the waiver in deportation proceedings.³⁰⁵ This is so because if the LPR in the exclusion proceeding is denied section 212(c) relief, the government must institute removal proceedings anyway. Furthermore, the majority's construction of the statute might actually increase the number of deportation proceedings and thereby increase the expenditure of government resources.³⁰⁶

Second, the government interest the majority identifies is in direct conflict with the statute itself. In creating section 212(c) relief, Congress identified a class of aliens it "deemed worthy to remain in the country, in spite of having been convicted of particular crimes"—subject, of course, to the discretion of the AG.³⁰⁷ However, this congressional intent conflicts with the majority's assertion that a rational Congress would want to encourage the self-deportation of this same class. There is simply no rational or legitimate reason to discriminate between members of this favored group based solely on the whether or not they have departed and reentered the country. Recognizing the relatively low threshold mandated by minimal scrutiny, the rational basis justifications for discriminating between LPRs who depart and return to the country and those who simply remain must nonetheless "be made of sterner stuff."³⁰⁸

300. *Id.* at 1206.

301. *Id.*

302. *Id.* at 1210 (Clifton, J., concurring).

303. *Id.* at 1206 n.4 (majority opinion) (emphasis added).

304. *Id.* at 1215 (Thomas, J., dissenting).

305. *Id.*

306. *Id.* at 1215–16.

307. *Id.* at 1216.

308. *Id.* at 1210 (Clifton, J., concurring).

Unlike the Ninth Circuit, the majority of circuits acknowledge that the constitutional guarantee of equal protection requires that section 212(c) eligibility be made available to deportable LPRs who are similarly situated to excludable LPRs. It is arbitrary to distinguish deportable LPRs from excludable LPRs who differ only in terms of a recent departure from the country.³⁰⁹ However, the BIA's comparable grounds test employed by the majority of the circuits turns on equally arbitrary grounds. In deciding whether LPRs are similarly situated there is no rational basis for requiring that an LPR's ground of deportation have a substantially identical statutory counterpart in a ground of inadmissibility. This reliance on linguistic similarity between grounds of deportation and inadmissibility creates new arbitrary distinctions and thus violates equal protection.

Consider alien *A*, who commits the offense of sexual abuse of a minor. Alien *A* is both deportable, because his offense falls under the aggravated felony ground of deportation, and excludable, because his offense also falls under the CIMT ground of exclusion. In an exclusion proceeding, alien *A* would be eligible for a section 212(c) waiver. However, in a deportation proceeding, he would not be eligible for section 212(c) relief because the CIMT ground of exclusion is not a substantially identical statutory counterpart to the aggravated felony ground of deportation. On the other hand, consider alien *B*, who commits a particular drug offense that also makes him both deportable and excludable. However, because the deportation and exclusion grounds utilize similar language in describing drug offenses, alien *B* is eligible for the section 212(c) waiver in a deportation proceeding. This kind of distinction between similarly situated LPRs is arbitrary and is not rationally related to a legitimate government interest. As Judge Thomas wrote in his dissenting opinion in *Abebe v. Mukasey*, "Decisions about the size, scope, and overlap of *categories* of deportable and excludable offenses have no rational relation to judgments about which aliens should be permitted to remain in our country and which should not."³¹⁰

It is the alien's particular *offense*, categorized under either a ground of inadmissibility or deportation, that makes the alien inadmissible or deportable. It is the alien's particular offense that makes one alien similarly situated to another, not the grounds under which the government chooses to use to deport the alien.³¹¹ Because of this, the alien's particular offense should determine eligibility for section 212(c) relief. The touchstone of the equal protection analysis in *Francis* was the "irrelevant and fortuitous circumstance of traveling abroad recently," not how and with what language an LPR's offense is categorized as a ground of deportation.³¹² Eligibility for relief under *Francis* turned on whether the LPR's offense could trigger relief in exclusion proceedings.³¹³ Thus, the comparable grounds test is irreconcilable with the equal protection analysis in *Francis*, while the individualized, offense-specific analysis adopted by the Second Circuit comports with *Francis* and Supreme Court equal protection jurisprudence.

309. *Blake v. Carbone*, 489 F.3d 88, 95 (2d Cir. 2007) (citing *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976)).

310. 554 F.3d at 1218 (Thomas, J., dissenting).

311. *Blake*, 489 F.3d at 104.

312. *Id.* at 102 (quoting *Francis*, 532 F.2d at 273).

313. *Id.*

CONCLUSION

As the Supreme Court observed in *St. Cyr*, the availability of section 212(c) relief in the deportation context is of great practical importance and has a profound impact on LPRs in deportation proceedings.³¹⁴ Although the waiver was eliminated over ten years ago, it continues to affect LPRs in removal proceedings, providing a vital lifeline for qualifying aliens. The Supreme Court must resolve this issue of section 212(c) availability in favor of the Second Circuit's offense-specific analysis and avoid the severe, unnecessary, and unconstitutional result that the comparable grounds analysis mandates. The individualized, offense-specific approach is the only constitutional application of *Francis* and the only approach that comports with Supreme Court equal protection jurisprudence. The statutory counterpart test serves no legitimate government interest and makes arbitrary distinctions between similarly situated LPRs. As Judge Thomas writes in his dissent in *Abebe v. Mukasey*, "There is no rational basis for treating a lawful permanent resident who steps across the border for a day better than one who does not."³¹⁵

314. See *INS v. St. Cyr*, 533 U.S. 289, 295 (2001).

315. *Abebe v. Mukasey*, 554 F.3d at 1219 (Thomas, J., dissenting).