C IS FOR CONFUSION: THE TORTUOUS PATH OF SECTION 212(c) RELIEF IN THE DEPORTATION CONTEXT

by
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The jurisprudence of section 212(c) of the Immigration and Nationalization Act has endured more than five decades of administrative decisions, congressional amendments, administrative rulemaking, and U.S. circuit court and Supreme Court decisions. This Comment discusses the history of section 212(c) as a form of relief under immigration law and critically examines the Board of Immigration Appeals' jurisprudence in applying section 212(c) relief in the deportation context. Exploring the circuit court split and scrutinizing the rationales underlying the comparable grounds and offense-specific approaches, the author asserts that the comparable grounds approach fails to comport with equal protection, leaving the offense-specific approach as the rational choice in determining eligibility for section 212(c) relief in deportation proceedings.

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I. INTRODUCTION[1]

Imagine the following two scenarios. First, a lawful permanent resident (LPR) residing in the United States is convicted of sexually abusing a minor. On the basis of this conviction, the Department of Homeland Security (DHS) initiates removal proceedings, charging the alien with deportability based on the aggravated felony category of sexual abuse of a minor. In the second scenario, a different permanent resident has been convicted of sexually abusing a minor. After the conviction, this resident temporarily departs the United States to visit family abroad. As he attempts to re-enter the United States, immigration officials discover that he may be excludable because of his prior conviction. The excludability would not be based on the aggravated felony ground of sexual abuse of a minor—since such a ground only exists for deportable offenses—but rather would constitute a crime involving moral turpitude, which *is* an excludable offense.

Immigration law is clear regarding the resident in the second scenario: he could request a discretionary waiver of the ground of excludability—crime involving moral turpitude—under section 212(c). What remains unclear is whether the resident in the first scenario, who has been convicted of the same offense but did not depart the country following the conviction, can claim the same relief in the deportation context under section 212(c).[2]

Five decades of administrative decisions, congressional amendments, administrative rulemaking, and U.S. circuit court decisions have attempted to answer this question. As one circuit court explains, the

[1] Although immigration law now distinguishes between "inadmissible" and "deportable" aliens in single "removal" proceedings, this paper uses the terms "excludable" and "deportable" instead of "inadmissible" or "removable" to remain consistent with the law at the time that section 212(c) was a provision in the Immigration and Nationality Act. However, the author retains use of the terms "inadmissible" or "deportable" when providing direct quotes.

[2] Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(c) (1994) (repealed 1996).

result has created "an untidy patchwork, even, one might say, a mess."[3] Just how should a court determine eligibility for relief when such relief was never contemplated by the statute in the first place? The Board of Immigration Appeals ("Board" or "BIA") struggled with this issue for years, alternating between an "offense-specific" approach which looks to the alien's deportable offense and a "comparable grounds" approach which focuses on comparing the charged ground of deportability with the grounds of exclusion. The Board's struggle was exacerbated in 1976 by the Second Circuit's decision in *Francis v. INS*, which applied equal protection principles to extend eligibility for section 212(c) relief to permanent residents in deportation proceedings who had never left the country after being convicted of an offense that would render them excludable.[4]

The debate over which approach should determine section 212(c) eligibility is now, in essence, a problem of application resulting from *Francis*. The Board quickly adopted the *Francis* rule in *Matter of Silva*,[5] decided just a few months after *Francis*. Following these decisions, the U.S. circuit courts of appeals unanimously accepted the ruling that equal protection requires non-departing, deportable aliens to be eligible for the same section 212(c) waiver available to "similarly situated" aliens who had left the United States following the conviction which rendered them deportable, thus becoming excludable upon return.[6] How, then, does one define similarly situated?

Two approaches have emerged to answer this question.[7] Of the circuits that have considered the issue, all but one have adopted a comparable grounds approach, which compares the ground of deportability charged with the grounds of exclusion.[8] If the deportation

[3] Campos v. INS, 961 F.2d 309, 315 (1st Cir. 1992).

[4] 532 F.2d 268, 272–73 (2nd Cir. 1976).

[5] 16 I. & N. Dec. 26, 30 (B.I.A. 1976).

[6] Lozada v. INS, 857 F.2d 10, 11 n.1 (1st Cir. 1988); Green v. INS, 46 F.3d 313 (3rd Cir. 1995); Chiravacharadhikul v. INS, 645 F.2d 248, 248 n.1 (4th Cir. 1981); Mantell v. INS, 798 F.2d 124, 125 n.2 (5th Cir. 1986); De Gonzales v. INS, 996 F.2d 804, 806 (6th Cir. 1993); Variamparambil v. INS, 831 F.2d 1362, 1364 n.1 (7th Cir. 1987); Varela-Blanco v. INS, 18 F.3d 584, 588 (8th Cir. 1994); Tapia-Acuna v. INS, 640 F.2d 223, 224 (9th Cir. 1981); Vissian v. INS, 548 F.2d 325, 328 (10th Cir. 1977); Rodriguez-Padron v. INS, 13 F.3d 1455, 1459 (11th Cir. 1994).

[7] Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 784 (1997) ("In the years following *Francis* there have been a number of attempts to define the limits of section 212(c) waiver in deportation proceedings.").

[8] Kim v. Gonzales, 468 F.3d 58, 62 (1st Cir. 2006); Caroleo v. Gonzales, 476 F.3d 158, 164 (3d Cir. 2007); Brieva-Perez v. Gonzales, 482 F.3d 356, 358 (5th Cir. 2007); Avilez-Granados v. Gonzales, 481 F.3d 869, 872 (5th Cir. 2007); Vo v. Gonzales, 482 F.3d 363, 372 (5th Cir. 2007); Gajonaj v. INS, 47 F.3d 824, 827 (6th Cir. 1995); Valere v. Gonzales, 473 F.3d 757, 762 (7th Cir. 2007); Soriano v. Gonzales, 489 F.3d 909 (8th Cir. 2006); Vue v. Gonzales, 496 F.3d 858, 863 (8th Cir. 2007); Abebe v. Gonzales, 493 F.3d 1092, 1101 (9th Cir. 2007); Jimenez-Santillano v. INS, No. 96-9532, 1997 WL

ground charged is "comparable," "analogous," or "corresponding" to a waivable ground of exclusion, then the alien is similarly situated. The Second Circuit, on the other hand, espouses an offense-specific approach. This approach looks to the specific offense that underlies the deportation ground to determine whether the alien would have been eligible for a waiver of exclusion upon return.[9] The line of this split is particularly significant because it was the Second Circuit which established the similarly-situated requirement in the first place in *Francis*.[10] Should this approach receive particular deference under the assumption that the Second Circuit best knows how to interpret its own language?

In *Blake v. Carbone*, the Second Circuit's recent decision adopting the offense-specific approach, the Court explained that "[t]he past thirty years have highlighted the difficulties that arise when constitutionally problematic legislation is juxtaposed with judicial stitchery and administrative attempts at coalescing the two."[11] When is a deportable alien similarly situated to an excludable alien? Which approach remains most true to the intent of Congress? Is congressional intent even relevant to an inquiry into an administratively and judicially-created doctrine? Does one approach merely create new arbitrary distinctions? Does one approach allow for inequitable application of prosecutorial discretion? Does one approach raise the undesirable result of favoring aliens who commit more serious crimes over those who commit less serious offenses? Returning to the opening scenario of the two resident aliens convicted of sexual abuse of a minor: does one approach better ensure that both residents will be equally eligible (or ineligible) for relief? They were convicted of the same crime, and the requirement that an alien must depart the country in order to qualify for relief no longer exists. Are these two residents indeed similarly situated to each other? These questions ultimately remain unanswered because of the circuit court split.

Adding fuel to the fire, on January 25, 2008, the Ninth Circuit ordered that its current decision on this issue, *Abebe v. Gonzales*—decided in July 2007, only one month after the Second Circuit decided *Blake*—be reheard en banc.[12] The *Abebe* opinion now being reconsidered unequivocally adopts a comparable-grounds approach in opposition to the Second Circuit's *Blake* decision.[13] Given the clear circuit split and the

447315, at *2 (10th Cir. July 28, 1997); Rubio v. U.S. Atty. Gen., 182 Fed. Appx. 925 (11th Cir. 2006) (unpublished).

[9] Blake v. Carbone, 489 F.3d 88 (2nd Cir. 2007).

[10] 532 F.2d at 272.

[11] 489 F.3d at 105.

[12] Abebe v. Mukasey, 514 F.3d 909 (9th Cir. 2008).

[13] Abebe v. Gonzales, 493 F.3d 1092 (9th Cir. 2007). The case was argued before and submitted to the en banc Ninth Circuit panel on March 25, 2008. A decision is currently pending. *See* Ninth Circuit, Status of Pending En Banc Cases,

Ninth Circuit's apparent distrust for the current state of the law, the time is ripe for the Supreme Court to decide, once and for all, how to determine eligibility for section 212(c) relief for deportable aliens.

The first Part of this Comment examines the history of section 212(c) as a form of relief under immigration law. The second Part critically examines the Board's methodology in applying section 212(c) relief in the deportation context. The third Part explores the circuit court split and scrutinizes the rationales underlying adoption of the comparable grounds and offense-specific approaches. The Comment concludes by asserting that the offense-specific approach is preferable to the comparable-grounds approach in determining eligibility for section 212(c) relief in deportation proceedings.

II. HISTORY OF SECTION 212(c) RELIEF

A. Relief Under the Immigration Act of 1917

The first waiver of excludability traces back to the Immigration Act of 1917.[14] Chapter 29 of the "Seventh Proviso" of the Act included a provision authorizing discretionary relief from the process of exclusion at the border to certain resident aliens.[15] By its terms, this relief applied only to permanent residents in the exclusion context.

In 1940, the Board of Immigration Appeals and the Attorney General extended "Seventh Proviso" exclusionary relief into the deportation arena in the case *Matter of L—*.[16] The case involved a lawful permanent resident who was convicted of larceny in 1924.[17] In June 1939, L— left the country to settle an estate in his native Yugoslavia and was re-admitted to the United States upon return two months later.[18] Immigration officials subsequently charged L— with deportability based on his 1924 larceny conviction.[19] The Attorney General concluded that relief could be extended *nunc pro tunc* because L— would have been eligible for relief upon re-entry had immigration officials sought to exclude him on the basis of his conviction.[20] Finding that the exclusion

http://www.ca9.uscourts.gov/, click on Status of Pending En Banc Cases (last updated May 27, 2008).

[14] *See id.* at 1096–1100 (discussing the history of section 212(c) relief).

[15] Immigration Act of 1917, 39 Stat. 874, ch. 29 § 3 (February 5, 1917) (notwithstanding otherwise applicable exclusion law, "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe.").

[16] Matter of L—, 1 I. & N. Dec. 1, 1 (B.I.A. 1940). *See also Abebe v. Gonzales*, 493 F.3d at 1097–98 (discussing the history of section 212(c) relief).

[17] *Matter of L—*, 1 I. & N. Dec. at 1.

[18] *Id.* at 2.

[19] *Id.*

[20] *Id.* at 6. Nunc pro tunc means "[h]aving retroactive legal effect through a court's inherent power." BLACK'S LAW DICTIONARY 1100 (8th ed. 2004).

and deportation provisions of the act "must be read together," the Attorney General reasoned that Congress could not have "intended the immigration laws to operate in so capricious and whimsical a fashion."[21] He added that "judgment ought not to depend upon the technical form of the proceedings. No policy of Congress could possibly be served by such irrational result."[22]

B. Relief Under the Immigration and Nationality Act of 1952

The Immigration and Nationality Act of 1952 (INA) codified "Seventh Proviso" exclusionary relief into modern immigration law through section 212(c). The section provided that

> [a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provision of subsection (a) [describing classes of excludable aliens].[23]

As with the "Seventh Proviso," the language of section 212(c) applied only to exclusion proceedings. However, the BIA continued its practice of extending such relief into the deportation context.[24] As a result, permanent residents who departed the country after being convicted of a deportable offense and re-entered the U.S. without exclusionary process remained eligible for section 212(c) relief if later placed in deportation proceedings.

In 1976, the Second Circuit Court of Appeals dramatically altered the application of section 212(c) relief.[25] In the landmark decision *Francis v. INS*, the Second Circuit extended eligibility for section 212(c) relief to permanent residents in deportation proceedings who had never left the country after being convicted of an offense that would render them excludable.[26] *Francis* involved a lawful permanent resident who was charged with deportability after being convicted of criminal possession of marijuana.[27] The immigration judge held that Francis was not eligible for section 212(c) relief because he had not temporarily departed the

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[21] *Matter of L—*, 1 I. & N. Dec. at 5.

[22] *Id.*

[23] Immigration and Nationality Act of 1952, 8 U.S.C. 1182(c) (1994) (repealed 1996).

[24] *See, e.g.*, Matter of T—, 5 I. & N. Dec. 389 (B.I.A. 1953); Matter of G—A—, 7 I. & N. Dec. 274 (B.I.A. 1956); Matter of Tanori, 15 I. & N. Dec. 566 (B.I.A. 1976); Matter of Silva, 16 I. & N. Dec. 26 (B.I.A. 1976); Matter of Granados, 16 I. & N. Dec. 726 (B.I.A. 1979); Matter of Wadud, 19 I. & N. Dec. 182 (B.I.A. 1984); Matter of Meza, 20 I. & N. Dec. 257 (B.I.A. 1991).

[25] Daniel Kanstroom, St. Cyr *or Insincere: the Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 432 (2002).

[26] 532 F.2d 268 (2nd Cir. 1976).

[27] *Id.* at 269.

United States after his conviction, as required by the statute.[28] The Board of Immigration Appeals affirmed.[29] Francis argued that this interpretation of the statute "creates 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."[30] Because this distinction is not rationally related to any legitimate purpose of the statute, the statute as applied violates the equal protection clause of the Fourteenth Amendment.[31] The Second Circuit agreed, explaining that "[f]undamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner."[32]

The same year, the BIA adopted the *Francis* holding in *Matter of Silva*.[33] The *Silva* Board noted that the BIA has "interpreted section 212(c) of the Act to mean that a waiver of the ground of inadmissibility may be granted in a deportation proceeding when, at the time of the alien's last entry, he was inadmissible because of the *same facts* which form the basis of his deportability."[34] In light of *Francis*, the Board now held that a permanent resident may be eligible for a waiver regardless of whether he departed the United States following the act(s) which render him excludable.[35] The BIA concluded that "similarly situated" permanent resident aliens shall be treated equally with respect to their applications for discretionary relief under section 212(c) of the Act.[36]

C. Amendment, Repeal, and Reinstatement of Relief Post-1990

During the 1990s, section 212(c) relief was limited and ultimately repealed through a series of amendments.[37] A primary goal of these amendments was to facilitate the deportation of criminal aliens.[38] The Immigration Act of 1990 (IMMACT) eliminated eligibility for any alien who had been convicted of an aggravated felony and served more than five years in prison.[39] In 1996, the Antiterrorism and Effective Death

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[28] *Id.* at 270.

[29] *Id.*

[30] *Id.* at 272.

[31] *Id.*

[32] *Id.* at 273.

[33] Matter of Silva, 16 I. & N. Dec. 26 (B.I.A. 1976).

[34] *Id.* at 27–28 (emphasis added).

[35] *Id.* at 30.

[36] *Id.*

[37] Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After* St. Cyr, 19 GEO. IMMIGR. L.J. 455, 462 (2005).

[38] Vashti D. Van Wyke, Comment, *Retroactivity and Immigrant Crimes Since* St. Cyr*: Emerging Signs of Judicial Restraint*, 154 U. PA. L. REV. 741, 741 (2006).

[39] *See* Abebe v. Gonzales, 493 F.3d 1092, 1099 (9th Cir. 2007) (discussing the Immigration Act of 1990, Pub. L. 101-649, § 511, 104 Stat. 4978).

Penalty Act (AEDPA) stripped eligibility from any alien who was deportable by reason of any aggravated felony conviction—regardless of the length of sentence.[40] AEDPA also added categories of aliens ineligible for relief, including those whose deportability rested on a drug conviction, multiple crimes involving moral turpitude, or certain weapons and national security violations.[41] Shortly thereafter, Congress repealed section 212(c) relief altogether in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[42] Congress also added new categories of crimes to the aggravated felony ground of deportation, including minor offenses.[43] Because these new categories apply retroactively, the statute effectively precludes residents who committed minor crimes decades ago from qualifying for relief from deportation.[44] This result can have harsh consequences on permanent residents who possess otherwise desirable qualities under immigration law—such as long-term residence and the corresponding ties to the United States, proof of genuine rehabilitation, and employment—because these discretionary considerations no longer play a role in determining eligibility for relief.[45]

In 2001, the Supreme Court ruled in *INS v. St. Cyr* that section 212(c) relief remained available to aliens who pled guilty to a deportable offense prior to enactment of these amendments and who "would have been eligible for section 212(c) relief at the time of their plea under the

[40] *See id.* at 1099–1100 (discussing the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277).

[41] *Id.*

[42] *See id.* at 1100 (discussing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), (b); 110 Stat. 3009-594 to -597, which repealed section 212(c) availability for proceedings commenced on or after April 1, 1997).

[43] *See* IIRAIRA Reform, American Immigration Lawyers Association, *available at* http://www.aila.org/Content/default.aspx?docid=3545 ("Under IIRAIRA, crimes as minor as shoplifting now constitute aggravated felonies.") [hereinafter IIRAIRA Reform]; Vashti D. Van Wyke, *supra* note 38, at 741 ("IIRIRA redefined the term 'aggravated felony' to encompass scores of new offenses, including misdemeanors and low-level felonies that are not understood to be aggravated felonies in any other context. In addition, Congress made this redefinition of 'aggravated felony' explicitly retroactive to crimes committed before passage of IIRIRA."(footnotes omitted)).

[44] *See* IIRAIRA Reform, *supra* note 43 (because the expanded definition is retroactive, "a legal immigrant today may be put into deportation proceedings for an offense he or she committed 25 years ago, even if the crime was not then defined as an aggravated felony (and therefore may not have been a deportable offense), and the immigrant at that time was punished in the criminal law system." (emphasis removed). Because of the repeal of section 212(c) relief, "immigrants who 25 years ago committed aggravated felonies now have no relief from deportation."(citation omitted)). *Id.*

[45] *See* Anthony Distini, *Gone But Not Forgotten: How Section 212(c) Relief Continues to Divide Courts Presiding Over Indictments for Illegal Reentry*, 74 FORDHAM L. REV. 2809, 2820 (2006) (describing the adverse and favorable discretionary factors to be considered by courts reviewing section 212(c) applications).

law then in effect."[46] The Department of Justice published a final rule in 2004 implementing the *St. Cyr* holding.[47] The final rule provides that "an alien who is deportable or removable on a ground that does not have a corresponding ground of exclusion or inadmissibility is ineligible for section 212(c) relief."[48]

The language adopted by the final rule is noteworthy. By precluding eligibility for section 212(c) relief to aliens whose ground of deportation does not have a "corresponding" ground of exclusion, the regulation mandates a comparable-grounds analysis for determining whether a deportable alien is "similarly situated" to an excludable alien under *Francis*. Agency intent to adopt this approach is clear: the "corresponding ground" language was added to the final rule in response to a comment suggesting that eligibility be prohibited for aliens found deportable as aggravated felons "if there is no comparable ground of inadmissibility for the specific category of aggravated felony charged."[49] Under this rule, the first alien in our opening scenario would not be eligible for relief because he was charged with committing sexual abuse of a minor, a deportation ground for which no corresponding ground of exclusion exists.

The final rule was codified into regulation under 8 C.F.R. § 212.3 and § 1212.3.[50] The final rule specifies that section 212(c) relief is unavailable where an alien "is deportable under former section 241 of

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[46] 533 U.S. 289, 326 (2001).

[47] Section 212(c) Relief for Aliens With Certain Criminal Convictions, 69 Fed. Reg. 57826, 57832 (Sept. 28, 2004) (codified at 8 C.F.R. section 212.3 and section 1212.3) (mandates that "[c]ertain LPRs who pleaded guilty or *nolo contendere* to crimes before April 1, 1997, may seek section 212(c) relief from being deported or removed from the United States on account of those pleas. Under this rule, eligible LPRs currently in immigration proceedings (and former LPRs under a final order of deportation or removal) who have not departed from the United States may file a request to apply for relief under former section 212(c) of the Act, as in effect on the date of their plea, regardless of the date the plea agreement was entered by the court"). *See* Abebe v. Gonzales, 493 F.3d 1092, 1100 (9th Cir. 2007).

[48] Section 212(c) Relief for Aliens With Certain Criminal Convictions, 69 Fed. Reg. at 57832–33.

[49] *Id.* at 57831 (emphasis omitted). ("In describing the eligibility requirements, the supplementary information of the proposed rule noted that '[a]n applicant must, at a minimum, meet the following criteria to be considered for a waiver under section 212(c): . . . [t]he alien is deportable or removable on a ground that has a corresponding ground of exclusion or inadmissibility. . . . However, this requirement was not included in the regulatory language of the proposed rule. As a result, the Department will effectuate the commenter's suggestion by adding this requirement for section 212(c) eligibility. Accordingly, the final rule provides that an alien who is deportable or removable on a ground that does not have a corresponding ground of exclusion or inadmissibility is ineligible for section 212(c) relief." (internal citations omitted)).

[50] *See* 8 C.F.R. §§ 212.3, 1212.3 (2007) (entitled "Application for the exercise of discretion under former section 212(c)").

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."[51]

This regulatory language plays a substantial role in solidifying the comparable-grounds approach in post-regulation circuit court and Board decisions involving section 212(c) in the deportation context. This role has proven to be significant, given the tidal wave of post-regulation section 212(c) activity that has recently swept through nearly every circuit.[52] Since 2006, at least eight circuits have issued an opinion on this issue.[53] With the exception of the Second Circuit's *Blake v. Carbone* and a Ninth Circuit concurrence written by Judge Berzon in *Abebe v. Gonzales*, every circuit that has considered the issue has adopted the rule's approach.[54]

Despite the repeal of section 212(c) relief under IIRIRA, the Supreme Court's decision in *St. Cyr*, as well as the agency's codification of *St. Cyr* in its final rule and regulations, ensures that section 212(c) relief remains available to certain permanent residents in deportation and removal proceedings today. Given the substantial backlog in caseload faced by immigration courts today and the protracted length of time it takes for a claim filed in immigration court to be heard by the circuit courts on judicial appeal, the number of permanent residents presently affected by section 212(c) jurisprudence remains significant.[55]

III. AN ANALYSIS OF BIA SECTION 212(c) JURISPRUDENCE

Section 212(c) case law adopted by the BIA constitutes a hodgepodge of inconsistent and loosely-worded opinions. Quite simply, the Board has not been too careful in penning its decisions. To be sure, the Board could not know at the time of its early decisions how important word choice would become post-*Francis*, when the Board and circuit courts would scrutinize the language of previous cases to determine what "similarly situated" means. Unable to foresee the critical significance of word choice, the Board's early decisions employed the terms "ground(s)," "charge(s)," "offense(s)," and "fact(s)" loosely, often interchangeably. The lax use of terminology translates into a tenuous foundation underlying the Board's section 212(c) jurisprudence. As a result, any circuit court decision which rests significantly on Board deference loses its strength. In reviewing BIA case law, three distinct

[51] § 1212.3(f)(5).

[52] *See* cases cited *supra* note 8.

[53] *See* cases cited *supra* note 8.

[54] *See* cases cited *supra* note 8.

[55] For example, between fiscal year 2002 and fiscal year 2006, immigration courts granted 2,978 waivers under section 212(c). This number does not include those applicants who were found eligible for a section 212(c) waiver but were denied relief based on discretionary factors. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FISCAL YEAR 2006 STATISTICAL YEARBOOK R3 tbl.15 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf.

phases of section 212(c) jurisprudence emerge: pre-*Francis*, post-*Francis*, and post-regulation.

*A. BIA Section 212(c) Jurisprudence Pre-*Francis*: Vacillating Between the Comparable-Grounds and Offense-Specific Approaches*

Before the *Francis* decision, the Board did not consider equal protection in their section 212(c) decisions. The issue had not yet been raised, so the analytical framework based on "similarly situated" aliens was not within the Board's purview. During this time, the Board alternated between adopting a grounds-specific approach and an offense-specific approach in determining section 212(c) eligibility for residents in deportation proceedings.[56]

Matter of T—, decided in 1953, appears to be the first explicit use of a comparable-grounds approach by the BIA.[57] T— was a lawful permanent resident who had departed the United States for a half-day trip to Mexico.[58] A few days after her re-admission to the United States, she was found deportable on the basis that she had misrepresented herself as a United States citizen when she re-entered the country from Mexico.[59] In deciding whether T— was eligible for section 212(c) relief, the BIA seized on the language in section 212(c) that specified that a resident alien "may be admitted under the discretion of the Attorney General *without regard to the provisions of* [*section 212(a)*] *paragraphs (1) through (25) and paragraphs (30) and (31).*"[60] The BIA concluded from this text that "the form of discretionary relief embodied in section 212(c) is no longer a discretion which may be used generally but is confined to the grounds of inadmissibility enumerated therein."[61] The BIA went on to consider that the *charge* contained in the deportation warrant—entry without inspection—is not contained among the *grounds* enumerated in section 212(a) but is contained among the *grounds* for deportation.[62] The Board ultimately concluded that section 212(c) cannot be used to waive a ground of deportability that does not also constitute an enumerated waivable ground of exclusion specified by the statute.[63]

Just three years later, in 1956, the Board adopted an offense-specific approach without any acknowledgement that this approach differs analytically from the grounds-based approach used in *Matter of T—*. In

[56] Because the equal protection doctrine of *Francis* had not yet been established, the Board's decisions at this time reviewed section 212(c) eligibility for residents who had left the country following a deportable conviction and re-entered the country without exclusionary process.

[57] 5 I. & N. Dec. 389, 389 (B.I.A. 1953).

[58] *Id.*

[59] *Id.*

[60] *Id.* at 390 (emphasis added).

[61] *Id.*

[62] *Id.*

[63] *Id.*

Matter of G— A—, the BIA considered whether section 212(c) could apply to deportation proceedings of a permanent resident convicted of a marijuana offense.[64] The INS charged G— A— under an INA ground of exclusion, but the Board found that G— A— was not excludable because the INA was not in effect at the time of his re-entry.[65] However, the narcotics ground of deportation *did* apply.[66] Prefacing its use of an offense-specific approach in this case, the Board deemed it "unnecessary to reopen the hearing to lodge the proper charge."[67] By discounting the need to predicate its decision on "the proper charge," the BIA in effect dismissed the idea that section 212(c) analysis in deportation proceedings requires a comparison of the ground charged with the grounds of exclusion.

The BIA granted relief, concluding that if section 212(c) "is exercised to waive a ground of inadmissibility based upon a criminal conviction, a deportation proceeding cannot thereafter be properly instituted based upon the same criminal conviction."[68] The BIA explained that "it would be clearly repugnant to say that the respondent remains deportable because of the same conviction" for which he could have been granted exclusionary relief.[69] The Board cited *Matter of L—* for support, which, as may be recalled, held section 212(c) relief available when an alien would have been eligible for relief upon reentry had immigration officials sought to exclude him on the basis of his conviction.[70]

The Board's analysis in *G— A—* focused on the *specific criminal offense* that triggers the excludability or deportability of a resident alien, rather than the general ground of exclusion or deportation charged by the government. This distinction is significant because under an offense-specific approach, a particular conviction might fall under both a general ground of exclusion *and* a general ground of deportation—establishing section 212(c) availability—*even if* the two grounds appear textually distinct. Under the comparable-grounds approach, that same conviction fails to establish availability *because* the two grounds are textually distinct.

Twenty years after deciding *Matter of G— A—*, and one month before the Second Circuit ruled in *Francis*, the BIA clearly confirmed the offense-specific approach in *Matter of Tanori*.[71] Tanori was charged with

[64] 7 I. & N. Dec. 274 (B.I.A. 1956).

[65] *Id.* at 275.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at 276.

[70] Matter of L—, 1 I. & N. Dec. 1, 6 (B.I.A. 1940).

[71] 15 I. & N. Dec. 566, 566 (B.I.A. 1976). During the twenty years between *Matter of G— A—* and *Matter of Tanori*, the Board did not address the substantive issue of section 212(c) eligibility in the deportation context. The majority of section 212(c) cases within that time period related to interpreting technical statutory requirements, such as whether relief applies to returning aliens who are not permanent residents or

deportability based on a marijuana conviction.[72] Noting that the waivable grounds of exclusion under section 212(c) include the ground for conviction of a marijuana offense,[73] the BIA specified that "a waiver of the ground of inadmissibility may be granted in a deportation proceeding when, at the time of the alien's last entry, he was inadmissible *because of the same facts which form the basis of his deportability*."[74] Recall that the *Matter of Silva* decision—the BIA case decided in the same year as *Matter of G— A—* which adopted *Francis*'s equal protection analysis—also includes the "same facts" language.[75] This phrasing mandates that eligibility for section 212(c) relief in deportation proceedings rests on the comparability of the offense rather than the comparability of the grounds charged.

*B. BIA Section 212(c) Jurisprudence Post-*Francis*: Moving Towards a Comparable-Grounds Approach*

Despite the clear preference for an offense-specific approach suggested in *G— A—* and *Tanori*, the Board continued to vacillate between the two approaches in its post-*Francis* decisions. The Board's vacillation is particularly perplexing in light of its own contemporaneous interpretation of *Francis* in *Matter of Silva*, which explained that a deportable permanent resident is "similarly situated" to an excludable permanent resident because of the "same facts" underlying their deportability. Of the Board's decisions following *Francis* and *Silva*, several purport to adopt a comparable-grounds approach while actually conducting an offense-specific analysis. Not until 1991, when the Attorney General weighed in on the issue after the Board's decision in *Matter of Hernandez-Casillas*,[76] did the Board's section 212(c) jurisprudence clearly mandate the comparable-grounds approach.

Matter of Granados, decided three years after *Silva*, is often cited by the circuit courts to support the comparable-grounds approach.[77] However, close examination of this case reveals that it does not provide the solid foundation for comparable-grounds analysis attributed to it by the circuit courts. *Matter of Granados* involved a resident who was convicted of a deportable offense, possession of an unregistered sawed-off shotgun. In determining whether the section 212(c) waiver applied, the BIA invoked the reasoning of *Matter of T—* by noting that section 212(c) was "not a general form of discretionary relief but instead was

who broke their continuous residency; whether relief applies to aliens returning after departing under an order of deportation; or whether relief applies to residents attempting to adjust status.

[72] *Id.*

[73] *Id.* at 567.

[74] *Id.* at 568 (emphasis added).

[75] Matter of Silva, 16 I. & N. Dec. 26, 27–28 (B.I.A. 1976).

[76] 10 I. & N. Dec. 262 (B.I.A., Att'y Gen. 1991).

[77] Matter of Granados, 16 I. & N. Dec. 726 (B.I.A. 1979).

confined to the grounds of inadmissibility enumerated therein."[78] The BIA also noted that the *Francis* and *Silva* holdings "expanded the class of aliens to whom section 212(c) relief is available but did not increase the statutory grounds to which section 212(c) relief may be applied."[79]

In making these points, the Board expressed concern that finding Granados eligible for relief would require the Board to expand the availability of section 212(c) waivers to those grounds of deportability specifically precluded from section 212(c) relief, such as subversive grounds. The Board reasoned that since "possession of a concealed sawed-off shotgun" is not a ground of exclusion, granting Granados section 212(c) relief would effectively require the Board to open eligibility to *all* grounds of exclusion—an action the Board was not willing to take given its conclusion that the statute limited waivers to the enumerated grounds.[80] The Board did not explain why it considered only these two limited approaches—either granting eligibility by opening up availability to all grounds of exclusion, including those specifically precluded, or denying eligibility—to be the only two options. There is at least one other alternative that the Board failed to expressly consider in this analysis: granting (or denying) eligibility according to whether the underlying offense falls under an enumerated ground of exclusion, i.e. the offense-specific approach.

In choosing the option of denying relief, the Board makes a significant conclusory leap in affirming the comparable-grounds approach without any explanation as to why this particular approach actually applies. The Board unreasonably presumes an association between *Silva* and the comparable-grounds approach:

> In *Matter of Silva*, we adopted the holding of the *Francis* court and concluded that section 212(c) permits a waiver of a ground of inadmissibility to a permanent resident alien in a deportation proceeding regardless of whether he departs the United States following the act or acts rendering him deportable. *Therefore, if a ground of deportation is also a ground of inadmissibility, section 212(c) can be invoked in a deportation hearing.*[81]

However, *Silva* employed the "same facts" language indicative of the offense-specific approach which looks to the specific criminal conviction underlying an alien's deportation to determine whether that same conviction would be waivable in the exclusion context. It does not compare the ground of deportation charged with the grounds of exclusion. In addition, *Granados* specifically cites *Matter of Tanori* in reaching its conclusion above—another case which applied the "same facts" approach. As a consequence of these misattributions, *Matter of*

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[78] *Id.* at 727.
[79] *Id.* at 728.
[80] *Id.*
[81] *Id.* (citation omitted) (emphasis added).

Granados lays the unfounded groundwork for the comparable-grounds approach later adopted by the majority of circuit courts.

Moreover, although *Matter of Granados* purports to apply the comparable-grounds test, it actually applies an offense-specific analysis. The BIA explained that "[c]onviction for possession of a concealed sawed-off shotgun is not a specified section 212(a) ground of excludability, nor a crime involving moral turpitude that would render the respondent excludable under [section 212(a)]."[82] Yet to determine whether a conviction constitutes a crime involving moral turpitude, the BIA must look to the specific offense. In effect, then, the Board does in fact consider Granados's offense to determine whether section 212(c) relief applies.[83] In doing so, the Board departs from a strict comparable-grounds approach, which precludes any consideration of the underlying offense, and instead relies solely on a facial comparison of the deportation ground charged with the grounds of exclusion.

In the end, *Matter of Granados* does not provide a fully reasoned, decisive analysis establishing any single method for assessing section 212(c) claims. The Board purports to adopt a comparable-grounds approach in order to avoid the possibility that relief could be granted based on the specified non-waivable grounds, a rationale of questionable logic given the Board's failure to consider viable alternatives in its analysis. The Board then declares the comparable-grounds approach applicable despite basing this conclusion on precedent which mandates an offense-specific approach, and goes on to conduct an offense-specific analysis by considering whether Granados's specific conviction would qualify under the exclusion ground for crimes involving moral turpitude.

The Board finally began to solidify its section 212(c) jurisprudence five years later in 1984 when it decided *Matter of Wadud*.[84] Wadud was charged with being deportable for his conviction on six counts of conspiracy to defraud and commit offenses against the United States.[85] Citing several earlier cases, the BIA contended that "the Board has consistently held that section 212(c) of the Act can only be invoked in a deportation hearing where the ground of deportation charged is also a ground of inadmissibility."[86] In its string of citations, the BIA improperly included *Matter of Tanori*, which, as previously discussed, stands for an

[82] *Id.*

[83] In a subsequent case, the B.I.A. asserts that the portion of this case analyzing whether the conviction constitutes a crime involving moral turpitude "was dictum." *Wadud*, 19 I. & N. Dec. at 185. However, the language is not dictum because the *Granados* Board prefaces its analysis with the words "in the present case." *Granados*, 16 I. & N. Dec. at 727. It seems clear the *Granados* Board's "crime involving moral turpitude" analysis was applied directly to the case at bar. In *Abebe v. Gonzales*, the Ninth Circuit accepts the Board's erroneous contention in *Wadud* that this language in *Granados* is dictum. 493 F.3d at 1103.

[84] 19 I. & N. Dec. at 182.

[85] *Id.* at 183–84.

[86] *Id.* at 184.

offense-specific approach. However, in a footnote, the BIA conclusively withdrew from the "same facts" language in earlier cases "to the extent that it is inconsistent with [the Board's] decision today," adopting the comparable-grounds approach.[87]

The BIA also abandoned the offense-specific "crimes against moral turpitude" analysis applied in *Matter of Granados*. Although the BIA erroneously attributed that portion of the *Granados* decision to dictum, it explained that the Board "need not determine whether the respondent's conviction was one involving moral turpitude because we decline to expand the scope of section 212(c) relief in cases where the ground of deportability charged is not also a ground of inadmissibility."[88] In so stating, the BIA conclusively held that the correct approach to determining eligibility for section 212(c) relief is to compare the ground of deportability charged to the grounds of exclusion.

Despite the definitive language used in *Matter of Wadud* settling on the comparable grounds approach, the BIA convoluted this approach in *Matter of Meza,* decided in 1991.[89] Meza was charged on separate grounds with being deportable for committing an aggravated felony and a controlled substance violation.[90] Because there was no exclusion ground for aliens "convicted of an aggravated felony," the immigration judge found Meza ineligible for section 212(c) relief.[91]

However, the BIA applied the Immigration Act of 1990 (IMMACT)[92] to overturn the immigration judge's decision.[93] IMMACT section 511(a) eliminated section 212(c) eligibility from any "alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years."[94] The implementing regulations further specified that eligibility shall be denied to an alien "convicted of an aggravated felony . . . and who has served a term of imprisonment of at least five years for such conviction."[95] The BIA construed this language to imply that "some aliens who have been convicted of an aggravated felony are eligible for a section 212(c) waiver," i.e. those who have served less than five years

[87] *Id.* at 185 n.3.

[88] *See id.* at 185 (the Court reasoned that "[w]ere we to hold otherwise, an anomalous situation would result in cases where deportability is charged under section 241(a)(5) of the Act since most of the offenses described in that section do not involve moral turpitude. To afford section 212(c) relief only to those aliens whose crime under section 241(a)(5) involved moral turpitude would be to reward those guilty of a more egregious offense for their greater culpability. We are unable to conclude that Congress intended such an inequitable consequence to ensue from the implementation of section 212(c).").

[89] *Meza*, 20 I. & N. Dec. at 257.

[90] *Id.* at 258.

[91] *Id.*

[92] Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978.

[93] *Meza*, 20 I. & N. Dec. at 258.

[94] *Id.*

[95] 8 C.F.R. § 212.3(f)(4)(1992).

imprisonment.[96] The BIA also cited legislative history indicating that Congress understood section 212(c) as providing eligibility for relief to aliens convicted of aggravated felonies.[97] Consequently, the BIA found that "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 [the deportation provision] of the Act."[98] Instead, the Board concluded, it must look to the specific category of aggravated felony to determine eligibility for relief.[99]

The category of aggravated felony at issue in this case involved convictions for "any illicit trafficking in any controlled substance . . . , including any drug trafficking crime."[100] The BIA found that "[t]his category is comprised of trafficking offenses, most, if not all, of which would also be encompassed within the scope of [the controlled substances exclusion ground] of the Act."[101] Accordingly, the Board held that "as the respondent's conviction for a drug-related aggravated felony *clearly could also form the basis for excludability* under [the controlled substances exclusion ground], he is not precluded from establishing eligibility for section 212(c) relief based on his conviction for an aggravated felony."[102] With this language, the BIA suggests that courts may examine the conviction to determine whether the deportable offense could also have been a waivable excludable offense—an inquiry characterized by the offense-specific approach and precluded under the comparable-grounds analysis.

Subsequent Board decisions attempted to isolate *Meza* as a unique holding based on the IMMACT amendment to section 212(c), limited to the context of controlled substances.[103] These attempts are misguided.

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[96] *Meza,* 20 I. & N. Dec. at 258.

[97] *Id.* at 258–59.

[98] *Id.* at 259.

[99] *Id.* at 260.

[100] *Id.*(alteration in original) (citation omitted).

[101] *Id.*

[102] *Id.* at 260 (emphasis added).

[103] In *Matter of Montenegro*, 20 I. & N. Dec. 603, 605 (B.I.A. 1992), the respondent argued eligibility for section 212(c) relief under *Meza* because his conviction for a deportable firearms violation constituted a crime involving moral turpitude. The Board distinguished *Meza*, noting that it "addressed the unique situation created by the language and legislative history of an amendment to section 212(c) by [IMMACT], which indicated that some aggravated felons are eligible for a section 212(c) waiver in deportation proceedings even though there is no single comparable ground of exclusion based on conviction of an aggravated felony." In *In re Esposito*, 21 I. & N. Dec. 1 (B.I.A. 1995), the respondent argued that his firearms violation constituted a predicate offense for the multiple criminal convictions exclusion ground. The Board again distinguished *Meza* as a decision that was "limited to the question of eligibility for section 212(c) relief in the case of a conviction for a drug-trafficking aggravated felony and [was] based on the specific amendment to section 212(c) regarding aggravated felonies." *Id.* at 9.

Meza stands for a simple proposition: when dealing with aggravated felony deportation grounds, courts must examine the specific category of aggravated felony to determine whether the felony could also form the basis for excludability.[104] In mandating that courts examine the specific category of aggravated felony when determining section 212(c) eligibility, the Board in effect mandated an offense-specific analysis because reviewing the category of aggravated felony requires reference to the specific felony committed. While *Meza* involved the particular felony of "controlled substances," its holding is not limited to that category of offenses. Rather, the holding represents the analytical process to be conducted when dealing with *any* aggravated felony. Nothing in IMMACT restricts relief to the controlled substances context.

Further, and perhaps more significantly, the Board's conclusion that IMMACT suggests an offense-specific approach logically extends beyond the aggravated felony context. Although IMMACT expressly refers only to the availability of section 212(c) relief for residents charged with aggravated felonies, the very distinction made by Congress between aggravated felons sentenced to at least five years and all other aggravated felons serves to generally preclude a comparable-grounds analysis. In order to determine which aggravated felons are eligible for relief, a court must look to the underlying facts of the case—the offense committed and the sentence imposed—rather than relying solely on a facial comparison of the deportation and exclusion grounds as demanded by the comparable grounds approach.

In other words, to comply with the statutory directive that section 212(c) "shall not apply to an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years," *courts must engage in an analysis that considers the specific facts underlying the deportation ground*. Congress has thus shown intent to preclude a strict comparable-grounds approach in the context of aggravated felonies. In the legislative history supporting IMMACT, Congress recognized aggravated felonies as just one of many grounds that give rise to relief, noting that section 212(c) relief "is obtained by numerous excludable and deportable aliens, including aliens convicted of aggravated felonies."[105] There is therefore no reason why the preclusion against the comparable-grounds approach that applies to aggravated felonies should not apply to other deportation grounds that, in the Board's words, may not "recite" the same language as the grounds of exclusion.

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[104] The Board concedes as much in its decision *Matter of Blake*, 23 I. & N. Dec. 722, 725–26 (B.I.A. 2005), and explained that in *Meza* "we held that 'a waiver under section 212(c) is not unwaivable to an alien . . . simply because there is no ground of exclusion which recites the words "convicted of an aggravated felony,"' . . . We referred, instead, to the specific category of aggravated felony charged" to find that the ground of deportation at issue clearly could also form the basis for excludability. (citation omitted).

[105] 136 CONG. REC. 11195 (1990).

Despite this foundational preclusion against the comparable-grounds approach, *Meza* still purports to adopt a comparable-grounds approach and several recent circuit court decisions have relied on this conclusion.[106]

Matter of Hernandez-Casillas, decided in 1991, marks a turning point in the history of section 212(c) analysis by definitively adopting the comparable-grounds approach.[107] Hernandez-Casillas was convicted of entering the United States without inspection.[108] The INS subsequently charged him with being deportable under the deportation ground for unlawful entry.[109] At the hearing, INS introduced into evidence a complaint stating that border control agents observed Hernandez-Casillas guide a group of illegal aliens across the Rio Grande for a fee.[110] However, because the INS only charged Hernandez-Casillas with deportability based on unlawful entry[111]—for which there is no comparable ground of exclusion—the immigration judge denied his application for a waiver under section 212(c).[112]

Hernandez-Casillas argued that the INS should have charged him with deportability under a separate ground of deportation relating to the smuggling of aliens for gain.[113] Because this latter ground has a corresponding ground of exclusion, he would be eligible for section 212(c) relief.[114] The BIA took this opportunity to point out that the comparable grounds approach "can result in the total unavailability of relief from deportation for longtime resident aliens who, like the present respondent, may not have committed offenses nearly as serious as those of other aliens who are eligible for the section 212(c) waiver."[115] In this case, for example, Hernandez-Casillas was ineligible for relief because of

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[106] *See, e.g.,* Abebe v. Gonzales, 493 F.3d 1092, 1099 (9th Cir. 2007). (citing *Meza* in explaining that "it is also well established that section 212(c) authorizes relief from the narcotics-related grounds of deportation because they have specific counterparts in the grounds of excludability."); Vo v. Gonzales, 482 F.3d 363, 468 (5th Cir. 2007) ("[I]n *Meza*, both the ground for excludability and the ground for deportation involved illicit traffic in controlled substances. Thus Congress had expressed an intent to address the same class of offense."); Vue v. Gonzales, 496 F.3d 858, 862 (8th Cir. 2007) (citing *Meza*); Avilez-Granados v. Gonzales, 481 F.3d 869, 872 (5th Cir. 2007) (noting that in *Meza*, the petitioner was "found eligible to apply for § section 212(c) relief because his crime, trafficking in a controlled substance, was sufficiently analogous to a section 212(c) ground of excludability, namely violation of laws related to a controlled substance").

[107] 20 I. & N. Dec. 262 (B.I.A., Att'y Gen. 1991); *see also* Daniel Kanstroom, *supra* note 7, at 789–91 (discussing the *Hernandez-Casillas* case).

[108] *Hernandez-Casillas*, 20 I. & N. Dec. at 263.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 264.

[113] *Id.*

[114] *Id.* at 264.

[115] *Id.* at 265.

his unlawful entry, but would have been eligible for relief based on a charge involving the smuggling of aliens—a more serious crime. In order to solve this "anomalous situation," the Board extended the availability of section 212(c) to all grounds of deportability except those relating to subversives and war criminals.[116] In doing so, the Board essentially resigned itself to the fact that section 212(c) jurisprudence had become impossibly convoluted by eliminating the requirement for *any* comparative analysis between deportation and exclusion.

The Board reasoned that the statute as currently applied "bears little resemblance to the statute as written."[117] It noted that the same equal protection concerns identified in *Francis* should apply to expand section 212(c) eligibility to aliens deportable under any ground except those specifically precluded by the statute.[118] Having made section 212(c) available in deportation proceedings in the first place, the Board could find "no reason not to make it applicable to all grounds of deportability with the exception of those comparable to the exclusion grounds expressly excluded by section 212(c), rather than limiting it, as now, to grounds of deportability having equivalent exclusion provisions."[119] The BIA felt that both approaches were "equally logical and bear equally little resemblance to the statute as written."[120] The former approach, however, "has the benefit of alleviating potential hardships from sometimes deserving aliens."[121] Accordingly, the Board withdrew from its previous decisions that limited section 212(c) availability.[122] In so reasoning, the Board implicitly returned to its humanitarian roots when it first extended "Seventh Proviso" relief *nunc pro tunc* in *Matter of L—* based on the notion

[116] *Id.*

[117] *Id.*

[118] *Id.* at 266.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 267. The B.I.A. had some precedent for its decision. In 1983, the Eleventh Circuit considered *Marti-Xiques v. INS*, which presented a case where an alien was charged with both entry without inspection and smuggling aliens for gain under separate deportation grounds. 713 F.2d 1511 (11th Cir. 1983). The Eleventh Circuit held that "where an appellant is deportable under two grounds arising out of the same incident, Sec. section 212(c) permits waiver of an unenumerated ground if a more serious ground is an enumerated ground for waiver." *Id.* at 1516. The B.I.A. declined to adopt the Marti-Xiques analysis, emphasizing that the Eleventh Circuit's piecemeal approach adds unnecessary complexity by raising "new issues regarding which deportation grounds are 'more serious' than others." *Hernandez-Casillas*, 20 I. & N. Dec. at 268. Furthermore, the B.I.A. felt that the approach "depends upon which charges happen to be made in a case and would result in situations . . . where the alien desires to have a more serious charge of deportability lodged against him, so he can apply for a section 212(c) waiver." *Id.* The B.I.A. found its solution to be "cleaner and simpler" than that offered by *Marti-Xiques*, as well as "fully in keeping" with the generous spirit of section 212(c) relief. *Id.* at 266.

that immigration laws were not intended to operate in a "capricious and whimsical fashion."[123]

The Board's simple new approach was short-lived. The Attorney General reversed the decision and overruled the Board's reasoning.[124] Specifically, the Attorney General held that the BIA erred in extending eligibility for section 212(c) relief to grounds of deportation that lack equivalent waivable grounds of exclusion.[125] His reasoning was two-fold: (1) the Board was wrong to conclude that "its holding in *Silva* and its further expansion of section 212(c) in this case 'bear equally little resemblance to the statute as written,'"[126] and (2) the guarantee of equal protection articulated in *Francis* and *Silva* does not require "the further departure from the terms of section 212(c) made by the Board in this case."[127]

First, prefacing concerns later adopted by the majority circuits' comparable-grounds approach, the Attorney General explained that the BIA's decision substantially disrupts the statutory scheme governing exclusion and deportation.[128] He noted that *Silva* remained tied to the statutory text because it "permits waivers of only those grounds for deportation that Congress expressly made waivable in the related context of exclusion"[129] and found *Hernandez-Casillas* distinguishable because it departed entirely from the exclusionary basis of section 212(c) by eliminating the requirement of a comparable ground of exclusion.[130] Furthermore, the decision infringed on the waiver scheme established for deportation proceedings by supplanting the standard of proof that Congress required for discretionary relief from deportation.[131] As a result, extending section 212(c) relief to all grounds of deportation (except those with a comparable exclusion ground specifically precluded from relief by the statute) would eliminate the showing of "good moral character" and "extreme hardship" statutorily required for relief from deportation.[132] The Attorney General found this result to be an unacceptable disruption of the statutory scheme. The majority circuit courts would later echo this reasoning.

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[123] 1 I. & N. Dec. 1, 5 (B.I.A. 1940).

[124] *Hernandez-Casillas*, 20 I. & N. Dec. at 262.

[125] *Id.* at 286–87.

[126] *Id.* at 287.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 287.

[130] *Id.*

[131] *Id.* Under Section 244(a)(1), discretionary relief from deportation is available for an alien who "'has been physically present in the United States for a continuous period of at least seven years,' who 'proves that during all of such period he was and is a person of good moral character,' and who 'is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship . . . .'" *Id.*

[132] *Id.*

Second, the Attorney General rationalized that the guarantee of equal protection articulated in *Francis* and *Silva* does not require expanding section 212(c) relief to all grounds of deportability.[133] He explained that these cases simply held that "an alien subject to deportation must have the same opportunity to seek discretionary relief as an alien who has temporarily left this country and, upon reentry, been subject to exclusion."[134] Accordingly, "[u]nder no plausible understanding of equal protection principles must discretionary relief be made available in deportation cases where the ground for deportation could not be waived if asserted in an exclusion case—or, as here, could not be asserted at all in an exclusion case."[135] In his view, equal protection requires comparison of the ground of deportation charged with the grounds of exclusion—the comparable grounds approach. Because the Constitution requires nothing more than the holdings in *Francis* and *Silva*, the Attorney General found unconvincing the BIA's conclusion that there is "no reason not to make [section 212(c)] applicable to all grounds of deportability."[136]

Following the Attorney General's decisive repudiation of the Board's reasoning in *Hernandez-Casillas*, the comparable-grounds test became firmly embedded as the approach employed by the Board to determine claims of section 212(c) relief.

C. BIA section 212(c) Jurisprudence Post-Final Rule: The Comparable-Grounds Approach Solidified

Aligning with the Attorney General's decision in *Matter of Hernandez-Casillas*, the final rule and corresponding regulation published by the Executive Office for Immigration Review in 2004 to implement the Supreme Court's *St. Cyr* decision clearly mandates a comparable-grounds approach, providing that "an alien who is deportable or removable on a ground that does not have a corresponding ground of exclusion or inadmissibility is ineligible for section 212(c) relief."[137] The supplementary information to the rule discusses this approach in the context of aggravated felonies, agreeing with one commenter that relief under section 212(c) is not available to a deportable alien "if there is no comparable ground of inadmissibility for the specific category of aggravated felony charged."[138] This emphasis on aggravated felonies is significant because aggravated felonies highlight the inherent tension in the comparable grounds approach: Congress never intended section

[133] *Id.*

[134] *Id.*

[135] *Id.* at 288.

[136] *Hernandez-Casillas*, 20 I. & N. Dec. at 289 (emphasis omitted).

[137] Section 212(c) Relief for Aliens With Certain Criminal Convictions, 69 Fed. Reg. 57831, 57832 (Sept. 28, 2004). *See supra* Section II(C).

[138] *Id* at 57831(emphasis omitted).

212(c) relief to apply in the deportation context, but eligibility for deportable aliens rests on whether Congress employed similar language to describe excludable and deportable offenses; because the phrase "aggravated felony" does not appear in the exclusion provision, courts struggle when deciding eligibility based on the aggravated felony deportation grounds. Two of the first cases decided by the Board after publication of the final rule, *Matter of Blake*[139] and *Matter of Brieva-Perez*,[140] both involve aggravated felonies and solidify the Board's adoption of the comparable-grounds approach. The wave of recent post-rule circuit court decisions adopting the comparable-grounds approach relies heavily on the Board's decisions in these two cases.[141]

In *Matter of Blake*, decided in 2005, the Board considered whether an alien convicted of the aggravated felony offense of sexual abuse of a minor is eligible for section 212(c) relief.[142] The BIA concluded that section 212(c) relief was not available because the "sexual abuse of a minor" deportation category does not have a statutory counterpart in the grounds of exclusion.[143]

The Board referred to *Wadud*, *Granados*, and *Hernandez-Casillas* as forming the basis for what it considered to be the firmly-established comparable-grounds approach.[144] The Board also relied on several of its previous decisions to derive the premise that, when dealing with an aggravated felony ground of deportation, the BIA must compare the specific category of aggravated felony charged (e.g. sexual abuse of a minor) to the exclusion grounds to determine whether a statutory counterpart exists.[145] Moreover, incidental overlap between the coverage of an aggravated felony deportation category (such as sexual abuse of a minor) and an exclusion ground (such as crimes involving moral turpitude) is insufficient to establish section 212(c) eligibility.[146] Finally,

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[139] 23 I. & N. Dec. 722 (B.I.A. 2005).

[140] 23 I. & N. Dec. 766 (B.I.A. 2005).

[141] Kim v. Gonzales, 468 F.3d 58, 63 (1st Cir. 2006); Caroleo v. Gonzales, 476 F.3d 158, 166–168 (3d Cir. 2007); Brieva-Perez v. Gonzales, 482 F.3d 356 (5th Cir. 2007); Avilez-Granados v. Gonzales, 481 F.3d 869, 872–73 (5th Cir. 2007); Vo v. Gonzales, 482 F.3d 363, 367–69 (5th Cir. 2007); Valere v. Gonzales, 473 F.3d 757, 761–62 (7th Cir. 2007); Soriano v. Gonzales, 489 F.3d 909 (8th Cir. 2006); Vue v. Gonzales, 496 F.3d 858, 860 (8th Cir. 2007); Abebe v. Gonzales, 493 F.3d 1092 (9th Cir. 2007); Rubio v. U.S. Atty. Gen., 182 Fed. Appx. 925 (11th Cir. 2006) (unpublished).

[142] 23 I. & N. Dec. 722 (B.IA. 2005).

[143] *Id.* at 724.

[144] *Id.*

[145] *See id.* at 724–25 (referring to *Meza* in explaining "[w]e concluded that 'as the respondent's conviction for a drug-related aggravated felony clearly could also form the basis for excludability under section 212(a)(23), he is not precluded from establishing eligibility for section 212(c) relief based on his conviction for an aggravated felony'").

[146] *See id.* at 725–26 (citing Matter of Montenegro, 20 I. & N. Dec. 603 (B.I.A. 1992); Matter of Esposito, 12 I. & N. Dec. 1 (B.I.A. 1995); Matter of Jimenez, 21 I. & N. Dec. 567 (B.I.A. 1996)). *Montenegro* involved an alien found deportable for a

the Board emphasized that the 2004 regulation clearly confirms the comparable grounds approach.[147]

Concluding that the inadmissibility ground of "crimes involving moral turpitude" is not comparable to "sexual abuse of a minor," the Board reasoned that "the moral turpitude ground of exclusion addresses a distinctly different and much broader category of offenses than the aggravated felony sexual abuse of a minor charge."[148] The Board explained that finding a statutory counterpart "turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses."[149] Drawing from its prior decisions, the BIA concluded that:

> Although many firearms offenses may also be crimes of moral turpitude, the category of firearms offenses is not a statutory counterpart to crimes of moral turpitude. Similarly, although there may be considerable overlap between offenses categorized as sexual abuse of a minor and those considered crimes of moral turpitude, these two categories of offenses are not statutory counterparts.[150]

Accordingly, "[t]he coverage of the offenses described need not be a perfect match in order to be statutory counterparts under the regulation so long as the ground of inadmissibility addresses essentially the same category of offenses under which the removal charge is based."[151]

Merely showing that the offense charged could also be a crime involving moral turpitude is insufficient.[152] In placing the focus squarely on the statutory language, the Board subtly shifts the emphasis of the

firearms offense. Montenegro argued that the ground of deportation charged has a comparable ground of exclusion in "crimes involving moral turpitude." The Board denied relief, reasoning that section 212(c) relief does not become available by simply subsuming the alien's deportable offense under a ground of exclusion. Rather, the ground charged for deportability must itself have a comparable ground of exclusion. *Montenegro*, 20 I. & N. Dec. at 605. *Esposito* also involved an alien found deportable for a firearms offense. Esposito argued that the conviction underlying the charge is a constituent element of the exclusion ground of multiple criminal convictions. The Board used the same rationale as *Montenegro* to deny relief. Esposito, 12 I. & N. Dec. at 9. In *Jimenez*, the Board similarly rejected an approach which looked to whether an offense is subsumed under the terms of an exclusion ground. Explaining that *Montenegro* and *Esposito* limit *Meza* "to the question of eligibility for section 212(c) relief in the case of a conviction for a drug-trafficking aggravated felony [which] is based on the specific amendment to section 212(c) regarding aggravated felonies," the B.I.A. reiterated in *Blake* the general rule "that section 212(c) relief is available in deportation proceedings only to those aliens who have been found deportable under a ground of deportability for which there is a comparable ground of excludability". *Blake*, 23 I. & N. at 726 (quoting *Esposito*, 12 I. & N. Dec. at 9–10).

[147] *Blake*, 23 I. & N. at 726.

[148] *Id.* at 728.

[149] *Id.*

[150] *Id.*

[151] *Id.* at 729.

[152] *Id.*

inquiry to a strict textual comparison. Even the term "statutory counterpart"—now replacing the previous phraseology of "comparable ground" or "corresponding ground" or "analogous ground"—works to tighten the textual focus: the grounds may no longer be merely comparable or corresponding or analogous; they must be counterparts. The recent circuit court decisions adopting the majority comparable-grounds approach rely heavily on this strict textual counterpart requirement. The result has been an overwhelming denial of eligibility for criminal residents, particularly aggravated felons, who, because of the expansive definition of aggravated felony developed by the 1990s amendments, may have committed a minor offense not typically considered to be "aggravated" in any other analysis.

Just two months after deciding *Blake*, the Board decided *Brieva-Perez*. In *Brieva-Perez*, the BIA examined a different category of aggravated felony—"crime of violence"—but reached the same conclusion: the deportable offense of "crime of violence" lacks a statutory counterpart among the grounds of exclusion.[153] Again, incidental overlap between grounds is insufficient to establish counterpart status. The Board had now made clear its adoption of a rigid comparable-grounds approach.

IV. AN ANALYSIS OF CIRCUIT COURT SECTION 212(c) JURISPRUDENCE

The Board's decisions regarding section 212(c) eligibility pave a tortuous path of inconsistent and unclear case law. The U.S. circuit court decisions are no less incongruous. The majority of circuit courts that have decided the issue have followed the Board in adopting the comparable grounds approach.[154] Only the Second Circuit and Judge Berzon's concurrence[155] in the Ninth Circuit's *Abebe v. Gonzales* have held an offense-specific approach to be appropriate.[156] With its recent order to rehear *Abebe v. Gonzales* en banc, the Ninth Circuit may be poised to affirm Judge Berzon's reasoning and join the Second Circuit in adopting an offense-specific approach.

[153] Matter of Brieva- Perez, 23 I. & N. Dec. 766, 773 (B.I.A. 2005).

[154] Circuits which have adopted the comparable-grounds approach include the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. *See* cases cited *supra* note 8.

[155] *Abebe v. Gonzales* held that section 212(c) relief was unavailable for an alien who was deportable for being convicted of the aggravated felony of sexual abuse of a minor, because the deportation ground lacks a statutory counterpart in the grounds of exclusion. Judge Berzon concurred with the majority in *Abebe* only because she agreed that the Ninth Circuit was constrained in its decision by its earlier decision in Komarenko v. INS, 35 F.3d 432 (9th Cir. 1994). Asserting that *Komarenko* was wrongly decided, Judge Berzon explained that "but for *Komarenko*, I would decide this case as the Second Circuit decided Blake." Abebe v. Gonzales, 493 F.3d 1092, 1106 (9th Cir. 2007) (Berzon, J., concurring).

[156] Blake v. Carbone, 489 F.3d 88 (2nd Cir. 2007).

It is significant that the lone circuit to adopt the offense-specific approach is the same circuit that decided *Francis*—and thus presumably the circuit most familiar with the analysis required for determining what it means to be "similarly situated." It is also significant that the Second Circuit's unequivocal adoption of the offense-specific approach comes in its decision overturning *Matter of Blake*—the case relied upon by the majority of circuits to uphold the comparable-grounds approach.

The comparable-grounds analysis submitted by the majority of circuit courts rests on rampant misinterpretation of and inappropriate reliance on BIA case law, an ill-conceived focus on statutory language and congressional intent, and a corresponding unreasonable deference to the legislative and executive branches, given the history of section 212(c) relief. In addition, the comparable-grounds approach invites new arbitrary distinctions, fails to afford individualized adjudications, and raises an operational anomaly in the way that relief is actually granted. More fundamentally, the comparable-grounds approach does not satisfy the equal protection mandate of *Francis* and *Silva*. From the rubble of section 212(c) case law, the offense-specific approach clearly stands as the rational choice.

A. The Majority Circuits' Reliance on BIA Case Law is Inappropriate

The majority circuits have consistently relied on BIA case law as clear support for the comparable-grounds approach. For example, the First Circuit has noted that "the BIA steadfastly ruled prior to 1990 that section 212(c) could not be utilized to waive all grounds of deportability, but only those grounds of deportability having a corresponding ground of excludability as specifically referenced in the statute."[157] The Seventh Circuit has cited several of the Board cases discussed in the previous section in explaining that "[t]he 'statutory counterpart' rule for deportees seeking to invoke section 212(c) appears in the case law as far back as the late 1970s."[158] Most recently, the Ninth Circuit recounted in *Abebe v. Gonzales* that "[t]he BIA continued the pre-1952 practice of extending relief into the deportation context where the ground of deportability charged was closely allied to an inadmissibility ground."[159]

[157] Campos v. INS, 961 F.2d 309, 313 (1st Cir. 1992) (emphasis omitted). *Campos* was one of the first published circuit court decisions decided after *Matter of Hernandez-Casillas*. Several other courts relied upon *Campos* in early decisions adopting the comparable-grounds approach. *See, e.g.*, Ins v. Chow, 12 F.3d 34, 38 (5th Cir. 1993); Matty v. INS, 21 F.3d 428, 428 (6th Cir. 1994) (unpublished decision); Lee v. INS, 12 F.3d 1102, 1102 (8th Cir. 1993) (unpublished decision); *Komarenko*, 35 F.3d at 434; Samuel v. INS, 81 F.3d 173, 173 (10th Cir. 1996) (unpublished decision); Rodriguez-Padron v. INS, 13 F.3d 1455, 1458 (11th Cir. 1994).

[158] Valere v. Gonzales, 473 F.3d 757, 761(7th Cir. 2007) (citing Matter of Montenegro, 20 I. & N. Dec. 603 (B.I.A. 1992); Matter of Meza, 20 I. & N. Dec. 257 (B.I.A. 1991); Matter of Granados, 16 I. & N. Dec. 726 (B.I.A. 1979); Matter of Wadud, 19 I. & N. Dec. 182 (B.I.A. 1984)).

[159] 493 F.3d 1092, 1098 (9th Cir. 2007).

The majority circuits are simply mistaken in depicting BIA case law as historically mandating a comparable-grounds approach. As seen from reviewing the very cases relied on by these circuits, the Board waffled mightily for decades between an offense-specific approach and a comparable-grounds approach. The very first case giving rise to section 212(c) relief in the deportation context—*Matter of L*—adopts an offense-specific approach.[160] So does the Board's landmark case *Silva* in adopting the *Francis* equal protection rationale.[161] The majority circuits' strict adherence to the comparable-grounds approach on the basis of Board precedent is therefore unwarranted and inappropriate. The Supreme Court has clarified that "[a]n agency interpretation of a relevant [statutory] provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."[162] The Board's interpretation of section 212(c) availability in the deportation context has remained inconsistent throughout decades of jurisprudence. As a result, the Board's recent confirmation of the comparable-grounds approach is entitled to substantially less deference.

It is arguable that the Board's decisions on this issue, as well as the agency's 2004 final rule and regulation implementing the comparable-grounds approach, are not entitled to any deference under *Chevron* analysis.[163] In *Blake v. Carbone*, the Second Circuit challenged the regulation relied upon by the Board in *Matter of Blake*.[164] Recognizing the unusual origin of the rule, the Second Circuit noted that it "is a creature of constitutional avoidance, arising from 'the ramifications of a prior constitutional decision of this court, rather than the original statute concerning whose interpretation the Attorney General has conceded expertise.'"[165] As a result, the Second Circuit concluded, any difficulty in determining section 212(c)'s applicability to deportation does not arise from ambiguity in the statute, but rather from agency misinterpretation

[160] Matter of L—, 1 I. & N. Dec. 1 (B.I.A. 1940).

[161] Matter of Silva, 16 I. & N. 26 (B.I.A. 1976).

[162] INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987).

[163] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, 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. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (citations omitted)).

[164] 489 F.3d 88, 100 (2nd Cir. 2007).

[165] *Id.* (citation omitted).

of the constitutional requirements of *Francis v. INS*.[166] Because the statute is clear, the agency's statutory interpretation—specifically its approach to applying equal protection—does not warrant deference.[167] The majority circuits are therefore not only mistaken when supposing that "[t]he *Blake* comparability test seems to us to be a reasonable interpretation of the relevant INA provisions"; they should not even reach the question of reasonableness under *Chevron* at all.[168]

B. The Majority Circuits Assert an Ill-Conceived Focus on Congressional Intent

The majority circuit courts also rely on congressional intent and the principle of plenary power to support the comparable-grounds approach. This rationale is fundamentally based on the historical distinction in immigration law between exclusion of aliens seeking to enter the U.S. and deportation of aliens already within U.S. borders. For example, the Ninth Circuit explains that a "policy choice that what might count as good reason to deny admission to a first-time entry-seeker might not be a good reason to expel a resident alien who has developed ties to this country."[169] It is Congress's job to define those policy choices and courts must defer to the intent of Congress insomuch as the intent and effect of the law is constitutional.

The majority circuits apply this rationale to the section 212(c) context as a way to limit the availability of relief: eligibility for section 212(c) relief in deportation proceedings must be restricted to those circumstances in which Congress has made relief available during exclusion proceedings. Since section 212(c) was originally designed as an exclusion provision—and was expanded to the deportation context only through a lengthy series of administrative and judicial decisions—availability of section 212(c) in the deportation context should mirror the relief available under exclusion proceedings. Otherwise, courts would thwart the policy choices made by Congress in establishing distinct regimes governing excludable and deportable aliens.[170]

This analysis supposes that because there is a rational basis for distinguishing excludable and deportable aliens, Courts should adopt the

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[166] *Id.*

[167] *Id.*

[168] Rubio v. U.S. Atty. Gen., 182 Fed. Appx. 925, 929 (11th Cir. 2006) (unpublished). It certainly is arguable that under *Chevron*, the courts *do* reach the issue of reasonableness if section 212(c) is interpreted as being *silent* on the question of eligibility in the deportation context. However, under *Chevron*'s step two, the agency's interpretation of the statute as imposing a comparable grounds test remains unreasonable for the reasons discussed in this Comment.

[169] Abebe v. Gonzales, 493 F.3d 1092, 1096 (9th Cir. 2007).

[170] For example, the Seventh Circuit cites the Attorney General's *Matter of Hernandez-Casillas* decision in noting that "Congress's scheme for awarding discretionary relief . . . deliberately set the eligibility bar higher in cases of deportation than those involving exclusion." Leal-Rodriguez v. INS, 990 F.2d 939, 949 (7th Cir. 1993).

approach that aligns most closely to congressional intent. The Fifth Circuit has emphasized that "Congress is not required to treat all aliens alike; it is only required to give a facially legitimate and bona fide reason for treating them differently."[171] In cases involving section 212(c) eligibility:

> the different limits on section 212(c) relief act as a 'carrot' to induce voluntary departure: 'Congress's more lenient treatment of excludable as distinct from deportable aliens . . . creates an incentive for deportable aliens to leave the country—which is after all the goal of deportation—without their having to be ordered to leave at the government's expense.'[172]

These arguments pointing to congressional intent find substance by invoking Congress's plenary power. As noted by the Fifth Circuit, "in the immigration context, there is a particular need for courts to defer to congressional choices."[173] The majority circuits think the comparable-grounds approach best respects Congress's policy choices.

In their decisions following *Matters of Blake* and *Brieva-Perez*, the majority circuits have adopted the Board's focus on requiring a strict textual link to determine that the deportation ground charged is a statutory counterpart (and not just comparable) to an exclusion ground. These decisions exemplify a glaring reliance on congressional intent by heavily emphasizing statutory language. By basing section 212(c) eligibility on the establishment of a precise textual link between the exclusion grounds and deportation ground charged, both the Board, in deciding *Blake* and *Brieva-Perez*, and the circuit courts, in affirming these cases, demonstrate a profound reliance on statutory language and congressional intent in determining section 212(c) eligibility.

The Second Circuit and Judge Berzon find the BIA's "emphasis on similar language" to be "strange" because section 212(c) relief was never intended by Congress to be a form of deportation relief.[174] Therefore, Congress "never contemplated that its grounds of deportation would have any connection with the grounds of exclusion."[175] Emphasizing that the current section 212(c) inquiry for deportees began with *Francis v. INS*, which was itself compelled by the Constitution, the Second Circuit explained that section 212(c) relief in deportation "was neither what Congress wrote nor what Congress 'intended.'"[176] As a result, it is "an

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[171] *See* Vo v. Gonzales, 482 F.3d 363, 371 (5th Cir. 2007) (citing Rodriguez v. INS, 9 F.3d 408, 414 (5th Cir. 1992)).

[172] *Id.* (citing Requena-Rodriguez v. Pasquarell, 190 F.3d 299, 309 (5th Cir. 1999)).

[173] *Id.* at 372.

[174] Blake v. Carbone, 489 F.3d 88, 102 (2nd Cir. 2007); *Abebe v. Gonzales*, 493 F.3d at 1108 (Berzon, J., concurring).

[175] *Blake*, 489 F.3d at 102.

[176] *Id.*

exercise in futility to search for similar language to gauge whether equal protection is being afforded."[177]

The Second Circuit's analysis is compelling because it eliminates—or at least seriously diminishes—the effect of the majority circuits' plenary power argument. There is no logical reason to defer to "congressional policy choices" when Congress never made such choices in the first place. To be sure, Congress established separate schemes granting discretionary relief in the exclusion and deportation contexts. But these regimes merged as a result of decisions made by the administrative and judicial courts—decisions which were originally based on humanitarian concerns (Board) and equal protection requirements (Courts of Appeal), not on congressional mandate.

Furthermore, even if "congressional intent" was a valid reason on which to base the comparable-grounds rationale, the approach which best adheres to congressional intent is an offense-specific analysis, not a comparable-grounds methodology. The section 212(c) inquiry asks, quite simply, whether the "irrelevant and fortuitous" circumstance of not leaving the country impedes a resident's eligibility for relief.[178] To answer this question, adjudicators must in turn ask whether the person would be eligible for relief *had* he or she left the country. The only rational way to answer that question is to conduct the same type of analysis that adjudicators conduct in the first instance when reviewing an exclusion case—an offense-specific analysis to determine whether the alien is excludable, followed by an offense-specific analysis to determine whether the alien qualifies for relief.

C. The Majority Circuits' Deference to the Legislative and Executive Branches is Unreasonable

The majority circuits have expressed a great fear of overstepping judicial bounds, which results in unreasonable deference to legislative and executive branches in the context of section 212(c) relief in deportation proceedings. While closely tied to the courts' presumption of plenary power and their reliance on congressional intent, this fear is articulated by the majority circuits as a distinct rationale for adopting the comparable-grounds approach.

1. Deference to Legislative Branch

Because the law regarding section 212(c) relief has traveled far from its statutory origins, the majority circuit courts are reluctant to apply the section 212(c) waiver in a way that further detaches the provision from the statute.[179] To these courts, the comparable-grounds approach ensures

[177] *Id.*

[178] *Id.* at 104.

[179] The majority circuits have proven one commentator's prediction correct. Following *INS v. St. Cyr*, 533 U.S. 289 (2001), Daniel Kanstroom noted that "some courts may again be confronted by a host of such 'comparable ground' issues in

that application of section 212(c) relief in the deportation context remains tied to its statutory application in exclusion proceedings. As expressed by the First Circuit, "the combined effects of section 212(c) and the interpretation in *Francis* . . . is to create an untidy patchwork. . . . But we think the most propitious means of improvement lies with Congress."[180]

This position is made particularly clear in early circuit court decisions addressing the scope of section 212(c) applicability. The Seventh Circuit has explained, "[w]e are reluctant . . . to conclude that once the initial judicial extension of waiver of exclusion relief was made from *no* grounds for deportation to *most* grounds for deportation, further action by the judiciary must be taken to expand section 212(c) to cover *all* grounds"[181] The court continued: "[t]o hold that the same form of discretionary relief must be available to aliens deportable for different, but arguably comparable, violations is to interfere again, on an even weaker rationale, with Congress's scheme for regulating aliens."[182]

The courts' reluctance to further "tinker" with the statutory scheme is closely tied to their desire to uphold congressional intent. However, these rationales remain distinct. In upholding congressional intent, the courts actively examine the statutory scheme and history to determine what Congress intended in creating section 212(c). In refusing to "tinker," the courts merely examine whether the proposed judicial action would alter the current application of law; if so, the courts step back and decline to take such action for fear of further disruption. Despite these analytical differences distinguishing the majority courts' reliance on congressional intent and their fear of overstepping judicial bounds, the result is the same: neither rationale is valid because Congress never contemplated this issue. As a result, there is no intent to follow and no boundary over which to step.

2. Deference to Executive Branch

The majority circuits are not only concerned with infringing on Congress's province; they are also concerned with overstepping the traditional executive realm of prosecutorial discretion. For example, the Ninth Circuit cited fear of improperly stepping into the executive sphere as a reason to adopt the comparable-grounds approach in *Komarenko v. INS*,[183] an early decision heavily relied upon in *Abebe v. Gonzales*.[184] The Ninth Circuit reasoned that an offense-specific approach would require courts to speculate whether the government would have invoked a

revived Section 212(c) cases and might simply invoke *Chevron* or other traditional canons of deference and decline 'to tinker.'" Kanstroom, *supra* note 25, at 433.

[180] Campos v. INS, 961 F.2d 309, 315 (1st Cir. 1992).

[181] Leal-Rodriguez v. INS, 990 F.2d 939, 952 (7th Cir. 1993).

[182] *Id.*

[183] 35 F.3d 432 (9th Cir. 1994).

[184] 493 F.3d 1092 (9th Cir. 2007).

particular ground of exclusion—an inappropriate inquiry given the executive's power of prosecutorial discretion.[185]

Despite the majority circuits' concern about infringing on executive authority, an offense-specific approach which allows adjudicators to conduct a minimal level of speculation is much preferable to a comparable-grounds approach which opens the door to an arbitrary misuse of prosecutorial discretion, if *Francis*'s equal protection mandate is to be upheld.

The comparable-grounds approach places too much power in the hands of DHS, which only raises additional equal protection concerns. Under regular immigration proceedings, it is the adjudicators' role to determine whether a certain alien qualifies for relief in the specific circumstances of the case. The adjudicator must review the facts which render the alien deportable and then determine whether the facts qualify the alien for relief. A comparable-grounds analysis effectively eliminates the second inquiry by shifting the focus away from the facts and mandating a superficial review of the text of the grounds. This removes the individualized nature of the inquiry and allows DHS to distinguish between equal classes of aliens at its whim by deciding which ground to charge. To ensure that relief remains unavailable to a particular alien, DHS needs simply look at the language of the grounds and charge the alien with a deportation ground that lacks a statutory counterpart. Distinguishing between aliens in this way becomes arbitrary and capricious and serves no rational basis. Furthermore, the ability for DHS to distinguish between aliens in this manner runs counter to the very idea of relief: why maintain a provision for relief at all if DHS can ensure that it cannot be accessed?

An offense-specific approach allowing adjudicators to contemplate whether relief would have been available to residents in exclusion proceedings does not raise the same equal protection concerns. Furthermore, the speculation level is minimal because adjudicators merely look to see whether the facts—i.e., the criminal offense—fall under a ground of exclusion. The adjudicator need not speculate whether DHS would have *actually* charged a particular ground, but rather need only decide whether DHS *could have* charged a particular ground. If the resident *could have* applied for a waiver at the border, then relief should be available in deportation proceedings. Any other conclusion ignores the linchpin of the analysis: the "irrelevant and fortuitous" circumstance of having departed the country.

D. The Comparable Grounds Approach Invites New Arbitrary Distinctions, Fails to Afford Individualized Adjudications and Raises an Operational Anomaly

The majority circuits accept the Board's concern in *Blake* and *Brieva-Perez* that incidental overlap between the grounds will—but should not—

[185] *Id.* at 1107 (Berzon, J., concurring).

lead to relief. The Second Circuit offers a thoughtful response, emphasizing that any standard which considers, and ignores as insignificant, the incidental overlap between grounds of deportation and grounds of exclusion merely invites arbitrary decision-making.[186] Deliberation over "incidental overlap" in the comparable-grounds analysis requires that "all or substantially all of the offenses under a particular ground of deportation must also fall under the counterpart ground of exclusion."[187] The Second Circuit rejected this idea as immaterial to the principal question of whether the "irrelevant and fortuitous" circumstance of traveling abroad stands in the way of section 212(c) eligibility. *Francis v. INS* mandates that eligibility turns on whether the resident's offense triggers a waiver of exclusion, not how his offense was categorized as a ground of deportation.[188]

Illuminating the arbitrary distinctions created by the comparable-grounds approach's treatment of incidental overlap, Judge Berzon explains that "[a]lthough 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."[189] That is to say, the comparable-grounds test arbitrarily distinguishes among classes of permanent residents who would *all* be excludable had they sought return after departing.

In the first class, the resident *is denied* eligibility because the government has charged a deportation ground which is linguistically different than the grounds of exclusion (for example, aggravated felony for sexual abuse of a minor, for which there is no similarly-worded exclusion ground). In the second class, the resident *is eligible* for a section 212(c) waiver because the grounds of deportation and exclusion describe the applicable ground with similar language (for example, certain drug offenses).[190] Yet a section 212(c) waiver would be available for members of both classes under the "crimes against moral turpitude" ground of exclusion had both members sought a waiver during exclusionary (rather than deportation) proceedings.[191] Judge Berzon concludes that "no rational purpose can be served by this distinction."[192]

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[186] Blake v. Carbone, 489 F.3d 88, 102 n.10 (2nd Cir. 2007) The court wondered: "[h]ow would the BIA determine how much overlap suffices? Would more than half the offenses underlying a ground of deportation have to fit within a particular ground of exclusion? Or would 33.333% do?" *Id.*

[187] *Id.* at 102.

[188] *Id.*

[189] *Abebe v. Gonzales*, 493 F.3d at 1109 (Berzon, J., concurring) (emphasis omitted).

[190] *Id.* at 1108–09.

[191] *Id.*

[192] *Id.* at 1109. She also reiterates the Second Circuit's concern in *Blake* regarding the difficulty in implementing the comparable grounds approach evenly: "How would

The arbitrary distinctions raised by the comparable grounds analysis highlight the lack of individualized inquiry under the approach. In *Blake v. Carbone*, the Second Circuit emphasized that section 212(c) eligibility turns on the guarantee of equal protection.[193] Restating the *Francis v. INS* holding, the court noted that permanent residents do not receive equal treatment when their eligibility for a section 212(c) waiver "turns on an irrational classification—whether they traveled abroad recently."[194] The court conceded that "[i]n the thirty-plus years since, we have offered precious little guidance on how to carry out that mandate."[195] With the opportunity to set the mandate in *Blake*, the court framed the issue as "whether the 'irrelevant and fortuitous' circumstance of not leaving the country stands in the way of petitioners' eligibility for a section 212(c) waiver."[196]

To answer this question, adjudicators must engage in an individualized inquiry. Failure to perform an individual analysis in removal proceedings, as in any adjudication, is itself a violation of equal protection. Yet the comparable grounds approach eliminates the individualized nature of a determination regarding section 212(c) eligibility.

Take, for example, *Blake v. Carbone*. Blake, it may be remembered, was convicted of sexual abuse of a minor, rendering him deportable under the aggravated felony ground. Blake argued that section 212(c) relief is available in his case under the "crimes involving moral turpitude" ground of exclusion because aggravated felonies involve moral turpitude.[197] The Second Circuit agreed with the majority circuits' conclusion that this type of argument rests on a false premise, since not all offenses falling under aggravated felonies necessarily inhere moral turpitude.[198] Were the court to find that two such broad categories signaled congruency, it "would be extending the scope of section 212(c) to a potentially different, and perhaps much larger, class of persons than necessary under *Francis*."[199] However, rather than concluding that Blake was ineligible because the grounds do not match textually and incidental overlap is insufficient (as the majority circuits do), the Second Circuit held that section 212(c) eligibility must turn on the particular offense committed by each resident.[200] The more nuanced offense-specific approach allows the courts to conduct a more authentic review into

the B.I.A. determine how much overlap suffices? Would more than half the offenses underlying a ground of deportation have to fit within a particular ground of exclusion? Or would 33.333% do?" *Id.*

[193] 489 F.3d 88, 100 (2nd Cir. 2007).

[194] *Id.* at 101 (citation omitted).

[195] *Id.*

[196] *Id.*

[197] *Id.* at 102.

[198] *Id.* at 103.

[199] *Id.* at 103.

[200] *Id.*

whether a particular deportable alien is eligible for section 212(c) relief. After all, eligibility for section 212(c) relief is an individualized inquiry to determine whether the circumstances surrounding a particular person qualify for relief.

An individualized offense-specific analysis comports with equal protection because it is the offense which renders a non-departing deportable resident "similarly situated" to a returning excludable resident. It is the *offense* which renders an entering alien excludable, and accordingly eligible for a waiver of exclusion. The Second Circuit points out that the Board and Attorney General have previously acknowledged this sentiment.[201] Moreover, as seen from examining Board jurisprudence, the BIA has experience employing the offense-specific approach in earlier cases. The Second Circuit explained, as applied to the facts of the *Blake* case, that the "task [of] determining whether a particular aggravated felony could be considered a crime of moral turpitude [] is one well within the BIA's expertise."[202] The Second Circuit is correct in asserting that the comparable-grounds' "formulaic" approach—limited to the language of the relevant grounds of deportation and exclusion—does not comply with the guarantee of equal protection recognized by all of the circuits in adopting *Francis v. INS*.[203]

In addition to raising new problems of arbitrariness and failing to afford individualized adjudications, the comparable-grounds test raises an operational anomaly once relief is granted. As noted by Judge Berzon, BIA case law is well-settled in holding that an alien who receives a waiver of excludability or deportability "can no longer be excluded or deported solely due to the offense that made him excludable."[204] This remains true "even if there is a category of deportable crimes that applies to his offense and that is different from the category that permitted the waiver."[205] As a result, relief under section 212(c) is itself offense-specific, not ground-specific.[206] Applying a grounds-specific analysis to

[201] *Id.* The court noted that the Attorney General observed in *Matter of Hernandez-Casillas* that, "'[T]he guarantee of equal protection requires, at most, that an alien subject to deportation must have the same opportunity to seek discretionary relief as an alien who has temporarily left this country and, upon reentry, been subject to exclusion.'" *Id.* (quoting Matter of Hernandez-Casillas, 20 I. & N. Dec. 262, 287 (B.I.A., Att'y Gen. 1991). The court also noted that the B.I.A. pointed out that "[i]t would indeed be remarkable if a section 212(c) waiver were available to an alien in deportation proceedings when that same alien would not have occasion to seek such relief were he in exclusion proceedings instead." *Id.* (quoting Matter of Jimenez-Santillano, 21 I. & N. Dec. 567, 575 (B.I.A. 1996)).

[202] *Id.* at 104.

[203] *Id.*

[204] Abebe v. Gonzales, 493 F.3d 1092, 1109 (9th Cir. 2007) (Berzon, J., concurring).

[205] *Id.*

[206] *Id.*

determining eligibility therefore is inconsistent with the actual way in which relief is granted.[207]

V. CONCLUSION

Relief from deportation under section 212(c) has followed a long and tortuous path. From its origin as an exclusionary remedy, section 212(c) is now available to certain residents[208] in deportation proceedings, regardless of whether the resident departed the country after being convicted of the deportable offense. For decades, the Board and circuit courts have struggled to establish a single approach to determining section 212(c) eligibility for residents in this context. Before 1991, when the Attorney General finally stepped in, in *Matter of Hernandez-Casillas*, the Board shifted back and forth between an offense-specific approach and a comparable-grounds approach.[209] The majority of circuit courts which have heard the issue have followed the Board's lead in settling on a comparable-grounds approach. However, their reasons for adopting such an approach are erroneous and unpersuasive.

At its very essence, the comparable-grounds approach represents an extreme proposition of form over substance. The approach simply orders a superficial comparison between the text of the deportation ground charged and the text of the grounds of excludability. If the two texts lack sufficient linguistic similarity, the resident in deportation proceedings is not considered to be similarly situated to a resident in exclusion proceedings—even if both residents are identical in all other respects. However, reliance on textual similarity between grounds does not address the heart of the issue: whether the deportable resident would have been eligible for section 212(c) relief had he been in exclusion proceedings. The only way to answer this question is to examine the resident's specific offense to determine if the offense qualifies under a ground of exclusion.

The rationale behind the majority circuits' approach collapses under scrutiny. Their characterization of Board precedent as clearly and steadfastly mandating a comparable-grounds approach is simply

[207] *Id.* Judge Berzon explains that "[t]he result of this anomaly is, once again, inexplicable distinctions in the treatment of similarly situated individuals: As between two individuals who would be deported for the same aggravated felony, alien C who had received a waiver at the border for that offense is insulated from deportation for the offense on any ground, including on the aggravated felony ground that did not give rise to the waiver; alien D, who remained here, is deportable as an aggravated felon because of the categorical mismatch. In other words, the categorical approach is applied to one but not the other, resulting in an arbitrary distinction."(emphasis removed). *Id.*

[208] *See* INS v. St. Cyr, 533 U.S. 289, 326 (2001) (Scalia, J., dissenting) (singling out residents who pled guilty to a deportable offense prior to enactment of the 1990s amendments and who "would have been eligible for section 212(c) relief at the time of their plea under the law then in effect.").

[209] 20 I. & N. Dec. 262 (B.I.A., Att'y Gen. 1991).

erroneous. Consequently, the majority circuits' unyielding deference to the Board is unwarranted. Their reliance on plenary power and congressional intent is misplaced because Congress never contemplated that section 212(c) would be applied in the deportation context. Their fear of overstepping judicial bounds seems to be an excuse to avoid "further disrupting" the already-convoluted law. Rather than straighten the errant path that the circuits have been following, they have chosen instead to continue ambling. Yet despite the circuits' fear of infringing on congressional or executive province, it is the judiciary's responsibility to correct misappropriated law. Because the majority of circuits seem unwilling to do so, the Supreme Court must step in to mandate the offense-specific approach.

The offense-specific approach addresses the equal protection requirements highlighted in *Francis v. INS*. Because the "irrelevant and fortuitous" circumstance of having traveled abroad triggers the equal protection problem, establishing whether a deportable resident is similarly situated to an excludable resident requires adjudicators to examine whether the deportable resident would have been excludable upon return had he departed the country. The very nature of this inquiry mandates an offense-specific approach. Under this inquiry, "incidental overlap" is irrelevant—if the offense falls under a waivable ground of exclusion, then section 212(c) relief becomes available in deportation proceedings. Whether the ground of deportation is textually similar to the ground of exclusion is simply not germane to the question. The comparable-grounds approach does not address the central equal protection problem. Moreover, the approach raises additional problems of equal protection. Because the focus of the comparable-grounds approach rests on the charge issued by DHS, the approach grants DHS an unusually high level of prosecutorial discretion—lending itself to arbitrary and capricious prosecutorial charging decisions. In addition, the focus on textual language results in unequal treatment between residents who are otherwise identical in circumstance, but for the textual distinction between grounds—a distinction never contemplated by Congress in the first place.

The primary flaw of the offense-specific approach is that it may result in the availability of relief for residents who committed serious crimes while barring from relief residents who committed less severe infractions. The Board recognized this anomaly in *Matter of Hernandez-Casillas*, wherein Hernandez-Casillas was ineligible for section 212(c) relief because of his unlawful entry, but would have been eligible for relief based on a charge involving the smuggling of aliens.[210] However, this flaw is easily rectified in the application of section 212(c) relief. Because a waiver under section 212(c) is discretionary, immigration courts confronted with an applicant for section 212(c) relief who has been

[210] *Id.*

convicted of a serious crime can deny relief based on the severity of the crime.[211] This result is certainly preferable to absolutely barring eligibility to all residents whose deportation ground happens to be textually dissimilar to the grounds of exclusion, considering that many of these residents have equitable qualities, such as long-term attachments to the United States, which immigration law otherwise considers highly desirable.

Section 212(c) relief was first extended into the deportation context as a humanitarian decision. The lone circuit to adopt an offense-specific approach is the same circuit which decided *Francis v. INS* and overturned *Matter of Blake*—the case heavily relied upon by the majority circuits in their post-regulation decisions. The Second Circuit's interpretation of its own holding should carry weight in this discussion. The comparable-grounds approach results in the unreasonable denial of relief to large classes of criminal residents based on a superficial and non-individualized test and leads section 212(c) relief farther from its roots. The Supreme Court should take action to correct the long and winding path of section 212(c) relief in the deportation arena.

[211] Distini, *supra* note 45, at 2820 (noting that the "decision maker [must] weigh 'the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf;'" where adverse factors include "the nature and circumstances of the grounds for the alien's deportation.").