IN THE

Supreme Court of the United States

FERNANDO CANTO,

Petitioner,

—v.—

ERIC H. HOLDER, Attorney General
of the United States,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 212(c) of the Immigration and Nationality Act granted the Attorney General broad discretion to waive the deportation of certain aliens. It was repealed in 1996. This Court has held that aliens who entered a plea of guilty to a deportable offense prior to 1996 may continue to rely on Section 212(c) to seek a waiver of deportation., *INS v. St. Cyr*, 533 U.S. 289 (2001). Petitioner Fernando Canto was convicted of a deportable offense prior to 1996 after exercising his right to trial by jury. Are individuals who went to trial entitled to the same relief provided in *St. Cyr* such that they may continue to seek waiver of deportation under Section 212(c) despite its repeal?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

FEDERAL CASES

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

FEDERAL STATUTES

TABLE OF AUTHORITIES (cont'd)

MISCELLANEOUS

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OPINIONS BELOW

The opinion of the Court of Appeals in Mr. Canto's petition for review is published and reported at 593 F.3d 638 (7th Cir. 2010), and reprinted at Pet. App. 1a-14a. The opinions of the Board of Immigration Appeals and the Immigration Judge are reprinted at Pet. App. 14a-18a and Pet. App. 19a-32a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), enacted in 1952, provides, as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily, and not under order of deportation, who are returning to a lawful unrelinquished domicile of seven consecutive years may be admitted in the discretion of the Attorney General . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Section 212(c) was repealed in 1996 by Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 8 U.S.C. § 1229b (1996).

INTRODUCTION

Petitioner Fernando Canto is a lawful permanent resident who has resided in the United States since 1971. He supports his wife and stepson and owns his own business, which employs 20 people. In 1983, 27 years ago, Mr. Canto was convicted of three counts of federal counterfeiting and one count of unlawfully carrying a firearm during commission of a felony, for which he was sentenced to two years in prison.

At the time of his conviction, Mr. Canto became deportable, but he also was eligible for so-called "Section 212(c) relief." At the time, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c)(1995) allowed an alien who was deportable to seek discretionary relief from the Attorney General. Historically, Section 212(c) relief carried with it an approximately a 50 percent chance of success. Pet. App. at 7a. Had Mr. Canto been subject to deportation back then, he would have been able to make a strong showing to the Attorney General for Section 212(c) relief in light of his long-term residence in the United States, his service to the community, and his clean record since his conviction. *See Matter of Marin*, 16 I. & N. Dec. 581, 584 (BIA 1978) (weighing of "social and humane considerations" in reviewing a 212(c) petition).

Congress repealed Section 212(c) relief in 1996. Nevertheless, this Court in *INS v. St. Cyr*, 533 U.S. 289 (2001), held that it is impermissible to deprive an alien of Section 212(c) relief if the alien was convicted by pleading guilty before the repeal of Section 212(c). The Court in *St. Cyr*, however, did not address whether the same rule applies to an alien who was convicted after exercising his right to trial.

The circuits are hopelessly split on the issue. With every regional circuit but one weighing in, most of the circuits have broken into three irreconcilable camps—(1) Section 212(c) relief must always be made available to an alien who was convicted prior to 1996 following a trial; (2) Section 212(c) relief is *never* available under those circumstances; and (3) Section 212(c) relief is available, but only when the alien demonstrates that he actually relied on the continued availability of Section 212(c) in making the decision to proceed to trial. Thus, whether an alien convicted after trial can seek Section 212(c) relief is almost entirely a function of where he happens to live when he is being deported. The circuits have had ample opportunity to reconcile their positions, but they are entrenched in their respective positions. Only this Court can settle the confusion.

The issue is a matter of national importance. Deportation is a serious penalty, bordering on a criminal sanction. Hundreds of thousands of aliens—more than ever before—are being deported every year, with approximately 100,000 each year classified as criminals by the Department of

Homeland Security. Thousands of these individuals received their convictions following trial, and many of them were likely convicted prior to the 1996 repeal of Section 212(c). It is critically important to them—and to the orderly administration of immigration law—to know whether, and under what circumstances, Section 212(c) relief is available to this universe of aliens. The issue is all the more critical, because the courts that are denying Section 212(c) relief are misapplying this Court's precedents on retroactive application of laws.

STATEMENT OF THE CASE

Statutory Background

Section 212(c) relief was first enacted with the passage of the Immigration and Nationality Act of 1952 ("INA"). Although the explicit statutory language applied only to aliens in exclusion proceedings, courts uniformly applied it to all persons in deportation proceedings. *Leal-Rodriguez v. INS*, 990 F.2d 939, 949 (7th Cir. 1993); *Gonzalez v. INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Casalena v. INS*, 984 F.2d 105, 106 n.3 (4th Cir. 1993); *Ghassan v. INS*, 972 F.2d 631, 633 n.2 (5th Cir. 1992); *Joseph v. INS*, 909 F.2d 605, 606 n.1 (1st Cir. 1990); *Tapia-Acuna v. INS*, 640 F.2d 223, 224-25 (9th Cir. 1981) (*overruled by Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc)); *Vissian v. INS*, 548 F.2d 328 n.3 (10th Cir. 1977); *Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976); *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *see also Yeung v. INS*, 76 F.3d 337, 341 (11th Cir. 1996).

Congress repealed Section 212(c) in September 1996, when it enacted the IIRIRA. Section 304(b) of IIRIRA replaced Section 212(c) relief with a procedure called "cancellation of removal," *see* 8 U.S.C. § 1229b (1996), and provided that cancellation of removal is not available to an alien convicted of any "aggravated felony." Previously, Section 212(c) relief was available to aliens convicted of "aggravated felon[ies]" so long as they did not serve a term of imprisonment of five years or greater and met the other criteria of the statute.[1]

INS v. St. Cyr

In *St. Cyr*, this Court considered the issue of whether Section 212(c) relief was still available, despite its repeal, to an alien who had accepted a plea prior to 1996 that rendered him eligible at the time to seek relief from deportation. Applying the retroactivity analysis set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court found that:

> Two important legal consequences ensued from respondent's entry of a guilty plea in

[1] Just prior to IIRIRA, in April 1996, Congress also narrowed the availability of Section 212(c) relief through the 1996 passage of Section 440(d) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which identified a broad set of offenses that precluded Section 212(c) relief, such as aggravated felonies, drug convictions, or multiple crimes of moral turpitude regardless of the length of their sentence, ineligible for discretionary relief from deportation under former Section 212(c). 110 Stat. 1277 (amending 8 U.S.C. § 1182(c)). Several cases involving Section 212(c) relief analyze the retroactivity of IIRIRA and AEDPA together.

> March 1996: (1) He became subject to deportation, and (2) he became eligible for a discretionary waiver of that deportation under the prevailing interpretation of § 212(c).

St. Cyr, 533 U.S. at 314-15.

The Court concluded that the repeal of Section 212(c) "clearly attache[d] a new disability, in respect to transactions or considerations already past" and thus it was impermissible to deny Section 212(c) relief to individuals such as St. Cyr. *Id.* at 321 (internal marks and citation omitted).

Noting that "whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations," *id.* (internal marks and citation omitted), the Court indicated that in accepting a plea a criminal defendant would be "acutely aware of the immigration consequences of their convictions." *Id.* at 322. The Court further indicated that "[g]iven the frequency with which § 212(c) relief was granted . . . preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer. . . ." *Id.* at 323.

Statement of Facts

Petitioner Fernando Canto is 50 years old and has lived in the United States as a lawful permanent resident for nearly 40 years, since he came to the country at age 10, in 1971. Pet. App. at 3a. As a U.S. resident, he has married, started a family, and

established his own business that employs 20 people. *Id.* While Mr. Canto is a citizen of Mexico, his two sisters and brother are all U.S. citizens and reside in Chicago. His parents are in Puerto Rico, not Mexico. Mr. Canto's wife and stepson depend upon him for financial support, and thus it would constitute an extreme hardship to his family were he to be deported.

Twenty-seven years ago, in 1983, Mr. Canto elected to proceed to trial on charges of federal counterfeiting, in violation of 18 U.S.C. §§ 472 and 473, as well as a related weapons charge. *Id.* Although Mr. Canto was originally charged with six counts, the government dropped one charge during trial and Mr. Canto was acquitted of another. Consequently, he was convicted at trial on three counts of federal counterfeiting and sentenced to two years imprisonment. *Id.* at 21a-22a. Mr. Canto forewent appeal following this trial conviction. *Id.* at 11a.

Mr. Canto's longstanding good character since his conviction in 1983 is undisputed. As the Court of Appeals acknowledged, "by all accounts, his life has been on the straight and narrow." *Id.* at 2a-3a. In April 2005, while reentering the United States from a trip to Mexico, immigration officials detained Mr. Canto and initiated deportation proceedings based on his prior convictions in 1983. *Id.* at 3a. Before the Board of Immigration Appeals ("BIA"), Mr. Canto did not dispute that he was removable, but argued that he should be allowed to petition the Attorney General for a deportation waiver under

Section 212(c), despite its repeal. *Id.* at 22a. The BIA denied Mr. Canto's request. *Id.* at 31a.

Mr. Canto sought review before the Seventh Circuit under 8 U.S.C. § 1252. There, too, he asserted that the repeal of equitable relief under Section 212(c) was impermissibly retroactive as applied to him. *See id.* at 2a. The Court of Appeals rejected that argument, based upon its own precedent in *Montenegro v. Ashcroft*, 355 F.3d 1035, 1036-37 (7th Cir. 2004), holding that aliens who went to trial could never invoke Section 212(c) now that the provision has been repealed. The Court of Appeals' rule is based on the premise that an alien in that position could not have decided to forego any rights in reliance on the continued existence of Section 212(c). Pet. App. at 11a. In so holding, the Court of Appeals acknowledged that its holding was in conflict with other circuits, which have adopted different rules regarding the continued availability of Section 212(c) relief in these circumstances. *Id.* at 9a-11a.

REASONS FOR GRANTING THE PETITION

This Court should exercise certiorari review over this case for at least three reasons. First, and most significantly, 11 of the 12 regional circuits have weighed in on the issue at hand and have reached vastly disparate and confusing results. Second, resolution of this case will provide clarity for a significant and ongoing national problem, as many aliens are similarly situated to Mr. Canto, and therefore will continue to face the risk of near-certain deportation in at least some of the regional

circuits. Third, the Court of Appeals, and several of the other circuits, have decided this important federal question in a manner that conflicts with this Court's guiding precedent on the issue of retroactivity, and particularly the presumption against retroactive application of IIRIRA to Section 212(c) relief set forth in *St. Cyr*.

I. A Significant And Entrenched Split Among Nearly All The Circuits Is Creating Confusion And Leading To Irreconcilable Results.

Every regional circuit but one (the D.C. Circuit) has grappled with the retroactive availability of Section 212(c) relief following a conviction by jury trial. They have reached diametrically opposite results, so that now whether an alien in Mr. Canto's position can seek Section 212(c) relief depends almost entirely on where he happens to reside. Specifically, most of the 11 regional circuits that have dealt with this issue fall into one of three disparate camps:

- On one extreme, the Third, Eighth and Tenth Circuits have found that Section 212(c) relief remains available even when an individual was convicted following trial. These circuits reason that denying relief from deportation to individuals who were convicted when such relief was available would give the IIRIRA impermissible retroactive effect by significantly changing and diminishing those individuals' rights.

- On the other extreme, the First, Sixth, Seventh and Ninth Circuits follow the rule that Section 212(c) relief is unavailable when an individual foregoes a guilty plea and elects to go to trial. These circuits reason that individuals proceeding through trial are ineligible for continued Section 212(c) relief because they could not have relied on the existence of Section 212(c) relief in proceeding to trial.

- Occupying the middle ground, the Fifth and Eleventh Circuits have fashioned a rule that operates on a case-by-case basis, requiring the courts to determine whether the individual at issue "actually relied" on Section 212(c) relief as a predicate to finding whether Section 212(c) continues to be available. These circuits reason that Section 212(c) relief is only available to individuals who can prove that they actually relied on its existence.

- Finally, the Second and Fourth Circuits fall outside of these camps, with the Second Circuit adopting more than one position and the Fourth adopting its own specific rationale on this issue.

Specifically, the first camp containing the Third, Eighth and Tenth Circuits would provide Mr. Canto with relief. Each of these circuits has held that Section 212(c) cannot be retroactively limited by IIRIRA for individuals convicted after trial. *See Lovan v. Holder*, 574 F.3d 990, 993-94 (8th Cir.

2009); *Atkinson v. Attorney General*, 479 F.3d 222, 227 (3d Cir. 2007); *Hem v. Maurer*, 458 F.3d 1185, 1200-01 (10th Cir. 2006); *see also Ponnapula v. Ashcroft*, 373 F.3d 480, 493-94 (3d Cir. 2004) (finding impermissible retroactive application where petitioner turned down a plea agreement for trial). In reaching this conclusion, the Third, Eighth and Tenth Circuits were fully aware of, considered and rejected the other circuits' approaches to this issue. For example, the Third Circuit, found that the requirement of "courts of appeals in other circuits . . . that there be reliance on the prior state of the law in order to make a finding that the elimination of Section 212(c) relief is impermissibly retroactive . . . . runs contrary to our understanding of prior Supreme Court law." *Atkinson*, 479 F.3d at 227 (internal citations omitted). The Third Circuit went on to find that "[t]he Court has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." *Id.* at 227-28.

The Eighth Circuit agreed that the actual reliance requirement is contrary to this Court's leading retroactivity decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). "Having carefully reviewed these various decisions [of the other circuits], we will follow the Third Circuit's decision in *Atkinson*" and hold that the petitioner was not precluded from Section 212(c) relief. *Lovan*, 574 F.3d at 993-94.

Similarly, the Tenth Circuit also rejected the rules adopted by the other two camps. *Hem*, 458 F.3d at 1191-92. With respect to the middle ground

camp's "requirement that a petitioner demonstrate that he actually relied on § 212(c)," the Tenth Circuit found that such an approach constituted an abandonment of "the Supreme Court's consistent use of objective reliance in the context of retroactivity analysis," *id.* at 1191, and concluded that the requirement "turns the historic presumption against retroactive application of statutes on its head." *Id.* at 1192. The Tenth Circuit similarly rejected the camp that found Section 212(c) unavailable following a trial conviction, finding that this analysis "elevat[es] the quid pro quo of the plea bargain into a prerequisite to an IIRIRA retroactivity challenge . . . [and] is overly constrained, ignoring *Landgraf's* direction that we consider whether a new statute 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* at 1192 (quoting *Landgraf*, 511 U.S. at 280). The Tenth Circuit concluded, "[i]n light of our review of the Court's retroactivity cases, we cannot follow our sister circuits that impose a requirement of subjective/actual reliance." *Id.* at 1196. The Tenth Circuit found that foregoing the right to appeal (as Mr. Canto did here) was sufficient to trigger Section 212(c) relief.

At the other extreme, the First, Sixth, Seventh and Ninth Circuits have categorically held that Section 212(c) is no longer available for individuals who elect to go to trial (the no-relief rule). *Kellerman v. Holder*, 592 F.3d 700, 707 (6th Cir. 2010); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002), *cert. denied*, 539 U.S. 902 (2003); *Dias v. INS*, 311 F.3d 456, 458 (1st Cir.

2002), *cert. denied*, 539 U.S. 926 (2003); Pet. App. at 11a. The decisions in this camp rest upon the conclusion that no individual could possibly have relied on the availability of Section 212(c) relief when deciding to go to trial. Thus, these circuits conflict sharply with the Third and Eighth Circuits, which have found no reliance at all is necessary. Again, these courts note their departure from the other circuits in reaching their conclusions, and are equally entrenched in their positions. *Kellerman*, 592 F.3d at 707 (finding the petitioner ineligible for waiver because he was convicted by jury, "we decline to adopt the Third Circuit's approach").

Navigating between these two extremes are the Fifth and Eleventh Circuits. They have held that in order for the presumption against retroactivity to apply, an individual must show that he or she actually relied upon the availability of Section 212(c) relief during the trial proceedings. This position has been referred to as the "actual reliance" standard. *Ferguson v. United States Atty. Gen.*, 563 F.3d 1254, 1271 (11th Cir. 2009), *cert. denied*, *Ferguson v. Holder*, ___ S. Ct. ___, No. 09-263, 2010 WL 757697 (Mar. 8, 2010); *Carranza-DeSalinas v. Gonzales*, 477 F.3d 200, 205 (5th Cir. 2007) ("this circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate actual, subjective reliance . . . . Because the reliance demonstrated must be actual, the determination of retroactive effect is made as to the individual applicant, not as to a group of similarly-situated applicants"); *Hernandez-Castillo v. Moore*, 436 F.3d 516, 519-520 (5th Cir. 2006), *cert. denied*, 549 U.S. 810 (2006) (finding no reliance). These circuits too have

considered and rejected certain decisions of the other circuits. *See Ferguson*, 563 F.3d at 1269-71 (finding "reliance is a core component of *St Cyr's* retroactivity analysis," and holding that while the petitioners in that case could not establish reliance, another who is differently situated might). This actual reliance standard presents its own difficulties given that collecting and presenting evidence to prove "actual reliance" in trials that took place before the 1996 IIRIRA repeal will likely be a difficult task for deportees in these circuits.

The Second and Fourth Circuits fall into none of the above categories. The Second Circuit adopted the no-relief rule of the First, Sixth, Seventh and Ninth Circuits in *Swaby v. Ashcroft*, 357 F.3d 156, 162 (2d Cir. 2004) (decision to go to trial as a matter of law forecloses any argument of detrimental reliance and individual proof of such reliance is therefore not welcome) and *Rankine v. Reno*, 319 F.3d 93, 99 (2d Cir. 2003), *cert. denied sub nom.*, *Lawrence v. Ashcroft*, 540 U.S. 910 (2003). But, in *Restrepo v. McElroy*, 369 F.3d 627, 640 (2d Cir. 2004), the Second Circuit remanded for an evidentiary hearing on whether the petitioner could show actual reliance in that she delayed filing for Section 212(c) relief with the expectation that such a filing could be made at a later date.

The Fourth Circuit takes an altogether different approach. Agreeing with the Third, Eighth and Tenth Circuits, the Fourth Circuit has concluded that reliance is not a relevant inquiry to this Court's retroactivity analysis: "In sum, the historical presumption against retroactive application of

statutes did not require reliance. Neither *Landgraf* nor subsequent Supreme Court authority imposes any such requirement. And we believe that the consideration of reliance is irrelevant to statutory retroactivity analysis." *Olatunji v. Ashcroft*, 387 F.3d 383, 394 (4th Cir. 2004). However, in *Chambers v. Reno*, the Fourth Circuit concluded that the petitioner's decision to go to trial was not sufficiently impacted by the repeal of Section 212(c) to trigger ongoing Section 212(c) availability. 307 F.3d 284, 293 (4th Cir. 2002).

Given these disparate results, the time is ripe to grant certiorari. The split on this issue is well developed, and the contours of the disagreement among the circuits will not appreciably change with future decisions, given that almost every circuit has considered this issue, weighed the other circuits' reasoning on the issue and published a decision accepting or rejecting those other analyses as it sees fit.[2] There is no reason for an immigrant facing deportation in Boston to have no prospect for Section 212(c) relief where a similarly situated immigrant in

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[2] Indeed, the circuit split that exists with respect to this issue is actually deeper than the split that preceded this Court's decision in *St. Cyr*. There, the Court found that the issue of a Section 212(c) availability following a guilty plea had split eight circuits, as opposed to the eleven circuits that have weighed in on this issue. *St. Cyr*, 533 U.S. at 293 n.1. This case is also a more attractive case for *certiorari* review than *St. Cyr* itself was because it presents the issue of Section 212(c) relief following a trial conviction without any other complicating legal issues. That was not the case in *St. Cyr*, which required resolution of a preliminary issue regarding whether *habeas corpus* jurisdiction exists over deportation proceedings under AEDPA and IIRIRA prior to reaching the Section 212(c) issue. *Id.* at 298-310.

Philadelphia could obtain such relief. Similar disparities exist across the country as the circuit split on this issue applies to every U.S. state. As this case provides an opportunity for the Court to resolve this wide variation in the legal landscape, certiorari should be granted.

II. This Is An Issue Of National Importance.

This case raises issues of profound national importance. A large and increasing number of individuals are facing deportation today with limited avenues for relief outside of Section 212(c). In 2008 alone, the Department of Homeland Security removed 358,886 aliens, 97,133 of whom the Department identified as "criminals." DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS, 3-4 (July 2009), *available at* www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf. This marked a 17% increase in the total number of aliens removed from this country relative to 2007, and the sixth year-on-year increase in total removals by the Department. *Id.* at Table 2. Now, absent Section 212(c) relief, "[u]nder contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses." *Padilla v. Kentucky*, ___ S.Ct. ___, No. 08-651, 2010 WL 1222274, *5 (Mar. 31, 2010).

Prior to its repeal, Section 212(c) relief was a check on the expansion in the use of deportation proceedings. Indeed, as this Court noted, Section 212(c) relief was used "to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to [the] 1996" IIRIRA. *Padilla*, 2010 WL 1222274, at *5 (citing *St. Cyr*, 533 U.S. at 296).

The fact that Section 212(c) has been repealed does not lessen the importance of this issue. Given that approximately 68,000 felony convictions each year are obtained through trial in state court alone and that, on average, these felony convictions are for less than five years imprisonment,[3] it is logical to conclude that the class of individuals that remain affected by Section 212(c)'s repeal is a significant number potentially numbering in the thousands.

Moreover, the burden caused by the uncertainty regarding the availability of Section 212(c) relief extends far beyond individuals facing actual deportation proceedings. As Mr. Canto's own circumstances illustrate, individuals in Mr. Canto's position are likely to be well-settled in this country and have jobs, families and ties to their communities, all of which would be impacted by

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[3] *See* SEAN ROSENMERKEL, ET AL., BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURT, 2006- STATISTICAL TABLES 1, § 4 (December 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (6% of the 1,132,290 felony convictions in state court come by way of jury and bench trial, rather than plea, and the average sentence for all state court felony convictions was four years and 11 months in 2006).

unwarranted deportation. They could live for many years with the fear of deportation lingering and, with the current state of the law, lack of clarity as to their right to seek relief from deportation. The lack of clarity regarding Section 212(c) relief impacts the Department of Homeland Security as well, which is expending resources in identifying and prosecuting deportation proceedings that may be completely unnecessary should this Court find that these individuals are eligible for Section 212(c) relief. Nor is this issue likely to end by itself anytime soon, as individuals convicted at the age of twenty just prior to the 1996 repeal of Section 212(c) would only be in their thirties today. As the numerous decisions among the circuits over the last eight years demonstrate, the issue of Section 212(c) relief will therefore doubtlessly recur as these individuals continue to leave and reenter the United States throughout their adulthood.

Finally, these individuals should not find themselves facing deportation without Section 212(c) relief simply because they elected to proceed to trial rather than accept a guilty plea. The Sixth Amendment guarantees a criminal defendant a right to a trial by jury, and is a fundamental guarantee under the Bill of Rights "reflect[ing] a profound judgment about the way law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). The exercise of this core constitutional right should not be penalized after the fact through selective retroactive application of IIRIRA, particularly where the penalty—deportation—could very well be the *most* important part of a criminal defendant's punishment:

> These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Padilla, 2010 WL 1222274, *5 (footnote omitted). Just as a noncitizen defendant has a right to accurate legal advice regarding the likelihood of deportation following a conviction, so too should a noncitizen defendant have the right to make reasoned decisions about whether or not to exercise the constitutional right to trial without the unforeseeable and retroactive imposition of deportation.

III. The Court Of Appeals And The Other Circuits To Reach Similar Conclusions Have Misapplied This Court's Precedent On Retroactivity.

The Court of Appeals, and the circuits on which it relied, has decided an important federal question in a manner that is at odds with this Court's applicable precedent. In *Landgraf*, this Court set forth the applicable test to determine whether a statute is impermissibly retroactive. The Court was careful to

point out that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 511 U.S. at 265. The Court explained:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

Id. (citation omitted). To implement this presumption, the Court established a two-part test for determining the appropriateness of retroactive application of a statute. First, the reviewing court must determine whether Congress intended retroactive application. *Id.* at 280. Second, if Congress expressed no clear intent, the court must consider whether applying the law retroactively would have an impermissible retroactive effect, *i.e.*, whether it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.*, or as this Court further elaborated in *St. Cyr*, whether "it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attached a new disability." *St. Cyr,* 533 U.S. at 321.

With respect to the first question, as the Court of Appeals noted, "the *Landgraf* analysis here is the same as it is in *St. Cyr*—Congress did not state with certainty that it intended the repeal of section 212(c) to apply retroactively." Pet. App. at 9a. Consequently, with the first question answered in the negative, the court must turn to the second part of the test. It is here where the Court of Appeals and several of its sister circuits, fail to faithfully implement this Court's precedent. Rather than asking the question this Court has set out as the second prong of the two-part test, and considering whether the repeal of Section 212(c) relief took away a right or created a disability for Mr. Canto, the Court of Appeals launched immediately into a discussion of whether Mr. Canto relied on that relief in going to trial rather than accepting a plea. *Id.* at 9a-14a. First, it should be noted that Congress made no distinctions between trials and guilty pleas in fashioning Section 212(c) relief—it was available to all regardless of their path to conviction. Second, this Court has never imposed such a test into the retroactivity analysis. *See, e.g.*, *Landgraf*, 511 U.S. at 270-72 (collecting retroactivity precedent); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946-47 (1997) (same). Rather, as noted by the Third Circuit, the analysis should have proceeded as follows:

> Prior to IIRIRA's enactment, [Petitioner] remained free to apply for a waiver under section 212(c) despite his conviction of an aggravated felony. After IIRIRA, he lost that right; applying basic principles of retroactivity, IIRIRA attached a new legal

> consequence to [Petitioner's] conviction: the certainty—rather than the possibility—of deportation. Such a change in legal consequences based on events completed before IIRIRA's enactment constitutes an impermissible retroactive effect.

Atkinson, 479 F.3d at 230.

The Court of Appeals erred in applying this Court's retroactivity precedent by focusing on whether Mr. Canto relied on existing law, rather than finding that new "legal consequences" attached to Mr. Canto's existing rights. While this Court has suggested that reliance can be considered as a factor in determining whether a law has retroactive effect, stating that "courts should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations," *Martin v. Hadix*, 527 U.S. 343, 358 (1998) (quoting *Landgraf*, 511 U.S., at 270), the Court of Appeals' finding that reliance is a condition precedent to finding impermissible retroactivity is inconsistent with the Court's decision in *Landgraf* and its progeny and misreads *St Cyr*.

Certiorari should be granted to correct this misapplication of the Court's precedent on this important issue, which affects not only the substantial rights of Mr. Canto, but all others similarly situated.

CONCLUSION

Certiorari should be granted to resolve the deep and entrenched conflict that has arisen among the circuit courts regarding the continued availability of Section 212(c) relief for individuals that exercise their right to trial. Review is also warranted to address the misapplication of this Court's precedent on the issue of retroactivity of the IIRIRA. As this is a significant national issue that will not resolve itself without this Court's intervention, the petition for writ of certiorari should be granted.

Respectfully submitted,

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