No. 10-___

IN THE

Supreme Court of the United States

LIVINGSTON RONDELL JOHNSON,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Former Immigration and Nationality Act ("INA") subsection 212(c), 8 U.S.C. § 1182 (repealed), permitted discretionary relief from exclusion, notwithstanding certain convictions, to certain returning permanent resident immigrants. While by its terms § 212(c) applied only to immigrants in exclusion proceedings (proceedings in which immigrants were seeking to "be admitted" to the United States after "temporarily proceed[ing] abroad voluntarily"), it was construed as also being available to immigrants in deportation proceedings (proceedings in which the Government seeks to remove from the country an immigrant who has already been "admitted"). *See INS v. St. Cyr*, 533 U.S. 289, 295 (2001). But, an immigrant in deportation proceedings could obtain § 212(c) relief only if the act or conviction triggering deportability had a counterpart among the statutory grounds of exclusion.

In 1996, Congress repealed § 212(c). In *St. Cyr*, this Court held that the repeal did not apply retroactively to an immigrant who had been convicted before the repeal, through a plea agreement, of a crime that would make him inadmissible. Such immigrants, this Court held, may avail themselves of § 212(c) relief notwithstanding its repeal if they face deportation based on such a pre-1996 conviction.

This petition for a writ of certiorari presents two questions:

1. Whether this Court's holding in *St. Cyr* concerning the non-retroactivity of Congress's 1996 repeal of § 212(c) is a matter of statutory

interpretation that applies equally to all immigrants, or instead is non-retroactive only as to immigrants who can demonstrate reliance (either objectively or subjectively) on the continued availability of § 212(c) relief, such that the meaning of the statute repealing § 212(c) differs from case to case.

2. Whether, the "statutory counterpart" rule for eligibility for § 212(c) relief, as applied by the Board of Immigration Appeals nine years after the repeal of § 212(c), wrongly ignores the substance of an immigrant's conviction and its prior focus on treating similarly situated people similarly in favor of comparing the immigrant's listed ground for deportability with the language of the grounds found in the excludability statute.

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OPINIONS BELOW

An order of removal entered by an Immigration Judge ("IJ") (Pet. App. 11a-13a), accompanied by oral decision (Pet. App. 14a-19a), and a decision entered by the Board of Immigration Appeals ("BIA") dismissing an appeal from the IJ's order (Pet. App. 7a-10a), are unreported.

The order of the United States Court of Appeals for the Seventh Circuit denying Johnson's Petition for Review of the IJ's and BIA's orders (Pet. App. 1a-6a), and that court's order denying rehearing and rehearing *en banc* (Pet. App. 20a), are also unreported.

JURISDICTION

The Seventh Circuit's order denying Johnson's Petition for Review was entered on July 19, 2010. Pet. App. 1a. The Seventh Circuit's order denying rehearing en banc was entered on October 6, 2010. Pet. App. 20a. This Petition is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1 (Pet. App. 21a.)

8 U.S.C. § 1101 (Pet. App. 21a.)

8 U.S.C. § 1182 (Pet. App. 21a.)

8 U.S.C. § 1227 (Pet. App. 56a.)

8 U.S.C. § 1229b (Pet. App. 60a.)

8 C.F.R. § 1212.3(f)(5) (Pet. App. 71a.)

8 U.S.C. § 1182 (1995) (Pet. App. 71a.)

STATEMENT

This petition for certiorari places before this Court two well-developed and entrenched circuit splits. The proper resolution of these issues by this Court could make the difference between petitioner Livingston Johnson, a lawful permanent resident of the United States for nearly three decades, being able to remain here, or instead being uprooted and sent to Jamaica based on a single conviction from 18 years ago. While that result would be personally catastrophic for Johnson, the Seventh Circuit opinion endorsing it is more broadly problematic for countless other immigrants in that circuit and others like it, who must live under much harsher interpretations of INA § 212(c) waiver law than immigrants in various other circuits. By this petition, Johnson asks this Court grant certiorari to restore consistency to the law of § 212(c) deportability waivers.

1. Before 1996, if an immigrant was convicted of certain offenses that would render him deportable, he could seek a waiver of deportation from the Attorney General under § 212(c) so long as he could establish lawful unrelinquished domicile of seven consecutive years in this country.[1] Between 1989 and 1995, over 50 percent (and more than 10,000 in total) of these discretionary waiver applications were granted. *INS v. St. Cyr*, 533 U.S. 289, 296 & n.5 (2001).

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[1] As discussed more fully below, the language of § 212(c) technically applies only to excludable immigrants who were returning from trips abroad, but it has been interpreted for decades to apply to similarly-situated deportable immigrants as well. *See St. Cyr*, 533 U.S. at 295.

That waiver law changed dramatically in the 1990s. In 1990, Congress amended § 212(c) to preclude relief for anyone convicted of an aggravated felony who had served a prison term of at least 5 years. *Id.* at 297; Pub. L. No. 101-649, § 511, 104 Stat. 5052. Then in 1996, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") eliminated the availability of § 212(c) waivers for any immigrant convicted of "one or more aggravated felonies." Pub. L. No. 104-132, § 440, 110 Stat. 1277. Later in 1996, § 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub L. No. 104-208, § 304(b), 110 Stat. 3009-597, repealed § 212(c) altogether and replaced it with a "cancellation of removal" proceeding, again unavailable to anyone "convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3).

In *St. Cyr*, this Court held that the repeal of § 212(c) could not be retroactively applied to an immigrant who pled guilty and was convicted before 1996 of an offense that would have made him deportable, but for which § 212(c) relief would have been available before its repeal. Analyzing retroactivity under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the Court first determined that there was no clear indication from Congress that it intended the repeal to be retroactive. 533 U.S. at 316. It then held that applying that repeal retroactively would attach a new disability to transactions or considerations already past. *Id.* at 321. In St. Cyr's case, for instance, St. Cyr pled guilty before 1996, likely as a way to maximize his chances of receiving a future § 212(c) waiver. *Id.* at 321-23. Moreover, the Court opined that the discretionary nature of a § 212(c) waiver was

discretionary did not assuage these retroactivity concerns, for "[t]here is a clear difference, for the purposes of retroactivity, between facing possible deportation and facing certain deportation." *Id.* at 325.

Since *St. Cyr* was decided, the Courts of Appeals have splintered over application in cases not directly on all fours with the facts of *St. Cyr*. The Third and Eighth Circuits have held, as a matter of statutory interpretation, that the 1996 repeal is generally inapplicable as to convictions that predated the repeal; that analysis recognizes that retroactivity analysis under *Landgraf* turns on whether a change in law adds a "new disability" to "transactions or considerations already past," 511 U.S. at 269, which the repeal of § 212(c) certainly did.

The Seventh Circuit, in contrast, has joined four others (including the First, Sixth, Ninth, and Eleventh Circuits) in essentially limiting *St. Cyr* to its facts. Approaching the question of retroactivity not as one of statutory interpretation, but as one of individual reliance and hardship, those courts hold that the 1996 repeal is not retroactive only as to those pre-repeal felonies that resulted from guilty pleas. An immigrant who went to trial, the reasoning goes, could not have relied on the possibility of a § 212(c) waiver, and thus the repeal can retroactively be applied to such convictions.

Other courts have taken still different positions. The Second and Fifth Circuits permit the repeal of § 212(c) to function retroactively except for immigrants who can establish subjective reliance on the availability of § 212(c) relief, even where the immigrant did not plead guilty, after a case-by-case

analysis. The Tenth Circuit also requires reliance, but does not require a showing of individualized subjective reliance; it applies a "group-based" approach which bars retroactive application when it would be objectively reasonable to have relied on § 212(c) relief in those circumstances.

2. For those individuals who may yet call upon § 212(c) relief despite its 1996 repeal, there is a second question of the kinds of removability from which it can provide discretionary relief. Section 212(c) by its own terms applies only to persons in exclusion proceedings; it was through judicial and agency decisions that it was extended to immigrants facing deportation (now called removal).[2] Those decisions limit the availability of § 212(c) relief in deportation proceedings, however, to those cases where the ground on which deportation is based has a "statutory counterpart" in the enumerated grounds for exclusion. *See* 8 C.F.R. § 1212.3(f)(5) (codifying this the "statutory counterpart" test). Put differently, where a conviction is of a kind that it could serve both as a ground for deportation, and as a ground for exclusion, § 212(c) relief is available for that conviction in deportation proceedings.

While this much is common ground, the Courts of Appeals disagree on how this "statutory counterpart" test applies. The Seventh Circuit, along with eight other circuits, follow the BIA's test, which asks whether the ground of deportability charged by the government has a mirror-image in the grounds of

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[2] *See* Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597. For consistency and ease of comprehension, this petition uses only the term deportation when referring to such proceedings.

exclusion found in 8 U.S.C. § 1182. For instance, while an "aggravated felony" is a ground for deportation, *see* 8 U.S.C. § 1227(a)(2)(A)(iii), and "aggravated felony" is defined to include "sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A), neither the phrase "aggravated felony" nor "sexual abuse of a minor" appears in the list of grounds for exclusion. *See generally* 8 U.S.C. § 1182(a). Accordingly, these courts reason, § 212(c) relief is categorically unavailable to immigrants deportable on that ground.

The Second Circuit, in contrast, rejects the mirror-image test for the statute, asking instead whether a similarly situated individual who traveled abroad would be, or was previously, excludable on grounds permitting § 212(c) eligibility. While there is no ground of excludability for the "aggravated felony" category, a conviction for a "crime involving moral turpitude" renders a person inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(I). Rather than limiting the comparison to the language of the statutory grounds for deportation and exclusion, that court holds that one must actually look at the conviction, and determine whether it would trigger excludability as a crime of moral turpitude. If a similarly situated person who is in or could have been subject to exclusion proceedings would be eligible for relief, so, too, an immigrant qualifies for § 212(c) relief in deportation proceedings.

3. A citizen of Jamaica, Livingston Johnson came to the United States in 1978 and has resided here as a lawful permanent resident since 1981. In 1992, he was convicted of sexual assault on a minor and sentenced to 30 months of supervised probation and 9

months of work release. Pet. App. 2a. In 2003, years after he completed his sentence, he applied to become a naturalized citizen. The DHS denied his application on the basis of his conviction and in 2006 arrested him and put him in deportation proceedings for committing an aggravated felony after being admitted into the United States. *Id.* 2a-3a.

Before an IJ, Johnson conceded the factual allegations against him and sought waivers of deportation or inadmissibility under current § 212(h) and also § 212(c), which had been repealed in 1996—after his conviction but before his deportation proceedings. *Id.* 3a. The IJ ruled that § 212(h) was unavailable on account of his aggravated felony conviction. *Id.* 18a. Following Seventh Circuit precedent, the IJ also ruled that the 1996 repeal rendered § 212(c) unavailable to Johnson, distinguishing *St. Cyr* because Johnson was convicted of an aggravated felony after a bench trial rather than after a guilty plea. *Id.* 16a-17a. Alternatively, the IJ ruled that even if § 212(c) were available, Johnson would not qualify because he was being deported based on his commission of an "aggravated felony," a ground that has no statutory counterpart for exclusion under § 212(a). *Id.* 17a-18a.

The BIA dismissed his appeal in July 2009, affirming the IJ decision in all particulars. Pet. App. 7a-10a. A panel of the United States Court of Appeals for the Seventh Circuit—exercising its jurisdiction under 8 U.S.C. § 1252—denied Johnson's petition for review on July 19, 2010, *id.* 1a-6a, and the court denied *en banc* review on October 6, 2010, *id.* 20a.

4. The importance of these two frequently recurring issues, both to Johnson and more broadly, is undeniable. The conflicts they have created are entrenched, expanding, and frequently reoccurring. Indeed, thousands of immigrants seek § 212(c) relief each year, and thousands will continue to do so, as immigration officials bring new deportation proceedings even as immigrants' pre-1996 convictions become more distant history. The confused state of the law in this area also has a direct impact on how courts analyze the retroactivity of other changes in immigration law, and indeed retroactivity issues arising outside the immigration context. This case provides an excellent vehicle—a rare opportunity to resolve these two major circuit conflicts concerning the law of deportation waiver in a single case. The Court should grant certiorari to finally resolve these long unsettled issues.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE BADLY SPLINTERED IN THEIR APPROACHES TO THE RETROACTIVITY OF THE REPEAL OF THE § 212(C) WAIVER.

Retroactive legislation "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). Thus, due process "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf*, 511 U.S. at 266.

As a matter of statutory construction, this Court has long adhered to a "presumption against

retroactive legislation" that is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *St. Cyr*, 533 U.S. at 316. But several Courts of Appeals have misapplied this Court's decision in *St. Cyr*, treating that case as establishing an exception to a statutory rule rather than a construction of the statute. Two circuits have correctly held that after *St. Cyr*, the 1996 repeal of § 212(c) does not apply to any pre-1996 convictions, finding that reliance need not be the dispositive question in a *Landgraf* analysis; this approach yields one statutory meaning for one statutory text. In contrast, the Seventh Circuit and four others categorically allow retroactive application of the repeal to any pre-1996 convictions following trial, concluding that an immigrant who went to trial instead of pleading guilty could never have relied on § 212(c) relief. Under that rule, the same statute means two different things to two different groups. Three circuits have adopted approaches which call for even more individualized assessment in order to discern the statutory meaning. Two circuits allow the repeal to apply retroactively except where an individual can make a subjective showing of reliance on § 212(c) relief; under that view, the statute has no fixed meaning, but differs with the facts of each individual case. One circuit requires reliance, but applies a group-based, objective reliance approach to preclude retroactive repeal of § 212(c) relief categorically to individuals who waived appeal of their convictions; this approach permits a multiplicity of statutory meanings, but not the infinite variety of meanings permitted by the pure subjective approach. Clarification from this Court is urgently needed.

A. The Third And Eighth Circuits Bar Retroactive Application Of The Repeal To Any Pre-1996 Conviction.

The Third and Eighth Circuits read *St. Cyr* to bar retroactive application of the 1996 repeal of § 212(c) to any pre-1996 conviction, regardless of any particularized showing of reliance, and regardless of whether the conviction was obtained after trial or after a guilty plea. As these courts recognize, this Court's decision in *Landgraf* established a two part test for determining whether a statute applies retroactively. *First*, courts ask "whether Congress has expressly prescribed the statute's proper [temporal] reach." *Landgraf*, 511 U.S. at 280. *Second*, if the court cannot ascertain congressional intent, it must consider whether the statute has a retroactive effect. *Id.* A provision has a retroactive effect if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id.* at 269 (citation omitted). If a retroactive effect exists, the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.* at 280. In making this determination, courts are guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 270.

As the Third Circuit has explained, against this backdrop "[i]mpermissible retroactivity, as defined in *Landgraf*, does not require that those affected by the change in law have relied on the prior state of the law." *Atkinson v. Attorney Gen.*, 479 F.3d 222, 229 (3d Cir. 2007); *see also Lovan v. Holder*, 574 F.3d

990, 993 (8th Cir. 2009).[3] Instead, while reliance may be a factor, *Atkinson*, 479 F.3d at 229, the dispositive question under *Landgraf* is merely whether the change imposes a "new disability in respect to transactions or considerations already past." *Id.* at 227 (citation and punctuation omitted).

After *St. Cyr*, as these two circuits have recognized, that question is easily answered in the context of § 212(c). Prior to the 1996 repeal, "[an immigrant] remained free to apply for a waiver under section 212(c) despite his conviction of an aggravated felony." *Atkinson*, 479 F.3d at 230. After the repeal, "he lost that right; applying basic principles of retroactivity, [the repeal] attached a new legal consequence to Atkinson's conviction: the certainty—rather than the possibility—of deportation." *Id.*; *see also Lovan*, 574 F.3d at 994. So these two Circuits do not allow the 1996 appeal of § 212(c) to apply retroactively to deny relief for pre-1996 convictions.

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[3] In a case involving a conviction barring reentry into the United States, a panel of the Fourth Circuit seemed to follow the same reasoning, emphasizing that regardless of reliance at the time of conviction, the repeal attached new legal consequences to the immigrant's conviction, which is the central question of a *Landgraf* retroactivity analysis. *See Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004). But as described *infra*, other Fourth Circuit panels before and after *Olatunji* have taken a different approach, allowing retroactive application of the repeal any time the immigrant challenged a conviction at trial.

B. Five Circuits Categorically Allow Retroactive Application Of The Repeal For All Pre-1996 Convictions Obtained After Trial.

At the opposite pole, taking the most extreme approach, the First, Sixth, Seventh, Ninth, and Eleventh Circuits categorically allow retroactive application of the repeal any time a pre-1996 conviction was obtained after trial. These circuits not only find reliance to be the *sine qua non* of retroactivity analysis, but they deem reliance to be impossible any time an immigrant chose to go to trial before he was convicted. *See, e.g.*, *Kellermann v. Holder*, 592 F.3d 700 (6th Cir. 2010); *Ferguson v. Attorney Gen.*, 563 F.3d 1254 (11th Cir. 2009); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (per curiam)[4]; *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002).[5] Before and after *Olatunji*, which followed the Third and Eighth Circuit's approach, panels of the Fourth Circuit also

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[4] Other Seventh Circuit panels, including *De Horta Garcia* and the panel in this case, followed *Montenegro* without additional in-depth analysis. *See, e.g.*, *Zamora v. Gonzales*, 240 F. App'x 150, 153 (7th Cir. 2007); *United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008); *Esquivel v. Mukasey*, 543 F.3d 919, 922 (7th Cir. 2008). But at least one Seventh Circuit judge has written a separate concurrence, finding the court bound by circuit precedent but hoping that the precedent would be rejected in favor of the Third and Eighth Circuit's approach. *See De Horta Garcia*, 519 F.3d at 662 (Rovner, J. concurring).

[5] The Seventh Circuit provides a limited exception to this rule for immigrants who contested criminal charges at trial but who conceded deportability before the repeal and can show reliance on § 212(c). *See De Horta Garcia*, 519 F.3d at 661.

have taken this extreme position. *See Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007); *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002).

This Court's recent decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), demonstrates the flaw of conclusively presuming that immigrants who challenge allegations at trial did not rely on the availability § 212(c) relief when adopting a trial strategy. In *Padilla*, the Court ruled that misadvice as to the immigration consequences of a conviction could be constitutionally defective, rejecting the argument that such advice could never be constitutionally deficient because immigration consequences are "collateral" to the conviction itself. To the contrary, the Court concluded, "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." *Id.* at 1480. Similarly, it makes no sense in the context of § 212(c) retroactivity for courts to conclusively presume that individuals who challenge criminal allegations through trial never rely on the availability of § 212(c) relief in making strategic decisions such as whether to appeal or whether to focus on the sentencing phase of trial. Instead, the correct analysis is the one that *Landgraf* requires, which focuses on the change in law attaches a new disability to transactions or considerations already past.

But perhaps the most significant problem with this approach is that it leads to wildly inconsistent applications of the same statute in different cases. Because retroactivity analysis is a matter of statutory interpretation, a single statutory provision

should not be construed differently based on the particular factual circumstances of the parties before the court—such as whether they can demonstrate reliance. In *Clark v. Martinez*, 543 U.S. 371 (2005), for example, the Court held that the INA's detention provision, 8 U.S.C. § 1231(a)(6), must be given the same meaning when applied to excludable as well as deportable immigrants. 543 U.S. at 378-81. Earlier, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court interpreted the detention provision to avoid a constitutional concern over indefinite detention of permanent resident immigrants. *Id.* at 696-99. The *Zadvydas* Court limited its holding to deportable immigrants, announcing that "[a]liens who have not yet gained initial admission to this country would present a very different question." *Id.* at 682. But when confronted in *Clark* with that question, the Court held that *Zadvydas* in fact compelled the "same answer." *Clark*, 543 U.S. at 379. Because the statutory text contained no distinction between those groups, the Court held that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Id.* at 378. Though the constitutional doubts driving the statutory construction in *Zadvydas* were of debatable applicability to excludable immigrants such as Clark, such a difference "cannot justify giving the *same* detention provision a different meaning when such [excludable] aliens are involved." *Id.* at 380. As the Court explained, "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The

lowest common denominator, as it were, must govern." *Id.*

Likewise here, nothing in IIRIRA's 1996 repeal of § 212(c) differentiates between immigrants who pled guilty and those who were convicted after trial. *See generally* Pub L. No. 104-208, § 304(b), 110 Stat. 3009-597. The *Landgraf* analysis is one of statutory construction, and whether the repeal of § 212(c) attaches a new legal consequence to pre-enactment convictions is a question that must be answered for the provision as a whole, not by giving "the *same* . . . provision a different meaning when [different] aliens are involved." *Clark*, 543 U.S. at 380.

C. Three Circuits Take One Of Two Intermediate Approaches.

Other circuits come out somewhere in between. Two of them, the Second and Fifth, hold that whether the 1996 repeal applies retroactively to pre-1996 convictions turns on whether the immigrant can make an individualized showing that he relied on § 212(c) waiver authority when responding to criminal charges. These courts require an immigrant to establish that he subjectively relied in some way on the availability of § 212(c) waiver in responding to his criminal charges. *See Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007). For these courts, like the five courts of appeals who allow retroactive application absent a plea deal, a showing of reliance is paramount to the retroactivity question. But unlike those courts in these two circuits, the reliance inquiry is not categorical, but instead turns on the individual circumstances of the case.

The Tenth Circuit, in contrast, does not require a showing of individualized subjective reliance, but instead looks to "the objective group-based interests that Congress could practically have assessed ex ante," *Hem v. Maurer*, 458 F.3d 1185, 1197 (10th Cir. 2006), asking whether it would be objectively reasonable for particular classes of individuals to have relied on the continued availability of § 212(c) relief. *Id.* In *Hem*, the Tenth Circuit ruled that all immigrants who forwent an appeal of their convictions (when a successful appeal could have deprived them of § 212(c) eligibility) could prevent retroactive application of the repeal. *Id.* at 1199. Thus, in the Tenth Circuit, evidence of reliance is again the central question in the retroactivity question. But the answer may differ for different categories of immigrants, and a subjective showing of individual reliance is not necessary.

II. THE CIRCUITS HAVE ALSO SPLIT ON APPLICATION OF THE "STATUTORY COUNTERPART" RULE FOR § 212(C) ELIGIBILITY.

Assuming that an immigrant is not categorically ineligible for § 212(c) relief based on the 1996 repeal, he should be eligible for that relief so long as he meets the requirements of that provision. On this question, too, the decision below implicates another circuit split worthy of this Court's consideration.

By its terms, § 212(c) applied only to lawful resident immigrants who were put into exclusion proceedings upon return to the United States from a brief trip abroad. Since the enactment of § 212(c), and indeed, predating that precise form of relief, the BIA had a practice of permitting *nunc pro tunc*

applications by residents who had been erroneously admitted despite their excludability, and thereafter put into deportation proceedings. *See, e.g.*, *Matter of Tanori*, 15 I. & N. Dec. 566, 567-68 (BIA 1976) (collecting cases); *Matter of L-*, 1 I. & N. Dec. 1 (BIA 1940). This was subsequently expanded to individuals who had never traveled abroad, based on the Second Circuit's conclusion in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), that there was no rational basis to distinguish between those immigrants in deportation proceedings who had traveled, and those who had never left. The Board adopted this interpretation in *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976). Not all deportable immigrants were eligible for § 212(c) relief. Only those who could have sought § 212(c) relief in exclusion proceedings were considered eligible. *See id.* at 30. Ultimately, the class of "similarly situated" deportable immigrants eligible for § 212(c) relief was limited to those whose grounds for deportation, as listed in § 241, 8 U.S.C. § 1227,[6] had a "statutory counterpart" in the enumerated grounds for exclusion in § 212(a). In 2004, this statutory counterpart rule was codified as part of a regulation implementing *St. Cyr*'s holding on the retroactivity of § 212(c) relief. *See* 8 C.F.R. § 1212.3(f)(5).

Both before and after this 2004 regulation was promulgated, the BIA often held that § 212(c) relief was available for immigrants deportable for aggravated felonies that could also be considered crimes involving moral turpitude. *See Matter of*

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[6] In 1996, § 241 was renumbered § 237 of the INA and recodified at 8 U.S.C. § 1227. *See* Pub. L. No. 104-208, § 305(a)(2), 110 Stat. 3009-598.

Meza, 20 I. & N. Dec. 257, 259 (BIA 1991). Such aggravated felonies for which § 212(c) relief was available included "crimes of violence" under 8 U.S.C. § 1101(a)(43)(F), *see, e.g.*, *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-91 (BIA 1992), and sexual abuse of a minor under § 1101(a)(43)(A), *see, e.g.*, *Matter of Rodriguez-Symonds*, 2004 WL 880246 (BIA Mar. 9, 2004).

But in 2005, nine years after *St. Cyr*, the BIA changed course and interpreted this rule to turn on "whether Congress has employed similar language to describe substantially equivalent categories of offenses" in the separate provisions governing grounds for deportability and grounds for excludability (and without regard to the relevant categories of exclusion and deportation at the time of the conviction or plea). *In re Blake* ("*Blake I*"), 23 I. & N. Dec. 722, 728 (BIA 2005). Since 1996, the definition of "aggravated felony" has included "sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A), and conviction of an aggravated felony is a ground of removability. 8 U.S.C. § 1227(a)(2)(A)(iii). Neither an "aggravated felony" nor "sexual abuse of a minor" is, as such, a listed ground for exclusion under § 212(a)—although a "crime involving moral turpitude" is. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I). Accordingly, numerous circuits, following the BIA's statutory comparison test, hold that a person being deported for committing sexual abuse of a minor cannot receive § 212(c) relief.[7]

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[7] *See, e.g.*, *Gonzalez-Mesias v. Mukasey*, 529 F.3d 62, 64-65 (1st Cir. 2008); *Kim v. Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Sudol v. Attorney Gen.*, 300 F. App'x 157, 158-59 (3d Cir. 2008) (per curiam); *Calderon-Minchola v. Attorney General*, 258 F.

The Second Circuit, however, holds differently. Considering the case (among others) of an immigrant convicted of sexual abuse of a minor, the Second Circuit ruled the BIA's statutory counterpart test constitutionally deficient. *Blake v. Carbone* ("*Blake II*"), 489 F.3d 88, 104 (2d Cir. 2007). "[W]hat makes one alien similarly situated to another," the court reasoned, "is his or her act or offense," not the language Congress chose to describe it. *Id.* And since "sexual abuse of a minor" qualifies as a "crime involving moral turpitude," the court held it inappropriate to deny § 212(c) relief for all immigrants convicted of sexual abuse of a minor based simply on comparing the language used to describe the offense in deportation proceedings and the language Congress chose in enumerating the acts, offenses or groups of offenses, that constitute grounds for exclusion and deportation. *Id.*

App'x 425, 427-28 (3d Cir. 2007); *Caroleo v. Gonzales*, 476 F.3d 158, 162-63 (3d Cir. 2007); *Hakimi v. Holder*, 360 F. App'x 497, 497 (4th Cir. 2010) (per curiam); *Singh v. Keisler*, 255 F. App'x 710, 713 (4th Cir. 2007); *Garza-Garcia v. Mukasey*, 293 F. App'x 282, 283 (5th Cir. 2008); *Brieva-Perez v. Gonzales*, 482 F.3d 356, 362 (5th Cir. 2007); *Koussan v. Holder*, 556 F.3d 403, 408-09, 412-14 (6th Cir. 2009); *Gjonaj v. I.N.S.*, 47 F.3d 824, 827 (6th Cir. 1995); *De Leon v. Holder*, 334 F. App'x 28, 29-30 (7th Cir. 2009); *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 683-84 (7th Cir.2008); *Lovan*, 574 F.3d at 993-97; *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007); *Soriano v. Gonzales*, 489 F.3d 909, 909 (8th Cir. 2006) (per curiam); *Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (per curiam); *Alvarez v. Mukasey*, 282 F. App'x 718, 723 (10th Cir. 2008); *Falaniko v. Mukasey*. 272 F. App'x 742, 746-49 (10th Cir. 2008); *Hernandez v. Attorney Gen.*, No. 10-10872, 2010 WL 3836121, at *2 (11th Cir. Oct. 4, 2010); *De la Rosa v. Holder*, 579 F.3d 1327, 1337-40 (11th Cir. 2009) (per curiam).

(remanding to the BIA for the particularized determination).

While the majority of circuits disagrees with the Second Circuit's opinion in *Blake II*, most have done so without legitimate justification. Often, these courts seem motivated in large part by the conclusion that the Second Circuit in *Francis*, in the first instance, imposed the wrong remedy for the equal-protection violation when, rather than simply strike the statute, it interpreted § 212(c) to be available for potential deportees who never left the country. *See, e.g.*, *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 684-85 (7th Cir. 2008). In particular, the Seventh Circuit has opined that, because "§ 212(c) has already been 'stretched beyond its language' in response to 'equal protection concerns,'" *see id.* at 692 (quoting *Campos v. INS*, 961 F.2d 309, 316 (1st Cir. 1992)), "[a]dditional 'judicial redrafting would serve only to pull the statute further from its moorings in the legislative will,'" *id.* (quoting *Farquaharson v. Attorney Gen.*, 246 F.3d 1317, 1325 (11th Cir. 2001)).

But this concern does not justify parting with *Blake II*'s independent holding on the statutory counterpart test. For all the hand-wringing about "judicial redrafting," the Agency in fact not only accepted *Francis*'s holding, it codified it. The *Blake II* approach does not reject the statutory counterpart test, but is faithful to that codification; without unnecessary statutory contortions, the Second Circuit interprets it in a manner which vindicates its rationale, treating similarly situated people the same. By contrast, the BIA's formalistic linguistic approach treats similar people differently, violating

Equal Protection and reaching an unnecessarily illogical result.

In fact, only the Second Circuit's approach avoids the back-door result of retroactive application of the § 212(c) repeal through the BIA's interpretation of the statutory counterpart rule. This case proves the point. Johnson was not deportable. Section 241's list of deportable offenses included aggravated felonies, but the definition of aggravated felony did not include sexual abuse of a minor. The list also included crimes of moral turpitude, but only if committed within 5 years of earning lawful permanent resident status. *See* 8 U.S.C. § 1227(a)(2). However, Johnson would have been excludable (and still is), as § 212(a)'s list of excludable offenses includes all felony crimes involving moral turpitude. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I). Thus, before 1996, as Johnson faced a threat of exclusion but not deportation, Johnson could have sought a § 212(c) waiver, prospectively or upon return from travel abroad. *See* 8 C.F.R. § 212.3(b). The BIA's approach, however, holds that while § 212(c) itself was not repealed retroactively, a separate statutory provision amending the aggravated felony definition—a provision not purporting to repeal § 212(c)—*sub silentio* repealed § 212(c) retroactively as to people like Johnson. That makes no sense.

III. THIS COURT'S GUIDANCE IS NEEDED ON THESE TWO ISSUES, AND THIS CASE PRESENTS AN EXCELLENT VEHICLE IN WHICH TO ADDRESS THEM.

This case provides a rare opportunity to resolve two circuit splits that are entrenched, well-defined, and vital, with new circuits having weighed in on the

issues as recently as this year. These matters are important not only for the thousands of immigrants who have sought § 212(c) waiver each year, but also (as to the retroactivity issue) to anyone litigating the retroactivity of a statute in any context, as the fundamental nature of the Court's retroactivity analysis has been muddied by the Circuits' wildly differing reactions to *St. Cyr*. This Court should use this case to clarify the law on both of these matters.

A. The Circuit Conflicts Are Entrenched.

Nearly all circuits have now had the opportunity to address both issues presented in this case. If anything, rather than developing a consensus, the circuits seem to be drifting further apart.

On the retroactivity issue, last year, the Eighth Circuit became the eleventh court of appeals to weigh in, adopting the Third Circuit rule and following *St. Cyr* to reject retroactive application of the repeal to any pre-1996 conviction. *See Lovan*, 574 F.3d at 994. This year, the Sixth Circuit became the twelfth court of appeals to do so, adopting the polar opposite approach and siding with the Seventh Circuit and others. *See Kellerman*, 592 F.3d at 707. Nothing suggests that further percolation would be beneficial, and there appears to be no hope for resolution absent this Court's intervention.

On the "statutory counterpart" issue, the Second Circuit, having been intimately involved in the genesis of the rule after *Francis*, took a clear stand in *Blake II*, against a wooden, linguistic approach to determining whether deportable crimes have a statutory counterpart in the enumerated list of excludable crimes. Other Circuits, though, have expressly considered and rejected *Blake*'s approach.

At this point, eleven circuits have addressed the matter. This issue, too, is now ripe for this Court's attention.

B. The Issues Involved Are Frequently Recurring, Important For Immigrants Across The Country, And Important For Retroactivity Analysis In General.

As this Court observed in *St. Cyr*, § 212(c) waivers are sought by (and granted to) thousands of immigrants each year. *See* 533 U.S. at 296 & n.5. As shown by the dozens of appellate court decisions on the issue to come down only in the last few years,[8]

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[8] *See, e.g.*, *Myers v. Holder*, No. 07-72858, 2010 WL 3938203, at *1 (9th Cir. Oct. 8, 2010); *Johnson v. Holder*, No. 09-3084, 2010 WL 2836302, at *2 (7th Cir. July 9, 2010); *Canto v. Holder*, 593 F.3d 638, 643-45 (7th Cir. 2010); *Kellermann*, 592 F.3d at 705-07; *Telemaque v. Attorney Gen.*, 358 F. App'x. 145, 146-47 (11th Cir. 2009) (per curiam); *De la Rosa*, 579 F.3d at 1329; *Lovan*, 574 F.3d at 993-97; *Van Don Nguyen v. Holder*, 571 F.3d 524, 527 (6th Cir. 2009); *Johnson v. Holder*, 564 F.3d 95, 97-100 (2d Cir. 2009); *Ferguson*, 563 F.3d at 1259-71; *Nadal-Ginard v. Holder*, 558 F.3d 61, 70 (1st Cir. 2009); *Haque v. Holder*, 312 F. App'x 946, 947 (9th Cir. 2009); *McKenzie v. Attorney Gen.*, 301 F. App'x 915, 918 (11th Cir. 2008); *Morgorichev v. Mukasey*, 274 F. App'x. 98, 100-01 (2d Cir. 2008); *Ibanez v. Attorney Gen.*, 270 F. App'x 816, 817-18 (11th Cir. 2008) (per curiam); *Rodriguez v. Carbone*, 269 F. App'x 114, 115 n.1 (2d Cir. 2008); *De Horta Garcia*, 519 F.3d at 661; *Walcott v. Chertoff*, 517 F.3d 149, 153-55 (2d Cir. 2008); *Singh v. Mukasey*, 520 F.3d 119, 123-25 (2d Cir. 2008) (per curiam); *Eski v. Mukasey*, 266 F. App'x 669, 670 n.1 (9th Cir. 2008); *De Freitas v. Mukasey*, 256 F. App'x 985, 987-88 (9th Cir. 2007); *Maiwand v. Gonzales*, 501 F.3d 101, 104-05 (2d Cir. 2007); *Zamora*, 240 F. App'x at 152-54; *Hamilton v. Attorney Gen.* 239 F. App'x. 496, 498 (11th Cir. 2007) (per curiam); *Lee v. Attorney Gen.*, 242 F. App'x 637, 639 (11th Cir. 2007) (per curiam); *Cerbacio-Diaz v. Gonzales*, 234 F. App'x 583, 583 (9th Cir. 2007); *United States v. Gibbs*, 226 F. App'x 6, 7 (D.C. Cir. 2007); *Saravia-Paguada v. Gonzales*, 488 F.3d 1122,

the issue of § 212(c)'s repeal and its retroactivity shows no sign of abating. And what is at stake in these cases, the ability to remain in the United States, where immigrants such as Johnson have often lived for nearly all of their lives, is "an integral part—indeed, sometimes the most important part—" of a criminal proceeding involving an immigrant. *Padilla*, 130 S. Ct. at 1480.

The confusion in this area of retroactivity has also crept into other parts of immigration law. *See, e.g.*, *Zuluaga Martinez v. INS*, 523 F.3d 365, 386 (2d Cir. 2008) (Straub. J., concurring) (in an analysis of INA § 240A(d)(1), the court noting that "whether—and to what extent—a showing of reliance on the prior law is required to demonstrate impermissible retroactive effect of a new law is the subject of much debate and, perhaps, 'should be re-visited' or reviewed.") (quoting *United States v. De Horta Garcia*, 519 F.3d 658, 666 (7th Cir. 2008) (Rovner, J., concurring)); *id.* at 664 (discussing § 212(c) cases in analyzing retroactivity of the stop-time rule in 8 U.S.C. § 1229b(d)(1)); *see also Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 938 (9th Cir. 2007) (considering INA § 244(a)(2), noting that "*St Cyr* has produced considerable disagreement among the courts of appeals concerning whether 'reasonable reliance' on pre-IIRIRA relief

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1129-35 (9th Cir. 2007); *Bernate v. Gonzales*, 229 F. App'x 767, 768-69 (10th Cir. 2007); *Tilley v. Gonzales*, 228 F. App'x 585, 587-88 (6th Cir. 2007); *Lopez-Bazante v. Gonzales*, 237 F. App'x 131, 132 n.1 (9th 2007); *Mbea*, 482 F.3d at 280-82; *Irabor v. Attorney Gen.*, 219 F. App'x 964, 968 (11th Cir. 2007) (per curiam); *Atkinson*, 479 F.3d at 226-31; *United States v. Munoz-Recillas*, 224 F. App'x 621, 623 (9th Cir. 2007); *Johnson v. Gonzales*, 478 F.3d 795, 797-800 (7th Cir. 2007).

from deportation is a required element of a *Landgraf* claim . . . "); *id.* at 941 (adopting the Tenth Circuit's objective reliance standard in *Hem*); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602 (9th Cir. 2002) (considering INA § 240A(d), allowing retroactive application due to lack of reliance); *Hernandez v. Gonzales*, 437 F.3d 341, 352 (3d Cir. 2006) (distinguishing *Jimenez-Angeles* and *Karageorgious v. Ashcroft*, 374 F.3d 152 (2d Cir. 2004), "[b]ecause our colleagues in the Second and Ninth Circuits engage in a retroactivity analysis different from the one we apply").

And in fact, this confusion over the role of reliance in a retroactivity analysis has even spilled over from immigration to entirely unrelated parts of the law. For example, citing *Olatunji* among other cases, the Federal Circuit recently noted that the Courts of Appeals have disagreed on "[t]he weight to be given" to the reliance interests mentioned in *Landgraf*. *Princess Cruise Lines, Inc. v. United States*, 397 F.3d 1358, 1366 (Fed. Cir. 2005). The court ultimately avoided the difficult issue, concluding that it did not "need [to] resolve the relative weight to be given to [reliance] because it points in the same direction as [other factors in the retroactivity analysis]." *Id.* Indeed, it is becoming increasingly common for courts to leave the question unanswered. *See, e.g.*, *In re Jones*, 226 F.3d 328, 331-32 (4th Cir. 2000) ("[W]e need not define the appropriate reliance standard[.]"). And when the role of reliance cannot be avoided, Circuit court panels often find themselves divided. *See Combs v. Comm'r of Soc. Sec.*, 459 F.3d 640 (6th Cir. 2006) (en banc) (allowing retroactive application of a change in adjudication of disability benefits in part because of a lack of reliance on

existing rules); *id.* at 673 (Clay, J., dissenting) (taking issue with the majority's reliance analysis); *see also generally Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003) (en banc) (allowing retroactive application of decisional law based on the particular circumstances of the defendant); *id.* at 1229 (Edmondson, J., dissenting) (contending that "the sweep of the Court's decision" reaches all defendants, and once the court "decide[s] to apply a rule retroactively," the court "must apply the rule retroactively to all whose cases are still pending"). While this is perhaps understandable given the muddled state of the law, it only confirms that this Court's guidance is urgently needed.[9]

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[9] Despite the broad implications of this important issue, the Solicitor General has previously opposed certiorari on this circuit split, arguing that the issue of the retroactivity of the repeal of § 212(c) is becoming less frequent as pre-1996 convictions become more and more distant past. *See, e.g.*, Brief for Respondent in Opposition at 13, *Zamora v. Mukasey*, 533 U.S. 1004 (2008) (No. 07-820), 2008 WL 809105. Of course, this argument could conceivably be raised to avoid this Court's review of any retroactivity issue; by definition, they all involve a change in law that becomes more distant history with each passing day. But that was not a bar to this Court's review in *St. Cyr*, *Landgraf*, *Hughes*, or any other retroactivity case, and it should never be a reason to deny an otherwise *cert*-worthy retroactivity case. Moreover, as this case itself shows, the fact that a conviction is decades old does not prevent the DHS from arresting an immigrant and initiating deportation proceedings. The issue is here to stay, and the countless thousands of immigrants with pre-1996 convictions deserve the Court's attention.

C. This Case Is The Perfect Vehicle To Decide Two Related Issues On Which The Circuits Have Split, And The Proper Resolution Of These Issues Could Dramatically Affect Johnson's Life.

Finally, unlike the vast majority of petitions for certiorari on the retroactivity of § 212(c)'s repeal,[10] this case also squarely presents the second conflict involving application of the "statutory counterpart" test for § 212(c) eligibility. The answers to both of these questions could produce a dramatically different result in this case than the one rendered by the Seventh Circuit.

That Johnson's case could have been adjudicated differently in a court of appeals where § 212(c) relief is available for an aggravated felony is self-evident.[11]

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[10] *See, e.g.*, *Ferguson v. Holder*, 130 S. Ct. 1735 (2010); *Molina-De La Villa v. Holder*, 130 S. Ct. 1882 (2010); *Cruz-Garcia v. Holder*, 129 S. Ct. 2424 (2009); *Aguilar v. Mukasey*, 128 S. Ct. 2961 (2008); *Zamora v. Mukasey*, 553 U.S. 1004 (2008); *Hernandez-Castillo v. Gonzales*, 549 U.S. 810 (2006); *Thom v. Gonzales*, 546 U.S. 828 (2005); *Stephens v. Ashcroft*, 543 U.S. 1124 (2005); *Reyes v. McElroy*, 543 U.S. 1057 (2005); *Lawrence v. Ashcroft*, 540 U.S. 910 (2003); *Armendariz-Montoya v. Sonchik*, 539 U.S. 902 (2003).

[11] This is true even if the Court were to adopt one of the intermediate positions, short of full non-retroactivity of the § 212(c) repeal for all immigrants. Johnson demonstrated objective reliance when he declined to appeal his criminal conviction, having received a probationary sentence which did not bar him from § 212(c) relief. *Cf. Hem*, 458 F. 3d at 1199 (finding objectively reasonable reliance where appeal could have resulted in remand for retrial or resentencing which might have barred relief). Subjectively, Johnson could have sought waiver of deportation earlier, but he did not; Johnson expected § 212(c) relief would be available in future years, at which time he could

Moreover, as to the second issue, if Johnson's case were in the Second Circuit, *Blake II* would control, and he would be eligible for § 212(c) relief. Johnson was convicted of the same offense as Blake—sexual abuse of a minor—and Johnson raises the same issue—whether the absence of "aggravated felony" per se on the list of excludable offenses categorically precludes him from § 212(c) eligibility despite the distinct possibility that the offense qualifies as a "crime involving moral turpitude."

Nor are there any other evident vehicle problems. Indeed, Johnson did not challenge the facts underlying his conviction. Pet. App. 3a. The issues are purely legal, and the circuit conflicts are well-established. This is a rare opportunity for the Court to address and resolve *both* of these major circuit splits, which continue to befuddle the lower courts, once and for all.

CONCLUSION

The petition should be granted.

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demonstrate a stronger record of constructive, law-abiding behavior on which to base his discretionary waiver claim. Delaying a claim for a § 212(c) waiver "could thus have reasonably been motivated by the availability of § 212(c) relief" in the future. 458 F. 3d at 1199. If reliance is a prerequisite at all, and if case-by-case (or category-by-category) retroactivity analysis is tenable, this should be enough for Johnson to be eligible for the § 212(c) waiver.

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