No. 10-730

In the Supreme Court of the United States

LIVINGSTON RONDELL JOHNSON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ANDREW C. MACLACHLAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Blank Page

QUESTIONS PRESENTED

1. Whether this Court's holding in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), that the repeal of Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994), did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief, applies to an alien who was convicted of sexual abuse of a minor after trial, and who therefore did not relinquish his right to a trial in reliance on potential eligibility for a waiver under Section 212(c).

2. Whether the denial of relief from removal under former Section 212(c) violates the equal protection component of the Due Process Clause, when an alien who is removable because he committed a specific aggravated felony is not being treated differently from other aliens who are similarly removable on grounds that have no statutory counterpart in the INA's grounds for inadmissibility.

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulation:

Miscellaneous—Continued: Page

Blank Page

In the Supreme Court of the United States

No. 10-730

LIVINGSTON RONDELL JOHNSON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the *Federal Reporter* but is reprinted at 385 Fed. Appx. 597. The decisions of the Board of Immigration Appeals (Pet. App. 7a-10a) and the immigration judge (Pet. App. 11a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2010. A petition for rehearing was denied on October 6, 2010 (Pet. App. 20a). The petition for a writ of certiorari was filed on December 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed

1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. By its terms, Section 212(c) applied only to certain aliens in exclusion proceedings (*i.e.*, proceedings in which aliens were seeking to "be admitted" to the United States after "temporarily proceed[ing] abroad voluntarily"). In 1976, however, the Second Circuit determined that making that discretionary relief available to aliens who had departed the United States while denying it to aliens who remained in the United States violated equal protection. *Francis* v. *INS*, 532 F.2d 268, 273. The Board of Immigration Appeals (Board) adopted that rationale on a nationwide basis in *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976), so that Section 212(c) was generally construed as being available in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In applying the principle of treating those in deportation proceedings like those in exclusion proceedings, the Board has long maintained that an alien in deportation proceedings can obtain Section 212(c) relief only if the ground for his deportation has a comparable ground among the statutory grounds of exclusion. See, *e.g.*, *In re Wadud*, 19 I. & N. Dec. 182 (B.I.A. 1984); *In re Granados*, 16 I. & N. Dec. 726 (B.I.A. 1979). That practice is known as the "comparable ground" or "statutory counterpart" test, and it has been codified by regulation at 8 C.F.R. 1212.3(f)(5).[1]

---

[1] In pertinent part, 8 C.F.R. 1212.3(f) states:

> An application for relief under former section 212(c) of the Act shall be denied if: * * * (5) The alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

Between 1990 and 1996, Congress enacted three statutes that "reduced the size of the class of aliens eligible for" relief under Section 212(c). *St. Cyr*, 533 U.S. at 297. In the Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052, Congress made Section 212(c) relief unavailable to anyone who had been convicted of an aggravated felony and served a term of imprisonment of at least five years. In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress further amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including an aggravated felony, irrespective of the length of the sentence served. See *St. Cyr*, 533 U.S. at 297 n.7. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b. The latter section now provides for a form of discretionary relief known as cancellation of removal, which is not available to many criminal aliens, including those who have been convicted of an aggravated felony (the definition of which was expanded by IIRIRA and, as relevant here, includes "sexual abuse of a minor"). See 8 U.S.C. 1101(a)(43)(A), 1229b(a)(3); see also *St. Cyr*, 533 U.S. at 297. IIRIRA also did away with the distinction between "deportation" and "exclusion" proceedings, designating them both as "removal" proceedings. See §§ 303-306, 110 Stat. 3009-585.

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony on the basis of a plea agreement

that the alien made at a time when the sentence the alien received under the plea agreement would not have rendered him ineligible for relief under former Section 212(c), but a greater sentence (of five years or more) would have done so. 533 U.S. at 314-326. In particular, the Court explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their convictions, they would still have some "likelihood of receiving [Section] 212(c) relief" from deportation. *Id.* at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the decision in *St. Cyr*. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on the proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the regulations, which provide that aliens are ineligible for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h); see also 8 C.F.R. 1003.44(a)-(b).

Although some aliens necessarily benefitted from the conclusion that Section 212(c)'s repeal was not retroactively applicable in some circumstances, this Court in *St. Cyr* did not suggest that aliens would be exempt from any pre-existing limitations on their eligibility for relief under Section 212(c), including the "statutory counter-

part" test. As relevant to the circumstances of this case, the operation of that test was further clarified by the Board in *In re Blake*, 23 I. & N. Dec. 722 (2005), remanded, 489 F.3d 88 (2d Cir. 2007), and *In re Brieva-Perez*, 23 I. & N. Dec. 766 (2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007). Those cases held that a statutory ground of exclusion is a "comparable ground[]" to the charged ground of deportation only if the two grounds use similar language to describe "substantially equivalent categories of offenses." *Brieva-Perez*, 23 I. & N. Dec. at 771; *In re Blake*, 23 I. & N. Dec. at 728. In *In re Blake*, the Board held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for sexual abuse of a minor. *Id.* at 729. In *Brieva-Perez*, the Board similarly held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for a crime of violence. 23 I. & N. Dec. at 773. Well before the Board published those precedential decisions, however, the analytical underpinnings of its interpretation had been confirmed by, among others, the Ninth Circuit's decision in *Komarenko* v. *INS*, 35 F.3d 432 (1994).

In 2007, the Second Circuit disagreed with *Komarenko* and the "several other circuits" that had followed it. *Blake* v. *Carbone*, 489 F.3d 88, 103-104. The Second Circuit recognized that the statutory-counterpart test codified in 8 C.F.R. 1212.3(f)(5) did "nothing more than crystallize the agency's preexisting body of law and therefore [could not] have an impermissible retroactive effect"; but the Second Circuit held that, when analyzed on the basis of a "particular criminal offense[]," the

ground of inadmissibility for a "crime involving moral turpitude" was sufficiently comparable to an aggravated felony of sexual abuse of a minor to permit relief under former Section 212(c). *Blake*, 489 F.3d at 98-99, 101, 103.

2. Petitioner is a native and citizen of Jamaica who was admitted to the United States as lawful permanent resident in 1981. Pet. App. 2a, 8a. In 1992, petitioner was convicted after a bench trial of one count of aggravated criminal sexual abuse in violation of Ill. Rev. Stat. 1991, ch. 38, ¶ 12-16(b).[2] It was an "aggravated" offense because it involved an act with a family member who was under 18 years old. *Ibid.* Petitioner was sentenced to 30 months of supervised probation and nine months in a work release program, and was also required to complete a sex-offender treatment program. Pet. App. 2a, 15a.

Based on his conviction for aggravated criminal sexual abuse, petitioner was placed in removal proceedings in 2006. Pet. App. 2a. In December 2007, an immigration judge ruled that petitioner is subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien who has been convicted of an aggravated felony—specifically, "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A)—and ordered that petitioner be removed to Jamaica. Pet. App. 16a, 19a. The immigration judge concluded that petitioner is not eligible for discretionary relief from removal under former Section 212(c) because, unlike the alien in *St. Cyr*, he did not plead guilty to the offense he committed, but was instead convicted after a bench trial. *Id.* at 16a-17a. The immigration judge further con-

---

[2] That provision is now codified at 720 Ill. Comp. Stat. Ann. 5/12-16(b) (West 2002).

cluded that petitioner is also ineligible for relief under former Section 212(c) because, under the Board's decision in *In re Blake*, there is no ground of inadmissibility sufficiently comparable to the aggravated-felony ground for removal. *Id.* at 17a-18a.

3. Petitioner appealed to the Board, which dismissed his appeal in July 2009. Pet. App. 7a-10a. The Board rejected petitioner's argument that aliens who did not plead guilty in reliance on former Section 212(c) could still seek such relief. *Id.* at 9a. It noted that its decision in this regard was consistent with both Seventh Circuit precedent and 8 C.F.R. 1003.44(b). Pet. App. 9a.

The Board also rejected petitioner's argument that he should be eligible for Section 212(c) relief under the Second Circuit's decision in *Blake* v. *Carbone*, *supra*. Pet. App. 9a-10a. The Board explained that the Seventh Circuit had already rejected the Second Circuit's approach and had instead followed the Board's own decision in *In re Blake*, holding that an alien removable on the ground of a sexual-abuse-of-a-minor aggravated felony is not eligible for relief. *Id.* at 9a-10a (citing *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679, 692-693 (7th Cir. 2008)).

4. Petitioner sought judicial review of the Board's decision, and the court of appeals denied his petition for review. Pet. App. 1a-6a. It concluded that *St. Cyr*'s holding—that the repeal of Section 212(c) does not apply to aliens who pleaded guilty to offenses making them deportable in likely reliance on being eligible for relief—does not apply to aliens, like petitioner, who did not plead guilty. *Id.* at 5a (citing *Esquivel* v. *Mukasey*, 543 F.3d 919, 922 (7th Cir. 2008)). The court explained that "[d]efendants who went to trial are in a different category, because they 'did not abandon any rights or admit

guilt in reliance on continued eligibility for § 212(c) relief.'" *Ibid.* (quoting *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004)). The court also noted that the applicable agency regulation, 8 C.F.R. 1212.3(h), is consistent with Seventh Circuit "case law on this issue." *Ibid.*[3]

The court of appeals did not address petitioner's claim that the repeal of Section 212(c) is impermissibly retroactive in his case because he delayed applying for relief in reliance on its continued availability (Pet. C.A. Br. 18-19), or the government's contention that the court lacked jurisdiction to address that form of alleged reliance because petitioner had not raised it before the immigration judge or the Board (Resp. C.A. Br. 21-22).

The court of appeals also did not address whether petitioner is independently ineligible for relief under former Section 212(c) because, under 8 C.F.R. 1212.3(f)(5), there is no ground of inadmissibility sufficiently "comparable" to his ground of removability for having been convicted of an aggravated felony of sexual abuse of a minor.

ARGUMENT

Petitioner renews his arguments that he is eligible for discretionary relief from removal under former Section 212(c) of the INA. He contends (Pet. 8-16) that the repeal of Section 212(c) is inapplicable to him, even though, unlike the alien in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), he did not plead guilty to the offense that ren-

---

[3] The court of appeals also held (Pet. App. 5a)—as the Board had (Pet. App. 10a)—that petitioner's conviction for an aggravated felony disqualifies him from receiving a waiver of removal under Section 212(h) of the INA, 8 U.S.C. 1182(h). Petitioner does not challenge that aspect of the decision below in his petition for a writ of certiorari.

dered him removable. He also contends (Pet. 16-21) that the Board's application of the statutory-counterpart rule is inconsistent with equal protection. The court of appeals did not address the latter issue, presumably because it found petitioner ineligible on the independent ground that the repeal of Section 212(c) in 1996 (which took effect in 1997) rendered it inapplicable to him. This case therefore would not be a suitable vehicle for considering the latter issue even if it otherwise warranted review.

In any event, with respect to each question, petitioner notes a narrow split in the courts of appeals, but neither warrants review, and petitioner himself would not be eligible for relief under former Section 212(c) in any circuit, because the one circuit in which he might prevail on one question would foreclose relief to him on the other. The issues petitioner raises involve a statutory provision that was repealed almost 14 years ago, and is therefore of greatly diminished importance. Moreover, the Court has recently denied certiorari in several cases presenting similar questions with respect to both retroactivity[4] and application of the statutory-

---

[4] See, *e.g.*, *Canto* v. *Holder*, 131 S. Ct. 85 (2010); *Jerez-Sanchez* v. *Holder*, 131 S. Ct. 73 (2010); *De Johnson* v. *Holder*, 130 S. Ct. 3273 (2010); *Molina-De La Villa* v. *Holder*, 130 S. Ct. 1882 (2010); *Ferguson* v. *Holder*, 130 S. Ct. 1735 (2010); *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009); *Morgorichev* v. *Holder*, 129 S. Ct. 2424 (2009); *Aguilar* v. *Mukasey*, 554 U.S. 918 (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).

counterpart rule.[5] Further review is similarly unwarranted in this case.

1. a. The court of appeals correctly rejected petitioner's contention that the repeal of Section 212(c) is inapplicable to him. In arguing to the contrary, petitioner relies not on *St. Cyr*, which addressed the repeal of Section 212(c), but on *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). He contends that, "while reliance may be a factor" in analyzing the retroactivity of the repeal of Section 212(c), "the dispositive question under *Landgraf* is merely whether the change imposes a 'new disability in respect to transactions or considerations already past.'" Pet. 11 (quoting *Atkinson* v. *Attorney Gen.*, 479 F.3d 222, 227 (3d Cir. 2007)). As this Court has explained, however, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, *reasonable reliance*, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (emphasis added) (quoting *Landgraf*, 511 U.S. at 270).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which [Section] 212(c) relief

---

[5] See *Ukofia* v. *Holder*, 131 S. Ct. 191 (2010); *De la Rosa* v. *Holder*, 130 S. Ct. 3272 (2010); *Abebe* v. *Holder*, 130 S. Ct. 3272 (2010); *Birkett* v. *Holder*, 129 S. Ct. 2043 (2009); *Gonzalez-Mesias* v. *Holder*, 129 S. Ct. 2042 (2009). A similar question is presented in the pending petition for certiorari in *Judulang* v. *Holder*, No. 10-694 (filed Nov. 24, 2010).

was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because the Court concluded that aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of [Section] 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. Thus, the likelihood of reliance played an important role in the Court's decision in *St. Cyr*. Petitioner's contrary view—that the absence of likely reliance should be irrelevant—would make the Court's analysis of guilty pleas in *St. Cyr* superfluous.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner relies (Pet. 10, 15) chiefly on *Landgraf*. That decision, however, does not support petitioner's arguments. In *Landgraf*, the Court specifically identified "reasonable reliance" as a consideration that "offer[s] sound guidance" in evaluating retroactivity, 511 U.S. at 270, and it quoted that same proposition from *Landgraf* in *St. Cyr*, 533 U.S. at 321.

Petitioner also argues (Pet. 13-14) that the court of appeals' reasoning conflicts with a general canon of statutory interpretation, described in *Clark* v. *Martinez*, 543 U.S. 371 (2005), that a single statutory term cannot be construed to have different meanings based on the factual circumstances of the applicant.[6] That canon is inapplicable to the relevant aspect of this Court's retroactiv-

[6] The same contention was raised in the petitions for certiorari in *Jerez-Sanchez* v. *Holder*, No. 09-1211, cert. denied, 131 S. Ct. 73 (2010), and *Ferguson* v. *Holder*, No. 09-263, cert. denied, 130 S. Ct. 1735 (2010).

ity analysis. *Clark* interpreted a statutory term. See *id.* at 378. The second step of retroactivity analysis, on the other hand, determines the temporal reach of a statute only when it has been established that the statute contains no provision establishing its retroactivity. See *St. Cyr*, 533 U.S. at 316-317. Where the application of a statute would have retroactive effect, retroactivity analysis may require a court to decline to apply the statute. *Id.* at 316. Conversely, in a case where the same statute would not have retroactive effect, there is no reason not to apply the statute. See *Landgraf*, 511 U.S. at 269-270. Whether a statute's application would have a retroactive effect necessarily depends on "transactions" and "considerations already past," such as past plea agreements. *Ibid.* (quotation marks omitted).

Nothing in *St. Cyr* suggested that any alien who was eligible for Section 212(c) relief before its repeal would remain forever eligible. To the contrary, the Court specifically held that Section "212(c) relief remains available for aliens, *like respondent, whose convictions were obtained through plea agreements* and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326 (emphasis added). That understanding is likewise embodied in the regulations promulgated by the Department of Justice following *St. Cyr*, concerning the availability of relief under Section 212(c) in proceedings before an immigration judge or the Board. See p. 4, *supra*.

Moreover, this Court's most recent decision addressing retroactivity in the immigration context explicitly discussed *St. Cyr* and reconfirmed the importance of reliance. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the Court stated that *St. Cyr* "emphasized that

plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (citations and internal quotation marks omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as *St. Cyr* did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Thus, the court of appeals did not err in considering the prospect of reliance as part of its "commonsense, functional judgment" about retroactivity. *Martin*, 527 U.S. at 357.

b. Petitioner contends (Pet. 9-16) that there is a conflict among the circuits, warranting this Court's review, about the proper interpretation of *St. Cyr*. But the disagreement in the analysis of the circuits is quite narrow. Nine circuits have declined to extend the holding of *St. Cyr* as a general matter to aliens who were convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v. *Holder*, 592 F.3d 700, 705-706 (6th Cir. 2010); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007); *Hem*

v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); *Ferguson* v. *United States Att'y Gen.*, 563 F.3d 1254, 1259-1271 (11th Cir. 2009), cert. denied, 130 S. Ct. 1735 (2010). Two circuits have held that no showing of reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the Board from precluding Section 212(c) relief. See *Atkinson*, 479 F.3d at 231 (3d Cir.); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009) (following *Atkinson* with little further analysis).

In *Atkinson*, the Third Circuit retreated from dictum in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004), which had suggested that an alien who had not been offered a guilty plea would be unable to establish reliance for purposes of retroactivity analysis, *id.* at 494. *Atkinson* held that the repeal of Section 212(c) should not be construed to apply retroactively to "aliens who, like Atkinson, had not been offered pleas and who had been convicted of aggravated felonies following a jury trial at a time when that conviction would not have rendered them ineligible for [S]ection 212(c) relief." 479 F.3d at 229-230.

The *Atkinson* court's analysis was based on the observation that this 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." 479 F.3d at 227-228. But that result cannot be squared with the rationale of *St. Cyr*, which specifically identified "reasonable reliance" as an important part of the "commonsense, functional judgment" in retroactivity analysis, and then explicitly rested its holding on the assessment that it was likely that aliens who pleaded guilty prior to 1996 had reasonably relied on the possible availability of Section 212(c) relief. See 533 U.S. at 321-323.

If the Third Circuit's view that retroactivity analysis turns on the fact of conviction simpliciter were correct, then that entire discussion in *St. Cyr* was superfluous.

Furthermore, the Court's analysis in *St. Cyr* was focused on the prospect of detrimental reliance by an alien who pleaded guilty to an aggravated felony between 1990, when Congress enacted the bar to Section 212(c) relief for aliens who served more than five years on a sentence for an aggravated felony, and 1996, when Congress repealed Section 212(c) altogether. See 533 U.S. at 293 (describing the facts of St. Cyr's case); *id.* at 297 (describing 1990 enactment). At the time of St. Cyr's conviction, his controlled-substance offense was an aggravated felony that made him deportable. See 8 U.S.C. 1101(a)(43)(B) (1994) (including "illicit trafficking in a controlled substance" in the definition of an aggravated felony); 8 U.S.C. 1251(a)(2)(A)(iii) (1994).[7] An alien in his circumstances who was concerned about preserving eligibility for relief under Section 212(c) would have had an incentive to enter into a plea agreement that provided for a sentence of five years or less, rather than go to trial and risk a longer (and disqualifying) sentence, and accordingly may have developed reasonable reliance interests. See *St. Cyr*, 533 U.S. at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a sentence of less than five years).

Petitioner, by contrast, was convicted in 1992 of an offense that, at the time, was not an aggravated felony, and therefore did not even make him deportable. As petitioner notes (Pet. 21), his conviction for sexual abuse

---

[7] The same was true of the alien in *Atkinson*, who was convicted in 1991 of a controlled-substance offense. See 479 F.3d at 224.

of a minor did not render him deportable until IIRIRA later classified it as an aggravated felony.[8] As a result, at the time of his criminal proceeding, preserving eligibility for relief under Section 212(c) would not reasonably have been expected to play the same role in an alien's strategic decisions as it did in *St. Cyr* and *Atkinson*.

In any event, the deviation in the circuits' analysis is narrow, because the Third Circuit nonetheless acknowledged that reliance is "but one consideration." *Atkinson*, 479 F.3d at 231. As a result, its split from the other circuits' analysis extends only to whether a determination of retroactive effect *must* turn on the prospect of reliance. No circuit has denied that a determination of retroactive effect *may* be based on the prospect of reliance. Thus, as the Seventh Circuit recently noted, "the distinction between [its] analysis" and "that of the Third, Eighth, and Tenth Circuits * * * is one of fine line drawing." *Canto* v. *Holder*, 593 F.3d 638, 644, cert. denied, 131 S. Ct. 85 (2010).

c. Although petitioner's principal argument concerns the distinction between pleading guilty and going to trial, he alternatively suggests (Pet. 13) that "it makes no sense in the context of § 212(c) retroactivity for courts to conclusively presume that individuals who

---

[8] There is no dispute that Congress made the amended definition of "aggravated felony"—which included sexual abuse of a minor, see IIRRA § 321(a)(1), 110 Stat. 3009-627—applicable to offenses (like petitioner's) that were committed before its effective date. See IIRIRA § 321(b), 110 Stat. 3009-628; 8 U.S.C. 1101(a)(43) ("Notwithstanding any other provision of law (including any effective date), the term ['aggravated felony'] applies regardless of whether the conviction was entered before, on, or after September 30, 1996."). Indeed, *St. Cyr* described "IIRIRA's amendment of the definition of 'aggravated felony'" as an instance where Congress "indicate[d] unambiguously its intention to apply" a provision retroactively. 533 U.S. at 318-319.

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." As the Seventh Circuit noted in *Canto*, however, "[i]t is a stretch to think" that he might have been motivated to forgo an appeal by the risk of receiving a sentence greater than five years after a successful appeal. 593 F.3d at 645.

Even though *St. Cyr* recognized that "it is more than likely that those aliens faced with plea agreements contemplated their ability to seek [S]ection 212(c) relief, the same logic cannot necessarily be extended to those aliens convicted at trial" because they did not, as a categorical matter, "forgo any possible benefit in reliance on [S]ection 212(c)." *Canto*, 593 F.3d at 644-645. And no court has interpreted this Court's retroactivity analysis to find a retroactive effect based on new consequences flowing from *every* prior decision or action. To the contrary, several courts have specifically held that the prior decision to commit a crime is not protected against application of Section 212(c)'s repeal, whether the alien asserted possible reliance on not getting caught, or acquittal at trial, or a sentence that does not bar relief, or the continued availability of relief at all. See *Ponnapula*, 373 F.3d at 495-496 & n.14; *Rankine*, 319 F.3d at 101-102; *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000). Indeed, in the decision that this Court affirmed in *St. Cyr*, the Second Circuit explained that "[i]t would border on the absurd to argue" that aliens "might have decided not to commit"

crimes "or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also * * * ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2000) (quoting *Jurado-Gutierrez*, 190 F.3d at 1150; in turn quoting *LaGuerre*, 164 F.3d at 1041), aff'd, 533 U.S. 289 (2001)). Yet, that is the sort of result to which petitioner's alternative interpretation of retroactive effect would lead.

Similarly, despite petitioner's cursory assertion to the contrary (Pet. 27 n.11),[9] he did not demonstrate "objectively reasonable reliance" on the continued existence of Section 212(c). It is implausible that an alien concerned about building equities for a future application for discretionary relief under Section 212(c) would forgo the equity of accepting responsibility through a guilty plea. It is even less plausible that an alien who was actively engaged in the process of building equities for a particular form of relief would delay seeking a waiver in order to "demonstrate a stronger record of constructive, law-abiding behavior," Pet. 28 n.11, and yet would fail to monitor developments in the law sufficiently to apply for that relief before the provision was repealed. As relevant here, Congress's September 1996 repeal of Section 212(c) did not take effect until April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. There is accordingly no reason to conclude that petitioner would prevail

---

[9] Before the immigration judge and the Board, petitioner did not contend that he may have delayed filing an affirmative application for a waiver under Section 212(c) in order to build equities after his conviction. Although he made such an assertion in the court of appeals, the government contended that the argument had not been exhausted before the agency, and the court did not address it. See p. 8, *supra*; Pet. App. 5a.

even if this Court were to adopt what petitioner calls an "intermediate position[]" that turns on objectively reasonable reliance. Pet. 27 n.11 (citing *Hem* v. *Maurer*, *supra*).

2. With respect to the second question presented, petitioner contends (Pet. 20-21) that the Board's statutory-counterpart test "treats similar people differently, violating Equal Protection and reaching an unnecessarily illogical result." The court of appeals did not address that question in this case, however, having found petitioner ineligible for Section 212(c) relief on the independent ground that the repeal of Section 212(c) in 1996 rendered it inapplicable to him. This case therefore would not be an appropriate vehicle for considering that issue even if it otherwise warranted review.

In any event, every court of appeals to have addressed the question (except the Second Circuit) would deny petitioner relief; the decision of the court of appeals is correct; and this Court has recently denied certiorari in a number of cases presenting a similar question (see note 5, *supra*).

a. As petitioner acknowledges (Pet. 18-19 n.7), the First, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have concluded in published opinions that the Board's application of the statutory-counterpart test constitutes a permissible interpretation of former Section 212(c) and does not violate equal protection. See, *e.g.*, *Kim* v. *Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 162-163 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 371-372 (5th Cir. 2007); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009); *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679, 691-692 (7th Cir. 2008); *Vue* v. *Gonzales*, 496 F.3d 858, 860-862 (8th Cir. 2007); *De la Rosa* v. *United States*

Att'y Gen., 579 F.3d 1327, 1337-1340 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010).[10]

In addition, the Ninth Circuit's en banc decision in *Abebe* v. *Mukasey*, 554 F.3d 1203, 1206-1207 (2009), cert. denied, 130 S. Ct. 3272 (2010), essentially comports with those circuits with regard to the statutory-counterpart rule. Although *Abebe* disagreed with the proposition that there is any constitutional basis for applying former Section 212(c) to aliens in deportation (as opposed to exclusion) proceedings, it left in place the regulation implementing the statutory-counterpart test, which means that the Board's reasoning in *In re Blake*, 23 I. & N. Dec. 722 (2005), still applies in the Ninth Circuit. See *Abebe*, 554 F.3d at 1207 (stating that the decision does not "cast[] any doubt on the regulation" that codified the Board's statutory-counterpart rule); see also *Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010) (applying 8 C.F.R. 1212.3(f)(5) and finding alien ineligible for Section 212(c) relief because the grounds for his removal did not have statutory counterparts among the grounds of inadmissibility); *In re Moreno-Escobosa*, 25 I. & N. Dec. 114, 117 (B.I.A. 2009) ("[T]he Ninth Circuit's decision in *Abebe* v. *Mukasey* can be

---

[10] As petitioner notes (Pet. 19 n.7), the Tenth Circuit has applied the statutory-counterpart rule in unpublished decisions. See *Alvarez* v. *Mukasey*, 282 Fed. Appx. 718, 723 (2008); *Falaniko* v. *Mukasey*, 272 Fed. Appx. 742, 746-748 (2008). Petitioner also cites (Pet. 19 n.7) two unpublished decisions from the Fourth Circuit, but neither of them actually applied the statutory-counterpart rule. See *Hakimi* v. *Holder*, 360 Fed. Appx. 497, 497 (denying petition for review because alien had not addressed alternative ground of ineligibility for Section 212(c) relief), cert. denied, 130 S. Ct. 3422 (2010); *Singh* v. *Keisler*, 255 Fed. Appx. 710, 713 (2007) (finding alien ineligible for Section 212(c) relief on a basis separate from the statutory-counterpart rule).

fairly read as rejecting the equal protection challenge to the application of the statutory counterpart rule.").

As petitioner concedes (Pet. 19), the only court of appeals to have reached a different result is the Second Circuit, in *Blake* v. *Carbone*, 489 F.3d 88, 103-104 (2007). But the result in petitioner's case would not be any different in the Second Circuit, because it is one of the many circuits that would still find him independently ineligible for relief under former Section 212(c) because he did not plead guilty to the aggravated felony that renders him removable. See p. 13, *supra*.

b. Contrary to petitioner's contention (Pet. 16-19), the statutory-counterpart rule applied by the Board does not violate the equal protection component of the Fifth Amendment's Due Process Clause.

Petitioner contends that, before and after the statutory-counterpart rule was codified in 8 C.F.R. 1212.3(f)(5), "the [Board] often held that § 212(c) relief was available for immigrants deportable for aggravated felonies that could also be considered crimes involving moral turpitude," until the Board "changed course" in its decision in *In re Blake* "in 2005, nine [*sic*] years after *St. Cyr*." Pet. 17-18. But the decisions of the Board that petitioner cites do not bear out his interpretation.

Only two of the decisions petitioner cites were precedential. The first, *In re Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991), held only that the words "convicted of an aggravated felony" do not themselves preclude the possibility of a statutory counterpart, and that drug-trafficking aggravated felonies would be encompassed within the drug-trafficking ground for exclusion. *Id.* at 259. As a result, the Board affirmatively distinguished *In re Meza* in its decision in *In re Blake*, which is the only precedential decision to have specifically addressed

an aggravated felony involving sexual abuse of a minor. See 23 I. & N. Dec. at 724-728. The second decision petitioner cites, *In re Rodriguez-Cortes*, 20 I. & N. Dec. 587 (B.I.A. 1992), addressed only the issue of whether a sentence-enhancement provision (which permitted the imprisonment served to exceed the five years then required to bar relief under Section 212(c)) necessarily caused a conviction to constitute one involving a firearm. *Id.* at 590. Thus, both cases involved aggravated felonies, but neither decision specifically addressed or held, as petitioner suggests, that a crime involving moral turpitude under 8 U.S.C. 1182(a)(2)(A)(i)(I) is a ground of inadmissibility that is comparable to any aggravated felony.[11] Accordingly, petitioner cites no precedential Board decision holding that an alien who has been convicted of a crime rendering him deportable as an aggravated felon on the ground of "sexual abuse of a minor" is categorically eligible for Section 212(c) relief if the facts underlying his particular crime could have served as a basis for inadmissibility.

c. As this Court has repeatedly stated: "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."

---

[11] The third decision that petitioner cites, *In re Rodriguez-Symonds*, File: A90 200 064 (San Diego), 2004 WL 880246 (B.I.A. Mar. 9, 2004), was not precedential. He contends (Pet. 18) that it stands for the proposition that aggravated felony "sexual abuse of a minor" is also covered by the "crime involving moral turpitude" ground of inadmissibility. In fact, the Board in *Rodriguez-Symonds* reversed the immigration judge's decision solely on the issue of whether the alien had accrued seven years of lawful domicile. 2004 WL 880426, at para. 3. The Board did not reach the statutory-counterpart issue, but instead remanded to allow "the parties [to] present arguments about whether the respondent's crime [a lewd act upon a child] is in fact a [crime involving moral turpitude]" in light of *In re Meza*. *Id.* para. 4.

Fiallo v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Thus, whether an immigration provision is constitutional depends only on the existence of a "facially legitimate and bona fide reason" for its enactment. *Id.* at 794 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1992)).

As a general matter, Congress has determined that the statutory regime that applies to an alien who has already been admitted to the country is different from the one that applies to an alien who is seeking admission. Compare 8 U.S.C. 1182, with 8 U.S.C. 1227. It is thus unsurprising that the categories of offenses that make an alien inadmissible to the country are not always the same as those that may render an alien deportable from the country. That fundamental legislative choice shows that aliens who are inadmissible are not situated similarly to aliens who are deportable, even though there is some overlap between the conduct that renders an alien inadmissible and the conduct that renders an alien deportable. It is only when a ground that renders an alien deportable under the one regime has a statutory counterpart that renders an alien inadmissible under the other regime that there could be any basis for concluding that the two aliens are similarly situated for equal protection purposes (and on that theory to warrant the application of former Section 212(c) to the category of aliens to whom it did not, by its own terms, apply).

The reasoning employed in *Komarenko* v. *INS*, 35 F.3d 432 (9th Cir. 1994), which has also been endorsed by most of the other courts of appeals, is persuasive. In *Komarenko*, the court rejected a similar equal protection claim in finding that two groups of aliens convicted of different crimes were not similarly situated for pur-

poses of eligibility for Section 212(c) relief. *Id.* at 435. The court concluded that the "linchpin of the equal protection analysis in this context is that the two provisions be 'substantially identical.'" *Ibid.*; see also *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 952 (7th Cir. 1993). Komarenko contended that the court was required to "focus on the facts of his individual case and conclude that because he *could have been* excluded under the moral turpitude provision, he has been denied equal protection." *Komarenko*, 35 F.3d at 435. The court, however, refused "to speculate whether the I.N.S. would have applied this broad excludability provision to an alien in Komarenko's position," because engaging in such speculation "would extend discretionary review to every ground for deportation that could constitute 'the essential elements of a crime involving moral turpitude.'" *Ibid.* Such an approach would be tantamount to "judicial legislating," would "vastly overstep" the courts' "limited scope of judicial inquiry into immigration legislation," and "would interfere with the broad enforcement powers Congress has delegated to the Attorney General." *Ibid.* (quoting *Fiallo*, 430 U.S. at 792). Accordingly, the court "decline[d] to adopt a factual approach to * * * equal protection analysis in the context of the deportation and excludability provisions of the INA," and it "conclude[d] that Komarenko was not denied his constitutional right to equal protection of the law." *Ibid.*

Thus, under the rational-basis standard of review, Congress may draw lines on the basis of general categories of offenses as defined by statute, without regard to the factual circumstances of a particular individual. See, *e.g.*, *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). Under that standard, it is only when the

statutory ground for a deportable alien's removal from the country has a statutory counterpart in the grounds for inadmissibility that a deportable alien is arguably similarly situated to inadmissible aliens. See *Komarenko*, 35 F.3d at 435. As the Seventh Circuit has explained:

> [C]ertain deportable aliens may receive exclusion-type relief as if they were subject to exclusion rather than deportation. But that fiction requires that the aliens be excludable *for the same reasons* that render them deportable—a situation not necessarily true for all aliens facing deportations. Accordingly, [S]ection 212(c) relief was not extended to aliens whose deportability was based on a ground for which a comparable ground of exclusion did not exist.

Leal-Rodriguez, 990 F.2d at 949 (emphasis added). The court in *Leal-Rodriguez* held that an alien who was deportable for entering the United States without inspection was not eligible for Section 212(c) relief because there was no corresponding ground of inadmissibility to the deportation charge. *Id.* at 948, 950.

In this case, petitioner's argument similarly fails because his ground of deportation (for having been convicted of the aggravated felony of sexual abuse of a minor) is not "substantially equivalent" or "substantially identical" to a ground of inadmissibility under Section 212(a) of the INA. *Komarenko*, 35 F.3d at 435. As the Board correctly reasoned in *In re Blake*, sexual abuse of a minor under 8 U.S.C. 1101(a)(43)(A) lacks a statutory counterpart among the grounds of inadmissibility in Section 212(a). Although the circumstances underlying sexual abuse of a minor may constitute "a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I) of

the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), the latter category addresses a distinctly different category of offenses than a charge for an aggravated felony of sexual abuse of a minor. Thus, while the statutory-counterpart test does not require a perfect match, the ground of inadmissibility must address essentially the same category of offense on which the removal charge is based.

Under the pertinent regulations and the Board's decisions, that test is not met merely by showing that some (or even many) of the aliens whose offenses are included in a given category could also have their crimes characterized as ones involving moral turpitude. See, *e.g.*, *Zamora-Mallari*, 514 F.3d at 693 (holding that the aggravated felony of sexual abuse of a minor has no statutory counterpart); *Avilez-Granados* v. *Gonzales*, 481 F.3d 869, 871-872 (5th Cir. 2007) (same). That analysis is firmly supported by the unanimous decisions of the courts of appeals holding that a firearms offense (which is a ground of removability under 8 U.S.C. 1227(a)(2)(C)) has no statutory counterpart under Section 212(a), even though "many firearms offenses may also be crimes of moral turpitude." *In re Blake*, 23 I. & N. Dec. at 728.

Thus, because petitioner is not similarly situated to an inadmissible alien who has been convicted of a crime involving moral turpitude, and because he is not being treated any differently than other aliens who are deportable upon grounds that themselves have no corresponding ground of inadmissibility, his equal protection claim is meritless.[12]

---

[12] Petitioner suggests (Pet. 17, 20) that the relevant comparison should be between deportable aliens who have left the country and those who have not, because a deportable alien who left the country could be treated as if he had been put into proceedings upon reentry such that relief was available *nunc pro tunc*. But the cases in which the

Similarly, although petitioner contends that the statutory-counterpart test effects a "retroactive application of the [Section] 212(c) repeal" through the "back[] door," that argument is based on the erroneous assertion that it "makes no sense" to treat him differently after Congress made him newly deportable by virtue of his having been convicted of an aggravated felony. Pet. 21. But, as explained above (see note 8, *supra*), there is no dispute that Congress made the amended definition of "aggravated felony" retroactively applicable. It is hardly illogical to conclude that someone may lose eligibility for discretionary relief from removal when he becomes subject to a new ground for removal. As a result, when petitioner became deportable on IIRIRA's effective date in 1997, he was not situated similarly to someone in his pre-IIRIRA state (in which he was merely excludable if he had departed the United States and sought to return), and the consequences attendant upon his legal change of circumstance do not violate equal protection.

d. Although the Second Circuit has reached a different result, the statutory-counterpart issue in this case—

Board has applied Section 212(c) or its predecessor provisions make clear that, although "[i]t has long been the administrative practice to exercise the discretion permitted by the foregoing provisions of law, *nunc pro tunc*," the Board does so only "where complete justice to an alien dictates such extraordinary action." *In re T–*, 6 I. & N. Dec. 410, 413 (B.I.A. 1954). Thus, while "the equitable power to grant orders *nunc pro tunc* is conceptually broad," *Ramirez-Canales* v. *Mukasey*, 517 F.3d 904, 910 (6th Cir. 2008), its application is wholly discretionary and is limited to extraordinary cases—not to every case where an alien would otherwise be eligible for relief. For the same reasons that petitioner is not similarly situated to an alien who departed and is seeking to re-enter, complete justice would not mandate the application of *nunc pro tunc* discretion.

which was not addressed in the court of appeals' decision below—does not present a question of sufficient importance to warrant this Court's review. The Second Circuit is an outlier: eight other circuits have approved the Board's approach in *In re Blake*. And this Court denied certiorari twice in 2009 and three more times last year, well after the Second Circuit had issued its decision in *Blake* v. *Carbone*. See note 5, *supra*. Moreover, the question petitioner raises concerns an alien's eligibility for a form of discretionary relief under a statutory provision that was repealed almost 14 years ago and is only potentially applicable to him on the theory that he might have relied on being eligible for it had his removal proceedings been initiated before the 1996 enactments. See *St. Cyr*, 533 U.S. at 325.

But the statutory-counterpart test to which petitioner objects is not new—indeed, it long predates the repeal of Section 212(c) in 1996 (see p. 2, *supra*; *De la Rosa*, 579 F.3d at 1336; *Blake*, 489 F.3d at 98-99)—and petitioner could have easily avoided its effects by departing the country voluntarily at any point before his removal proceedings were initiated in 2006. Cf. *Fernandez-Vargas*, 548 U.S. at 44 ("It is therefore the alien's choice to continue his illegal presence * * * that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.").

3. a. Petitioner claims (Pet. 8) his case is of broad importance because "thousands of immigrants seek § 212(c) relief each year, and thousands will continue to do so." In fact, however, both applications for and grants of relief under former Section 212(c) are rapidly diminishing. The statistics that *St. Cyr* invoked in the passage that petitioner cites (Pet. 23) are of little rele-

vance here, not only because of their age but also because Section 212(c) was still in effect during the period of those statistics (between 1989 and 1995).

In recent years, the number of grants of relief under former Section 212(c) has been smaller and declining. It went from 1905 grants in FY 2004 to 857 grants in FY 2010—a 55% decline. See Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf; Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2010 Statistical Year Book* Table 15, at R3 (2011), http://www.justice.gov/eoir/statspub/fy10syb.pdf. Over that same period, the number of applications for relief under former Section 212(c) fell even more dramatically. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2010, there were 507. That reflects an 81% decline since FY 2004—and a 60% decline since FY 2008.[13]

---

[13] These figures, which are based on both published and unpublished statistics compiled by the Executive Office of Immigration Review through FY 2010, extend the FY 2009 figures cited in the government's briefs opposing certiorari in *Ferguson* v. *Holder*, No. 09-263, cert. denied, 130 S. Ct. 1735 (2010); *Molina-De La Villa* v. *Holder*, No. 09-640, cert. denied, 130 S. Ct. 1882 (2010); *De la Rosa* v. *Holder*, No. 09-594, cert. denied, 130 S. Ct. 3272 (2010); *Abebe* v. *Holder*, No. 09-600, cert. denied, 130 S. Ct. 3272 (2010); *Jerez-Sanchez* v. *Holder*, No. 09-1211, cert. denied, 131 S. Ct. 73 (2010); and *Canto* v. *Holder*, No. 09-1333, cert. denied, 131 S. Ct. 85 (2010). In *Molina-De La Villa*, the petitioner's reply brief (at 6) noted that previous editions of the *Statistical Year Book* had reported lower numbers of 212(c) grants for some years. The higher figures in the more recent editions of the *Statistical Year Book* reflected a database conversion that more accurately captured the number of aliens with requests for relief under former Section 212(c).

Of course, the number of aliens who could be affected by the outcome of this case would necessarily be even smaller, since an alien would not become eligible for discretionary relief under petitioner's theory unless he or she met, at a minimum, each of the following criteria: (1) the alien must have lawful-permanent-resident status; (2) the alien must have a conviction predating the repeal of Section 212(c); (3) if it occurred after 1990, that conviction must have resulted in a sentence of less than five years; and (4) the charge of removal must have no comparable ground of inadmissibility except when considered on the basis of the facts of the underlying offense. Given the limited nature of that class, petitioner's assertion (Pet. 23) that the case presents "frequently recurring" and "important" issues fails.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ANDREW C. MACLACHLAN
Attorneys

MARCH 2011