Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

DIONICIO GUERRERO,

Petitioner,

v.

ERIC H. HOLDER, JR,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the former Section 212(c) of the Immigration and Nationality Act, discretionary relief was available to certain permanent residents convicted of deportable criminal offenses. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) repealed Section 212(c). In *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court held that Congress did not clearly indicate its intent to apply the repeal retroactively. Absent Congress's clear retroactive intent, this Court then determined that the repeal was impermissibly retroactive when applied to permanent residents who entered plea agreements for deportable crimes when 212(c) relief was available. Following *St. Cyr*, the courts of appeals have splintered on whether 212(c)'s repeal extends to pre-IIRIRA trial convictions. The questions presented are:

1. Whether Section 212(c)'s repeal: a) is categorically impermissibly retroactive when applied to convictions that predate IIRIRA, as two courts of appeals have held; b) can have an impermissible retroactive effect when applied to pre-IIRIRA trial convictions, as three courts of appeals have held; or c) is categorically not impermissibly retroactive when applied to pre-IIRIRA trial convictions, as six courts of appeals have held.

2. Whether reliance is irrelevant, determinative, or one factor in retroactive analysis, as eleven courts

QUESTIONS PRESENTED – Continued

of appeals have failed to apply an approach uniformly, and if relevant, whether the standard should be individualized subjective reliance, as some courts of appeals have held, or objectively reasonable reliance of a class of individuals, as other courts of appeals have held.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Judicial Materials

Other Materials

PETITION FOR A WRIT OF CERTIORARI

Petitioner Dionicio Guerrero respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-7a), Board of Immigration Appeals (App., *infra*, 8a-10a), and Immigration Judge (App., *infra*, 11a-16a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 1, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App., *infra*, 17a-18a.

STATEMENT

1. Discretionary relief under the former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(c) (1994) (repealed 1996), was available to a permanent resident convicted, whether by plea or trial, of a deportable criminal offense who

could show seven years of unrelinquished lawful domicile in the United States. (Commonly referred to as "212(c) relief.") Only permanent residents who had been convicted of an "aggravated felony," as defined under 8 U.S.C. § 1101(a)(43), and had served a term of imprisonment of at least five years were disqualified from relief.

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, eliminated 212(c) relief for permanent residents who were deportable for having committed aggravated felonies, controlled substance offenses, certain firearms offenses, and multiple crimes of moral turpitude. Congress then passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, which at Section 304(b) repealed Section 212(c) relief completely, and replaced it with a provision allowing a significantly narrower form of relief known as "cancellation of removal." 8 U.S.C. § 1229(b)(a). With 212(c)'s repeal, relief was no longer available to a permanent resident convicted of an aggravated felony.

The question remained of how the repeal would affect a permanent resident who was convicted prior to IIRIRA's enactment, but was put into removal proceedings after its enactment. The issue became the subject of litigation that led to this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001).

In *St. Cyr*, this Court applied the two-step retroactive test of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and its progeny, *Martin v. Hadix*, 527 U.S. 343 (1999); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). *St. Cyr*, 533 U.S. at 315-321. This Court first held that Congress did not clearly express its intent to retroactively apply the repeal of 212(c) relief to convictions predating IIRIRA. *Id.* at 315-20.

With the second *Landgraf* step, this Court determined whether 212(c)'s repeal would produce an "impermissible retroactive effect" on those affected by the law's change. *Id.* at 320. In general, "A statute has retroactive effect when 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 321 (quoting *Landgraf,* 511 U.S. at 269). Such inquiry, this Court noted, must be "guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.* (citing *Martin,* 527 U.S. at 358 (quoting *Landgraf,* 511 U.S. at 270)).

In reaching its conclusion regarding the statutory construction of the repeal provision, IIRIRA § 304(b), this Court adhered to the "deeply rooted" "presumption against retroactive legislation," *id.* at 316, to hold that the repeal did not apply retroactively to convictions reached by plea agreement. *Id.* at 325. This Court noted that such arrangements involve a *quid pro quo* between a

criminal defendant and the government. *Id.* at 321. Individuals who enter into plea agreements with the expectation that they would be eligible for such relief clearly "attaches a new disability, in respect to transactions or considerations already past." *Id.* Therefore, this Court held that the repeal had an impermissible retroactive effect because the elimination of Section 212(c) relief had an "obvious and severe retroactive effect." *Id.* at 325.

2. Petitioner Dionicio Guerrero has lived in the United States for thirty-one years. He entered the United States in 1980 without authorization when he was just seventeen years old. App., *infra*, 12a. Guerrero received lawful permanent resident status in the United States on August 15, 1990, at the age of twenty-eight. App., *infra*, 12a. Now forty-eight years old, Guerrero has lived his entire adult life in this country. App., *infra*, 12a. He is a father of one child, a daughter born in 2005 in Chicago, Illinois. App., *infra*, 2a. Guerrero has been married to his daughter's mother since 1999, and they have lived together at the same address since that time, for twelve years. App., *infra*, 2a. He has been steadily employed at the same company since 1996, working his way up to reach management level. App., *infra*, 2a.

Eighteen years ago, in October 1993, Guerrero was charged in Illinois with two counts of the manufacture or delivery of more than five hundred grams of marijuana in violation of 720 ILCS 550/5-56.5-705-E. App., *infra*, 12a. Guerrero was assigned a

public defender, following which he chose to exercise his right to challenge the charges. Administrative Record[1] (Record) at 109-112. He pled not guilty and the matter went to trial. Record at 112.

On July 26, 1995, Guerrero was found not guilty on one count and convicted on one count, and was sentenced to two years of probation. App., *infra*, 2a; Record at 112. After consulting his public defender, he chose not to appeal the conviction because his sentence meant that he was still eligible for Section 212(c) relief. Record at 31. On January 9, 1998, his probation was terminated as satisfied. Record at 112. Guerrero has no other criminal record. App., *infra*, 2a.

Thirteen years after Guerrero's conviction, the Department of Homeland Security initiated removal proceedings against him in 2008, twelve years after Congress enacted IIRIRA. App., *infra*, 12a. He applied for a waiver of relief from removal under the former INA § 212(c). Rather than scheduling a merits hearing on the application, the Immigration Judge ("IJ") pretermitted the application, citing case law arising from the circuit in which it sits, *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (holding that 212(c)'s repeal applies to individuals who proceeded to trial). App., *infra*, 12a-16a. Based on *Montenegro*, the IJ deemed Guerrero statutorily ineligible for 212(c) relief as a matter of

[1] References to the "Record" are to the Administrative Record filed by the Office of Immigration Litigation with the Court of Appeals for the Seventh Circuit on August 24, 2010.

law because the conviction resulted from a trial and not through a plea agreement. App., *infra*, 15a. The Board of Immigration Appeals affirmed the IJ's decision and denied Guerrero's appeal. App., *infra*, 8a-10a.

3. The U.S. Court of Appeals for the Seventh Circuit denied Guerrero's petition for review. App., *infra*, 1a-7a. While the court based its decision on circuit precedent, the court noted the "messy circuit split" regarding the retroactive inquiry and trial convictions that predate IIRIRA. App., *infra*, 6a. The court cited the splintered circuits, comparing numerous divergent holdings.[2] App., *infra*, 6a.

The court of appeals denied the petition for review, bound by precedent set in *Canto v. Holder*, 593 F.3d 638, 642-45 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 85 (2010), and *Montenegro*, 355 F.3d at

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[2] *Kellermann v. Holder*, 592 F.3d 700, 707 (6th Cir. 2010) (applying categorical approach to hold that 212(c)'s repeal is not impermissibly retroactive); *Ferguson v. Att'y Gen.*, 563 F.3d 1254, 1271 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1735 (2010) (same); *Montenegro*, 355 F.3d at 1037; *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002) (same); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002) (same), with *Lovan v. Holder*, 574 F.3d 990, 993-94 (8th Cir. 2009) (applying categorical approach to hold 212(c)'s repeal is impermissibly retroactive); *Atkinson v. Att'y Gen.*, 479 F.3d 222, 229-31 (3d Cir. 2007) (same); *Hem v. Maurer*, 458 F.3d 1185, 1199-1200 (10th Cir. 2006) (same), and *Carranza-de Salinas v. Gonzales*, 477 F.3d 200, 209-10 (5th Cir. 2007) (applying individualized approach and requiring actual reliance); *Wilson v. Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006) (same); *Chambers v. Reno*, 307 F.3d 284, 290-91 (4th Cir. 2002) (same).

1036-37. In *Canto*, the court held that IIRIRA's repeal of Section 212(c) is not impermissibly retroactive when extended to immigrants with pre-IIRIRA trial convictions, even if they have waived appeal. 593 F.3d at 644-45. By applying a categorical approach, the court followed *Canto*'s conclusion that it would not be objectively reasonable for the class of permanent residents who were convicted at trial and waived appeal to have relied on the availability of Section 212(c) at any point in the judicial process. App., *infra*, 4a-5a (citing *Canto*, 593 F.3d at 644-45). In the absence of objective reliance, the court held that applying the repeal retroactively would not be impermissibly retroactive. App., *infra*, 4a-5a (citing *Canto*, 593 F.3d at 645). With its approach, the court has made reliance the determinative factor in the retroactive inquiry.

While the court acknowledged that Guerrero "articulated a solid defense," of another circuit's approach,[3] the *Canto* decision was entitled to "considerable weight" and a "compelling reason" was required to overturn it. App., *infra*, 5a (citing *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006)). As the court noted, even if Guerrero were to show that the court wrongly decided *Canto*, that would fail to constitute a "compelling reason" to justify overturning precedent. App., *infra*, 6a (citing *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, 582-83 (7th Cir. 2005)).

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[3] App., *infra*, 5a (citing *Hem*, 458 F.3d at 1199-1200).

Despite its unfavorable ruling to Guerrero, the court of appeals emphasized in its conclusion that only this Court can resolve the "conflict" among the circuits. App., *infra*, 6a-7a. In closing, the court noted that even overruling its prior decisions would not eliminate the circuit split, acknowledging that only this Court can mend the splintered circuits and the conflicting lines of cases that have emerged after *St. Cyr*. App., *infra*, 6a-7a.

In sharp contrast with the Seventh Circuit's decision, had Guerrero's case arisen in the Third or Eighth Circuits, he would have been deemed eligible as a matter of law for 212(c) relief, as those courts have held that extending the repeal to trial convictions is impermissibly retroactive. *See Lovan*, 574 F.3d at 993-94; *Atkinson*, 479 F.3d at 230-31. If Guerrero's case had arisen in yet another jurisdiction, such as the Second, Fifth, or Tenth Circuit, he would have been afforded the chance to have his application for 212(c) relief heard in immigration court to determine if he had relied on the availability of Section 212(c). *See Carranza-de Salinas*, 477 F.3d at 210; *Wilson*, 471 F.3d at 122; *Hem*, 458 F.3d at 1191. Based on the discrepancies in circuit treatment, there is a clear lack in the uniform application of the law. Instead, 212(c) eligibility turns on the luck or, as in Guerrero's case, misfortune of the circuit where the matter occurs.

REASONS FOR GRANTING THE WRIT

By accepting review of this case, this Court can finally resolve the entrenched circuit conflict regarding whether 212(c)'s repeal applies to pre-IIRIRA trial convictions. Even the Seventh Circuit in this case referred to the splintered state of the circuits as a "messy circuit split" en route to inviting this Court to settle the conflict. App., *infra*, 6a. Among the eleven courts of appeals that have addressed the issue, there are three different approaches that have emerged, which require this Court's review to resolve. Some courts hold that categorically the repeal does not apply; yet others hold that categorically the repeal does apply; and finally other courts hold that the repeal may apply, but still differ on the reliance standard used.

The issue at hand is of statutory construction, namely, whether 212(c)'s repeal applies to pre-IIRIRA trial convictions. In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court established the two-step test to determine whether a statute is impermissibly retroactive. This Court noted in *Landgraf* the longstanding "presumption against retroactive legislation" that is "deeply rooted in our jurisprudence." *Id.* at 265. This Court also underscored the importance of the presumption, which stems from the understanding that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."

Id. That presumption against retroactivity" is "the essence" of *Landgraf* and its progeny. *Ponnapula v. Ashcroft*, 373 F.3d 489-91 (3rd Cir. 2004) (discussing *Republic of Austria v. Altman*, 541 U.S. 677 (2004); *St. Cyr*, 533 U.S. 289; *Martin*, 527 U.S. 343; *Hughes Aircraft Co.,* 520 U.S. 939; *Landgraf*, 511 U.S. 244).

In *St. Cyr*, this Court used the *Landgraf* analysis to determine whether the repeal of 212(c) had an impermissible effect, thus rendering the repeal inapplicable. Faced with the question of whether 212(c)'s repeal applied to pre-IIRIRA convictions reached by plea agreement, this Court first held that Congress did not clearly express its intent to retroactively apply the repeal. *St. Cyr*, 533 U.S. at 315-20. This Court applied the second step of *Landgraf* retroactive analysis to determine whether the repeal of 212(c) would produce an "impermissible retroactive effect" on those affected by the law's change. *Id.* at 320. The central inquiry was whether applying the repeal "attaches a new disability, in respect to transactions or considerations already past." *Id.* at 321.

Given the plea agreement context, *St. Cyr* noted that such arrangements involve a *quid pro quo* between a criminal defendant and the government. *Id.* This Court concluded that those who enter into plea agreements with the expectation that they would still be eligible for immigration relief under 212(c) clearly "attaches a new disability, in respect to transactions or considerations already past." *Id.* at 321.

After *St. Cyr*, circuit courts have diverged in their interpretations of its holding and the retroactive inquiry. As a result, the circuits' treatment of identical facts is strikingly inconsistent. Given the same facts, a permanent resident with a pre-IIRIRA trial conviction would be categorically deemed eligible for 212(c) relief and entitled to a hearing, whereas in another circuit, that person would be categorically deemed ineligible for 212(c) and face certain removal from the United States. In the latter, a permanent resident whose conviction once permitted 212(c) eligibility, changed drastically to no longer render viable relief from removal.

With 212(c)'s repeal, the rug had been pulled from underneath permanent residents whose convictions and sentences then carried new, unforeseen legal consequences. New disabilities and legal consequences were given to past considerations and transactions–the very definition of impermissible retroactivity. *See Landgraf,* 511 U.S. at 269-270. Without review from this Court to resolve the circuit conflict, permanent residents' abilities to remain in this country will hinge on the circuit in which their case arises. Such inconsistent treatment endangers the "Nation's need to 'speak with one voice' in immigration matters." *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001). The circuit split remains fixed and the only way that the conflict can be resolved is if this Court accepts review of a case like this.

I. THE CIRCUIT SPLIT ON WHETHER THE REPEAL OF 212(c) APPLIES TO PRE-IIRIRA TRIAL CONVICTIONS IS SO PRONOUNCED THAT THE SAME PERMANENT RESIDENT WOULD BE DEEMED STATUTORILY ELIGIBLE FOR 212(c) RELIEF IN ONE CIRCUIT AND DENIED ELIGIBILITY AS A MATTER OF LAW IN ANOTHER.

The courts of appeals have splintered to such a severe degree on whether 212(c)'s repeal applies to pre-IIRIRA trial convictions that a permanent resident in removal proceedings can receive a merits hearing on 212(c) relief in one circuit and in another circuit be denied eligibility as a matter of law. The divergent treatment of the same individual reflects the conflict and confusion among the courts of appeals in interpreting *St. Cyr* and conducting retroactive analysis.

In the context of pre-IIRIRA trial convictions, the Third and Eighth Circuits have held that an individual is categorically eligible to receive a merits hearing for relief filed under 212(c), while in sharp contrast, some circuits, such as the Seventh, would find such an applicant statutorily ineligible and thus deprived of a hearing. There is little consistency in how the circuits interpret *St. Cyr* and conduct retroactive analysis. The result is conflicting circuit treatment of what should be uniform application of the law. In the end, a permanent resident's eligibility for 212(c) relief hinges on the luck of which circuit has jurisdiction.

A. Two circuits have held that 212(c)'s repeal does not extend to pre-IIRIRA convictions because applying the repeal would cause an impermissible retroactive effect.

The Third and Eighth Circuits have held that 212(c)'s repeal does not extend to pre-IIRIRA convictions, regardless of manner reached, because an impermissible retroactive effect would result. *See Lovan*, 574 F.3d at 993-94; *Atkinson*, 479 F.3d at 230-31. Those circuits have concluded that a permanent resident is categorically eligible for post-IIRIRA 212(c) relief, even if the conviction was reached at trial. *Id.*

Neither circuit requires reliance on the continuing availability of the prior state of the law, here 212(c) eligibility, as a factor in the retroactive inquiry. *Id.* While the Third Circuit in *Atkinson* acknowledged that *St. Cyr* discussed an element of reliance in its retroactive inquiry, the court modeled its analysis after *Landgraf*, the basis for *St. Cyr*'s analysis. 479 F.3d at 229. In doing so, its retroactive inquiry turned on whether new legal consequences were created. *Id.*

Looking to *Landgraf*, the Third Circuit noted that this Court does not require reliance to find an impermissible retroactive effect. *Id.* As this Court defined impermissible retroactivity in *Landgraf*, there is no requirement that an individual have relied on the prior state of the law. *Id.* While reliance may have been a factor in *St. Cyr* because of the

particular facts of that case, which involved a plea agreement and the *quid pro quo* arrangement inherent to that context, *Atkinson* noted that this Court in *Landgraf* never made reliance an essential factor of the retroactive inquiry. *Id.* at 231.

The *Atkinson* court framed the bottom line issue, "Does applying IIRIRA to eliminate the availability of discretionary relief under former section 212(c) attach new legal consequences to events completed before the repeal?" *Id.* at 230. The "event" to which IIRIRA attached a new legal consequence was the conviction, which "occurred in the past and cannot be changed." *Id.* In what the Third Circuit viewed as "straightforward" application of *Landgraf* analysis, *id.*, it concluded that IIRIRA "attached new legal consequences" to the conviction and sentence since Atkinson was eligible for 212(c) relief before IIRIRA's enactment and lost eligibility with 212(c)'s repeal. *Id.* at 230-31. With IIRIRA, the legal consequences of his conviction and sentence changed drastically from possible deportation to certain deportation. *Id.* at 230.

The Eighth Circuit's approach follows the Third Circuit. *See Lovan*, 574 F.3d at 993. When addressing an individual's sudden loss of 212(c) relief eligibility immediately upon IIRIRA's enactment, the court in *Lovan* held that such a drastic change in availability of relief is an "obvious and severe retroactive effect," as contemplated in *St. Cyr*. *Id.* at 995.

The Fourth Circuit appeared to have an approach consistent with the Third and Eighth Circuits. *See Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). Although the court contemplated another IIRIRA provision in *Olatunji*, *id.* at 386, it spoke generally of the retroactivity inquiry and its elements. *Id.* at 388. The court, as in the Third and Eighth Circuits, focused on determining whether IIRIRA attached new legal consequences to a previous event. *Id.* at 389. It held that reliance, whether subjective or objective, "is not a requirement of impermissible retroactivity." *Id.* In fact, the court concluded that reliance is "irrelevant" to the retroactive inquiry. *Id.* at 394. This holding directly contrasted its prior holding in *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002), in which the court held that a permanent resident who was convicted at trial pre-IIRIRA does not have a reliance interest similar to that found in *St. Cyr*'s plea agreement exchange, and therefore the repeal was applied. *Id.* at 290. In *Olatunji*, however, the court seemed to overturn itself.

Three years later the Fourth Circuit again addressed retroactivity and the effect of 212(c)'s repeal on pre-IIRIRA trial convictions. *Mbea v. Gonzales*, 482 F.3d 276, 278 (4th Cir. 2007). The court actually failed to mention *Olatunji*, but reached back to *Chambers* to hold that the repeal applies to pre-IIRIRA trial convictions because there is no impermissible retroactive effect. *Id.* at 281-282. While the court's *Mbea* decision means statutory ineligibility for 212(c) relief and certain removal, the extreme way in which the Fourth Circuit vacillated

positions between 2002 and 2009 underscores the confusion among, as well as within, courts of appeals when it comes to interpreting *St. Cyr*, applying the *Landgraf* retroactive inquiry, and analyzing the effect of 212(c)'s repeal on pre-IIRIRA trial convictions.

B. Three circuits have held that 212(c)'s repeal can have an impermissible retroactive effect when applied to pre-IIRIRA trial convictions.

Three courts of appeals have held that 212(c)'s repeal can be impermissibly retroactive when applied to pre-IIRIRA convictions, including those reached at trial. The Second, Fifth, and Tenth Circuits, however, diverge from the Third and Eighth Circuits, by not taking a categorical approach to finding impermissibility to all pre-IIRIRA convictions. *See Carranza-de Salinas*, 477 F.3d at 210; *Wilson*, 471 F.3d at 122; *Hem*, 458 F.3d at 1191; *Restrepo v. McElroy*, 369 F.3d 627, 638 n.18 (2d Cir. 2004). The retroactive inquiry among those courts turns on reliance on the prior condition of the law, as in this case, eligibility for 212(c) relief. Within this group, however, the courts divide into two categories on the standard of reliance required to find impermissible retroactive effect: subjective and objective.

In the Second and Fifth Circuits, there must be a showing of subjective reliance on 212(c)'s existence. *See e.g.*, *Carranza-de Salinas*, 477 F.3d at 205-06; *Wilson*, 471 F.3d at 122. The Second Circuit has held

that permanent residents seeking 212(c) relief must show that before IIRIRA they knew 212(c) relief was available and wanted to apply for relief, however, chose to delay filing since discretionary factors weighed in adjudicating the application would improve over time. *See Walcott v. Chertoff*, 517 F.3d 149, 155 (2d Cir. 2008).

The Fifth Circuit follows the Second Circuit in its subjective reliance approach. *See Carranza-de Salinas*, 477 F.3d at 205. As in the Second Circuit, the Fifth Circuit has held that delaying an application to strengthen the case for 212(c) relief could create an impermissible retroactive effect if individual reliance is shown on the continuing availability of 212(c) relief. *Id.* at 209.[4]

Like the Second and Fifth Circuits, the Tenth Circuit has also held that permanent residents with post-IIRIRA trial convictions can be deemed eligible for 212(c) relief; however, the reliance standard differs. *See Hem*, 458 F.3d at 1200. Individuals must show that they belong to a class for whom it would be "objectively reasonable" to have relied on 212(c) availability. *Id.* The court based its conclusion on its analysis of this Court's *Landgraf* line of cases dealing with retroactivity, particularly *Hughes Aircraft Co.* and *Martin*. *Id.* at 1197.

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[4] *See* Mark J. DiFiore, Note, *The Unforeseen Costs of Going to Trial: The Vitality of 212(c) Relief for Lawful Permanent Residents Convicted by Trial*, 79 FORDHAM L. REV. 649, 680-681 (2010).

The court in *Hem* observed that this Court never deemed individual reliance as determinative in retroactive analysis. *Id.* The court acknowledged the reliance element in the *St. Cyr* analysis, but the Third Circuit noted that nowhere in the decision does this Court require a showing that the permanent resident relied on the continuing availability of 212(c) relief. *Id.*

In *Hem*, the Tenth Circuit addressed facts similar to those of this case, a pre-IIRIRA trial conviction after which the permanent resident waived appeal when 212(c) relief was still available. The court adhered to an objective reliance standard to determine the effect is impermissibly retroactive. *Id.* at 1189. Applying that standard, the court concluded that Hem belonged to a group of similarly situated permanent residents whose reliance on 212(c)'s continued availability was "objectively reasonable." *Id.* at 1199-1200.

C. Some circuits have held that 212(c)'s repeal is not impermissibly retroactive when applied to pre-IIRIRA trial convictions.

Six courts of appeals have held that 212(c)'s repeal is not impermissibly retroactive when applied to pre-IIRIRA trial convictions. *See Kellermann*, 592 F.3d at 707; *Canto*, 593 F.3d at 644; *Ferguson*, 563 F.3d at 1271; *Mbea*, 482 F.3d at 281-82; *Dias*, 311 F.3d at 458; *Armendariz-Montoya*, 291 F.3d at 1121. In reaching their holdings, the First, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits have

categorically concluded that permanent residents who exercised their rights to proceed to trial are ineligible for 212(c) relief because they cannot demonstrate reliance on the availability of that relief pre-IIRIRA to make the repeal impermissibly retroactive. *Id.* These circuits interpret *St. Cyr*'s retroactive analysis to turn on the question of reliance since this Court discussed the *quid pro quo* context of plea agreements. *See e.g., Canto*, 593 F.3d at 645; *Dias*, 311 F.3d at 458.

In addition to the confused state of the Fourth Circuit that was discussed, Section A *supra*, within the Seventh Circuit, from which this case arises, concerns were raised over the court's approach to retroactive analysis. *See United States v. De Horta Garcia*, 519 F.3d 658, 662 (7th Cir. 2008) (Rovner, J., concurring). Judge Rovner wrote "in the hope" that the court would "re-examine" its precedent applying the repeal to pre-IIRIRA trial convictions. *Id.*

D. The circuits are firmly divided on this issue of national significance.

The circuit courts are severely splintered in their treatment of permanent residents, such as Guerrero, who have pre-IIRIRA trial convictions and seek 212(c) relief in post-repeal removal proceedings. In this case, the Seventh Circuit followed its precedent established in *Canto*, 593 F.3d at 644 and *Montenegro*, 355 F.3d at 1035, categorically applying the repeal of 212(c) to pre-IIRIRA trial convictions. App., *infra*, 4a-5a. In doing so, the court aligned itself

with the First, Sixth, Ninth, and Eleventh Circuits. *See e.g., Kellermann*, 592 F.3d at 707. The holding in Guerrero's case, however, diverges from the circuits that deem the repeal categorically inapplicable to pre-IIRIRA trial convictions. *See e.g., Lovan*, 574 F.3d at 990. Yet, some other circuits have held that applying the repeal to permanent residents like Guerrero may have an impermissible retroactive effect, depending on the showing of reliance. *See e.g., Carranza-de Salinas*, 477 F.3d at 210.

With such divergent opinions coming from the circuits, there is a clear split and lack of uniformity in applying the repeal of 212(c) to pre-IIRIRA trial convictions. That conflict endangers the "Nation's need to 'speak with one voice' in immigration matters." *Zadvydas v. Davis*, 533 U.S. at 700. The policy favoring uniformity in applying immigration law is embedded in the Constitution, which provides the foundation for Congress's power to regulate immigration. *See* U.S. Const. art. I, § 8 ("The Congress shall have the Power To ... establish an uniform Rule of Naturalization....") The circuit courts have recognized the need for uniformity in the immigration context.[5]

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[5] *See e.g., Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004) (relying on "the presumption that immigration laws should be interpreted to be nationally uniform...."); *Gerbier v. Holmes*, 280 F.3d 297, 311-312 (3d Cir. 2002) ("Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner."); *Aguirre v. I.N.S.*, 79 F.3d 315, 317 (2d Cir. 1996) (recognizing "the interests of nationwide uniformity [in administering immigration laws]"); *Rosendo-*

Despite the longstanding policy favoring uniformity in the immigration context, the circuits remain entrenched in their division. In light of multiple circuits following their respective precedent decisions in recent years, it is evident that the split remains fixed and no resolution will emerge without this Court's review. *See e.g.*, *Myers v. Holder*, No. 07-72858, 2010 WL 3938203 (9th Cir. Oct. 8, 2010), *cert. filed* March 24, 2011; *Johnson v. Holder*, 385 F. App'x. 597 (7th Cir. 2010), *cert. filed* December 1, 2010; *Canto*, 593 F.3d at 638; *Kellermann*, 592 F.3d at 707; *Lovan*, 574 F.3d at 990.

Eleven circuits have ruled on this issue and applied varying approaches, which only this Court can resolve. App., *infra*, 7a (citing *Buchmeier v. United States*, 581 F.3d 561, 565-66 (7th Cir. 2009)(en banc)). The volume of circuit court litigation following *St. Cyr* on the issue of 212(c)'s repeal applying retroactively reflects the severe circuit split, as well as the significance that 212(c) relief maintains to this day.[6]

Ramirez v. I.N.S., 32 F.3d 1085, 1091 (7th Cir. 1994) (observing that "[n]ational uniformity in the immigration and naturalization laws is paramount....") (citation omitted).

[6] *See* Petition for Writ of Certiorari, *Ferguson v. Holder*, 130 S. Ct. 1735 (2010) (No. 09-263), 2009 WL 2842077 at 14 n.6 (citing more than fifty-five cases, not including Board of Immigration Appeals decisions, on the issue presented in recent years). Since that list was compiled, additional circuit decisions have been issued, including *Myers*, 2010 WL 3938203; *Johnson*, 385 F. App'x. 597; *Canto,* 593 F.3d 638; *Kellermann*, 592 F.3d 707.

Section 212(c) relief was and remains relevant in immigration procedures even fifteen years after its repeal.[7] Before Congress enacted IIRIRA, permanent residents often sought 212(c) relief to prevent deportation. As this Court recently noted, in the five-year period before its repeal, 212(c) provided relief to over 10,000 noncitizens who were otherwise subject to deportation. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) (citing *St. Cyr,* 533 U.S. at 296)).

Statistics from the Executive Office for Immigration Review ("EOIR") Fiscal Year 2010 Statistical Year Book reveal that the number of immigration court cases granting 212(c) relief remained consistent from 2009 to 2010, at 857.[8] That figure does not include the number of cases that were actually filed. In the six-year period for fiscal years 2005 to 2010, the total number of cases granted relief under 212(c) totaled 6,686.[9] That number equates to an average of a fraction over 1,114 cases per year

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[7] *See* Brief of Amici Curiae Immigration Defense Project et al. in Support of Petitioner at 3-4, *Ferguson v. Holder,* 130 S. Ct. 1735 (2010) (No. 09-263), 2009 WL 3155387 (explaining that the continuing availability of 212(c) relief remains important for thousands of individuals and their families); *see also* 79 FORDHAM L. REV. at 653-655.

[8] *See also* Petition for Writ of Certiorari, *Myers v. Holder*, __ S.Ct. __, (2011) (No. 10-1178), 2011 WL 1155236 at 22-24.

[9] *See Executive Office for Immigration Review FY 2010 Statistical Year Book, Office of Planning, Analysis, and Technology*, January 2011 at R3, http://www.justice.gov/eoir/statspub/fy10syb.pdf; *Executive Office for Immigration Review FY 2009 Statistical Year Book, Office of Planning, Analysis, and Technology*, March 2010 at R3, http://www.justice.gov/eoir/statspub/fy09syb.pdf.

where permanent residents have avoided removal from this country, separation from family, and lost educational and employment opportunities. It cannot be assumed that the numbers will drop as time continues, given for example that the number of approvals in 2008 outnumbered those of 2005, according to the EOIR fiscal year statistical year books. *Id.*

As immigration enforcement efforts increase, the number of noncitizens placed into removal proceedings will escalate.[10] With the increase in enforcement, it is likely that there will also be an increase in the number of applications for 212(c) relief. According to the government's most recent annual report, in 2009 the Department of Homeland Security apprehended 613,003 foreign nationals, and 393,289 foreign nationals were removed from the United States, including 128,345 considered known criminals. *Id.* The total number of removals increased 10% from 358,886 in 2008. *Id.* at 4.

Under the current administration, there has been an increase in work-site raids and company audits, leading to a significant increase in noncitizens facing removal.[11] While the targets of these raids are often

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[10] *See Dep't of Homeland Security, Immigration Enforcement Actions: 2009, Annual Report*, August 2010, 3-4 (August 2010), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf.

[11] See Peter Slevin, *Deportation of illegal immigrants increases under Obama administration*, WASHINGTON POST, July 26,

unauthorized workers, or in the case of home raids, known gang members or violent criminals, sometimes the enforcement efforts often lead to removal proceedings against permanent residents with old convictions who have not been on the government's radar.[12] One such example was the subject of litigation in *Ferguson,* 563 F.3d 1254.

E. This case is an appropriate vehicle to resolve the circuit conflict, as it perpetuates the split, but also invites this Court to review the circuits' divergent holdings.

This case is an appropriate vehicle to resolve the circuit split on whether individuals with pre-IIRIRA trial convictions are eligible for 212(c) relief. In rendering a decision, this Court would have an opportunity to finally address the circuits' divergent interpretations of *St. Cyr* and to what extent reliance factors into the retroactivity inquiry, if at all.

The favorable facts of this case should raise this Court's concerns that a permanent resident of two decades was stripped of his lawful immigrant status and ordered removed because of the Seventh Circuit's interpretation of *St. Cyr*, which is in direct

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2010, *available at* http://www.washingtonpost.com/wp-yn/content/article/2010/07/25/AR2010072501790.html.

[12] *See* Brief of Amici Curiae at 6-13 (describing how permanent residents with pre-IIRIRA convictions for deportable offenses are only now coming to the government's attention); *see also,* 79 FORDHAM L. REV. at 653-654.

conflict with other circuits. Guerrero is a forty-eight-year-old husband and father who has lived in the United States since he was seventeen. App., *infra*, 2a.

Guerrero exercised his right to challenge the two counts brought against him. Record at 109-112. At trial, he was found not guilty on one count and convicted on one count, and was sentenced to two years of probation. App., *infra*, 2a; Record at 112. After consulting his public defender, he chose not to appeal the conviction because his sentence meant that he was still eligible for 212(c) relief. Record at 31. Guerrero satisfied his probation and has no other criminal record. App., *infra*, 2a.

Despite the compelling factors in his case, Guerrero was denied the opportunity to have them considered at a merits hearing on 212(c) relief. The primary reason Guerrero was deprived his day in court and ordered removed from the United States hinged on the circuit where the case arose rather than the uniform application of statutory construction to federal immigration law.

The circuits themselves recognize the split and appear to encourage this Court to resolve it, as indicated in the circuit court's decision in this case, App., *infra*, 6a-7a. The Seventh Circuit in this case refers to the "messy circuit split" and concludes the opinion noting, "only the Supreme Court can resolve" the divergent circuit holdings. App., *infra*, 6a-7a. Finally, the court finds that even overruling

precedent would prove futile against the severely splintered circuits. App., *infra*, 6a-7a. Any efforts to overrule precedent "would neither eliminate the conflict altogether nor advance a new line of argument; 'restless movement' to another side of the circuit split would waste judicial resources...." App., *infra*, 6a-7a (citing *Buchmeier*, 581 F.3d at 565-66). With such language, the court seems to invite this Court to finally resolve the split and clarify its position in *St. Cyr* and retroactive analysis.

II. THE SEVENTH CIRCUIT'S POSITION ON THE REPEAL OF 212(C) CONFLICTS WITH THE LONGSTANDING PRESUMPTION AGAINST RETROACTIVE LEGISLATION AND CREATES AN IMPERMISSIBLE RETROACTIVE EFFECT WHEN APPLIED TO PRE-IIRIRA TRIAL CONVICTIONS.

The court of appeals in this case was bound by precedent to apply 212(c)'s repeal to Guerrero because he challenged his criminal charges at trial rather than enter a plea agreement, and then waived his right to appeal his sole conviction. *See Canto*, 593 F.3d 638; *Montenegro*, 355 F.3d 1035. The circuit's position, however, is wrong because all of Guerrero's relevant actions occurred before IIRIRA. Applying the repeal to pre-IIRIRA trial convictions causes the offense and conviction to undergo "changed legal consequences," in other words, an impermissible retroactive effect. *See Atkinson*, 479 F.3d at 226 (citing *Landgraf*, 511 U.S. at 270). Similarly, applying the repeal to Guerrero in light of having

waived his right to appeal while 212(c) relief was available also changed legal consequences. *See Hem*, 458 F.3d 1185.

Applying 212(c)'s repeal to pre-IIRIRA trial convictions runs afoul of the deep-rooted presumption against retroactive legislation. *See Landgraf*, 511 U.S. at 265. Further, it violates an individual's ability to know the law and conform conduct accordingly. *Id.* As such, Guerrero has been denied the opportunity to assess the legal effect of his conduct "under the law that existed when the conduct took place," a fundamental principle that "has timeless and universal appeal." *Id.* (citation omitted).

Among the divided circuits, the Third Circuit's application of retroactive analysis best adheres to this Court's approach in *Landgraf*, which was the basis for *St. Cyr*. The Eighth Circuit has expressly followed the Third Circuit. *See Lovan*, 574 F.3d at 993. Adhering to the inquiry in *Landgraf*, the Third Circuit correctly focused on determining whether applying IIRIRA to eliminate 212(c) eligibility attaches new legal consequences to pre-repeal events. *Atkinson*, 479 F.3d at 230. The answer, as the Third Circuit and other courts have observed is yes, IIRIRA attached new legal consequences because before IIRIRA's enactment the individual was eligible for 212(c) relief and then lost eligibility with 212(c)'s repeal. *Id.* at 230-31. When Congress enacted IIRIRA, the legal consequences of the conviction, regardless of manner it was reached, and

sentence drastically altered from potential deportation to certain deportation. *Id.* at 230.

Even if the bar of 212(c)'s repeal is not categorically applicable to pre-IIRIRA convictions, to the extent that reliance is a factor, the objective reliance standard is closest to this Court's holdings. *See Hem*, 458 F.3d at 1200. The court in *Hem* held that permanent residents with post-IIRIRA trial convictions can be deemed eligible for 212(c) relief; however, individuals must show that they belong to a class for whom it would be "objectively reasonable" to have relied on the availability of 212(c). *Id.* Similar to Guerrero, Hem was likely influenced by 212(c) eligibility when opting not to exercise the right to appeal his conviction, thus, he suffered "new legal consequences" with 212(c)'s repeal. *Id.* at 1200-01.

The Seventh Circuit in *Canto* briefly acknowledged, but failed to follow, the Tenth Circuit's approach expressed in *Hem* and *Ponnapula*. The court was incorrect to hold that it was not objectively reasonable for the class of individuals who proceeded to trial and waived appeal of a deportable conviction to have relied on the continuing availability of 212(c). 593 F.3d at 644.

As with St. Cyr, Guerrero acted with knowledge of 212(c) eligibility when foregoing a legal right, in his case the right to appeal the conviction. Record at 31. In Illinois, an appeal of right is always available when the defendant pleads not guilty. Ill. S.Ct. Rule 605(a) (1995); *People v. Johnston*, 421 N.E.2d 412

(Ill. App. Ct. 1981). Further, an Illinois defendant who has been found guilty and sentenced to probation may appeal the judgment as a matter of right. Ill. S.Ct. Rule 604(b) (1995). All critical actions and decisions in Guerrero's criminal case occurred before 212(c)'s repeal, and he acted with the understanding that 212(c) relief was always available to him when he exercised his right to challenge the two charges at trial and again when he waived his right to appeal the sole conviction. Record at 31. With the court's holding that the repeal applies to Guerrero, he is "penalized so harshly, *ipso facto*, for going to trial, in the hopes of avoiding the disgrace and permanent stain of a conviction," which "seems to run counter to fundamental principles of the American constitutional polity...." *Ponnapula*, 373 F.3d at 500, n. 19.

Denying 212(c) eligibility has created an impermissible effect by retroactively changing Guerrero's conviction to carry new legal consequences after the repeal of 212(c). The danger expressed in *St. Cyr* is that of the repeal altering legal consequences of past events when 212(c) relief was available. 533 U.S. at 325. The court in Guerrero's case simply followed *Canto*, but appears to have invited this Court to resolve the "messy split" among the circuits. App., *infra*, 6a-7a.

With 212(c)'s repeal, the rug was pulled from underneath permanent residents whose convictions unexpectedly carried new legal consequences. Increased disabilities were given to past

considerations and transactions, the very definition of impermissibly retroactive. If this Court does not resolve the circuit conflict, the country's ability to "speak with one voice" on this nationally significant immigration issue is threatened. Unless this Court addresses the circuit split, permanent residents' eligibility to remain in this country will hinge on the sheer luck of the circuits in which cases arise rather than uniform application of the law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

APPENDIX