NO. _____

In the
Supreme Court of the United States

JUAN RAICEDO ACEBO-LEYVA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner fled Cuba over fifty years ago after assisting anti-Castro forces in the Bay of Pigs operation. Now 72 years old, he has spent his entire adult life as a lawful permanent resident in the United States. In 2007, the federal government initiated removal proceedings against him based on convictions from 1981. He applied for discretionary relief under former Section 212(c) of the Immigration and Nationality Act and for deferral of removal under regulations implementing the Convention Against Torture. Although Congress repealed § 212(c) in 1996, this Court has held that this repeal does not retroactively bar discretionary relief for individuals who, like Petitioner, were eligible when convicted. *See INS v. St. Cyr*, 533 U.S. 289 (2001). Nevertheless, the court below deemed Petitioner ineligible for such relief, concluding that *St. Cyr* applies only to individuals who pled guilty. In doing so, the Eleventh Circuit reinforced an intractable split among the circuits on whether *St. Cyr* applies to individuals who exercised their right to trial. As a result of that split, whether an alien is eligible for discretionary relief can hinge solely on whether he resides in Los Angeles or Miami. The Eleventh Circuit also refused to review Petitioner's Convention Against Torture claim, and in doing so implicated another acknowledged circuit split regarding the extent of a court's jurisdiction to review such claims under 8 U.S.C. § 1252(a)(2).

The questions presented are:

1) whether discretionary relief under § 212(c) of the Immigration and Nationality Act remains available to individuals who were eligible for such

relief at the time of their convictions and exercised their right to trial, rather than pleading guilty;

2) whether the court of appeals had jurisdiction to review Petitioner's claim for deferred removal under the Convention Against Torture.

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PETITION FOR WRIT OF CERTIORARI

This case is an ideal vehicle for resolving two acknowledged circuit splits on recurring questions of national importance—one involving statutory retroactivity, the other concerning jurisdiction. This Court has resolved the statutory retroactivity question before, but the courts of appeals remain divided. In *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of discretionary relief from deportation under former § 212(c) of the Immigration and Nationality Act does not retroactively apply to individuals who were eligible at the time of their conviction. Yet, the lower courts have split over whether the holding in *St. Cyr* applies beyond the narrow facts of the case. The decision below and three other circuits have held that only those who pled guilty, like St. Cyr, remain eligible for relief. Four circuits have held the opposite—that individuals convicted at trial are also eligible for relief. And three circuits require individuals to demonstrate some form of reliance on the availability of relief.

To the extent that *St. Cyr* left any doubt on this question, this Court's more recent decision in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), has resolved it. Yet, the circuits still remain divided. *Vartelas* confirmed that reliance is not required and the "essential inquiry" in retroactivity cases is whether the law would attach a new disability to prior events. In light of *Vartelas*, the Fifth and Ninth Circuits have reversed course and held that individuals convicted at trial remain eligible for § 212(c) relief because barring such relief would attach new legal consequences to prior convictions. But in direct conflict with those decisions,

the Eleventh Circuit refused to reconsider its rule and held that Petitioner is ineligible for § 212(c) relief solely because he exercised his right to trial. That decision is wrong, and this case is an ideal vehicle for resolving this important question because Petitioner would be an excellent candidate for discretionary relief.

The lower court's refusal to exercise jurisdiction over Petitioner's Convention Against Torture claim is also wrong and warrants this Court's review. Petitioner challenged the Board of Immigration Appeals' inexplicable legal conclusion that he is not likely to face torture if removed to Cuba because he failed to prove that the Cuban government is aware of his past involvement with anti-Castro forces. The Eleventh Circuit considered itself powerless to review that decision, but other circuits would have considered the issue. Thus, here too, Petitioner's fate turns on the fact that he resides in Miami rather than, say, Los Angeles. This sort of disparity is profoundly unfair and antithetical to the national character of our immigration laws. This Court's prompt review is required.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced at App. 1–5. The unreported decision of the Board of Immigration Appeals is reproduced at App. 6–9, and the unreported oral decision of the Immigration Judge is reproduced at App. 10–26.

JURISDICTION

The Court of Appeals issued its opinion on September 20, 2013. On December 3, 2013, Justice Thomas extended the time within which to file a

petition for a writ of certiorari to and including January 20, 2014. *See* No. 13A552. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1976), is reproduced at App. 27. The relevant portion of Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act is reproduced at App. 30. The relevant jurisdictional provisions of the Immigration and Nationality Act, Illegal Immigration Reform and Immigrant Responsibility Act, and REAL ID Act, 8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C)–(D), are reproduced at App. 28–29.

STATEMENT OF THE CASE

A. Statutory Background

1. At the time of his convictions, Petitioner was eligible for a discretionary waiver of removal under former Section 212(c) of the Immigration and Nationality Act (INA), but later amendments eliminated that relief. Discretionary relief from removal stems from the Immigration Act of 1917. Section 3 of that Act identified aliens who were excluded from admission into the United States, but also provided that aliens with an "unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe." Pub. L. No. 301, 39 Stat. 874, 875–58. Although the provision "applied literally only to exclusion proceedings," the government "relied on § 3 to grant relief in deportation proceedings involving aliens who had departed and returned to this country after the

ground for deportation arose." *St. Cyr*, 533 U.S. at 294 (citing *Matter of L*, 1 I. & N. Dec. 1, 2 (BIA 1940)).

Section 212(c) of the Immigration and Nationality Act of 1952 carried this exception forward. This statute "excluded from the United States several classes of aliens, including those convicted of offenses involving moral turpitude or the illicit traffic in narcotics." *St. Cyr*, 533 U.S. at 294. Like the earlier law, however, it granted the Attorney General "broad discretion to admit excludable aliens" with an "unrelinquished domicile of seven consecutive years." *Id.* at 294–95; *see* 8 U.S.C. § 1182(c) (1976). And it too has been applied to removal proceedings. *See St. Cyr*, 533 U.S. at 295; *see also, e.g.*, *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976).

Discretionary relief "has had great practical importance" in deportation proceedings. *St. Cyr*, 355 U.S. at 295. "[D]eportable offenses have historically been defined broadly," and Congress has only broadened their reach over the past few decades. *Id.* Yet, for many immigrants covered by these laws, removal would be unnecessary or unjust. An "extremely large" number of those immigrants have remained in this country based on the Attorney General's decision to waive their deportability, including over 10,000 individuals between 1989 and 1995 alone. *Id.* at 296.

Three statutes enacted in the 1990s restricted the availability of discretionary relief. Section 511 of the Immigration Act of 1990 "amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years." *Id.* at 297; Pub.

L. No. 101-649, 104 Stat. 4978, 5052. Section 440(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) "identified a broad set of offenses for which convictions would preclude such relief." 553 U.S. at 297; Pub. L. No. 104-132, 110 Stat. 1214, 1277. And Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed § 212(c) and "replaced it with a new section that gives the Attorney General the authority to cancel removal for a narrow class of inadmissible or deportable aliens" that excludes anyone convicted of an "aggravated felony." 533 U.S. at 297; Pub. L. 104-208, 110 Stat. 3009, 3009-597.

At first, the government sought to apply the 1996 repeal to everyone convicted of an aggravated felony before IIRIRA. But in *St. Cyr*, this Court rejected that policy. Applying well-settled principles of statutory retroactivity doctrine, the Court held that Congress did not intend for the 1996 amendments to apply retroactively and that applying those provisions to pre-1996 convictions would have an impermissible retroactive effect. *See* 533 U.S. at 326. Thus, it held that discretionary relief remains available to individuals who "would have been eligible for § 212(c) relief at the time of their" convictions. *Id.* Based on a fact-bound reading of *St. Cyr*, however, the government has continued to apply the 1996 repeal to immigrants convicted at trial, and the courts of appeals have divided over this question. *See supra*.

2. Certain immigrants are eligible for deferral of removal pursuant to regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(CAT), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20 (1988); 8 C.F.R. § 1208.17. To qualify for CAT relief, an immigrant must "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2). Under the regulations, torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person … when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *See* 8 C.F.R. § 1208.18(a)(1). Deferral of removal enables the immigrant to remain in the country until he is no longer likely to suffer torture.

The INA grants jurisdiction for the courts of appeals to review "a final order of removal" in specified circumstances. 8 U.S.C. § 1252(a)(1). Congress restricted this jurisdiction in IIRIRA by providing that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in" certain sections of the INA. 8 U.S.C. § 1252(a)(2)(C). The REAL ID Act of 2005, however, amended the statute to preserve jurisdiction over "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). The courts of appeals have divided over the effect these provisions have on their review of CAT claims. *See supra*.

B. Facts and Procedural History

Petitioner escaped to the United States over fifty years ago after serving with anti-Castro forces in the Bay of Pigs operation. App. 12. Following the failed

operations, Petitioner evaded helicopter fire and bombings from Castro's army, while moving through the Cuban mountains, and eventually gained protection in the Brazilian Embassy. App. 13–14. At the Brazilian government's request, Cuba issued Petitioner a safe conduct pass, and he escaped by plane. App. 14. His brother was killed by Castro's forces. App. 13.

Petitioner entered the United States in 1961 at the age of 18 and became a lawful permanent resident. App. 12. For nearly two decades, he lived and worked in this country as a law-abiding resident. In 1980, Petitioner was arrested for methaqualone trafficking and conspiracy to traffic methaqualone. He exercised his constitutional right to trial and was convicted by a Florida jury in 1981. App. 19–20. He served ten years in prison and was released in 1991. Since his release, Petitioner has lived a law-abiding life as a productive member of society.

In 2007, the federal government initiated removal proceedings against Petitioner based on his 1981 convictions. He was issued a notice to appear and charged as removable under 8 U.S.C. § 1227(a)(2)(B)(i) and 8 U.S.C. § 1227(a)(2)(A)(iii), for conviction of an aggravated felony. Petitioner admitted the allegations and conceded removability under § 1227(a)(2)(B)(i). But because he faces near-certain harm if removed to Cuba, he applied for a discretionary waiver of removal under former INA § 212(c) and deferral of removal under the Convention Against Torture.

An Immigration Judge (IJ) pretermitted Petitioner's application for § 212(c) relief and denied

his CAT request on the merits. The IJ held that Petitioner was not eligible for discretionary relief based on the government's view that "[a]liens are not eligible to apply for Section 212(c) relief … with respect to convictions entered after trial." App. 19. With respect to his CAT claim, the IJ found Petitioner's testimony to be credible, App. 22, held that there is not "a safe place for him to relocate" if removed to Cuba, App. 23, and acknowledged that "the Castro government is still one of the most repressive in the hemisphere, if not the world." App. 25. Nonetheless, it held that Petitioner failed to prove he is more likely than not to face torture if removed to Cuba because "it is not clear" that Cuba would be aware of Petitioner's past involvement with anti-Castro forces. App. 23. Petitioner appealed to the Board of Immigration Appeals (BIA).

The BIA dismissed Petitioner's appeal. It affirmed his CAT claim on the merits and agreed with the IJ that Petitioner is ineligible for relief under § 212(c). Like the IJ, the BIA recognized that "there is evidence of significant human rights violations by the Cuban government." App. 8. Yet, it affirmed the IJ's denial of CAT relief solely because, in its view, Petitioner "has not established that the Cuban government is or will become aware of his political opposition or his involvement in an armed uprising in 1961." App. 8–9. With respect to discretionary relief, the BIA held that "[b]ecause his conviction for methaqualone trafficking was the result of a jury trial and not a plea agreement," Petitioner "does not come under the class of aliens contemplated in *INS v. St. Cyr*." App. 7 (citing 8 C.F.R. § 1212.3(h)(1) and *Ferguson v. U.S. Att'y Gen.*, 563 F.3d 1254, 1271 (11th

Cir. 2009)). The BIA did not cite any other reason for dismissing Petitioner's request for discretionary relief.

Petitioner sought review in the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit denied the petition for review with respect to § 212(c) discretionary relief. The court explained that, in *Ferguson v. U.S. Attorney General*, 563 F.3d 1254 (11th Cir. 2009), it had "declined to extend the Supreme Court's decision in *St. Cyr* to aliens who were convicted by a jury following a trial." App. 2–3. Petitioner argued that this Court's recent decision in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), undermined *Ferguson*'s holding. But the Eleventh Circuit disagreed, holding that *Vartelas* is irrelevant to the question presented because it addressed a different provision in IIRIRA. App. 3–4. Instead, the court "concluded it is 'more reasonable to focus on the reliance elements, as laid out in *St. Cyr*, than other elements of a retroactivity analysis, put forth in other Supreme Court cases.'" App. 4 (alteration marks omitted) (quoting *Ferguson*, 563 F.3d at 1270). Thus, the Eleventh Circuit held that "*Ferguson* is dispositive of Acebo-Leyva's claim for a waiver" under § 212(c) because he "was convicted by a jury of his underlying drug offense following his decision to proceed to trial." App. 3. Petitioner argued that the BIA committed legal error by misapplying the standard for CAT relief, but the Eleventh Circuit dismissed this portion of his petition, holding that it lacked jurisdiction to review the BIA's conclusions. App. 4–5 (citing *Singh v. Att'y Gen.*, 561 F.3d 1275, 1280 (11th Cir. 2009)).

REASONS FOR GRANTING CERTIORARI

This case presents two important and recurring questions on which the lower courts are in acknowledged conflict. After this Court's decision in *St. Cyr*, the lower courts divided over whether IIRIRA's repeal of INA § 212(c) applies to individuals convicted at trial before 1996. The Eleventh Circuit and three other circuits have applied *St. Cyr* strictly according to its facts, holding that only individuals who pled guilty prior to 1996 remain eligible for discretionary relief. Four other circuits refuse to differentiate between guilty pleas and jury trial convictions, holding that application of IIRIRA's repeal of § 212(c) would be impermissibly retroactive in both instances because it would attach new legal consequences to a prior conviction. And three other circuits hold that individuals remain eligible if they can show individualized or objective reliance on the availability of discretionary relief.

This Court's recent decision in *Vartelas* has altered the circuit split, but not in the Eleventh Circuit. In *Vartelas*, the Court clarified that actual reliance is "not a necessary predicate for invoking the antiretroactivity principle." 132 S. Ct. at 1491. Instead, retroactive application is impermissible when it "would take away or impair vested rights acquired under existing laws" or "attach a new disability, in respect to transactions or considerations already past." *Id.* at 1486–87 (quotation and alteration marks omitted). After *Vartelas*, the Fifth and Ninth Circuits abandoned prior precedents and held that individuals convicted at trial remain eligible for discretionary relief. But the decision below expressly declined to

alter Eleventh Circuit precedent in light of *Vartelas*. And the Seventh Circuit has expressly declined to reconsider its rule requiring proof of actual reliance. Thus, despite this Court's clear guidance in *Vartelas*, four of the largest regional circuits—where a great many of the country's immigration appeals are decided—have again divided over the proper application of this Court's statutory retroactivity decisions.

The decision below is wrong and should be reversed. In *St. Cyr*, this Court held that Congress did not intend for its repeal of § 212(c) relief to apply retroactively and that applying IIRIRA's repeal to pre-1996 convictions "produces an impermissible retroactive effect." 533 U.S. at 320. The Court never suggested that reliance was required or that its decision was confined to the facts of the case. To the extent there was any lingering doubt, this Court's more recent decision in *Vartelas* resolves it. Applying IIRIRA's repeal of discretionary relief here would plainly attach "new legal consequences" to Petitioner's 1981 convictions. At the time of his convictions, he was eligible to seek discretionary relief. But when the government initiated removal proceedings against him 26 years later, he was denied that opportunity. By ignoring this new disability, solely because Mr. Acebo exercised his constitutional right to trial, the Eleventh Circuit has flatly ignored this Court's precedents. Had Petitioner's proceedings taken place in one of four other circuits, in one of twenty-two other states, the opposite would be true. That is wrong, unfair, and warrants this Court's review.

It goes without saying that this is a recurring issue of national importance. Since 2001, this Court has twice considered whether changes implemented in IIRIRA apply retroactively, both times holding that they do not. In the twelve years since *St. Cyr*, every regional circuit has confronted the question, multiple times. And since *Vartelas*, four circuits have reassessed their decisions but again divided. In the meantime, similar cases around the country are being adjudicated under vastly different legal regimes. For many individuals, the ability to stay in this country depends solely on whether they are in, say, Los Angeles or Houston versus Miami. That is unfair, and there is no reason to let the disparity continue—particularly given immigration law's inherently national character. This case, moreover, is an ideal vehicle for the Court to resolve the circuit split. The Eleventh Circuit confronted this Court's decision in *Vartelas* head on and yet reaffirmed its view that reliance is required to retain § 212(c) eligibility. And this Court's review would be meaningful in this case because Petitioner is an excellent candidate for discretionary relief.

The lower courts have also divided over the reach of their jurisdiction to review the denial of CAT relief. The Ninth Circuit has held that it may review denials "on the merits," and the Seventh Circuit has held that it may review all decisions regarding deferral of removal. But the lower court and other circuits have held that they lack jurisdiction to review claims like Petitioner's. Here, too, this is an ideal case for resolving an important issue that is arising with great frequency. And here, too, it is profoundly unfair that Petitioner's fate will turn on his residence in Miami

rather than Los Angeles. This disuniformity is not how immigration policy is supposed to work. It thus requires this Court's prompt review.

I. The Availability Of Discretionary Relief From Removal For Individuals Convicted At Trial Is A Recurring Issue Of National Importance On Which There Is An Acknowledged And Developed Circuit Split.

This is the rare case that raises a recurring issue of national importance on which the circuits are in acknowledged conflict and where resolution of the question will have a significant impact on Petitioner and others in his situation. Particularly where the liberty interests of thousands are at stake and where the results turn on no more than an individual's geographic location, this Court's review is essential. There is no reason to delay resolution of this circuit split any longer, and this is an ideal vehicle to decide the question.

A. There Is an Acknowledged Circuit Split on This Question.

The courts of appeals are deeply splintered on the question presented. The circuits have divided in three general directions on whether individuals convicted at trial can avoid retroactive repeal of § 212(c) discretionary relief. Four circuits have held that individuals who were eligible for discretionary relief when convicted at trial remain eligible. Four circuits have held that only individuals who pled guilty remain eligible for discretionary relief. Three circuits have held that individuals convicted at trial are eligible if they can show they relied on the availability of relief. And these circuits are further divided: two require a

showing of individualized, subjective reliance while the other circuit requires objective evidence that an individual in the applicant's position would have reasonably relied on the availability of relief. This disagreement presents a classic case for this Court's review.

1. Four circuits have rejected the rule applied in this case. The Third, Fifth, Eighth, and Ninth Circuits have held that individuals convicted at trial who were eligible for relief at the time of their conviction remain eligible for § 212(c) discretionary relief. *See, e.g.*, *Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1121 (9th Cir. 2013); *Carranza-De Salinas v. Holder*, 700 F.3d 768, 773 (5th Cir. 2012); *Lovan v. Holder*, 574 F.3d 990, 993–94 (8th Cir. 2009); *Atkinson v. Att'y Gen. of U.S.*, 479 F.3d 222, 230 (3d Cir. 2007). These courts have rightly concluded 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." *Atkinson*, 479 F.3d at 227–28. Instead, these courts have held that individuals convicted at trial remain eligible for relief because retroactively deeming them ineligible would impermissibly "attach[] new legal consequences to [their] conviction[s]." *Id.* at 230. And they deny that any subjective or objective showing of reliance is necessary to prove that retroactive application of a statute would be impermissible. *See, e.g.*, *Lovan*, 574 F.3d at 993 ("[R]equiring actual reliance in each case runs contrary to the Supreme Court's retroactivity analysis in *Landgraf v. USI Film Products*, which was the basis for the decision in *St. Cyr*." (quotation marks and citations omitted)).

Two circuits have reached this conclusion based on this Court's guidance in *Vartelas*. In *Vartelas*, this Court reversed a lower court decision that applied *St. Cyr* as requiring reliance. The Court unambiguously held the "essential inquiry" is "'whether the new provision attaches new legal consequences to events completed before its enactment.'" 132 S. Ct. at 1491 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994)). "In light of *Vartelas*," the Fifth and Ninth Circuits have concluded that "an alien need not prove any type of reliance in order to show that the repeal of § 212 relief is impermissibly retroactive and need only show that the repeal is impermissibly retroactive because it attaches new consequences to a trial conviction for an aggravated felony." *Cardenas-Delgado*, 720 F.3d at 1119; *accord Carranza-De Salinas*, 700 F.3d at 772 ("Carranza argues that *Vartelas* is a 'game-changer' in this case. We agree.").[1]

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[1] Prior to *Vartelas*, the Fifth and Ninth Circuits required individuals convicted at trial to demonstrate reliance on the availability of relief. *See, e.g.*, *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 939 (9th Cir. 2007) ("[T]his court has held that aliens claiming that IIRIRA's repeal of relief from deportation is impermissibly retroactive as applied to them must demonstrate reasonable reliance on pre-IIRIRA law."); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200, 210 (5th Cir. 2007) ("If … Carranza can demonstrate on remand that she affirmatively decided to postpone her § 212(c) application to increase her likelihood of relief, then she has … established a reasonable 'reliance interest' in the future availability of § 212(c) relief comparable to that of the applicants in *St. Cyr* and she is entitled to make her application for relief."). The Fifth Circuit followed the Second and Seventh Circuits' requirement that an alien must show individualized, subjective reliance. *See* 477 F.3d at 208 ("We find the reasoning of the *Restrepo* Court persuasive ...."). The Ninth Circuit, like the Tenth Circuit, looked objectively to

2. Four circuits adhere to the rule reaffirmed below. In addition to the Eleventh Circuit, the First, Fourth, and Sixth Circuits have interpreted *St. Cyr* strictly according to its facts and held that only individuals who entered guilty pleas remain eligible for discretionary relief. *See, e.g.*, *Kellermann v. Holder*, 592 F.3d 700, 705–07 (6th Cir. 2010); *Ferguson*, 563 F.3d at 1271; *Mbea v. Gonzales*, 482 F.3d 276, 282 (4th Cir. 2007); *Dias v. INS*, 311 F.3d 456, 457–58 (1st Cir. 2002).[2] These circuits have categorically "decline[d] to extend *St. Cyr* to aliens

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whether individuals in the alien's position would have reasonably relied on the availability of relief. *See Hernandez de Anderson*, 497 F.3d at 941 ("We now hold that individuals demonstrate reasonable reliance on pre-IIRIRA law and "'plausibly claim that they would have acted ... differently if they had known" about the elimination of [the] relief' if it would have been objectively reasonable under the circumstances to rely on the law at the time.").

[2] Elements of the Eleventh Circuit's decision in *Ferguson* suggest it adopted a subjective reliance standard, but that is not how the decision below interpreted the Eleventh Circuit's precedent. For instance, in *Ferguson*, the court noted that, "aside from her decision to go to trial, [Ferguson] point[ed] to no other 'transactions' or 'considerations already past' on which she relied." 563 F.3d at 1271. Yet, in the same breath, the court reached the absolute conclusion that *St. Cyr* does not extend "to aliens who were convicted after a trial" and thus held that "§ 212(c) relief is not available to such aliens." *Id.* The decision below in this case treated the Eleventh Circuit's precedents as establishing an absolute rule when it held that "*Ferguson* is dispositive of Acebo-Leyva's claim for a waiver" solely because "Acebo-Leyva was convicted by a jury." App. 3. In all events, it is clear that Petitioner's case would have been decided differently in the Third, Fifth, Eighth, and Ninth Circuits. Thus, whatever the doctrinal details of the Eleventh Circuit's rule, it directly conflicts with other circuits' approach.

who were convicted after a trial." *Ferguson*, 563 F.3d at 1271; *accord Kellermann*, 592 F.3d at 707 ("declining to extend *St. Cyr,* to aliens, like the petitioner, who, prior to the repeal of § 212(c), were convicted after a trial"); *Mbea*, 482 F.3d at 281 ("IIRIRA's repeal of § 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial."); *Dias*, 311 F.3d at 458 (holding that the repeal of discretionary relief "does not have an impermissible retroactive effect on those aliens who would have been eligible for discretionary relief when they were convicted of a felony after trial").[3]

3. Three other Circuits hold that individuals convicted at trial remain eligible if they can demonstrate reliance on the availability of relief. These circuits, however, have divided on whether reliance must be shown through individualized, subjective evidence that the applicant actually relied on the availability of relief or through an objective showing that individuals in the applicant's position would have relied on the availability of relief.

a. The Second and Seventh Circuits have held that individuals convicted at trial remain eligible for discretionary relief if they make an individualized showing of subjective reliance on the availability of § 212(c) relief prior to its repeal. *See, e.g.*, *Khodja v. Holder*, 666 F.3d 415, 419–20 (7th Cir. 2011) ("The

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[3] In tension with its decisions on § 212(c), the Fourth Circuit has also held that "reliance is irrelevant to statutory retroactivity analysis." *Olatunji v. Ashcroft*, 387 F.3d 383, 394 (4th Cir. 2004). The decision in *Olatunji* addressed the same statutory provision in *Vartelas*, and this Court endorsed *Olatunji*'s reasoning in *Vartelas*. 132 S. Ct. at 1491 (citing *Olatunji*, 387 F.3d at 389–95).

rule in this circuit remains that relief under § 212(c) is not available to any alien whose removal proceeding began after repeal except to those who affirmatively abandoned rights or admitted guilt in reliance on § 212(c) relief." (quotation marks omitted)); *Wilson v. Gonzales*, 471 F.3d 111, 117 (2d Cir. 2006) ("[A] petitioner who asserts that he is eligible for § 212(c) relief … is required to make an individualized showing of reliance.").[4] For instance, the Seventh Circuit has held that individuals convicted at trial remain eligible for relief if they "conceded deportability based on the expectation that they could seek relief under § 212(c)" or if they "chose not to appeal the denial of" a motion for a judicial recommendation against deportation because they expected to be eligible for § 212(c) relief. *Khodja*, 666 F.3d at 420. The Seventh Circuit has

[4] At times, the Seventh Circuit has appeared to take the absolute approach that no one convicted at trial can avoid retroactive repeal of § 212(c). *See, e.g.*, *Canto v. Holder*, 593 F.3d 638, 644 (7th Cir. 2010) (categorically holding "that the category of aliens who went to trial did not forgo any possible benefit in reliance on section 212(c)."); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1036–37 (7th Cir. 2004) (per curiam) (The *St. Cyr* "exception does not apply to aliens like Montenegro who chose to go to trial; such aliens did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief."). The Seventh Circuit's latest precedential statement on the matter, however, treats *Khodja*'s actual reliance standard as the circuit's operative rule. *See Zivkovic v. Holder*, 724 F.3d 894, 902 (7th Cir. 2013) ("We have understood *St. Cyr* to require a demonstration that the defendant affirmatively abandoned rights or admitted guilt in reliance on a chance of obtaining Section 212(c) relief." (citing *Khodja*)). Whatever the Seventh Circuit's actual approach may be, it is inconsistent with a number of other circuits.

declined to reconsider its position since *Vartelas*. *See Zivkovic v. Holder*, 724 F.3d 894, 903 (7th Cir. 2013).

b. The Tenth Circuit requires individuals convicted at trial prior to 1996 to show objective reliance—*i.e.*, that individuals in the applicant's position would have reasonably relied on the availability of discretionary relief—to remain eligible for relief under § 212(c). *See, e.g.*, *Hem v. Mauer*, 458 F.3d 1185, 1197 (10th Cir. 2006). The Tenth Circuit's objective reliance standard has led to different results for individuals convicted at trial. In *Hem*, the court held that discretionary relief remained available to an immigrant who "proceeds to trial, is convicted, [and] chooses not to pursue an appeal when that appeal could result in the loss of § 212(c) relief." *Id.* at 1200. However, the Tenth Circuit has enforced the 1996 repeal retroactively against an applicant who did not "affirmatively argue that any decision he made during his criminal proceedings demonstrates objective reliance on the availability of § 212(c) relief." *Bernate v. Gonzales*, 229 F. App'x 767, 769 (10th Cir. 2007).[5]

[5] The lower courts have sometimes struggled with how to categorize each other's holdings on this question. For instance, some courts have viewed seemingly absolute decisions as based on objective or subjective reliance standards. *See, e.g.*, *Canto*, 593 F.3d at 643 (categorizing the Third, Eighth, and Tenth Circuits having "employed an objective reliance standard" and the Fourth and Eleventh Circuits as having "employed an actual reliance standard"). But these taxonomical squabbles are irrelevant. The bottom line remains that the lower courts are hopelessly divided on the question presented, such that similar facts produce different results in different circuits. That is the touchstone of this Court's standard for reviewing an issue.

* * *

The circuits' thorough consideration and persistent disagreement on this question makes it ripe for this Court's review. The lower courts openly acknowledge that they "are split on how to apply *St. Cyr* to aliens outside of the guilty plea context." *Ferguson*, 563 F.3d at 1263; *see also, e.g.*, *Cardenas-Delgado*, 720 F.3d at 1118; *Lovan*, 574 F.3d at 993. They have considered virtually every angle to the question and have taken different paths to different results for similarly situated individuals—both before and after *Vartelas*. This is not a case where "further consideration of the substantive and procedural ramifications of the problem by other courts will enable [this Court] to deal with the issue more wisely at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., opinion respecting the denial of certiorari). In fact, further delay will only exacerbate the injustice of subjecting immigrants in different parts of the country to different legal regimes. "Because uniformity among federal courts is important on questions of this order," this Court should "grant[] certiorari to end the division of authority." *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

B. The Decision Below Is Incorrect.

The decision below cannot be reconciled with this Court's statutory retroactivity precedents. The strong "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. In civil matters, "Congress has the power to enact laws with retroactive effect."

St. Cyr, 533 U.S. at 316. But retroactivity will not be presumed "absent a clear indication from Congress that it intended such a result." *Id.* This demanding standard is satisfied only in cases where the statutory language "was so clear that it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997). And in immigration cases, the already formidable presumption is "buttressed by 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *St. Cyr*, 533 U.S. at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

Absent the requisite congressional intent, a statute may not be applied retroactively. "The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321 (quotation marks omitted). A statute has an impermissibly retroactive effect if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id.* (quotation marks omitted). This analysis is "informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* (quotation marks omitted). But this Court has never "required a party challenging the application of a statute to show he relied on prior law in structuring his conduct." *Vartelas*, 132 S. Ct. at 1490 (quotation and alteration marks omitted). Instead, the "essential inquiry" has always been "whether the new provision attaches new

legal consequences to events completed before its enactment." *Id.* at 1491 (quotation marks omitted).

In *St. Cyr*, this Court held that IIRIRA's repeal of § 212(c) does not apply retroactively, and thus individuals who were eligible at the time of their conviction remain eligible for relief. This Court concluded that applying "IIRIRA's elimination of any possibility of § 212(c) relief … clearly attaches a new disability, in respect to transactions or considerations already past." 533 U.S. at 321 (quotations omitted). It did not matter that § 212(c) relief remains discretionary: "There is a clear difference," the Court explained, "between facing possible deportation and facing certain deportation." *Id.* at 325. The Court also concluded that many immigrants, like St. Cyr, pled guilty in order to preserve eligibility for discretionary relief and the retroactive effect of denying them eligibility for discretionary relief would be especially "obvious and severe." *Id.* But the Court never indicated that this reliance interest was necessary to its holding. And to the extent there was any doubt, *Vartelas* confirmed that reliance is *not* required to demonstrate that a statute would have an impermissible retroactive effect. Indeed, it would be "strange," the Court explained, for the presumption against retroactivity to arise "only on a showing of actual reliance." 132 S. Ct. at 1491 (quoting *Ponnapula v. Ashcroft*, 373 F.3d 480, 491 (3d Cir. 2004) (quotation and alteration marks omitted)).

Applying IIRIRA's repeal to Petitioner plainly attaches "new legal consequences" to his 1981 convictions. At the time of his convictions, Petitioner did not face "certain deportation"; now he does. *St.*

Cyr, 533 U.S. at 325. And that makes "a clear difference" to the immigration consequences of his convictions. *Id.* IIRIRA eliminates something that was available to Petitioner at the time of his conviction—just as it did for St. Cyr and Vartelas. *See also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997) (elimination of a defense to *qui tam* suits impermissibly attached "a new disability, in respect to transactions or considerations already past"). Indeed, punishing Petitioner for his decision—fifteen years before IIRIRA was enacted—to exercise his constitutional right to trial would be an especially perverse retroactive effect, especially given that this Court has already held that Congress did not intend for its 1996 repeal of discretionary relief to apply retroactively. As four circuits have squarely held, discretionary relief under § 212(c) must remain available to individuals, like Petitioner, who were eligible at the time of their convictions. The decision below should be reversed.

C. This Case Is an Ideal Vehicle to Resolve This Recurring Issue of National Importance.

This is an inherently national issue that arises with great frequency. And because Petitioner is an especially strong candidate for discretionary relief, this is the ideal case to resolve the question.

1. The application of this country's immigration laws is quintessentially national in character. Immigration regulation is one of only a handful of policy issues the Constitution places exclusively in the federal government's authority. *See* U.S. Const. art. I, § 8, cl. 4; *see also, e.g.*, *Galvan v. Press*, 347 U.S. 522,

531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are … entrusted exclusively to Congress."). This Court has been clear that "the removal process is entrusted to the discretion of the Federal Government." *Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012) (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999)). And for good reason: "Removal decisions, including the selection of a removed alien's destination, may implicate [the Nation's] relations with foreign powers and require consideration of changing political and economic circumstances." *Jama v. ICE*, 543 U.S. 335, 348 (2005). Thus, just as it would be uniquely inappropriate for the various states to adopt different policies regarding which immigrants may apply for waiver of removability, it is inappropriate for different rules to persist in different circuits.

2. This question has frequently arisen and will recur. The lower courts have been grappling with the question for over a decade, and there has been no shortage of decisions on the matter in the past five years. *See, e.g.*, *Canto*, 593 F.3d at 643; *Kellermann*, 592 F.3d at 705–07; *Lovan*, 574 F.3d at 993–94; *Ferguson*, 563 F.3d at 1263. Indeed, even in less than two years since *Vartelas*, four cases have considered the question. *See* App. 2–4; *Cardenas-Delgado*, 720 F.3d at 1121; *Carranza-De Salinas*, 700 F.3d at 773; *Zivkovic*, 724 F.3d at 903. Although, by definition, the class of individuals affected by the question is limited to those convicted at trial before 1996, that class remains significant in size and the federal government continues to initiate removal proceedings against such individuals—even those who were released from

custody decades ago, as this case confirms. Despite the government's repeated suggestion that issues concerning IIRIRA's changes are of diminishing importance, this Court has continued deciding such questions, including cases concerning the BIA's application of § 212(c). *See Judulang v. Holder*, 132 S. Ct. 476 (2011) (considering the BIA's use of the "comparable-grounds" rule when evaluating § 212(c) waiver requests); *Vartelas*, 132 S. Ct. 1479 (considering retroactive application of IIRIRA § 1101(a)(13)(C)(v)). There is no reason to delay review on the expectation that someday everyone affected by the issue will be dead or deported. Running out the clock is no way to resolve an unfair and persistent circuit split on an issue of this magnitude.

3. This case is an especially good vehicle for resolving the issue. The decision below squarely addressed the question presented. And it did so with the benefit of this Court's guidance in *Vartelas*. Yet, it ignored this Court's direction that *St. Cyr* is not limited to those who relied on the prior regime. Thus, it not only re-entrenched the long-standing circuit split on this question; it flatly contradicted this Court's most recent precedent on statutory retroactivity. Either error alone would be sufficient to warrant this Court's review.

Moreover, this Court's decision will have a meaningful effect for Petitioner because he is an especially strong candidate for discretionary relief. Petitioner has lived and worked in this country for over half a century as a lawful permanent resident. He had no criminal record before his non-violent drug

convictions, and he has been a law-abiding resident for over two decades since he was released from custody. He has never once returned to Cuba, his family is here, he is advanced in age, and he is likely to face severe hardship if removed to Cuba. Administrative Record (AR) 204. He also "owns his home," has been "steadily employed," and has "paid his taxes every year." AR 354. When Petitioner fled to this country, the Cuban government wanted him dead because he assisted the United States' anti-Castro efforts. That same government remains in power today. All of these factors would counsel in favor of relief. *See Matter of Edwards*, 20 I. & N. Dec. 191, 195 (BIA 1990). Aside from a now thirty-two year old drug conviction, there is no reason to subject Petitioner to removal, and there is every reason to grant him a waiver. And when discretionary relief was generally available, it was often exercised in similarly compelling cases. *See, e.g.*, *St. Cyr*, 533 U.S. at 296 ("[I]n the period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens.").[6]

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[6] For all the reasons that the 1996 amendments do not apply here, neither does the 1990 amendment. Thus, this Court's decision in this case would control any question whether the 1990 amendment might apply retroactively to Petitioner. *See, e.g.*, *Toia v. Fasano*, 334 F.3d 917, 920–21 (9th Cir. 2003) (applying *St. Cyr* to hold that the 1990 amendment would have an impermissibly retroactive effect); *but cf. Alexandre v. Att'y Gen.*, 452 F.3d 1204, 1207 (11th Cir. 2006) (suggesting in dicta that "the retroactivity rationale of *St. Cyr* does not apply to" the 1990 amendment). In all events, reversal on the question presented would grant Petitioner all the relief he can obtain in these proceedings because the IJ, BIA, and Eleventh Circuit all rested their decision solely on IIRIRA's repeal of § 212(c). *See, e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943).

II. The Extent Of Courts' Jurisdiction To Review Convention Against Torture Claims Is A Recurring Issue Of National Importance That Has Divided The Circuits.

The lower courts are also divided over the extent of their jurisdiction to review BIA decisions denying CAT relief. This conflict similarly creates an unfair geographic disparity that frustrates the national interest in uniform application of our immigration laws and treaty obligations. As the split itself demonstrates, the issue arises with great frequency. And this case is an ideal vehicle for resolving the question because Petitioner's CAT claim is compelling. Thus, this issue warrants this Court's review as well.

The Eleventh Circuit held that it lacked jurisdiction to review Petitioner's challenge to the BIA's denial of his claim for deferred removal. The BIA concluded that Petitioner "failed to show it was more likely than not he would be tortured if returned to Cuba because the Cuban government likely did not know about his past actions, and thus would have no reason to target him." App. 5. Petitioner sought review of that conclusion as a legally erroneous application of the standard for CAT relief. But the Eleventh Circuit categorically held that the jurisdiction-stripping provisions in 8 U.S.C. § 1252(a)(2)(C) deprive it of jurisdiction to review the BIA's decision. *Id.* (citing *Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1280 (11th Cir. 2009) (per curiam)). Other circuits have adopted a similarly narrow view of their ability to review the denial of CAT relief. *See, e.g.*, *Gallimore v. Holder*, 715 F.3d 687, 690 (8th Cir. 2013); *Escudero-Arciniega v. Holder*, 702 F.3d 781, 785 (5th

Cir. 2012) (per curiam); *Gourdet v. Holder*, 587 F.3d 1, 5 (1st Cir. 2009); *Saintha v. Mukasey*, 516 F.3d 243, 248–50 (4th Cir. 2008).

That holding conflicts with the decisions of two other circuits, which would have reviewed Petitioner's challenge. The Ninth Circuit has held that § 1252(a)(2)(C) does not deprive it of jurisdiction to review deferral of removal claims denied "on the merits" of an alien's claim for relief. *See, e.g.*, *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1083–84 (9th Cir. 2008). Section 1252(a)(2)(D) provides jurisdiction to review constitutional or legal questions arising out of the agency proceedings, including questions involving "application of law to undisputed facts, sometimes referred to as mixed questions of law and fact." *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (per curiam). The Ninth Circuit holds that, "'when an IJ does not rely on an alien's conviction in denying CAT relief and instead denies relief on the merits, none of the jurisdiction-stripping provisions … appl[ies] to divest th[e] court of jurisdiction.'" *Brezilien v. Holder*, 569 F.3d 403, 410 (9th Cir. 2009) (quoting *Morales v. Gonzales*, 478 F.3d 972, 980 (9th Cir. 2007)). At the very least, Petitioner presented a mixed question of law and fact regarding the BIA's application of the CAT standard to the extensive evidence that he is likely to face torture if removed to Cuba. And the BIA denied his CAT claim on the merits rather than relying on his convictions. Thus, the Ninth Circuit would have decided the issue.

The Seventh Circuit has suggested that § 1252(a)(2)(C) does not apply to orders regarding deferral of removal because they are not "final" orders

under the statute. *See Wanjiru v. Holder*, 705 F.3d 258, 264 (7th Cir. 2013). Instead, the court has reasoned, "deferral of removal is like an injunction: for the time being, it prevents the government from removing the person in question, but it can be revisited if circumstances change." *Id.* Thus, "such an order can be final enough to permit judicial review, but at the same time not be the kind of 'final' order covered by § 1252(a)(2)(C)." *Id.* Here, too, the outcome for Petitioner would have been different, and the Seventh Circuit would have reviewed his CAT claim.

This case is also an ideal vehicle for resolving the acknowledged circuit split on this recurring issue of national importance. The Eleventh Circuit had jurisdiction to review the BIA's erroneous denial of Petitioner CAT claim. At the very least, the courts of appeals have jurisdiction to decide whether the BIA correctly applied the law to the extensive facts presented at Petitioner's hearing. The BIA's legal holding that Petitioner was required to prove that the Cuban government knows of his past conduct is incorrect. And the Board's ultimate conclusion that a former dissident is not likely to face torture if returned to Cuba is baffling—especially given that the BIA acknowledged "there is evidence of significant human rights violations by the Cuban government." App. 8. Petitioner was involved with anti-Castro military activities, for which the Cuban government tried to kill him, and it is no secret that the Cuban government has executed, imprisoned, and tortured others who took up arms against it. At bottom, the BIA's sole reason for denying relief is that the Cuban government might not be "aware of his political opposition or his involvement in an armed uprising in

1961." App. 8–9. But requiring Petitioner to disprove that negative would essentially require him to *guarantee* that he would face torture if removed. Surely this nation's immigration laws and the Convention Against Torture do not require that perverse result.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

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