No. 13-877

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

BRIEF OF LAW PROFESSORS *AMICI CURIAE* SUPPORTING PETITIONER

HOLLY S. COOPER
Counsel of Record
IMMIGRATION LAW CLINIC
UNIVERSITY OF CALIFORNIA, DAVIS
One Shields Avenue
Davis, CA 95618
(530) 752-6942
hscooper@ucdavis.edu

STEVEN A. HIRSCH
KEKER & VAN NEST, LLP
633 Battery Street
San Francisco, CA 94111
(415) 391-5400
SHirsch@kvn.com

Counsel for Amici Curiae

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Constitutional Provisions

TABLE OF AUTHORITIES

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors at law schools in the United States who have an interest in the uniform application of law. This case involves the deep and growing split among the courts in analyzing when the retroactive application of immigration laws attaches new and impermissible consequences to previous criminal conduct. The immediate issue is whether lawful permanent residents (LPRs) with pre-1996 convictions will continue to have access to a form of equitable relief from removal. More broadly, the issue raises essential concerns of fair notice and settled expectations in the law. As professors concerned with the proper and consistent application of the immigration consequences of criminal conduct, *amici* urge the Court to grant the petition for writ of certiorari in this case to resolve this important issue. A complete list of *amici* who reviewed and joined in this brief is included in the attached Appendix. *Amici* file this brief solely as individuals and not on behalf of any institution with which they are affiliated. *Amici* represent neither party in this action, and offer the following views on this matter.

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[1] The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court, in accordance with Supreme Court Rule 37.2(a). The parties were given 10-days notice prior to the filing of this brief, as required by Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Immigration law has undergone sweeping changes, amendments, and revisions in the last century,[2] and will likely face significant revisions in the future. After each statutory change, courts, immigration attorneys, pro se respondents, and public defenders confront the issue of what version of the law will govern removability, eligibility for relief from removal, and naturalization. Yet, despite the millions of immigrants affected by statutory and regulatory changes, confusion persists in the lower courts on how to determine whether a statute will be afforded retroactive application.

Here, the circuit split turns on eligibility for relief under former § 212(c) of the Immigration and Nationality Act (INA). LPRs have long applied for relief under former § 212(c) to waive grounds of removability for criminal convictions where the individual has strong equitable factors and significant family ties to the United States. However, with the 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), Congress repealed former § 212(c) and eliminated it as a form of relief for LPRs.

After the repeal of § 212(c), circuit courts grappled with whether the repeal retroactively divested thousands of LPRs of eligibility for § 212(c). Over a

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[2] For example, statutory reforms occurred in 1990, with the passage of the Immigration Act of 1990; in 1996, under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which repealed § 212(c) relief; and in 2002, through the Homeland Security Act.

decade ago, the Court in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001) provided clarity to the lower courts by holding that the repeal of § 212(c) had an impermissible retroactive effect. Thus, § 212(c) relief was available to lawful permanent residents who were convicted before 1996.

After *St. Cyr*, however, a new split developed in the lower courts about whether an individual needed to demonstrate "reliance" on the pre-1996 law to stave off retroactive application of the 1996 repeal of § 212(c). The lower courts divided on whether individuals convicted at trial before 1996 sufficiently relied on the law at the time of the jury verdict. Four circuits found that *St. Cyr* applied only to individuals who pleaded guilty prior to 1996, and hence that those who went to trial could not demonstrate reliance. In contrast, two circuits found that the 1996 repeal of § 212(c) would be impermissibly retroactive in either instance—whether the conviction resulted from a jury-trial conviction or a guilty plea. Five circuits held that LPRs must show individualized or objective reliance on the availability of § 212(c).[3]

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[3] Prior to *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), the circuits divided into multiple analyses for retroactivity. Some circuits held categorically that individuals who chose to go to trial were not eligible for § 212(c) relief, while those who entered guilty pleas were. *See, e.g.*, *Kellermann v. Holder*, 592 F.3d 700 (6th Cir. 2010); *Ferguson v. U.S. Att'y Gen.*, 563 F.3d 1254 (11th Cir. 2009); *Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007); *Dias v. I.N.S.*, 311 F.3d 456 (1st Cir. 2002). Other circuits focused on the demonstration of either objective or subjective reliance. *See, e.g.*, *Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007) (objective reliance) *overruled by Cardenas-Delgado v. Holder*, 720 F.3d 1111 (9th Cir. 2013); *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006) (objective reliance); *Khodja v. Holder*, 666

In *Vartelas*, this Court then further clarified that actual reliance is not a necessary predicate for invoking antiretroactivity principles, noting that "Congress intends its laws to govern prospectively" and that "it is a strange 'presumption' . . . that arises only on … a showing of reliance." *Vartelas v. Holder*, 132 S. Ct. 1479, 1491 (internal citation omitted). This Court reminded the circuits that "the essential inquiry . . . is whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 269–70 (1994)).

After *Vartelas*, the Fifth and Ninth Circuits changed course and no longer differentiated between jury trial convictions and convictions obtained by plea agreement. Both circuits acknowledged that reliance can no longer be a prerequisite to stave off retroactive application of new laws. But the Eleventh Circuit, despite the clear holding of this Court in *Vartelas*, has held fast to the notion that an immigrant must show reliance on old law to avoid retroactive application of new law.

F.3d 415 (7th Cir. 2011) (subjective reliance); *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006) (subjective reliance) *overruled by Carranza-De Salinas v. Holder*, 700 F.3d 768 (5th Cir. 2012); *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003) (subjective reliance). Finally, two circuits held pre-*Vartelas* that § 212(c) focused on the attachment of new legal consequences to past conduct and therefore held that relief was available regardless of whether an individual's conviction resulted from a guilty plea or from a jury verdict. *See Atkinson v. U.S. Att'y Gen.*, 479 F.3d 222 (3d Cir. 2007); *Lovan v. Holder*, 574 F.3d 990 (8th Cir. 2009).

The continued availability of § 212(c) remains critical to thousands of LPRs. Moreover, obtaining uniformity in how courts determine the retroactive reach of new laws is an issue of national importance. The retroactivity analysis has further implications that reach far beyond determining eligibility for § 212(c) relief, also affecting eligibility for naturalization, political asylum, and many other immigration benefits.

Amici urge this Court to grant certiorari in the present case for the following four reasons:

First, the existence of differing retroactivity analyses creates inconsistent results for similarly situated immigrants. Immigrants cannot predict which circuit's law will govern their removal proceedings, as many immigrants are detained outside their circuits of residence. Video hearings further compound the issue. When video hearings are held, the issue of which circuit's law will apply turns not on where the immigrant is detained, but on where the judge who is appearing via videoconference presides. Thus, an immigrant's fate can be decided arbitrarily by place of detention or by where the immigration judge presides, rather than by a uniform set of laws.

Second, differing retroactivity analyses impede the ability of criminal-defense counsel to meet their Sixth Amendment obligation to advise clients about the immigration consequences of accepting a plea agreement. *See Padilla v. Kentucky*, 559 U.S. 356 (2010). Immigrants can be transferred out of criminal custody to immigration detention centers anywhere in the United States. Defenders therefore

cannot know in advance which circuit's laws will govern removal proceedings. The balkanization of retroactivity law makes it impossible to fulfill the duty to immigrant criminal defendants that *Padilla* mandates.

Third, the Eleventh Circuit's post-*Vartelas* holding creates a disincentive for noncitizen defendants to opt for a trial by jury, since convictions by jury trial in these jurisdictions do not insulate noncitizens from the retroactive reach of new laws. Many immigrants may forego their right to a jury trial if a plea agreement is the only certain way to obtain protection from the retrospective reach of new laws. The right to a jury trial is one of the most critical rights defining our democracy. Defendants should not be counseled to waive that right to protect themselves from future changes in the law.

Fourth, relief under § 212(c) still remains important for thousands of immigrants. The split affects the circuits that hear the largest number of immigration cases and the circuits with the largest number of immigrants and detention centers. Thus, this Court should grant the petition, as the current split has enormous national impact.

REASONS FOR GRANTING CERTIORARI

I. The circuit split causes eligibility for § 212(c) relief to turn arbitrarily on the circuit in which the government happens to initiate removal proceedings.

The need for jurisprudential uniformity is highest in immigration law. The Constitution states that

Congress shall "establish an *uniform* Rule of Naturalization … throughout the United States." U.S. CONST. art. I, § 8, cl. 4 (emphasis added). And this Court has made clear that immigration laws should be uniformly interpreted and administered because of "the Nation's need to 'speak with one voice' in immigration matters." *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001).

The rule of law cannot be maintained if immigrants do not have a uniform set of rules to govern their removal proceedings. Outcomes will be determined not by a coherent set of laws, but rather by where the government chooses to commence removal proceedings. *See* 8 C.F.R. § 1003.14 (stating that jurisdiction vests when the government files the charging document with immigration court); *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 394–96 (BIA 2002) (finding immigration judges apply the law of the circuit in which they sit).

Due to the large number of immigrants in the United States, it is common practice for United States Immigration and Customs Enforcement ("ICE") to transfer detainees from their initial place of detention, often in the state of their residence, to another facility outside that state or circuit. *See* New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 Cardozo L. Rev. 357, 369 (Dec. 2011) ("NY Report"). The circuits most likely to receive transfers, and also the circuits between which the deepest split exists, are the Fifth, Ninth, and Eleventh Circuits.[4] Human

[4] The Fifth Circuit receives about 24% and the Ninth Circuit

Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, Dec. 2009, at 6 ("2009 HRW Report"). (*See also* App. at 11a, Fig. 4.) Transfers between Pennsylvania and Texas (Third and Fifth Circuits) were the third most frequent transfer used, which covers a distance of 1,642 miles. Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, Jun. 14, 2011, at 5, Table 2 ("2011 HRW Report"). (*See also* App. at 9a, Fig. 3.)

ICE's practice of transferring detainees is pervasive and increasing every year.[5] In 1999, 19.6% of detainees were moved even after removal proceedings were initiated. TRAC Immigration, http://trac.syr.edu/immigration/reports/220/ (last visited Feb. 8, 2014). (*See also* App. at 12a–13a, Figs. 5–6.) In 2008, this number increased to 52.4%. *Id.* In 2011, over 46% of all transferred detainees had been transferred at least two times, with 3,400 people transferred ten times or more. 2011 HRW Report at 1. Further, 27% of the total transfers were interstate. 2011 HRW Report at 19.

The practice of transferring immigrants outside their circuits of residence means that those immigrants have no guarantee as to which circuit's laws

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receives about 37% of all transfers. The Eleventh Circuit, receiving about 9%, is the third most popular transfer-receiving circuit. 2011 HRW Report at 22, Table 5.

[5] Close to 400,000 immigrants are in detention each year, and between 1998 and 2010, roughly two million detainee transfers took place. 2011 HRW Report at 1.

will govern their removal proceedings. And the fate of their removal proceedings will rest not on the merits of their cases, but rather on the fortuity of where the government chooses to detain them. Thus, arbitrary factors such as where detention space is available—for example, in the Krome Detention Center in Miami, Florida, or in the El Centro Service Processing Center in El Centro, California—can mean the difference between "possible deportation and . . . certain deportation." *St. Cyr*, 533 U.S. at 325.

Further compounding the problem is the rise in video and telephonic hearings where the immigration judge may be located in one circuit while the immigrant is detained in another circuit. Daniel L. Swanwick, *Location, Location, Location: Venue for Immigration Appeals in the U.S. Circuit Courts*, 5 Immigration Law Advisor: A Legal Publication of the Executive Office for Immigration Review 1, 2 (Jan. 2011) ("EOIR Article"). INA § 240(b)(2) authorizes the use of videoconferencing and telephonic hearings as important docket-management tools. *Id.* (referring to 8 U.S.C. § 1229a(b)(2) and 8 C.F.R. § 1003.25(c)). The internal guidelines of the Office of the Chief Immigration Judge state that the law governing removal proceedings does not turn on the location of the detainee, but on where ICE chooses to file the charging documents. *See* EOIR Article at 3-4 (referring to EOIR Operating Policies and Procedures Memorandum No. 04–06, *Hearings Conducted through Telephone and Video Conference*, http://www.justice.gov/eoir/efoia/ocji/oppm04/04-06.pdf). The government determines the governing law by simply filing the charging document where the judge conducting the videoconference presides. *See, e.g.*, *Ramos v. Ashcroft*, 371 F.3d 948, 949 (7th

Cir. 2004) (finding that the law governing the proceedings is determined by the location "where the immigration judge completed the proceedings" and not the law in the circuit where the immigrant was detained). Thus, the § 212(c) eligibility of an LPR detained in the Ninth Circuit will be governed by Eleventh Circuit law, if the videoconference judge presides in Florida.

The government's power to determine eligibility for § 212(c) relief by deciding where to file charging documents or where to detain the immigrant is antithetical to the policy of having a uniform, nationwide immigration law. It is also arbitrary and unfair.

II. The circuit split prevents criminal-defense lawyers from fulfilling their Sixth Amendment duties.

Immigration law is "intimately related to the criminal process." *Padilla*, 559 U.S. at 357. This Court held in *Padilla* that criminal-defense counsel's Sixth Amendment duty to provide noncitizen defendants with effective assistance of counsel includes "the critical obligation" to advise "the client of the advantages and disadvantages of a plea agreement." *Id.* at 370 (citation omitted). Failing to do this is ineffective assistance of counsel. *See id.* at 373.

Defense lawyers can fulfill that obligation only if they can identify with certainty the immigration law governing the collateral immigration consequences of the plea. If the law is not uniform throughout the United States, defense lawyers cannot accurately nor adequately advise defendants of the collateral consequences of their convictions. A New York de-

fense lawyer who does not know whether the noncitizen defendant will face removal proceedings in the Eleventh or Ninth Circuit cannot adequately advise her client on the consequences of pleading guilty to criminal charges.

Although most LPRs eligible for § 212(c) relief presumably have already been convicted, the retroactivity issue is still highly relevant to present-day criminal defenders. If, for example, a noncitizen in 2014 were facing a charge for an aggravated felony offense like drug trafficking, the defender would have a duty to advise him about how that conviction affects his deportability and eligibility for relief from removal. If the noncitizen received a jury-trial conviction in 1995 on a previous aggravated felony drug trafficking offense, the defender would likely want to assess whether his client, given the 1995 conviction, was eligible for § 212(c) relief, and whether any future plea to the current drug-sale charge would undermine his eligibility for § 212(c) relief. If the defender knew that Eleventh Circuit law would govern the immigration analysis, she might advise her client that he was not eligible for § 212(c) relief because it was retroactively repealed by IIRIRA.[6] The defender would tell her client that under Eleventh Circuit law, even if she was able to negotiate an "immigration safe" plea for his new charge, he still would

[6] Applying *Ferguson v. U.S. Att'y Gen.*, 563 F.3d 1254 (11th 2009), defense counsel would conclude that his client would not be eligible for § 212(c) to waive his client's 1995 jury-trial conviction for an aggravated felony drug trafficking offense, as the court held that immigrants convicted at jury trial cannot invoke the antiretroactivity principles to ward off IIRIRA's 1996 repeal of § 212(c).

almost certainly be deported.[7] In other words, in the Eleventh Circuit, the criminal defender would not necessarily be motivated enter a plea bargain that eliminated the immigration consequences of the 2014 charge, because her client's "deportation fate" was already sealed by the 1995 jury-trial conviction.

On the other hand, if the defense lawyer knew that the Ninth Circuit law would govern removal proceedings, she would likely try to eliminate any immigration-law consequences of the new 2014 criminal charge. The defense counsel would advise her client that if placed in removal proceedings, he would likely be eligible for a § 212(c) waiver for the 1995 conviction, and that if he pleaded to the new 2014 charge, he could undermine his eligibility for § 212(c) relief.[8] The criminal-defense lawyer would be highly motivated to craft an "immigration safe" plea to maintain his client's eligibility for § 212(c) relief, and might even agree to a plea deal in which his cli-

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[7] Although relief under the Convention Against Torture ("CAT") would not be affected by any criminal conviction, the reality is that CAT is not a realistic possibility for many immigrants who do not fear torture in their home countries. *See, e.g.*, *Matter of Jean*, 23 I. & N. Dec. 373, 376 n. 7 (AG 2002) (applicant's criminal history is "irrelevant in examining his or her entitlement to deferral of removal under the Convention [Against Torture].").

[8] Although § 212(c) can waive drug trafficking aggravated felony jury trial convictions that *pre-date* IIRIRA's 1996 repeal, a client who has an aggravated felony conviction that occurs *after* 1996 would not be eligible for § 212(c) to waive the offense. Thus, to preserve his client's eligibility for § 212(c), the defender would need to ensure the 2014 charge had no immigration consequences to avoid a separate basis for removability.

ent would receive a greater criminal sentence in exchange for a conviction that had no immigration consequences.[9]

Currently, however, the defense lawyer in the example discussed above has no guarantee as to where her noncitizen client will be detained and hence which circuit's law will govern the client's removal proceedings. Thus, the ability to fulfill duties under *Padilla* is greatly hindered. Without uniformity of law, the defender cannot advise her client if the additional time he will serve in exchange for the "immigration safe" plea will allow him to maintain § 212(c) eligibility. Instead, such a plea may merely be a pointless sacrifice of the client's freedom, because his removal is already guaranteed by the 1995 jury-trial conviction.

Retroactivity analysis also impacts immigration remedies beyond § 212(c) relief. For example, eligibility for cancellation of removal, adjustment of sta-

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[9] For example, in the Ninth Circuit, a common "immigration safe" plea for a drug-sale charge is to sanitize—or strike from the complaint—the specific nature or type of controlled substance sold. *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007) (finding that where the specific nature of the controlled substance is not delineated in the plea agreement, the noncitizen may not be deportable for a controlled substance offense). Moreover, often "pleading up" to offenses with higher sentencing exposure may also insulate immigrants from removability. The duty to advise about immigration consequences also includes the duty to defend against those consequences. *People v. Bautista*, 115 Cal. App. 4th 229 (2004) (finding that counsel correctly told the defendant that he "would" be deported for possession-for-sale conviction, but a defense attorney's failure to attempt to "plead up" to "offer to sell" or "transportation" may be ineffective assistance of counsel).

tus, asylum or withholding of deportation, and claims to United States citizenship can all be determined by a retroactivity analysis. *See, e.g.*, *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1197–1203 (9th Cir. 2006) (finding that the stop-time rule regarding the commission of criminal offenses cannot be applied retroactively under step two of *Landgraf* to bar LPR cancellation); *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084 (10th Cir. 2007) (finding that where a person married and adjusted status to conditional resident before IIRIRA, the application of INA § 241(a)(5) was impermissibly retroactive); *Kankamalage v. I.N.S.*, 335 F.3d 858 (9th Cir. 2003) (refusing to retroactively apply a regulatory criminal bar to an asylum application); *Drakes v. Ashcroft*, 323 F.3d 189 (2d Cir. 2003) (holding that repeal of INA § 321 by Child Citizenship Act did not apply retroactively). Thus, the need for uniform retroactivity doctrines extends beyond determining eligibility for § 212(c) relief.

Finally, retroactivity analysis can implicate the retrospective reach of regulations and even new case law. *See, e.g.*, *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007) (deciding that Attorney General's adjudicative decision could not be applied retroactively where the noncitizen pleaded guilty before the decision was published). The Board of Immigration Appeals (BIA) regularly publishes new opinions that impact an immigrant's eligibility for relief. Defenders cannot know how to determine the retroactive impact of those opinions if the retroactivity analysis differs from one circuit to another. Thus, this Court should grant the petition and establish a uniform method for determining the retroactive effect of new immigration laws.

III. The First, Fourth, Sixth, and Eleventh Circuits' holdings undermine the right to a jury trial.

Blackstone called the jury trial "'the grand bulwark' of English liberties," *see Jones v. United States*, 526 U.S. 227, 246 (1999) (citing 4 W. Blackstone, Commentaries on the Laws of England 342–44 (Oxford, Clarendon Pr. 1992) (1765)), and stated that

> [t]he trial by jury has ever been, and . . . ever will be, looked upon as the glory of the English law . . . . It is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected, either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.

Mitchell v. Harmony, 54 U.S. 115, 142–43 (1851) (quoting Blackstone, *supra*).

Thomas Jefferson also recognized the jury's significance, stating: "I consider trial by jury as the only anchor ever yet invented by man, by which a government can be held to the principles of its constitution." Thomas Jefferson, Letter to Thomas Paine, *in* 3 The Writings of Thomas Jefferson 71 (Washington, ed., 1861) (1788). John Adams likewise emphasized its importance, observing that "representative government and trial by jury are the heart and lungs of liberty." Thomas J. Methvin, *Alabama—The Arbitration State*, 62 ALA. L. REV. 48, 49 (2001).

The best testament to the Founding Fathers' veneration of the jury is the Constitution's grant of the right to trial by jury. Hon. Jennifer Walker, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 3, 8 (2011). In the criminal context, Article III states that "[t]he Trial of all Crimes … shall be by Jury … [and] held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § 2, cl. 3. In addition, the Fifth Amendment mandates indictment by a grand jury, and the Sixth Amendment sets forth requirements for criminal jury trials. *See* U.S. CONST. amends. V–VI.

The approach taken by the Eleventh Circuit, as well as the First, Fourth, and Sixth Circuits, significantly undermines this right by permitting § 212(c) relief only in cases involving guilty pleas.[10] *See Ferguson v. U.S. Att'y Gen.*, 563 F.3d 1254 (11th Cir. 2009) (holding that defendant could not seek § 212(c) relief because she elected to go to trial instead of entering a guilty plea in reliance of § 212(c) relief); *see also Nadal-Ginard v. Holder*, 558 F.3d 61 (1st Cir. 2009); *Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007); *Kellermann v. Holder*, 592 F.3d 700 (6th Cir.

[10] Additionally, the Second, Seventh, and Tenth Circuits continue to hold that individuals convicted at trial remain eligible for § 212(c) relief if they can demonstrate subjective or objective reliance on the availability of relief. Although the approach of these three Circuits does not impair the right to jury trial to the extent that the rule of the First, Fourth, Sixth, and Eleventh does, the requirement to demonstrate reliance still places significant burdens on individuals to pass a test that is not required by this Court's retroactivity analysis, as articulated in *Landgraf*, *St. Cyr*, and *Vartelas*.

2010). These cases hold that, if the accused proceeds to a jury trial on criminal charges and is convicted, she will be deemed not to have relied on the law in effect at the time of conviction. Thus, an LPR defendant eligible to seek § 212(c) relief at the time of verdict had no guarantee that future legal changes in the law would not undermine that right. As Mr. Acebo-Leyva's case illustrates, immigrants can be placed in removal proceedings decades after their convictions and new laws can retroactively upset their eligibility for § 212(c) relief.

If the reasoning of *Acebo-Leyva* stands, noncitizen and LPR defendants must confront whether to lock-in the state of law by accepting a plea bargain or risk exposure to adverse changes in the law. *Acebo-Leyva*, 537 F. App'x 875, 877 (11th Cir. 2013) (No. 13-877) (finding that it is "more reasonable to focus on [] reliance . . . than other elements of a retroactivity analysis.") (quoting *Ferguson*, 563 F.3d at 1270). The Eleventh Circuit's rationale in *Acebo-Leyva* makes noncitizen defendants vulnerable to retroactive application of any new law and upsets settled expectations merely because defendants sought to invoke this venerable right of trial by jury. Noncitizen defendants are therefore forced to choose between the right to jury trial or, if they accept a plea bargain, the right to settled expectations of the law.

Mr. Acebo-Leyva's case is illustrative. Here, Mr. Acebo-Leyva was arrested in 1980 for trafficking and conspiracy to traffic narcotics. Petition for Writ of Certiorari at 7, *Acebo-Leyva*, 537 F. App'x 875 (No. 13-877). Under the Eleventh Circuit's current precedent, an informed criminal-defense attorney would tell Mr. Acebo-Leyva that accepting a guilty plea

carries the "advantage" of establishing reliance on currently available forms of relief from deportation. In other words, by going to trial he may forfeit eligibility for discretionary relief if the law changes in the future. The defender might advise the defendant to take a plea deal, not necessarily based on the merits of the case, but simply to ward off future retroactive changes in the law. *See Rankine v. Reno*, 319 F.3d 93, 99 (2d Cir. 2003) (finding petitioners who invoked their right to trial ineligible for § 212(c) relief because "[u]nlike aliens who entered pleas, the petitioners made no decision to abandon any rights and admit guilt."). Thus, this Court should grant the petition to help safeguard a defendant's right to a jury trial.

IV. The circuit split still affects thousands of LPRs.

Section 212(c) remains a vital form of relief for LPRs with criminal records, whose convictions predate the 1996 changes in immigration law. Section 212(c) extends a critical lifeline to longtime residents, like Mr. Acebo-Leyva, who have been fully rehabilitated and have significant family ties in the United States. Whether a noncitizen is eligible for § 212(c) means the difference between "possible deportation and certain deportation." *St. Cyr*, 533 U.S. at 325. Although it was repealed almost 18 years ago, immigration judges still hear roughly between 1,588 and 2,098 applications for § 212(c) relief each year, and historically, the rate of granting such relief has been very high.[11]

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[11] An LPR applying for § 212(c) relief had a greater than 50% chance that relief would be granted, especially in cases with

Before this Court issued its holding in *Vartelas*, eleven circuits addressed the availability of § 212(c) relief for LPRs with pre-1996 jury trial convictions. Post-*Vartelas*, the Fifth, Seventh, Ninth, and Eleventh Circuits have addressed that question again. Those circuits are some of the most heavily populated, with a combined LPR population of nearly 7.5 million—more than half of the total LPR population in the United States. *See* Nancy Rytina, *Population Estimates: Estimates of the Legal Permanent Resident Population in 2012*, DHS Office of Immigration Statistics, Jul. 2013, at 4, Table 5 ("2012 DHS Estimates"). (*See also* App. at 5a, 7a, Figs. 1–2.) Yet if the government can detain and transfer an LPR to anywhere in the United States, the current circuit split potentially affects every LPR.

The Fifth, Seventh, Ninth, and Eleventh Circuits also hear the majority of cases on appeal from the BIA. *See* Administrative Office of the United States Courts, Caseload Statistics Summary (2013), available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013/caseload-summary.aspx (finding that across the country "[a]ppeals challenging decisions by BIA climbed 11% to 7,035; and of these, 50% were filed in the Ninth Circuit."). Thus, the split not only affects millions of LPRs, but the circuits with the deepest split have

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strong equities. *See* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2012 Statistical Year Book (2013), http://www.usdoj.gov/eoir/statspub/syb2000main.htm (data from 2008-2012 shows 794–1,049 § 212(c) applications were granted); *St. Cyr*, 533 U.S. at 296 n.5 (discussing data that over half of § 212(c) applications were granted).

the largest impact.

Immigration changes are on the horizon and undoubtedly will affect millions of people, not just those seeking § 212(c) relief. Immigration-law reforms can affect many other statutory benefits and bars, including other grounds for relief, naturalization, LPR status, visas, and labor certifications. Statutory amendments will, in one way or another, affect the estimated 13.3 million LPRs and 11.7 million unauthorized immigrants living in the United States.[12] An unsettled approach to retroactivity analysis of these changes in immigration law will dramatically affect a combined population of roughly 25 million immigrants. Thus, there has never been a greater need for this Court to settle the dispute over how to apply retroactivity analysis in the immigration context.

CONCLUSION

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

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[12] *See* 2012 DHS Estimates, at Table 5; Pew Research Center, U.S. Unauthorized Immigration Population Trends, 1990–2012 (Sep. 23, 2013).

Respectfully submitted,

HOLLY S. COOPER
Counsel of Record
IMMIGRATION LAW CLINIC
UNIVERSITY OF
CALIFORNIA, DAVIS
One Shields Avenue
Davis, CA 95618
(530) 752-6942
hscooper@ucdavis.edu

STEVEN A. HIRSCH
KEKER & VAN NEST, LLP
633 Battery Street
San Francisco, CA 94111
(415) 391-5400
SHirsch@kvn.com

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APPENDIX

Amici Curiae

Raquel Aldana
Professor of Law
University of the Pacific | McGeorge School of Law

Erwin Chemerinksy
Dean, Distinguished Professor of Law
Raymond Pryke Professor of First Amendment Law
University of California, Irvine | School of Law

Gabriel "Jack" Chin
Professor of Law, Aoki Center Fellow
University of California, Davis | School of Law

Denise L. Gilman
Clinical Professor of Law
Co-Director, Immigration Clinic
University of Texas, Austin | School of Law

Barbara Hines
Clinical Professor of Law
Co-Director, Immigration Clinic
University of Texas, Austin | School of Law

Bill Ong Hing
Professor of Law Emeritus
University of California, Davis | School of Law
Professor of Law, Dean's Circle Scholar
University of San Francisco | School of Law

Hiroko Kusuda
Associate Clinic Professor
Loyola University, New Orleans | College of Law

Christopher Lasch
Assistant Professor of Law
University of Denver | Sturm College of Law

Fatma E. Marouf
Associate Professor of Law
Co-Director of Immigration Clinic
University of Nevada, Las Vegas
William S. Boyd School of Law

M. Isabel Medina
Ferris Family Distinguished Professor of Law
Loyola University, New Orleans
College of Law

Millard A. Murphy
Clinical Professor of Law
Prison Law Clinic
University of California, Davis | School of Law

Blake Nordahl
Assistant Professor
University of the Pacific | McGeorge School of Law

Maritza Reyes
Associate Professor
Florida A&M University | College of Law

Cruz Reynoso
Professor of Law Emeritus
University of California, Davis | School of Law

Victor C. Romero
Maureen B. Cavanaugh Distinguished Faculty Scholar
Professor of Law
Pennsylvania State University
Dickinson School of Law

Rachel E. Rosenbloom
Associate Professor
Northeastern University | School of Law

Leticia Saucedo
Professor of Law
Director, Clinical Legal Education
University of California, Davis | School of Law

Rebecca Sharpless
Associate Clinical Professor
Director, Immigration Clinic
University of Miami | School of Law

James Smith
Professor of Law Emeritus
University of California, Davis | School of Law

Maureen Sweeney
Law School Associate Professor
Director, Immigration Clinic
University of Maryland | Carey School of Law

Stacy Taeuber
Clinical Assistant Professor
Immigrant Justice Clinic
University of Wisconsin Law School

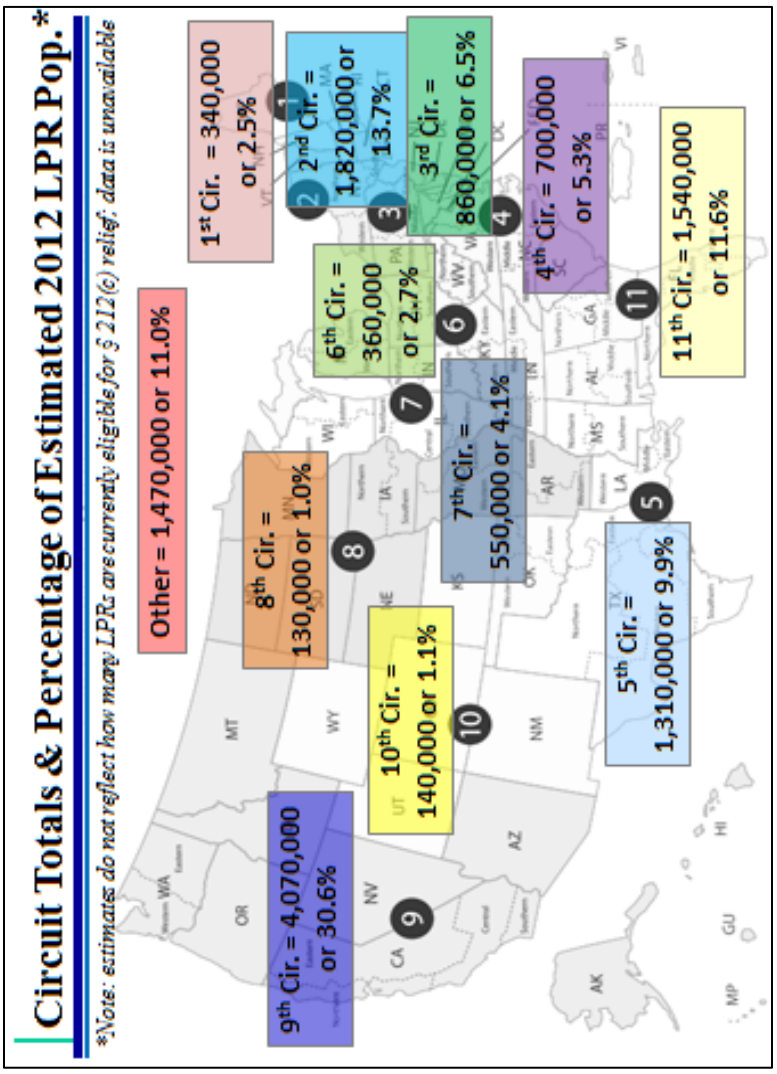
David B. Thronson
Associate Dean for Academic Affairs
Professor of Law
Michigan State University | College of Law

Rose Cuison Villazor
Professor of Law
University of California, Davis | School of Law

Carter C. White
Clinical Professor of Law
Civil Rights Clinic
University of California, Davis | School of Law

Michael Wishnie
William O. Douglas Clinical Professor of Law
Deputy Dean for Experiential Education
Yale Law School

FIGURE 1: 2012 DHS estimates of LPR population (shown per circuit).



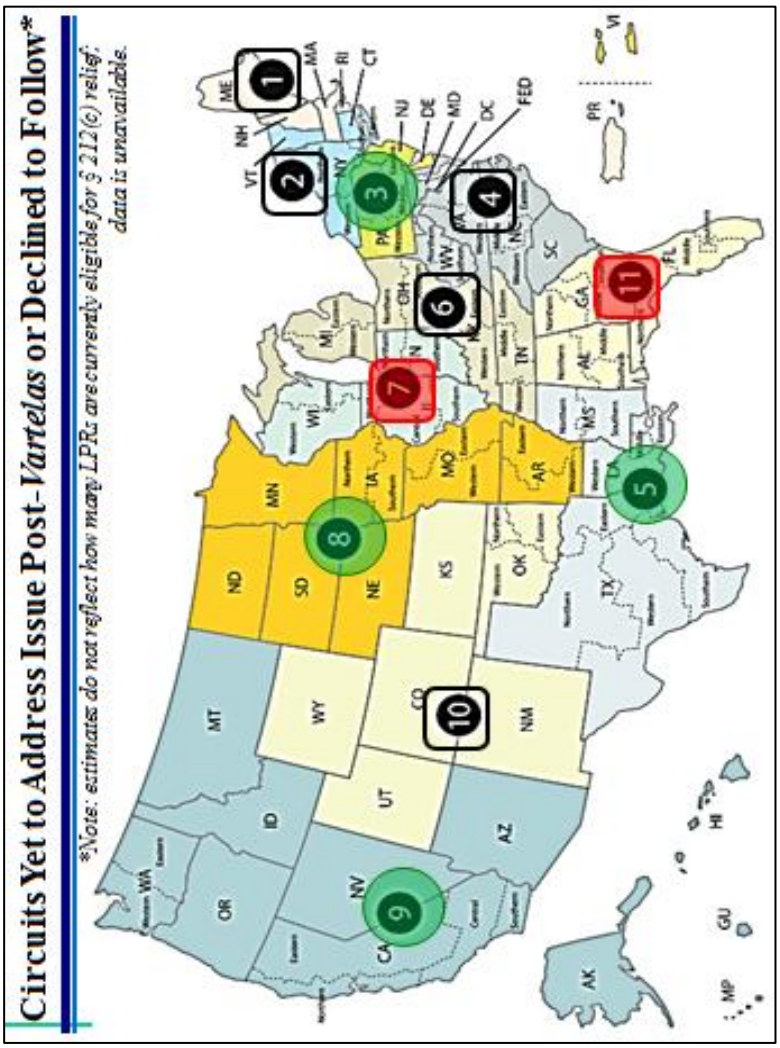
Note for Figure 1:

The data does not fully depict the precise number of LPRs residing in each circuit. If a state's LPR population was below 130,000, DHS did not include information about that state separately, but rather added those state's populations together to create the "Other" category. Thus, in reality, a greater number of LPRs reside in certain circuits. For example, Oregon, which is in the Ninth Circuit, likely has a large LPR population, but that population was not listed by DHS, and could not be calculated into the overall Ninth Circuit LPR population total.

Sources for Figure 1:

http://www.uscourts.gov/uscourts/images/CircuitMap.pdf (last visited Jan. 26, 2014); s*ee also* Nancy Rytina, *Population Estimates: Estimates of the Legal Permanent Resident Population in 2012*, DHS Office of Immigration Statistics, Jul. 2013, at 4, Table 5, available at http://www.dhs.gov/sites/default/files/publications/ois_lpr_pe_2012_pdf ("2012 DHS Estimates) (last visited Jan. 26, 2014)

FIGURE 2: Breakdown of circuit split over role of reliance in retroactivity analysis (shown with corresponding total 2012 DHS estimates of LPR population in each circuit, which excludes the estimated 1,470,000 LPRs in the "Other" category in the 2012 DHS Estimates).



Key for Figure 2:

- **Green circuits:** follow *Vartelas* by not requiring reliance in retroactivity analysis, and not barring § 212(c) as a form of relief to those with pre-1996 jury-trial convictions. Total 2012 DHS estimates of LPR population in corresponding circuits = 6,370,000.

- **Red circuits:** decline to follow *Vartelas* by still requiring reliance in retroactivity analysis, and bars § 212(c) to those with pre-1996 jury-trial convictions by limiting relief only to those who pleaded guilty, or by requiring subjective reliance. Total 2012 DHS estimate of LPR population in corresponding circuits = 2,090,000.

- **Black circuits:** circuits yet to revisit the issue post-*Vartelas*, but prior to *Vartelas* barred § 212(c) relief to those with pre-1996 jury-trial convictions either by limiting relief only to those who pleaded guilty, or by requiring subjective or objective reliance. Total 2012 DHS estimate of LPR population in corresponding circuits = 3,360,000.

Sources for Figure 2:

http://www.uscourts.gov/uscourts/images/CircuitMap.pdf (last visited Jan. 26, 2014); s*ee also* 2012 DHS Estimates.

FIGURE 3: 2011 Human Rights Watch Report, Table 2 (shows transfer data by circuit).

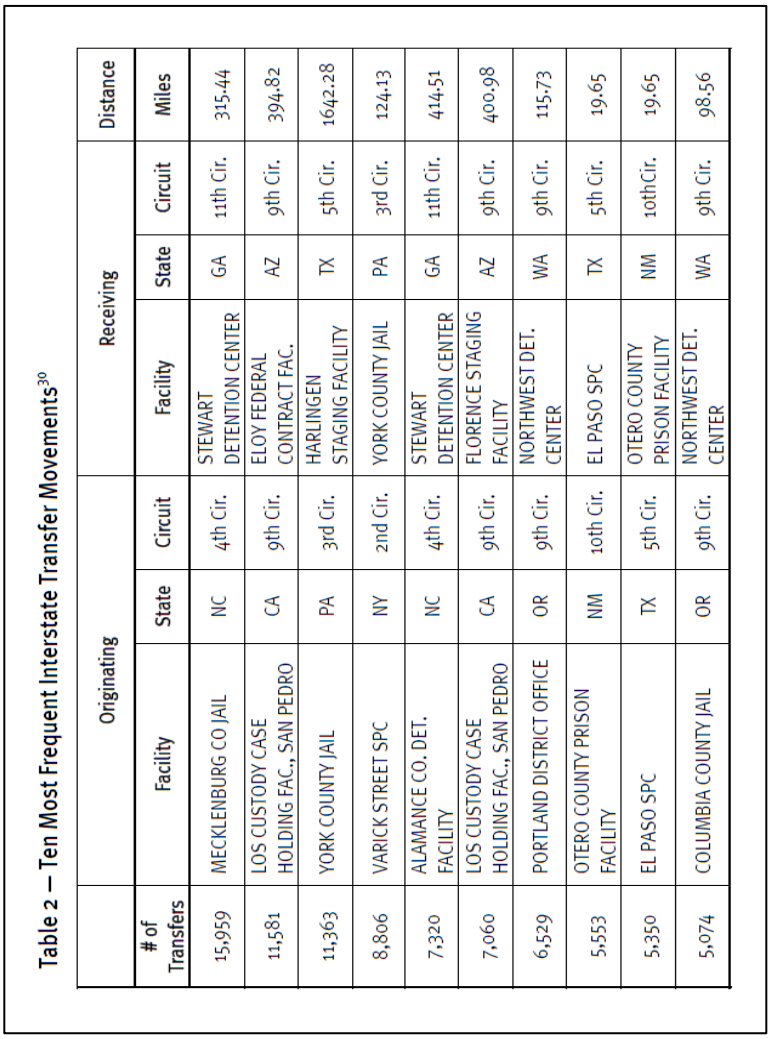


Table 2 — Ten Most Frequent Interstate Transfer Movements[39]

	Originating			Receiving			Distance
# of Transfers	Facility	State	Circuit	Facility	State	Circuit	Miles
15,959	MECKLENBURG CO JAIL	NC	4th Cir.	STEWART DETENTION CENTER	GA	11th Cir.	315.44
11,581	LOS CUSTODY CASE HOLDING FAC., SAN PEDRO	CA	9th Cir.	ELOY FEDERAL CONTRACT FAC.	AZ	9th Cir.	394.82
11,363	YORK COUNTY JAIL	PA	3rd Cir.	HARLINGEN STAGING FACILITY	TX	5th Cir.	1642.28
8,806	VARICK STREET SPC	NY	2nd Cir.	YORK COUNTY JAIL	PA	3rd Cir.	124.13
7,320	ALAMANCE CO. DET. FACILITY	NC	4th Cir.	STEWART DETENTION CENTER	GA	11th Cir.	414.51
7,060	LOS CUSTODY CASE HOLDING FAC., SAN PEDRO	CA	9th Cir.	FLORENCE STAGING FACILITY	AZ	9th Cir.	400.98
6,529	PORTLAND DISTRICT OFFICE	OR	9th Cir.	NORTHWEST DET. CENTER	WA	9th Cir.	115.73
5,553	OTERO COUNTY PRISON FACILITY	NM	10th Cir.	EL PASO SPC	TX	5th Cir.	19.65
5,350	EL PASO SPC	TX	5th Cir.	OTERO COUNTY PRISON FACILITY	NM	10thCir.	19.65
5,074	COLUMBIA COUNTY JAIL	OR	9th Cir.	NORTHWEST DET. CENTER	WA	9th Cir.	98.56

Source for Figure 3:

Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* (Jun. 14, 2011) at 20 ("2011 HRW Report").

FIGURE 4: 2011 Human Rights Watch Report, Table 5 (shows transfer data by circuit).

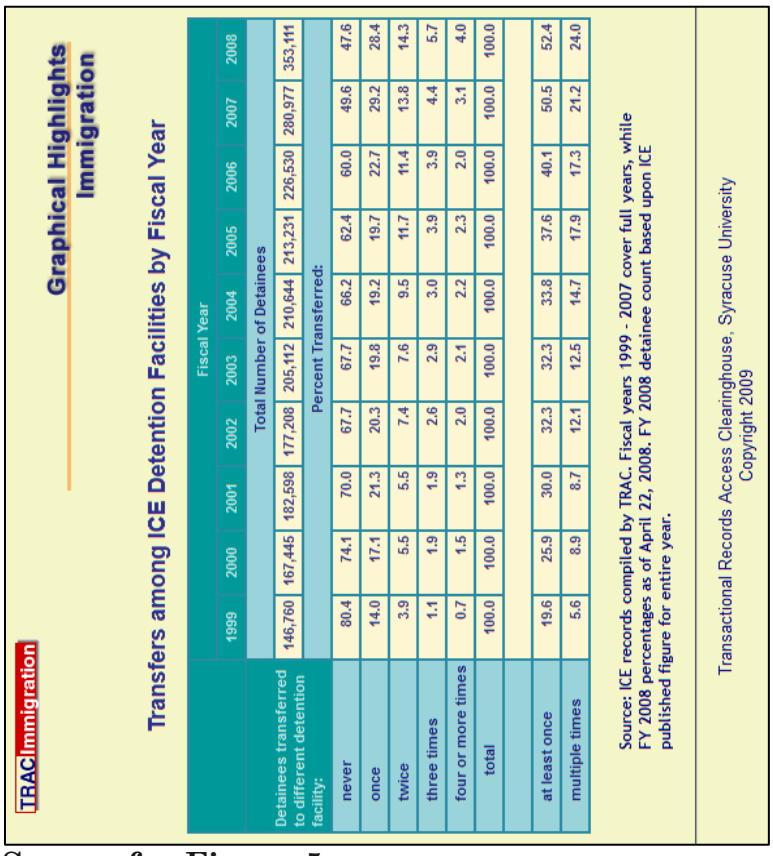
Table 5 – Transfers Originating in, and Received by, Each Circuit Court

Court Circuit	Originating		Received	
	Number	Percent	Number	Percent
D.C. Circuit	189	0%	89	0%
First Circuit	31,378	2%	40,143	2%
Second Circuit	41,541	2%	66,287	3%
Third Circuit	108,344	5%	126,855	6%
Fourth Circuit	47,509	2%	104,738	5%
Fifth Circuit	617,586	30%	483,457	24%
Sixth Circuit	45,035	2%	73,624	4%
Seventh Circuit	51,993	3%	47,177	2%
Eighth Circuit	43,422	2%	58,927	3%
Ninth Circuit	756,531	37%	760,606	37%
Tenth Circuit	90,677	4%	90,898	4%
Eleventh Circuit	205,895	10%	187,275	9%
Unknown	3	0%	27	0%
Total	2,040,103		2,040,103	

Source for Figure 4:

2011 HRW Report, at 23.

FIGURE 5: TRAC Immigration Data—Transfers among ICE detention facilities (shows number of times a detainee can be transferred during removal proceedings).



TRACImmigration

Graphical Highlights Immigration

Transfers among ICE Detention Facilities by Fiscal Year

Detainees transferred to different detention facility:	Fiscal Year 1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Total Number of Detainees	146,760	167,445	182,598	177,208	205,112	210,644	213,231	226,530	280,977	353,111
Percent Transferred:										
never	80.4	74.1	70.0	67.7	67.7	66.2	62.4	60.0	49.6	47.6
once	14.0	17.1	21.3	20.3	19.8	19.2	19.7	22.7	29.2	28.4
twice	3.9	5.5	5.5	7.4	7.6	9.5	11.7	11.4	13.8	14.3
three times	1.1	1.9	1.9	2.6	2.9	3.0	3.9	3.9	4.4	5.7
four or more times	0.7	1.5	1.3	2.0	2.1	2.2	2.3	2.0	3.1	4.0
total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
at least once	19.6	25.9	30.0	32.3	32.3	33.8	37.6	40.1	50.5	52.4
multiple times	5.6	8.9	8.7	12.1	12.5	14.7	17.9	17.3	21.2	24.0

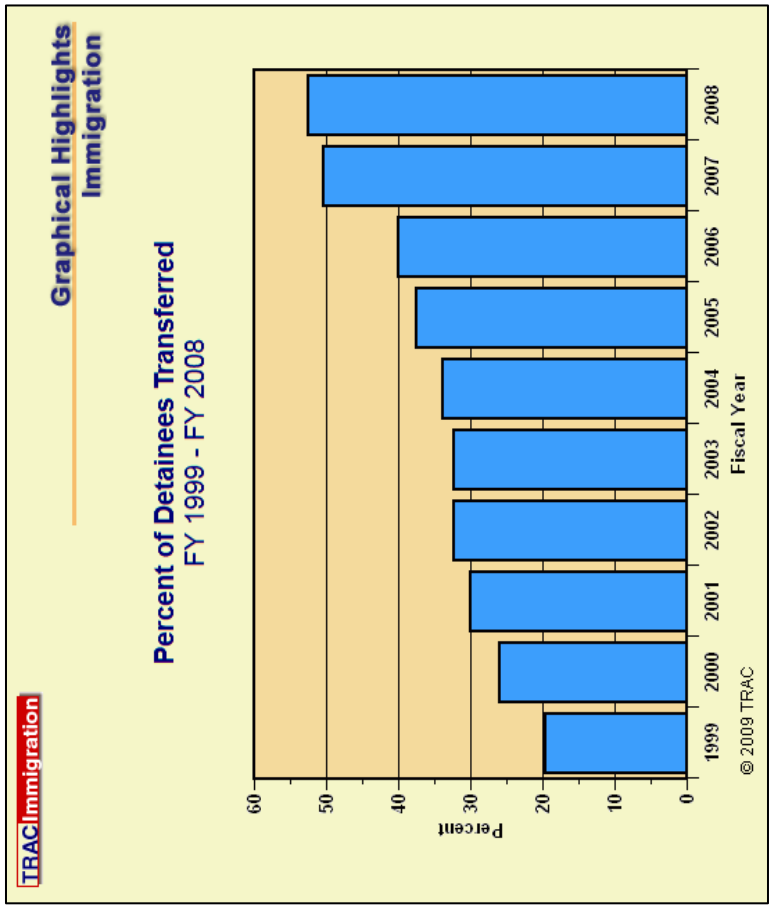
Source: ICE records compiled by TRAC. Fiscal years 1999 - 2007 cover full years, while FY 2008 percentages as of April 22, 2008. FY 2008 detainee count based upon ICE published figure for entire year.

Transactional Records Access Clearinghouse, Syracuse University
Copyright 2009

Source for Figure 5:

Transnational Records Access Clearinghouse, Syracuse University (2009), available at http://trac.syr.edu/immigration/reports/220/include/transfers.html (last visited Feb. 19, 2014), http://trac.syr.edu/immigration/reports/220/index.html (last visited Feb. 19, 2014) ("TRAC Records").

FIGURE 6: TRAC Immigration Data—Percentage of detainees transferred (shows total percentage of detainees transferred between ICE detention facilities per year).



Source for Figure 6:

TRAC Records at http://trac.syr.edu/immigration/reports/220 (last visited Feb. 19, 2014), http://trac.syr.edu/immigration/reports/220/include/transfersG.html (last visited Feb. 19, 2014).