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 *AMICI CURIAE* FORMER DEPARTMENT OF JUSTICE AND DEPARTMENT OF HOMELAND SECURITY OFFICIALS IN SUPPORT OF PETITIONER

Carolyn F. Corwin
Counsel of Record
Alex N. Wong
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000
ccorwin@cov.com

Counsel for Amici Curiae

February 2014

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are former senior officials of the U.S. Department of Justice and the U.S. Department of Homeland Security. In their prior governmental capacities, Amici oversaw or directly administered U.S. policy with regard to enforcement of immigration law, adjudication of removal cases, or the granting of discretionary relief from removal proceedings. Although no longer in government service, Amici continue to monitor developments in immigration law and policy and maintain an interest in ensuring that the immigration system is administered efficiently and consistently in accordance with prior precedents of this Court, established principles of law, and the Constitution. Only if that is done will the system command and deserve the support and confidence of both the Bar and the public.

Amici are:

Mark Filip. Deputy Attorney General, U.S. Department of Justice (2008–09)

David A. Martin. Principal Deputy General Counsel, U.S. Department of Homeland Security (2009–10); General Counsel, U.S.

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[1] The parties have consented to the filing of this brief, and letters confirming such consent have either been lodged with the Clerk or accompany this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief.

Immigration and Naturalization Service (1995–98)

Robert McCallum, Jr. Associate Attorney General, U.S. Department of Justice (2003–06); Assistant Attorney General for the Civil Division (2001–03).

Michael B. Mukasey. Attorney General, U.S. Department of Justice (2007–09).

Julie Myers Wood. Assistant Secretary of Homeland Security, U.S. Immigration and Customs Enforcement (2006–08).

James W. Ziglar. Commissioner, U.S. Immigration and Naturalization Service (2001–02).

SUMMARY OF ARGUMENT

The Court should grant the petition to resolve a circuit split that has imposed continuing burdens on the immigration system. Petitioner's case also presents this Court with an opportunity to craft a uniform rule regarding statutory retroactivity that is consistent with the Court's precedents, facilitates the efficient administration of removal proceedings, and comports with the nation's constitutional principles.

This Court in *INS v. St. Cyr*, 533 U.S. 289 (2001), found that the 1996 repeal of discretionary relief from removal under former Section 212(c) of the Immigration and Nationality Act did not apply retroactively to an immigrant who was eligible for relief at the time he was convicted of a removable offense following a plea deal. Since that decision, the federal circuits have divided sharply on the question whether the repeal operates retroactively to bar discretionary relief for immigrants convicted *after trial*, rather than following a plea deal. This circuit split has created three different rules on the issue: one that bars retroactivity and affords discretionary relief to those convicted after trial, another that applies the repeal retroactively to such cases and precludes discretionary relief, and a third that inquires into whether the immigrant actually or objectively relied on the availability of relief at the time of conviction.

The Court should grant the petition to resolve this circuit split and relieve the burdens it imposes on both immigrants and the immigration system.

First, the circuit split frustrates our nation's constitutionally based interest in the uniformity of immigration law and of its enforcement.

Second, the split creates a situation where the availability of discretionary relief to an immigrant depends on arbitrary factors. These factors include the place of the immigrant's domicile, the location where an immigrant is apprehended, the location where an immigrant is detained when removal proceedings begin, and whether a removal case is heard before an immigration judge located in another federal circuit via videoconference. This situation results in disparate treatment of similarly situated immigrants and erodes public respect for the immigration system.

Third, the circuit split places burdens on an immigrant's right to move for a change of immigration court venue. An immigrant exercising this right may unwittingly subject himself to a rule that forecloses his opportunity for discretionary relief if the move will be to a venue in a different federal circuit. Even if an immigrant is aware of the split among the circuits, that knowledge likely skews his decision process and may undercut the considerations that ordinarily would weigh in favor of a venue change. The circuit split, in effect, can present an immigrant with a Hobson's choice: preserve the opportunity for discretionary relief or impair his ability to mount a vigorous defense in an appropriate venue.

Last, this Court's decision in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), has prompted

numerous challenges to removal decisions based on the question of retroactivity, raising the prospect of significant and unnecessary ongoing litigation costs. The circuits have taken different approaches post-*Vartelas* toward the overall retroactivity question. Unless the Supreme Court resolves the split, litigation resources that would be better utilized to reduce the backlog of immigration cases will continue to be expended litigating the retroactivity question.

Petitioner's case affords the Court an opportunity not just to resolve a circuit split, but to craft a uniform rule that bars retroactivity in all cases in which an immigrant was eligible for Section 212(c) relief prior to its repeal. The Court should adopt such a rule for the following reasons.

First, a rule broadly barring retroactivity in the Section 212(c) context would be in harmony with the Court's prior decisions in *St. Cyr* and *Vartelas*.

Second, such a rule would facilitate the efficient administration of removal proceedings. It would avoid the need for immigration courts to inquire into the actual or objective reliance of an immigrant on the availability of relief. Further, such a rule would also have a firm logical foundation, which is essential to the proper administration of any rule that immigration judges must apply to future circumstances yet unforeseen.

Third, a rule broadly barring retroactivity would comport with our nation's constitutional principles and historical respect for the right to trial.

ARGUMENT

This case raises an important question regarding the uniform administration of the Attorney General's discretionary power to grant certain immigrants post-conviction relief from removal proceedings when it serves the national interest. This discretionary power has longstanding provenance, originating in the Immigration Act of 1917 when it was first granted to the Secretary of Labor. *See* Pub. L. No. 301, 39 Stat. 874, 878. In exercising this discretion, the Attorney General may weigh a number of factors, including an immigrant's past or current service in the U.S. Armed Forces, history of employment and business ties in the United States, value and service to the community, and proof of genuine rehabilitation. *See Matter of Marin*, 16 I. & N. Dec. 581, 585 (B.I.A. 1978).

As this Court has recognized, discretionary relief in the immigration context "has had great practical importance," *INS v. St. Cyr*, 533 U.S. 289, 295 (2001), providing the federal government a safety valve so that generally applicable rules do not result in the removal of long-time permanent residents and other immigrants whose continued residence would benefit their families, their communities, and the nation. The uniform availability of discretionary relief to those entitled to it is therefore essential to ensure that the Attorney General strikes the proper balance of U.S. national interests.

The ruling of the Eleventh Circuit below in this case threatens that balance. The court of

appeals held that a 1996 statute that narrowed the scope of discretionary relief works retroactively to bar relief for otherwise eligible immigrants who exercised their right to trial prior to the effective date of the statute. This ruling deepened a circuit split regarding the 1996 statute's retroactive effect, a split that has detrimental effects on the uniform administration of the immigration enforcement scheme. In addition, the ruling is inconsistent with this Court's precedents, and, even apart from the effect of the circuit split, will interfere with the federal government's ability to uniformly and efficiently administer removal proceedings.

Petitioner's case thus implicates important issues involving the administration of the immigration system. The case requires this Court's review.

I. The Court Should Grant The Petition In Order To Resolve A Significant Circuit Split That Imposes Continuing Burdens On The Immigration System.

The federal circuit courts have adopted starkly divergent rules regarding the question at the heart of this case: the availability of relief from removal to individuals who exercised their right to trial prior to Congress's repeal of the provision for such relief. In 1996, the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) repealed Section 212(c) of the Immigration and Nationality Act, removing the Attorney General's authority to grant discretionary relief from certain post-conviction removal proceedings to lawful immigrants domiciled

in the United States for more than seven consecutive years. Since that time, the courts of appeals have repeatedly considered the question whether the repeal worked retroactively to bar discretionary relief for eligible immigrants who were convicted prior to its effective date but for whom removal proceedings had not yet been initiated.

This Court, in *INS v. St. Cyr*, 533 U.S. 289, appeared to answer this question in the negative. The *St. Cyr* Court applied the "presumption against retroactive application of ambiguous statutory provisions" and invoked the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" to hold that those eligible for discretionary relief at the time of their convictions did not lose that benefit *post facto* with the passage of the IIRIRA. *Id.* at 320, quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

Four circuits—the Third, Fifth, Eighth, and Ninth Circuits—have applied *St. Cyr* in all instances where retroactivity of Section 212(c) is at issue, holding that discretionary relief is available to all immigrants who were eligible for such relief prior to the repeal of Section 212(c). *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) However, a number of other circuits have distinguished *St. Cyr* on various bases, applying the repeal retroactively to certain classes of removable immigrants and not to others.

Four circuits—the First, Fourth, Sixth, and Eleventh—have limited the holding of *St. Cyr* strictly to immigrants who had entered a guilty plea to a removable offense—the fact pattern in that case. *See, e.g.*, *Kellermann v. Holder*, 592 F.3d 700, 705–07 (6th Cir. 2010); *Ferguson v. U.S. Att'y Gen.*, 563 F.3d 1254, 1271 (11th Cir. 2009); *Mbea v. Gonzales*, 482 F.3d 276, 282 (4th Cir. 2007); *Dias v. INS*, 311 F.3d 456, 457–58 (1st Cir. 2002). In these circuits, immigrants who were convicted after exercising their constitutional right to trial do not enjoy the usual presumption against retroactive application of the laws and are denied eligibility for discretionary relief.

Three other circuits—the Second, Seventh, and Tenth Circuits—have crafted more complicated "subjective" and "objective" standards by which a court is to judge whether an immigrant had relied on the availability of Section 212(c) discretionary relief in deciding whether to strike a plea deal or proceed to trial. If the immigrant demonstrates reliance, discretionary relief is available. However, if there is insufficient proof of reliance, the repeal operates retroactively to bar Section 212(c) relief. *See Khodja v. Holder*, 666 F.3d 415, 419–20 (7th Cir. 2011); *Wilson v. Gonzales*, 471 F.3d 111, 117 (2d Cir. 2006); *Hem v. Maurer*, 458 F.3d 1185, 1197 (10th Cir. 2006).

The three-way circuit split on the scope of *St. Cyr*'s holding—which has persisted for over a decade—has produced several invidious effects. First, it frustrates both the Framers' and Congress's intent that federal immigration law be administered according to uniform standards. Second, it causes the

availability of discretionary relief to turn on arbitrary factors, placing unnecessary burdens on immigrants facing removal hearings. Third, the circuit split imposes unnecessary costs on the administration of the federal immigration enforcement scheme, diverting resources that could be more productively used to reduce the backlog of immigration cases.

This Court should grant certiorari in order to resolve the circuit split and thereby eliminate these detrimental effects.

A. The Circuit Split Frustrates The Nation's Significant Interest In The Uniformity Of Immigration Law And Enforcement.

The circuit-by-circuit patchwork of rules on the availability of Section 212(c) discretionary relief for immigrants convicted prior to the effective date of the IIRIRA frustrates the nationwide uniformity of immigration law. While any circuit split in any area of federal law has this effect, the lack of uniformity in the immigration context treads on a significant and longstanding commitment to uniformity that stretches back to the nation's founding and that has been reinforced by Congress and the Executive Branch.

The principle that the law on international migration is an area of federal plenary power in which uniformity is paramount is grounded in the Constitution. *See* U.S. Const. art. I, § 8, cl. 4 ("Congress shall have Power To . . . establish a uniform Rule of Naturalization") (emphasis added);

Bustamante-Barrera v. Gonzalez, 447 F.3d 388, 399 (5th Cir. 2006) (citing "overarching constitutional interest in uniformity of federal immigration and naturalization laws"). James Madison explained that an explicit constitutional provision empowering Congress to enact "a uniform rule of naturalization throughout the United States" was necessary to guard against the "defect of the [Articles of] Confederation" that allowed for the "dissimilarity in the rules of naturalization" among the several states. *See* Federalist No. 42, at 269–71 (James Madison) (Clinton Rossiter ed., 1961).

Congress has used this power to pass nationwide immigration laws and has expressed its sense that "the immigration laws of the United States should be enforced vigorously and *uniformly*." Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359 (emphasis added).

The Executive Branch has traditionally echoed Congress and adopted before this Court the position that immigration laws should be uniform nationwide. The federal government has argued, correctly, that an "[immigration] scheme that depends on national uniformity cannot coexist with a patchwork of . . . different substantive rules." Brief for the United States at 24, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182); *see also* Brief for the United States at 13, *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (No. 09-60) (arguing against "patchwork application of federal immigration law"). In the longstanding view of the United States government, "uniformity of treatment"

and "fixed standards" are "necessary for the efficient administration of the immigration laws." Brief for the United States at 38–39, *Pino v. Landon*, 75 S. Ct. 576 (1955) (No. 333).

During their governmental service, Amici witnessed firsthand the wisdom of Madison's argument in favor of uniformity. A circuit split on immigration law imposes administrative costs on the agencies charged with enforcing the law, results in the disparate treatment of similarly situated individuals, and makes difficult—if not impossible—the full implementation of the government's immigration policy goals.

The sharp split among the circuits reflected in and deepened by the decision below creates the kind of patchwork of immigration rules James Madison warned against. The significant national interest in uniformity weighs heavily in favor of granting the petition.

B. The Circuit Split Causes The Availability of Discretionary Relief To Turn on Arbitrary Factors.

The circuit split has resulted in dramatically divergent outcomes for the lives of a significant number of the nation's immigrants, based on largely arbitrary factors. Amici believe that hinging the question of whether a long-time lawful resident of the United States will have an opportunity to remain in the country on arbitrary factors is inconsistent with the predictable and uniform application of the law and tends to undermine the public's respect for the immigration system.

The law on retroactivity that will apply to a particular immigrant currently depends on the federal circuit in which he is entitled to appeal a removal decision. The federal circuit is determined by the location of the immigration judge at the time the underlying removal decision is issued. 8 U.S.C § 1252(b)(2) ("The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."). The location of the immigration judge, in turn, may turn on a number of factors that are influenced in large part by the discretion of the enforcement officer initiating removal proceedings and which immigration judge is assigned to the case.

The first factor is the place of residence of the immigrant. Many "charging documents"—the term for notices filed to initiate removal proceedings—are filed with immigration courts in the federal district where an immigrant resides. Therefore, the law applicable to a particular immigrant may depend entirely on where he has chosen to make his home.

Other factors, such as the location where an immigrant is apprehended, are specific to the immigration enforcement and adjudication context. In some cases, an immigrant will be detained at a port of entry. Charging papers may be filed with an immigration court in the federal district where the port of entry is located. This may be in a circuit different from the circuit in which the immigrant makes his domicile. To illustrate, an immigrant living in Los Angeles—which is located in the Ninth Circuit—may be detained and flagged for removal upon reentry into the country in New York, which is

located in the Second Circuit. If the removal proceedings are completed by a judge in New York, Second Circuit law will apply.

The applicable law may also depend on where an immigrant is detained at the time removal proceedings are initiated. A detained immigrant may be transferred from one detention facility to a different facility located in another circuit entirely. While federal authorities strive to file charging documents in one location before effecting a transfer, so that removal proceedings will take place in the circuit where the immigrant was initially apprehended, *see* U.S. Immigration and Customs Enforcement, Policy 11022.1, Detainee Transfers § 5.7(1) (Jan. 4, 2012) ("Before the transfer, all charging documents will be issued and signed by the individual with signatory authority for the sending office."), this rule is not mandatory, *see id.* at § 5.5(2) (authorizing waiver of charging documents procedure prior to transfer). The result is that the federal circuit in which an immigrant finds himself at the time removal proceedings are initiated may be completely dependent on the administrative exigencies of the immigration detention system.

Another factor affecting what law will apply is the growing use of video conference technology to allow immigration judges to preside over removal proceedings remotely. *See* Daniel L. Swanwick, "Location, Location, Location: Venue for Immigration Appeals in the U.S. Circuit Courts," Immigration Law Advisor, Vol. 5 No. 1, at 2 (Jan. 2011). This practice has become commonplace because of the immense volume of immigration hearings and the

shortage or absence of adjudicatory resources in some districts. In these instances, the immigrant, the lawyers, and the immigration judge may all be located in different cities, at times within the boundaries of different federal circuits. The applicable law in such cases is the law of the circuit in which the immigration judge renders his order (even though the venue would still technically be considered the immigration court where the charging papers were filed, *see* 8 C.F.R §§ 1003.14(a), 1003.20(a)). *See* 8 U.S.C. § 1252(b)(2); *Ramos v. Ashcroft*, 371 F.3d 948 (7th Cir. 2004). So while the immigrant may participate in the immigration court proceeding in a facility near his location, the law that will apply on appeal will be that of another circuit if his case is adjudicated via videoconference by a judge located in a different circuit. As a result, an immigrant's access to discretionary relief may be foreclosed simply because a backlog of immigration cases pushed the hearing to a judge presiding from a different part of the country.

C. The Circuit Split Creates Legal Pitfalls And Places Burdens On The Right To Move For Change Of Immigration Court Venue.

Immigrants subject to removal proceedings may, for good cause, move to change venue. 8 C.F.R. § 1003.20(a). As explained in the previous section, the venue of a removal proceeding is not always determinative of the circuit law that will apply. Nevertheless, venue of a proceeding will often be a significant factor in determining what circuit law is applied. As a result, the circuit split at issue here

creates both legal pitfalls and burdens for immigrants as they weigh whether to exercise their right to move for a change in immigration court venue.

Immigrants may wish to change venue to avail themselves of conveniences and relieve various hardships, particularly if the immigrant is detained in a location a great distance away from his domicile. However, immigrants unaware of the uneven legal landscape may change venue and unwittingly subject themselves to circuit law that limits or forecloses their discretionary relief options. This possibility is heightened by the fact that, at this time, there exists no constitutional requirement for counsel in civil removal proceedings to advise clients on the differences in circuit law pertaining to the retroactivity of Section 212(c) repeal prior to their seeking a change in venue.[2] *Compare United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002) (holding that in a civil removal proceeding "eligibility for § 212(c) relief is not a liberty or property interest warranting due process protection"), *with Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (requiring counsel to inform client in a criminal trial that a plea would make him eligible for removal).

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[2] Some courts have found that rules established by the Board of Immigration Appeals allow removal proceedings to be reopened if a counsel's assistance was ineffective and foreclosed the possibility of Section 212(c) discretionary relief. *See Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006). However, this rule is subject to change as a matter of administrative policy and a number of circuits have not addressed the reopening issue.

If an immigrant is aware of the variations in circuit case law, the circuit split may well skew his decision, potentially outweighing the considerations he ordinarily would take into account when deciding whether to seek a change in venue. If an immigrant is domiciled in a circuit where discretionary relief is unavailable, he may be forced to trade the personal value of being near family and the legal advantages of having easier access to counsel and to relevant documentation or other evidence in order to obtain the opportunity for discretionary relief. Put plainly, the circuit split potentially presents an immigrant with a Hobson's choice: obtain the opportunity for discretionary relief or impair his ability to mount a vigorous defense in a more appropriate venue.

D. The Circuit Split Imposes Unnecessary Litigation Costs In The Aftermath Of *Vartelas*.

Following this Court's decision in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), there will be further appeals of removal decisions in those circuits that apply cramped interpretations of the *St. Cyr* decision to limit the availability of discretionary relief. A decision by this Court in this case would obviate the need for such unnecessary litigation by announcing a uniform rule regarding the retroactivity of the IIRIRA's repeal of Section 212(c) discretionary relief.

In *Vartelas*, this Court held that the "likelihood of reliance…[is] not a necessary predicate for invoking the antiretroactivity principle" in the immigration context. 132 S. Ct. at 1491. In doing so, the *Vartelas* Court discussed *St. Cyr* as an

"illustrative" case where the presence of an immigrant's reliance—far from being the necessary component in the retroactivity analysis—merely "strengthen[ed] the case for reading a newly enacted law prospectively." *Id.* The Court in fact labeled as a "misperception" "treating reliance as essential to application of the antiretroactivity principle," *id.* at 1492, and held that the essential inquiry is instead "whether the new [statutory] provision attaches new legal consequences to events completed before its enactment." *Id.* at 1491. The *Vartelas* decision has already sparked numerous appeals of removal decisions in circuits that had previously applied the IIRIRA repeal retroactively either to immigrants who were convicted at trial or to those unable to demonstrate reliance on the availability of discretionary relief. *See, e.g.*, *Othi v. Holder*, 734 F.3d 259 (4th Cir. 2013), *Kleynburg v. Holder*, 525 F. App'x 814 (10th Cir. 2013); *Pereyra-Martinez v. Holder*, 522 F. App'x 91 (2d Cir. 2013).

The four circuits that have so far considered *Vartelas* have split on its effect, ensuring that the circuit split and its unfortunate practical consequences will persist. The Fifth and Ninth Circuits have revisited their prior rulings and now deem individuals who exercised their right to trial to be eligible for Section 212(c) relief. *See Cardenas-Delgado*, 720 F.3d at 1121; *Carranza-De Salinas*, 700 F.3d at 773. The Eleventh Circuit—in the case at issue in this petition—and the Seventh Circuit have gone in the opposite direction. The latter two circuits have read *Vartelas* narrowly, adhering to their prior holdings. Despite the *Vartelas* Court's express recognition that its holding was consistent

with *St. Cyr* and with Section 212(c) relief, both the Eleventh and Seventh Circuits distinguished *Vartelas* on the ground that it involved a different repeal provision of the IIRIRA. *See* Pet. App. 3; *Zivkovic v. Holder*, 724 F.3d 894, 903 (7th Cir. 2013). Therefore, the Eleventh Circuit still denies discretionary relief to immigrants who exercised their right to trial instead of accepting a plea deal, and the Seventh Circuit still applies a test to determine whether such an immigrant relied on the availability of discretionary relief.

With the circuit split deeply embedded even post-*Vartelas*, current and future appeals of removal decisions will impose significant costs on immigrant litigants, the Department of Justice, and the federal courts, but will not ultimately produce a clear resolution of the issue. The resources consumed by this litigation would be better spent on other cases, reducing the backlog of immigration cases in the court system.

A decision by the Court in this case would minimize future litigation and allow for uniform, durable, and settled administrative resolution of hundreds of outstanding Section 212(c) cases. Amici urge the Court to grant the petition and establish a definitive rule that can be implemented in an orderly fashion in all pending and future cases.

II. The Court Should Use This Case To Craft A Uniform Rule Barring Retroactivity In All Cases In Which An Immigrant Seeks Section 212(c) Discretionary Relief.

The Court should use this case to craft a uniform, definitive rule that bars the retroactive application of the IIRIRA for all immigrants who were eligible for Section 212(c) discretionary relief at the time of their convictions, regardless of whether they exercised their constitutional right to trial. Such a rule would be consistent with this Court's precedents, would facilitate the efficient administration of removal proceedings, and would comport with the nation's constitutional values.

A. A Rule Broadly Barring Retroactivity In The Section 212(c) Context Would Be In Harmony With This Court's Precedents.

The circuit court decisions that apply retroactivity selectively based on which IIRIRA repeal provision is involved or the particular facts of each immigrant's circumstances are in tension with this Court's precedents on the issue. The Court should take the opportunity presented by this petition to reconcile the inconsistencies in this line of cases.

Read in concert, this Court's decisions in *St. Cyr* and *Vartelas* make clear that the ordinary presumption against the retroactive effect of statutes applies across the board to any immigrant entitled to discretionary relief under Section 212(c) at the time of conviction. The *St. Cyr* Court squarely held that

the withdrawal of eligibility for discretionary relief "attaches new legal consequences to events completed before" the effective date of the IIRIRA repeal of Section 212(c), and "takes away or impairs vested rights acquired under existing laws." *St. Cyr*, 533 U.S. at 321. Applying the general rule requiring a "clear indication from Congress" before a law may be deemed to operate retroactively, the *St. Cyr* Court found no such clear language in the IIRIRA and barred the retroactive effect of Section 212(c). *Id.* at 316, 320. To the extent *St. Cyr* may have raised questions about the significance of reliance in the retroactivity analysis, the Court left no doubt in *Vartelas*. Specifically referring to its holding in *St. Cyr*, the *Vartelas* Court held that reliance on a prior right or privilege is "not a necessary predicate" or an "essential" element of the antiretroactivity principle. *Vartelas*, 132 S. Ct. at 1491-92.

Considered together, the *St. Cyr* and *Vartelas* decisions preclude a rule that imposes retroactive effect where immigrants convicted after trial are presumed not to have relied on the availability of Section 212(c) relief. And they preclude a standard that instructs courts to inquire into an immigrant's objective or actual reliance. Reliance, while helping to justify the presumption against retroactive effect, is irrelevant to the retroactivity inquiry. *See id.* at 1491 (reliance merely "strengthens the case for reading a newly enacted law prospectively," but is not "necessary").

The circuits that persist in maintaining such rules appear to apply the presumption against retroactivity in reverse. Instead of presuming

against retroactivity and "construing any lingering ambiguities in deportation statutes in favor of the alien," *Cardoza-Fonseca*, 480 U.S. at 449, these courts strive to *preserve retroactivity* in the face of contrary case law and statutory construction principles. For example, the Eleventh Circuit in the case at issue here declined to follow *Vartelas*, opting instead to "focus on the reliance elements…laid out in *St. Cyr*" and to disregard the *Vartelas* Court's explicit discussion of *St. Cyr*'s reliance language. In adopting such cramped readings of *St. Cyr* and *Vartelas*, these circuits are effectively adopting a presumption *in favor* of retroactivity. That approach is inconsistent with the thrust of this Court's precedents.

B. A Rule Broadly Barring Retroactivity Would Facilitate Efficient Administration Of Removal Proceedings.

Any uniform rule the Court might adopt if it grants the petition would facilitate the efficient administration of immigration law. However, of the three general approaches the Court might adopt, only a rule that broadly bars retroactive application of IIRIRA repeals of discretionary relief would yield significant administrative benefits. This Court should grant the petition and adopt such a rule.

It is plain that a rule requiring courts to inquire into actual or objective reliance by an immigrant—as currently required in the Second, Seventh, and Tenth Circuits—would be unworkable and result in inconsistent outcomes. Inquiries into

the states of mind of immigrants or the factual settings of plea negotiations between their lawyers and immigration authorities from decades ago are difficult undertakings that would require significant resources from all parties involved. The predictable result of routinely requiring such inquiries would be widely disparate and untrustworthy outcomes for similarly situated immigrants. In addition, the time and cost required to make such determinations would slow the workings of an already backlogged immigration adjudication system.

A rule such as that adopted by the Eleventh Circuit in this case—one that distinguishes between those immigrants who accepted a plea bargain and those who proceeded to trial—is a cleaner rule to implement than one requiring determination of actual or objective reliance. However, it not only appears inconsistent with this Court's precedents, as discussed above; it lacks the firm logical foundation essential to the effective administration of any rule that judges must apply to future circumstances yet unforeseen.

A rule precluding discretionary relief for those convicted at trial rests on the assumption that anyone who decided to forgo a plea deal and exercise the constitutional right to go to trial did not rely on the availability of Section 212(c) relief. *See, e.g.*, Pet. App. at 20 ("[T]he decision to go to trial [does] not satisfy the reliance requirement articulated by the Supreme Court in *St. Cyr*."). This assumption is logically flawed. As the *St. Cyr* Court explained, "[t]here is a clear difference . . . between facing possible deportation and facing certain deportation."

533 U.S. at 325. Relying on a reasonable prospect of relief—which from 1989 to 1995 had been granted at the rate of frequency of 51.5 percent, *id.* at 295–96 n.55—some immigrants chose to plead guilty to a deportable offense because the "right to remain in the United States may [have been] more important to [them] than any potential jail sentence." *Id.* at 322 (quoting 3 Bender, *Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999)).

However, some immigrants may have viewed the prospect of relief differently. To these immigrants, the opportunity to seek Section 212(c) relief reduced the risk of going to trial. So instead of accepting a plea deal and thereby incurring the stigma of a conviction, even with a potentially lower jail sentence, these immigrants might well have opted to try to prevail at trial. As seen from the vantage point of pre-IIRIRA law, the upside benefit of going to trial was acquittal, and the downside risk—conviction—might still not result in removal, because of the availability of Section 212(c) relief (particularly for an immigrant who had an otherwise favorable record). Because the certainty of removal would have altered that calculus, a decision to go to trial would have involved just as much reliance on the availability of discretionary relief as a plea deal does.

Because of the logical flaw in the assumption underlying the rule precluding discretionary relief for those who exercised their right to trial, any future decisions predicated on the rule will feature an internal contradiction. That latent tension may undermine the finality of those cases, as new fact

situations may demonstrate reliance on the part of those convicted after trial. A growing gap between immigration judges' decisions and the reality of immigrants' cases would serve to reduce public respect for the nation's immigration system.

The most logical rule, and the one most consistent with efficient administration of the immigration system, therefore, is one that applies the holdings of *St. Cyr* and *Vartelas* faithfully and consistently, *i.e.*, a rule that bars retroactive effect of the IIRIRA's repeal for all those who were eligible for Section 212(c) relief, regardless of the circumstances of their conviction.

C. A Rule Broadly Barring Retroactivity Would Comport With Our Nation's Constitutional Principles.

The rule adopted by the Eleventh Circuit in this case is, at a basic level, discordant with the tenor of this nation's constitutional principles. Denial of discretionary relief to those who sought to vindicate themselves at trial is perverse, as it extinguishes a previously available privilege in derogation of a protected constitutional right.

In most cases Congress has the power to craft a law and apply it retroactively if it so states in explicit terms. Although it did not do so in the IIRIRA, it is conceivable that Congress might have chosen to craft an explicit and generally applicable rule that denied discretionary relief to anyone convicted prior to the effective date of the IIRIRA's repeal of Section 212(c). But in light of this Court's

precedents and the historical value the nation has placed on the fundamental right to defend oneself vigorously at trial, it is difficult to imagine that Congress would craft a retroactive rule that significantly disadvantages, among all affected persons with criminal convictions, only those who had previously availed themselves of the constitutional right to trial.

In light of the improbability that Congress would have crafted such a rule explicitly, it is exceedingly odd that some circuits have determined that Congress did so impliedly. And it is particularly disturbing that some circuits persist in holding to this determination despite contrary Supreme Court precedent and the weight of our nation's constitutional history.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

Carolyn F. Corwin
Counsel of Record
Alex N. Wong
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000
ccorwin@cov.com

Counsel for Amici Curiae

February 2014