01-2135 (L), 01-2483 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HOPETON ANTHONY RANKINE, PAUL LAWRENCE,

Petitioners – Appellants,

v.

JANET RENO, Attorney General of the United States, DISTRICT DIRECTOR, Immigration and Naturalization Services, INS,

Respondents – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE OF THE NEW YORK STATE DEFENDERS ASSOCIATION, THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS - APPELLANTS

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PRELIMINARY STATEMENT

In this case, the INS seeks to apply a new law retroactively in a way that will radically alter the immigration consequences of an immigrant's decision, made under prior law, to go to trial. If the new law is applied retroactively, these immigrants, who chose to face pending criminal charges (rather than negotiate an alternative disposition) in the belief that a conviction on these charges would not lead to deportation, will now face *mandatory* deportation. Such an application of the law has a clear "retroactive effect" and is, therefore, impermissible.

The change in law at issue is the repeal of § 212(c) of the Immigration and Nationality Act, a statutory provision that permitted lawful permanent residents to apply for discretionary deportation relief. Under § 212(c), an immigrant who was deportable for conviction of certain crimes could seek complete relief from deportation on the basis of equitable factors such as his or her ties to the United States (including whether he or she had U.S. citizen family and children), length of time in this country, and the benefit to the community if relief were granted. This equitable relief was granted in the majority of cases and was predictably granted where certain favorable factors were present. *See INS v. St. Cyr*, 121 S. Ct. 2271, 2277 & n.5 (2001). In 1996, however, Congress repealed this provision. The question presented here is whether this repeal of discretionary relief from deportation should be applied to pre-enactment decisions and events – specifically,

to those immigrants who faced criminal charges, elected to go to trial, and were convicted before the new law's enactment.

In *INS v. St. Cyr*, the Supreme Court considered the same statutory repeal at issue here, and concluded that applying the repeal to immigrants who pled guilty before the new law's enactment would be impermissibly retroactive. The Court recognized that immigrants are "acutely aware" of the immigration consequences when they decide whether to go to trial or accept a plea, and rely on the law governing discretionary relief when making these critical decisions in their criminal cases. *See* 121 S. Ct. at 2291. Because of these strong reliance interests, the Court found that it would be impermissible to apply the repeal retroactively to such immigrants and, therefore, held that the petitioner was eligible to apply for discretionary relief. *Id.* at 2293.

After *St. Cyr*, the question before this Court is whether applying the statutory repeal to immigrants such as petitioners Lawrence and Rankine – whose convictions by trial pre-dated the change in law – would similarly constitute an impermissible retroactive effect. Amici contend that it would, for two reasons. *First*, as in *St. Cyr*, the class of immigrants who were convicted at trial has strong reliance interests on the immigration consequences of their decisions made before the change in law. As in *St. Cyr*, these immigrants would rely on the availability of deportation relief when making the crucial decision whether to go to trial or to try

to negotiate a plea to other charges on the criminal charges in question. The assumption that deportation relief was available in the event of a conviction may also have affected strategic decisions by these immigrants relating to their defense during trial. *Second*, this class of immigrants and their families have made subsequent decisions and conditioned their lives on their understanding – which was correct at the time – that deportation was not mandatory, and that, in many cases, it was extremely unlikely to be ordered. Their settled expectations will be severely disrupted if the INS is permitted to apply the statutory repeal to decisions that took place before the law was enacted. Congress has not specified that the repeal of deportation relief is retroactive to these immigrants. In light of these immigrants' interests in reliance and repose, under the Supreme Court's retroactivity jurisprudence, the statutory repeal should not be applied to them, as doing so would constitute an impermissible retroactive effect.

STATEMENT OF INTEREST

The New York State Defenders Association, the Legal Aid Society of the City of New York, and the New York State Association of Criminal Defense Lawyers ("Amici") are criminal defense organizations with years of experience representing or providing counsel to lawful permanent resident immigrants in criminal proceedings in New York State, the state with the second largest number of lawful permanent residents in the country.

The New York State Defenders Association ("NYSDA") is a not-for-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and other persons throughout the State of New York. Since 1981, under contract with New York, NYSDA has operated the Immigrant Defense Project which provides state public defender, legal aid society, and assigned counsel program lawyers with legal research consultation and training specifically on issues involving the interplay between criminal and immigration law.

The Legal Aid Society of the City of New York is a private, non-profit legal services agency that represents New York City residents who cannot afford to hire a lawyer. Since 1965, the Criminal Defense Division of The Society has been the primary public defender for indigent persons who are prosecuted for crimes in state courts in New York City. In fiscal year 2001, the Division represented more than 195,000 clients in New York, Kings, Queens, and Bronx counties. A large percentage of the Division's clients are not United States citizens.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a non-profit membership organization of more than 1,100 attorneys who practice criminal defense law in the State of New York. Its purpose is to assist, educate and provide support to the criminal defense bar.

Amici have, over the years, counseled and represented thousands of immigrants accused of crimes. As part of our practice, we advise immigrant

defendants regarding the immigration consequences of a conviction of the criminal charge pending against them, as well as alternative charges to which these immigrants might be able to negotiate a guilty plea. We also counsel these immigrants about their prospects for discretionary relief from deportation in later immigration proceedings should they be convicted of a deportable offense.

In our experience, immigrants frequently made, and make, the decision whether to stand trial or plead guilty based on the advice they received from us regarding the immigration consequences of the alternative courses of action. In fact, many immigrants have decided to go to trial in reliance upon the advice we gave them that doing so would not harm their right to seek deportation relief, and that under the standards applied by the Board of Immigration Appeals ("BIA"), such relief was likely to be granted.[1] That advice was based on the law in effect at the time, which gave these immigrants the right to apply for discretionary deportation relief. It was also based on our experience that many of these immigrants could expect to obtain relief from deportation based on their length of residence in the United States, and other equities such as their family ties and evidence of rehabilitation.

[1] Section 212(c) relief is governed by predictable standards, "comparable to common-law rules," *St. Cyr*, 121 S. Ct. at 2277 n.5, which are set out in over 60 years of BIA precedent.

If the right to apply for deportation relief is taken away from these individuals, our advice regarding the immigration consequences of their convictions will, retrospectively, be rendered incorrect, and the immigrants will have relied to their detriment on our counsel. Moreover, it is our experience that if these immigrants had known that, by virtue of a decision to go to trial, they would forfeit their right to seek deportation relief, many would have sought to enter into agreements to plead guilty to different charges that preserved the possibility of deportation relief – even if the immigrant believed in his or her innocence of the government's charges, or that an acquittal on such charges was attainable at trial.

The retroactive repeal of deportation relief will convert what was a possibility of deportation into mandatory removal from this country for many immigrants. Amici respectfully ask this Court to decline to apply the statutory repeal to these immigrants, in light of the unfairness of undermining the immigrants' reliance on the prior legal regime in making important decisions about their cases, and of disturbing their settled expectations as to their ability to continue to reside in this country.

BACKGROUND

A. Statutory Background

Under the statutory regime in place prior to 1996, a lawful permanent resident immigrant convicted of a deportable offense was statutorily eligible,

pursuant to § 212(c) of the Immigration and Nationality Act, to seek from the Attorney General discretionary relief from deportation ("212(c) relief"). *See* 8 U.S.C. § 1182(c) (1994). With the passage of two new laws, the AntiTerrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-128, 110 Stat. 3009, Congress has significantly restricted the availability and scope of deportation relief.

Prior to IIRIRA, immigrants who were deportable on the basis of a criminal offense could apply for 212(c) relief so long as they had lived in this country continuously for seven years.[2] Only those who had been convicted – either by plea or at trial – of a crime that fell under the definition of an "aggravated felony," *see* 8 U.S.C. § 1101(a)(43) (1994), and who had *served* a prison term of at least five years were statutorily ineligible for discretionary relief. *See* 8 U.S.C. § 1182(c) (1994). Even a defendant convicted of an aggravated felony and sentenced to five or more years' imprisonment might have maintained eligibility for 212(c) relief provided that, as often occurs, he had not served five years of his sentence by the

[2] Even if a lawful permanent resident had not lived in this country for seven continuous years at the time of the criminal proceedings, he could still seek a discretionary waiver if he had fulfilled the residency requirement as of the time of a final administrative order of deportation. *See Matter of Lok*, 18 I&N Dec. 101, 105 (BIA 1981).

time of his removal hearing.[3] Relief was, in short, available to a large number of immigrant defendants, regardless of the sentence ultimately imposed.

Section 212(c) relief was not conditioned on the means by which an immigrant acquired a conviction: it was equally available to those who were convicted by entering a guilty plea as to those who were convicted at trial. And there was a strong likelihood that such relief would be granted: the Attorney General granted it in over half of all cases in which it was sought. *See St. Cyr*, 121 S. Ct. at 2277 & n.5. Moreover, the relief was predictably granted where certain factors were present, including evidence of rehabilitation, residence of long duration in this country (particularly when the immigrant entered this country at a young age), family ties, evidence of hardship to the immigrant's family as a result of deportation, and stable history of employment. *See Matter of Marin*, 16 I.&N. Dec. 581, 584-85 (BIA 1978).

With IIRIRA, Congress repealed 212(c) relief altogether and replaced it with a provision that created a new and significantly narrower form of relief called "cancellation of removal." This form of relief is now unavailable to any immigrant

[3] *See Matter of Ramirez-Somera*, 20 I&N Dec. 564, 566 (BIA 1992) (immigrant defendant eligible for 212(c) relief despite having been sentenced to 15-year prison term because he had not yet served five years of sentence); *see also Greenidge v. INS*, No. 00 Civ. 1682, 2001 U.S. Dist. LEXIS 19816 (S.D.N.Y. Nov. 27, 2001); *Bosquet v. INS*, No. 00 Civ. 6152, 2001 U.S. Dist. LEXIS 13573 (S.D.N.Y. Sept. 6, 2001).

who was convicted of an aggravated felony, no matter the length of the sentence. *See* 8 U.S.C. § 1229b. The practical effect of the repeal of 212(c) relief, in conjunction with several other statutory amendments,[4] is dramatic: a far larger number of immigrants are now deportable under the new law, while a much smaller number are eligible for any form of relief from deportation. Moreover, if the repeal is applied retroactively to immigrants such as petitioners, the practical effect is that it will convert what was the mere *possibility* (often, a remote possibility) of deportation into a certainty.

B. The Supreme Court's Decision in *St. Cyr*

In *St. Cyr*, the Supreme Court considered the same statutory repeal at issue here, inquiring whether the repeal should apply retroactively to pre-enactment events. The Court held that applying the repeal to the petitioner before the Court, *i.e.*, an immigrant who pled guilty before the new law's enactment, would present a

[4] The definition of aggravated felony has been retroactively expanded to include dozens more offenses, including misdemeanor and low-level felony offenses. *See* 8 U.S.C. § 1101(a)(43). Courts have upheld the application of the expanded definition of "aggravated felony" to seemingly minor offenses. *See, e.g.*, *United States v. Christopher*, 239 F.3d 1191, 1193 (11th Cir.) (misdemeanor state crime of shoplifting, for which immigrant received a 12-month suspended sentence, is aggravated felony), *cert. denied*, 122 S. Ct. 178 (2001); *United States v. Pacheco*, 225 F.3d 148, 154 (2d Cir. 2000) (misdemeanor state theft of a video game valued at $10, for which immigrant received one-year suspended sentence, is aggravated felony), *cert. denied*, 533 U.S. 904 (2001); *United States v. Graham*, 169 F.3d 787, 792 (3d Cir. 1999) (misdemeanor crime of petty larceny is aggravated felony).

"clear[]" example of retroactive effect and, therefore, was impermissible. 121 S. Ct. at 2293.

The Court in *St. Cyr* applied its well-established two-part retroactivity test set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and its progeny. Under the first step of *Landgraf*, the Court held that Congress had not unambiguously prescribed the temporal reach of IIRIRA's repeal of discretionary relief. 121 S. Ct. at 2287-89; *see also St. Cyr v. INS*, 229 F.3d 406, 416 (2d Cir. 2000). That ruling is not subject to challenge and is binding on this Court.

Because Congress had not expressed an intent to apply the repeal retroactively, the Court turned to the second step of the retroactivity analysis – whether the statute would have an impermissible "retroactive effect" if applied to immigrants who pled guilty prior to IIRIRA's enactment. Consistent with this Court's analysis in *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), the Supreme Court rejected the INS's argument that because there always had been the possibility of deportation, the repeal of discretionary relief could never have a retroactive effect. 121 S. Ct. 2293 ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation."). Rather, the Court held that its duty was to make a "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment," 121 S. Ct. at 2290 (internal quotations and

citation omitted), guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 2292 (internal quotations and citation omitted).

In making that judgment, the Court noted that immigrants are "acutely aware" of the immigration consequences when they decide whether to go to trial or accept a plea, and rely on the law governing discretionary relief when making these critical decisions about this criminal case: "[P]reserving the possibility of [212(c)] relief" is one of the main considerations for an immigrant in deciding "whether to accept a plea offer or instead to proceed to trial." 121 S. Ct. at 2291. Indeed, the Court noted that, for some immigrants, preserving the availability of discretionary relief may be more important than any criminal justice consideration. *Id.* Because immigrants may rely at the time of plea on the availability of discretionary relief from deportation, the Court held that applying the repeal of that relief to this class of immigrants would present a retroactive effect that was both "obvious and severe." It therefore held that the petitioner was eligible to apply for discretionary relief. 121 S. Ct. at 2293.[5]

[5]The Justices who reached the merits unanimously concluded that applying the repeal to St. Cyr would be impermissibly retroactive. The dissenting Justices concluded that the Court did not have jurisdiction, and did not opine on the merits. 121 S. Ct. at 2293 (O'Connor, J., dissenting); *id.* at 2294 (Scalia, J., dissenting).

SUMMARY OF ARGUMENT

Applying the statutory repeal of deportation relief to immigrants who, like petitioners, contested the government's charges at trial would be impermissibly retroactive. Prior to the change in law, when these immigrants made the decision to stand trial, discretionary deportation relief was available to them. The immigrants who went to trial often did so in reliance on advice regarding the immigration consequences of going to trial on the charges in question, and, as such, the reasoning of *St. Cyr* extends to these immigrants as well. In addition to disrupting these immigrant defendants' reasonable reliance on the then-extant immigration consequences of a conviction, holding the repeal applicable to immigrants like petitioners would "attach new legal consequences" to their convictions that were unimaginable at the time that they decided to go to trial. *See St. Cyr*, 121 S. Ct. at 2290. The new legal consequence – mandatory deportation – would upset these immigrants' settled expectations and their interest in the law's repose, in which case, under the Supreme Court's retroactivity case law, retroactive application of the statute is prohibited. Finally, there is no basis to conclude that Congress intended to differentiate between immigrants who pled guilty and immigrants who were convicted at trial, because IIRIRA speaks generally of "convictions," without regard to the manner in which they were obtained.

ARGUMENT

A. The Reasoning of *St. Cyr* Extends To Immigrants Who Were Convicted At Trial Before IIRIRA's Enactment, Because Such Immigrants May Have Relied On The Immigration Consequences At The Time They Elected To Face The Charges At Trial, Rather Than Negotiating A Plea To Other Charges.

As in *St. Cyr*, applying the repeal of 212(c) relief to immigrants who were convicted at trial before IIRIRA's enactment would fundamentally disrupt the reliance interests of such immigrants. These immigrants often relied on the immigration consequences of the options available to them at the time – and, specifically, on the availability of discretionary relief – much as immigrants such as St. Cyr relied on the state of the law when deciding to plead guilty.[6] And, as in *St. Cyr*, it is immaterial whether any particular immigrant relied in a specific case; rather, this Court must examine whether, "as a general matter," similarly situated immigrants would have relied on the availability of discretionary relief at the time

[6] This case does not present the question whether the repeal of 212(c) relief could properly be applied to a defendant whose underlying criminal conduct pre-dated IIRIRA but where conviction post-dated IIRIRA. Amici's position on that question is that the repeal should not be applied to such persons, and that this Court's decision in *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001), may appropriately be reconsidered in light of the Supreme Court's decision in *St. Cyr*.

that they decided whether to accept a guilty plea or proceed to trial. 121 S. Ct. at 2291; *see also St. Cyr*, 229 F.3d at 419.[7]

As the Supreme Court recognized, immigrants are "acutely aware" of immigration consequences when making the critical decisions about their criminal case, including whether to plead guilty or go to trial. *St. Cyr*, 121 S. Ct. at 2291. Indeed, it is our experience that, for some immigrants, the immigration consequences of a conviction are more important that any criminal justice penalty. These immigrants will decide whether to go to trial based, in part, on their understanding of the immigration consequences of the charged offense. *See id.* As such, the decision whether to go to trial may be profoundly affected by the legal rules governing 212(c) relief in effect at the time the immigrant is charged.[8]

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[7]Before *St. Cyr*, a minority of circuits had required an immigrant to show he or she actually relied. *Mattis v. Reno*, 212 F.3d 31, 38 (1st Cir. 2000); *Magana-Pizano v. INS*, 200 F.3d 603, 613 (9th Cir. 1999). The Supreme Court rejected this approach. *St. Cyr*, 121 S. Ct. at 2285 n.33, 2291-93.

[8] This Court's decision in *St. Cyr* does not resolve this issue. Although there is dicta in this Court's *St. Cyr* opinion to the effect that "cancellation of removal still applies to all aliens with convictions pre-dating IIRIRA," 229 F.3d at 421, the decision in that case solely dealt with convictions by guilty plea. The Supreme Court's subsequent affirmance of this decision does not indicate its approval for this language: the Supreme Court reviews judgments, not "statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987). In any event, the Supreme Court's resolution of *St. Cyr*, and its recognition of the vital importance to immigrants of deportation consequences in deciding how to proceed when confronted with criminal charges, bear heavily upon the proper resolution of the question presented here.

Where an immigrant defendant has been informed, either by his lawyer[9] or the court, that a conviction of the pending charges will in no way imperil his right to seek 212(c) relief, it is our experience that he will rely on this knowledge and decide whether to go to trial based solely on familiar criminal justice considerations. These include his belief in innocence, the strength of the government's case, and the length of the potential sentence. In that context, the defendant's understanding that conviction will not mean necessary deportation will have formed the very basis of his decision to face these charges at trial. By contrast, in our experience, where a defendant is informed that deportation relief may be unavailable in the event of a conviction on the charged offense, the defendant will often elect to negotiate a guilty plea to different or lesser charges that carry less risk of deportation.

Prior to IIRIRA, a wide range of scenarios existed under which a defendant could decide to stand trial for a deportable offense yet still preserve eligibility for 212(c) relief. Under pre-IIRIRA law, a lawful permanent resident would be ineligible to apply for 212(c) relief if (1) he had been convicted of an "aggravated

[9] Lawyers in the Second Circuit are obligated to inform their clients of the risks of pleading versus going to trial. *See, e.g.*, *Cullen v. United States*, 194 F.3d 401, 404 (2d Cir. 1999); *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996); *see also St. Cyr*, 229 F.3d at 419 (recognizing that "an attorney's professional duty to his or her client includes advising that client of the immigration consequences of a plea or conviction").

felony," *and* (2) he had *served* five or more years in prison. 8 U.S.C. § 1182(c) (1994). Many deportable offenses, however, were not classified as "aggravated felonies," *see, e.g.*, 8 U.S.C. § 1251(a)(2)(A) (1994) (crimes of "moral turpitude"); 8 U.S.C. § 1251(a)(2)(B)(i) (1994) ("controlled substances" violations), so an immigrant could go to trial (even on a deportable offense) with the knowledge that eligibility for 212(c) relief would be preserved. It was also possible to be charged with an aggravated felony that did not carry a possible sentence of more than five years, thereby also preserving eligibility to apply for 212(c) relief.[10] To illustrate, an immigrant could have been charged under New York state law with the following deportable offenses yet preserved eligibility for 212(c) relief:

?? *Any theft crime that carried a maximum sentence of less than five years' imprisonment. See, e.g.*, N.Y. Penal Law § 155.30 (grand larceny in the fourth degree).

?? *A fraud offense. See, e.g.*, N.Y. Penal Law § 170.05 (forgery). Such an offense was typically considered a "crime of moral turpitude," and was not considered an aggravated felony unless the amount of loss at issue exceeded $200,000. *See* 8 U.S.C. § 1101(a)(43)(M) (1994).

?? *Any drug crime that did not carry a maximum sentence of more than*

[10] Other immigrants might face a maximum sentence of more than five years, but might be advised that they would be unlikely to serve more than five years in prison and, therefore, would likely remain eligible for discretionary relief. *Cf.* Brief for United States at n.7, *INS v. St. Cyr*, No. 00-767 (St. Cyr was convicted of an aggravated felony and was sentenced to "ten years imprisonment, with execution suspended after five years," but served less than five years and remained eligible for 212(c) relief).

five years' imprisonment. See, e.g., N.Y. Penal Law §§ 110.05, 220.31.

In these and other cases, we would have counseled the immigrant defendant that the ultimate sentence received would have *no effect* on his right to seek 212(c) relief. With the prospect of mandatory deportation removed from the equation, typically the defendant would then decide whether to go to trial based solely on different criminal justice considerations (*e.g.*, the likelihood and penal consequences of conviction). These immigrant defendants had no reason to believe that, by virtue of a decision to contest the government's charges rather than to negotiate a plea to a different offense, they might be relinquishing the possibility of 212(c) relief. This fact would have been of pivotal importance to many such defendants. Accordingly, their decision to stand trial – like the decision of immigrants like St. Cyr who chose to plead guilty – was anchored in their belief that the course of action they chose (even if it resulted in a conviction) was *preserving* their eligibility to apply for 212(c) relief and stay in this country.

If the rules governing discretionary deportation relief had been different, the defendant's decision-making calculus would have been dramatically altered.[11] For

[11] A telling example is supplied by a case pending in the Fourth Circuit. *See Chambers v. Ashcroft*, No. 00-6364 (4th Cir. 2002). Mr. Chambers was charged with an offense the conviction for which did not even render him *deportable* under prior law. Had Mr. Chambers been advised by counsel that a conviction for robbery with a deadly weapon would ultimately render him both deportable and

example, in our experience, if the immigrant defendants had known that a conviction would result in automatic deportation with no possibility of any relief, many of them would have made it a top priority to preserve their right to remain in this country. Competing criminal justice considerations would have been secondary. Remaining in the country would have been particularly important for defendants with families or other roots in this country.

To that end, many such defendants would have sought to secure a plea arrangement that would not result in disqualification for 212(c) relief. And we, as criminal defense lawyers, would have counseled immigrant defendants charged with offenses like those described above that they should seek to plead to different or lesser charges, rather than stand trial, because of the likelihood that conviction of the offense charged would have rendered them deportable with no possibility of deportation relief. For example, for the immigrant who was charged with a theft crime, the new law dictates that a conviction for *any* theft offense constitutes an aggravated felony if the sentence imposed is greater than one year. *See* 8 U.S.C. § 1101(a)(43)(G). Had we had knowledge of the true immigration consequences, we

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ineligible for discretionary relief, his counsel likely would have tried to negotiate a plea agreement that would not result in his automatic deportation. *See* Brief for Appellant at 7, *Chambers v. Ashcroft*, No. 00-6364 (4th Cir. 2002). Lesser included offenses that would have preserved 212(c) relief were available, including a simple assault offense, or an assault or robbery offense with a prison sentence of less than a year.

would have tried to negotiate a plea agreement to a theft offense that carried a sentence of less than one year. Similarly, for the defendant charged with fraud, the new law provides that any fraud conviction that involves loss to the victims of more than $10,000 is an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(M). We would have known to try to structure a plea agreement to a fraud offense that involved less than the threshold amount of loss. By contrast, under the old law, the $10,000 figure would have had no significance. Likewise, we would have counseled the defendant charged with the drug crime to seek a plea agreement that would have preserved the possibility of 212(c) relief, such as a plea to a drug possession charge. *See Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996).

To secure such a plea, these defendants would have had an incentive to relinquish their right to go to trial, and even to agree to conditions (*e.g.*, a higher sentence; a greater fine or restitution) that they might otherwise have resisted. In our experience, prosecutors are sometimes willing to negotiate pleas that preserve favorable immigration consequences. The prosecutor, of course, has a strong incentive to accept a guilty plea to such an offense, even if the offense was a lesser offense than might otherwise be charged, in order to conserve resources and eliminate the risk of failing to obtain a conviction at trial. *See St. Cyr*, 121 S. Ct. at 2292 (recognizing that the prosecutor receives a benefit in return for accepting a plea). And in some cases, prosecutors have been persuaded that it is most

equitable, in light of the defendant's family circumstances or other factors, to structure a plea that permitted the defendant to seek discretionary relief. *See, e.g.*, *Jideonwo v. INS*, 224 F.3d 692, 699 (7th Cir. 2000) (prosecutor and defense attorney structured plea to preserve availability of discretionary relief); *see also St. Cyr*, 121 S. Ct. at 2292.

For an immigrant defendant facing the possibility of deportation, the decisions whether to go to trial or to enter a plea, and if so, to what offense, are made with the utmost care. *See St. Cyr*, 121 S. Ct. at 2291. A defendant who goes to trial wrongly believing that his opportunity to seek 212(c) relief is secure, or that there is no immigration benefit to negotiating a plea to other charges is equally as disrupted in his reasonable expectations as the defendant (like St. Cyr) who accepts a plea wrongly believing the plea to confer such a benefit.[12]

[12] The INS has argued, in another case, that the holding of *St. Cyr* does not apply to immigrants who were convicted at trial before IIRIRA because an immigrant who goes to trial does not relinquish any constitutional right as part of a "*quid pro quo*" with the government. *See* Supplemental Brief for Appellees at 2-4, *Chambers v. Ashcroft*, No. 00-6364 (4th Cir. 2002). While the Court in *St. Cyr* noted that "plea agreements involve a *quid pro quo* between the criminal defendant and the government" and that, in a plea, "defendants waive several of their constitutional rights," 121 S. Ct. at 2291, these statements only underscored the Court's conclusion that the strong reliance interests present created an "obvious and severe" retroactive effect. *St. Cyr* does not state or imply that a "*quid pro quo*" or waiver of constitutional rights is required to establish retroactive effect. The "reliance" formulation of retroactive effect is premised on the idea that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly," *Landgraf*, 511 U.S. at 265; there is no expectation of a

A defendant's understanding of the immigration consequences of the offense charged may also affect decisions made during trial. For example, consider the strategic choices facing an immigrant being tried for fraud or tax evasion. After IIRIRA, an immigrant convicted of either of these crimes would be subject to mandatory deportation unless the loss to the victim was less than $10,000. 8 U.S.C. § 1101(a)(43)(M). By contrast, in a pre-IIRIRA criminal trial, the $10,000 figure would have had no significance. A defendant aware at the time of trial that his ability to remain in the United States would *turn* on this factual determination would have an enormous incentive to litigate this issue – and not merely guilt or innocence – aggressively. *See St. Cyr*, 121 S. Ct. at 2291.

Finally, a person is likely to expend different resources defending himself depending on the ultimate consequences. *See Slusser v. Commodity Futures Trading Comm'n*, 210 F.3d 783, 786 (7th Cir. 2000). In *Slusser*, the Seventh Circuit considered whether it would be impermissibly retroactive to apply an

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quid pro quo exchange in this expression of the anti-retroactivity principle. Indeed, any attempt to make retroactivity turn on a *quid pro quo* or the relinquishment of a constitutional right would be inconsistent with the Court's retroactivity jurisprudence. *See, e.g.*, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (new statute that eliminated a defense to a *qui tam* action could not be applied to pre-enactment conduct; case did not involve a *quid pro quo* or waiver of constitutional rights); *Landgraf*, 511 U.S. 244 (1994) (statute that created compensatory and punitive damages for civil rights violations could not be applied to pre-enactment conduct; case did not involve a *quid pro quo* or waiver of constitutional rights).

increased fine to the defendant. It held that because "[a] reasonable person in Slusser's position would have assumed that his maximum exposure was $600,000 and financed his defense accordingly," it was impermissibly retroactive to apply the increased fine to him. *Id.* The same reasoning applies here: because "[t]here is a clear difference . . . between facing possible deportation and facing certain deportation," *St. Cyr*, 121 S. Ct. at 2293, an immigrant facing the lesser consequence would have planned his defense accordingly. Indeed, for an immigrant operating under the pre-IIRIRA rules, the immigrant might reasonably have decided to allocate his limited resources to preparing and presenting his case at the 212(c) hearing.

As the Supreme Court recognized in *St. Cyr*, "[p]reserving the [immigrant's] right to remain in the United States may be more important to the [immigrant] than any potential jail sentence." 121 S. Ct. at 2291 (internal quotations omitted). Our experience bears this out: immigrants make decisions both before and during trial with the aim of preserving their ability to stay in the United States. Because of these choices, the reasoning of *St. Cyr* should extend to those immigrants who, before IIRIRA, were convicted at trial.

B. Applying Retroactively The Repeal Of 212(c) Relief To Immigrants Who Exercised Their Right To Go To Trial Would Also "Attach New Legal Consequences" To Decisions Made Before IIRIRA And Would Disturb These Immigrants' Settled Expectations.

As the Supreme Court has made clear, a statute has 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." *Landgraf*, 511 U.S. at 269 (internal quotations omitted). Under this inquiry, even where the defendant did not specifically rely on the prior legal regime at the time that he took the action that subjected him to it, it may still be improper to apply later-enacted laws to that action. Rather, the Court makes a "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment," 121 S. Ct. at 2290 (internal quotations and citation omitted), and whether doing so would offend the standards not only of reasonable reliance, but also fair notice and settled expectations. *Id.* at 2291.[13] Indeed, the Supreme Court has found impermissible retroactive effect without considering whether a party did rely – or even could have relied – on the prior law. *See, e.g.*, *Hughes Aircraft*, 520 U.S. at 947-50 (conducting retroactivity analysis without any discussion of the defendant's reliance on prior law either in engaging in its primary conduct, which was the submission of a false claim to the government, or its secondary conduct, which was disclosure of that information to the government);

[13] *St. Cyr* is not to the contrary: in finding that the reliance presented there was an "obvious and severe" instance of retroactive effect, 121 S. Ct. at 2293, the Supreme Court did not imply that reliance was necessary. Rather, it emphasized that there is no single test for retroactivity. *Id.* at 2290-92, 2293 & n.46.

see also Velasquez-Gabriel v. Crocetti, 263 F.3d 102, 109 (4th Cir. 2001) (noting that Supreme Court found retroactive effect in *Hughes Aircraft* without considering "whether any party detrimentally relied on previous law").[14]

In this case, apart from undermining immigrants' reasonable reliance interests, the elimination of 212(c) relief would also "attach[] new legal consequences to events completed before its enactment," *St. Cyr*, 121 S. Ct. at 2290. The new consequence – *mandatory* deportation – thoroughly disrupts these immigrants' "settled expectations" and their trust in the law's repose. *See id.* at 2292 (settled expectations "surely" disrupted by applying IIRIRA's restrictions to petitioners); *Martin v. Hadix*, 527 U.S. 343, 358 (1999); *see also Landgraf*, 511 U.S. at 266 ("interests in fair notice and repose … may be compromised by retroactive legislation").

Retroactively transforming the possibility of deportation into a certainty would be a crushing blow to immigrants and their families. These persons had often developed settled expectations that deportation was at most a remote

[14] This conclusion is further buttressed by cases decided under the Ex Post Facto Clause. The Supreme Court has repeatedly analogized to Ex Post Facto cases for guidance in deciding civil retroactivity cases, *see Hughes Aircraft*, 520 U.S. at 948; *Landgraf*, 511 U.S. at 266-67, 269 n.23, and it did so again in *St. Cyr*, 121 S. Ct. at 2293. In the Ex Post Facto context, the Court has squarely held that reliance is not required to establish a retroactive effect. *Carmell v. Texas*, 529 U.S. 513, 533 (2000); *see also Lindsey v. Washington*, 301 U.S. 397, 401 (1937).

possibility. Some immigrants affected by the law were convicted of crimes many years, or even *decades*, ago. They had lived their lives believing that, should deportation proceedings be commenced, they had a very real chance for relief, particularly where their subsequent rehabilitation and law-abiding conduct made them strong candidates under the BIA's standards for granting such relief. If their deportation becomes mandatory, they will be leaving behind the very spouses they decided to marry, the children they decided to have and raise, the aging parents they decided to care for, the homes they decided to buy, and the businesses they decided to run, all in the expectation that they would have the opportunity to present the individual equities of their cases, and that they would be able to try to persuade a court to grant them deportation relief. Absent evidence that Congress intended this result, this Court should apply the presumption against retroactivity, *St. Cyr*, 121 S. Ct. at 2288, so as to respect these settled expectations.

C. Retroactivity Analysis Is A Proxy For Congressional Intent, And There Is No Basis For Ascribing To Congress The Intent To Eliminate 212(c) Relief For Those Immigrants Who Pled Guilty Before IIRIRA But Not For Those Who Went To Trial.

Finally, there is no basis in the statute for limiting *St. Cyr*'s finding of retroactive effect to the facts of that case, thereby providing relief only to persons convicted by plea, but not at trial. Retroactivity analysis serves as a proxy for congressional intent. *Landgraf*, 511 U.S. at 272; *see also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 858 n.3 (1990) (Scalia, J., concurring) (the

"application of the presumption [against statutory retroactivity], like the presumption itself, seeks to ascertain the probable legislative intent"); *see also Landgraf*, 511 U.S. at 273 (Congress passes statutes against the "predictable background rule" of the presumption against retroactivity). There is no basis to conclude that Congress sought to distinguish between convicted immigrants depending on whether they pled guilty or were convicted at trial. The plain language of the statute is, in fact, to the contrary.

In IIRIRA, Congress legislated with respect to "convictions" – not "trials" or "pleas." *See, e.g.*, 8 U.S.C. §§ 1227(a)(2) (defining deportable offenses with reference to convictions), 1229b(a) (cancellation of removal not available to an immigrant "convicted" of an aggravated felony). This legislative decision in IIRIRA is consistent with congressional decisions in pre-IIRIRA law, in which Congress also had legislated with respect to "convictions," without making a distinction as to how the conviction came to be obtained. *See, e.g.*, 8 U.S.C. 1182(c) (1994) (212(c) relief available to all lawful permanent residents except those "convicted" of an aggravated felony and sentenced to more than five years' imprisonment). Had Congress determined that it was desirable, for some reason, to draw a distinction between those defendants who pled and those who did not, the new law would have reflected this policy choice. *See Landgraf*, 511 U.S. at 273

(clear statement requirement forces Congress to take responsibility "for fundamental policy judgments concerning the proper temporal reach of statutes").

Under the INS's approach, a defendant who pled guilty to a particular deportable offense would have the right to 212(c) relief, whereas a defendant who was convicted at trial of *the identical charge on the same day* would face mandatory deportation. It is inconceivable that Congress intended this result, and this Court should not interpret IIRIRA to bring it about.

CONCLUSION

For the foregoing reasons, this Court should hold that the repeal of 212(c) relief may not be applied to immigrants, such as Mr. Lawrence and Mr. Rankine, who were convicted at trial before the enactment of IIRIRA.

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