No. 10-694

IN THE
Supreme Court of the United States

JOEL JUDULANG,
Petitioner,
v.
ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL LEGAL AID & DEFENDER ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 12,500 members nationwide, joined by 35,000 members of 90 affiliate organizations in all 50 states. Founded in 1958, NACDL promotes criminal law research, advances and disseminates knowledge in the area of criminal practice, and encourages integrity, independence, and expertise among criminal defense counsel. NACDL's members include criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The National Legal Aid & Defender Association ("NLADA"), founded in 1911, is this country's oldest and largest nonprofit association of individual legal professionals and legal organizations devoted to ensuring the delivery of legal services to the poor. For one hundred years, NLADA has secured access to justice for people who cannot afford counsel through the creation and improvement of legal institutions, advocacy, training and the development of nationally applicable standards. NLADA

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

promotes the fair, transparent, efficient and uniform administration of criminal justice, and serves as the collective voice for both civil legal services and public defense services throughout the nation.

Many of the members of NACDL and NLADA are called upon to give legal advice to lawful permanent resident clients regarding the immigration consequences of criminal proceedings in connection with those clients' decisions as to whether to enter into a guilty plea. Many provided such advice prior to the 1996 repeal of former Section 212(c) of the Immigration and Nationality Act. The decision of the court and Board of Immigration Appeals ("BIA") below would have the effect of retroactively rendering an essential element of that advice inaccurate: advice that discretionary relief under former Section 212(c) was available in deportation proceedings to lawful permanent residents who pleaded guilty prior to 1996 and remained in the country, with only two relatively limited exceptions, namely, firearms offenses, and aggravated felony offenses for which five or more years in prison have been served. NACDL's and NLADA's members did not advise their lawful permanent resident clients pleading guilty to other offenses that in order to seek Section 212(c) relief they would have to leave the country, either to trigger exclusion proceedings and an opportunity to seek relief in that context upon their return, or to gain the ability to obtain "*nunc pro tunc*" relief from exclusion that would also operate to relieve deportability.[2] Thus, NACDL and NLADA

[2] In 1996, Congress began using the term "inadmissible" in lieu of "excludable" and developed a single "removal" proceeding for

have an interest in ensuring that Section 212(c) relief, which this Court has already ruled was not eliminated by Congress retroactively, not be eviscerated retroactively by way of BIA decision for a vast swath of legal permanent residents who pleaded guilty to deportation-triggering offenses prior to 1996.

SUMMARY OF ARGUMENT

When thousands of lawful permanent residents chose to plead guilty to criminal offenses prior to 1996, they generally did so with the advice of counsel that they would be entitled to seek discretionary relief from deportation under Section 212(c) of the Immigration and Naturalization Act. After Congress repealed Section 212(c), this Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001), that "familiar considerations of fair notice, reasonable reliance, and settled expectations" dictated that such discretionary relief should remain available to people who entered their pleas before the law changed. *Id.* at 323 (quotation marks omitted). The Court specifically concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or proceed to trial," given that "competent

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both inadmissible and deportable aliens. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-589. This change was one of nomenclature only, as the statutory distinction between the two categories of individuals remains. *Compare* 8 U.S.C. § 1182(a) (inadmissibility) *with id.* § 1227(a) (deportability). This brief uses the terms "deportation" and "exclusion" where applicable to the analysis under former Section 212(c).

defense counsel, following the advice of numerous practice guides, would have advised [them] of the provision's importance." *Id.* at 321-23 & n.50. In reaching this conclusion, this Court cited evidence marshaled in an *amici* brief submitted by NACDL and other associations of public and private criminal defense lawyers. *Id.*

This case threatens the same disruption of justified reliance interests that this Court held in *St. Cyr* was not permissible, with only a minor twist. The agency interpretation that was struck down in *St. Cyr* would have cut off Section 212(c) relief for all lawful permanent residents with pre-repeal guilty pleas to crimes for which Congress had eliminated this form of relief. The agency interpretation affirmed by the decision below would have the same effect, except that it would be limited to lawful permanent residents whose convictions would not have precluded Section 212(c) relief in a deportation proceeding prior to 1996, but who remained in the country after pleading guilty to their deportation-triggering offenses. Yet the expectations of the members of this subset of lawful permanent residents with pre-1996 convictions were no different than the expectations of Enrico St. Cyr and other members of the larger group. At the time of their pre-1996 guilty pleas, both sets of people would have been advised by counsel that they could seek discretionary relief under Section 212(c) if later found to be excludable or deportable *regardless of whether or not they remained in the country*.

This conclusion is borne out in the same sources this Court relied on in *St. Cyr* – the practice guides

and training programs used by the criminal defense bar to advise its clients on immigration issues. And it is borne out in the pre-1996 law, which confirms that in all relevant respects, the availability of Section 212(c) relief was identical in the deportation and exclusion contexts. *St. Cyr* held that these considerations demonstrated that Congress did not intend to retroactively withdraw Section 212(c) from those that relied upon its availability. These same considerations also demonstrate that the government has no basis to adopt an administrative interpretation of Section 212(c) that would achieve much the same retroactive effect.

ARGUMENT

I. PRIOR TO 1996, LAWFUL PERMANENT RESIDENTS IN PETITIONER'S POSITION PLEADED GUILTY IN REASONABLE RELIANCE ON THE RIGHT TO SEEK SECTION 212(C) RELIEF FROM DEPORTATION.

In *St. Cyr*, this Court held that the 1996 Amendments to the INA did not affect the availability of Section 212(c) relief for convictions obtained by guilty pleas occurring before the amendments' enactment. 533 U.S. 289. The Court reasoned that eliminating "any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief" constituted an unfair retroactive impact not clearly intended by Congress. *Id.* at 321 (quotation marks omitted).

In arriving at this holding, the Court relied in part on a brief submitted by *amici* NACDL and criminal defense associations from around the

country. *Id.* at 323 & n.50. That brief canvassed a wide array of criminal defense practice aides, training programs, and expert declarations that illuminated the type of advice that lawful permanent resident criminal defendants received from their attorneys prior to 1996 about the immigration consequences of pleading guilty. *See* Brief for National Association of Criminal Defense Lawyers, et al., as *Amici Curiae*, *St Cyr,* 533 U.S. 289 (2001) (No. 00-767), 2001 WL 306179. The materials presented by amici in *St. Cyr* established that prior to 1996 lawful permanent resident criminal defendants were routinely advised by their defense counsel about the availability of Section 212(c) relief in connection with deciding whether to accept a guilty plea. And as this Court recognized, the materials showed that "preserving the possibility of [Section 212(c)] relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr*, 533 U.S. at 323 & n.50.

The same evidence that was before this Court in *St. Cyr* reflects that the consistent and well-established practice of competent defense counsel prior to 1996 was not merely to assert the existence of Section 212(c) relief in general terms. Rather, competent criminal defense counsel routinely advised their lawful permanent resident clients, consistent with the "statutory counterpart" rule as it was then applied, that Section 212(c) relief would be available for most offenses, with narrowly delineated exceptions. More specifically, defense counsel advised these clients that the exceptions were

limited to crimes involving firearms (because typically such offenses would not have provided a basis for exclusion and therefore had no statutory counterpart) and aggravated felony offenses where the defendant has served a term of imprisonment of more than five years (circumstances that Congress had expressly provided in the Immigration Act of 1990 would bar Section 212(c) relief). This advice was based on administrative and judicial case law, as well as the "in the trenches" expertise of practitioners who had dealt with hundreds of deportation proceedings and requests for Section 212(c) relief over the years.

Yet, beginning in 2005 with its decisions in *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005), and *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (BIA 2005), the BIA adopted the view that Section 212(c) relief for pre-1996 criminal convictions is limited to only those deportation grounds that have a "closely-worded" counterpart in the grounds for exclusion. Under this interpretation, a large number of lawful permanent residents who pleaded guilty prior to 1996 – including lawful permanent residents who pleaded guilty to offenses constituting aggravated felony crimes of violence, such as Petitioner – are ineligible for Section 212(c) relief in a deportation proceeding. This is the case under the BIA's interpretation even though the same individuals would be eligible to seek this discretionary relief if they were to travel outside the United States and upon their return were placed in exclusion proceedings based on those same pre-1996 convictions. Moreover, and of special concern to

amici, this interpretation is contrary to how these lawful permanent resident defendants were advised in connection with their pre-1996 guilty pleas by their defense counsel, as it was not the state of the law prior to 2005.

As this Court recently recognized in *Padilla v. Kentucky*, criminal defense counsel are ethically obliged to inform their clients about the immigration consequences of a guilty plea. 130 S. Ct. 1473, 1482 (2010). Their clients in turn rely on that advice, and in the case of lawful permanent resident defendants this advice often matters to them even more than advice concerning the criminal law consequences of a plea. Accordingly, if this Court were to permit the approach the BIA has adopted, it would retroactively make erroneous the advice given by criminal defense counsel to innumerable lawful permanent resident clients regarding the types of convictions that would preserve eligibility for Section 212(c) relief.

A. Consistent With The State Of The Law At That Time, Lawful Permanent Residents Were Advised That They Could Apply For Section 212(c) Relief If Convicted Of Any Deportable Crime, With Limited Exceptions Not Applicable To Individuals Such As Petitioner.

At the outset, it is important to recognize that the law and practice governing Section 212(c) eligibility was clear prior to the BIA's decisions in *Blake* and *Brieva-Perez*. Prior to the repeal of Section 212(c), criminal defense lawyers advised their lawful permanent resident clients that they could seek discretionary relief from deportation based on a

guilty plea to a deportable offense – with very limited exceptions – regardless of whether or not they left the country following their plea. This consistent practice by the criminal defense community was based on the statutory counterpart rule as it was applied at that time.

There are numerous BIA cases confirming that this advice represented a noncontroversial understanding of the statutory counterpart rule. Specifically, pre-*St. Cyr* cases make clear that the key question for application of the statutory counterpart rule was whether the lawful permanent resident's conviction that was the basis for deportation could also serve as grounds for exclusion – not whether equivalent language was employed in the immigration statute to describe the basis for deportation and the basis for exclusion. As most convictions were understood to constitute grounds for both deportation and exclusion – typically as crimes involving moral turpitude – Section 212(c) relief was generally available for criminal convictions in both types of proceedings, including aggravated felony convictions, with only narrow exceptions. This was true even though the INA's deportation provisions, but not its exclusion provisions, utilized the words "aggravated felony" to identify certain deportation grounds. *See, e.g., Matter of Meza*, 20 I. & N. Dec. 257, 259 (BIA 1991) (characterizing the analysis as whether "conviction for [a particular] felony . . . could also form the basis for excludability" and explaining that "a waiver under section 212(c) is not unavailable to an alien convicted of an aggravated felony simply because

there is no ground of exclusion which recites the words, 'convicted of an aggravated felony'"); *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 287 (Att'y Gen. 1991) ("[A]n alien subject to deportation must have the same opportunity to seek discretionary relief as an alien who has temporarily left this country and, upon reentry, been subject to exclusion."); *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-91 (BIA 1992) (murder conviction does not preclude application for section 212(c) relief) *See also* Petitioner's Brief at 4-22 (discussing the statutory counterpart rule).

In fact, based on the application of the statutory counterpart rule prevailing before *Blake* and *Brieva-Perez,* there were primarily two grounds for deportation that could not also form the basis for exclusion: firearms offenses and entry without inspection.[3] Neither of these grounds afforded the

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[3] *See, e.g., Matter of Rodriguez-Cortes*, 20 I. & N. Dec. at 589 ("In order to determine if the respondent is eligible for a section 212(c) waiver of inadmissibility, we must address the question whether she is deportable pursuant to section 241(a)(2)(C) of the Act[, covering firearms offenses]."); *Matter of Esposito*, 21 I. & N. Dec. 1, 10 (BIA 1995) ("[W]e note that . . . no court which has addressed the issue has held that a section 212(c) waiver is available to waive deportability on the ground of a firearms offense. . . . the respondent is ineligible for relief under section 212(c) of the Act because he has been found deportable under a ground of deportation which does not itself have a comparable ground of exclusion."); *Matter of Montenegro*, 20 I. & N. Dec. 603, 604-05 (BIA 1992) ("[E]ven after the 1990 revisions, there is no corresponding exclusion ground to the charge of deportability under section 241(a)(2)(C) of the Act," covering firearms offenses.); *Cato v. INS*, 84 F.3d 597 (2d Cir. 1996) (holding that the deportation grounds of a weapons offense had

possibility of seeking Section 212(c) relief in a deportation proceeding, because neither was a basis for excludability. Thus, necessarily, there could be no application for Section 212(c) relief from exclusion on those grounds.

Defense counsel, who were obligated to inform their clients of the immigration consequences of a criminal conviction, *see infra*, relied on this body of case law in advising their clients. And as we explain in the next section, the teachings of that case law were consistently reflected in the practice guides and expert trainings for criminal defense attorneys at that time.

B. Practice Aides And Training Programs Instructed Defense Lawyers That Lawful Permanent Residents Could Apply For Section 212(c) Relief If Convicted Of Any Deportable Crime, With Limited Exceptions Not Applicable To Individuals Such As Petitioner.

The starting point for any criminal defense lawyer seeking to understand the immigration consequences of a noncitizen's guilty plea would be the criminal defense practice guides governing that defense lawyer's state or federal law criminal practice. Prior to the BIA's decisions in *Blake* and *Brieva-Perez*, the practice guides looked to by criminal defense attorneys across the country taught that Section 212(c) relief would be available for

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no statutory counterpart in 212(a)); *Farquharson v. U.S. Att'y Gen.*, 246 F.3d 1317, 1324 (11th Cir. 2001) ("Farquharson is deportable on the statutory ground of entry without inspection, for which there is no analogous ground for exclusion.").

lawful permanent residents convicted of a wide array of offenses prior to 1996. These guides took into account the statutory counterpart rule by further instructing as to the – at the time – very limited situations in which the nature of the offense would preclude a lawful permanent resident from seeking 212(c) relief in a deportation proceeding.

These materials are the same materials that were before this Court in the *St. Cyr* matter. Thus, the same evidence that led this Court to conclude that lawful permanent residents would have been advised by competent defense counsel of the existence of 212(c) relief generally also demonstrates that this advice specifically included advising lawful permanent residents that the only criminal offenses for which they would not be eligible to seek relief would be firearms offenses, as well as (after 1990) aggravated felonies for which a term of more than five years was actually served.[4]

For example, in California, the state in which Petitioner pleaded guilty to his underlying crime, the basic "bible" of criminal defense for California practitioners, *California Criminal Law: Procedure and Practice*, contains a full chapter devoted to "Representing the Noncitizen Criminal Defendant." *See* Declaration of Katherine A. Brady at 2 filed in *In re Resendiz*, No. S078879 (Cal. Jan. 7, 1999).[5] The

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[4] The guides generally did not discuss the unavailability of 212(c) relief to entry without inspection deportations because the guides were concerned with the immigration consequences of criminal convictions, not entry without inspection.

[5] With the exception of the 1988 edition of the treatise *Immigration Law and Crimes*, *see infra* pp.15-16, the materials

1996 edition of that chapter stated that "[w]ith two exceptions, the [Section 212(c)] waiver can excuse any ground of exclusion or deportation." Continuing Education of the Bar ("CEB"), *California Criminal Law: Procedure and Practice* § 48.22 (3d ed. 1994-1996). The first exception cited was offenses "involving firearms or destructive devices." *Id.* The second was "a person who has served a total of five years for conviction of one or more aggravated felonies." *Id.* Another highly-respected guide for California practitioners, published by immigration law experts at the Immigrant Legal Resource Center and entitled *California Criminal Law and Immigration*, explained in 1995 that relief under 212(c) could be sought for a conviction constituting a basis for deportation if that conviction "could also serve as a basis for exclusion." Katherine A. Brady, et al., Immigrant Legal Resource Center, *California Criminal Law and Immigration* § 9.13 (1995 ed.). Thus, as this guide explained, at the time the requirements for Section 212(c) eligibility were: "Lawful permanent resident with 7 years of lawful unrelinquished domicile. Not deportable under the firearms/explosives ground. Not incarcerated for five years for one or more aggravated felonies." *Id.* § 11.10.

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cited in this section and the following section were lodged by NACDL with the Court in *St. Cyr*. Lodging to Brief of *Amici Curiae* NACDL, et al., *INS v. St. Cyr*, 533 U.S. 289 (No. 00-767) ("St. Cyr Lodging"). In light of the Court's subsequent change to the lodging rule, *see* S. Ct. R. 32.3, NACDL has assembled a file of these materials and will make it available to the Court upon request to NACDL's counsel of record.

Similarly, the 1990 edition of the California public defender's guide states that "[t]he eligibility of [LPRs] to apply for a waiver of deportation or exclusion will survive a conviction for any crime, except [weapons] possession." Katherine A. Brady & David S. Schwartz, *Public Defenders' Handbook on Immigration Law* § 1.4 (California Public Defenders Ass'n, 1988 ed.); Katherine A. Brady & David S. Schwartz, *Public Defenders' Handbook on Immigration Law* § 1.4 (California Public Defenders Ass'n 1989 2d ed.) (repeating same advice in previous year). A 1995 resource published by the Federal Defenders of San Diego, and available for use by federal defenders throughout the country, taught that Section 212(c) is "[t]he most readily available form of relief from deportation/exclusion" and that "[i]t even applies to aggravated felons, if they are sentenced to less than five years imprisonment." Larry Ainbinder, updated by Hilary Hochman, *Special Considerations in Representing the Non-Citizen Defendant* § 17.06 in *Defending a Federal Criminal Case* (Federal Defenders of San Diego, Inc., 1995 ed.).

Criminal defense guides around the country reflected the same guidance provided to and by defense counsel in California. For instance, a 1995 practice guide from the Northwest Immigrants Rights Project in Seattle offered the following description of Section 212(c) availability:

> This waiver can be used to waive all the criminal grounds of exclusion described above, and most of the criminal grounds for deportation, including drug-related

> convictions. It is important to note, however, that the 212(c) waiver will not waive a firearms conviction. Also, the 212(c) waiver is not available to an LPR who has been convicted of an aggravated felony and served 5 years or more in prison.

Robert Pauw & Jay Stansell, Northwest Immigrant Rights Project, *Immigration Consequences of Criminal Convictions* 16 (1995 ed.); Robert Pauw & Jay Stansell, Northwest Immigrant Rights Project, *Immigration Consequences of Criminal Convictions* A-13 (1992 ed.) (repeating same advice in previous year). This guide mentions no other restrictions. *See also, e.g.,* Ainbinder & Hochman, *supra*, § 17-852 ("The most readily available form of relief from deportation/exclusion is the discretionary waiver available under § 212(c) of the Act. This waiver is available to aliens who have accrued at least seven years of uninterrupted legal resident status in the United States. It even applies to aggravated felons, if they are sentenced to less than five years imprisonment.").

Indeed, the leading national treatise on the question of the immigration consequences of criminal convictions, entitled *Immigration Law and Crimes*, contained the same guidance as the myriad other sources to which criminal defense attorneys looked to for guidance so as to be able to effectively advise their clients. As long ago as 1988, this treatise taught that Section 212(c) relief from deportation could be sought where there was a comparable

ground for exclusion. The treatise then explained that for this reason firearms offenses constituted an exception to the general rule of availability of such relief. Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law & Crimes* § 7.5 (1988 ed.).

Other guides also took care to explain the statutory counterpart rule, and in doing so they reinforced the understanding of the criminal defense bar, and the advice given by the bar to our clients, that Section 212(c) relief could be sought for convictions other than firearms offenses. Thus, the 1990 Public Defenders' Handbook on Immigration Law explained that murder, rape, voluntary manslaughter, robbery, burglary, theft (grand or petit), arson, aggravated forms of assault, and forgery, were all offenses that had been consistently held to involve moral turpitude. Brady & Schwartz, *Public Defenders' Handbook on Immigration Law*, *supra*, § 4.7 (1989 2d ed.); *see also* Sarah M. Burr, Legal Aid Society, *Immigration Consequences of Criminal Convictions for Non-Citizen Clients* N-9 (1991) (murder, voluntary manslaughter, kidnapping, aggravated assault, kidnapping, rape, sexual abuse, robber, and burglary are all crimes deemed to involve moral turpitude). In contrast, the Public Defender's Handbook explains, firearms possession offenses generally do not involve moral turpitude. Brady & Schwartz, *Public Defenders' Handbook on Immigration Law*, *supra*, Table (1989 2d ed.). Therefore, "[n]on-citizens who plead to such weapons offenses [would] be rendered deportable and ineligible for 212(c) relief." *Id.* § 11.6.

In addition to providing practice guides, over the years nationally renowned experts have trained public defenders and other criminal defense attorneys around the country that Section 212(c) relief for pre-1996 convictions is widely available in deportation proceedings, with only a few specific exceptions. *See, e.g.*, Declaration of Katherine A. Brady, *supra*.

For instance, a 1994 California training seminar for federal public defenders instructed that "The waiver provided for under section 212(c) of the act is the last remedy available to many aliens convicted of serious crimes, including aggravated felonies. . . . This is an extremely important waiver. . . . [T]he waiver continues to be available even to aggravated felons, [except that] . . . the waiver is not available to aggravated felons who have served a term of imprisonment of at least five years." Jan Joseph Bejar, *Representing Aliens in Criminal Proceedings: Some Pitfalls for the Criminal Practitioner to Avoid* (1994). A 1994 orientation seminar for federal defenders in Phoenix Arizona similarly specified that aggravated felons may not eligible for waivers, but only "if the person has been convicted of an aggravated felony *and* served a term of imprisonment of at least five years." Tova Indritz, Orientation Seminar for Assistant Federal Defenders, *Representing a Non-Citizen Client in a Criminal* Case 19 (Phoenix, Arizona, Nov. 7-11, 1994) (internal quotation marks omitted) (emphasis added).

A training provided by the Santa Clara County Bar Association in 1995 explained to defense counsel

that the way to determine if a client would be eligible for relief from deportation despite a guilty plea was as follows: "Is crime one of the listed aggravated felonies? . . . *If yes*, client is deportable. If there is a firearm conviction, no waiver available. If there is no firearm conviction, then, client may be eligible for 212(c) waiver. (Client must be LPR for 7 years to be eligible to apply)." Victor Castro & Benardo Saucedo, Criminal Law Section of the Santa Clara County Bar Association, *Immigration Consequences in Criminal Law* (Oct. 18, 1995).

James A. Benzoni, an immigration expert who delivered trainings on immigration consequences of criminal convictions throughout the state of Iowa in the early 1990s, explained to defense counsel attending his courses that "§ 212(c) relief is based on the grounds of exclusion. Certain grounds of deportation do not have a corresponding ground of exclusion." James A. Benzoni, *Defending Aliens in Criminal Cases* 13 (training materials for criminal defense lawyers CLE program in Iowa from 1994-1997). Benzoni further explained that, pursuant to this principle, the sole exceptions to eligibility for relief were "anyone convicted of a firearm offense" and "[p]ersons who have served five (5) or more years of a sentence for a crime of violence." *Id.*

In sum, over the course of many years, and across the country, the same guidance was given to the criminal defense bar, and the same advice was given by competent defense counsel to their lawful permanent resident clients when those clients were weighing the immigration consequences of pleading guilty to a crime: that with the exception of certain

limited categories of offenses – viz., firearms offenses, and aggravated felonies for which a sentence of more than five years was served – Section 212(c) relief would be available in a deportation proceeding based on a conviction resulting from such a plea. Competent defense counsel did not advise their lawful permanent resident clients that in order to seek such relief they would have to travel outside the country.

C. Lawful Permanent Residents Relied On This Guidance Of Competent Defense Counsel When Pleading Guilty To Crimes.

For a noncitizen criminal defendant, the immigration implications of a criminal conviction are often far more severe than any punishment from the underlying crime. As this Court has repeatedly recognized, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Padilla*, 130 S. Ct. at 1482 (quoting *St. Cyr*, 533 U.S. at 323 (quoting 3 Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999))).[6] Thus, as this Court recently held

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[6] *See also* Declaration of Larry Kupers ¶ 15 filed originally in *Jun Li Tam v. Reno*, No. 99-15775 (9th Cir. Feb. 22, 1999) ("I cannot state strongly enough the enormous importance that his or her immigration status has to a Legal Alien and that it has been my experience that a Legal Alien will place that status first above all other considerations, including even guilt or innocence, when faced with criminal charges conviction of which could result in deportation."); *Mojica v. Reno*, 970 F. Supp. 130, 176 (E.D.N.Y. 1997) ("Deportation to a country where a legal permanent resident of the United States has not lived since childhood; or where the immigrant has no family or means of support; or where he or she would be permanently

in *Padilla*, it expects "that counsel . . . would . . . advise themselves of the importance of [Section 212(c)]," so as to be able to competently advise their clients. *Id.* at 1483 (*citing St. Cyr*, 533 U.S. at 523 n.50).

With respect to a lawful permanent resident's receptivity to a plea, it has been *amici*'s experience that legal aliens are far more likely than a citizen to plead guilty to an offense when doing so reduces the risk of what this Court has "long recognized" as a "particularly severe 'penalty.'" *Id.* at 1481 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)). *See* Declaration of Cristina Arguedas ¶ 9 filed originally in *Jun Li Tam v. Reno*, No. 99-15775 (9th Cir. Feb. 22, 1999) ("[I]t has been my experience that Legal Alien clients are incomparably more risk-averse as a class of criminal defendants than citizen defendants. That is to say . . . . Legal Alien clients will not jeopardize their immigration status in the United States by going to trial when accepting a plea bargain gives them even a modest advantage for the preservation of their immigration status.").

For many criminal defense lawyers, therefore, the "first concern is to determine what kind of plea offer will help to preserve [their] client's legal status in the United States." *Id.* Prior to 1996, this frequently involved pleading to offenses that would preserve a client's right to apply for a Section 212(c) waiver. *St.*

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separated from a spouse, children and other loved ones, is surely a consequence of serious proportions that any immigrant would want to consider in entering a plea."), *motion to withdraw appeal granted sub nom. Yesil v. Reno*, 175 F.3d 287 (2d Cir. 1999).

Cyr, 533 U.S. at 321. As a result, the precise guidance in practice aides and training programs about which crimes preserved Section 212(c) eligibility played a critical role in shaping defendants' pleas. *See, e.g.*, Katherine Brady, Immigrant Legal Resource Center, *Public Defenders' Handbook on Immigration Law: Update* (Update Jan. 1989) ("For immigration purposes, non-citizens should never plead guilty to possession of a firearm or destructive device. Recall that persons who are deportable under this ground are not eligible for '212(c)' relief."); Indritz, *supra*, at 2 (instructing attorneys not to "preclude potential forms of immigration relief for which the client might otherwise be eligible"); Affidavit of Dennis R. Murphy ¶ 7 filed with amicus curiae brief of the National Association of Criminal Defense Lawyers & the National Legal Aid and Defender Association before the Attorney General in *Matter of Soriano*, Int. Dec. 3289 on Apr. 30, 1998 ("[O]ur lawful permanent resident clients have relied on information that we have provided regarding their statutory right to apply for relief from deportation when pleading guilty to a criminal charge that made them deportable from the United States, or when choosing not to pursue an appeal.").

And as this Court recently recognized in *Padilla*, "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." 130 S. Ct. at 1482; *cf. Glover v. United States*, 531 U.S. 198 (2001) (holding that counsel has a Sixth Amendment obligation to mitigate punishment). Indeed, the

Court observed that "authorities of every stripe-including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications-universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients." *Padilla*, 130 S. Ct. at 1482 (quoting Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12-14); *see also ABA Standards for Criminal Justice, Pleas of Guilty* (3d ed.), Standard 14-3.2(f), commentary at 27 (1999) ("it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction").

These obligations of counsel were no less clear prior to 1996. At that time, the Standards for Criminal Justice of the American Bar Association provided that, where it is apparent that a defendant may face deportation as a result of a conviction, counsel "should fully advise the defendant of these consequences." *ABA Standards for Criminal Justice, Pleas of Guilty* (2d ed.), Standard 14-3.2, commentary at 75 (1982). In addition, contemporaneous Performance Guidelines of the National Legal Aid and Defender Association recognized that it is defense counsel's duty to "be fully aware of, and make sure that the client is fully aware of . . . consequences of conviction such as deportation," and to explain to the client the potential consequences of any plea agreement. *NLADA Performance Guidelines for Criminal Defense Representation*, Guidelines 6.2(a)(3) & 6.3(a), at 77 (1994).

Lawful permanent resident criminal defendants pleading guilty relied on the understanding of Section 212(c) eligibility described in the criminal defense practice aides and training programs discussed herein. *See* Part I, *supra*. This guidance reasonably advised among other things that a lawful permanent resident who pleaded guilty to a crime that would be a basis for an exclusion proceeding were the individual seeking admission to the United States, would also be eligible to seek Section 212(c) relief in a deportation proceeding. Such crimes included crimes of violence, such as the crime to which Petitioner pleaded guilty, because these offenses were understood to involve moral turpitude. The existing guidance did not state that criminal defense attorneys should advise their lawful permanent resident clients pleading guilty that in order to seek such relief they would have to leave the United States, and competent counsel did not so advise these clients. Criminal defendants in petitioner's position therefore would have reasonably expected to be able to seek such relief in a deportation proceeding, without regard for whether a guilty plea was followed by travel outside of the United States, and conversely would not have had reason to think that the only way to obtain relief would be to leave the country (thus either triggering exclusion proceedings, or permitting a Section 212(c) waiver of inadmissibility *nunc pro tunc* in subsequent deportation proceedings).

Indeed, if contrary to the manner in which lawful permanent resident criminal defendants were in fact advised, they had been advised that they would be

unequivocally barred from seeking Section 212(c) in all but the narrowest of cases (as the BIA's 2005 decisions in *Blake* and *Brieva-Perez* would have it), then these lawful permanent resident defendants may have rejected the plea offer pursuant to which they were convicted. Before agreeing to plead guilty, many specifically asked their defense lawyers what chance they would have of being granted relief from deportation. As this Court noted in *St. Cyr*, that outcome was far from remote: statistics indicated that "51.5% of the applications for which a final decision was reached between 1989 and 1995 were granted." *St. Cyr*, 533 U.S. at 296 & n.5. Defendants then weighed any immigration consequences just as they weighed other aspects of a plea offer, such as the probable sentence, the availability of parole, and the overall disruption that the plea would cause to themselves and their families.[7]

Finally, it is worth noting that the lawful permanent residents who tended to rely the most on the possibility of a waiver of deportation were precisely those who had the strongest equities, *e.g.*,

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[7] As the Court recognized in *Padilla*, informed consideration of the many consequences flowing from a plea agreement benefits both the State and the defendant, and an understanding of those consequences may allow counsel to "plea bargain creatively with the prosecutor" so as to reduce the severity of those consequences. *Padilla*, 130 S. Ct. at 1486; *see also* Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 How. L.J. 693, 697 (2011) (noting that information as to immigration consequences "may well factor into defense counsel's negotiation or sentencing advocacy," allowing the defendant to obtain "a different or better plea bargain").

individuals who had lived virtually their entire lives in the United States, whose family members were all in the United States, or who had served in the U.S. military. Even if such a permanent resident had no prior criminal record and the evidence of guilt was weak, he or she might have pleaded guilty based on advice that deportation would not be automatic and that there would be a good chance of having a Section 212(c) application granted based on those very same factors – family, job, residence, etc. – that also made it more likely that defense counsel would be able to negotiate a plea with little or no jail time. Indeed, the lack of a prior criminal record could make a plea agreement more likely because in that circumstance the defendant would not face recidivist enhancements to any sentence imposed. The BIA's rule in *Blake* and *Brieva-Perez* would add an additional layer of irony to the plight of those affected by it: these are the lawful permanent resident defendants who, since their guilty pleas, have remained in the country and therefore have only further reinforced their strong ties here over the course of years.

II. THE RULE IN *BLAKE* AND *BRIEVA-PEREZ* HAS THE IMPERMISSIBLE RETROACTIVE EFFECT THAT *ST. CYR* HELD CONGRESS DID NOT INTEND.

The BIA's decisions in *Blake* and *Brieva-Perez* regarding the availability of Section 212(c) relief have the effect of precluding any possibility of such relief for a substantial subset of the lawful permanent residents at issue in *St. Cyr*. Thus, although the government claims that its interpretation is consistent with *St. Cyr*, in fact this

interpretation has the effect of undermining that decision by imposing the very retroactive burdens that *St. Cyr* said were not intended by Congress and are impermissible.

In *St. Cyr*, this Court held that it would have an unintended retroactive effect to eliminate Section 212(c) for defendants previously convicted by guilty plea. In reaching that determination, the Court emphasized that eliminating Section 212(c) would upend the reasonable expectations of lawful permanent residents about the immigration consequences of their guilty pleas, based on the advice of their counsel, and would unfairly deprive them of the benefit of the bargain they struck by pleading guilty in reliance on that advice:

> Relying on settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose Section 212(c) relief, a great number of defendants . . . agreed to plead guilty. Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would surely be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations,' *Landgraf* [*v. USI Film Prods.*, 511 U.S. 244, 270 (1994)], to hold that . . . subsequent restrictions deprive them of any possibility of such relief.

St. Cyr, 533 U.S. at 323-24 (footnote omitted).

So too here. Prior to 1996, lawful permanent residents were advised by counsel that they could seek discretionary relief under Section 212(c) if they were later subjected to exclusion or deportation proceedings based on their guilty plea. And as explained above, lawful permanent resident criminal defendants at that time did not just rely on *some* conception of Section 212(c) relief. Instead, they were specifically counseled that Section 212(c) would be available for a broad range of crimes, with limited exceptions not applicable to Petitioner or others who pleaded guilty to crimes such as his. Yet the government's novel interpretation of the statutory counterpart rule now eliminates the possibility of such relief for all but a sliver of the class that had been covered by *St. Cyr*.

To take Mr. Judulang as an example, if he had been the respondent in *St. Cyr*, *amici* respectfully submit that this Court would have found that depriving him of a Section 212(c) remedy would have had an unintended retroactive effect. His guilty plea to voluntary manslaughter would have been treated as one falling within the scope of the statutory counterpart rule in effect when he pleaded guilty in 1988 (and which continued in effect until 2005) – because it involved moral turpitude – making him eligible for Section 212(c) relief if subjected to exclusion or deportation proceedings based on that conviction. *See, e.g.*, Brady & Schwartz, *Public Defenders' Handbook on Immigration Law*, *supra*, § 1.4 (1988) ("The eligibility of [LPRs] to apply for a

waiver of deportation or exclusion will survive a conviction for any crime, except [weapons] possession."); Brady & Schwartz, *Public Defenders' Handbook on Immigration Law*, *supra*, § 1.4 (1989 2d ed.) (same). Indeed, the BIA's new reasoning would have precluded relief for many individuals previously found by the BIA to be eligible for relief from deportation based on application of the statutory counterpart rule to their crime of violence convictions. *See, e.g.*, *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003) (dismissing agency's appeal of decision granting 212(c) relief to an individual convicted of first degree manslaughter and holding that, although "the ground of deportation and exclusion" are not "identical in wording," the offense "is considered to be a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I)); *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. at 590-91 (finding that an individual who had been convicted of murder, an aggravated felony, was eligible for relief because he was deportable under a provision analogous to the exclusion provision for crimes involving moral turpitude).

Yet under the government's current interpretation of the rule, Petitioner and others like him are no longer entitled to Section 212(c) relief despite having pleaded guilty under a legal regime that unquestionably made that relief available, and under which defendants pleading guilty to crimes of violence such as his were routinely advised by competent defense counsel that this would be the case.

Thus, all of the considerations this Court considered in *St. Cyr* are present here. Then, as now, "[t]here can be little doubt that . . . alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *St. Cyr*, 533 U.S. at 322. Then, as now, "preserving the possibility of [Section 212(c)] relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And then, as now, it would have an "obvious and severe retroactive effect" to eliminate *ex post* the entitlement to Section 212(c) relief, especially because LPRs were frequently successful in obtaining waivers of deportation under the provision. *Id.* at 325, 296 n.5.

St. Cyr resolved whether Congress intended its repeal of Section 212(c) to apply retroactively. Having determined that Congress did not so intend, this Court should now hold that the BIA may not achieve an equivalent result to what *St. Cyr* forbade through agency decision. An "agency's power to promulgate legislative regulations is limited to the authority delegated by Congress," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Nor may an agency change course and impose retroactive consequences where the "ill effect of the retroactive application of a new standard . . . [exceeds] the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). In particular, "an administrative agency may not apply a new rule

retroactively when to do so would unduly intrude upon reasonable reliance interests." *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984).

Here, there is no argument that granting Section 212(c) relief – where the equities so warrant – could be a result "contrary to statutory design" given that this Court has already held that Congress intended to maintain Section 212(c)'s availability for lawful permanent residents convicted before 1996 where that relief was previously available to them. Nor do the other factors that courts typically consider in a *Chenery* analysis support the government's position. *Amici* will not repeat the analysis set forth in Petitioner's brief, Petitioner's Brief at 31-38, but we place special emphasis on the reliance inquiry that *Chenery* requires, and *Heckler* emphasizes. As *St. Cyr* recognized, a plea agreement is a "quid pro quo," that a defendant enters into in part on the basis of the advice of his counsel. 533 U.S. at 322-24. For all the reasons stated above, the government's interpretation in *Blake* and *Brieva-Perez* upends that deal by changing the consequences of a lawful permanent resident's guilty plea. The Court in *St. Cyr* rejected the idea that Congress implicitly intended to change those consequences, and there is no basis for the BIA to retroactively impose such a change here.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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