No. 04-339

In the Supreme Court of the United States

LOUIS EVANGELISTA, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

As a result of 1996 amendments to the Immigration and Nationality Act, a removable alien is ineligible for discretionary relief from removal if the alien was previously convicted of an aggravated felony. The question presented is whether the amendments may be applied to an alien whose criminal conduct predated the amendments but whose conviction postdated them.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 359 F.3d 145. The opinion of the district court (Pet. App. 21a-36a) is reported at 232 F. Supp. 2d 30. The opinion of the Board of Immigration Appeals (Pet. App. 37a-45a), the order of the immigration judge denying petitioner's motion to reconsider (Pet. App. 46a-47a), and the decision of the immigration judge finding petitioner removable and ineligible for relief from removal (Pet. App. 48a-52a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2004. A petition for rehearing was denied on June 9, 2004 (Pet. App. 53a-54a). The petition for a writ of certiorari was filed on September 3, 2004. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1988) (repealed 1996), authorized a permanent resident alien with "a lawful unrelinquished domicile of seven consecutive years" to apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). In the Immigration Act of 1990, Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. See Pub. L. No. 101-649, § 511, 104 Stat. 5052. In April 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien previously convicted of certain types of offenses, including an aggravated felony, without regard to the amount of time spent in prison. See Pub. L. No. 104-132, § 440(d), 110 Stat. 1277. In September 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress repealed Section 212(c), see Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A precludes from discretionary relief an alien who is an aggravated felon. See 8 U.S.C. 1229b(a)(3).

2. Petitioner is a native and citizen of Italy who entered the United States as a lawful permanent resident in 1961. Pet. App. 3a. On February 28, 1996 (*id*. at

38a), a jury in the Eastern District of New York found petitioner guilty of conspiracy to defraud the United States by impeding the collection of taxes, in violation of 18 U.S.C. 371; evading personal income taxes, in violation of 26 U.S.C. 7201; and failing to pay withholding taxes and FICA contributions, in violation of 26 U.S.C. 7202. *United States* v. *Evangelista*, 122 F.3d 112, 113 (2d Cir. 1997) (affirming conviction), cert. denied, 522 U.S. 1114 (1998). On October 30, 1996, petitioner was sentenced to 51 months of imprisonment, and the judgment of conviction was entered the same day. *Ibid*. The criminal conduct that formed the basis for the tax-evasion charge occurred in June 1991. Pet. App. 38a.

3. Under the INA, the definition of "aggravated felony" includes an offense "described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." 8 U.S.C. 1101(a)(43)(M)(ii). In April 1999, on the basis of his conviction of tax evasion, the Immigration and Naturalization Service (INS) initiated proceedings to have petitioner removed from the United States as an alien who had been convicted of an aggravated felony. Pet. App. 48a-49a.[1] An immigration judge (IJ) ruled that petitioner's violation of 26 U.S.C. 7201 rendered him removable as an aggravated felon. Pet. App. 49a-51a. The IJ also ruled that petitioner's status as an aggravated felon made him ineligible for discretionary relief from removal. *Id*. at 51a. The IJ noted, in this

[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. IV, § 441, 116 Stat. 2192 (to be codified at 6 U.S.C. 251).

connection, that petitioner's conviction postdated the 1996 amendments to the INA. *Ibid.*

After the IJ denied a motion to reconsider, Pet. App. 46a-47a, the Board of Immigration Appeals (BIA) dismissed petitioner's appeal, *id.* at 37a-45a. The BIA agreed with the IJ that petitioner's violation of 26 U.S.C. 7201 was an aggravated felony, *id.* at 38a-42a; rejected petitioner's contention that he was eligible for relief under Section 212(c) because his criminal conduct predated the 1996 amendments to the INA, *id.* at 42a-43a; and held that petitioner was not eligible for any other form of relief, *id.* at 44a-45a.

4. Petitioner then filed a petition for a writ of habeas corpus in the Eastern District of New York, naming the Attorney General, the Commissioner of the INS, and the INS as respondents.[2] The district court denied the petition. Pet. App. 21a-36a. After rejecting petitioner's contention that he had not been convicted of an aggravated felony, *id.* at 26a-27a, the court ruled that petitioner was not eligible for discretionary relief from

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[2] Under the principles of *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711 (2004), the proper respondent in a habeas corpus action challenging an alien's custody is the alien's custodian, and the habeas corpus petition must be filed in the district of confinement. See *Robledo-Gonzales* v. *Ashcroft*, 342 F.3d 667, 672-674 (7th Cir. 2003); *Roman* v. *Ashcroft*, 340 F.3d 314, 318-327 (6th Cir. 2003); *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); *Yi* v. *Maugans*, 24 F.3d 500, 507 (3d Cir. 1994). Despite the fact that (according to records of the Bureau of Prisons) petitioner was confined in Allenwood, Pennsylvania at the time he filed his habeas corpus petition, the petition was filed in the Eastern District of New York, and it did not name any official of the Allenwood facility as a respondent. Respondents did not argue in the courts below, however, that the habeas corpus petition should be dismissed or transferred on the ground that petitioner did not name the proper respondent or that he filed in the wrong district.

removal under Section 212(c), *id.* at 28a-34a. The court held that petitioner "is not entitled to a Section 212(c) hearing for discretionary relief from deportation because his conduct took place prior to repeal of the statute and he was convicted after its repeal." *Id.* at 32a.

5. The court of appeals affirmed. Pet. App. 1a-20a. It first held that petitioner's tax-evasion offense was an aggravated felony, and that petitioner was therefore removable. *Id.* at 7a-14a. It then held that petitioner was ineligible for discretionary relief from removal under Section 212(c) of the INA. *Id.* at 14a-20a.

In rejecting petitioner's contention that IIRIRA's repeal of Section 212(c) could not be applied to an alien, like petitioner, who had been "convicted of an aggravated felony based on criminal acts that took place before the repeal," Pet. App. 16a, the court of appeals followed its earlier decision in *Domond* v. *INS*, 244 F.3d 81 (2d Cir. 2001). As the court explained, *Domond* held that the 1996 amendments "impose[d] no new legal consequences" on aliens whose criminal conduct predates the amendments, but whose conviction postdates them, because "[i]t is the conviction, not the underlying criminal act, that triggers the disqualification from § 212(c) relief." Pet. App. 16a (quoting *Domond*, 244 F.3d at 85-86). Again quoting *Domond*, the court added that it "cannot reasonably be argued" that "aliens committed crimes in reliance on a hearing that might possibly waive their deportation." *Ibid.* (quoting 244 F.3d at 86).

Domond was decided shortly before this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which held that IIRIRA's repeal of Section 212(c) does not apply to an alien convicted of an aggravated felony

through a plea agreement at a time when the conviction would not have rendered him ineligible for relief under Section 212(c). The court below noted that it had "reconsidered *Domond*'s viability in light of *St. Cyr* in several cases, and in each concluded that *Domond* remains good law." Pet. App. 17a. The court observed that one of those cases, *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003), was "directly on point" and "squarely govern[ed] [petitioner's] challenge." Pet. App. 18a-19a.

ARGUMENT

Petitioner contends (Pet. 10-18) that it would be an impermissibly retroactive application of the 1996 amendments to the INA to apply them to an alien, like petitioner, whose criminal conduct predates the amendments but whose conviction postdates them, and that petitioner is therefore eligible for discretionary relief from deportation under Section 212(c). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The Second Circuit's decision in *Domond* is correct, and the decision below, which followed *Domond*, is therefore correct as well. As this Court has explained, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994). Rather, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-270. As the Second Circuit explained in *Domond*, the 1996 amendments to the INA

"impose[d] no new legal consequences on aliens * * * whose criminal conduct pre-dates AEDPA, but whose convictions came after AEDPA's enactment," because it is "the conviction, not the underlying criminal act, that triggers the disqualification from § 212(c) relief." 244 F.3d at 85-86 (quoting *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2d Cir. 2000), aff'd, 533 U.S. 289 (2001)).

2. Petitioner cites no decision of any court holding that an alien in petitioner's position—one whose criminal conduct predated the 1996 amendments and whose conviction postdated them—is eligible for discretionary relief from removal under Section 212(c) of the INA. Each of the cases on which petitioner relies involved a different issue.

a. Petitioner suggests (Pet. 10-11) that the court of appeals' decision conflicts with this Court's decision in *St. Cyr*, because, petitioner says, *St. Cyr* "implicitly overrule[d] *Domond*" (Pet. 10). The decision below does not conflict with *St. Cyr*, because the two cases involve distinct issues, as *Domond* itself recognized (see 244 F.3d at 86). The issue in this case is whether the 1996 amendments to the INA may be applied to an alien who *committed* an aggravated felony before the enactment of the amendments; the issue in *St. Cyr* was whether the amendments may be applied to an alien who *pleaded guilty* to an aggravated felony before their enactment.

That is not a distinction without a difference. As this Court explained in *St. Cyr*, "the judgment whether a particular statute acts retroactively 'should be informed and guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations."'" 533 U.S. at 321 (quoting *Martin* v. *Hadix*, 527 U.S. 343, 358 (1999), in turn quoting *Landgraf*, 511 U.S. at 270). *Domond* does not "raise the same reliance and expecta-

tion concerns raised in *St. Cyr*," because, in the latter case, "both criminal conduct and guilty pleas pre-dated" the 1996 amendments. *Domond*, 244 F.3d at 86. "Reliance and expectation interests are especially strong in such circumstances, because an alien is likely to consider the immigration consequences when deciding whether and how to plead." *Ibid*. The situation in *Domond* is different, because "it cannot reasonably be argued that aliens committed crimes in reliance on a hearing that might possibly waive their deportation." *Ibid*. Indeed, as the Second Circuit recognized in the decision that was affirmed by this Court in *St. Cyr*, "[i]t would border on the absurd" to think that aliens might have decided not to commit aggravated felonies "had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." 229 F.3d at 418 (quoting *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000), in turn quoting *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000)).

b. Petitioner contends (Pet. 13) that there is a conflict between the Second Circuit's decision in *Rankine* v. *Reno*, 319 F.3d 93, cert. denied, 540 U.S. 910 (2003), on which the decision below also relied, and the Third Circuit's decision in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004). The issue on which those cases disagree, however, is different from the issue that petitioner raises here. The question in those cases was whether this Court's holding in *St. Cyr* applies to aliens convicted after trial—*i.e.*, whether an alien who stood trial, rather than pleading guilty, before the 1996 amendments to the INA is eligible for discretionary relief under Section 212(c). The cases did not address the question pre-

sented in petitioner's certiorari petition, which is whether an alien whose criminal conduct predates the 1996 amendments, but whose conviction postdates them, is eligible for Section 212(c) relief.

Petitioner frames the disagreement between *Rankine* and *Ponnapula* at a higher level of generality. He contends that the circuit split concerns "whether a *quid pro quo* is necessary to demonstrate that a statute is impermissibly retroactive." Pet. 13. But this case does not present that question either. In expressing the view that the "reliance and expectation concerns" in a case of that type were not the same as those "raised in *St. Cyr*," 244 F.3d at 86, *Domond* said nothing about the presence of a "quid pro quo" in *St. Cyr*, or about its absence in that case. The decision below is likewise silent on whether a "quid pro quo" is a necessary condition for concluding that a statute is impermissibly retroactive.

Finally, even if petitioner *were* raising the issue addressed in *Rankine* and *Ponnapula*, the resolution of that issue would have no effect on the outcome of this case. *Rankine* held that an alien found guilty at trial before the 1996 amendments to the INA is not eligible for discretionary relief under Section 212(c). 319 F.3d at 97-102. *Ponnapula* disagreed with that conclusion only insofar as it held that an alien found guilty at trial is eligible for Section 212(c) relief if he declined a plea agreement. 373 F.3d at 494-496. Petitioner was found guilty of an aggravated felony at trial, but he does not contend that he turned down a plea agreement before proceeding to trial. He would therefore be ineligible for discretionary relief from removal under either decision.

c. Petitioner also suggests (Pet. 15-16) that the decision below conflicts with the Eighth Circuit's decision in *Alvarez-Portillo* v. *Ashcroft*, 280 F.3d 858 (2002). But

that case involved a different issue, one even further removed from the issue in this case than are the issues in *St. Cyr* and *Ponnapula*, which at least involved the availability of Section 212(c) relief to aliens removable by virtue of having been convicted of an aggravated felony. The issue in *Alvarez-Portillo* was whether 8 U.S.C. 1231(a)(5), which requires the reinstatement of an order of removal against a previously removed alien who illegally reentered the United States, and precludes the alien from seeking relief from removal, can be applied to an alien who illegally reentered before the enactment of the provision. (The Eighth Circuit held that it cannot.)

Nor is *Alvarez-Portillo* inconsistent with the decision below in any more general sense. In this case, the court of appeals reasoned that it is "the conviction [of an aggravated felony], not the underlying criminal act, that triggers the disqualification from § 212(c) relief." Pet. App. 16a (quoting *Domond*, 244 F.3d at 85-86). The illegal reentry in *Alvarez-Portillo* can be viewed as the analogue of the conviction of an aggravated felony, because, under 8 U.S.C. 1231(a)(5), it is the illegal reentry itself that "triggers the disqualification from * * * relief." Pet. App. 16a.

d. Petitioner is also mistaken in his contention (Pet. 17-18) that the court of appeals' decision conflicts with this Court's decision in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997). At the most basic level, there is no conflict between the two decisions because *Hughes Aircraft* involves an issue even further removed from the issue in this case than is the issue in *Alvarez-Portillo*. *Hughes Aircraft* not only does not involve the availability of Section 212(c) relief, it does not involve the interpretation of an immigration statute.

Instead, the case holds that an amendment to the *qui tam* provision of the False Claims Act that eliminated a defense could not be applied in a case where the allegedly false claims were submitted before the amendment was enacted.

Nor does the reasoning (as distinct from the holding) of *Hughes Aircraft* conflict with the reasoning of the decision below. Petitioner relies (Pet. 17) on the Court's statement that, by eliminating a defense to a *qui tam* suit, the amendment had the effect of "attach[ing] a new disability, in respect of transactions or considerations already past." 520 U.S. at 948 (quoting *Landgraf*, 511 U.S. at 269). The "transaction" in *Hughes Aircraft* to which the "new disability" attached was the allegedly unlawful conduct—the submission of a false claim. In this case, by contrast, the transaction to which the new disability attached was not the unlawful conduct itself—the commission of an aggravated felony—but the conviction based on that conduct. "It is the conviction, not the underlying criminal act, that triggers the disqualification from § 212(c) relief." Pet. App. 16a (quoting *Domond*, 244 F.3d at 85-86). Cf. *Chambers* v. *Reno*, 307 F.3d 284, 293 (4th Cir. 2002) (declining to extend holding of *St. Cyr* to aliens convicted of aggravated felony after trial and observing that, "unlike the amendment at issue in *Hughes Aircraft*," IIRIRA's repeal of Section 212(c) does not "attach[] a new disability" to "the *relevant past conduct*, *i.e.*, [the alien's] decision to go to trial").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2005