No. 08-771

In the Supreme Court of the United States

SERGEI MORGORICHEV, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress amended Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which had provided for a discretionary waiver of deportation, by making it unavailable to aliens convicted of aggravated felonies and then by repealing it altogether. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether this Court's holding in *St. Cyr* applies to an alien who was convicted of an aggravated felony after trial and who does not claim to have relied in any way on the potential availability of discretionary relief under Section 212(c).

2. Whether, for purposes of the retroactive availability of relief under former Section 212(c), it violates the equal protection component of the Due Process Clause to distinguish between an alien who is removable on the basis of a conviction that followed a guilty plea and one whose conviction occurred after a jury trial.

3. Whether 8 C.F.R. 1212.3(g) violates the equal protection component of the Due Process Clause by allowing criminal aliens to seek Section 212(c) relief if they were placed in deportation proceedings before they were made ineligible for such relief.

4. Whether it violates the Sixth Amendment right to a jury trial to distinguish, for purposes of the retroactive availability of Section 212(c) relief, between criminal aliens who pleaded guilty and those who went to trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-9a) is not published in the *Federal Reporter* but is reprinted in 274 Fed. Appx. 98. The order of the district court (Pet. App. 10a-11a) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. 12a-14a), and the immigration judge (Pet. App. 15a-19a) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 24, 2008. A petition for rehearing was denied on August 20, 2008 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of aggravated felonies. See *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant to this case, includes a drug-trafficking crime). See 8 U.S.C. 1101(a)(43)(B), 1229b(a)(3); see also *St. Cyr*, 533 U.S. at 297.

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326. In particular, the Court in *St. Cyr* explained

that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their convictions, they would still have some "likelihood of receiving § 212(c) relief" from deportation. *Id*. at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the *St. Cyr* decision. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it had "determined to retain the distinction between ineligible aliens who were convicted after criminal trials, and [potentially eligible aliens] convicted through plea agreements." *Id*. at 57,828. That determination is reflected in the regulations, which make aliens ineligible to apply for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h).

The 2004 regulations also retained a previously adopted regulation, which had—following decisions of the majority of the courts of appeal—allowed aliens to apply for Section 212(c) relief without regard to the limitations imposed by AEDPA § 440(d), as long as their "deportation proceedings were commenced before the Immigration Court before April 24, 1996," AEDPA's date of enactment. 8 C.F.R. 1212.3(g); see also 69 Fed. Reg. at 57,832; *Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996*, 66 Fed. Reg. 6436, 6437-6438 (2001).

2. Petitioner is a native of the former Soviet Union who, pursuant to a 1983 adjustment of status, was deemed admitted to the United States for lawful permanent residence in 1980. Pet. App. 16a. In 1993, a jury found petitioner guilty of conspiring to distribute and possession with intent to distribute heroin, in violation of 21 U.S.C. 846. Pet. App. 5a. Petitioner was sentenced to 63 months of imprisonment to be followed by four years of supervised release. *Ibid.* His conviction and sentence were affirmed on appeal. See *United States* v. *Podlog*, 35 F.3d 699, 705-707 (2d Cir. 1994), cert. denied, 513 U.S. 1135 (1995). With good-time credit, he ultimately served approximately 41 months in prison. C.A. App. 9, 23, 26.

Before petitioner had finished serving his term of imprisonment, the former Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner—issuing an order to show cause in October 1996 and serving it on him in February 1997—alleging that he was deportable as an aggravated felon and drug offender. C.A. App. 30-31; Pet. App. 5a, 12a; see 8 U.S.C. 1251(a)(2)(A)(ii) and (B)(i) (1994). The deportation proceedings were later transformed into removal proceedings by the issuance of a post-IIRIRA Notice to Appear. Pet. App. 13a n.1.

In May 1997, after a hearing, the immigration judge (IJ) found petitioner removable on both grounds charged. Pet. App. 16a-17a. The IJ noted that petitioner had not sought relief from removal but proceeded to conclude that no relief was available anyway. *Id.* at 16a. In particular, the IJ concluded that petitioner was not eligible for relief under former Section 212(c) because he had been convicted of an aggravated felony, and that he was not eligible for withholding of removal because his

aggravated-felony conviction had resulted in a sentence of imprisonment of more than five years. *Id.* at 17a-18a.

Petitioner appealed that decision to the Board of Immigration Appeals (BIA), which, on June 9, 1998, dismissed his appeal concerning eligibility for relief from removal. Pet. App. 12a-14a. It specifically concluded that he was not eligible for withholding of deportation in light of his aggravated-felony conviction. *Id.* at 13a.[1]

3. Petitioner filed a habeas corpus petition in the United States District Court for the Eastern District of New York, contending that the BIA had erred in applying AEDPA and IIRIRA to find him ineligible for Section 212(c) relief on the basis of his 1993 conviction. Pet. App. 6a. The district court granted the habeas petition on June 20, 2000. *Id.* at 10a-11a. It relied (*id.* at 11a) on *Pena-Rosario* v. *Reno*, 83 F. Supp. 2d 349 (E.D.N.Y. 2000), which held that the restrictions in AEDPA and IIRIRA on Section 212(c) relief did not apply to "aliens whose criminal conduct predated those statutes' enactment." *Id.* at 365.

The government appealed the district court's decision to the United States Court of Appeals for the Second Circuit. Pet. App. 6a. While that appeal was pending, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, which generally barred the use of habeas petitions to review orders of removal, but allowed pending habeas petitions to be converted into petitions for review in the courts of appeals. § 106(a) and (c), 119 Stat. 310, 311. The court of appeals thus vacated the district court's decision and treated the

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[1] The BIA sustained petitioner's appeal with regard to the country of removal, Pet. App. 13a-14a—an issue that is unrelated to the questions presented to this Court by the petition for a writ of certiorari.

government's appeal as if petitioner had filed a petition for review of the BIA's order of removal. Pet. App. 7a.

4. The court of appeals denied the petition for review in an unpublished order dated April 24, 2008. Pet. App. 3a-9a. The court held (*id.* at 8a) that it was bound by its decision in *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003), which concluded that "the repeal of § 212(c) relief does not have an impermissibly retroactive effect when applied to petitioners. We agree with our sister circuits that the lack of detrimental reliance on § 212(c) by those aliens who chose to go to trial puts them on different footing than aliens like St. Cyr," *id.* at 102. The court of appeals recognized that petitioner challenged *Rankine* as being in conflict with both the retroactivity analysis in *Landgraf* v. *USI Film Products,* 511 U.S. 244 (1994), and in violation of principles of equal protection. Pet. App. 7a-8a. It explained, however, that *Rankine* had addressed both of these issues. *Id.* at 8a.

The court of appeals also rejected petitioner's argument that 8 C.F.R. 1212.3(g) violates equal protection by distinguishing between criminal aliens on the basis of whether their deportation proceedings commenced before or after AEDPA was enacted. Pet. App. 8a. The court explained that the regulation "is a permissible implementation of Congress's intention in passing [AEDPA], which, as we have held, was precisely to effectuate this line-drawing." *Ibid.* (citing *Henderson* v. *INS*, 157 F.3d 106, 130 (2d Cir. 1998) (holding that AEDPA's restrictions on Section 212(c) relief do not apply to criminal aliens whose immigration proceedings were pending on the date of enactment), cert. denied, 526 U.S. 1004 (1999)). The court rejected the suggestion that "the government might have manipulated the tim-

ing of proceedings in order to prevent aliens from receiving 212(c) relief" and specifically noted that there was no evidence here of "any unreasonable delay in the commencement of [petitioner's] deportation proceedings." *Ibid.* Finally, the court concluded that it had "considered all of [petitioner's] claims and f[ou]nd them to be without merit." *Id.* at 9a.

ARGUMENT

1. Petitioner contends (Pet. 11-21) that the court of appeals' decision that he is unable to seek relief under former Section 212(c)—because he went to trial rather than pleading guilty to an aggravated felony—conflicts with this Court's retroactivity analysis. He also contends (Pet. 21-30) that this Court's intervention is needed to resolve a conflict in the circuits. The unpublished decision of the court of appeals does not warrant further review, because petitioner's arguments lack merit. The courts of appeals have correctly recognized that reliance—either actual or assumed—is a significant factor to be considered for purposes of retroactivity analysis, although it may be given different weight in different circuits. Furthermore, the underlying question involves the retroactive effect of a statutory repeal that occurred more than 12 years ago, and this Court has denied petitions urging a similar extension of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), in a number of prior cases. See, *e.g.*, *Aguilar* v. *Mukasey*, 128 S. Ct. 2961 (2008); *Zamora* v. *Mukasey*, 128 S. Ct. 2051 (2008); *Hernandez-Castillo* v. *Gonzales*, 549 U.S. 810 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124

(2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003).[2]

a. Petitioner's argument (Pet. 11-21) that the decision below conflicts with this Court's retroactivity analysis by considering whether petitioner relied on Section 212(c) before it was repealed lacks merit. As this Court has explained, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, *reasonable reliance*, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)) (emphasis added).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court 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 instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimina-

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[2] A similar question is presented in the petition for a writ of certiorari in *Cruz-Garcia* v. *Holder*, No. 08-878 (filed Jan. 2, 2009).

tion of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner principally relies (Pet. 17-21) on this Court's decision in *Landgraf*, *supra*. Of course *Landgraf* specifically mentioned "reasonable reliance," 511 U.S. at 270. Moreover, *Landgraf* pre-dates the decision in *St. Cyr*, which specifically addressed the availability of relief under former Section 212(c), as well as this Court's decision in another immigration case, *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), which explicitly discussed *St. Cyr* and confirmed the importance of reliance in its analysis. In *Fernandez-Vargas*, the Court stated that *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (internal quotation marks and citations omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Petitioner argues that retroactivity analysis here should focus on the fact that, even if an alien did not rely on Section 212(c), when his eligibility for discretionary relief from deportation is reduced, he suffers "a punitive measure that serves to increase liability for past conduct." Pet. 19. The amendment and later repeal of Section 212(c) in 1996, however, were neither punitive nor

designed to increase liability for past criminal conduct. Rather, they reflected Congress's judgment regarding the character of aliens who should be afforded an opportunity to remain in the United States at the present time *notwithstanding* their past criminal conduct. Moreover, petitioner's characterization of the repeal of Section 212(c) would have applied in *St. Cyr* itself, which means that, under petitioner's view, the "reasoning and analytical approach" in *St. Cyr* were "superfluous by half," and its discussion of reliance "was a wholly unnecessary and gratuitous academic exercise." *Ferguson* v. *United States Att'y Gen.*, No. 08-10806, 2009 WL 824434, at *12 (11th Cir. Mar. 31, 2009).

Thus, the court of appeals did not err in considering reasonable reliance as part of its "commonsense, functional" judgment about retroactivity. *Martin*, 527 U.S. at 357.

b. Petitioner contends (Pet. 21-30) that there is a conflict among the circuits as to the availability of Section 212(c) relief to aliens convicted of crimes prior to the enactment of AEDPA and IIRIRA. The disagreement is quite narrow, however. Nine circuits have declined to extend the holding of *St. Cyr* generally to aliens convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007);[3] *Hernandez-Castillo* v. *Moore*, 436 F.3d 516,

[3] Petitioner calls (Pet. 23) the Fourth Circuit's case law "unclear," because that court's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004), rejected a reliance requirement for retroactivity analysis, which petitioner says "seems to directly contradict" (Pet. 24) the holding in *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002), which found that the

520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *United States* v. *Zuñiga-Guerrero*, 460 F.3d 733, 737-739 (6th Cir. 2006), cert. denied, 549 U.S. 1145 (2007); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007); *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); *Ferguson*, 2009 WL 824434, at *13 (11th Cir. 2009). Only the Third Circuit has held that no showing of reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the BIA from precluding Section 212(c) relief. See *Atkinson* v. *Attorney Gen. of the United States*, 479 F.3d 222, 231 (2007). The existence of that one outlier concerning the interpretation of a statutory provision repealed more than 12 years ago does not warrant this Court's review.

Although petitioner stresses (Pet. 28) that the courts of appeals have "generated different approaches" to analyzing the retroactivity of the 1996 amendments to and repeal of Section 212(c), his case would be an inappropriate vehicle for addressing nearly all of the distinctions among those different approaches. As the court of appeals noted (Pet. App. 7a n.3), petitioner does not contend that he could establish reliance by virtue of a deci-

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repeal of Section 212(c) was not impermissibly retroactive as applied to aliens who went to trial. The Fourth Circuit, however, apparently does not perceive such a conflict. Its opinion in *Olatunji* distinguished *Chambers* on the ground that "IIRIRA was not substantively retroactive to Chambers' relevant past conduct" (*i.e.*, "his decision to go to trial"). 387 F.3d at 392. As petitioner acknowledges (Pet. 24), even after *Olatunji*, the Fourth Circuit has continued to hold that "IIRIRA's repeal of § 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea*, 482 F.3d at 281.

sion to "delay[] seeking 212(c) relief," which could warrant relief in the Second or Fifth Circuits. See *Wilson* v. *Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006); *Carranza-de Salinas* v. *Gonzales*, 477 F.3d 200, 210 (5th Cir. 2007). Nor does petitioner suggest that he could establish some "other reliance interests" or even a form of assumed, "objectively reasonable reliance" (Pet. 27), which might warrant relief in the Ninth or Tenth Circuits. Nor—despite petitioner's repeated references to Congress's amendments to the definition of "aggravated felony" (Pet. 3, 10, 25, 28; Pet. App. 21a-32a)—does his case present any question about whether an alien is precluded from establishing reliance if his offense of conviction "did not become [a] deportable offense[] until later." Pet. 28. Petitioner's own conviction for conspiring to distribute and possession with intent to distribute heroin, in violation of 21 U.S.C. 846, indisputably made him deportable well in advance of his 1993 conviction, and he remains so today. See 8 U.S.C. 1101(a)(43), 1251(a)(4)(B) (1988); 18 U.S.C. 924(c)(2) (1988); 8 U.S.C. 1227(a)(2)(iii); see also Pet. 31. Accordingly, even if the issues petitioner identifies otherwise warranted review, this case would not be a suitable vehicle for their consideration.

2. Petitioner contends (Pet. 30-34) that the court of appeals' decision violates the equal protection component of the Due Process Clause because it distinguishes "between classes of aliens who pleaded guilty and those who were convicted at trial," a distinction he portrays as "wholly irrelevant to the purpose of any of the statutes at hand." Pet. 32, 33.

Petitioner does not suggest that there is any disagreement among the courts of appeals on that question. In fact, one case he cites (Pet. 28) for a different propo-

sition expressly rejected an equal protection claim about IIRIRA's retroactive repeal of Section 212(c) on the ground that there is "a rational basis in differentiating between a defendant who pleads guilty versus a defendant who goes to trial." *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1274 (11th Cir. 2002).

Moreover, the court of appeals correctly rejected petitioner's equal protection argument, because he was not "similarly situated" with aliens the court found to be eligible for Section 212(c) relief. See *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 63 (2001). Petitioner is not similarly situated *vis-à-vis* an alien who surrendered an important legal right by pleading guilty in presumptive reliance upon existing eligibility under the law at the time. As this Court has previously recognized, the "protection of reasonable reliance interests" is sufficient to survive equal protection review even under the heightened scrutiny used for equal protection challenges to gender-based classifications. *Heckler* v. *Mathews*, 465 U.S. 728, 746 (1984). It follows *a fortiori* that reliance can provide the basis for a legitimate distinction in the immigration context, where a more deferential approach prevails. Indeed, petitioner effectively concedes that point by acknowledging (Pet. 33) that his equal protection analysis depends on an evaluation of allegedly disparate treatment "outside of the context of * * * retroactivity analysis."

3. Petitioner calls (Pet. 33) his equal protection challenge to 8 C.F.R. 1212.3(g) a "far clearer" one. He contends (Pet. 33-35) that the regulation violates equal protection by making AEDPA's amendments to the scope of Section 212(c) generally inapplicable to criminal aliens whose deportation proceedings commenced before the April 24, 1996 enactment of AEDPA. Although peti-

tioner concedes that "a procedural line must be drawn at some point" (Pet. 35), he does not specify any line that would be *more* reasonable than one that permits an alien to seek a discretionary waiver of deportation if that waiver would have been available to him when the deportation proceedings began—much less establish that the line the regulation draws is altogether irrational.[4] In fact, as the Department of Justice twice explained in adopting and later retaining the regulation, the line drawn in the regulation reflected the view of several courts of appeals that had rejected Attorney General Reno's application of AEDPA's restrictions even to aliens who were already in deportation proceedings but who had not already been granted final Section 212(c) relief before AEDPA's enactment. See 69 Fed Reg. at 57,832; 66 Fed. Reg. at 6437-6439. Petitioner does not identify any circuit conflict about the regulation's constitutionality, and no further review of the question is warranted.[5]

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[4] Petitioner suggests (Pet. 34) that the date removal proceedings commence is inappropriate because it "is exclusively determined by the government." He also asserts (Pet. 34-35 n.12) that an unspecified "survey of 212(c) case law" may indicate that "the former INS frequently delayed the service and filing of charging documents * * * until after the passage of AEDPA and IIRIRA." But he does not cite any instance involving intentional delays or otherwise refute the court of appeals' express finding (Pet. App. 8a) that there was no evidence of "any unreasonable delay in the commencement of [petitioner's] deportation proceedings"—which were initiated while he was still imprisoned for his aggravated-felony conviction.

[5] Petitioner does "note" (Pet. 34) that the date proceedings commence is determined differently in different circuits. Any distinction, however, between the date an Order to Show Cause or a Notice to Appear was issued and the date on which it was served on the alien is com-

4. Finally, petitioner contends (Pet. 35-38) that the Sixth Amendment right to a jury trial is violated by allowing those who pleaded guilty to apply for Section 212(c) relief while barring relief to those who went to trial. Petitioner identifies no conflict on this question; indeed, he identifies no court that has addressed the question (since the court of appeals in this case evidently did not believe it warranted separate treatment in its opinion rejecting "all of [petitioner's] claims" as being "without merit," Pet. App. 9a).

Petitioner's claim is founded on erroneous assumptions. He argues that barring him from Section 212(c) relief impermissibly "punishes him for a second time" by eliminating "any possible relief from removal" on the basis of "conduct for which he already served several years in prison." Pet. 36. Leaving aside the fact that petitioner served a term of imprisonment for conspiring to distribute heroin and possessing heroin with intent to distribute it—and not for opting to go to trial—it is simply not true that barring him from discretionary withholding of removal operates as a "punishment." As this Court has long explained, "Congress has power to order the deportation of aliens whose presence in the country it deems hurtful," and deportation is not "a punishment," even when it is based on facts that might constitute a crime. *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913); see *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."). Furthermore, even assuming that the unavailability of relief from deporta-

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pletely irrelevant to petitioner's case, in which all of those events occurred after AEDPA's date of enactment.

tion could be seen as a penalty for not pleading guilty, this Court has also explained that the government is constitutionally permitted "to extend a proper degree of leniency in return for guilty pleas." *Corbitt* v. *New Jersey*, 439 U.S. 212, 223 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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