No. 10-1178

In the Supreme Court of the United States

KENNETH MICHAEL MYERS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's holding in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), that the repeal of Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994), 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, applies to an alien who was convicted of burglary, rape, and sexual penetration with a foreign object after trial, and who therefore did not relinquish his right to a trial in reliance on potential eligibility for a waiver under Section 212(c).

2. Whether Congress's 1996 amendment to Section 101(a)(13) of the INA, 8 U.S.C. 1101(a)(13), which defines those seeking "admission" to the United States as including a lawful permanent resident returning to the United States from travel abroad who "has committed an offense identified in [8 U.S.C. 1182(a)(2)]," is applicable to an alien who committed (and was convicted by a jury of) such offenses before 1996 and then departed from and returned to the United States in 2003.

3. Whether petitioner failed to establish "prima facie eligibility for naturalization" for purposes of his motion to terminate removal proceedings under 8 C.F.R. 1239.2(f), when the letter from the Department of Homeland Security on which he relied as an affirmative statement of his eligibility said only that the agency had no authority at that time to consider his eligibility.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulation:

Statutes and regulation—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 5-8) and the immigration judge (Pet. App. 9-14, 15-21) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 2010. A petition for rehearing was denied on December 28, 2010 (Pet. App. 22). The petition for a writ of certiorari was filed on March 24, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted substantial reforms of many aspects of border control and immigration enforcement in 1996. The first two questions presented in the peti-

tion for a writ of certiorari pertain to the effects of some of those changes on lawful permanent resident aliens (LPRs) who were convicted of criminal offenses before 1996 and placed in removal proceedings after the 1996 amendments generally took effect.

a. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some LPRs domiciled in the United States for seven consecutive years to apply for discretionary relief from inadmissibility. By its terms, Section 212(c) applied only to certain aliens in exclusion proceedings (specifically, aliens who were seeking to "be admitted" to the United States after "temporarily proceed[ing] abroad voluntarily"), but it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

Between 1990 and 1996, Congress enacted three statutes that "reduced the size of the class of aliens eligible for" relief under Section 212(c). *St. Cyr*, 533 U.S. at 297. In the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 511, 104 Stat. 5052, which was enacted on November 29, 1990, Congress made Section 212(c) relief unavailable to anyone who had been convicted of an aggravated felony and served a term of imprisonment of at least five years. 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 any alien previously convicted of certain offenses, including an aggravated felony, irrespective of the length of the sentence served. See *St. Cyr*, 533 U.S. at 297 n.7. Later in 1996, 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). The latter section 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 here, includes rape and burglary). See 8 U.S.C. 1101(a)(43)(A) and (G), 1229b(a)(3).

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 on the basis of a plea agreement that the alien made at a time when the sentence the alien received under the plea agreement would not have rendered him ineligible for relief under former Section 212(c), but a greater sentence (of five years or more) would have done so. 533 U.S. at 314-326. In particular, the Court 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 [Section] 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 decision in *St. Cyr*. 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 the 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 "has determined to retain the distinc-

tion between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the regulations, which provide that aliens are ineligible for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h); see also 8 C.F.R. 1003.44(a)-(b).

b. Before IIRIRA, the INA defined an alien's "entry" into the United States as meaning "any coming of an alien into the United States, from a foreign port or place," but the definition specified that an LPR returning from abroad would "not be regarded as making an entry into the United States * * * if the alien prove[d] * * * that his departure to a foreign port or place * * * was not intended or reasonably to be expected by him or * * * was not voluntary." 8 U.S.C. 1101(a)(13) (1994) (repealed 1996). Construing that definition in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), this Court observed that it did "not think Congress intended to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned in 'about a couple hours.'" *Id.* at 461. The Court therefore held "that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." *Id.* at 462.

In Section 301(a) of IIRIRA, Congress specified the circumstances under which an LPR returning to the United States from abroad could be treated as seeking "admission," and therefore subject to limitations on admissibility contained in 8 U.S.C. 1182. See 110 Stat.

3009-575. The new definition of "admission" provides in relevant part as follows:

> An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking admission into the United States for purposes of the immigration laws unless the alien—
>
> * * * * *
>
> (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title[.]

8 U.S.C. 1101(a)(13)(C).

In 1998, the Board of Immigration Appeals (Board) determined that IIRIRA's definition of "admission" had "expressly preserve[d] some, but not all, of the *Fleuti* doctrine," and that a returning LPR described in Section 1101(a)(13)(C)(i)-(vi) "shall be regarded as 'seeking an admission' into the United States without regard to whether the alien's departure from the United States might previously have been regarded as 'brief, casual, and innocent' under the *Fleuti* doctrine." *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1065-1066 (1998) (en banc).

c. The third question in the petition for a writ of certiorari pertains to a regulation that authorizes an immigration judge (IJ) to "terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization." 8 C.F.R. 1239.2(f). That regulation permits termination "when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors." *Ibid.* The Board has explained that, for purposes of establishing prima facie eligibility, "it is appropriate for the Board and the

Immigration Judges to require some form of affirmative communication from the [Department of Homeland Security (DHS)] prior to terminating proceedings." *In re Hidalgo*, 24 I. & N. Dec. 103, 106 (2007).

2. Petitioner is a native and citizen of the United Kingdom who was admitted to the United States as an LPR in 1971. In 1986, petitioner was convicted, after trial, in California state court of three felonies: first-degree burglary, rape, and sexual penetration with a foreign object by force. He was sentenced to a three-year term of imprisonment, paroled in 1988, and released from parole in 1991. Pet. App. 10, 16-17.

In April 2003, petitioner traveled to the United Kingdom for two weeks and returned to Los Angeles. Pet. App. 10; Administrative Record (A.R.) 128. He sought admission to the United States as a returning LPR, and he was paroled into the United States pending adjudication of his application for admission. Pet. App. 10; A.R. 147. On May 20, 2003, petitioner filed an application for naturalization, and on May 28, 2003, he was placed in removal proceedings based on a charge that he was an arriving alien who was inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) on account of his conviction for a crime involving moral turpitude (specifically, each of the three offenses of which he was convicted in 1986). Pet. App. 16-17.

In July 2003, petitioner, while represented by counsel before an IJ, admitted the factual allegations and conceded his inadmissibility. Pet. App. 11. In December 2003, he moved to terminate the removal proceedings against him to permit adjudication of his pending application for naturalization. *Id.* at 11, 17. The IJ denied that motion in May 2004, on the ground that petitioner had not "established prima facie eligibility for

naturalization" as required by 8 C.F.R. 1239.2(f). Pet. App. 15-21.

In October 2004, petitioner sought discretionary relief from removal under former Section 212(c). Pet. App. 11, 13. In December 2005, the IJ denied that application, finding that petitioner was not eligible for relief under former Section 212(c) because his "conviction resulted from a jury trial, rather than a plea agreement." *Id.* at 14 (citing *St. Cyr*, 533 U.S. at 326; *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); 8 C.F.R. 1212.3(h)).

3. In June 2007, the Board dismissed petitioner's appeal. Pet. App. 4-8. The Board ruled that the IJ had properly declined to terminate removal proceedings because petitioner had not established prima facie eligibility for naturalization "by an affirmative communication from the DHS." *Id.* at 6-7. The Board also rejected petitioner's argument that, notwithstanding his lack of a guilty plea, he should be eligible for relief under former Section 212(c). The Board concluded that petitioner's argument was foreclosed by circuit precedent and 8 C.F.R. 1003.44(b). Pet. App. 7.

4. Petitioner sought judicial review of the Board's decision, and the Ninth Circuit denied his petition for review in a per curiam, unpublished memorandum. Pet. App. 1-3. The court of appeals held that petitioner's request to terminate his removal proceedings was properly denied, because there had been no "affirmative communication" from DHS that petitioner had established prima facie eligibility to naturalize. *Id.* at 1-2.

The court of appeals further held that petitioner was not entitled to relief under former Section 212(c) because he could not "demonstrate reliance" on that provision "when he rejected a plea agreement and elected a

jury trial." Pet. App. 2 (citing *St. Cyr*, 533 U.S. at 325-326; *Armendariz-Montoya*, 291 F.3d at 1121-1122).

The court of appeals also rejected an argument that petitioner made for the first time in that court. It held that petitioner "was not entitled to avoid being deemed inadmissible upon his reentry into the country" under the *Fleuti* doctrine and the pre-IIRIRA version of 8 U.S.C. 1101(a)(13). Pet. App. 2. Distinguishing *Camins* v. *Gonzales*, 500 F.3d 872, 884-885 (9th Cir. 2007), in which an alien had pleaded guilty to the offense that made him inadmissible and had been permitted to proceed under pre-IIRIRA law, the court held that petitioner had "failed to demonstrate reliance on the prior version of" Section 1101(a)(13). Pet. App. 2.[1]

ARGUMENT

Petitioner renews three of the arguments he advanced in the court of appeals, but none of them warrants this Court's review. The bulk of the petition contends (Pet. 11-31) that Congress's repeal of former Section 212(c) of the INA is inapplicable to petitioner, even though, unlike the alien in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), he did not plead guilty to the offenses that rendered him removable. Although there is some disagreement in the circuits with respect to that question, the disagreement is narrow and the question involves a statutory provision that was repealed more than 14 years

[1] The court of appeals also rejected two further arguments: that petitioner's due process rights had been violated by the failure to give him a hearing on the merits of his application for relief under former Section 212(c); and that the IJ had violated the equal-protection component of the Fifth Amendment's Due Process Clause by distinguishing between aliens on the basis of whether their applications for Section 212(c) relief were filed before or after that provision was repealed. Pet. App. 2-3. Petitioner does not repeat those arguments in this Court.

ago and is therefore of greatly diminished importance. Moreover, this Court has repeatedly denied petitions urging a similar extension of *St. Cyr*'s holding. See, *e.g.*, *Canto* v. *Holder*, 131 S. Ct. 85 (2010); *Jerez-Sanchez* v. *Holder*, 131 S. Ct. 73 (2010); *De Johnson* v. *Holder*, 130 S. Ct. 3273 (2010); *Molina-De La Villa* v. *Holder*, 130 S. Ct. 1882 (2010); *Ferguson* v. *Holder*, 130 S. Ct. 1735 (2010); *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009); *Morgorichev* v. *Holder*, 129 S. Ct. 2424 (2009); *Aguilar* v. *Mukasey*, 554 U.S. 918 (2008); *Zamora* v. *Mukasey*, 553 U.S. 1004 (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); *Lawrence* v. *Ashcroft*, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003).[2] Nor is certiorari warranted with respect to the two "[a]dditional [i]ssues" (Pet. 31) that petitioner raises. His positions on both of those issues lack merit and have occasioned no conflict in the courts of appeals. The petition for a writ of certiorari should be denied.

1. With respect to the first question presented, petitioner contends the Ninth Circuit was "wrong on the law" to conclude that he did not "demonstrate reliance * * * on the continued availability of [Section] 212(c)" when he elected to proceed to trial on his felony offenses

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[2] Whether *St. Cyr*'s holding should be extended to aliens who did not plead guilty is also the first question presented in the pending petition for a writ of certiorari in *Johnson* v. *Holder*, No. 10-730 (filed Dec. 1, 2010). It appears that *Johnson* is being held by the Court for *Judulang* v. *Holder*, No. 10-694 (oral argument scheduled for Oct. 12, 2011), because the second question presented in *Johnson* pertains to "the 'statutory counterpart' rule for eligibility for § 212(c) relief." Pet. at ii, *Johnson*, *supra*.

in 1986 (Pet. 24) and when he later refrained from applying for relief under Section 212(c) on the theory that "all LPR's convicted of deportable offenses before the enactment of IIRIRA are relying on the continued availability of [Section] 212(c) relief by the mere act of waiting * * * because it strengthens the application" (Pet. 28).

a. Although it is unclear whether petitioner believes that "reliance is not properly an element of the retroactivity inquiry," Pet. 30; see also Pet. 29 ("even if reliance were a critical factor"), or simply that he has adequately established that he and all other LPRs with pre-IIRIRA convictions actually relied on Section 212(c), Pet. 24-29, his argument 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) (emphasis added) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

In finding an impermissible retroactive effect 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 [Section] 212(c) relief was granted in the years leading up to [1996]," the Court concluded in *St. Cyr* 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 the Court concluded that aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of [Section] 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. Thus, the likelihood of reliance played an important role in the Court's decision in *St. Cyr*. To the extent that petitioner contends that the absence of reliance should be irrelevant (Pet. 30), his view makes the Court's analysis of guilty pleas in *St. Cyr* superfluous.

Nothing in *St. Cyr* suggested that any alien who was eligible for Section 212(c) relief before its repeal would remain forever eligible. To the contrary, the Court held that Section "212(c) relief remains available for aliens, *like respondent, whose convictions were obtained through plea agreements* and who, notwithstanding those convictions, would have been eligible for [Section] 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326 (emphasis added). That understanding is likewise embodied in the regulations promulgated by the Department of Justice following *St. Cyr*, concerning the availability of relief under Section 212(c) in proceedings before an IJ or the Board. See pp. 3-4, *supra*.

Moreover, this Court's most recent decision addressing retroactivity in the immigration context explicitly discussed *St. Cyr* and reconfirmed the importance of reliance. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), 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 (citations and internal quotation marks 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.

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

b. Nor did the court of appeals err in concluding that petitioner did not establish reliance on Section 212(c) when he made the decision to go to trial rather than to plead guilty in 1986. As the Seventh Circuit recently explained, even though *St. Cyr* recognized that "it is more than likely that those aliens faced with plea agreements contemplated their ability to seek [S]ection 212(c) relief, the same logic cannot necessarily be extended to those aliens convicted at trial" because they did not, as a categorical matter, "forgo any possible benefit in reliance on [S]ection 212(c)." *Canto* v. *Holder*, 593 F.3d 638, 645, cert. denied, 131 S. Ct. 85 (2010).

That distinction flows directly from the Court's analysis in *St. Cyr*, which was focused on the prospect of detrimental reliance by an alien who pleaded guilty to an aggravated felony between 1990, when Congress enacted the bar to Section 212(c) relief for aliens who served more than five years on a sentence for an aggravated felony, and 1996, when Congress repealed Section 212(c) altogether. See 533 U.S. at 293 (describing the

facts of St. Cyr's case); *id.* at 297 (describing 1990 enactment). At the time of the guilty plea that resulted in St. Cyr's conviction, his controlled-substance offense was an aggravated felony that made him deportable. See 8 U.S.C. 1101(a)(43)(B) (1994) (including "illicit trafficking in a controlled substance" in the definition of an aggravated felony); 8 U.S.C. 1251(a)(2)(A)(iii) (1994). An alien in those circumstances who was concerned about preserving eligibility for relief under Section 212(c) would have had an incentive to enter into a plea agreement that provided for a sentence of five years or less, rather than go to trial and risk a longer (and disqualifying) sentence, and accordingly may have developed reasonable reliance interests. See *St. Cyr*, 533 U.S. at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a sentence of less than five years).

Petitioner, by contrast, was convicted in 1986 of offenses that, at the time, were not aggravated felonies and did not even make him deportable.[3] As a result, at the time of his criminal proceeding, preserving eligibility for relief under Section 212(c) would not reasonably have been expected to play the same sort of role in an alien's strategic decisions as the Court believed was likely in *St. Cyr*. Petitioner implicitly concedes as much,

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[3] The definition of "aggravated felony" was expanded in 1990 to include "any crime of violence." IMMACT § 501(a), 104 Stat. 5048. The express references to "rape" now appearing at 8 U.S.C. 1101(a)(43)(A) was added in 1996 by IIRIRA. See IIRIRA § 321(a)(1), 110 Stat. 3009-627. The reference to "burglary" now appearing at 8 U.S.C. 1101(a)(43)(G) was added in 1994, but was then triggered only when a five-year term of imprisonment had been imposed. See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4321.

because, rather than explain what he gave up by deciding to go to trial, he tellingly contends (Pet. 27) that *all* criminal aliens can "show reliance" because "[i]t is very possible that LPR's would have been much more careful about their conduct and would have thought much more carefully about engaging in crimes, had they had notice of the coming repeal of § 212(c)."

Petitioner identifies no court of appeals that has applied this Court's retroactivity analysis in such a sweeping fashion. To the contrary, several courts have specifically held that an alien's prior decision to commit a crime that rendered him or her removable is *not* enough to protect the alien against application of Section 212(c)'s repeal, whether the alien asserted possible reliance on not getting caught, or on being acquitted at trial, or on receiving a sentence that would not bar relief, or on the continued availability of relief at all. See, *e.g.*, *Ponnapula* v. *Ashcroft*, 373 F.3d 480, 495-496 & n.14 (3d Cir. 2004); *Rankine* v. *Reno*, 319 F.3d 93, 101-102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000). Indeed, in the decision that this Court affirmed in *St. Cyr*, the Second Circuit explained that "[i]t would border on the absurd to argue" that aliens "might have decided not to commit" crimes "or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also * * * ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2000) (quoting *Jurado-*

Gutierrez, 190 F.3d at 1150; in turn quoting *LaGuerre*, 164 F.3d at 1041), aff'd, 533 U.S. 289 (2001).

In response, petitioner suggests only that "[t]he rationale expressed" in *LaGuerre* "says nothing" because it "was decided without the guidance this [C]ourt set forth in *St. Cyr*." Pet. 25-26. But long after *St. Cyr*, courts of appeals have continued to recognize that aliens do not engage in reasonable reliance on the present status of immigration law when they commit crimes that make them removable. See, *e.g.*, *Vartelas* v. *Holder*, 620 F.3d 108, 120 (2d Cir. 2010) ("We have consistently rejected the notion that an alien can reasonably have relied on provisions of the immigration laws in 'committ[ing]' his crimes."), petition for cert. pending, No. 10-1211 (filed Apr. 4, 2011); *Saravia-Paguada* v. *Gonzales*, 488 F.3d 1122, 1133-1135 (9th Cir. 2007) (explaining that "an alien's *decision* to enter a guilty plea or proceed to trial is the past relevant conduct for purposes of *Landgraf* analysis, not the commission of the underlying crime," and specifically rejecting the argument that that approach to reliance is inconsistent with *St. Cyr*), cert. denied, 553 U.S. 1064 (2008).

Nor is there merit to petitioner's alternative, and similarly sweeping, contention that "all LPR's convicted of deportable offenses before the enactment of IIRIRA are relying on the continued availability of § 212(c) relief by the mere act of waiting" to seek such relief because waiting "strengthens" an application for relief. Pet. 28. Such a claim is particularly implausible for an alien, like petitioner, whose conviction occurred a full decade before Congress withdrew Section 212(c). That distinguishes his case from, for example, *Walcott* v. *Chertoff*, 517 F.3d 149 (2d Cir. 2008), in which the alien was convicted of an aggravated felony only seven weeks before

such a conviction made him ineligible to apply for Section 212(c) relief. *Id.* at 150. If petitioner were truly attempting to build equities for relief under Section 212(c), it would be reasonable to expect him to monitor developments in the law sufficiently to seek that relief prior to its repeal—especially when he had already had a ten-year-long post-conviction record to draw upon at that point, to say nothing of the several additional years that elapsed before proceedings were initiated against him in 2003.

c. Petitioner contends (Pet. 13-20) that there is a conflict among the circuits warranting review by this Court about the proper interpretation of *St. Cyr*. But the disagreement in the analysis of the circuits is narrow. Nine circuits have declined to extend the holding of *St. Cyr* as a general matter to aliens who were 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*, 319 F.3d at 102 (2d Cir.); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v. *Holder*, 592 F.3d 700, 705-706 (6th Cir. 2010); *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* v. *United States Att'y Gen.*, 563 F.3d 1254, 1259-1271 (11th Cir. 2009), cert. denied, 130 S. Ct. 1735 (2010). Two circuits have 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 Board from precluding Section 212(c) relief. See *Atkinson* v. *Attorney Gen.*, 479 F.3d

222, 231 (3d Cir. 2007); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009) (following *Atkinson* with little further analysis).

In *Atkinson*, the Third Circuit retreated from dictum in *Ponnapula*, *supra*, which had suggested that an alien who had not been offered a guilty plea would be unable to establish reliance for purposes of retroactivity analysis, 373 F.3d at 494. The Third Circuit in *Atkinson* held that the repeal of Section 212(c) should not be construed to apply retroactively to "aliens who, like Atkinson, had not been offered pleas and who had been convicted of aggravated felonies following a jury trial at a time when that conviction would not have rendered them ineligible for [S]ection 212(c) relief." 479 F.3d at 229-230.

The *Atkinson* court's analysis was based on the observation that this Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." 479 F.3d at 227-228. But that result cannot be squared with the rationale of *St. Cyr*, which specifically identified "reasonable reliance" as an important part of the "commonsense, functional judgment" in retroactivity analysis, and then explicitly rested its holding on the assessment that it was likely that aliens who pleaded guilty prior to 1996 had reasonably relied on the possible availability of Section 212(c) relief. See 533 U.S. at 321-323. If the Third Circuit meant that retroactivity analysis turns on the fact of conviction *simpliciter*, and if that view were correct, then the entire discussion in *St. Cyr* concerning the likelihood of reliance in the plea-bargain setting was superfluous.[4]

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[4] The alien in *Atkinson*—like St. Cyr but unlike petitioner here—was convicted of a controlled-substance offense during the period between

In any event, the deviation in the circuits' analysis is narrow, because the Third Circuit nonetheless acknowledged that reliance is "but one consideration." *Atkinson*, 479 F.3d at 231. As a result, any split from other circuits' analysis extends only to whether a determination of retroactive effect must turn on the prospect of reliance. No circuit has denied that a determination of retroactive effect may be based on the prospect of reliance.

Moreover, reliance is required by those circuits that have permitted aliens to attempt to establish individual reliance on Section 212(c) by demonstrating that they "desired" to apply for Section 212(c) relief "but decided to delay their applications based upon the understanding that their chances of obtaining relief would grow stronger with time." *Walcott*, 517 F.3d at 155; see also *Carranza-de Salinas* v. *Gonzales*, 477 F.3d 200, 209-210 (5th Cir. 2007).[5] In addition, it is unclear whether petitioner would ultimately qualify for relief in those circuits, because the decisions petitioner cites merely remanded to permit aliens to attempt to establish that they had taken affirmative actions in detrimental reliance on Section 212(c). See *Walcott*, 517 F.3d at 155;

1990 and 1996 when such a conviction was an aggravated felony that made him deportable and rendered him ineligible for Section 212(c) relief if he served a sentence of at least five years. See *Atkinson*, 479 F.3d at 224, 226.

[5] Neither the Second nor the Fifth Circuit has embraced petitioner's claim that "*all* LPR's convicted of deportable offenses before the enactment of IIRIRA are relying on the continued availability of § 212(c) relief by the mere act of waiting." Pet. 28 (emphasis added). See *Carranza-de Salinas*, 477 F.3d at 206 n.6; *Wilson* v. *Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006).

Carranza-de Salinas, 477 F.3d at 209-210.[6] As noted above (see pp. 15-16, *supra*), petitioner's reliance contention suffers from the fact that ten years since his conviction had already passed when Congress curtailed and then repealed Section 212(c), and he still took no action in the several additional years between then and 2003.

As the Seventh Circuit noted in *Canto*, 593 F.3d at 644, "the distinction between [its] analysis" of reliance and "that of the Third, Eighth, and Tenth Circuits * * * is one of fine line drawing." The same is also true of the approach of the Second and Fifth Circuits (although the Seventh Circuit had no need to say so, since the alien in *Canto* did not advance a reliance argument along those lines). Such fine distinctions in the "commonsense, functional judgment[s]" (*Martin*, 527 U.S. at 357) among the circuits do not warrant this Court's review.

d. Petitioner contends (Pet. 22-24) that his case presents questions "important to many individuals" because the total number of court cases and the total number of grants of relief under Section 212(c) by the agency in the last five years are "substantial," and he speculates that "increased efforts at law enforcement" might precipitate more cases.

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[6] Petitioner also invokes (Pet. 25) the Second Circuit's decision in *Restrepo*, but that decision did not establish what would suffice to demonstrate reliance. *Restrepo* did not even decide whether the alien was required to make "an *individualized* showing" of reliance, 369 F.3d at 639, although the Second Circuit has since explained that there must indeed have been an affirmative act of detrimental reliance. See *Walcott*, 517 F.3d at 155; see also *ibid.* ("Nor is it sufficient for an alien to claim that, in hindsight, he would have acted differently had he foreseen [Congress's later enactment].").

But enforcement against criminal aliens has been the priority since the 1996 reforms, and those enforcement efforts were enhanced with greater resources after 2001. Moreover, many aliens eligible to apply for relief under Section 212(c) did apply after this Court's *St. Cyr* decision. The numbers of applications, grants, and court cases therefore rose after *St. Cyr*, but are now diminishing.[7] In recent years, the number of grants of relief under former Section 212(c) has been smaller and declining. That number went from 1905 grants in FY 2004 to 857 grants in FY 2010—a 55% decline. See Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf; Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2010 Statistical Year Book* Table 15, at R3 (2011), http://www.justice.gov/eoir/statspub/fy10syb.pdf. Over that same period, the number of applications for relief under former Section 212(c) fell even more dramatically. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2010, there were 507. That reflects a 80% decline since FY 2004—and a 60% decline since FY 2008.[8] In addition, because green cards issued

[7] Although petitioner argues that there have been "many appellate court decisions which have been decided on this issue in the last few years," Pet. 22, the number of such cases is an unreliable gauge of the issue's continuing importance because immigration cases often take so long to be resolved. Thus, in *Ferguson* v. *Holder*, cert. denied, 130 S. Ct. 1735 (2010) (No. 09-263), the government's brief opposing certiorari explained (at 15-17) that 40 of the 57 decisions that Ferguson had cited in her petition involved immigration proceedings that were initiated before *St. Cyr*.

[8] These figures are based on unpublished statistics compiled by the Executive Office of Immigration review through FY 2010. Petitioner notes (Pet. 23 & n.6) that the numbers of Section 212(c) applications

after 1989 expire after ten years, see 54 Fed. Reg 47,586 (1989), nearly all lawful permanent residents who are removable on the basis of pre-IIRIRA convictions—even those who, unlike petitioner, did not leave and re-enter the United States— have already been exposed to immigration authorities at some point since 2001. That further shrinks the pool of those who might still have new proceedings initiated against them on the basis of pre-1996 convictions.

Because petitioner's first question is one of diminishing importance, it involves a statutory provision that was repealed more than 14 years ago and it affects a narrow class of individuals (LPRs who were convicted of, but did not plead guilty to, certain crimes before 1996 and have not since been granted a waiver or citizenship or departed the United States or otherwise abandoned their status as LPRs), the Court should deny further review on that question, as it has done in at least 15 other cases in the last few years. See pp. 8-9, *supra*.

2. With respect to his second question, petitioner contends (Pet. 34-36) that the 1996 statutory definition of "admission" is impermissibly retroactive when applied to an alien who was convicted after a trial of an offense identified in 8 U.S.C. 1182(a)(2) (which, as relevant here, includes crimes involving moral turpitude). Petitioner's argument in support of that contention relies entirely on "the very same analysis [he advances] as to why he is eligible for § 212(c) [relief]" (Pet. 36), but

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that were granted do not include those who were "unable to pursue a grant of [Section] 212(c)" but "submitted applications for other forms of relief such as withholding of removal" or protection from torture. But eligibility for such other forms of relief would not be affected by the question presented, which pertains only to relief under former Section 212(c).

his claim on this question is even weaker on the merits and involves no circuit split, because the definition's applicability turns on whether petitioner "committed an offense," 8 U.S.C. 1101(a)(13)(C)(v), not on whether he had a conviction.

a. Even assuming—as petitioner argues with respect to the first question presented—that a court's retroactivity analysis should not turn on whether an alien entered into a guilty plea in either objective or subjective reliance on the then-current state of immigration law, petitioner's argument lacks merit because the definition of "admission" in 8 U.S.C. 1101(a)(13)(C) that Congress adopted in 1996 would not be retroactive in this case for two reasons.

First, the prior conduct that triggers the new definition's applicability is not petitioner's decision to go to trial rather than to plead guilty. As the Second Circuit has explained, "unlike § 212(c)," the relevant definition of "admission" "does not hinge on either an LPR's conviction or his decision to plead guilty; rather, it turns on whether the LPR 'has *committed* an offense identified in [S]ection 1182(a)(2).'" *Vartelas* v. *Holder*, 620 F.3d 108, 119 (2010) (quoting 8 U.S.C. 1101(a)(13)(C)(v)), petition for cert. pending, No. 10-1211 (filed Apr. 4, 2011). But courts have repeatedly "rejected the notion that an alien can reasonably have relied on provisions of the immigration laws in 'committ[ing]' his crimes." *Id.* at 120. See also pp. 14-15, *supra*; *Hernandez de Anderson*, 497 F.3d at 943 (distinguishing prior Ninth Circuit cases finding no impermissible retroactive effect with respect to the consequences of criminal conduct as opposed to convictions).

Second, the conduct in question here is not only petitioner's pre-1996 criminal conduct, but also conduct that

occurred well *after* the enactment of the revised version of Section 1101(a)(13). In order for a lawful permanent resident to be "regarded as seeking an admission into the United States" (8 U.S.C. 1101(a)(13)(C)), it is not only necessary that he commit a certain kind of offense; he must also depart from and return to the United States. Here, petitioner's April 14, 2003 departure from the United States (A.R. 128) and April 28, 2003 return (Pet. App. 10) both occurred many years after the 1997 effective date of the new definition of "admission." Thus, petitioner could have avoided the application of the statute: After IIRIRA became effective in 1997, petitioner could have refrained from departing from the United States (or from returning to the United States). Moreover, he could also have attempted to avoid the consequences of the "admission" definition by, in advance of his departure and return, filing and obtaining approval of either of the applications that he has since filed—for naturalization or for relief under former Section 212(c). To paraphase *Fernandez-Vargas*: "It is therefore the alien's choice" to depart and seek to reenter the country "after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out." 548 U.S. at 44.[9]

b. Petitioner does not identify any conflict in the courts of appeals about the applicability of the new definition of "admission" to an alien who was convicted at trial before 1996. Indeed, it does not appear that

[9] Like the alien in *Fernandez-Vargas*, see 548 U.S. at 44 n.10, petitioner does not claim that he has a "vested right[]" to the matter at issue (the ability to depart from and return to the United States on a brief, casual, and innocent basis, without regard to his admissibility).

any published court of appeals opinion has addressed the purportedly retroactive applicability of Section 1101(a)(13)(C)(v) in the context of an alien who had not pleaded guilty to the relevant offense. The Second Circuit's decision in *Vartelas* involved an alien who had pleaded guilty to a crime involving moral turpitude, but that court still held that "the application of [Section 1101(a)(13)(C)(v)] with respect to Vartelas's January 2003 foreign trip—an event begun and completed long after the effective date of IIRIRA—is not impermissibly retroactive." 620 F.3d at 120.

Although petitioner contends (Pet. 35) that his "position is * * * supported by the reasoning of the Fourth Circuit in *Olatunji*," that decision repeatedly stressed that its retroactivity analysis turned on "new legal consequences" associated with the defendant's "decision to plead guilty" and the resulting "conviction," *Olatunji* v. *Ashcroft*, 387 F.3d 383, 396 (2004)—not on the immigration consequences of the defendant's underlying criminal conduct. Moreover, as *Vartelas* noted, the court in *Olatunji* did not address the statute's "focus on the LPR's 'commi[ssion]' of the crime." 620 F.3d at 121. Nor did the Ninth Circuit's decision in *Camins* v. *Gonzales*, 500 F.3d 872 (2007), which petitioner implicitly concedes does not even present an intra-circuit conflict with the decision below, since he claims that the court of appeals erred here "in failing *to extend the holding* in *Camins* * * * to aliens who were convicted following a jury trial." Pet. 34 (emphasis added). Petitioner is thus correct in refraining from alleging any conflict with the decision below.

c. In any event, this case would be a poor vehicle to address the extent to which the 1996 statute superseded the so-called *Fleuti* doctrine, because petitioner did not

exhaust the argument before the Board, and he has not even attempted to establish that his absence from the United States was so "innocent, casual, and brief" that he would not be deemed to have "'intended'" to "'depart[]'" the United States under the prior version of the statute. *Rosenberg* v. *Fleuti*, 374 U.S. 449, 461 (1963) (quoting 8 U.S.C. 1101(a)(13) (1952)). In *Camins*, *supra*, the Ninth Circuit explained that the *Fleuti* doctrine requires consideration of "three non-exclusive factors": the length of the alien's absence, the purpose of the foreign travel, and whether the alien had to procure any travel documents. 500 F.3d at 877. But the only information in the record about the foreign travel that precipitated the charge of inadmissibility against petitioner is his statement (made with the assistance of counsel) that he "remain[ed] in England approximately 2 weeks, for the purpose of visit." A.R. 128-129.[10]

Petitioner did not raise any argument based on Section 1101(a)(13) or *Fleuti* before the IJ, see A.R. 90-102 (points and authorities supporting application for Section 212(c) relief); A.R. 156-161 (motion to terminate). To the contrary, he affirmatively "conceded inadmissibility." Pet. App. 11. Nor did he raise any such argument before the Board. See A.R. 7-21 (appellate brief). As a result, there is at the very least a serious question

[10] The same form disclosed that petitioner had previously made "various trips to England for vacation," but did not include details about the dates, frequency, or lengths of those earlier trips. A.R. 128; see also A.R. 106 (petitioner's declaration, filed with the IJ) ("From 1991 until my detention at LAX in 2003 I departed the United States and returned numerous times.").

whether the court of appeals even had jurisdiction to consider the Section 1101(a)(13) issue.[11]

Moreover, when petitioner raised the issue for the first time in the court of appeals, he simply asserted that, under the Ninth Circuit's decision in *Camins*, he should not have been treated "as an arriving alien," without providing any explanation for why he satisfied *Fleuti*. Pet. C.A. Br. 20. Even in this Court, petitioner has not explained why he would not have been deemed to be seeking admission under *Fleuti*. See Pet. 34-36.

Accordingly, even assuming that there is jurisdiction to consider this non-exhausted claim and that petitioner were to prevail on his legal argument in this Court, there would still be no basis in the record to conclude

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[11] Under 8 U.S.C. 1252(d), a court "may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right." Although the government did not raise petitioner's failure to exhaust in the court of appeals, and that court did not address exhaustion in the one sentence it devoted to petitioner's *Fleuti*-doctrine argument (Pet. App. 2), the Ninth Circuit has long recognized, correctly, that an alien's "failure to raise an issue to the BIA generally constitutes a failure to exhaust, thus depriving th[e] court of jurisdiction to consider the issue." *Young* v. *Holder*, 634 F.3d 1014, 1018 (2011); see also *Zara* v. *Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004) (citing cases). In the court of appeals, petitioner asserted that exhaustion was not required because *Camins* was decided only after the Board's decision in his case. Pet. C.A. Br. 21. He cited a case that did not provide any support for that proposition but did say that an alien is not required to exhaust a retroactivity argument because "the BIA cannot give relief on such claims." *Garcia-Ramirez* v. *Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005). That alternative rationale is not only incorrect. See, *e.g.*, *Falek* v. *Gonzales*, 475 F.3d 285, 290-291 (5th Cir. 2007); *Theodoropoulos* v. *INS*, 358 F.3d 162, 172 (2d Cir.), cert. denied, 543 U.S. 823 (2004). It is also inconsistent with petitioner's approach to the issue of the retroactive effect of the repeal of Section 212(c), which he *did* raise before the Board.

that he should not have been subjected to inspection as an arriving alien. Further review of petitioner's second question presented is therefore unwarranted.

3. With respect to the third question presented, petitioner contends (Pet. 31-33) that the court of appeals erred in "upholding the BIA's denial of [petitioner's] request to terminate removal proceedings." Under the relevant regulation, an IJ may grant such a request "when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors." 8 C.F.R. 1239.2(f).

Petitioner does not dispute that, as relevant here, the agency's construction of its regulation required him to establish prima facie eligibility by an "'affirmative communication' from the DHS."[12] Pet. App. 2 (quoting *Hernandez de Anderson*, 497 F.3d at 933); see also *In re Hidalgo*, 24 I. & N. Dec. 103, 106 (B.I.A. 2007) ("it is appropriate for the Board and the Immigration Judges to require some form of affirmative communication from the DHS prior to terminating proceedings"); *In re Cruz*, 15 I. & N. Dec. 236, 237 (B.I.A. 1975) (construing prior version of regulation; "[w]e hold that prima facie eligibility may be established by an affirmative communication from the [Immigration and Naturalization] Service * * * that the alien would be eligible for naturalization but for the pendency of the deportation proceedings"). As the Fourth Circuit has explained, that rule recognizes that "DHS is best suited to make an accurate prima facie finding based on its adjudicatory experience

[12] Petitioner criticizes the IJ for making her own determination about whether petitioner was prima facie eligible, Pet. 33, but that was not the basis of the Board's decision, which expressly concluded that "there has been no affirmative communication * * * as to [petitioner's] eligibility to naturalize," Pet. App. 6.

and expertise." *Barnes* v. *Holder*, 625 F.3d 801, 806 (2010).

Petitioner instead contends (Pet. 33) that a letter he received from DHS "must be construed as a *prima facie* determination that [he] is eligible for naturalization." That claim is meritless, because the letter in question stated merely that the agency was "*without authority* to consider [petitioner's] eligibility for naturalization," A.R. 149 (emphasis added).[13] That statement—which took no position, not even a preliminary one, about petitioner's eligibility—did not constitute an affirmative communication or any kind of finding about petitioner's eligibility based on the agency's adjudicatory experience and expertise. See Pet. App. 6-7 ("The DHS's letter makes no mention of the respondent's eligibility to naturalize and provides no indication that, but for the pendency of the removal proceedings, the DHS would act favorably on his naturalization application.").

Petitioner does not even suggest there is any circuit split with respect to his factbound claim of prima facie eligibility for naturalization. Nor does his attempt to distinguish the Ninth Circuit's decision in *Hernandez de*

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[13] After noting that petitioner had filed an application for naturalization, that he had been placed in removal proceedings, and that DHS's powers with respect to naturalization had been transferred from the Attorney General, the letter from DHS stated as follows:

> Section 318 [of the INA, 8 U.S.C. 1429,] limits the Attorney General's power to consider applications for naturalization while removal proceedings are pending. Because removal proceedings are pending against you, the Attorney General is without authority to consider your eligibility for naturalization. Therefore, no decision can be made on your Application for Naturalization until the removal proceedings in your case are completed.

A.R. 149.

Anderson (Pet. 33) reveal an intra-circuit split, because this case, like that one, is one in which DHS had not "state[d] that an alien is prima facie eligible for naturalization." 497 F.3d at 935. Further review of petitioner's third question presented is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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