No. 10-1366

In the Supreme Court of the United States

DIONICIO GUERRERO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ANDREW C. MACLACHLAN
AARON R. PETTY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

In 1996, Congress repealed Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which provided for a discretionary waiver of exclusion, and replaced it with another form of discretionary relief not available to aliens convicted of certain crimes, including aggravated felonies. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court, applying principles of non-retroactivity, held that the repeal of Section 212(c) did not apply 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 controlled-substance offense 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, based on principles of non-retroactivity, the repeal of Section 212(c) is applicable to an alien who was convicted of an aggravated felony controlled-substance offense after trial, but alleges that he relinquished his right to appeal the conviction in reliance on potential eligibility for a waiver under Section 212(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter* but is reprinted at 407 Fed. Appx. 964. The decisions of the Board of Immigration Appeals (Pet. App. 8a-10a) and of the immigration judge (Pet. App. 11a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2011. The petition for a writ of certiorari was filed on May 2, 2011. 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 Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domi-

ciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. 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, Pub. L. No. 101-649, § 511, 104 Stat. 5052, 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 April 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress further amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including aggravated felonies, irrespective of the length of the sentence served. 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. The latter section now provides for a form of discretionary relief known as cancellation of removal, which is unavailable to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant here, includes illicit

trafficking in a controlled substance). See 8 U.S.C. 1101(a)(43)(B), 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 through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under former Section 212(c). 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 distinction 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 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).

2. a. Petitioner is a native and citizen of Mexico. Pet. App. 2a. He entered the United States illegally in 1980. *Ibid.* In 1990, petitioner adjusted his status to

that of a lawful permanent resident in accordance with the amnesty provisions of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a)(1), 100 Stat. 3394-3403 (codified as amended at 8 U.S.C. 1255a). See Pet. App. 2a. In 1995, petitioner was convicted in Illinois state court, after a trial, of the manufacture or delivery of more than 500 grams of marijuana. *Ibid.* He was sentenced to two years of probation and did not appeal his conviction. *Ibid.*

b. In 2008, the Department of Homeland Security placed petitioner in removal proceedings and charged him with being removable under 8 U.S.C. 1227(a)(2)(A)(iii), as an alien who has been convicted of an aggravated felony as defined in 8 U.S.C. 1101(a)(43)(B) (referring to an offense related to illicit trafficking in a controlled substance). Pet. App. 11a.

At a hearing before an immigration judge (IJ) in 2009, petitioner, represented by counsel, conceded that his conviction was an aggravated felony, but requested that the ground of removability be waived under former Section 212(c). Pet. App. 12a. The IJ concluded that petitioner was not eligible for relief under former Section 212(c) because, unlike the alien in *St. Cyr*, petitioner had not entered a guilty plea, but was instead convicted of an aggravated felony after a trial and therefore "did not abandon any right or admit guilt in reliance on continued eligibility for Section 212(c) relief." *Id.* at 15a.

c. Petitioner appealed that ruling to the Board of Immigration Appeals (Board), contending not only that reliance is not relevant to retroactivity analysis but also (for the first time) that he had in fact relied on the possibility of Section 212(c) relief in deciding not to appeal his conviction. Administrative Record (A.R.) 24, 31. The Board dismissed the appeal, concluding that petitioner

was not eligible for a waiver under former Section 212(c) because of his aggravated felony conviction. Pet. App. 8a-10a. Applying Seventh Circuit precedents and Department of Justice regulations, the Board rejected petitioner's retroactivity argument because he had not pleaded guilty to his aggravated felony and thus did not forgo any benefit in reliance on Section 212(c). *Id.* at 9a-10a (citing *Canto* v. *Holder*, 593 F.3d 638, 642-645 (7th Cir.), cert. denied, 131 S. Ct. 85 (2010); *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1036-1037 (7th Cir. 2004); and 8 C.F.R. 1212.3(h) (2009)).

3. Petitioner filed a petition for review in the court of appeals, which denied his request in an unpublished opinion. Pet. App. 1a-7a. Petitioner argued that circuit precedent had erroneously failed to extend *St. Cyr* to aliens whose convictions followed a trial rather than a guilty plea, and also that he reasonably relied on the availability of a Section 212(c) waiver when he decided not to appeal his conviction. *Id.* at 3a; Pet. C.A. Br. 10-19. The court of appeals noted that it had "recently rejected that very contention in *Canto* v. *Holder*." Pet. App. 4a (citation omitted). The court therefore declined to find that principles of non-retroactivity barred the application of Section 212(c)'s repeal to the category of aliens who claimed to rely on the continued availability of Section 212(c) relief in deciding, before IIRIRA, not to appeal the convictions that later made them ineligible for discretionary relief. *Id.* at 4a-5a. The court concluded that "the category of aliens who went to trial did not forgo any possible benefit in reliance on [S]ection 212(c)." *Ibid.* (quoting *Canto*, 593 F.3d at 644). And it found that, "[e]ven if aliens who went to trial but [c]hose not to appeal ought to [be] considered separately, * * * the argument still would be doomed because it is implau-

sible that those aliens gave up their right to appeal in reliance on [Section] 212(c)." *Id.* at 4a-5a (citing *Canto*, 593 F.3d at 645). The court of appeals also determined that no "supervening development" had "undermined" its prior decision in *Canto*, which petitioner had failed even to cite in his opening brief, even though it had been cited by the Board, *id.* at 5a-6a, and that overruling circuit precedent would not be able to "eliminate * * * altogether" a circuit split on "the broader question whether the repeal of [Section] 212(c) is impermissibly retroactive when applied to aliens who put the government to its proof at trial." *Id.* at 6a-7a.

ARGUMENT

Petitioner contends (Pet. 9-11) that *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which involved an alien convicted of an aggravated felony after a plea agreement, has been misinterpreted by the majority of the courts of appeals and that the availability of discretionary relief from removal under former Section 212(c) of the INA should be extended to any alien found guilty of a deportable offense after a trial. Petitioner's argument lacks merit. 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 ago and is therefore of greatly diminished importance. Moreover, this Court has repeatedly denied petitions urging a similar extension of *St. Cyr*'s holding—including, most recently, in the case that the decision below viewed as controlling, see *Canto* v. *Holder*, 593 F.3d 638 (7th Cir.), cert. denied, 131 S. Ct. 85 (2010). See also *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).[1]

1. Petitioner principally contends (Pet. 26-28) that the decision below erred in making reliance part of its analysis of whether the repeal of Section 212(c) had an impermissibly retroactive effect. That contention 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 *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

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[1] Two other pending petitions for certiorari urge a similar extension of *St. Cyr*'s holding to permit relief under former Section 212(c) for aliens who were convicted after trial. See *Myers* v. *Holder*, No. 10-1178 (filed Mar. 24, 2011) (first question presented); *Johnson* v. *Holder*, No. 10-730 (filed Dec. 1, 2010) (first question presented). 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*.

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 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 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*. Petitioner's contrary view—that the prospect of reliance is irrelevant—would make the Court's analysis of guilty pleas in *St. Cyr* superfluous.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner relies (Pet. 9-11, 26-27) principally on *Landgraf*. That case, however, does not support petitioner's arguments. In *Landgraf*, the Court explained that a statute "may unsettle expectations and impose burdens on past conduct" without operating retrospectively. 511 U.S. at 269 n.24; see also *id.* at 270 n.24 ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.") (quoting Lon L. Fuller, *The Morality of Law* 60 (1964)). *Landgraf* specifically identified "reasonable reliance" as a consideration that "offer[s] sound guidance" in evaluating retroactivity, *id.* at 270, and the

Court quoted that same proposition in *St. Cyr*, 533 U.S. at 321. 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." *Id.* at 326 (emphasis added).

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.

2. Petitioner contends (Pet. 12-21) that there is a conflict among the circuits about the proper interpreta-

tion of this Court's *St. Cyr* decision. 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* 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); *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); *Saravia-Paguada* v. *Gonzales*, 488 F.3d 1122, 1131 (9th Cir. 2007), cert. denied, 553 U.S. 1064 (2008); *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 its dictum in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004), 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, *id.* at 494. *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's view that retroactivity analysis turns on the fact of conviction simpliciter were correct, then that entire discussion in *St. Cyr* was superfluous, even though it was emphasized by the Court in *Fernandez-Vargas*, see p. 9, *supra*. Cf. *Molina Jerez* v. *Holder*, 625 F.3d 1058, 1072 n.11 (8th Cir. 2010) (noting that, in following *Atkinson*, the Eighth Circuit's decision in "*Lovan* does not cite *Fernandez-Vargas*" and "does cite" another Eighth Circuit decision that was "overruled by *Fernandez-Vargas*").

In any event, the deviation in the circuits' analyses is narrow, because the Third Circuit nonetheless acknowledged that reliance is "but one consideration." *Atkinson*, 479 F.3d at 231. As a result, its departure from the 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* take into account the prospect of reliance.

3. Although petitioner's principal argument concerns the distinction between pleading guilty and going to trial, he also contends (Pet. 18, 28) that he would prevail under the Tenth Circuit's decision in *Hem*, *supra*, which contemplated that an alien who did not plead guilty could still establish reliance by focusing on his decision not to appeal a conviction. But petitioner's circumstances are distinct from those of the alien in *Hem*, whose appeal could have put him "at risk of being sentenced to a sentence longer than 5 years * * * making him ineligible for [Section] 212(c) relief" (under the statutory regime that was in effect after 1990). 458 F.3d at 1199. Petitioner, who received a sentence of two years of probation, makes no such claim that success on an appeal realistically could have resulted in a new sentence on remand that would have affirmatively made him ineligible for Section 212(c) relief under pre-IIRIRA law.[2] Moreover, the court of appeals—exercising its "commonsense, functional judgment" about retroactivity, *Martin*, 527 U.S. at 357—reasonably found that, as a general matter, "it is implausible that those aliens" who were convicted after trial but did not appeal "gave up their right to appeal in reliance on [Section] 212(c)." Pet. App. 5a (citing *Canto*, 593 F.3d at 645).

This Court denied certiorari in similar circumstances in *Canto*, see 131 S. Ct. 85, and there is no reason for a different disposition here.

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[2] Petitioner submitted an affidavit to the Board in support of his argument about reliance in making his decision not to appeal. It did not mention any risk of losing Section 212(c) eligibility, but instead stated as follows: "I did not appeal my case because my attorney informed me that the conviction would not affect my immigration status." A.R. 31.

4. In claiming that this case presents an "issue of national significance," petitioner notes (Pet. 19, 21-24) that there have been a number of court of appeals decisions involving former Section 212(c), observes that the number of grants of relief under former Section 212(c) remained the same in the last two years, and suggests that enhanced enforcement will only increase the number of future applications. In fact, the issue is of limited prospective importance, because it pertains to the retroactive effect of a statutory amendment to former Section 212(c) that occurred more than 14 years ago.

The "volume of circuit court litigation" about Section 212(c) (Pet. 21) is an unreliable gauge of the issue's continuing importance because immigration cases often take so long to resolve. Thus, although petitioner invokes a list of recent cases in the petition for a writ of certiorari in *Ferguson* v. *Holder*, 130 S. Ct. 1735 (2010) (No. 09-263), the government's brief opposing certiorari in *Ferguson* explained (at 15-17) that 40 of the 57 cited decisions involved immigration proceedings that were initiated before *St. Cyr* was decided.

Although petitioner predicts that increased immigration "enforcement efforts" may result in more applications for Section 212(c) relief, Pet. 23, enforcement against criminal aliens has been a high priority since Congress's 1996 reforms, and the government's enforcement efforts have been enhanced with greater resources since 2001. Thus, many aliens eligible to apply for relief under former Section 212(c) applied after this Court's decision in *St. Cyr*. The numbers of applications, grants of relief, and court cases expanded after *St. Cyr*, but those numbers are now diminishing. In recent years, the number of both applications and grants of relief under former Section 212(c) has been smaller and declin-

ing. Although, as petitioner notes (Pet. 22), the number of applications granted was static between FY 2009 and FY 2010, that number went from 1905 in FY 2004 to 857 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.[3] That reflects a 80% decline since FY 2004—and a 60% decline since FY 2008.

Moreover, because the great majority of criminal defendants plead guilty (see *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010)), the number of aliens affected by the general rule in the circuits that Section 212(c) does not apply to an alien who was convicted after a trial, therefore, would be only a small fraction of the number of aliens with pre-IIRIRA convictions.[4]

Finally, because green cards issued after 1989 expire after ten years, see 54 Fed. Reg. 47,586 (1989), nearly all

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[3] These figures are based on unpublished statistics compiled by the Executive Office of Immigration Review through FY 2010.

[4] Cf. *Ponnapula*, 373 F.3d at 496 n.16 ("[I]n comparison to the holding in *St. Cyr*, the effect of our overall holding is likely to be small. First, the class of aliens affected by this ruling is constantly shrinking in size as the effective date of IIRIRA recedes into the past. Second, * * * many aliens who are within the scope of this holding will nonetheless be statutorily ineligible for [Section] 212(c) relief by reason of having served five years or more in prison. Third, many times more criminal defendants enter into plea agreements than go to trial.").

lawful permanent residents who are removable on the basis of pre-IIRIRA convictions—even those who 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. There is accordingly every reason to believe that this issue—which involves a statutory provision that was repealed more than 14 years ago—affects only a narrow class of individuals and is of diminishing prospective importance.

The Court should therefore deny further review, as it has done in at least 15 other cases in the last few years. See pp. 6-7, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

DONALD E. KEENER
ANDREW C. MACLACHLAN
AARON R. PETTY
Attorneys

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