No. 06-140

In the Supreme Court of the United States

SAMARJEET SIDHU, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

As a result of the 1996 amendments to the Immigration and Nationality Act, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, a removable alien is ineligible for discretionary relief from removal if the alien was previously convicted of an aggravated felony. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court, based on principles of non-retroactivity, held that the 1996 amendments did not 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 discretionary relief. The question presented is whether this Court's holding in *St. Cyr* applies to an alien convicted of an aggravated felony after trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter*, but is *reprinted in* 179 Fed. Appx. 221. The opinion of the Board of Immigration Appeals (Pet. App. 6-8) and the decision of the immigration judge (Pet. App. 9-20) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 27, 2006. The petition for a writ of certiorari was filed on July 26, 2006. 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 Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed Supp. II 1996), authorized a permanent resident alien

with a lawful unrelinquished domicile of seven consecutive years to apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). In the Immigration Act of 1990, Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. Pub. L. No. 101-649, § 511, 104 Stat. 5052. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien previously convicted of certain types of offenses, including an aggravated felony, without regard to the amount of time spent in prison. See Pub. L. No. 104-132, § 440(d), 110 Stat. 1277.

Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), see Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A precludes from discretionary relief an alien who has been convicted of an aggravated felony. See 8 U.S.C. 1229b(a)(3). In *St. Cyr*, *supra*, 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 if, at the time of the plea agreement, the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

2. Petitioner is a citizen of Canada. In 1984, he was admitted to the United States as a lawful permanent

resident. In 1996, a jury found petitioner guilty of conspiracy to commit mail fraud; aiding and abetting mail fraud; and making material false, fictitious, and fraudulent statements to federal investigators. Pet. App. 2-3, 21. He was sentenced to a term of imprisonment of 37 months. *Id.* at 30. In 1999, the government commenced removal proceedings against petitioner based on his conviction of an aggravated felony. *Id.* at 3; see 8 U.S.C. 1101(a)(43)(M)(i) (offense involving fraud or deceit with loss to the victim exceeding $10,000); 8 U.S.C. 1101(a)(43)(U) (conspiracy to commit aggravated felony); 8 U.S.C. 1227(a)(2)(A)(iii). In April 2001, the immigration judge (IJ) found petitioner removable as charged and ineligible for any relief from removal, and ordered petitioner removed to Canada. Pet. App. 28-40.

Petitioner appealed to the Board of Immigration Appeals (BIA). While the appeal was pending, this Court issued its decision in *St. Cyr*. Petitioner then filed a supplemental brief, in which he argued, based on *St. Cyr*, that he was eligible to seek discretionary relief from removal under former Section 212(c) because his aggravated felony conviction predated the repeal of Section 212(c). The BIA dismissed the appeal and remanded the case to the IJ for consideration of petitioner's application for discretionary relief under former Section 212(c). Pet. App. 21-27.

3. On remand, the IJ found that petitioner was eligible to seek discretionary relief under former Section 212(c), and, after a hearing, granted petitioner discretionary relief. Pet. App. 9-20.[1]

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[1] The IJ concluded that, although petitioner's conviction postdated AEDPA, his offense did not qualify as an aggravated felony until IIRIRA later amended the definition of aggravated felony so as to reduce the minimum amount of loss for an offense involving fraud or

The government appealed the IJ's decision, and the BIA sustained the government's appeal. Pet. App. 6-8. The BIA, relying on the decisions of a number of courts of appeals, concluded that *St. Cyr* is inapplicable to an alien whose aggravated felony conviction was pursuant to a trial rather than a guilty plea. *Id.* at 7. The BIA further explained that, under proposed regulations implementing *St. Cyr*, the availability of relief under former Section 212(c) did not extend to an alien whose aggravated felony conviction was pursuant to a trial. *Id.* at 7-8; see 8 C.F.R. 1003.44(a), 1212.3(h). The BIA therefore ordered petitioner removed to Canada. Pet. App. 8.

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-5. The court, relying on its previous decision in *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (5th Cir. 2006), held that *St. Cyr* does not apply to an alien whose aggravated felony conviction was pursuant to a trial rather than a guilty plea. Pet. App. 5. Accordingly, the court concluded, petitioner is ineligible for discretionary relief under former Section 212(c). *Ibid.*

ARGUMENT

Petitioner contends (Pet. 13-22) that the holding of *St. Cyr*, which involved aliens convicted of an aggravated felony through a plea agreement, should be extended to aliens convicted after trial. He also argues (Pet. 15-16) that the court of appeals' decision conflicts with the Third Circuit's decision in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004). Those contentions lack merit and do not warrant review. This Court has denied other petitions raising the same claim raised by petitioner, see

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deceit from $200,000 to $10,000. See Pet. App. 11, 13; 8 U.S.C. 1101(a)(43)(M)(i); IIRIRA § 321(a)(7), 110 Stat. 3009-628.

Thom v. *Gonzales*, 126 S. Ct. 40 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005), and there is no reason for a different result here.

1. In *St. Cyr*, this Court addressed the situation of aliens who pleaded guilty after Section 212(c) was amended in 1990 to render ineligible for relief any alien convicted of an aggravated felony who had served a prison term of at least five years. A plea agreement providing for a sentence of less than five years thus would have assured the alien's eligibility for relief under then-current law. See *INS* v. *St. Cyr*, 533 U.S. 289, 293, 321-324 (2001). 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." *Id.* at 321-322 (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 elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

St. Cyr therefore was grounded in the notion that, because aliens would have based their decision to plead guilty on the continued availability of discretionary re-

lief, the plea of guilty gave rise to a reasonable reliance interest and expectations in preserving eligibility for that relief. In short, as the Court recently observed in describing the reasoning of *St. Cyr*, the "possible discretionary relief" was "a focus of expectation and reliance" in the decision to plead guilty as part of a "*quid pro quo* agreement." *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2432 & n.10 (2006) (citing *St. Cyr*, 533 U.S. at 323).

In *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (2006), petition for cert. pending, No. 05-1251 (filed Mar. 28, 2006), on which the court of appeals relied below, see Pet. App. 5, the Fifth Circuit correctly concluded that "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." 436 F.3d at 520 (quoting *Rankine* v. *Reno*, 319 F.3d 93, 99 (2d Cir.), cert. denied, 540 U.S. 910 (2003)). As the court explained, unlike an alien who pleaded guilty, an alien who went to trial did not "detrimentally change[] his position in reliance on continued eligibility for § 212(c) relief." *Ibid.* (quoting *Rankine*, 319 F.3d at 99). An alien who pleaded guilty "would have participated in the *quid pro quo* relationship in which a greater expectation of relief is provided in exchange for forgoing a trial," thus implicating "the reliance interest emphasized by [this] Court in *St. Cyr*." *Ibid.* (quoting *Rankine*, 319 F.3d at 99). Aliens who elected to go to trial, by contrast, "made no decision to abandon any rights and admit guilt—thereby immediately rendering themselves deportable—in reliance on the availability of the relief offered prior to IIRIRA." *Id.* at 520 n.3 (quoting *Rankine*, 319 F.3d at 99). Their decision to go to trial, "standing alone, had no impact on their immigration status," and "[u]nless and until they

were convicted of their underlying crimes," they "could not be deported." *Ibid.* (quoting *Rankine*, 319 F.3d at 99). Such aliens, unlike aliens who pleaded guilty, therefore could make no "claim that they relied on the availability of § 212(c) relief in making the decision to go to trial." *Ibid.* (quoting *Rankine*, 319 F.3d at 99).

2. In addition to the Fifth Circuit below, six other courts of appeals have likewise declined to extend the holding of *St. Cyr* to aliens convicted after trial. See *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002); *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1036-1037 (7th Cir. 2004) (per curiam); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-1122 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1273-1274 (11th Cir. 2002).

a. Contrary to petitioner's argument (Pet. 15-16), those decisions do not conflict with the Third Circuit's decision in *Ponnapula*. While *Ponnapula* did address the question whether the 1996 amendments to the INA apply to aliens found guilty at trial before 1996, it did not hold that the amendments are inapplicable to *any* alien found guilty at trial. The Third Circuit framed the question to be decided in *Ponnapula* as "what aliens—if any—who went to trial and were convicted did so in reasonable reliance on the availability of § 212(c) relief." 373 F.3d at 494. The court observed that, "[g]enerally speaking, reliance interests (in the legal sense) arise because some choice is made evincing reliance." *Ibid.* The court thus divided the category of "aliens who went to trial and were convicted prior to the effective date of IIRIRA's repeal of former § 212(c)" into (i) "aliens who

went to trial because they declined a plea agreement that was offered to them," and (ii) "aliens who went to trial because they were not offered a plea agreement." *Ibid.* Because aliens in the latter category "had no opportunity to alter their course in the criminal justice system in reliance on the availability of § 212(c) relief," the court "highly doubt[ed]" that aliens who were not offered a plea agreement "have a reliance interest that renders IIRIRA's repeal of former § 212(c) impermissibly retroactive as to them." *Ibid.* The Third Circuit ultimately held that "aliens * * * who affirmatively turned down a plea agreement had a reliance interest in the potential availability of § 212(c) relief." *Ibid.*

Petitioner was convicted of an aggravated felony at trial, but he does not contend that he declined a plea agreement before proceeding to trial. He therefore would not be able to prevail even under the Third Circuit's decision in *Ponnapula*. With respect to aliens who were convicted at trial before AEDPA and IIRIRA and who did not decline a plea agreement, there is no conflict between the decision below and *Ponnapula* on the question whether application of those laws would be retroactive.[2]

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[2] Although petitioner observes (Pet. 12) that he argued below that "he could well have relied upon the existence of § 212(c) in electing *not* to enter into a plea bargain," petitioner has made no contention, either in the proceedings below or in the petition, that he was offered a plea agreement or that he declined to enter into a plea agreement. Rather, petitioner has hypothesized only that "a plea agreement could likely have been arranged." Pet. C.A. Br. 46. The alien in *Ponnapula*, by contrast, had been offered and had declined a plea agreement based on advice that, if he were convicted at trial, he likely would be sentenced to less than five years and thus would remain qualified for relief under former Section 212(c). See *Ponnapula*, 373 F.3d at 484. The *Pon-*

b. The court of appeals' decision also does not conflict with the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004). See Pet. 17-18. That decision did not address in any form the question presented here. *Olatunji* involved a different provision of IIRIRA, codified at 8 U.S.C. 1101(a)(13)(C)(v), that provides that a lawful permanent resident who travels outside the United States will not be regarded as seeking admission upon his return unless he has been convicted of certain crimes. See *Olatunji*, 387 F.3d at 386. The question presented here was addressed by the Fourth Circuit in a different case, *Chambers* v. *Reno*, 307 F.3d 284 (2002), which held, consistent with the view of every other court of appeals to consider the question, that the amendments rendering aggravated felons ineligible for discretionary relief apply to an otherwise-eligible alien who was convicted after trial.

It is true, as petitioner observes (Pet. 18), that, in ruling for the alien in *Olatunji*, the Fourth Circuit reasoned that the fact that the provision of IIRIRA in question "attached new legal consequences to Olatunji's guilty plea is, alone, sufficient to sustain his claim," and that "no form of reliance is necessary." 387 F.3d at 389. But *Olatunji* did not purport to overrule *Chambers*. Indeed, *Olatunji* explicitly distinguished *Chambers* on the ground that the provision of IIRIRA at issue there (and here) "did not attach new consequences to [the alien's] 'relevant past conduct,' namely his decision to go to trial." *Id.* at 392 (quoting *Chambers*, 307 F.3d at 293). Even under the reasoning employed in *Olatunji*, therefore, the amendments to the INA limiting the availabil-

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napula court accordingly limited its holding to aliens "who affirmatively turned down a plea agreement," *id.* at 494, and petitioner does not suggest that he fits in that category.

ity of relief from removal are applicable to aliens, like petitioner, who were convicted of an aggravated felony after trial.

c. Finally, the court of appeals' decision does not conflict with the Second Circuit's decision in *Restrepo* v. *McElroy*, 369 F.3d 627 (2004). See Pet. 17. The Second Circuit held in that case that the repeal of Section 212(c) relief does not apply to an alien who decided to forgo an opportunity to apply "affirmatively" for Section 212(c) relief—*i.e.*, after his criminal conviction but before being placed in deportation proceedings—in the hope that he could build a stronger case for relief. See *Restrepo*, 369 F.3d at 632-635. That decision does not assist petitioner because he has not suggested that he decided to forgo affirmatively applying for Section 212(c) relief before he was placed in removal proceedings. See *Thom* v. *Ashcroft*, 369 F.3d 158, 163 (2d Cir. 2004) (*Restrepo* does not apply to an alien who was convicted of an aggravated felony after a trial rather than through a guilty plea and who "does not claim any other basis for * * * a reliance or expectation"), cert. denied, 126 S. Ct. 40 (2005).

Moreover, the Second Circuit in *Restrepo* distinguished and reaffirmed its decision in *Rankine*, *supra*, which held that *St. Cyr* did not apply to an alien convicted of an aggravated felony after a trial rather than through a guilty plea because such an alien could make no comparable claim of reliance in the decision to go to trial. See *Restrepo*, 369 F.3d at 636-637. The court of appeals below adhered to its previous decision in *Hernandez-Castillo*, which in turn relied heavily on the Second Circuit's decision in *Rankine*. See *Hernandez-Castillo*, 436 F.3d at 520; pp. 6-7, *supra*. The Second

Circuit therefore would resolve petitioner's claim in the same manner as the court of appeals below.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2006

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[3] The Tenth Circuit's decision in *Hem* v. *Maurer*, 458 F.3d 1185 (2006), which was issued after the petition was filed in this case, does not assist petitioner. In that case, the court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) does not apply to an alien "who proceeds to trial but forgoes his right to appeal when § 212(c) relief was potentially available." *Id.* at 1187. The court reasoned that an alien might decide to forgo an appeal if a successful appeal could ultimately result in imposition of a sentence of more than five years, such that the alien would thereby be deprived of eligibility for relief under former Section 212(c). *Id.* at 1200-1201. Petitioner is not aided by the decision in *Hem* because he did not forgo an appeal, but instead appealed his conviction. See *United States* v. *Sidhu*, 130 F.3d 644 (5th Cir. 1997).