No. 06-929

In the Supreme Court of the United States

ANTONIO RODRIGUEZ-ZAPATA, 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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QUESTIONS PRESENTED

As a result of 1996 amendments to the Immigration and Nationality Act, a removable alien is ineligible for discretionary relief from removal if the alien was previously convicted of an aggravated felony. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held, based on principles of non-retroactivity, that the 1996 amendments do 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 questions presented are:

1. Whether the holding of *St. Cyr* applies to an alien convicted of an aggravated felony after trial.

2. Whether the right to seek discretionary relief from removal is protected by the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted at 193 Fed. Appx. 312. The decisions of the Board of Immigration Appeals (Pet. App. 3a) and the immigration judge (Pet. App. 4a-7a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2006. A petition for rehearing was denied on October 4, 2006 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on January 3, 2007 (the Court was closed on January 2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

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 Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion.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

In the Immigration Act of 1990, Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. See Pub. L. No. 101-649, Tit. V, § 511, 104 Stat. 5052. Subsequently, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including an aggravated felony, without regard to the amount of time spent in prison. See Pub. L. No. 104-132, Tit. IV, § 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, Tit. III, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b (1996), which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A makes aggravated felons ineligible for discretionary relief. See 8 U.S.C. 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 Section 212(c). 533 U.S. at 314-326.

2. Petitioner is a native and citizen of Mexico. In 1981, he was admitted to the United States as a lawful permanent resident. In 1995, a jury found petitioner guilty of indecency with a child, in violation of Texas law. He was sentenced to 10 years of probation and a fine of $2000. In 2001, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner.* It alleged that he was removable because the offense of which he was convicted was an aggravated felony. Pet. App. 4a-5a; see 8 U.S.C. 1101(a)(43)(A), 1227(a)(2)(A)(iii).

Petitioner conceded that he was removable but sought discretionary relief from removal under Section 212(c) of the INA. The immigration judge (IJ) ruled that Section 212(c) relief is unavailable to an alien convicted of an aggravated felony before the 1996 amendments to the INA if the alien was convicted after trial. Because petitioner was convicted after trial, the IJ found that his application for Section 212(c) relief was pretermitted and ordered him removed to Mexico. Pet. App. 4a-7a.

The Board of Immigration Appeals affirmed the IJ's decision without opinion. Pet. App. 3a.

3. Petitioner then filed a petition for a writ of habeas corpus. Pet. App. 2a. He argued that applying the 1996 amendments to the INA in his case was impermissibly retroactive and that denying him relief and a hearing

* The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

under Section 212(c) violated due process. *Ibid*. Pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106, 119 Stat. 310-311, the district court transferred the petition to the court of appeals, which treated it as a petition for review. Pet. App. 2a.

The court of appeals denied the petition in an unpublished per curiam opinion. Pet. App. 1a-2a. Relying on *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (5th Cir.), cert. denied, 127 S. Ct. 40 (2006), the court held that "application of the [IIRIRA's] repeal of INA § 212(c) to aliens who, like [petitioner], went to trial and were convicted of an aggravated felony prior to the repeal of § 212(c), did not create an impermissible retroactive effect." Pet. App. 2a. And, relying on *United States* v. *Lopez-Ortiz*, 313 F.3d 225 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003), the court held that "eligibility for discretionary relief under INA § 212(c) is not an interest warranting constitutional due process protection." Pet. App. 2a.

ARGUMENT

1. Petitioner contends (Pet. 10-20, 25-27) 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. The court of appeals correctly held otherwise, and further review is unwarranted. Indeed, this Court has already denied petitions raising the claim that petitioner raises in at least six prior cases, and it has denied three such petitions in the last seven months alone. See *Appel* v. *Gonzales*, 127 S. Ct. 659 (2006); *Sidhu* v. *Gonzales*, 127 S. Ct. 495 (2006); *Hernandez-Castillo* v. *Gonzales*, 127 S. Ct. 40 (2006); *Thom* v. *Gonzales*, 126 S. Ct. 40 (2005);

Stephens v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005).

a. In *St. Cyr*, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. See *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2431-2432 & n.10 (2006) (reaffirming *quid pro quo* basis for *St. Cyr*'s holding).

The decision below relied (Pet. App. 2a) upon *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (5th Cir.), cert. denied, 127 S. Ct. 40 (2006), which itself "adopt[ed] th[e] reasoning" (*id.* at 520) of *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003). In *Rankine*, the Second 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." 319 F.3d at 99. As the court explained in *Rankine*, 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.* An alien who pleaded guilty made a decision "to abandon any rights and admit guilt —thereby immediately rendering [himself] deportable—in reliance on the availability of the relief offered prior to IIRIRA." *Ibid.* An alien who went to trial, by contrast, did so "to challenge the underlying crime that could render [him] deportable and, had [he] succeeded, § 212(c) relief would be irrelevant." *Id.* at 99-100. In short, as *Rankine* correctly recognized, it is "the lack of detrimental reliance on § 212(c) by those aliens who chose to go to trial" that "puts them on different footing than aliens like St. Cyr." *Id.* at 102.

b. Petitioner contends (Pet. 18-20) that the decision below is inconsistent with this Court's retroactivity precedents, which establish that the ultimate question is whether the statute at issue attaches new legal consequences to events completed before its enactment and treat reliance as merely a factor to be considered in answering that question. That contention is mistaken.

The most relevant of this Court's retroactivity precedents is of course *St. Cyr*, which, like this case, addressed the question whether the 1996 amendments to the INA can be applied to bar the availability of Section 212(c) relief to an alien convicted before the amendments' effective date. Following earlier decisions of this Court, *St. Cyr* makes clear that "[t]he inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" 533 U.S. at 321 (quoting *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999), in turn quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244,

270 (1994)). And, following earlier decisions of this Court, *St. Cyr* makes clear that "the judgment whether a particular statute acts retroactively 'should be informed and guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations."'" *Ibid.* (quoting *Martin*, 527 U.S. at 358, in turn quoting *Landgraf*, 511 U.S. at 270). Applying those principles, *St. Cyr* holds that "IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly 'attaches a new disability, in respect to transactions or considerations already past,'" principally because "[p]lea agreements involve a *quid pro quo*." *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269, in turn quoting *Society for the Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814) (No. 13,156) (Story, J.)); see *id.* at 321-325 (emphasizing reliance interest of aliens who entered into plea agreement before 1996 amendments).

The court of appeals' decision in *Hernandez-Castillo*, on which it relied here, is entirely consistent with *St. Cyr*'s retroactivity analysis. *Hernandez-Castillo* explicitly states that "there is an impermissible retroactive effect where the application of the statute 'attaches new legal consequences to events completed before [the statute's] enactment.'" 436 F.3d at 519 (quoting *Landgraf*, 511 U.S. at 270) (brackets in original). Quoting the Second Circuit's decision in *Rankine*, *Hernandez-Castillo* then goes on to say that aliens who pleaded guilty "participated in the *quid pro quo* relationship" that "gave rise to the reliance interest" found by "the Supreme Court in *St. Cyr*" to have "produced the impermissible retroactive effect of IIRIRA," whereas aliens convicted after trial "neither did anything nor surrendered any

rights that would give rise to a comparable reliance interest." *Id.* at 520 (quoting 319 F.3d at 100).

c. In addition to the Second Circuit (in *Rankine*) and the Fifth Circuit (in *Hernandez-Castillo*), five other courts of appeals have 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); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002); *Montenegro* v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (per curiam); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Brooks* v. *Ashcroft*, 283 F.3d 1268 (11th Cir. 2002). Petitioner contends (Pet. 10-18) that *Rankine*, *Hernandez-Castillo*, and the other decisions conflict with *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004), *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004), and *Hem* v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006). That contention is likewise mistaken.

i. Like the decision below, the Third Circuit's decision in *Ponnapula* addressed the question whether the 1996 amendments to the INA apply to aliens found guilty at trial before 1996, but it did not hold that the amendments do not apply 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 (1) "aliens who went to trial because they declined a plea agreement that was offered

to them," and (2) "aliens who went to trial because they were not offered a plea agreement." *Ibid.* Since 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 after 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*.

ii. The decision below also does not conflict with the Fourth Circuit's decision in *Olatunji*, which did not even address the question whether the 1996 amendments to the INA concerning former Section 212(c) apply to aliens found guilty at trial before 1996. *Olatunji* involved a different provision of IIRIRA, codified at 8 U.S.C. 1101(a)(13)(C)(v), which 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 in this case was addressed by the Fourth Circuit in another case, *Chambers*, *supra*, which held, consistent with the decision below, that the 1996 amendments concerning former Section 212(c) apply to an otherwise-eligible alien who was convicted after trial.

It is true 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; see Pet. 13-14, 17. 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." 387 F.3d at 392 (quoting *Chambers*, 307 F.3d at 293). Even under the reasoning employed in *Olatunji*, therefore, the amendments to the INA limiting the availability of relief from removal are applicable to aliens, like petitioner, who were convicted of an aggravated felony after trial.

iii. Nor does the decision below conflict with the Tenth Circuit's decision in *Hem*. Like the court of appeals here, the Tenth Circuit in *Hem* addressed the question whether the 1996 amendments to the INA apply to aliens found guilty at trial before 1996, but, like the Third Circuit in *Ponnapula*, it did not hold that the amendments do not apply to *any* alien found guilty at trial. The Tenth Circuit concluded that, "just as foregoing or exercising a right to jury trial can demonstrate objectively reasonable reliance, those who proceed to trial but forgo their right to appeal have suffered impermissible retroactive effects" under the 1996 amendments to the INA. 458 F.3d at 1191. The Tenth Circuit reasoned that, "[w]hen a defendant, like Hem, proceeds to trial, is convicted, [and] chooses not to pursue an appeal" that "could result in the loss of § 212(c) relief" (because the defendant could be resentenced to a prison term that would make him ineligible for discretionary

relief), and when the defendant "subsequently loses the availability of § 212(c) relief following the Attorney General's decision to apply [the 1996 amendments to the INA] retroactively," the defendant's "right to appeal has been retroactively impaired." *Id.* at 1200. The Tenth Circuit thus held that "a defendant who proceeds to trial but foregoes his right to appeal when § 212(c) relief was potentially available has suffered retroactive effects under IIRIRA." *Id.* at 1187.

Petitioner was convicted of an aggravated felony after trial, but he makes no argument that would bring him within the distinct rationale of *Hem* and points to nothing in the record that indicates that he chose not to pursue an appeal. He therefore would not be able to prevail even under the Tenth Circuit's decision in *Hem*.

d. After the certiorari petition was filed in this case, the Third Circuit again addressed the retroactivity question presented here in *Atkinson* v. *Attorney General*, 479 F.3d 222 (2007). It concluded that "the relevant question is whether IIRIRA attached new legal consequences to th[e] aliens' convictions," *id.* at 231, and that, with respect to aliens who "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 section 212(c) relief," applying IIRIRA "to eliminate the availability of discretionary relief under former section 212(c) attach[es] new legal consequences to events completed before the repeal," *id.* at 229-230. The Third Circuit therefore held that an alien convicted before the 1996 amendments to the INA, and otherwise eligible to seek relief under Section 212(c), cannot be precluded from seeking such relief whether the alien was convicted by guilty plea or after trial. *Id.* at 229-231. The court

characterized as dictum—and declined to follow—its statement in *Ponnapula* that aliens convicted at trial before the 1996 amendments are probably not eligible for Section 212(c) relief if they were not offered a plea agreement. *Id*. at 231.

i. The Third Circuit's analysis in *Atkinson* is inconsistent with retroactivity principles applied in *St. Cyr*. The Third Circuit specifically declined to regard the relevant past event for retroactivity purposes to be the alien's underlying criminal conduct. See 479 F.3d at 231 n.8. And with good reason. In *St. Cyr* itself, the Second Circuit had rejected the proposition that the 1996 amendments repealing Section 212(c) could not be applied to an alien whose criminal conduct occurred before the amendments. The court concluded that "[i]t would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2d Cir. 2000) (citation omitted), aff'd, 533 U.S. 289 (2001). This Court in *St. Cyr* did not disagree with the Second Circuit on that point, and it likewise did not adopt the sweeping rule the Second Circuit had rejected. As explained above, see p. 5, *supra*, this Court instead focused on the alien's conduct at the time of conviction, when he voluntarily entered a guilty plea, thereby changing position as part of a *quid pro quo* arrangement. It was that *conduct by the alien*, not the mere fact of conviction, at a time when he would have been eligible for Section 212(c) relief, that was the predicate for the Court's holding that the repeal

of Section 212(c) could not be applied to an alien who pleaded guilty.

Where, as in *Atkinson*, the alien did not plead guilty, but instead was convicted after a trial, there was no such change of position or other past conduct by the alien at the time of conviction that would trigger non-retroactivity principles based on considerations of reasonable reliance and fair notice. The Third Circuit in *Atkinson* instead rested its ruling on the mere fact of conviction, divorced from any voluntary conduct or transaction by the alien. Nothing in *St. Cyr*, or in non-retroactivity principles more generally, supports that result. See *Fernandez-Vargas*, 126 S. Ct. at 2431-2432.

ii. Unlike the decisions on which petitioner relies, *Atkinson* does appear to conflict with the decision below (and with the decisions from other courts of appeals that agree with the decision below). There is no need for this Court to resolve the conflict, however, because the retroactivity question has little prospective significance: it affects only aliens who (1) were convicted of an aggravated felony before the 1996 amendments to the INA; (2) were convicted after a trial; and then (3) served less than five years in prison (unless they were convicted before 1990). That is a small and ever-diminishing class. The vast majority of criminal aliens against whom removal proceedings are commenced at present—and against whom such proceedings will be commenced in the future—were convicted after the 1996 amendments to the INA; the vast majority of the small number convicted before the 1996 amendments were convicted by guilty plea; and many of those who were convicted before the 1996 amendments and after a trial served at least five years in prison, a circumstance that would make them ineligible for Section 212(c) relief under the

pre-AEDPA (*i.e.*, 1990) version of Section 212(c). See *Ponnapula*, 373 F.3d at 496 n.16 ("[T]he 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 § 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.").

In any event, it would be premature for the Court to decide whether *St. Cyr*'s holding applies to aliens convicted of an aggravated felony after trial. A final rule adopted by the Department of Justice to implement *St. Cyr* by amending certain provisions of Title 8 of the Code of Federal Regulations, see *Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004), provides that the 1996 amendments to the INA apply to aliens convicted after trial. In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for section 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 amended regulations, which took effect on October 28, 2004. See *id.* at 57,833 (8 C.F.R. 1003.44(a)) ("This section is not applicable with respect to any conviction entered after trial."); *id.* at 57,835 (8 C.F.R. 1212.3(h)) ("Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with

respect to convictions entered after trial."). Only a few courts have considered these regulations in deciding whether *St. Cyr*'s holding applies to aliens convicted at trial, see, *e.g.*, *Alexandre* v. *United States Att'y Gen.*, 452 F.3d 1204, 1207 (11th Cir. 2006) (per curiam), and this Court should not be one of the first to do so.

2. Petitioner also contends (Pet. 21-25, 27-30) that the denial of a hearing on his application for discretionary relief under Section 212(c) violated due process. The court of appeals correctly held otherwise, and further review is unwarranted.

As the Third Circuit has explained, "discretionary relief is necessarily a matter of grace rather than of right," and thus "aliens do not have a due process liberty interest in consideration for such relief." *United States* v. *Torres*, 383 F.3d 92, 104 (2004). At least seven courts of appeals have reached the same conclusion, including the Fifth Circuit, which so held in *United States* v. *Lopez-Ortiz*, 313 F.3d 225 (2002), cert. denied, 537 U.S. 1135 (2003), the decision on which it relied here (Pet. App. 2a); accord *United States* v. *Wilson*, 316 F.3d 506, 510 (4th Cir.), cert. denied, 538 U.S. 1025 (2003); *Ali* v. *Ashcroft*, 366 F.3d 407, 412 (6th Cir. 2004); *Dave* v. *Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004); *Jamieson* v. *Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005); *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc); *Oguejiofor* v. *Attorney Gen.*, 277 F.3d 1305, 1309 (11th Cir. 2002) (per curiam). Petitioner contends (Pet. 21-25) that those decisions conflict with *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004), and *United States* v. *Copeland*, 376 F.3d 61 (2d Cir. 2004). If there is such a conflict, however, it is not implicated here.

Petitioner does not (and could not) contend that he has a freestanding due process right to have the IJ consider a request for discretionary relief from removal independent of the right created by Section 212(c) of the INA. He contends that he has a statutory right—under Section 212(c) and *St. Cyr*—and that the statutory right creates a liberty or property interest protected by the Due Process Clause. See, *e.g.*, Pet. 28 (arguing that "the threshold inquiry is whether [petitioner] has a 'life, liberty, or property' interest sufficient to invoke due process protections" and that, "at the moment of his conviction, [petitioner] gained a protected interest in the right to seek § 212(c) relief") (emphasis omitted); see also Pet. C.A. Br. 33 (arguing that it was "[t]he impermissible retroactive application" of the 1996 amendments to the INA that violated due process). The question whether petitioner has a constitutionally protected interest in a hearing on his application for discretionary relief, however, has no relevance in this case. If petitioner has a statutory right to seek Section 212(c) relief, he is entitled to a hearing on that application under governing procedures regardless of whether the right to a hearing can also be characterized as constitutional; and if he has no statutory right to seek Section 212(c) relief, there is no liberty or property interest that could be protected by the Due Process Clause.

In the cases on which petitioner relies, unlike in this one, there was no dispute that the alien had a statutory right to apply for relief under Section 212(c), because the alien was convicted by guilty plea before the 1996 amendments to the INA. See *Copeland*, 376 F.3d at 63; *Ubaldo-Figueroa*, 364 F.3d at 1046. The question whether the statutory right created an interest protected by the Due Process Clause was relevant in those

cases because they were illegal-reentry prosecutions in which the alien collaterally challenged the removal order on the ground that he had been deprived of his right to seek Section 212(c) relief, and a collateral challenge is permitted only if, among other things, the entry of the order was "fundamentally unfair," 8 U.S.C. 1326(d)(3), a term that has been interpreted to mean that the alien's "due process rights were violated by defects in his underlying deportation proceeding" (and that he suffered prejudice as a result), *Ubaldo-Figueroa*, 364 F.3d at 1048 (quoting *United States* v. *Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir.), cert. denied, 525 U.S. 849 (1998)). Because this case is on direct review, petitioner need only demonstrate a statutory entitlement to a hearing on his application for discretionary relief; he need not demonstrate a constitutional entitlement as well. For that reason, the due process question raised in the petition is an academic one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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