03-2737 (LEAD)
03-2977 (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALFONSO BELL,

Petitioner-Appellant-Cross-Appellee,

-against-

JOHN ASHCROFT, Attorney General of the United States; Michael Garcia, Acting Commissioner, Edward J. McElroy, District Director, I.N.S, New York District; Theodore Nordmark, Acting District Director, I.N.S., Philadelphia District; George Wagner, Warden, Berks County Jail, Pennsylvania,

Respondents-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* THE NEW YORK STATE DEFENDERS ASSOCIATION, THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER-APPELLANT-CROSS-APPELLEE

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PRELIMINARY STATEMENT

This case presents a question of statutory retroactivity with profound significance for numerous legal permanent residents of this country. For many years, immigrants who for various reasons were deportable could apply for discretionary relief from deportation. This administrative relief was granted more than half of the time. It was predictably granted when various factors (including long-time permanent residence in the United States) were present in the applicant's case.

The outcome of this case has serious consequences not only for Appellant Alfonso Bell, but also for many other immigrants who pled guilty years ago, served their time, and who may have long since made a constructive law-abiding life for themselves in the United States. Among those affected are immigrants like Anthony Toia, a life-long legal permanent resident against whom deportation proceedings were initiated almost ten years after he pled guilty to a drug offense,[1] and Luz De Cardenas, a long-time legal permanent resident who pled guilty to a drug offense at a time when relief from deportation was clearly available to her. As the Immigration Judge in Ms. De Cardenas' case stated: "'To deport her to Colombia at such an age, after she has already been punished by such a long sentence, and to deprive her of her family in her final years'" would be

[1] *Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003).

"'inhumane, out of all proportion to her offense, and not justified by any valid governmental objective'."[2] This case will also have consequences for immigrants with decades-old guilty pleas whose deportation proceedings have been delayed or never initiated. Indeed, this Court has suggested that the government may have refrained from bringing deportation proceedings against the immigrants whose life stories made them strong candidates for relief from deportation.[3] For such immigrants, the INS's decision now to initiate deportation proceedings based on a later-enacted statute would endanger the very interests – including protecting settled expectations – that the heavy presumption against statutory retroactivity seeks to guard.

The district court denied Mr. Bell's request to apply for relief from deportation on the ground that the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 4978, on which his deportation was sought, could be applied *retroactively* to disentitle Mr. Bell to the right to seek such relief. Mr. Bell now appeals from the district court's decision.[4]

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[2] *De Cardenas v. Reno*, 278 F. Supp. 2d 284, 295 (D. Conn. 2003) (quoting the Immigration Judge and remanding to the BIA to grant relief from deportation).

[3] *Restrepo v. McElroy*, -- F.3d --, 2004 WL 652802, at *6 n.18 (2d Cir. Apr. 1, 2004).

[4] This brief supports appellant's claim that IMMACT Section 511 cannot be applied retroactively to deny the right to seek relief from deportation to immigrants who pled guilty or *nolo contendere* before IMMACT's effective date. The district

Amici curiae ("amici") are criminal defense organizations whose members or staff represent or counsel immigrants accused of crimes. Amici respectfully submit that this Court should hold that these immigrants cannot be retroactively deprived of the possibility of relief from deportation. This holding is dictated by the doctrinal approach the Supreme Court uses to govern questions of statutory retroactivity, in which retroactivity is strongly disfavored absent a clear expression of congressional intent, of which none is present in this case. Such a holding is also necessary to vindicate the "elementary considerations of fairness" in which the Supreme Court's retroactivity jurisprudence is rooted.

SUMMARY OF THE ARGUMENT

The district court's holding that Congress retroactively stripped Mr. Bell of his right to seek discretionary relief is flatly inconsistent with federal Supreme Court precedent on statutory retroactivity. In a series of cases handed down since 1994, the Court has held that a statute may not apply retroactively unless Congress

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court's ruling was also premised on an expanded definition of "aggravated felony," which this brief does not address.

We note that this Court considered a separate issue in *Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000): whether IMMACT § 602(d) superseded a provision of the Anti-Drug Abuse Act of 1988. On May 11, 2004, this Court will hear argument in *Gelman v. Ashcroft*, 03-4463, on the soundness of the prior *Bell* decision following *St. Cyr*. This issue is not presented to the Court in this appeal.

has clearly and unequivocally expressed its intention that the statute do so. Most apposite here, the Court held several years ago in *INS v. St. Cyr*, 533 U.S. 289 (2001), that 1996 legislation that (like IMMACT before it) restricted immigrant defendants' rights to seek discretionary relief could not retroactively apply to immigrants whose guilty pleas predated the legislation. The Court in *St. Cyr* recognized that the 1996 legislation did not contain an express, unambiguous textual directive that it apply retroactively and that it clearly had a retroactive effect on immigrants who elect to plead guilty and thus forego their constitutional right to contest the charges against them at a trial. The Court accordingly held that the legislation could not be judicially read to apply retroactively to immigrants whose guilty pleas predated its enactment.

This case presents a strikingly parallel situation, and the reasoning in *St. Cyr* is therefore decisive, if not controlling, here. Both cases involved a statute that restricted discretionary relief, but lacked any provision clearly giving the statute retroactive reach. And in both cases, applying that statute to a pre-enactment guilty plea would have an "obvious and severe" – and wholly "impermissible" – "retroactive effect" on the defendant immigrant. 533 U.S. at 325. The district court therefore should have held that IMMACT should not apply retroactively to immigrant defendants like Mr. Bell, whose guilty pleas predated IMMACT, and permitted him to seek discretionary relief from deportation.

The decision below thus contravenes settled principles relating to statutory retroactivity. If the decision below is left undisturbed, the legitimate reliance interests of numerous immigrant defendants will have been unfairly impaired. The result will be, in the district court's words, "repugnant to anyone with a philosophy that depends even in part on fair play." *Bell v. Ashcroft*, No. 03 Civ. 0766 (HB), 2003 WL 22358800, at *5 (S.D.N.Y. Oct. 15, 2003). Amici therefore respectfully submit this brief in support of reversal.

As amici explain in this brief, the district court's holding that IMMACT retroactively limited Mr. Bell's rights followed from a basic error. The district court adopted a needlessly – and incorrectly – expansive reading of this Court's decision in *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993). *Buitrago-Cuesta* held, in the context of rejecting the claims of an immigrant who had been convicted following a jury trial (not a guilty plea), that IMMACT retroactively limited the discretionary relief from deportation available to such an immigrant. While recognizing "some merit" to the "argument that *Buitrago-Cuesta* would not hold up if it were reconsidered in light of the Supreme Court's recent jurisprudence on retroactive legislation," the district court treated *Buitrago-Cuesta* as compelling its decision in this case. 2003 WL 22358800, at *5.

But, as amici demonstrate, the district court's reliance on *Buitrago-Cuesta* was misplaced. Since *Buitrago-Cuesta*, the Supreme Court has repudiated the

approach to retroactivity taken in that case. *Buitrago-Cuesta* inferred Congress's purported retroactive intent in the face of statutory silence on the question of retroactivity, treating this question as a garden-variety issue of statutory interpretation. But the Supreme Court has since held, in a series of cases decided after *Buitrago-Cuesta* and including *St. Cyr*, that, before a statute can apply retroactively so as to attach new consequences to pre-enactment conduct, Congress must include an express and unambiguous provision that sets out its intention for the statute to apply retroactively. These doctrinal developments call into question whether *Buitrago-Cuesta* was correctly decided.

But, even taking *Buitrago-Cuesta* as settled law as applied to the facts of that case, there was no basis for the District Court to *extend* that decision to the distinct class of immigrants who, like Mr. Bell, had pled guilty prior to its enactment. As one court of appeals has already recognized, such an extension was inconsistent with the Supreme Court's recognition in *St. Cyr* that immigrants who plead guilty have a particularly strong reliance interest in not having adverse deportation consequences later attached to their decision to plead guilty and relinquish valuable constitutional rights. *Toia v. Fasano*, 334 F.3d 917, 920-21 (9th Cir. 2003). This Court too, since *St. Cyr*, has emphasized the law's special disfavor for retroactively attaching new consequences to an earlier plea of guilty, except where Congress has expressly mandated this result, and has pointedly

distinguished that context from the situation in which a statute retroactively attaches new consequences to a conviction obtained at trial.

The Court should therefore reverse the decision below and hold that IMMACT did not deprive Mr. Bell of his right to seek discretionary relief from deportation.

STATEMENT OF INTEREST

The New York State Defenders Association, the New York State Association of Criminal Defense Lawyers, and the National Association of Criminal Defense Lawyers ("amici") are criminal defense organizations whose members and staff represent or counsel immigrants accused of crimes in criminal proceedings in New York State, the state with the second largest number of lawful permanent residents in the country. Amici and other organizations submitted an amicus brief in *St. Cyr*, to which the Supreme Court referred in its analysis of the decisions made by, and the advice given to, immigrant defendants. 533 U.S. at 321-23 & n.50.

The New York State Defenders Association ("NYSDA") is a not-for-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and other persons throughout the State of New York. Since 1997, under contract with the State of New York, NYSDA has operated the

Immigrant Defense Project which provides state public defender, legal aid society, and assigned counsel program lawyers with legal research consultation and training specifically on issues involving the interplay between criminal and immigration law.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a not-for-profit corporation with a subscribed membership of approximately 800 attorneys, which include private practitioners, public defenders, legal aid and law professors. It is a recognized State Affiliate of the National Association of Criminal Defense Lawyers. The NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and related disciplines. Its stated goals include promoting the proper administration of criminal justice; fostering, maintaining and encouraging the integrity, independence and expertise of defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; enlightening the public on such issues; and promoting the exchange of ideas and research, including by appearing as *amicus curiae* in cases of significant public interest or of professional concern to the criminal defense bar.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,400 members nationwide and 28,000 affiliate members in fifty states, including private criminal defense attorneys,

public defenders and law professors. NACDL was founded in 1958 to promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence and expertise among criminal-defense counsel. NACDL is particularly dedicated to advancing the proper, efficient and just administration of justice, including issues involving immigrant defendants. In furtherance of this and its other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal-justice issues.

The staff and members of amici have, over the years, counseled and represented thousands of immigrants accused of crimes. As part of our practice, we advise immigrant defendants regarding the immigration consequences of the decisions they make in their criminal cases, including whether and how to plead. We also counsel these immigrants about their prospects for discretionary relief from deportation in later immigration proceedings, should they be convicted of a deportable offense.

The decision below, if allowed to stand, would render incorrect the advice we gave these immigrants about the immigration consequences of a guilty plea, and the immigrants will have relied to their detriment on our counsel. Moreover, by abandoning the Supreme Court's bright line rule that statutes presumptively apply prospectively absent a clear statement from Congress to the contrary, this

decision would make it more difficult for the staff and members of amici to reliably determine whether a statute applies retroactively and advise our clients accordingly.

STATUTORY BACKGROUND

Under the statutory regime in place prior to 1990, a lawful permanent resident immigrant convicted of a deportable offense was statutorily eligible to apply for a waiver of deportation pursuant to Section 212(c) of the Immigration and Nationality Act (hereinafter, "212(c) relief") (codified at 8 U.S.C. § 1182). There was a strong likelihood that such discretionary relief would be granted: the Attorney General granted it in over half of all cases in which it was sought. *See St. Cyr*, 533 U.S. at 296 & n.5. Moreover, the relief was predictably granted where certain factors were present, including evidence of rehabilitation, residence of long duration in this country (particularly when the immigrant entered this country at a young age), family ties, evidence of hardship to the immigrant's family as a result of deportation, and stable history of employment. *See St. Cyr*, 533 U.S. at 296 n.5 (citing *Matter of Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978)).

Congress narrowed the availability of such relief in 1990 and in 1996. In 1990, Congress passed IMMACT, Section 511 of which precluded an immigrant who "has been convicted of an aggravated felony and has served a term of

imprisonment of at least 5 years" from seeking 212(c) relief. IMMACT § 511(a), Pub. L. No. 101-649, 104 Stat. 4978.[5] In 1993, this Court held that Section 511 could be applied retroactively to an immigrant defendant who, prior to the statute's enactment, had been convicted of an aggravated felony at trial. *See Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993). The issue in this case is whether Section 511 can be retroactively applied to an immigrant who, prior to the statute's enactment, pled guilty to such an aggravated felony.

In 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") further limited the availability of discretionary relief from deportation, ultimately replacing Section 212(c) with a new provision. AEDPA, Pub. L. No. 104-132, 110 Stat. 1214; IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009. In *St. Cyr*, as we have noted, the Supreme Court held that these 1996 statutory provisions relating to 212(c) relief could not be retroactively applied to immigrants who, prior to the statutes' enactment, had pled guilty. This Court has subsequently drawn a distinction between such immigrants and immigrants who had been

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[5] A 1991 amendment changed § 212(c) to apply to aliens who have committed "one or more" aggravated felonies. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 § 306(a)(10), Pub. L. No. 102-232, 105 Stat. 1733 (codified at 8 U.S.C. § 1182(c)). This amendment has no effect on the outcome of this case.

convicted at trial prior to the amendments' enactment, holding that the 1996 amendments may be retroactively applied to the latter class of immigrants, on the ground that such persons do not have the same reliance interests in the law's repose as immigrants whose convictions are obtained by means of a guilty plea. *See Rankine v. Reno*, 319 F.3d 93, 99-100 (2d Cir.), *cert. denied*, 124 S. Ct. 287 (2003).

ARGUMENT

Section 511 Of IMMACT May Not Be Retroactively Applied To Limit The Right To Seek Relief From Deportation Of An Immigrant Who Pled Guilty Prior To The Statute's Enactment.

A. A Statute May Not Be Applied So As To Have Retroactive Effect On Pre-Enactment Events Such As A Guilty Plea Unless Congress Has Included A Provision Expressly Mandating Such Retroactive Reach.

In a series of cases handed down since 1994, after this Court's decision in *Buitrago-Cuesta*, the Supreme Court has clearly set out the doctrinal approach used to govern questions of statutory retroactivity. Prior to 1994, the Court had oscillated between two different, and apparently conflicting, approaches for statutory retroactivity. In one test, favoring retroactivity, the Court had held that courts should "apply the law in effect at the time [the court] renders its decision." *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). In the other, the Court had held that statutes should not be construed "to have retroactive effect

unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). This Court, in fact, in its 1993 decision in *Buitrago-Cuesta,* noted the tension between these two competing lines of doctrine, observing that "[t]he Supreme Court's position on the retroactivity of civil statutes is 'somewhat unclear.'" 7 F.3d at 293 (citation omitted).

In 1994, the Supreme Court decided *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which resolved this tension by firmly coming down on the side of *Bowen*'s presumption against retroactivity, and setting out a highly restrictive test for statutory retroactivity. 511 U.S. at 277, 268-69. *Landgraf* set out a now familiar two-step test to determine whether a statute may apply to pre-enactment conduct. Against a background presumption against retroactivity, courts must first decide whether Congress "expressly prescribed the statute's proper reach." *Id.* at 280. Statutes were not retrospective "unless their language *requires this result.*" *Id.* at 272 (emphasis added) (internal quotation marks and citation omitted). If the statute expressly commanded that it be applied retroactively, courts were to enforce that command. However, if the statute lacked an express provision, courts were to determine whether the statute would have a "retroactive effect." *Id.* at 280. This second step of the analysis involves making a judgment about whether the new provision "attaches new legal consequences" to pre-enactment events. *Id.* at

269-70. If a statute without an express retroactivity provision would have such a retroactive effect, it could not be applied to pre-enactment events. *Id.* at 280.

The Court's decision in *Landgraf* was grounded in the particular sensitivity the law has for retroactivity because of "[e]lementary considerations of fairness," including respect for settled expectations. *Id.* at 265. The requirement of express legislation was designed to ensure that Congress had determined that the benefits of retroactivity outweigh the strong and longstanding interest in "a rule of law that gives people confidence about the legal consequences of their actions." *Id.* at 266, 268.

Notably, in the nine years since announcing the *Landgraf* test, the Court has applied that test in five retroactivity cases. In each, it held that the statutory amendment at issue did not apply to pre-enactment events. *INS v. St. Cyr*, 533 U.S. 289 (2001); *Martin v. Hadix*, 527 U.S. 343 (1999); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Lindh v. Murphy*, 521 U.S. 320 (1997); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

The decision in *St. Cyr* is particularly instructive in this case, because it also involves the question of whether a statute may validly be read to attach a new legal consequence (in the form of limits on the right to seek discretionary relief from deportation) to an earlier guilty plea. At issue in *St. Cyr* was whether provisions of the AEDPA and IIRIRA, both passed in 1996 and which limited the availability of

212(c) relief, were intended to apply retroactively. With regard to the first step of the *Landgraf* test, *St. Cyr* emphasized that, because of the strong and "deeply rooted" presumption against retroactivity, the standard for determining whether Congress has given "unambiguous direction" is a "demanding one." 533 U.S. at 316. As the Court put the point: "[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was *so clear that it could sustain only one interpretation.*" *Id.* at 316-17 (emphasis added) (internal quotation marks and citation omitted). The Court held in *St. Cyr* that the 1996 amendments to Section 212(c) did not contain any such unambiguous direction from Congress.

Because Congress had not expressed an unambiguous intention to apply the limitations on 212(c) relief retroactively, the Court turned to the second step of the *Landgraf* retroactivity test: whether the statute would have an impermissible "retroactive effect" if applied to immigrants who had pled guilty prior to IIRIRA's enactment. The Supreme Court held that its duty was to make a "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment," 533 U.S. at 321 (internal quotation marks and citations omitted), guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations," *id.* at 323-24 (internal quotation marks and citation omitted).

The Court held that applying the 1996 amendments to immigrants who had pled guilty prior to the statutes' enactment would have such a retroactive effect. In reaching that judgment, the Court noted that immigrants are "acutely aware" of the immigration consequences when they decide whether to go to trial or accept a plea, and that immigrants rely on the law governing discretionary relief when making these critical decisions about this criminal case: "[P]reserving the possibility of [212(c)] relief" is one of the main considerations for an immigrant in deciding "whether to accept a plea offer or instead to proceed to trial." 533 U.S. at 323. Indeed, the Court noted that, for some immigrants, preserving the availability of discretionary relief may be more important than any criminal justice consideration. *Id.* at 322-23. Because immigrants may rely at the time of plea on the availability of discretionary relief from deportation, the Court held that applying the repeal of that relief to this class of immigrants would present a retroactive effect that was both "obvious and severe." *Id.* at 325. The Court therefore held that the 1996 statutes could not be applied retroactively to the petitioner, St. Cyr, and that he thus retained his right to apply for discretionary relief. *Id.* at 326.[6]

[6] The Justices who reached the merits unanimously concluded that applying the repeal to St. Cyr would be impermissibly retroactive. The dissenting Justices concluded that the Court did not have jurisdiction, and did not opine on the merits. 533 U.S. at 326 (O'Connor, J., dissenting); *id.* at 327 (Scalia, J., dissenting).

B. Section 511 Of IMMACT May Not Be Retroactively Applied To Pre-Enactment Guilty Pleas, Because Doing So Would Have A "Retroactive Effect," And Congress Has Not Expressly Mandated Such A Retroactive Reach.

The decision in *St. Cyr* sets the doctrinal framework that governs this case. As to the second step of the *Landgraf* inquiry, *St. Cyr* makes clear that applying Section 511 of IMMACT to restrict the discretionary relief from deportation available to immigrants who had pled guilty before the statute's enactment would have a "retroactive effect." The decisive issue therefore is whether IMMACT satisfies the first step of *Landgraf*: whether Section 511 contains such express and "unambiguous direction" that the statute should apply retroactively so as to overcome the presumption against retroactivity. 533 U.S. at 316. As a review of the statute clearly reveals, IMMACT falls far short of meeting this demanding standard.

Put simply, Section 511 entirely lacks any retroactivity provision, let alone one that "expressly prescribe[s] the statute's proper reach." *Landgraf*, 511 U.S. at 280. Indeed, this Court acknowledged in *Buitrago-Cuesta* that Congress had been "silen[t]" as to whether Section 511 applied to pre-enactment convictions. 7 F.3d at 295. Section 511 of IMMACT amends the first sentence of Section 212(c), which allows the Attorney General to waive the deportation of lawful permanent

residents who have been in the United States for seven consecutive years.[7] Section 511 provides, in its entirety:

> (a) IN GENERAL.– Section 212(c) (8 U.S.C. 1182(c)) is amended by adding at the end the following: "The first sentence of this subsection shall not apply to an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years."
>
> (b) EFFECTIVE DATE.– The amendment made by subsection (a) shall apply to admissions occurring after the date of the enactment of this Act.

IMMACT § 511.

Nowhere in Section 511 is there any language expressly prescribing the convictions to which it applies. To the contrary, the only language in Section 511 that speaks at all to the amendment's temporal reach is the "enactment date" provision which limits the statute's reach to admissions after the statute's enactment. But the Supreme Court has repeatedly held, including in *St. Cyr*, that a

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[7] Before being amended by IMMACT, Section 212(c) provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to [provisions setting forth various grounds for exclusion].

8 U.S.C. § 1182(c) (1989) (amended by IMMACT and repealed by IIRIRA § 304(b)). Although the text of Section 212(c) literally applies only to exclusion, longstanding judicial construction has been to apply it to similarly situated immigrants subject to deportation as well. *Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976); *see also Drax v. Reno*, 338 F.3d 98, 107 (2d Cir. 2003).

statute's provision of an effective date "does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf,* 511 U.S. at 257; *St. Cyr*, 533 U.S. at 317; *De Cardenas v. Reno*, 278 F. Supp. 2d 284, 290-91 (D. Conn. 2003). Likewise, in *St. Cyr* the Supreme Court found no requisite clear statement in the IIRIRA's provision that certain amendments did not apply to immigrants with pending deportation proceedings. Like Section 511, which is directed at "admissions" and not convictions, the provision at issue did not "even discuss[] the effect of the statute on proceedings based on pre[-enactment] convictions that are commenced *after* its effective date." *Id.* at 318 (emphasis in original). This Court's observation in *Buitrago-Cuesta* that the statute was silent as to Section 511's temporal reach thus was quite clearly correct.

Of decisive importance, Section 511 does not contain any provision remotely akin to the sorts of provisions that *St. Cyr* held to meet *Landgraf*'s demanding first step. In *St. Cyr*, the Supreme Court cited provisions of the IIRIRA containing the language "before, on, or after" as evidence that Congress knew how to legislate retroactively. 533 U.S. at 319 & n.43 (quoting IIRIRA § 321(b) and citing provisions). The Second Circuit has pointed to the same "before, on, or after" phrase in other statutes and sections as "clear language of retroactivity" that satisfied the Supreme Court's rigorous test in the context of those provisions. *Drax v. Reno*, 338 F.3d 98, 109 (2d Cir. 2003) (Immigration and Nationality

Technical Corrections Act of 1994 ("INTCA") § 203, Pub. L. No. 103-416, 108 Stat. 4305); *see also Kuhali v. Reno*, 266 F.3d 93, 110 (2d Cir. 2001) (IIRIRA § 321(b)).

The absence of a clear textual provision in Section 511 mandating retroactivity defeats any claim that that provision applies retroactively. 533 U.S. at 316 (requiring an "unambiguous direction" from Congress). Moreover, the silence of IMMACT on Section 511's temporal reach stands in notable contrast to numerous other provisions in IMMACT (not relating to discretionary relief from deportation) that contain explicit language dictating their temporal scope. For example, Section 515 of IMMACT provides that the changes it makes to the availability of asylum apply to convictions "entered before, on, or after" IMMACT's enactment. Section 505(b) of IMMACT likewise expressly specifies the temporal reach of an amendment changing the effect of criminal convictions that pre-date IMMACT's enactment, eliminating judicial recommendations against deportation for "convictions entered before, on, or after" the enactment date. IMMACT § 515(b)(2). Thus, that Congress knew at the time that it passed Section 511 how to ensure its retroactive reach is literally evident from other provisions in the very same statute.[8]

[8] IMMACT provisions covering a wide range of subjects and appearing throughout the act set forth their temporal scope. IMMACT § 408(e) (amendments relating to

Final evidence that Section 511 falls short of satisfying the first step of the retroactivity inquiry is supplied by the contrary views that the federal courts of appeals have taken of that provision. *See Toia v. Fasano*, 334 F.3d 917, 920 (9th Cir. 2003) (concluding that Section 511 lacks the "clear, strong language" that the Supreme Court's jurisprudence requires and citing cases).

Because Congress did not unambiguously express an intention for Section 511 to apply retroactively, this case is on all fours with *St. Cyr*. Both cases involved a statute that restricted discretionary relief, but lacked any provision clearly mandating retroactive reach for the statute. And in both cases, applying that statute to a pre-enactment guilty plea would have an "obvious and severe" – and wholly "impermissible" – "retroactive effect" on the defendant immigrant. 533 U.S. at 325. Thus, as in *St. Cyr,* the Supreme Court's retroactivity precedents

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service in foreign armed forces "shall apply to exemptions from training or service obtained before, on or after" the enactment date); § 533(b) (amendment eliminating a prerequisite for filing a discrimination case "shall apply to unfair immigration-related employment practices occurring before, on, or after" the enactment date); § 701(b) (amendment waiving the conditional residence requirement for battered spouses or children "shall apply with respect to marriages entered into before, on, or after" the enactment date); § 702(c) (amendments creating a "bona fide marriage exception" "shall apply to marriages entered into before, on, or after" the enactment date). In 1991, Congress also amended IMMACT Section 513 to specify its application to convictions before, on or after the enactment date. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 § 306(a)(11), Pub. L. No. 102-232, 105 Stat. 1733.

compel the result that Section 511 may not be construed to apply retroactively to such persons.

Finally, as the Court stated in *St. Cyr*, it is particularly appropriate to hesitate before applying a statute retroactively so as to limit the rights of immigrants. The concern that a legislature might be tempted to legislate retroactively against "unpopular groups or individuals" – one reason that retroactive legislation is disfavored – is present to a high degree in this context. *Id.* at 315; *Restrepo v. McElroy*, -- F.3d --, 2004 WL 652802, at *4 (2d Cir. Apr. 1, 2004). At stake is deportation, a grave consequence that this Court has compared to banishment or exile. 2004 WL 652802, at *4 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)). Moreover, here, as in *St. Cyr*, the presumption against retroactivity is "buttressed by 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" 533 U.S. at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

C. The District Court Erred In Holding That *Buitrago-Cuesta* Controlled This Case.

In holding that Section 511 applied retroactively to attach a severe new consequence to Mr. Bell's guilty plea – abrogating his right to seek discretionary relief from deportation – the district court relied exclusively on this Court's decision in *Buitrago-Cuesta v. INS*. As we have noted, *Buitrago-Cuesta* held, in a

case that involved an immigrant who had been convicted at trial, that IMMACT's amendments to Section 212(c) could apply to pre-enactment events. However, the district court was wrong to regard *Buitrago-Cuesta* as controlling precedent in Mr. Bell's case.

The decision in *Buitrago-Cuesta* – rendered the year *before* the Supreme Court clarified its retroactivity jurisprudence in *Landgraf* – failed to anticipate the direction of that jurisprudence. The *Buitrago-Cuesta* Court instead approached the question of retroactivity without any presumption against retroactivity – indeed, as a garden-variety issue of statutory interpretation. The Court therefore held that a statute which was utterly silent on the question of retroactivity could apply retroactively based solely on the statutory structure.[9] But, as we have noted (*see*

[9] Applying ordinary principles of statutory interpretation, the *Buitrago-Cuesta* Court reasoned that Congress had limited the application of Section 511 to immigrants who had served at least five years in prison and had provided that the amendment applies to admissions occurring "after" the date of its enactment. IMMACT § 511(b). The Court read "after" as "promptly after" and considered the statute to be aimed at the conduct of the Attorney General. From these premises, it inferred that the statute applied to pre-1990 convictions, because otherwise it would constrain the Attorney General's discretion only after five years rather than promptly after enactment. 7 F.3d at 295. But this is the type of reasoning from statutory structure that the Supreme Court rejected in *St. Cyr*. There the INS argued that the comprehensiveness of IIRIRA's framework indicated Congress's intent that the old law no longer be applied. 533 U.S. at 317. The Supreme Court rejected this structural approach, which did not meet the Court's heightened standard that the language "require" retroactive application. *Id.* at 316-17. The language *Buitrago-Cuesta* relied on, and the similar awkwardness of its application, likewise falls short of a clear, unambiguous direction from Congress.

infra, § B), the proper approach should have been to inquire whether there was a express congressional directive for retroactive application (there was not), and, if not, whether the statute's application to the affected immigrants would have an retroactive effect (which it would).

While the *Buitrago-Cuesta* Court cannot be faulted for failing to anticipate the approach to questions of retroactivity that the Supreme Court would endorse a year later, it is unavoidable that the approach taken in *Buitrago-Cuesta* is significantly out of step with the now-prevailing doctrinal approach of *Landgraf* and *St. Cyr* relating to questions of statutory retroactivity. Were the option available for a panel of this Court to overrule the decision of the *Buitrago-Cuesta* panel, and if this case had presented the issue of *Buitrago-Cuesta*'s continued vitality in cases involving immigrants convicted at trial, amici would urge such an approach: *i.e.,* overruling *Buitrago-Cuesta* and examining the question presented therein in light of the Supreme Court's subsequent clarification of retroactivity jurisprudence.

This case, however, does not require the Court to disturb *Buitrago-Cuesta*, only to hold that that precedent should not be extended to the distinct category of immigrants who pled guilty, pre-enactment, to crimes later covered by IMMACT. There is no reason to read *Buitrago-Cuesta* to apply to such immigrants. The case did not present that question; the doctrinal approach used in that case has been

repudiated by the Supreme Court; and, as subsequent case law has reflected, immigrants who pled guilty pre-enactment have uniquely strong reliance interests which the presumption of retroactivity guards against. Amici therefore respectfully submit that the Court should entertain the question of IMMACT's application to immigrants who pled guilty pre-enactment as an open question, one not controlled by *Buitrago-Cuesta.*[10]

There is ample precedent in this Court for differentiating, for retroactivity purposes, between the situation of an immigrant who has pled guilty to a now-disqualifying offense and the situation of an immigrant who has been convicted at trial. Indeed, in its decision in *St. Cyr*, in which it found for the immigrant, presaging the Supreme Court's decision in the same case, this Court distinguished between the *Buitrago-Cuesta* situation, in which the immigrant had been convicted after trial, and the *St. Cyr* situation, in which the immigrant had pled guilty. The Court explained that its holding in *St. Cyr* was consistent with *Buitrago-Cuesta* both because the Supreme Court's retroactivity analysis had crystallized in the years since *Buitrago-Cuesta* was decided and because "the petitioner in *Buitrago-*

[10] This Court has limited its prior precedents in light of such considerations. *See, e.g., Union Carbide Corp. v. Commissioner*, 671 F.2d 67, 68 (2d Cir. 1982) (per curiam) (holding that its 22-year-old decision was not controlling because intervening Second Circuit and Supreme Court jurisprudence "weakened" its "authority," but not overruling the earlier case).

Cuesta did not [plead] guilty to a deportable crime," "but instead was convicted after a jury trial in state court." *St. Cyr v. INS*, 229 F.3d 406, 420 (2d Cir. 2000).

This Court's decisions following the Supreme Court's decision in *St. Cyr* have further differentiated between these distinct contexts. Heeding what this Court has described as the "strong signals" in *St. Cyr* to the effect that immigrants who "chose to go to trial" are "in a different position with respect to IIRIRA" than those who pled guilty, this Court has held that while the 1996 amendments contained in AEDPA and IIRIRA may not be applied to immigrants who pled guilty before the date those amendments were enacted, they may retroactively be applied to immigrants convicted at trial prior to enactment. *See Rankine v. Reno*, 319 F.3d 93, 99-100 (2d Cir. 2003). In so holding, this Court noted the particularly strong reliance interests of immigrants who pled guilty, observing that such immigrants reasonably relied at the time of their pleas on the availability of relief from deportation. 319 F.3d at 99-100; *see also Swaby v. Ashcroft*, 357 F.3d 156, 162 (2d Cir. 2004); *Restrepo*, 2004 WL 652802, at *9 (Calabresi, J., concurring); *De Cardenas v. Reno*, 278 F. Supp. 2d 284, 291 (D. Conn. 2003).

Indeed, since *Landgraf* was decided, this Court in its reported decisions has applied *Buitrago-Cuesta*'s holding only in the context of immigrants convicted at trial. In *Reid v. Holmes*, this Court was presented with the issue it had decided in *Buitrago-Cuesta*: whether IMMACT's limitations on relief from deportation could

be applied to an immigrant convicted at trial before the statute's enactment. 323 F.3d 187, 188 (2d Cir.) (per curiam), *cert. denied*, 124 S. Ct. 827 (2003). The Court held that *Buitrago-Cuesta* controlled this situation, and concluded that discretionary relief was unavailable. The fact that Reid had been convicted *at trial* was clearly before this Court; indeed, the district court's opinion in *Reid* treated this fact as significantly differentiating the case from *St. Cyr*. Limiting *Buitrago-Cuesta* to its factual context (immigrants convicted at trial) is thus consistent with this Court's post-*Landgraf* precedents, and the district court's apparent view that this Court has endorsed an expanded reading of *Buitrago-Cuesta* since *St. Cyr* was clearly incorrect.

The Ninth Circuit, in fact, recently addressed precisely the question before this Court and held that, in light of *St. Cyr*, Section 511's limitations on relief from deportation *could not* be applied to an immigrant who pled guilty before the statute's enactment. *See Toia*, 334 F.3d at 921. The court first noted that Section 511 lacked a clear statement of congressional intent that it apply retroactively. It cited as "perhaps the best evidence that congressional intent was not clearly expressed" the disagreement among the courts of appeals (and the BIA) over the proper reading of Section 511. *Id.* at 920. It then held that, under *St. Cyr*, applying Section 511's limitation on relief to immigrants who had pled guilty prior to enactment would have a clear and impermissible retroactive effect. *Id.* at 920-21.

Notably, in reaching this conclusion, the court overruled its prior, pre-*St. Cyr* precedent that had held that 212(c) relief was not available to an immigrant with a pre-enactment conviction. *Id.* at 921 (overruling *Samaniego-Meraz v. INS*, 53 F.3d 254 (9th Cir. 1995)); *see also Tasios v. Reno*, 204 F.3d 544, 550-51 (4th Cir. 2000) (noting that its earlier caselaw did not account for "the essential retroactive consequences of removing the availability of § 212(c) relief" that intervening retroactivity jurisprudence had made evident, and casting doubt on its holding in *De Osorio v. INS*, 10 F.3d 1034 (4th Cir. 1993) that Section 511's limitations on relief from deportation could be applied retroactively); *De Cardenas*, 278 F. Supp. 2d at 290-94 (holding that *Buitrago-Cuesta* does not control cases in which an immigrant has pled guilty rather than having been convicted at trial). Amici respectfully submit that this Court should similarly hold that Section 511 cannot be applied retroactively to a defendant immigrant like Bell who pled guilty prior to the enactment of IMMACT.

CONCLUSION

For the foregoing reasons, this Court should hold that the limitations on relief from deportation contained in Section 511 of IMMACT do not apply to immigrants who pled guilty before the statute's enactment.

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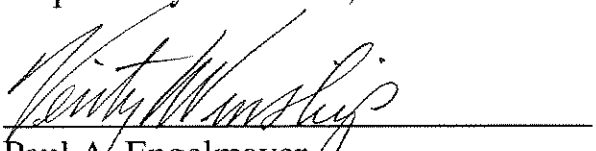
Respectfully submitted,



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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) & 32(a)(7)(B) because this brief contains 6,743 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(III).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2000 in Times New Roman 14-point type for text and footnotes.

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