PRELIMINARY STATEMENT

In this case, the INS seeks to apply a new law retroactively in a way that will radically alter the immigration consequences of an immigrant's decision, made under prior law, to go to trial. If the new law is applied retroactively, the immigrants, who chose to face pending criminal charges (rather than negotiate an alternative disposition) in the belief that a conviction on these charges would not lead to deportation, will now face *mandatory* deportation. Such an application of the law has a clear "retroactive effect" and is, therefore, impermissible.

The facts of this case clearly demonstrate the unfairness of applying this change in law retroactively. As the record demonstrates, Appellee Murali Ponnapula chose to go to trial (and turned down a plea offer) in reasonable reliance on the law in effect at the time. Under the clear guidance of the Supreme Court's recent decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), applying this change in law to such immigrants is impermissibly retroactive.

The change in law at issue is the repeal of § 212(c) of the Immigration and Nationality Act, a statutory provision that permitted lawful permanent residents to apply for discretionary deportation relief. Under § 212(c), an immigrant who was deportable for conviction of certain crimes could seek complete relief from deportation on the basis of equitable factors such as his or her ties to the United States (including whether he or she had U.S. citizen family and children), length of

time in this country, and the benefit to the community if relief were granted. This equitable relief was granted in the majority of cases and was predictably granted where certain favorable factors were present. *See St. Cyr*, 533 U.S. at 296 & n.5. In 1996, however, Congress repealed this provision. The question presented here is whether this repeal of discretionary relief from deportation should be applied to pre-enactment decisions and events – specifically, to those immigrants who faced criminal charges, elected to go to trial, and were convicted before the new law's enactment.

In *St. Cyr*, the Supreme Court considered the same statutory repeal at issue here, and concluded that applying the repeal to immigrants who pled guilty before the new law's enactment would be impermissibly retroactive. The Court recognized that immigrants are "acutely aware" of the immigration consequences when they decide whether to go to trial or accept a plea, and rely on the law governing discretionary relief when making these critical decisions in their criminal cases. *See id.* at 322. Because of these strong reliance interests, the Court found that it would be impermissible to apply the repeal retroactively to such immigrants and, therefore, held that the petitioner was eligible to apply for discretionary relief. *Id.* at 326.

After *St. Cyr*, the question before this Court is whether applying the statutory repeal to immigrants such as Ponnapula – whose conviction by trial pre-

dated the change in law – would similarly constitute an impermissible retroactive effect.

This Court should affirm the District Court's ruling that Ponnapula is eligible for 212(c) relief. As in *St. Cyr*, immigrants who chose to go to trial relied on the availability of deportation relief when making the crucial decision whether to go to trial or to negotiate a plea. Indeed, the facts of the present case provide a clear example of this reliance. This Court should therefore hold that the reasoning of *St. Cyr* also applies to immigrants who were convicted at trial before the new law's enactment. At the very minimum, the Court should hold that immigrants, such as Ponnapula, who can demonstrate actual reliance on the prior law are eligible for 212(c) relief.

STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers and the New York State Defenders Association ("Amici") are criminal defense organizations with years of experience representing or providing counsel to lawful permanent resident immigrants in criminal proceedings.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 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.

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 throughout the State of New York. Since 1981, under contract with the State of New York, NYSDA has operated the Public Defense Backup Center, which provides state public defender, legal aid society, and assigned counsel program lawyers with legal research and consultation, publications, and training. NYSDA also operates the Immigrant Defense Project, which provides the same services to public defense lawyers specifically on issues involving the interplay between criminal law and immigration law.

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 a conviction of the criminal charge pending against them, as well as alternative charges to which these immigrants might be able to negotiate a guilty plea. We also counsel immigrants about their prospects for discretionary relief from deportation in later immigration proceedings should they be convicted of a deportable offense.

BACKGROUND

A. Statutory Background

Under the statutory regime in place prior to 1996, a lawful permanent resident immigrant convicted of a deportable offense was statutorily eligible, pursuant to § 212(c) of the Immigration and Nationality Act, to seek from the Attorney General discretionary relief from deportation ("212(c) relief"). *See* 8 U.S.C. § 1182(c) (1994). With the passage of two new laws, the AntiTerrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, Congress has significantly restricted the availability and scope of deportation relief.

Prior to IIRIRA, immigrants who were deportable on the basis of a criminal offense could apply for 212(c) relief so long as they had lived in this country continuously for seven years. Only those who had been convicted – either by plea or at trial – of a crime that fell under the definition of an "aggravated felony," *see* 8 U.S.C. § 1101(a)(43) (1994), and who had *served* a prison term of at least five years were statutorily ineligible for discretionary relief. *See* 8 U.S.C. § 1182(c) (1994). Even a defendant convicted of an aggravated felony and sentenced to five or more years' imprisonment might have maintained eligibility for 212(c) relief provided that, as often occurs, he had not served five years of his sentence by the

time of his removal hearing.[1] Relief was, in short, available to a large number of immigrant defendants, regardless of the sentence ultimately imposed.

Section 212(c) relief was not conditioned on the means by which an immigrant acquired a conviction: it was equally available to those who were convicted by entering a guilty plea as to those who were convicted at trial. And there was a strong likelihood that such 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 In re Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978).[2]

With IIRIRA, Congress repealed 212(c) relief altogether and replaced it with a provision that created a new and significantly narrower form of relief called

---

[1] *See In re Ramirez-Somera*, 20 I&N Dec. 564, 566 (BIA 1992) (immigrant defendant eligible for 212(c) relief despite having been sentenced to 15-year prison term because he had not yet served five years of sentence); *see also, e.g., Archibald v. INS*, No. Civ. A. 02-722, 2002 WL 1434391 (E.D. Pa. July 1, 2002).

[2] Section 212(c) relief is governed by predictable standards, "comparable to common-law rules," *St. Cyr*, 533 U.S. at 296 n.5, which are set out in over 60 years of BIA precedent.

"cancellation of removal." This form of relief is now unavailable to any immigrant who was convicted of an aggravated felony, no matter the length of the sentence. *See* 8 U.S.C. § 1229b. The practical effect of the repeal of 212(c) relief, in conjunction with several other statutory amendments,[3] is dramatic: a far larger number of immigrants are now deportable under the new law, while a much smaller number are eligible for any form of relief from deportation. Moreover, if the repeal is applied retroactively to immigrants such as petitioner, the practical effect is that it will convert what was the mere *possibility* (often, a remote possibility) of deportation into a certainty.

B. The Supreme Court's Decision in *St. Cyr*

In *St. Cyr*, the Supreme Court considered the same statutory repeal at issue here, inquiring whether the repeal should apply retroactively to pre-enactment events. The Court held that applying the repeal to the petitioner before the Court, *i.e.*, an immigrant who pled guilty before the new law's enactment, would present a

[3] The definition of aggravated felony has been retroactively expanded to include dozens more offenses, including misdemeanor and low-level felony offenses. *See* 8 U.S.C. § 1101(a)(43). Courts have upheld the application of the expanded definition of "aggravated felony" to seemingly minor offenses. *See, e.g.*, *United States v. Pacheco*, 225 F.3d 148, 154 (2d Cir. 2000) (misdemeanor state theft of a video game valued at $10, for which immigrant received one-year suspended sentence, is aggravated felony); *United States v. Graham*, 169 F.3d 787, 792 (3d Cir. 1999) (misdemeanor crime of petty larceny is aggravated felony).

"clear[]" example of retroactive effect and, therefore, was impermissible. 533 U.S. at 321.

The Court in *St. Cyr* applied its well-established two-part retroactivity test set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and its progeny. Under the first step of *Landgraf*, the Court held that Congress had not unambiguously prescribed the temporal reach of IIRIRA's repeal of discretionary relief. 533 U.S. at 315-19. That ruling is not subject to challenge and is binding on this Court.

Because Congress had not expressed an intent to apply the repeal retroactively, the Supreme Court turned to the second step of the retroactivity analysis – whether the statute would have an impermissible "retroactive effect" if applied to immigrants who pled guilty prior to IIRIRA's enactment. The Supreme Court rejected the INS's argument that because there always had been the possibility of deportation, the repeal of discretionary relief could never have a retroactive effect. *Id.* at 325 ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.").[4] Rather, the Court held that its duty was to make a "commonsense,

[4] In so doing, the Supreme Court fatally undermined the reasoning of *Steele v. Blackman*, 236 F.3d 130, 134 (3d Cir. 2001) and *DeSousa v. Reno*, 190 F.3d 175, 187 (3d Cir. 1999). *See Perez v. Elwood*, 294 F.3d 552, 560 (3d Cir. 2002) ("*St. Cyr* rejected the ground on which *Steele* and *DeSousa* ultimately relied . . . .").

functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment," guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 321, 323 (internal quotations and citation omitted).

In making 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 rely on the law governing discretionary relief when making these critical decisions about their 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." *Id.* 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. 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." It therefore held that the petitioner was eligible to apply for discretionary relief. *Id.* at 325.[5]

[5] 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).

C. District Court Opinion

In the present case, Ponnapula filed a habeas petition challenging his final order of removal. He argued, *inter alia*, that because he was convicted (at trial) before the new law's enactment, he remains eligible for 212(c) relief under the reasoning of *St. Cyr*.

The record before the District Court established that Ponnapula relied on the availability of 212(c) relief when choosing to go to trial. According to the District Court:

> At one point during his trial, the District Attorney's office offered to allow petitioner to plead guilty to a misdemeanor with a probationary sentence. Petitioner considered the offer and immigration consequences of pleading guilty versus going to trial. Petitioner's counsel advised him that, if convicted after trial, he would likely receive a sentence of less than five years imprisonment. Petitioner realized that even if he were convicted of a felony after trial, he would still likely be eligible for hardship relief from deportation pursuant to [§ 212(c)]. Based on this information, Petitioner decided to turn down the plea offer and instead go to trial.

Ponnapula v. Ashcroft, 235 F. Supp. 2d 397, 399 (M.D. Pa. 2002) (citations omitted). As the District Court stated, "[a] major factor in his decision not to accept the offer 'was the lack of any distinction' for the purposes of § 212(c) relief between a misdemeanor and felony conviction." *Id.* at 403. Based on Ponnapula's reasonable reliance, the District Court concluded that *St. Cyr* controlled: "A defendant, who goes to trial believing that his opportunity to seek § 212(c) relief is

secure, is as equally disrupted in his reasonable and settled expectations as is a defendant who accepts a plea believing it to confer such a benefit." *Id.* at 404.

SUMMARY OF ARGUMENT

Applying the statutory repeal of deportation relief to immigrants who, like Ponnapula, contested the government's charges at trial would be impermissibly retroactive. As the factual record in this case demonstrates, immigrants who chose to go to trial – like those immigrants who pleaded guilty – made decisions in reliance on the immigration consequences of these decisions. This Court should therefore hold that the reasoning of *St. Cyr* extends to these immigrants as well. At the very minimum, this Court should hold that those immigrants, such as Ponnapula, who can demonstrate that they actually relied on the law in effect at the time are eligible to apply for 212(c) relief.

ARGUMENT

A. The Reasoning Of *St. Cyr* Extends To Immigrants Who Were Convicted At Trial Before IIRIRA's Enactment Because Such Immigrants Relied On The Immigration Consequences At The Time They Chose To Proceed To Trial.

As in *St. Cyr*, applying the repeal of 212(c) relief to immigrants who were convicted at trial before IIRIRA's enactment would fundamentally disrupt the reliance interests of such immigrants. These immigrants relied on the immigration consequences of the options available to them at the time – and, specifically, on the

availability of discretionary relief – much as immigrants such as St. Cyr relied on the state of the law when deciding to plead guilty.

As the Supreme Court recognized, immigrants are "acutely aware" of immigration consequences when making the critical decisions about their criminal case, including whether to plead guilty or go to trial. *St. Cyr*, 533 U.S. at 322. Indeed, it is our experience that, for some immigrants, the immigration consequences of a conviction are more important than any criminal justice penalty. These immigrants will decide whether to go to trial based, in part, on their understanding of the immigration consequences of the charged offense. *See id.* As such, the decision whether to go to trial may be profoundly affected by the legal rules governing 212(c) relief in effect at the time the immigrant is charged.

Where an immigrant defendant has been informed, either by his lawyer or the court, that a conviction of the pending charges are unlikely to imperil his right to seek 212(c) relief, it is our experience that he will rely on this knowledge and decide whether to go to trial based solely on familiar criminal justice considerations. These include his belief in innocence, the strength of the government's case, and the likely length of a potential sentence. In that context, the defendant's understanding that conviction will not mean necessary deportation will have formed the very basis of his decision to face these charges at trial. By contrast, in our experience, where a defendant is informed that deportation relief

may be unavailable in the event of a conviction on the charged offense, the defendant will often elect to negotiate a guilty plea to different or lesser charges that carry less risk of deportation.

Prior to IIRIRA, a wide range of scenarios existed under which a defendant could decide to stand trial for a deportable offense yet still preserve eligibility for 212(c) relief. Under pre-IIRIRA law, a lawful permanent resident would be ineligible to apply for 212(c) relief only if (1) he had been convicted of an "aggravated felony," *and* (2) he had *served* five or more years in prison. 8 U.S.C. § 1182(c) (1994). Many deportable offenses were not classified as "aggravated felonies," *see, e.g.*, 8 U.S.C. § 1251(a)(2)(A)(i) (1994) (crimes of "moral turpitude"); 8 U.S.C. § 1251(a)(2)(B)(i) (1994) ("controlled substances" violations), so an immigrant could go to trial (even on a deportable offense) with the knowledge that eligibility for 212(c) relief would be preserved.

It was also possible to be charged with an aggravated felony that did not carry a possible sentence of more than five years, or that would be unlikely to result in a sentence of more than five years, thereby preserving eligibility to apply for 212(c) relief. In such cases, we would have counseled the immigrant defendant that the ultimate sentence received would likely have no effect on his right to seek 212(c) relief. With the prospect of mandatory deportation removed from the equation, it is our experience that immigrant defendants would decide whether to

go to trial based solely on different criminal justice considerations (*e.g.*, the likelihood and penal consequences of conviction).

Indeed, Ponnapula's case demonstrates precisely this situation. According to the District Court:

> At one point during his trial, the District Attorney's office offered to allow petitioner to plead guilty to a misdemeanor with a probationary sentence. Petitioner considered the offer and immigration consequences of pleading guilty versus going to trial. Petitioner's counsel advised him that, if convicted after trial, he would likely receive a sentence of less than five years imprisonment. Petitioner realized that even if he were convicted of a felony after trial, he would still likely be eligible for hardship relief from deportation pursuant to [§ 212(c)]. Based on this information, Petitioner decided to turn down the plea offer and instead go to trial.

235 F. Supp. 2d at 399 (citations omitted). As the District Court stated, "[a] major factor in his decision not to accept the offer was the lack of any distinction for the purposes of § 212(c) relief between a misdemeanor and felony conviction." *Id.* at 403 (internal quotations omitted).[6] Although he was convicted at trial, his counsel's advice on sentencing, in fact, proved to be correct: Ponnapula was sentenced to an indeterminate term of imprisonment with a minimum of one year and a maximum of three years. According to the District Court, "[Ponnapula]

[6] Based on the factors considered by the BIA, Ponnapula had a strong chance of receiving such deportation relief. Ponnapula had lived in this country for eight years at the time of his conviction, his wife is a U.S. citizen, as are his children, and he had never previously been involved in any criminal conduct. *See also* 235 F. Supp. 2d at 405 n.11.

conformed his conduct – his decision to go to trial, rather than plead guilty – to his settled expectation that discretionary relief would be available in the event he were convicted." *Id.* at 405.

If the rules governing discretionary deportation relief had been different, immigrant defendants' decision-making calculus would have been dramatically altered. For example, in our experience, if immigrant defendants had known that a conviction would result in automatic deportation with no possibility of any relief, many of them would have made it a top priority to preserve their right to remain in this country. As the Supreme Court recognized in *St. Cyr*, "[p]reserving the [immigrant's] right to remain in the United States may be more important to the [immigrant] than any potential jail sentence." 533 U.S. at 322 (internal quotations omitted). As a result, competing criminal justice considerations would have been secondary. Remaining in the country would have been particularly important for defendants with families or other roots in this country.

To that end, many such defendants would have sought to secure a plea arrangement that would not result in disqualification for 212(c) relief. "Even if the defendant were not initially aware of § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision's importance." *St. Cyr*, 533 U.S. at 323 n.50. And we, as criminal defense lawyers, would have counseled immigrant defendants that they

should seek to plead to different or lesser charges, rather than stand trial, because of the likelihood that conviction of the offense charged would have rendered them deportable with no possibility of deportation relief.[7] For example, in the case of Ponnapula, it is hard to imagine he would not have accepted the plea offer to a misdemeanor if he had known that going to trial posed the risk of *mandatory* deportation. Indeed, Ponnapula in fact represented to the District Court that he would have accepted the plea offer if he had known about this risk. Petition for Writ of Habeas Corpus ¶ 19, *Ponnapula v. Ashcroft*, 02 Civ. 3546 (S.D.N.Y.) (later transferred to M.D. Pa.).

To secure such a plea, immigrant defendants would have had an incentive to relinquish their right to go to trial, and even to agree to conditions (*e.g.*, a higher sentence; a greater fine or restitution) that they might otherwise have resisted. In our experience, prosecutors are sometimes willing to negotiate pleas that preserve favorable immigration consequences. The prosecutor, of course, has a strong

[7] For example, for the immigrant who was charged with a theft crime, the new law dictates that a conviction for *any* theft offense constitutes an aggravated felony if the sentence imposed is at least one year. *See* 8 U.S.C. § 1101(a)(43)(G). Had we had knowledge of the true immigration consequences, we would have tried to negotiate a plea agreement to a theft offense that carried a sentence of less than one year. Likewise, we would have counseled the defendant charged with the drug crime to seek a plea agreement that would have preserved the possibility of 212(c) relief, such as a plea to a drug possession charge. *See, e.g., Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996).

incentive to accept a guilty plea to such an offense, even if the offense was a lesser offense than might otherwise be charged, in order to conserve resources and eliminate the risk of failing to obtain a conviction at trial. *See St. Cyr*, 533 U.S. at 323 (recognizing that the prosecutor receives a benefit in return for accepting a plea). And in some cases, prosecutors have been persuaded that it is most equitable, in light of the defendant's family circumstances or other factors, to structure a plea that permitted the defendant to seek discretionary relief. *See, e.g.*, *Jideonwo v. INS*, 224 F.3d 692, 699 (7th Cir. 2000) (prosecutor and defense attorney structured plea to preserve availability of discretionary relief); *see also St. Cyr*, 533 U.S. at 323.

For an immigrant defendant facing the possibility of deportation, the decisions whether to go to trial or to enter a plea, and if so, to what offense, are made with the utmost care. *See St. Cyr*, 533 U.S. at 322. As the District Court concluded, "[a] defendant who goes to trial believing that his opportunity to seek § 212(c) relief is secure, is as equally disrupted in his reasonable and settled expectations as is a defendant who accepts a plea believing it to confer such a benefit." 235 F. Supp. 2d at 404.[8]

[8] In addition, a person is likely to expend different resources defending himself depending on the ultimate consequences. *See Slusser v. Commodity Futures Trading Comm'n*, 210 F.3d 783, 786 (7th Cir. 2000) (Easterbrook, J.).

The government makes three principal points to counter these arguments. First, the government argues that the holding of *St. Cyr* does not apply to immigrants who were convicted at trial before IIRIRA because an immigrant who goes to trial does not relinquish any constitutional right as part of a "*quid pro quo*" with the government. See Brief for Appellant at 12, 17-19, 28-29, 32-33. To adopt the government's reading, however, would require this Court to re-write the Supreme Court's retroactivity jurisprudence. As the District Court stated, while the Court in *St. Cyr* noted that plea agreements involve a *quid pro quo* between the criminal defendant and the government and a waiver of several constitutional rights, *see* 533 U.S. at 322, these statements in *St. Cyr* "do not create an additional requirement necessary to establish retroactive effect." Instead, these statements only "serve to highlight the 'obvious and severe retroactive' effect" of applying IIRIRA to aliens who pleaded guilty. 235 F. Supp. 2d at 404. Indeed, any attempt to make retroactivity turn on a *quid pro quo* or the relinquishment of a constitutional right would be fundamentally inconsistent with the Supreme Court's retroactivity jurisprudence. *See, e.g.*, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (new statute that eliminated a defense to a *qui tam* action could not be applied to pre-enactment conduct; case did not involve a *quid pro quo* or waiver of constitutional rights); *Landgraf*, 511 U.S. 244 (1994) (statute that created compensatory and punitive damages for civil rights violations could

not be applied to pre-enactment conduct; case did not involve a *quid pro quo* or waiver of constitutional rights).

Second, the government argues that there can be no reasonable reliance in this case because there was a risk that Ponnapula might have been sentenced to more than five years in prison – and that, thereafter, he might have *served* more than five years in prison – thereby making him ineligible for 212(c) relief. Brief of Appellant at 33-34. The Court need not entertain such speculation. Ponnapula was in fact sentenced to a maximum of three years in prison (and served even less), and, as the District Court stated, the fact that counsel's advice proved to be correct "buttresses [the] conclusion that it was reasonable for [Ponnapula] to rely on his counsel's advice in making his immigration decisions." 235 F. Supp. 2d at 405.

Ironically, the government seeks to compare Ponnapula's risk of serving more than five years with the risk to the immigrant in *St. Cyr*. In fact, however, the immigrant in *St. Cyr* faced a much greater term of imprisonment: St. Cyr was convicted of an aggravated felony and was sentenced, after his guilty plea, to "ten years imprisonment, with execution suspended after five years." *See* Brief for United States at 11 n.7, *INS v. St. Cyr*, No. 00-767. Thus, the government is simply incorrect when it states that the immigrant in *St. Cyr* "pursued a litigation strategy that *ensured* his eligibility for section 212(c) relief," Brief of Appellant at 34 n.5

(emphasis in original). In fact, the immigrant in *St. Cyr* faced a much greater risk of serving more than five years than Ponnapula.

Finally, the government notes that other courts of appeals have rejected extending *St. Cyr* to immigrants who were convicted at trial before IIRIRA. Brief of the Appellant at 19-25. The holdings in these cases, however, are largely the result of the courts' failure to be convinced that immigrants who choose to go to trial could possibly have relied on the availability of 212(c) relief. As the Ninth Circuit stated in rejecting this argument: "Unlike aliens who pleaded guilty, aliens who elected a jury trial *cannot plausibly claim* that they would have acted any differently if they had known [that their decision would later make them ineligible for 212(c) relief]." *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (emphasis added); *see also Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002) ("It follows that, having been convicted after a trial *where there was not, and could not have been*, reliance by the defendant on the availability of discretionary relief, [petitioner] may not argue that the statute has impermissible retroactive effect as to him.") (emphasis added).

The facts of the present case expose the fallacy of this reasoning. As the District Court stated, "there can be no doubt that [Ponnapula] conformed his conduct to match his settled expectations of immigration law." 235 F. Supp. 2d at 405. Thus, the other courts of appeals are incorrect as a factual matter: because

immigrants who chose to go to trial relied on the availability of 212(c) when making the decision whether to plea guilty or go to trial, the reasoning of *St. Cyr* applies, and these immigrants should be permitted to apply for 212(c) relief.

B. There Is No Basis For Ascribing To Congress The Intent To Eliminate 212(c) Relief For Those Immigrants Who Pled Guilty Before IIRIRA But Not For Those Who Went To Trial.

Moreover, there is no basis in the statute for limiting *St. Cyr*'s finding of retroactive effect to the facts of that case, thereby providing relief only to persons convicted by plea, but not at trial. Retroactivity analysis serves as a proxy for congressional intent. *Landgraf*, 511 U.S. at 272; *see also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 858 n.3 (1990) (Scalia, J., concurring) (the "application of the presumption [against statutory retroactivity], like the presumption itself, seeks to ascertain the probable legislative intent"); *see also Landgraf*, 511 U.S. at 273 (Congress passes statutes against the "predictable background rule" of the presumption against retroactivity). As the District Court stated, "There is no basis to conclude that Congress sought to distinguish between those immigrants who were convicted because they pled guilty, or those convicted after trial." 235 F. Supp. 2d at 406. The plain language of the statute is, in fact, to the contrary.

In IIRIRA, Congress legislated with respect to "convictions" – not "trials" or "pleas." *See, e.g.*, 8 U.S.C. § 1227(a)(2) (defining deportable offenses with reference to convictions); *id.* § 1229b(a) (cancellation of removal not available to an immigrant "convicted" of an aggravated felony); *see also Perez v. Elwood*, 294 F.3d 552, 560-62 (3d Cir. 2002) (analyzing Congress's use of term "conviction" in IIRIRA). This legislative decision in IIRIRA is consistent with congressional decisions in pre-IIRIRA law, in which Congress also had legislated with respect to "convictions," without making a distinction as to how the conviction came to be obtained. *See, e.g.*, 8 U.S.C. § 1182(c) (1994) (212(c) relief available to all lawful permanent residents except those "convicted" of an aggravated felony and sentenced to more than five years' imprisonment). Had Congress determined that it was desirable, for some reason, to draw a distinction between those defendants who pled and those who did not, the new law would have reflected this policy choice. *See Landgraf*, 511 U.S. at 273 (clear statement requirement forces Congress to take responsibility "for fundamental policy judgments concerning the proper temporal reach of statutes"); *cf. Perez*, 294 F.3d at 560-62.

Under the INS's approach, a defendant who pled guilty to a particular deportable offense would have the right to 212(c) relief, whereas a defendant who was convicted at trial of *the identical charge on the same day* would face

mandatory deportation. As the District Court stated in the plainest terms: "It is inconceivable that Congress intended such a result." 235 F. Supp. 2d at 406.

C. At A Minimum, An Immigrant Who Demonstrates That He Actually Relied On The Availability Of 212(c) When Deciding Whether To Proceed To Trial Is Eligible For 212(c) Relief.

For the reasons set forth above, this Court should hold that immigrants who were convicted at trial before IIRIRA are eligible to apply for 212(c) relief, under *St. Cyr*, because similar reliance interests are present. At a minimum, however, this Court should hold that Ponnapula, and other immigrants who can demonstrate that they in fact reasonably relied on the availability of 212(c) relief when deciding to proceed to trial, are eligible to apply for this discretionary relief.

The Supreme Court has set out different formulations for determining whether a statute has a retroactive effect, and, in *St. Cyr*, the Court focused on the touchstone of "reasonable reliance." 533 U.S. at 321-24. Yet, in *St. Cyr*, there was not a scintilla of evidence that the petitioner in that case had relied on the availability of 212(c) relief – or even thought about 212(c) relief – when deciding to plead guilty. *See* Brief for Respondent Enrico St. Cyr at 5-6, *INS v. St. Cyr*, No. 00-767. Rather, the Court was willing to conclude that, as a general matter, immigrants are aware of the availability of 212(c) and, given the importance of

these immigration consequences, make the decision to plead or go to trial in reasonable reliance on the immigration law at the time. 533 U.S. at 321-25.

This case therefore presents even stronger reliance interests than in *St. Cyr* itself. In this case, the record establishes that Ponnapula actually relied on the availability of 212(c) when deciding whether to go to trial or accept a plea, and turned down an offer to plead guilty to a misdemeanor in reliance on this law. *A fortiori*, this Court should hold – at a minimum – that immigrants who can demonstrate such reliance remain eligible for 212(c) relief. *See Mattis v. Reno*, 212 F.3d 31, 38 (1st Cir. 2000) (pre-*St. Cyr* decision holding that immigrants who show actual reliance on prior law are eligible for 212(c) relief); *Magana-Pizano v. INS*, 200 F.3d 603, 613 (9th Cir. 1999) (same). Moreover, such a ruling would not be inconsistent with rulings in any sister circuit, as this is the first case before a court of appeals (post-*St. Cyr*) in which an immigrant has been able to present a record of actual reliance. See *Rankine v. Reno*, 319 F.3d 93, 99 (2d Cir. 2003) (no actual reliance alleged); *Chambers v. Reno*, 307 F.3d 284, 286-87, 290-92 (4th Cir. 2002) (same); *Armendariz-Montoya*, 291 F.3d at 1121 (same); *Dias*, 311 F.3d at 458 (same); *see also Lara-Ruiz v INS*, 241 F.3d 934, 945 (7th Cir. 2001) (pre-*St. Cyr*) ("[Petitioner] does not argue that his expectation of the availability of the [212(c)] waiver in any way influenced his litigation strategy either in his state criminal proceedings or in his removal proceedings.").

D. The Relevant Date For Retroactivity Analysis Is The Date Of The Underlying Conduct.

Although the Court need not decide this question, the Court may affirm on another ground: that the date of the underlying conduct is the relevant date for retroactivity analysis.[9]

The presumption against retroactivity is based on the fundamental principle that the rule of law requires that the government abide by the rules it has established. *St. Cyr*, 533 U.S. at 316 ("[e]lementary considerations of fairness" dictate that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place") (internal quotations omitted). While the legislature, of course, has the *power* to enact retroactive civil legislation, the presumption against retroactivity forces the legislature to make an express statement if it wishes to do so and, therefore, take political responsibility for its action. *See St. Cyr*, 533 U.S. at 314-16; *Landgraf*, 511 U.S. at 266-67. In this way, the presumption against retroactivity "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Landgraf*, 511 U.S. at 266-67 (internal quotations omitted); *see also St. Cyr*, 533 U.S. at 315. Because the presumption against retroactivity is rooted in the rule of law, retroactivity

[9] The Supreme Court has not had occasion to decide whether the relevant point for retroactivity analysis is the date of the underlying conduct, and, indeed, has expressly left that question open. *Hughes Aircraft*, 520 U.S. at 946 n.4.

principles dictate that the relevant date for retroactivity analysis is the date of the underlying conduct. *See St. Cyr*, 533 U.S. at 316 (rooting presumption against retroactivity in the rule of law); *see also Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 864-65 (8th Cir. 2002) (holding that the relevant event for retroactivity purposes was the date of conduct); *Koch v. SEC*, 177 F.3d 784, 787-88 (9th Cir. 1999) (Kozinski, J.) (same); *United States v. Hughes Aircraft Co.*, 162 F.3d 1027, 1031 (9th Cir. 1998) (same).[10]

Judge Goodwin, in dissent in the Fourth Circuit, has powerfully explained why the date of the underlying conduct is the relevant date for retroactivity analysis:

> [T]he presumption against retroactivity is grounded in broad[] and . . . fundamental concerns. As Justice Scalia has explained, there is "timeless and universal human appeal" to the notion that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Kaiser Aluminum & Chem . Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). .

[10] This is not to assert that individual defendants necessarily relied on the availability of 212(c) relief when they committed the underlying criminal acts. Nonetheless, as *Hughes Aircraft* conclusively establishes, while reliance is *sufficient* to find a retroactive effect, it is not *necessary* to such a finding. In *Hughes Aircraft*, the Court did not seek to determine whether the defendant had relied on prior law, but, nonetheless, held that applying the law to past events would be impermissibly retroactive. *Hughes Aircraft*, 520 U.S. at 948; *see also St. Cyr*, 533 U.S. at 321 & n.46, 325 (while the reliance in *St. Cyr* presented an "obvious and severe" example of retroactive effect, there is no single test for retroactivity).

> . . This concern "relates to concepts of governmental legitimacy." Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. Rev. 97, 136 (1998). "[T]he government engenders greater respect for its laws and its lawmaking institutions if it can commit to the stability of its laws." Jill E. Fisch, *Retroactivity and Legal Change: an Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1106 (1997). That is, the government operates with greater fairness, and thus greater legitimacy, when it does not change the rules midway through the game. Thus the presumption against retroactivity, like the various constitutional protections against retroactive legislation, serves to "limit[ ] the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects." *Lynce v. Mathis*, 519 U.S. 433, 440 (1997).

Chambers, 307 F.3d at 296 (Goodwin, J., dissenting) (parallel citations omitted).[11]

Thus, although this Court need not address this issue, it could also affirm the

[11] In addition, the Supreme Court has repeatedly analogized to cases decided under the Ex Post Facto Clause in deciding questions of statutory retroactivity, *St. Cyr*, 533 U.S. at 325; *Hughes Aircraft*, 520 U.S. at 948 (same); *Landgraf*, 511 U.S. at 266-67, 269 n.23 (same), and these cases provide further support that the relevant date for retroactivity analysis is the date of the underlying conduct.

The Ex Post Facto Clause mandates that the government may not alter the consequence of a criminal act after the date of conduct. *See, e.g.*, *Miller v. Florida*, 482 U.S. 423, 435-36 (1987). This is so not merely because of notice or reliance interests, but because the rule of law requires that the government be so constrained. As the Supreme Court recently stated, "even apart from any claim of reliance or notice," the Ex Post Facto Clause requires that the "government abide by the rules of law it establishes." *Carmell v. Texas*, 529 U.S. 513, 533 (2000); *see also Lynce v. Mathis*, 519 U.S. 433, 440 (1997) (Ex Post Facto Clause "limit[s] the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects"). Thus, the same considerations that undergird the Ex Post Facto Clause dictate that the date of the underlying conduct is the relevant date for retroactivity analysis.

District Court on the basis that the relevant date for retroactivity analysis is the date of the underlying conduct.

CONCLUSION

For the foregoing reasons, this Court should hold that the repeal of 212(c) relief may not be applied to immigrants who were convicted at trial before the enactment of IIRIRA. At a minimum, the Court should hold that the repeal may not be applied to immigrants, such as Ponnapula, who actually relied on the availability of 212(c) relief.

Respectfully submitted,

_____

Joshua L. Dratel
National Association of
Criminal Defense Lawyers
Joshua L. Dratel, P.C.
14 Wall Street
New York, New York 10005
(212) 732-0707

Paul A. Engelmayer
Christopher J. Meade
Katherine R. Goldstein
Wilmer, Cutler & Pickering
399 Park Avenue
New York, New York 10022
(212) 230-8800

Jonathan E. Gradess, Executive Director
Manuel D. Vargas, Project Director,
Immigrant Defense Project
New York State Defenders Association
P.O. Box 20058, West Village Station
New York, New York 10014
(212) 898-4119

Dated: New York, New York
November 24, 2003