No. 12-1519

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PAUL IGNATIUS TAYLOR,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General of the United States,

Respondent.

ON PETITION FOR REVIEW FROM AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF OF THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND THE IMMIGRANT DEFENSE PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Rules

Federal Rule of Appellate Procedure 29(b) 1

I. INTRODUCTION AND STATEMENT OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(b), the National Immigration Project of the National Lawyers Guild (National Immigration Project) and the Immigrant Defense Project proffer this brief to assist the Court in its consideration of § 240A(d)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1229b(d)(1)(B) and the validity of the Board of Immigration Appeals' (BIA or Board) interpretation of this provision in its decisions in *Matter of Robles,* 24 I&N Dec. 22 (BIA 2006) and *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999). Section 1229b(d)(1), commonly called the "stop-time" rule, limits a lawful permanent resident's ability to qualify for cancellation of removal under 8 U.S.C. § 1229b(a). The statute, which Congress enacted on September 30, 1996 and became effective on April 1, 1997, provides that a lawful permanent resident's continuous physical residence or continuous physical presence ends upon the earlier of either commission of certain criminal offenses or service of a Notice to Appear.

At issue in this case is whether § 1229b(d)(1)(B) applies retroactively to pre-enactment offenses to bar cancellation of removal for lawful permanent residents (LPR). Given the language Congress chose and its knowledge of how to enact retroactive legislation, Congress intended to apply § 1229b(d)(1)(B) prospectively only to offenses committed after the enactment of the Illegal Immigration Reform

and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

Moreover, even if the Court finds Congress's intent ambiguous, there are two reasons why the Board cannot apply § 1229b(d)(1)(B) retroactively. First, the Supreme Court's decision in *Vartelas v. Holder*, _ U.S. _, 132 S. Ct. 1479 (2012), requires finding that § 1229b(d)(1)(B) would have impermissible retroactive effect. In *Vartelas*, the Court held that retrospective application of another provision of the INA would attach "a new disability"— effectively banning travel outside the United States—to criminal conduct committed before the provision's enactment. *Id.* at 1490. Significantly, the Court instructed that courts must not require a litigant to show reliance on prior law to demonstrate improper retroactive impact. *Id.* at 1490-91. As in *Vartelas*, applying § 1229b(d)(1)(B) retroactively would attach a "new disability" to pre-enactment offenses; specifically, it would render longtime lawful permanent residents ineligible for relief from removal, notwithstanding the potentially minor nature of the offense, or how long ago committed.

Second, the Supreme Court's decision in *Judulang v. Holder*, _ U.S. _, 132 S. Ct. 476 (2011), compels the Court to reject the retroactive application of § 1229b(d)(1)(B). In *Judulang*, the Court rejected as arbitrary and capricious a rule that categorically excluded a group of individuals from the ability to apply for

immigration relief where the BIA failed to consider "germane" factors. *Id*. at 485. As in *Judulang*, the Board's retroactivity rule categorically disqualifies longtime lawful permanent residents from asking an immigration judge to cancel their removal and allow them to retain their status and remain with their families in the United States without consideration of factors that are "germane" to the analysis. *Id*.

As illustrated here, the Board's retroactive application of the stop-time rule unreasonably treats persons with recent criminal offenses more leniently than persons with long ago offenses. Petitioner entered the United States as a lawful permanent resident in 1975. The purported basis for denying Petitioner access to discretionary relief are his convictions in 1980 and 1981, which were less than seven years after he entered as a lawful permanent resident. Under the BIA's precedents, Petitioner would be eligible for relief had he committed those same offenses any time after 1982; i.e., after he accrued seven years continuous physical presence. Conditioning eligibility for relief on the fact that Petitioner committed an offense in 1981, rather than 1982, is irrational. As such, the Board's decisions applying § 1229b(d)(1)(B) retroactively also are arbitrary and capricious and, therefore, violate the Administrative Procedures Act, 5 U.S.C. § 706(2)(A).

The National Immigration Project is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working

to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The Immigrant Defense Project is a non-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. Both organizations have a direct interest in ensuring that noncitizens are not unduly prevented from exercising their statutory right to request relief from removal.

II. BACKGROUND

As this case involves a challenge to 8 U.S.C. § 1229b(d)(1)(B), which restricts eligibility for relief from removal, amici believe a brief review of the statutory and administrative background surrounding its enactment and interpretation will inform the Court's analysis.

A. RELEVANT STATUTORY FRAMEWORK PRIOR TO IIRIRA

Before IIRIRA, lawful permanent residents subject to deportation were eligible to apply for a discretionary waiver of deportation under former INA § 212(c). *See* 8 U.S.C. § 1182(c) (repealed 1996). To qualify for a waiver under INA § 212(c), the individual needed to show, *inter alia*, seven years of lawful unrelinquished domicile in the United States. *Id.* While the statute allowed § 212(c) waivers for lawful permanent residents in exclusion proceedings, the Board's policy extended the waiver's availability to lawful permanent residents in

deportation proceedings. *See INS v. St. Cyr,* 533 U.S. 289, 295 (2001) (discussing Board's extension of § 212(c) relief to the deportation context).

Over the same period, noncitizens who were not lawful permanent residents could qualify for relief from deportation under a separate provision in former INA § 244, known as suspension of deportation. Under this provision, a noncitizen had to demonstrate, *inter alia*, continuous physical presence in the United States for a period of at least seven years or at least ten years immediately preceding the date of application for relief, depending on the basis of deportability. 8 U.S.C. § 1254(a) (repealed 1996).

Significantly, for both § 212(c) relief and suspension of deportation, a person could continue to accrue the requisite period of continuous residence until the date of a final order of deportation. *See Matter of Duarte,* 18 I&N Dec. 329, 331 (BIA 1982); 8 U.S.C. § 1254(a)(1) (repealed 1996).

B. STATUTORY FRAMEWORK UNDER IIRIRA

Through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), Congress enacted numerous substantive and procedural changes to the immigration laws, including to the eligibility requirements for relief from deportation. Relevant here are the following changes:

- Congress replaced what had previously been called "deportation" and "exclusion" proceedings with "removal" proceedings. IIRIRA § 304(a)(3).

- For LPRs, Congress eliminated the § 212(c) waiver, and replaced it with cancellation of removal for lawful permanent residents. IIRIRA § 304(b); IIRIRA § 304(a)(3) enacting 8 U.S.C. § 1229b(a). The main change to this relief was a new rule that barred eligibility for anyone convicted of an aggravated felony. IIRIRA § 304(a)(3) enacting 8 U.S.C. § 1229b(a)(3). Congress also broadened the aggravated felony definition and expressly made the new definition retroactive. IIRIRA § 321(b) & (c) amending 8 U.S.C. § 1101(a)(43).

- For non-LPRs, Congress eliminated suspension of deportation under former INA § 244 and replaced it with cancellation of removal for non-lawful permanent residents. IIRIRA § 304(a)(3) repealing 8 U.S.C. § 1254(a) and enacting 8 U.S.C. § 1229b(b). Congress further restricted eligibility for this new relief by categorically precluding noncitizens with certain criminal convictions. *Id.*

- Congress, for the first time, introduced a rule stopping the accrual of time required to demonstrate continuous residence. IIRIRA § 304(a)(3) enacting 8 U.S.C. § 1229b(d)(1).

- Congress enacted IIRIRA § 309(c)(5), entitled "TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION." It states that, in deportation cases pending IIRIRA's effective date, the stop-time rule applies to "notices to appear" issued before, on or after the date of enactment of IIRIRA. Congress later replaced the words "notice to appear" with the pre-IIRIRA phrase "order to show cause," clarifying that the stop-time rule retrospectively applied to suspension cases pending on April 1, 1997. *See* Nicaraguan Adjustment and Central American Relief Act (NACARA) of 1997, § 203(a)(1), Pub. L. No. 105-100, 111 Stat. 2160 (Nov. 19, 1997).

These changes took effect on April 1, 1997. IIRIRA § 309(a).

The "stop-time" provision of § 1229b(d)(1) presently states:

(d) Special rules relating to continuous residence or physical presence.
(1) Termination of continuous period. For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end

> (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 239(a) [8 U.S.C. § 1229(a)], or
>
> (B) when the alien has committed an offense referred to in section 212(a)(2) [8 U.S.C. § 1182(a)(2)] that renders the alien inadmissible to the United States under section 212(a)(2) [8 U.S.C. § 1182(a)(2)] or removable from the United States under section 237(a)(2) or 237(a)(4) [8 U.S.C. §§ 1227(a)(2) or 1227(a)(4)], whichever is earliest.

This provision applies to two forms of relief in § 1229b —cancellation of removal for lawful permanent residents under § 1229b(a) and cancellation of removal for non-lawful permanent residents under § 1229b(b). Pursuant to IIRIRA's transitional rule, IIRIRA § 309(c)(5), which governed cases pending on IIRIRA's effective date (April 1, 1997), the provision also applied to then pending applications for suspension of deportation.

C. RELEVANT ADMINISTRATIVE AND JUDICIAL BACKGROUND

In *Matter of Perez,* 22 I&N Dec. 689, 691 (BIA 1999), the BIA held that § 1229b(d)(1)(B) ended a lawful permanent resident's accrual of continuous residence on the date of commission of an enumerated offense, even if the offense pre-dated the provision's enactment. In so holding, the Board relied on IIRIRA's general effective date provision. *Matter of Perez,* 22 I&N Dec. at 691.

In *Appiah v. U.S. INS,* this Court ruled that § 1229b(d)(1)(A) applies retroactively for purposes of suspension of deportation under former INA § 244, where the non-lawful permanent resident was in deportation proceedings prior to

the IIRIRA's enactment. 202 F.3d 704, 708-09 (4th Cir. 2000). The noncitizen argued that issuance of the order to show cause should not terminate his continuous presence; that his continuous presence should continue to accrue until the deportation order was final. The Court, however, found that Congress unambiguously stated in IIRIRA § 309(c)(5), as amended by NACARA § 203(a), that the stop-time rule applies to pending cases where the relief sought is suspension of deportation. *Id.* In dicta, the Court also posited that, even if the statutory language was somehow ambiguous, application of § 1229b(d)(1)(A) was not impermissibly retroactive because discretionary relief did not affect a substantive right. *Id* at 709.

A year later, the Supreme Court's decision in *St. Cyr* rejected the reasoning underlying the BIA's earlier decision in *Matter of Perez*. The Court held that a general effective date "does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *INS v. St. Cyr,* 533 U.S. at 317 (citation omitted). The Court went on to find that the repeal of relief under former INA § 212(c) has impermissible retroactive effect. *Id.* at 325. In so holding, and contrary to the suggestion of this Court in *Appiah*, the Supreme Court firmly rejected the Solicitor General's argument that the discretionary nature of the statutory relief at issue impacts the retroactivity analysis. *Id.* (explaining "there is

a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.”).

In *Matter of Robles,* the Board re-examined whether § 1229b(d)(1)(B) applies retroactively in light of *St. Cyr*. 24 I&N Dec. 22, 27-28 (BIA 2006). The BIA again concluded that the statute applied retroactively to the pre-enactment commission of an enumerated offense; this time reasoning that application of § 1229b(d)(1)(B) to pre-enactment conduct was not impermissibly retroactive because the noncitizen did not establish reliance on the future availability of relief when committing his crime. *Id.*

The Supreme Court again addressed the Board’s restrictions on relief under former § 212(c) in *Judulang v. Holder*, 132 S. Ct. at 485. In that case, the Court rejected BIA’s rulings in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang,* 132 S. Ct. at 482-83. Specifically, the Court rejected the Board’s “comparable ground test,” which permitted lawful permanent residents to apply for a § 212(c) waiver only if the Department of Homeland Security (DHS) charged them with a ground of deportability that had a comparable ground of inadmissibility. The Court found that the “comparable ground test” is arbitrary and capricious. *Id.* at 485-86.

In *Vartelas v. Holder*, the Supreme Court addressed the application of 8 U.S.C. § 1101(a)(13)(C)(v) to pre-IIRIRA offenses. 132 S. Ct. at 1491. Under §

1101(a)(13)(C)(v), lawful permanent residents returning from a trip abroad are regarded as seeking admission if they have "committed" certain criminal offenses and, consequently, DHS may initiate removal proceedings against them. Before IIRIRA took effect, lawful permanent residents with criminal convictions who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was "innocent, casual and brief." *See Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963). The *Vartelas* Court reasoned that the application of § 1101(a)(13)(C)(v) would have impermissible retroactive effect if applied to lawful permanent residents with pre-IIRIRA convictions because, at the time of their conviction, they could have traveled abroad without jeopardizing their permanent resident status. *Vartelas,* 132 S. Ct. at 1487-88. *See also Olatunji v. Ashcroft*, 387 F.3d 383, 397 (4th Cir. 2004). Importantly, the *Vartelas* Court expressly recognized that a showing of reliance on the prior law is not necessary to demonstrate impermissible retroactive effect. *Vartelas*, 132 S. Ct. at 1490-91.

III. ARGUMENT

A. CONGRESS INTENDED § 1229b(d)(1)(B) TO APPLY PROSPECTIVELY TO POST-IIRIRA OFFENSES IN CANCELLATION OF REMOVAL CASES.

A strong presumption against retroactivity "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). Under the presumption

against retroactive legislation, "courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity." *Vartelas v. Holder*, 132 S. Ct. at 1486. Courts should assess the impact of applying the new law to old conduct in light of the "traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." *Landgraf,* 511 U.S. at 278.

The Supreme Court has set out a two-part test to determine when it is permissible to apply a statute retroactively. First, courts, employing traditional tools of statutory construction, look to whether Congress provided for the statute's temporal reach, either explicitly or implicitly. *Landgraf*, 511 U.S. at 280; *Lindh v. Murphy*, 521 U.S. 320, 324-26 (1997). If Congress's intent can be ascertained, the inquiry ends. *Lindh*, 521 U.S. at 336. Only if a court determines Congress's intent cannot be ascertained, should it proceed to step two, asking whether application of the new law to past events would have an impermissible retroactive effect by imposing new disabilities or duties on past conduct. *Martin v. Hadix,* 527 U.S. 343, 357 (1999); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001). If the court finds impermissible retroactive effect, it must conclude the statute applies prospectively only. *St. Cyr,* 533 U.S. at 325.

Amici acknowledge the absence of express statutory language specifying the temporal reach of § 1229b(d)(1)(B) to cancellation of removal for lawful permanent residents under § 1229b(a). However, absent such express language, *Lindh* directs courts to employ customary rules of statutory construction to determine Congress's intent as to temporal reach. *Lindh,* 521 U.S. at 326. Application of these rules shows Congress's intent to apply the stop-time rule prospectively only.

1. Congress's Intent Can Be Discerned from Its Choice Not to Specifically Limit Relief Based on Past Offenses in § 1229(d)(1)(B) and to Expressly Do So Elsewhere in the INA.

Post-*Landgraf*, Congress is presumed to be aware of the presumption against retroactive legislation. *Goodyear Atomic Corporation v. Miller*, 486 U.S. 174, 184-85 (1988) ("[courts] presume that Congress is knowledgeable about the existing law pertinent to the legislation it enacts."). Accordingly, when Congress intends a statute to apply to past conduct, it must explicitly so provide. *Lindh*, 521 U.S. at 327-28. *Accord Olatunji*, 387 F.3d at 394 ("[W]here Congress has apparently given no thought to the question of retroactivity whatsoever, there is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply retroactively. Anything more, in the face of complete congressional silence, is nothing but judicial legislation."). Proof of intended *prospective* application does not require the "high level of clarity" that is required

to prove intended *retroactive* application, i.e., clarity that can sustain "only one interpretation." *St. Cyr*, 533 U.S. at 317 (citation omitted); *Lindh*, 521 U.S. at 326 ("*Landgraf* thus referred to 'express commands,' 'unambiguous directives,' and the like where it sought to reaffirm that clear-statement rule [requiring retroactive application], *but only there"*) (emphasis added, citations omitted).

Here, Congress did not explicitly provide for application of § 1229(d)(1)(B) to past conduct. *See Consumer Product Safety Commission v. GTE Sylvania, Inc*., 447 U.S. 102, 108 (1980) ("The starting point for interpreting a statute is the language of the statute itself"). Several provisions in IIRIRA show that Congress knew how to use express language when it chose to limit relief for lawful permanent residents based on past events. *But see Martinez v. I.N.S.*, 523 F.3d 365, 371-72 (2d Cir. 2008).

IIRIRA added two restrictions on cancellation of removal for lawful permanent residents: (1) the aggravated felony bar; and (2) the clock stop bar. IIRIRA § 304(a)(3) enacting 8 U.S.C. § 1229b(a)(3) (stating that the Attorney General cannot grant cancellation to a person who "has ... been convicted of an aggravated felony"); IIRIRA § 304(a)(3) enacting § 1229b(d)(1). In enacting these provisions, Congress considered whether to apply the new restrictions to past events. With the aggravated felony bar, it included specific language doing so. IIRIRA §§ 321(c), 321(b) (providing new aggravated felony definition applies "to

conviction[s] ... entered before, on or after" the enactment date, and that the section "shall apply to actions taken on or after the date of enactment of this Act, regardless of when the conviction occurred."). Importantly, however, with the stop-time rule in § 1229b(d)(1)(B) —other than the transitional rule for pending suspension cases—Congress did not similarly include retroactivity language. *See Lindh*, 52U.S. at 326-29 (discerning Congressional intent regarding the temporal reach of a statute by negative implication).

In other words, Congress knew how to make clear when certain of IIRIRA's restrictions would be retroactive, and declined to do so with respect to the stop-time rule as it applies to conduct committed before the law's enactment.[1] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (stating "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute"). As the Court noted in *St. Cyr,* this differing treatment of closely related provisions is highly indicative of congressional intent. 533 U.S. at 319 n.43.[2]

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[1] The stop-time rule, as part of the new general scheme, was made "effective" on April 1, 1997. But as the Supreme Court has repeatedly cautioned, a general effective date does not provide this kind of instruction on the applicability of the new rules to past events. *St. Cyr*, 533 U.S. at 317 ("[A] 'statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.'") (citation omitted).

[2] The Court listed as examples the following two IIRIRA sections, *inter alia*, that expressly indicate application to past conduct: IIRIRA § 322(c) ("The

2. Congress Demonstrated Its Intent to Apply § 1229(d)(1)(B) Prospectively to Cancellation of Removal by Expressly Applying the Rule to Past Offenses Only in Pending Suspension of Deportation Cases.

The language in the transitional rules of IIRIRA § 309(c)(5) further demonstrates that Congress was specific when it sought to apply new rules to past events. In IIRIRA § 309(c)(5), Congress singled out pending cases in which non-LPRs were seeking suspension of deportation as the context in which the new stop-time rule should be applied to past events. *See Appiah*, 202 F.3d at 708-709. In contrast, Congress did not make § 1229b(d)(1)(B) apply to pre-enactment conduct in cancellation cases commenced after the effective date of IIRIRA. This specific retroactivity provision for pending suspension cases is telling evidence that Congress did not mean to apply the stop-time rule to cancellation cases involving lawful permanent residents.[3] *Henry v. Ashcroft,* 175 F. Supp.2d 688, 694

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amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act"); and IIRIRA § 351(c) (discussing deportation for smuggling and providing that amendments "shall apply to applications for waivers filed before, on, or after the date" of enactment).

[3] Respondent relies on the Fifth Circuit's decision in *Heaven v. Gonzales,* 473 F.3d 167, 171-75 (5th Cir. 2006) to argue that Congress expressly intended for pre-enactment offenses to trigger the stop-time rule. Resp. Br. at 15. In *Heaven*, the Fifth Circuit concluded that § 1229b(d)(1)(B) must apply retroactively to lawful permanent residents in *cancellation* cases because Congress did expressly apply it retroactively to nonpermanent residents in pending *suspension* cases. But the Second Circuit rejected the *Heaven* Court's reasoning. *See Martinez v. I.N.S.*, 523

(S.D.N.Y. 2001) ("If Congress had intended for the clock stopping provision to apply to crimes committed before the law was passed where removal proceedings had not yet been commenced, Congress could have so provided. It did not"). *Accord Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . ..").

Congress's intent in enacting the transitional rules provides additional evidence that Congress intended 8 U.S.C. § 1229b(d)(1)(B) to apply prospectively. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy") (internal citations omitted). In enacting IIRIRA § 309(c)(5), Congress specifically sought to prevent

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F.3d 365, 371 (2d Cir. 2008) ("Congress could have done the same for permanent-rule cases, but did not.").

In addition, the Fifth Circuit relied on a Ninth Circuit decision addressing § 1229b(d)(2), a provision relevant only to non-lawful permanent residents. *Id*. at 175 (relying on *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 941 (9th Cir. 2005) (per curiam)). The Ninth Circuit subsequently ruled on the same question at issue before this Court (and addressed in *Heaven)*, finding that the stop-clock rule does not bar cancellation of removal for lawful permanent residents, such as Petitioner, who pled guilty before the enactment of IIRIRA and were eligible for discretionary relief at the time IIRIRA became effective. *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1202-03 (9th Cir. 2006). As discussed below, the Ninth Circuit analysis is the correct one.

noncitizens from purposefully delaying their deportation proceedings until they accrued the seven years of continuous residence required for eligibility. H.R.Rep. No. 104–879, at 108 (1997). This purpose would not be furthered by applying § 1229b(d)(1)(B) to cases, such as Petitioner's, in which the seven years already had accrued long before the effective date of IIRIRA and no deportation proceedings were pending at that time. *Henry v. Ashcroft*, 175 F. Supp.2d at 695. When IIRIRA became law, there simply were no proceedings against Petitioner that could be delayed.

In sum, Congress treated differently the various § 1229b(d)(1)(B) bars. It knew how to enact retroactive language, and it knew how silent legislation must be construed. Given this knowledge, the language it chose evinces clear intent not to apply § 1229b(d)(1)(B) to pre-IIRIA offenses to bar cancellation of removal for lawful permanent residents in removal proceedings.

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B. APPLYING § 1229b(d)(1)(B) RETROACTIVELY CONFLICTS WITH THE SUPREME COURT'S DECISIONS IN *VARTELAS* AND *JUDULANG*.

1. Under the Supreme Court's Decision in *Vartelas v. Holder,* Application of § 1229b(d)(1) to Pre-IIRIRA Offenses Has Impermissible Retroactive Effect.

If this Court concludes that it cannot discern the temporal reach of the statute using the ordinary rules of statutory construction, then it must determine whether applying § 1229(d)(1)(B) to conduct that took place prior to its enactment would have impermissible retroactive effect. Whether a new law has an impermissible retroactive effect is a "commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin*, 527 U.S. at 345 (citing *Landgraf,* 511 U.S. at 270). A new statute is impermissibly retroactive if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf*, 511 U.S. at 269 (citations omitted); *see, e.g., Olatunji*, 387 F.3d at 389 (quoting *St. Cyr,* 533 U.S. at 321).

i. Reliance on the availability of relief from removal is not required for the court to find that § 1229(d)(1)(B) has impermissible retroactive effect.

The Supreme Court made it unequivocally clear in *Vartelas v. Holder* that detrimental reliance on prior law is not required to find that a new law has

impermissible retroactive effect. 132 S. Ct. at 1491 (holding that the "presumption against retroactive application of statutes does not require a showing of detrimental reliance."). In doing so, the Court rejected the Second Circuit's contrary conclusion, stating:

> As the Government acknowledges, "th[is] Court has not required a party challenging the application of a statute to show [he relied on prior law] in structuring his conduct." Brief for Respondent 25–26 . . . .. The essential inquiry, as stated in *Landgraf*, 511 U. S., at 269–270, is "whether the new provision attaches new legal consequences to events completed before its enactment." That is just what occurred here.

Id. at 1490-91. Even before *Vartelas*, this Court did not require detrimental reliance. *Olatunji*, 387 F.3d at 394 ("[W]e believe that the consideration of reliance is irrelevant to statutory retroactivity analysis.").

Relying on the Board's decision in *Matter of Robles*, 24 I&N Dec. at 27-28, Respondent insists the application of the stop-time rule to Petitioner's pre-IIRIRA offense is not impermissibly retroactive because he cannot establish any reliance interest in relief from removal. Resp. Br. 16-18. Contrary to both Respondent's assertion and the reasoning behind *Matter of Robles,* reliance is not a pre-requisite of impermissible retroactive effect.[4] *Vartelas,* 132 S. Ct. at 1491; *Olatunji*, 387 F.3d at 394.

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[4] Moreover, a reviewing court owes no deference to the Board's treatment of retroactivity jurisprudence. *See St. Cyr,* 533 U.S. at 320 n.45; *Velasquez Gabriel,* 263 F.3d at 106 n.2 ("*St. Cyr* also precludes the INS's contention that we should

ii. Retroactive application of § 1229(d)(1)(B) attaches new and impermissible consequences to pre-enactment offenses for lawful permanent residents

Applying § 1229b(d)(1)(B) to pre-IIRIRA offenses would have an improper retroactive effect on lawful permanent residents, like Petitioner, by attaching new legal consequences to events completed before its enactment. Petitioner immigrated to this country as a lawful permanent resident in 1975. A.R. 3; A.R. 20. In 1980 and 1981, he was convicted of two minor marijuana offenses—an infraction and an attempted possession of small amounts.[5] A.R. 3-4; A.R. 137. More than 30 years after residing in this country as a lawful permanent resident, he was placed in removal proceedings following a 2007 controlled substance offense. A.R. 173-74. Under IIRIRA, § 1229b(a) is one of the chief forms of relief from deportation for lawful permanent residents. It would provide Petitioner with the opportunity to present his equities and the immigration judge the authority to

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defer to the Board of Immigration Appeals' alleged retroactive application of § 241(a)(5)") (citations omitted).

[5] Respondent, for the first time on petition for review, claims that Petitioner was convicted of marijuana sale, Resp. Br. 3, but there is no evidence in the record of conviction nor is there a finding by the immigration court or the Board to support this allegation. It appears that Respondent misreads Petitioner's arrest record. In New York, charges on the arrest record following the "in full satisfaction of" language are generally the charges that have been <u>dismissed</u> as part of the plea agreement. *See generally People v. McAllister*, 58 A.D.2d 712, 712 (N.Y. App. Div. 3d Dept. 1977) (Court accepted "plea of guilty to the lesser crime in full satisfaction of all crimes charged").

evaluate whether deportation is appropriate in light of those equities. Applying the stop-time rule to Petitioner would make him ineligible for cancellation of removal. It attaches a "new disability" to events completed before its enactment; it impairs important rights held by Petitioner at the time he acted and significantly increases his liability for that past conduct.

The reasoning in *Vartelas* compels a finding of improper retroactive impact here. There, the Court held that 8 U.S.C. § 1101(a)(13)(C)(v) does not apply retroactively to permanent residents who "committed" an offense prior to IIRIRA. *Vartelas*, 132 S. Ct. at 1490. The Court reasoned that retrospective application of § 1101(a)(13)(C)(v) would attach "a new disability"—of effectively banning travel outside the United States—to criminal conduct completed well before the provision's enactment. *Id*. Thus, the legal regime in force at the time of a person's pre-IIRIRA conviction governs.

Like the petitioner in *Vartelas*, the relevant criminal conduct predates the enactment of IIRIRA, and it is this commission of this decades-old offense which the government contends triggers the new statutory bar. As in *Vartelas*, the retrospective application of the stop-time rule would attach a "new disability" disqualifying Petitioner from relief from removal by reaching back in time to stop the accrual of continuous residence. In fact, § 1229b(d)(1)(B) establishes a lifetime bar to relief from removal for lawful permanent residents, subjecting them

to mandatory deportation after living in the U.S. for decades, in this case for more than thirty-five years, even though such persons would have been eligible for relief under the pre-IIRIRA regime. Under the Board's construction of the statute, such persons would become retrospectively strictly liable for any transgression of the immigration laws, no matter how minor, by losing all ability to present equities if ever placed in removal proceedings. By changing the rules for qualifying for cancellation of removal, the stop-time rule attaches a "new disability" to criminal conduct.[6] *See St. Cyr*, 533 U.S. at 321 (holding that the "elimination of any possibility of [immigration] relief" in the context of former INA §212(c) attaches "a new disability, in respect to transactions or considerations already past.").

As in the case of Mr. Vartelas, here the disability would not have attached under pre-IIRIRA law. The seven years of continuous lawful residence required for an INA § 212(c) waiver did not end until a deportation order became administratively final. *See Matter of Duarte,* 18 I&N Dec. at 331. Thus, under the immigration laws in effect prior to IIRIRA, lawful permanent residents, like

[6] In *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), the Supreme Court applied 8 U.S.C. § 1231(a)(5) retroactively to an individual who unlawfully reentered but did not take any affirmative steps to legalize his status in the United States before the effective date of the statute. *Id.* at 44 n.10 (noting that petitioner's retroactivity claim was not based on a claim that the statute in question cancelled vested rights because he "never availed himself" of cancellation, adjustment or voluntary departure and did not take an "action that enhanced their significance to him in particular"). Unlike that case, Petitioner here will lose a right to relief from deportation.

Petitioner, did not become statutorily ineligible for relief from removal by committing certain enumerated offenses, including minor drug offenses. In this case, the Petitioner had accrued seven years of continued lawful residence by 1982, and was otherwise eligible for discretionary relief from removal well before IIRIRA was enacted in 1996. By denying him already accrued eligibility, and thus permanently disqualifying him for relief from removal, the application of § 1229b(d)(1)(B) is impermissibly retroactive. *See Sinotes-Cruz*, 468 F.3d at 1202-03 (finding stop-time rule is impermissibly retroactive for lawful permanent resident who pled guilty before the enactment of IIRIRA and was eligible for discretionary relief at the time IIRIRA became effective). *But see Martinez*, 523 F.3d at 373-74 (finding stop-time rule is not impermissibly retroactive for lawful permanent resident who committed pre-IIRIRA offense but pled guilty post-IIRIRA and was not eligible for relief prior to IIRIRA).

In sum, applying § 1229b(d)(1)(B) retrospectively to pre-enactment offenses would have an impermissible retroactive effect because it would render longtime lawful permanent residents ineligible for discretionary relief from removal, notwithstanding the potentially minor nature of the offense or how long ago committed.

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2. Under the Supreme Court's Decision in *Judulang v. Holder,* Application of § 1229b(d)(1)(B) to Pre-IIRIRA Offenses Is "Arbitrary and Capricious."

Even if the Court cannot discern whether Congress intended to apply § 1229b(d)(1)(B) prospectively or retroactively using traditional statutory construction rules, the Court must reject the retroactive application of § 1229b(d)(1)(B) as "arbitrary and capricious" pursuant to *Judulang v. Holder*. 132 S. Ct. at 485. In that case, the Supreme Court unanimously rejected two BIA decisions addressing whether noncitizens in removal proceedings qualified for a discretionary waiver. *Id.* The Court found the BIA's decisions were "arbitrary and capricious" and, therefore, violated the Administrative Procedures Act, 5 U.S.C. § 706(2)(A). *Id*. at 483-84.[7] In so holding, the Court firmly rejected a rule categorically excluding a group of individuals from immigration relief based on random factors that bear no relationship to whether the person is worthy of the relief. *Id.* at 484-85.

Here, the BIA's decisions fail because they apply the stop-time rule retroactively to categorically exclude identically situated individuals from

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[7] The Court observed that the same standard applies under the second step of the test that governs an agency's interpretation of a statute, which the Court announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). *Judulang*, 132 S. Ct. at 484 (stating that "under Chevron step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance'") (*quoting Mayo Foundation for Medical Ed. and Research v. United States*, 131 S. Ct. 704, 711(2011)).

immigration relief based on random factors without considering their "fitness to remain in the country." *Id*. at 485. The BIA wrongly presumes that Congress meant to treat a person, like Petitioner, worse than person who had entered the country at the same time (in 1975), had the same convictions, but whose convictions were less remote in time when Congress enacted § 1229b(d)(1). This reading is not reasonable; it plainly turns on factors that are not at all "germane." *Id*. Applying the rationale of *Judulang*, this Court should reverse the BIA's decisions in *Matter of Robles*, *supra,* and *Matter of Perez*, *supra*.

At issue in *Judulang* was the BIA's test for eligibility for relief under former INA § 212(c). In *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005)), the BIA made the availability of that relief contingent on whether DHS charged the noncitizen with a ground of deportability that had a comparable ground of inadmissibility. *Judulang*, 132 S. Ct. at 482-83. The Court acknowledged the BIA's "expertise and experience" in administering the INA, yet it also heralded the "important" role of federal courts "in ensuring that agencies have engaged in reasoned decisionmaking." *Id.* at 483-84. The Court explained that, if the BIA intends to limit the availability of relief, "it must do so in some rational way." *Id*. at 485. The Court found that the Board's limitation on § 212(c) relief "flunked that test," *id*. at 484, stating:

> The comparable-grounds approach does not rest on any factors relevant to whether an alien (or any group of aliens) should be deported. It instead distinguishes among aliens—decides who should be eligible for discretionary relief and who should not—solely by comparing the metes and bounds of diverse statutory categories into which an alien falls. The resulting Venn diagrams have no connection to the goals of the deportation process or the rational operation of the immigration laws.

Judulang, 132 S. Ct. at 487.

At issue here, is the availability of relief under 8 U.S.C. §§ 1229b(a) and 1229b(d)(1). The BIA's decisions applying the statute retroactively creates the same type of asymmetrical divergence the Supreme Court rejected in *Judulang*. For example, a lawful permanent resident who committed a crime within seven years of admission decades before cannot qualify for cancellation, while an LPR who committed the same offense more recently would be eligible. Under the BIA's rule, this would be true even if they both entered the country on the exact same day. This disparate treatment of similar applicants without reason illustrates the irrationality of the BIA's approach.

Significantly, *Judulang* instructs that the Board must consider whether its decisions (applying the rule retroactively) are tied to the "purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang*, 132 S. Ct. at 485. The *Judulang* Court criticized the BIA for categorically denying lawful permanent residents eligibility for relief without

considering any of "germane" factors to the deportation decision, i.e., worthiness of relief. *Id*. at 485. The Court reasoned:

> Recall that the BIA asks whether the set of offenses in a particular deportation ground lines up with the set in an exclusion ground. But so what if it does? Does an alien charged with a particular deportation ground become more worthy of relief because that ground happens to match up with another? Or less worthy of relief because the ground does not? The comparison in no way changes the alien's prior offense or his other attributes and circumstances. So it is difficult to see why that comparison should matter. Each of these statutory grounds contains a slew of offenses. Whether each contains the same slew has nothing to do with whether a deportable alien whose prior conviction falls within both grounds merits the ability to seek a waiver.

Judulang, 132 S. Ct. at 485. Similarly, here, the Board's pre-*Judulang* decisions denying lawful permanent residents eligibility for relief failed to consider how the proposed construction related to an individual's "worthiness," "prior offense," or "other attributes and circumstances," i.e., whether the person "merits the ability to seek a waiver." *Id*.

Neither *Matter of Perez* nor *Matter of Robles* take into consideration an individual's attributes in a way that relates to the purpose of the cancellation statute itself, i.e., to authorize immigration judges to consider whether longtime lawful permanent residents deserve a second chance to remain in the United States or face permanent separation from their U.S. citizen or lawful permanent resident family

members.[8] For example, these decisions penalize noncitizens with convictions that are older, but occurred within the first seven years of their admission. Such a result cannot be tied to the purpose of the statute because remoteness of an offense has generally been considered to be a positive equity. *Matter of Marin,* 16 I&N Dec. at 584.

Like former § 212(c), the cancellation statute at § 1229b(a) is an empowering, not a divesting, statute, as it grants immigration judges the authority to order relief from deportation. *Accord Pruidze v. Holder*, 632 F.3d 234, 237 (6th Cir. 2011) ("This is an empowering, not a divesting, provision, as it grants the Board authority to entertain a motion to reopen"). Yet, as in *Judulang*, the Board's policy here is arbitrary and capricious because it sets forth "[a] method for disfavoring deportable aliens that bears no relation to these matters--that neither focuses on nor relates to an alien's fitness to remain in the country. . .." *Judulang*, 132 S. Ct. at 485.

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[8] In making this determination, an immigration judge balances positive factors (including service in the Armed Forces, family ties within the U.S., length of residency in the U.S., evidence of hardship to the person and family members, employment history, property or business ties, community service, proof of rehabilitation, and evidence of good character) against negative factors (including nature and circumstances of grounds for removal, additional immigration violations, criminal record, and evidence of bad character). *See Matter of C-V-T-,* 22 I&N Dec. 7, 11-13 (BIA 1998) (adopting criteria utilized in § 212(c) cases under *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978)).

In sum, the Court should decline to follow the Board's decisions in *Matter of Robles* and *Matter of Perez* because the BIA's reasons for applying §1229b(d)(1)(B) retroactivity are "unmoored from the purposes and concerns of the immigration laws." *Judulang*, 132 S. Ct. at 490. Thus, the Court should remand to allow Petitioner to have his application for cancellation of removal adjudicated on the merits under the Board's longstanding balancing test set forth in *Matter of Marin*. *Cf. Judulang*, 132 S. Ct. at 490 ("Judulang's proposed approach asks immigration officials only to do what they have done for years in exclusion cases; that means, for one thing, that officials can make use of substantial existing precedent governing whether a crime falls within a ground of exclusion").

IV. CONCLUSION

Congress intended the stop-time rule to apply prospectively only. In addition, retroactive application of the rule has impermissible retroactive effect when applied to lawful permanent residents, like Petitioner, with pre-IIRIRA offenses, and, therefore, conflicts with the Supreme Court's decisions in *Vartelas v. Holder*, *supra.* Retroactive application also conflicts with the rationale in *Judulang v. Holder*, *supra*, because the rule categorically excludes identically situated individuals from immigration relief without due consideration of factors relevant to their worthiness to remain in the United States.

For the foregoing reasons, the Court should grant the petition for review, and remand the case, through the BIA, to the immigration court for an adjudication of Petitioner's application for cancellation of removal.

December 21, 2012

Respectfully submitted,

/s/ Trina Realmuto

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1519 **Caption:** Paul Ignatius Taylor v. Eric Holder, Jr.

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(s) / Trina Realmuto

Attorney for Amici Curiae

Dated: 12/21/12

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