No. 09-263

In The
Supreme Court of the United States

SANDRA FERGUSON,

Petitioner,

v.

ERIC HOLDER, ATTORNEY GENERAL
OF THE UNITED STATES,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are organizations that provide legal services to immigrants and advise defense attorneys whose clients could face deportation. This case involves the deep and growing split among the courts of appeals over the continued availability of a critical form of equitable relief from deportation for lawful permanent residents (LPRs) with pre-1996 convictions. As organizations concerned with the proper and consistent understanding of the immigration consequences of criminal convictions, *amici* urge the Court to grant certiorari in this case to resolve this important issue.

The **Immigrant Defense Project** (IDP) provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. This Court has accepted and relied on amicus curiae briefs submitted by IDP in cases involving the proper application of federal immigration law to immigrants with past criminal adjudications, including this Court's recent decisions in *Lopez v. Gonzales*, 549

[1] The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court, in accordance with Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

U.S. 47 (2006), *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *INS v. St. Cyr*, 533 U.S. 289 (2001).

The **Immigrant Legal Resource Center** (ILRC) is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal adjudications.

The **National Immigration Project of the National Lawyers Guild** (NIP) 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. NIP provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of Immigration Law and Crimes and three other treatises published by Thomson-West. NIP has participated as amicus curiae in several significant immigration-related cases before this Court.

The **National Association of Criminal Defense Lawyers** (NACDL) is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public

defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. 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 and efficient administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations.

SUMMARY OF THE ARGUMENT

Under former § 212(c) of the Immigration and Nationality Act, lawful permanent residents (LPRs) with criminal convictions could seek relief from deportation on the basis of equitable factors and strong ties to the United States. In *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court held that applying the repeal of § 212(c) to LPRs convicted before its enactment had an impermissible retroactive effect. The courts of appeals are now deeply divided over whether applying the repeal of § 212(c) to LPRs who, prior to 1996, were convicted *after a decision to go to trial* would result in an impermissible retroactive effect, just as it does for LPRs who pled guilty before 1996. The continued availability of § 212(c) relief remains critical for thousands of individuals and

their families. *Amici* urge this Court to grant certiorari in the present case for the following four reasons.

First, because no statute of limitations restricts when the government can commence removal proceedings based on criminal convictions, LPRs with pre-1996 convictions will continue to be put into removal proceedings, and cases involving § 212(c) relief will emerge for years to come. As the present case demonstrates, the government can initiate removal proceedings long after an LPR has re-established a productive life following a conviction. Furthermore, the government's systems for initiating removal proceedings against immigrants with potentially-deportable offenses are becoming increasingly expansive. LPRs with pre-1996 convictions may find themselves in removal proceedings after returning from brief trips abroad, applying for naturalization, or renewing their permanent residency cards. Additionally, the integration of databases and increased communication with local law enforcement raises the likelihood that LPRs with old convictions will end up in removal proceedings.

Second, in addition to being of utmost importance to affected immigrants and their families, § 212(c) ensures that immigration judges can exercise discretion under well-established standards designed to promote "the best interests of this country." *Matter of Marin*, 16 I. & N. Dec. 581, 584 (BIA 1978). The individuals impacted by the retroactive application of the repeal of § 212(c) are all long-time LPRs with

convictions that are *at least* 13 years old. As Sandra Ferguson, the petitioner in this case, illustrates, these LPRs often have substantial ties to the United States, such as strong employment records, community involvement, and family ties, including United States citizen spouses, children, and other family members.

Third, because the government can commence removal proceedings in any circuit, the circuit split at issue creates inconsistent application of the law to similarly situated individuals. The Department of Homeland Security's (DHS) practice of transferring immigrant detainees far from their place of residence for removal proceedings leads to arbitrary differences in eligibility for relief under § 212(c). Individuals are transferred to jurisdictions that apply different rules than the jurisdictions in which they reside or where their convictions took place. Similarly, after traveling abroad, LPRs may be placed in removal proceedings based upon their port of entry to the United States, which may not be where they reside.

Fourth, as our experience counseling immigrant defendants and defense attorneys indicates, there is no justification for distinguishing between LPRs who pled guilty and those who were convicted after a trial, as the Eleventh Circuit has done. While *amici* believe that the opinion below gives too much weight to reliance in the retroactivity analysis, even if this Court concludes that reliance is a necessary factor, the Eleventh Circuit's opinion is flawed. Both the decision to plead guilty and the decision to go to trial

require an LPR to consider the impact on her immigration status and rely upon the relief available at the time. Thus, the retroactive application of the repeal of § 212(c) relief disrupts equally the reasonable expectations of an immigrant who is convicted at trial as those of an immigrant who accepted a plea agreement prior to 1996.

For these reasons, *amici* request that this Court grant certiorari to resolve the critical issue in this case.

REASONS FOR GRANTING THE WRIT

I. INCREASINGLY PERVASIVE METHODS OF IMMIGRATION ENFORCEMENT WILL CONTINUE TO LEAD TO REMOVAL PROCEEDINGS AGAINST INDIVIDUALS WITH PRE-1996 CRIMINAL CONVICTIONS.

Because no statute of limitations restricts when the government may commence removal proceedings based on potentially deportable criminal convictions, an LPR with a prior conviction may face removal proceedings at any point during her lifetime.[2] This possibility becomes a reality in routine situations, such as when immigrants travel, apply for naturalization, or seek renewals of identification. In

[2] *See* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 71.01 (2009).

addition, immigration authorities' increasingly widespread enforcement efforts and communication with local law enforcement lead to removal proceedings against LPRs with old convictions. Accordingly, contrary to the government's assertion in previous cases,[3] the question presented by the petition will continue to recur for a long time to come.

A. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings After Return To The United States From Travel Abroad.

LPRs with pre-1996 convictions are placed into removal proceedings upon returning to the United States from trips abroad. Returning LPRs are screened by DHS officials for previous convictions. Because DHS believes it cannot exercise discretion when screening individuals for admission to the United States,[4] LPRs find themselves facing deportation because of decades-old convictions.

Savario Perriello, for example, was returning from a brief trip to Italy in 2000 when immigration authorities charged him with inadmissibility and

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[3] *E.g.*, Brief for the Respondent in Opposition at 13, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) (No. 07-820).

[4] *See* Immigration & Naturalization Serv., U.S. Dep't of Justice, HQOPP 50/4, Memorandum to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel, *Exercising Prosecutorial Discretion* (2000), *reprinted in* 5 Bender's Immigration Bulletin 995 (Dec. 1, 2000).

initiated proceedings. Mr. Perriello, an LPR, had resided in the United States since 1961, when he was 13 years old. In the 23 years between his conviction by trial and the initiation of proceedings, Mr. Perriello married a United States citizen, operated a restaurant, and raised four United States citizen children. He was denied § 212(c) relief because his past conviction was by trial.[5]

B. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings After Applying For United States Citizenship.

Second, LPRs applying for citizenship are put into removal proceedings after disclosing prior convictions on naturalization applications. Applicants for naturalization must disclose prior convictions and undergo fingerprint checks. [6] If an applicant has a deportable conviction, United States Citizenship and Immigration Services (USCIS) can refer that individual to Immigration and Customs Enforcement (ICE) for removal proceedings. In 2007, there were

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[5] *Perriello v. Napolitano*, No. 05-2868, 2009 U.S. App. LEXIS 19595, at *3 (2d Cir. Sept. 1, 2009). *See also Nadal-Ginard v. Holder*, 558 F.3d 61, 64 (1st Cir. 2009) (longtime LPR placed into proceedings after brief trip abroad); *Mbea v. Gonzales*, 482 F.3d 276, 278 (4th Cir. 2007) (same); *Zamora v. Gonzales*, 240 F. App'x 150, 151 (7th Cir. 2007) (same); *Molina-De La Villa v. Mukasey*, 306 F. App'x 389, 391 (9th Cir. 2009) (same).

[6] 8 C.F.R. § 103.2(e) (2009).

almost 1.4 million applications for naturalization filed, nearly twice as many applications as the previous year.[7] Still, an estimated additional 8.2 million LPRs are eligible to naturalize.[8] Any of these LPRs with an old conviction faces removal proceedings when he or she seeks to naturalize.

Chanh Lovan, for instance, came to the United States as a refugee from Laos in 1981 and later became an LPR. In 2002, Mr. Lovan applied for naturalization, 11 years after his trial conviction. Mr. Lovan's application was denied and he was placed into removal proceedings, threatening to tear him away from his United States citizen wife and children. The government argued that he should be denied a § 212(c) hearing because he took his case to trial.[9]

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[7] Migration Policy Inst., *Behind the Naturalization Backlog: Causes, Contexts, and Concerns* 1 (2008), http://www.migrationpolicy.org/pubs/FS21_NaturalizationBacklog_022608.pdf.

[8] U.S. Dep't of Homeland Security, Office of Immigration Statistics, Population Estimates, *Estimates of the Legal Permanent Resident Population in 2007* 3 (2009), http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_pe_2007.pdf

[9] *Lovan v. Holder*, 574 F.3d 990, 992 (8th Cir. 2009). *See also Kelava v. Gonzales*, 434 F.3d 1120, 1122 (9th Cir. 2006) (longtime LPR placed into proceedings after applying for citizenship).

C. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings After Renewing Their Green Cards.

Third, LPRs may end up in removal proceedings after renewing their permanent residency cards, commonly known as "green cards." LPRs require a green card to return to the United States after traveling abroad. Many LPRs need a green card to prove work eligibility. Additionally, LPRs are required by law to carry proof of their immigration status at all times.[10] Because individuals applying for green card renewal are fingerprinted as part of the process, the renewal process can result in LPRs with old convictions being placed in removal proceedings.

Gerardo Martinez-Murillo, for example, applied for a replacement green card in 2004. Shortly thereafter, immigration authorities placed Mr. Martinez-Murillo into proceedings based on his 1992 conviction by trial. Mr. Martinez-Murillo came to the United States as a child. When he was placed in removal proceedings, he had lived here for 30 years with his mother and eleven siblings, one of whom was a member of the United States military. He was

[10] 8 U.S.C. § 1304(e) (2006). However, an expired green card has no effect on a person's lawful status. 8 C.F.R. § 1.1(p) (2009).

denied a hearing under § 212(c) because his conviction was by trial.[11]

D. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings Because Of Increased Communication Between Local Law Enforcement and Immigration Authorities.

Moreover, in addition to these standard practices that often result in removal proceedings, increased communication between local law enforcement and immigration authorities and the integration of informational databases is likely to result in even more widespread mechanisms for identifying individuals with old convictions. A new program called Secure Communities, for example, is designed to have all jails run fingerprints against immigration databases,[12] and pass matches along to ICE. ICE predicts nationwide expansion of Secure Communities by the year 2013.[13] Government officials predict this initiative will increase tenfold the numbers of individuals

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[11] Brief of Petitioner-Appellant at 5-6, *Martinez-Murillo v. Mukasey*, 267 F. App'x 519 (9th Cir. 2008) (No. 06-73562).

[12] Immigration & Customs Enforcement, U.S. Dep't of Homeland Security, *Secure Communities Fact Sheet* (2009), http://www.ice.gov/doclib/pi/news/factsheets/secure_communities.pdf.

[13] *Id*.

identified for deportation.[14] Similar programs operate out of local prisons, where ICE has offices.[15] These programs have been used to place LPRs with old criminal convictions in removal proceedings. *See e.g.*, *Garcia v. Shanahan*, 615 F. Supp. 2d 175 (S.D.N.Y. 2009).

E. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings Because Of ICE's Practice Of Carrying Out Raids.

Other methods of expanding enforcement include home raids,[16] raids on Amtrak trains and Greyhound buses,[17] and workplace raids.[18] The petitioner in this case, Sandra Ferguson, illustrates how workplace raids can sweep up those authorized to work in the United States. Immigration agents visited her workplace searching for an individual suspected of

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[14] Spencer S. Hsu, *U.S. to Expand Immigration Checks to all Local Jails*, Wash. Post, May 19, 2009, at A1.

[15] Many correctional facilities also provide office space to ICE to interview suspected non-citizens. Nina Bernstein, *Immigration Officials Often Detain Foreign-Born Rikers Inmates for Deportation*, N.Y. Times, Aug. 24, 2009, at A17.

[16] Nina Bernstein, *Immigrant Workers Caught in Net Cast for Gangs*, N.Y. Times, Nov. 25, 2007, at sec. 1, p. 41.

[17] Emily Bazar, *Some Travelers Criticize Border Patrol Inspection Methods*, USA Today, Sept. 30, 2008, http://www.usatoday.com/news/nation/2008-09-30-border-patrol-inside_N.htm.

[18] Editorial, *The Shame of Postville, Iowa*, N.Y. Times, July 13, 2008, at WK11.

working without authorization. (R. at 351-53.) Although Ms. Ferguson was authorized to work, immigration agents questioned her, leading to the initiation of her removal proceedings. (R. at 351-52.)

Such enforcement methods, combined with the lack of a statute of limitations, means LPRs with pre-1996 convictions will inevitably, and increasingly, come to the attention of immigration authorities. Because of this issue's importance to the affected individuals, it will continue to be litigated at the administrative agency level and in lower courts. Until this Court clarifies whether § 212(c) relief was retroactively repealed for LPRs convicted after trial, the courts of appeals will continue receiving petitions for review, and the Supreme Court will continue receiving petitions for certiorari.

II. ELIGIBILITY FOR § 212(c) RELIEF REMAINS CRITICAL FOR LAWFUL PERMANENT RESIDENTS PLACED IN REMOVAL PROCEEDINGS BASED ON OLD CONVICTIONS.

The continued availability of § 212(c) relief and the opportunity to present one's equities is of utmost importance to LPRs with pre-1996 convictions as well as to their families and communities. For LPRs applying for § 212(c) relief, the opportunity to present their equities means the difference between "facing possible deportation and facing certain deportation." *INS v. St. Cyr*, 533 U.S. 289, 325 (2001).

To obtain § 212(c) relief, an LPR must show that favorable considerations outweigh adverse factors such as criminal records, violations of immigration laws, or indications of bad character. *Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978). Such relevant favorable considerations include:

> family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of business ties, evidence of value and service to the community, proof of genuine rehabilitation if criminal record exists, and other evidence attesting to a respondent's good character.

Id. at 584-85. Immigration judges are allowed to grant § 212(c) relief when the balance of factors promotes "the best interests of this country." *Id.* at 584.

The equities of LPRs affected by the question presented in this case will be especially strong because only those convicted before 1996 are at issue. Thus, their convictions will be *at least* 13 years old. Some have convictions that are decades old. Most of these LPRs served their sentences long ago and have since rehabilitated themselves. The deep roots these LPRs have established and their contributions to

their communities make them strong candidates for equitable relief.

Although § 212(c) was repealed 13 years ago, statistical evidence illustrates its continued importance. Ms. Ferguson is but one of many LPRs put into removal proceedings annually based on an old conviction who could benefit from § 212(c) relief. Immigration judges still hear thousands of applications for § 212(c) relief every year[19] and, historically, the rate of granting § 212(c) relief has been very high.[20] In the past five years, for example, tens of thousands of LPRs have been granted equitable relief from removal, and § 212(c) waivers constituted a *full third* of the equitable relief granted to LPRs in that time period.[21]

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[19] *See* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2008 Statistical Year Book R3 (2009), http://www.usdoj.gov/eoir/statspub/syb2000main.htm [hereinafter FY 2008 Statistical Year Book].

[20] An LPR applying for § 212(c) relief had a greater than 50% chance that relief would be granted. *See St. Cyr*, 533 U.S. at 296 n.5. Considering that immigration judges grant § 212(c) relief in over a thousand cases a year, it is likely that somewhere between two and three thousand § 212(c) cases come before immigration judges annually.

[21] The remaining two thirds of grants of equitable relief to LPRs during the last five years were in the form of "cancellation of removal." *See* FY 2008 Statistical Year Book, *supra* note 18, at R3. Congress replaced § 212(c) relief with cancellation in IIRIRA. LPRs convicted of any aggravated felony – even if they served no jail time – are ineligible for cancellation. 8 U.S.C. § 1229b (2006). In addition, LPRs must meet a seven-year

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Recent circuit court cases demonstrate that LPRs with pre-1996 convictions by jury trial often have strong equities. The continued availability of § 212(c) relief remains critical for these individuals. Cases involving LPRs convicted by trial include LPRs with strong family ties to the United States, such as United States citizen children, spouses, parents, siblings, grand-parents, aunts, uncles, and friends;[22]

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continuous residence requirement. *Id*. For LPRs with old convictions, however, some courts have held that the clock stopped when they committed a deportable offense even if that offense was long before the passage of IIRIRA. *See e.g.*, *Zuluaga Martinez v. INS*, 523 F.3d 365 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1314 (2009).

[22] *See e.g.*, *Perriello v. Napolitano*, No. 05-2868, 2009 U.S. App. LEXIS 19595, at *3 (2d Cir. Sept. 1, 2009) (U.S. citizen wife and four U.S. citizen children); *Ponnapula v. Ashcroft*, 373 F.3d 480, 485 (3d Cir. 2004) (U.S. citizen wife, two children, and brothers); Brief of Petitioner-Appellant at 5, *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2007) (No. 00-6364) (U.S. citizen mother and grandmother); *Zamora v. Gonzales*, 240 F. App'x 150, 151 (7th Cir. 2007) (two U.S. citizen children and two U.S. citizen grandchildren); *Lovan v. Holder*, 574 F.3d 990, 992 (8th Cir. 2009) (U.S. citizen wife and children); Brief of Petitioner-Appellant at 7, *Molina-De La Villa v. Mukasey*, 306 F. App'x 389 (9th Cir. 2009) (Nos. 04-71033, 05-74126) (U.S. citizen wife and three children); Brief of Petitioner-Appellant at 2, *Gallardo v. Mukasey*, 279 F. App'x 484 (9th Cir. 2008) (No. 05-76739) (wife, two children, and five grandchildren are U.S. citizens); Brief of Petitioner-Appellant at 5, *Martinez-Murillo v. Mukasey*, 267 F. App'x 519 (9th Cir. 2008) (No. 06-73562) (twelve siblings in lawful status); *Saravia-Paguada v. Gonzale*s, 488 F.3d 1122, 1124 (9th Cir. 2007) (U.S. citizen child and mother and siblings with LPR status); Brief of Petitioner-Appellant at 5, *Haque v. Holder*, 312 F. App'x 946 (9th Cir. 2009) (Nos. 05-74825, 06-71433) (U.S. citizen parents and seven U.S. citizen siblings);

(Continued on following page)

LPRs who have lived almost their entire lives in the United States;[23] LPRs with strong employment records;[24] LPRs who are successful small business owners and employ others in their communities;[25]

Brief of Petitioner-Appellant at 7, *Prieto-Romero v. Mukasey*, 304 F. App'x 512 (9th Cir. 2008) (No. 07-35458) (two U.S. citizen children).

[23] *See e.g.*, Brief of Petitioner-Appellant at 3*, Walcott v. Chertoff*, 517 F.3d 149 (2d Cir. 2008) (No. 06-5516-ag) (became an LPR at age 11); *Hem v. Maurer*, 458 F.3d 1185, 1187 (10th Cir. 2006) (entered U.S. at age 7); *Wilson v. Gonzales*, 471 F.3d 111, 113 (2d Cir. 2006) (entered as an LPR at age 4); *Esquivel v. Mukasey*, 543 F.3d 919, 920 (7th Cir. 2007) (entered U.S. at age 6); Brief of Petitioner-Appellant at 2, *Chambers,* 307 F.3d 284 (No. 00-6364) (entered U.S. at age 2); Brief of Petitioner-Appellant at 4, *Manzo-Garcia v. Gonzales*, 225 F. App'x 631 (9th Cir. 2007) (No. 05-72660) (entered U.S. at a very young age); *Amendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 (9th Cir. 2002) (entered U.S. at age 3).

[24] *See e.g.*, Brief of Petitioner-Appellant at 6, *Prieto-Romero*, 304 F. App'x 512 (No. 07-35458) (worked fourteen years as a counselor for the State of Oregon Department of Human Services and nine years at a second job at Northwest Human Services); *Zamora*, 240 F. App'x at 151 (worked as a machinist since 1989); Brief of Petitioner-Appellant at 7, *Molina-De La Villa*, 306 F. App'x 389 (Nos. 04-71033, 05-74126) (immigrant was family's primary breadwinner).

[25] *See e.g.*, *Perriello*, 2009 U.S. App. LEXIS at *3 (operates restaurant in New York); Brief of Petitioner-Appellant at 3, *Appel v. Gonzales*, 146 F. App'x 175 (9th Cir. 2005) (No. 03-56986) (owns a business with assets more than one million dollars, employs 20 people, and contracts with an additional 40 people); Brief of Petitioner-Appellant at 5, *Haque*, 312 F. App'x 946 (Nos. 05-74825, 06-71433) (owned and ran two carwashes, earned over $100,000 per year, and employed approximately 70 employees).

LPRs who are very involved with their churches and faith communities[26] and who participate in community service;[27] and LPRs who served in the United States military.[28] All these individuals will be ineligible for § 212(c) relief if the repeal is applied to their old convictions solely because they took their cases to trial.

Ms. Ferguson's case demonstrates the equities presented by LPRs with old convictions. From her testimony at a § 212(c) hearing on February 2, 2006, it is clear that Ms. Ferguson has made a strong case for an award of relief under § 212(c).[29]

Ms. Ferguson has substantial family ties in the United States. *See Matter of Marin*, 16 I. & N. Dec. at 584. Her entire family lives in the United States, including her three American-born children, as well

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[26] *See e.g.*, Brief of Petitioner-Appellant at 7, *Molina-De La Villa*, 306 F. App'x 389 (Nos. 04-71033, 05-74126) (immigrant is active member of his church community).

[27] *See e.g.*, Brief of Petitioner-Appellant at 6, *Prieto-Romero*, 304 F. App'x 512 (No. 07-35458) (works as an on-call shelter worker at the Homeless Outreach and Advocacy Project).

[28] The petitioner in *Molina-De La Villa v. Mukasey*, 306 F. App'x 389 (9th Cir. 2009), was a former serviceman in the U.S. Navy. American Civil Liberties Union, *Prolonged Immigration Detention of Individuals Who Are Challenging Removal* 3 (2008), http://www.aclu.org/images/asset_upload_file766_40474.pdf.

[29] Initially, the government conceded Ms. Ferguson's § 212(c) eligibility, and the immigration judge scheduled a hearing to evaluate her § 212(c) application. (R. at 67-68.) At that hearing, Ms. Ferguson took the stand to answer questions about her conviction and her equities.

as her mother, three brothers, two sisters, three aunts, and great grandmother, most of whom are also United States citizens. (R. at 98.) She has lived in the United States for the vast majority of her life, having entered as an LPR at the age of 13 in 1977, and has only returned to Jamaica once for a brief trip. (R. at 83-84.)

Ms. Ferguson showed evidence of a strong employment history. *See Matter of Marin*, 16 I. & N. Dec. at 585. Ms. Ferguson has worked consistently since 1993 (R. at 226), and she has been employed as a certified nursing assistant and a medical assistant since 2002 (R. at 98). In her words, her duties include "[taking] care of elderly patients . . . [providing] love and comfort to them in their home[s] on a daily basis." (R. at 96.) She has never received welfare assistance and has always paid her taxes. (R. at 97.)

Beyond her employment record, Ms. Ferguson also produced additional "evidence of value and service to the community." *See Matter of Marin*, 16 I. & N. Dec. at 585. She volunteers at a food pantry where she distributes food to the needy and attends church twice a week with her children. (R. at 102.) Moreover, she has never had any subsequent convictions since her single 21-year-old drug conviction. (R. at 80-81.)

She also established that her family, particularly her children, would suffer hardship in the event of her deportation. *See Matter of Marin*, 16 I. & N. Dec. at 585. Two years ago, at the time of the hearing, her sons were sixteen, ten, and five years old. (R. at 93.)

Ms. Ferguson raised her three sons as a single mother and only received child support for her eldest son. (R. at 100.) Under Ms. Ferguson's care, her sons have flourished at school and have built strong social ties to the United States. (R. at 101, 156, 192-93.) Accompanying their mother to Jamaica would be a traumatic experience: her sons have no friends or family in Jamaica, and only the eldest son has ever even visited the country. (R. at 101.)

Indeed, Ms. Ferguson's equities are so strong that the immigration judge in her case believed § 212(c) relief was warranted. Immigration Judge Pedro Miranda noted that Ms. Ferguson is a "long-time person" with "a very old conviction" and that "hopefully there will be something" to indicate her § 212(c) eligibility. (R. at 131.) Yet, based on the fact that Ms. Ferguson was convicted by trial rather than by plea, the immigration judge felt bound to grant the government's motion to pretermit her application for § 212(c) relief. (R. at 126.) This Court should grant certiorari in the present case so that Ms. Ferguson and other similarly-situated LPRs who were convicted at trial can present their equities for § 212(c) relief just as this Court, in *St. Cyr*, allowed LPRs convicted by plea to do.

III. AVAILABILITY OF § 212(C) TO LAWFUL PERMANENT RESIDENTS WITH OLD CONVICTIONS IS ARBITRARILY DETERMINED BECAUSE THE GOVERNMENT MAY COMMENCE REMOVAL PROCEEDINGS IN ANY CIRCUIT.

DHS subjects individuals facing removal proceedings to detention in the location of the government's choosing without regard to where the individual resides or where the conviction occurred. Also, an LPR returning to the United States from a brief trip overseas may be placed into removal proceedings based on where she was inspected by immigration authorities, irrespective of whether this place of entry is in fact where she resides.

Because immigration judges apply the law of the circuit in which they sit,[30] the law applied in any one case depends on arbitrary facts, such as where the person is detained or where the person entered the country after a trip. This arbitrary application frustrates the expectations of immigrants and their lawyers.[31] Transfers of LPRs for removal proceedings will continue to play a role in the enforcement of

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[30] *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 394-96 (BIA 2002).

[31] *See, e.g.*, *Wilson v. Gonzales*, 471 F.3d 111, 114 (2d Cir. 2006) (New York resident transferred to immigration detention in Louisiana); *Ponnapula v. Ashcroft,* 373 F.3d 480, 485 (3d Cir. 2004) (New York resident transferred to immigration detention in Pennsylvania).

immigration laws, and so the confusion and unpredictability created by the present circuit split will remain a problem for a large number of LPRs with old convictions.

IV. EVEN IF RELIANCE WERE A CRITICAL FACTOR IN THE RETROACTIVITY ANALYSIS, THE ELEVENTH CIRCUIT ERRED BECAUSE IMMIGRANTS WHO DECIDE TO GO TO TRIAL, JUST AS THOSE WHO PLEAD GUILTY, RELY ON THE RELIEF AVAILABLE AT THE TIME.

As our extensive experience counseling immigrant defendants indicates, immigrants who chose to go to trial – like those who pled guilty – often relied on the availability of § 212(c) relief when making the decision. Demonstrable reliance is only one of several factors in the retroactivity analysis,[32] but even if it were essential, the Eleventh Circuit erroneously concluded that LPRs who went to trial before 1996 did not rely on the availability of § 212(c) relief.

Prior to IIRIRA, a variety of scenarios existed in which a defendant could choose to stand trial for a deportable offense while preserving § 212(c) eligibility. Before 1996, an LPR was ineligible for § 212(c)

[32] As the Petitioner in this case points out, the Eleventh Circuit places excessive weight on reliance in the retroactivity analysis. Petition for Writ of Certiorari at 22-24, *Ferguson v. Holder*, No. 09-263 (Aug. 28, 2009).

relief only if she (1) had been convicted of an "aggravated felony," *and* (2) had *served* five or more years in prison.[33] 8 U.S.C. § 1182(c) (1994) (emphasis added). Many deportable offenses were not classified as "aggravated felonies."[34] Consequently, an immigrant could go to trial for a deportable offense and still maintain § 212(c) eligibility. Furthermore, an LPR could be charged with an aggravated felony that did not carry, or probably would not result in, a sentence of more than five years. Indeed, because the five-year ban was only enacted in the Immigration Act of 1990, someone convicted before then, such as Ms. Ferguson, could have maintained § 212(c) eligibility even if she served more than five years.[35] In these cases prior to IIRIRA, and with even more certainty prior to the Immigration Act of 1990, we could and often did counsel the immigrant defendant that the conviction and sentence received at trial would probably not affect her right to seek § 212(c) relief.

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[33] This five-year bar was enacted in the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, effective November 29, 1990.

[34] *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).

[35] The regulations provide that a person remains eligible for § 212(c) relief, even if she served a sentence of five or more years, if the conviction was entered by guilty plea before November 29, 1990. 8 C.F.R. § 1212.3(f)(4)(ii) (2009).

Many LPRs relied on our advice that going to trial would not hurt their eligibility for § 212(c) relief and, thus, decided to stand trial. In cases where the immigrant defendant was informed, either by her lawyer or the court, that a conviction would probably not endanger § 212(c) eligibility, the decision to go to trial depended on considerations such as length of a potential sentence, belief in her innocence, and the strength of the government's case. Indeed, in our experience, cases in which defendants choose to stand trial tend to be the cases in which the prosecution's evidence of guilt is the weakest. Even when the prosecution's evidence is weak, however, a defendant who knows that conviction could foreclose deportation relief will often choose to plead to charges that carry less risk of deportation.

Murali Ponnapula's case, which our experience indicates is typical, demonstrates how immigrant defendants who chose trial still relied on the availability of § 212(c) relief. After Mr. Ponnapula was indicted for two felony charges, the District Attorney's office offered him a plea to a misdemeanor with a probationary sentence. Mr. Ponnapula's counsel advised him that, if convicted after trial, he would likely receive a sentence of less than five years, and so he would still be eligible for § 212(c) relief. Relying on that information, Mr. Ponnapula turned down the plea offer and went to trial. *Ponnapula v. Ashcroft*, 235 F. Supp. 2d 397, 399 (M.D. Pa. 2002). As the Third Circuit noted in upholding the district court's finding that IIRIRA's repeal of § 212(c) should

not apply retroactively to individuals such as Mr. Ponnapula, "[t]he advice of Ponnapula's counsel, and his reliance thereon, is easily understandable, for the evidence at trial barely established criminality." *Ponnapula v. Ashcroft*, 373 F.3d 480, 484 (3d Cir. 2004).

Although Mr. Ponnapula was convicted at trial, his counsel's advice on sentencing proved correct: he was sentenced to no more than three years. As the District Court explained, "[Mr. Ponnapula] 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." *Ponnapula*, 235 F. Supp. 2d at 405. It is hard to imagine he would have turned down the plea offer if he had known that going to trial posed the risk of *mandatory* deportation.

Immigrant defendants such as Mr. Ponnapula, who are facing the possibility of deportation, make the decision whether to go to trial or to enter a plea, and if so, to what offense, with the utmost care. *See INS v. St. Cyr*, 533 U.S. 289, 322 (2001). Our experience indicates, and courts have confirmed, that "[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." *Ponnapula*, 235 F. Supp. 2d at 404.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the petition for the writ of certiorari should be granted.

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New York, NY

Respectfully submitted,

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