No. _____

In The

Supreme Court of the United States

FIDEL CINTORA AGUILAR,

Petitioner,

v.

MICHAEL J. MUKASEY,
U.S. ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the elimination of section 212(c) of the Immigration and Nationality Act (INA) has an impermissible retroactive effect on lawful permanent residents who were found guilty of a deportable offense after a jury trial prior to the provision's repeal?

2. Whether Congress's expansion of the definition of "conviction" in INA § 101(a)(48), as retroactively applied to the Petitioner, violates the Due Process Clause of the Fifth Amendment when the Petitioner gave up his right to appeal an adverse jury verdict in reliance on the old definition of "conviction"?

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OPINION BELOW

The Immigration Judge (IJ) determined that the definition of conviction found in INA § 101(a)(48) applied to Cintora and determined that he was ineligible to apply for relief under repealed INA § 212(c) in an unpublished decision dated April 13, 2007. The Board of Immigration Appeals (BIA) affirmed the IJ's decision in an unpublished decision dated July 11, 2007. The Fifth Circuit Court of Appeals summarily affirmed the BIA in an unpublished decision dated October 2, 2007. The Court of Appeals denied Cintora's Petition for Rehearing En Banc in an unpublished decision dated November 28, 2007. These opinions are located in the appendix.

JURISDICTION

On October 2, 2007, the Fifth Circuit Court of Appeals filed its opinion summarily affirming the BIA's decision ordering Cintora's removal. On November 28, 2007, the Fifth Circuit denied the Petitioner's timely Petition for Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

– The Due Process Clause of the Fifth Amendment:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

STATUTORY PROVISIONS INVOLVED

– 8 U.S.C. § 1182(c), section 212(c) of the Immigration and Nationality Act

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years."

Section 212(c) was initially only applicable to exclusion proceedings. The BIA later extended its availability to lawful permanent residents in deportation proceedings. *See INS v. St. Cyr*, 533 U.S. 289, 295 (2001), *citing Matter of Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976). This Court succinctly stated the legislative history of § 212(c):

> In 1990, Congress amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years. § 511, 104 Stat. 5052 (amending 8 U.S.C. § 1182(c)). In 1996, in § 440(d) of AEDPA, Congress identified a broad set of offenses for which convictions would preclude such relief. See 110 Stat. 1277 (amending 8 U.S.C. § 1182(c)). And finally, that same year, Congress passed IIRIRA. That statute, *inter alia,* repealed § 212(c), see § 304(b), 110 Stat. 3009-597. . . .

Id.

– 8 U.S.C. § 1101(a)(48), section 101(a)(48) of the Immigration and Nationality Act:

> The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication has been withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a plea of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

This provision was added to the INA by § 322(a)(1) of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA). In § 322(c), Congress

stated that this provision should be applied retroactively.

STATEMENT OF THE CASE

Fidel Cintora Aguilar, a citizen and national of Mexico, became a lawful permanent resident of the United States on or around May 4, 1987. His wife and two minor children reside in the United States as lawful permanent residents. On November 1, 1993, Cintora was charged in Blaine County, Idaho, with one count of rape and one count of lewd and lascivious acts with a minor under the age of sixteen. He pled not guilty to both counts. On February 2, 1994, a jury acquitted Cintora of rape, but found him guilty of committing lewd and lascivious acts with a minor. After the jury verdict, the criminal case was adjourned for sentencing.

Realizing that the jury's guilty verdict placed Cintora's immigration status in jeopardy, his attorney, Kathleen Rivers, consulted an immigration attorney about how to structure Cintora's sentence in a manner to avoid his deportation. App. at 15. She was informed that if Cintora received an "Order Withholding Judgment" he would not be subject to deportation. An "Order Withholding Judgment" is a procedure under Idaho law where a defendant is found guilty of the offense, but the court withholds a formal finding of guilt to allow the defendant to complete a term of probation. Idaho Code Ann. § 19-2601(3)

(2007). Once the term of probation is completed, the court dismisses the charge and the Defendant is not convicted. App. at 15. Prior to the passage of the IIRIRA, an "Order Withholding Judgment" was not considered a "conviction" for immigration purposes. *See Matter of Ozkok*, 19 I. & N. Dec. 546 (B.I.A. 1988), *superseded by statute*, 8 U.S.C. § 1101(a)(48).

Relying on the pre-IIRIRA definition of conviction, Rivers advised Cintora to accept an "Order Withholding Judgment" because such an order would prevent his deportation. By pursuing an "Order Withholding Judgment," Cintora was forced to give up his right to appeal the jury's verdict, his right to have his sentence reconsidered, and his right to pursue post-conviction relief. App. at 16. Losing his appellate rights was especially important in Cintora's case because there was a "significant appealable issue." App. at 16. Rivers filed a preliminary motion to dismiss the charges against Cintora claiming the State of Idaho was practicing "selective prosecution on the basis of race and ethnic discrimination." App. at 16. An Anglo individual who committed a similar offense around the same time was not prosecuted by the State of Idaho while Cintora, a Mexican, was. By accepting the terms of the "Order Withholding Judgment," Cintora waived his right to appeal the trial judge's order denying this motion and every other issue. He thereby waived his last chance to be exonerated.

The sole reason Cintora waived his right to appeal and forsook the opportunity to be exonerated

was because he believed that by accepting an "Order Withholding Judgment" he would not be deported. This was likely confirmed to Rivers by immigration officials. App. at 15. It was Rivers' "practice to not simply accept the representations of one person on such an important issue and to instead, confirm the information with immigration." App. at 16. Rivers advised Cintora to pursue an "Order Withholding Judgment" because she believed that it would not result in his deportation. Cintora, trusting in his attorney, waived his right to appeal and instructed Rivers to pursue an "Order Withholding Judgment." App. at 18.

On March 28, 1994, the Idaho Criminal Court considered and granted Cintora's request for an "Order Withholding Judgment." Cintora was placed on probation for five years and upon completion of the term of probation the charge against him was to be dismissed. The court's order completed a *quid pro quo* arrangement between Cintora and the State of Idaho. Cintora accepted an "Order Withholding Judgment" and forsook his appeal rights; the State of Idaho, in return, accepted the Order and did not have to expend prosecutorial resources litigating an appeal.

Convinced that he would be allowed to reside in the United States permanently, Cintora filed a visa petition naming his spouse as the beneficiary on September 27, 1996. Believing that Cintora was able to permanently reside in the United States, his spouse and two minor daughters immigrated to this country. They left their home, school, and friends in

Mexico in favor of a lifetime in the United States with Cintora.

In 1996, Congress passed immigration legislation which greatly altered Cintora's immigration status and dramatically upset the terms of his *quid pro quo* arrangement. First, Congress changed the definition of "conviction" and superseded the BIA's decision in *Ozkok*. Congress's new definition of "conviction" includes the "Order Withholding Judgment" Cintora received. Congress also expressly made the new definition of "conviction" retroactive, *see* IIRIRA § 322(c), causing Cintora's 1994 "Order Withholding Judgment" to be considered a "conviction" for immigration purposes. Second, Congress eliminated § 212(c) – which contained the only defense to deportation available to Cintora. Therefore, the immigration laws passed in 1996 caused Cintora to move from a lawful permanent resident, residing lawfully with his family in this country, and on the path to becoming a United States citizen, to an alien subject to certain removal without recourse to any defense.

In 2001, this Court determined that the elimination of § 212(c) had an impermissible retroactive effect on aliens who pled guilty or nolo contendere to a deportable offense prior to the passage of the IIRIRA. *INS v. St. Cyr*, 533 U.S. 289 (2001). The Court did not, however, consider whether the elimination of § 212(c) relief has an impermissible retroactive effect on aliens found guilty of an offense by a jury. The circuit courts that have considered the issue have reached different conclusions. The Fifth Circuit

Court of Appeals, the appellate court with jurisdiction in this case, has determined that the repeal of § 212(c) has an impermissible retroactive effect only when the alien found guilty by a jury can show that he or she "actually relied" upon the provision. *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006); *Carranza de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007).

On January 17, 2007, Cintora was arrested by officers of the Department of Homeland Security (DHS) at a port of entry in Texas when he was returning to the United States after a brief trip to Mexico. The government charged that Cintora was inadmissible to the United States as an alien convicted of a crime involving moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(I)(i). Before the IJ, Cintora contended that he was not inadmissible because the retroactive application of the definition of "conviction" to him violated his due process rights. He also argued that he qualifies for relief under § 212(c) because the provision's elimination had an impermissible retroactive effect. The IJ rejected these arguments and ordered Cintora removed to Mexico. Cintora appealed. The BIA affirmed the IJ's decision on July 11, 2007. Cintora timely petitioned the Fifth Circuit for review. Relying on *Carranza de Salinas* and *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) (ruling that Congress intended for the IIRIRA's definition of "conviction" to apply retroactively), the government moved the court to summarily affirm the BIA's decision. Over Cintora's opposition, the court granted the

government's motion. Cintora petitioned for rehearing en banc, which was also denied. This petition now follows.

REASONS FOR GRANTING THE PETITION

This Court should grant the instant petition for the reasons stated in Supreme Court Rule 10, subsections (a) and (c).

I. Question One: The impermissible retroactive application of the repeal of INA § 212(c).

A. Conflict with Supreme Court Law

This Court has already ruled that the elimination of a defense – available to a defendant at the time when the transactions or considerations giving rise to the cause of action occurred – attaches a "new disability" to transactions already past and, as such, has an impermissible retroactive effect. *Hughes Aircraft Co. v. United States ex rel. Shumer*, 520 U.S. 939 (1997). The lower courts refusal to recognize the impermissible retroactive effect of the elimination of § 212(c) directly contradicts this Court's ruling in *Hughes Aircraft*. This Court also has ruled that settled expectations based on settled law as determined in a *quid pro quo* agreement between the prosecution and the defendant are protected from retroactive legislation. *INS v. St. Cyr,* 533 U.S. 289 (2001). Given that Cintora entered into a *quid pro quo* arrangement which is substantively indistinguishable from the one

confronted by the Court in *St. Cyr*, the Court of Appeals' requirement that Cintora show *actual reliance* on the pre-IIRIRA law is unacceptable. Finally, the requirement that an applicant demonstrate "actual reliance" upon § 212(c) fails to recognize the presumption against retroactive application of laws, and Supreme Court case law strongly suggests that actual reliance is simply not a relevant part of the analysis in determining whether a law has an impermissible retroactive effect.

B. Circuit Split

The circuit courts are in "considerable disagreement" whether the repeal of § 212(c) has an impermissible retroactive effect on immigrants who elected to go to trial prior to the IIRIRA instead of entering into a plea arrangement. *See Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 938 (9th Cir. 2007) (recognizing the split). The split between the circuits generally revolves around whether reliance is the *sine qua non* of the retroactive effect analysis and, if so, whether objective reliance or "actual reliance" must be shown. The Third Circuit Court of Appeals, in deciding that the repeal of § 212(c) does have a retroactive effect on individuals found guilty after a jury trial, ruled that reliance is just one factor among many to be considered. *Atkinson v. Att'y Gen. of the U.S.*, 479 F.3d 222, 231 (3d Cir. 2007); *accord Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). The Tenth Circuit Court of Appeals decided that a showing of objective "reasonable reliance" by an identified class

must be demonstrated in order to establish that the elimination of § 212(c) has an impermissible retroactive effect. *Hem v. Maurer*, 458 F.3d 1185, 1197 (10th Cir. 2006). The Fifth Circuit, the court with jurisdiction in this case, and the Second Circuit require a showing that the person "actually relied" upon § 212(c) in order to demonstrate that the repeal has an impermissible retroactive effect. *Carranza de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007); *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004). Three other circuits have decided that the repeal of § 212(c) does not have a retroactive effect on individuals who elected to have a trial instead of accepting a plea arrangement. *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); and *Chambers v. Reno,* 307 F.3d 284 (4th Cir. 2002).

II. Question Two: The change in the definition of "conviction" violated Cintora's due process rights because he gave up his right to appeal the jury's verdict based upon the pre-IIRIRA definition of "conviction."

ARGUMENT

I. Introduction

Retroactive laws are disfavored because they are "generally unjust; and, as has been forcibly said,

neither accord with sound legislation nor with the fundamental principles of the social compact." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 533 (1998) (quoting 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891)). Therefore, "[r]etroactive statutes raise special concerns." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001).

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'

Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). For the above reasons, the Court applies a "presumption against retroactive legislation [which] is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265; *see also Fernandez-Vargas v. Gonzales,* 126 S.Ct. 2422, 2428 (2006); *INS v. St. Cyr*, 533 U.S. 289, 316 (2001); *Martin v. Hadix*, 527 U.S. 343, 352 (1999); *Hughes Aircraft Co. v. Shumer*, 520 U.S. 939, 946 (1997).

The Court applies a two-part analysis to determine whether a law is impermissibly retroactive. *Fernandez-Vargas*, 126 S.Ct. at 2428. First, the Court

should attempt to ascertain whether Congress clearly intended for the statute to apply retroactively. *Id.* If not, the second step is to determine whether the statute has an impermissible retroactive effect. *Id.* If Congress did not clearly manifest its intent for the law to apply retroactively, and the law does have an impermissible retroactive effect, the Court will apply the presumption against retroactive application of the law. *Id.*

The Court in *St. Cyr* has already determined that Congress did not clearly manifest an intention for its elimination of § 212(c) to apply retroactively. *St. Cyr,* 533 U.S. at 320. *St. Cyr* decided that the elimination of § 212(c) had an impermissible retroactive effect on aliens who entered into a plea agreement. Cintora contends that the repeal of § 212(c) also has an impermissible retroactive effect upon lawful permanent residents found guilty after a jury trial. Moreover, although Congress did intend for the definition of "conviction" to be applied retroactively, the application of the new definition to Cintora results in a manifest injustice and accordingly violates the Due Process Clause of the Fifth Amendment.

II. The elimination of § 212(c) has an impermissible retroactive effect on lawful permanent residents who were found guilty of an offense after a jury trial.

"The inquiry into whether a statute operates retroactively demands a commonsense, functional

judgment about whether the new provision attached new legal consequences to events completed before its enactment." *St. Cyr,* 533 U.S. at 321. "A statute has retroactive effect when it '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. . . .'" *Id.* In its analysis, the Court "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.*, citing *Martin,* 527 U.S. at 358 (quoting *Landgraf*, 511 U.S. at 270).

The repeal of INA § 212(c) has an impermissible retroactive effect on Cintora for at least the following reasons. One, it imposes a "new disability" upon Cintora insofar as it removed a defense for which he previously qualified. Two, the repeal of § 212(c) significantly upset Cintora's "settled expectations" determined in a *quid pro quo* arrangement he entered into with the State of Idaho in which he forsook his appellate rights in return for the assurance that he would not be deported. Finally, the lower courts insistence that Cintora show "actual reliance" upon the repealed provision is inappropriate because it (a) nullifies the presumption against applying laws retroactively and (b) actual reliance is not a relevant consideration to the determination of whether a law has an impermissible retroactive effect; rather this Court has favored a showing of objective reasonable reliance which affects a class of people.

A. The repeal of § 212(c) has an impermissible retroactive effect because it imposed a "new disability" on Cintora by removing a defense for which he previously qualified.

In *Hughes Aircraft*, this Court held that the elimination of certain defenses to *qui tam* suits under the False Claims Act (FCA) could not be applied retroactively. Schumer sued Hughes Aircraft in 1989 under the *qui tam* provision of the FCA alleging that Hughes Aircraft submitted false claims to the government between 1982 and 1984.

> Prior to 1986, such suits were barred if the information on which they were based was already in the Government's possession. At issue in [*Hughes Aircraft Co.* was] whether a 1986 amendment to the FCA partially removing that bar applie[d] retroactively to *qui tam* suits regarding allegedly false claims submitted prior to its enactment. . . .

Id. at 941. A 1986 amendment to the FCA effectively removed "prior disclosure" to the government of a false claim as a defense to a *qui tam* suit. This defense was available to Hughes Aircraft in 1982 through 1984, the time when the alleged false claims occurred. In ruling that the application of the 1986 amendment to the FCA would have an impermissible retroactive effect on Hughes Aircraft, the Court stated:

> [T]he 1986 amendment eliminates a defense to a *qui tam* suit . . . and therefore changes

> the substance of the existing cause of action for *qui tam* defendants by "attach[ing] a new disability, in respect to transactions or considerations already past."

Id. at 948.

Similarly, Congress's 1996 amendments to the INA "eliminate[] a defense to [removal] . . . and therefore change[] the substance of the existing cause of action for [aliens in a removal proceeding] by 'attaching a new disability, in respect to transactions or considerations already past.'" *Id.* Like the defendant in *Hughes Aircraft*, Cintora lost a defense previously available to him on account of retroactive legislation. *Hughes Aircraft* decided that such a retroactive removal of a defense to a litigant in a civil proceeding attaches a new disability to transactions already past and, therefore, has an impermissible retroactive effect. The Court should apply its holding in *Hughes Aircraft* to find that the elimination of § 212(c) does have a retroactive effect in Cintora's case.

B. The retroactive elimination of INA § 212(c) is impermissible because it upsets Cintora's settled expectations on settled law, which were determined in a *quid pro quo* agreement he entered into with the State of Idaho.

In reaching its conclusion that the repeal of § 212(c) had an impermissible retroactive effect on

aliens who entered into a plea agreement, *St. Cyr* focused upon the *quid quo pro* arrangement involved in a plea bargain.

> Plea agreements involve a *quid pro quo* between a criminal defendant and the government. In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous 'tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources.' There can be little doubt that alien defendants considering whether to enter a plea agreement are acutely aware of the immigration consequences of their convictions.

St. Cyr, 533 U.S. at 321-322. It was the *quid pro quo* arrangement – not the actual plea of guilty – which caused the repeal of § 212(c) to have an impermissible retroactive effect in *St. Cyr.* The repeal of § 212(c) likewise has an impermissible retroactive effect on Cintora, even though he was found guilty by a jury, because he also entered into a *quid pro quo* agreement in which it was determined – based on settled law – that he would not be deported if he forsook his right to appeal.

There is no substantive difference between the *quid pro quo* arrangement in *St. Cyr* and Cintora's. Where St. Cyr gave up his right for a trial, Cintora gave up his right to appeal the jury's verdict. The government in St. Cyr's case did not need to expend

its resources in a trial; in Cintora's case, the government did not need to expend resources in an appeal. Both St. Cyr and Cintora entered their respective *quid pro quo* arrangements in order to avoid deportation. As such, this Court's decision in *St. Cyr* is directly on point and makes certain that the repeal of § 212(c) has an impermissible retroactive effect on Cintora.

The fact that Cintora's *quid pro quo* arrangement was post-jury verdict instead of as part of a plea bargain is wholly irrelevant because Cintora, like St. Cyr, made a calculated decision – based upon settled law – to waive his appellate rights in order to avoid deportation. This is the precise type of calculation that St. Cyr engaged in, and, furthermore, is the precise type of *quid pro quo* arrangement which the Supreme Court ruled in *St. Cyr* would be protected from the retroactive application of the repeal of § 212(c). *See, e.g., Hem*, 458 F.3d at 1200, n. 5 ("There is no basis for distinguishing between a decision to give up a right to trial in favor of the possibility of immigration relief and a decision to forego the right to appeal in favor of such a possibility."). The Court should protect Cintora's reliance interest determined in his *quid pro quo* arrangement in the same way it protected St. Cyr's; it should rule that the elimination of § 212(c) does have an impermissible retroactive effect to lawful permanent residents found guilty of an offense by a jury trial prior to the 1996 amendments.

C. The lower courts' insistence that Cintora show "actual reliance" on § 212(c) before applying the presumption against retroactive application of laws nullifies the presumption and is not supported by this Court's precedent.

All of the lower courts' decisions in Cintora's case are premised upon the Fifth Circuit Court of Appeals' decisions in *Hernandez-Castillo v. Moore,* 436 F.3d 516 (5th Cir. 2006) and *Carranza de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007). In these cases, the Fifth Circuit determined that the repeal of INA § 212(c) only has an impermissible retroactive effect upon aliens found guilty after a trial when the alien can demonstrate that he or she "actually relied" upon the repealed provision. This rule not only increases the burden upon the trier of fact to determine whether an individual actually relied upon the repealed provision, it also (1) fails to apply the presumption against retroactive laws; (2) is wholly unsupported by this Court's precedent; and (3) misunderstands the Court's previous holdings which hold that objective reliance – never actual reliance – is a factor to consider when determining if a law has an impermissible retroactive effect.

1. By requiring an applicant to demonstrate "actual reliance" upon § 212(c), the lower courts fail to apply the presumption against retroactive laws.

Landgraf and its progeny make clear that the presumption against retroactive laws "informs every step of the *Landgraf* inquiry." *Hem*, 458 F.3d at 1196. By requiring the applicant to demonstrate "actual reliance" on the prior law, however, the lower courts are effectively presuming that the law *does* apply retroactively and are placing the burden of proof on the individual applicant to demonstrate that he or she did, in fact, "actually rely" on the prior law. *See, e.g.*, *Ponnapula v. Ashcroft*, 373 F.3d 480, 491 (3d Cir. 2004) ("This has the effect of treating *Landgraf* as establishing a presumption *in favor* of retroactive application. . . ."); *Hem*, 458 F.3d at 1196 (Stating that to require *actual reliance* on the pre-IIRIRA law "turns the presumption against retroactivity on its head by demanding that petitioners 'point[ ] to . . . conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial'") citing, *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2003)). To require aliens to demonstrate that they relied upon the pre-IIRIRA law places the burden of demonstrating the retroactive application of § 212(c) on the applicant, instead of presuming the law does not apply retroactively. "It is a strange 'presumption,' in our view, that arises only on so heightened a showing as actual reliance." *Ponnapula*, 373 F.3d at 491.

2. Whether an individual "actually relied" upon a repealed provision is not a relevant consideration to determining whether the law has an impermissible retroactive effect.

In finding that the elimination of defenses to *qui tam* suits attached a new disability to completed transactions, the Court in *Hughes Aircraft* did so "without even a single word or discussion as to whether Hughes Aircraft . . . had relied on the eliminated defense to its detriment." *Olatunji v. Ashcroft*, 387 F.3d 383, 391 (4th Cir. 2004). Like the 1986 amendment to the FCA repealed a defense to a *qui tam* suit, the IIRIRA of 1996 removed an important defense to deportation – § 212(c). There is absolutely no reason why aliens in a removal proceeding should have to show actual reliance upon the existence of § 212(c), while defendants in a *qui tam* suit do not have to show actual reliance upon the pre-1986 defenses to a *qui tam* suit. *Hughes Aircraft*, as such, makes certain that the Supreme Court does not require a showing of *actual reliance* upon the prior law in order to demonstrate an impermissible retroactive effect. In fact, no Supreme Court precedent supports the rule that an alien must show *actual reliance* on § 212(c) in order to demonstrate the repeal's retroactive effect. *See Atkinson v. Att'y Gen. of the U.S.*, 479 F.3d 222, 227-228 (3d Cir. 2007) ("[t]he Supreme Court has never held that reliance on the prior law is an element required to make the determination that a statute be applied retroactively."). Reliance, whether objective or subjective, is at most one of many factors to consider when

the Court is confronted with a claim that a statute has an impermissible retroactive effect; it is not the "*sine qua non* of the retroactive effects inquiry." *Atkinson*, 479 F.3d at 231.

3. "Objective reliance" – as opposed to "subjective reliance" – on the prior law is a relevant factor to the determination of whether the new legislation has an impermissible retroactive effect.

Following *Martin* and *St. Cyr*, the Tenth Circuit Court of Appeals rejected the rule demanding petitioners demonstrate "actual reliance" and instead requires a showing of "objective reliance." *Hem*, 458 F.3d at 1197. The court provided three reasons to hold that reasonable reliance, as opposed to "actual reliance," is sufficient to "sustain a retroactivity claim":

> First, this rule is more directly tied to the basic aim of retroactivity analysis: in determining whether it is appropriate to presume Congress concluded that the benefits of a new law did not warrant disturbance of interests existing under prior law, it makes sense to look at the objective group-based interests that Congress could practically have assessed ex ante. Second, this rule is consistent with the Supreme Court's analyses in *Landgraf* and its progeny, none of which required actual reliance. Third, and most immediately pertinent here, the objective approach is consistent with the actual holding in *St. Cyr* – the Court's most reliance-focused decision – which

> precluded retroactive application of IIRIRA's elimination of § 212(c) eligibility to all aliens who reasonably could have relied on prior law when pleading guilty, rather than to just those aliens who actually did so rely.

Id. at 1197; *see also Hernandez de Anderson*, 497 F.3d at 940 (finding *Hem*'s three reasons to be persuasive).

Under an "objective reliance" approach, the court must "identify the class of persons whose objective reliance interests prior to the repeal of § 212(c) should be analyzed." *Hem*, 458 F.3d at 1199. *Hem* identified the following class: "Aliens who gave up their right to appeal their aggravated felony conviction when a successful appeal could have deprived them of § 212(c) eligibility." *Id.* Individuals in this class chose not to appeal because the results of the appeal could have disrupted their eligibility for § 212(c). *Hem* concluded that the repeal of § 212(c) has an impermissible retroactive effect on this class of people. *Id.* at 1201.

Cintora, of course, is a member of the class identified in *Hem*. Cintora, like Hem, gave up his right to appeal. Had Cintora appealed, he not only would have been unable to accept an "Order Withholding Judgment," he could have been sentenced to a period of incarceration exceeding five years for his felony conviction, thereby losing his eligibility for § 212(c) relief. Cintora, like Hem, could have lost his eligibility for § 212(c) relief had he appealed. The elimination of § 212(c), therefore, to individuals like Cintora and Hem has an impermissible retroactive effect.

III. Applying the IIRIRA's definition of "conviction" to Cintora violates the Due Process Clause of the United States Constitution because it resulted in a manifest injustice.

Before the passage of the IIRIRA, the term "conviction" was judicially defined. When judgment was withheld in a criminal proceeding, the BIA developed a three-pronged test to determine whether the offense constituted a conviction: (1) a judge or jury has found the alien guilty, or the alien has entered a plea of guilty or nolo contendere or admitted sufficient facts to warrant a finding of guilty; (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed; and (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding his guilt or innocence of the original charge. *Matter of Ozkok*, 19 I. & N. Dec. 546, 551-52 (B.I.A. 1988), *superseded by statute*, 8 U.S.C. § 1101(a)(48)(A). Relying on this definition, Cintora forsook his right to appeal and accepted an "Order Withholding Judgment" under Idaho law with the assurance that it would not result in his deportation. In 1996, Congress passed the IIRIRA and changed the definition of conviction. The new definition specifically includes Cintora's "Order Withholding Judgment." Congress also clearly manifested its intent for this provision to apply retroactively. IIRIRA § 322(c) ("Effective Date – The amendments made by subsection (a) shall apply

to convictions and sentences before, on, or after the date of the enactment of this Act . . . ").

"Despite the dangers inherent in retroactive legislation, it is beyond dispute that, *within constitutional limits*, Congress has the power to enact laws with retrospective effect." *St. Cyr*, 533 U.S. at 316 (emphasis added). The retroactive application of the new law, however, "must meet the test of due process. . . ." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976); *cf. Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) (a lawful permanent resident is entitled to due process of law). A law which Congress intends to be applied retroactively violates due process of law if it causes a "manifest injustice." *See Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 716 (1974); *Jideonwo v. INS*, 224 F.3d 692, 697 (7th Cir. 2000).

A "[m]anifest injustice may occur where a new law changes existing rights or imposes unanticipated obligations on a party without providing appropriate notice." *Jideonwo*, 224 F.3d at 697. In *Jideonwo*, the Seventh Circuit determined that the petitioner had a cognizable due process claim when Congress retroactively removed a defense to removal previously available to him. *Id.* Jideonwo pled guilty to an offense in return for a sentence of less than five years in order to maintain his eligibility for relief under § 212(c) in a future deportation proceeding. When Congress repealed § 212(c), Jideonwo's expectations determined in the plea arrangement were dramatically upended,

causing a manifest injustice, which violated the Due Process Clause.

It is indisputable that the retroactive application of the definition of "conviction" changed Cintora's existing rights without notice. Like Jideonwo relied on the pre-IIRIRA law to structure his plea arrangement, Cintora relied upon the pre-1996 definition of "conviction" to structure his sentencing. Cintora forsook his right to appeal the jury's guilty verdict in reliance upon the pre-IIRIRA definition of "conviction." Giving up appellate rights is always significant, but it was particularly so in Cintora's case because he had a "significant appealable issue" alleging "selective prosecution" by the State of Idaho. App. at 16. The sole reason he forsook his right to appeal was because he was assured that an "Order Withholding Judgment" would not result in his deportation. If the pre-1996 law were otherwise, and he knew that he would be deported for this offense, he certainly would have appealed and attempted to exonerate himself. The changing of the definition of "conviction" to make Cintora subject to removal after he gave up his right to appeal in reliance on the old definition is "manifestly unjust."

The treatment of Cintora invokes the Supreme Court's concerns with retroactive application of laws:

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use

> retroactive legislation as a means of retribution against unpopular groups or individuals."

Landgraf, 511 U.S. at 266. In this instance, Congress used its "unmatched power" to legislate retroactive laws affecting an immigrant found guilty of a sex offense – it targeted an unpopular group. This case represents an instance where Congress clearly has acted outside the limits of the Constitution and, in so doing, has violated Cintora's right to due process.

CONCLUSION

The retroactive definition of "conviction" as applied to Cintora violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution. The Court should accordingly vacate the lower courts decisions. Alternatively, the repeal of § 212(c) does have an impermissible retroactive effect on Cintora. The Court should vacate the lower courts' decisions and remand Cintora's case for a new hearing to be held to consider his application for relief under § 212(c).

Respectfully submitted,

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