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98-4246

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DEBORIS CALCANO-MARTINEZ, SERGIO MADRID, and FAZILA KHAN,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF OF AMICI CURIAE
THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK
THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
THE NEW YORK STATE DEFENDERS ASSOCIATION

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PRELIMINARY STATEMENT

Amici criminal defense organizations submit this brief to demonstrate the clear "retroactive effect" of the government's application of new laws eliminating deportation relief to lawful permanent resident immigrants convicted of past deportable offenses. Under prior law, lawful permanent residents such as the petitioners faced possible, but not certain, deportation based on their past conduct. This is because they had a statutory right to apply for relief from deportation. Indeed, this relief was granted in the majority of cases. However, if the new laws at issue here are applied to them, their statutory right to seek this relief is taken away and deportation becomes certain. There can be no question that this constitutes a change in the legal consequences of their prior conduct that amounts to genuine retroactive effect, and thus implicates the presumption against retroactive application of a new statute.

The government's application of the new laws at issue here to lawful permanent residents such as petitioners has "retroactive effect" regardless of whether actual reliance on the prior law may be shown. Amici criminal defense organizations submit this brief, however, to demonstrate that lawful permanent residents in fact relied on the prior law. In particular, this brief will show that lawful permanent residents in criminal proceedings pled guilty to

deportable offenses based on advice regarding their statutory right to seek relief from deportation if later placed in deportation proceedings. This reliance on the right to seek deportation relief under prior law vividly illustrates the retroactive effect of the government's taking away of that right.

All parties have consented to the filing of this amicus curiae brief. (See attached letters of consent).

STATEMENT OF INTEREST

Amici organizations -- the Legal Aid Society of the City of New York, the New York State Association of Criminal Defense Lawyers, and the New York State Defenders Association -- are criminal defense organizations with years of experience representing or providing counsel to lawful permanent resident immigrants in criminal proceedings in New York State, the state with the second largest number of lawful permanent residents in the country.

The Legal Aid Society of the City of New York is a private, non-profit legal services agency which represents poor New York City residents who cannot afford to hire a lawyer. The Criminal Defense Division (CDD) is the largest division of The Society, employing more than 400 attorneys.[1]

[1] The Society also has a Criminal Appeals Bureau, which represents convicted criminal defendants who are appealing their state court convictions; a Capital Defender Unit, which represents state court defendants who are charged with capital murders; a Federal Defender Division, which provides trial and appellate representation to indigent defendants in

Since 1965, the Division has been the primary public defender for indigent persons who are prosecuted for crimes in state courts in New York City. In fiscal year 1999, the Division represented more than 180,000 clients in New York, Kings, Queens, and Bronx counties. Because of the diversity of the New York City population, a large percentage of the Division's clients are not United States citizens.

The **New York State Association of Criminal Defense Lawyers** (NYSACDL) is a non-profit membership organization of more than 1,100 attorneys who practice criminal defense law in the State of New York. Its purpose is to assist, educate and provide support to the criminal defense bar to enable them to better serve the interest of their clients and to enhance their professional standing. NYSACDL has sponsored training sessions for its members on the immigration consequences of criminal convictions.

The **New York State Defenders Association** (NYSDA) is a not-for-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and other persons throughout the State of New York. Its objectives are to improve the quality of public defense services in New York State, establish standards for practice in the representation of poor people, and engage in a

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federal criminal prosecutions; a Juvenile Rights Division, which represents children in Family Court proceedings; and the Civil and Volunteer divisions, which represent poor people in civil proceedings.

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

All three amici organizations are concerned that the government's position in these cases undermines the factual and legal basis for plea agreements that we negotiated for many of our lawful permanent resident immigrant clients in past criminal proceedings. For years, we counseled lawful permanent resident defendants in criminal proceedings regarding the availability of relief from deportation in later immigration proceedings. Based on this information, many lawful permanent residents agreed to forego trial and plead guilty to criminal offenses of which they were accused -- even in many cases in which they continued to profess their innocence to us. Many of these immigrants could expect a likelihood of obtaining relief based on their length of residence in the United States, other equities such as family ties, and a determination to do what was needed after their conviction to show that they were either

completely rehabilitated or well on the way to complete rehabilitation. If the right to apply for deportation relief is taken away from these individuals in spite of what the law stated at the time, not only will our counsel regarding the immigration implications of their convictions be rendered incorrect, but the factual and legal basis for the plea agreements on which all parties to the criminal proceedings relied will be undermined. Amici respectfully urge this Court to consider carefully the impact its decision will have not only on the petitioners here, but on other individuals who agreed to criminal dispositions that neither the accused, nor the prosecution or the court, expected would result in mandatory removal.

Amici file this brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

ISSUE ADDRESSED

The limited issue addressed by this brief is whether the government's application of new laws eliminating deportation relief to lawful permanent residents convicted of prior criminal conduct has impermissible retroactive effect.

SUMMARY OF ARGUMENT

A new law has "retroactive effect" if its application to past conduct or transactions would result in taking away a right a party possessed under prior law. Whenever a new law that has such an effect does not include a clear and

unambiguous statement of retroactive intent, it is presumed that the new law does not govern past conduct or transactions.

The government's application of the two new laws at issue here – Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) – takes away a significant right that petitioners had under prior law. Under the law in place at the time of the conduct that made the petitioners deportable, lawful permanent residents had a statutory right to apply for a waiver of deportation under Section 212(c) of the Immigration and Nationality Act (INA). In fact, lawful permanent residents in the past often relied on the possibility of such relief from deportation when pleading guilty to a deportable offense. In any event, demonstrable reliance on prior law is not necessary to show impermissible retroactive effect of a new law. The government's elimination of the petititoners' right to apply for 212(c) relief changes the legal consequences of the past conduct and is therefore presumptively impermissible.

ARGUMENT

THE GOVERNMENT'S APPLICATION OF IIRIRA AND AEDPA TO TAKE AWAY FROM LAWFUL PERMANENT RESIDENT PETITIONERS THE RIGHT TO SEEK 212(C) RELIEF HAS IMPERMISSIBLE RETROACTIVE EFFECT

A. STATUTORY AND CASE LAW BACKGROUND

1. Right to seek 212(c) relief under old law

Lawful permanent residents convicted of a crime making them deportable have long had a right to seek a waiver of exclusion or deportation under INA Section 212(c) so long as they had seven years of lawful domicile in the United States at the time of their deportation hearing. See INA 212(c), 8 U.S.C. 1182(c) (added by Immigration and Nationality Act of 1952); see also Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (holding that 212(c) relief is available in deportation as well as exclusion proceedings); Matter of Silva, 16 I&N Dec. 26 (BIA 1976) (adopting and applying Francis holding nationwide). Prior to AEDPA and IIRIRA, a long-time lawful permanent resident accused of any crime triggering deportability could thus be reasonably assured that, even if he or she pled guilty or was otherwise convicted in the criminal proceedings, he or she would be able to seek a waiver of deportation in subsequent deportation proceedings. Even if the permanent resident did not have a lawful domicile of seven years in the United States at the time of the criminal proceedings, the person could be assured of being able to seek the waiver if he or she was likely to have the seven years by the time of the deportation proceedings. See generally Matter of Lok, 18 I&N Dec. 101 (BIA 1981), aff'd on other grounds, Lok v. INS, 681 F.2d 107 (2d Cir. 1982). The only criminal bar to 212(c) relief prior to AEDPA and IIRIRA applied to a permanent resident

whose crime(s) fell within the INA definition of an "aggravated felony" and who had served five years or more in prison for the crime(s). See INA 212(c), 8 U.S.C. 1182(c) (as in effect before April 24, 1996). This prior bar does not apply to the petitioners here.

2. Government retrospective denial of right to seek 212(c) relief

In these and other cases, the government is applying the new laws at issue here - IIRIRA Section 304(b) and/or AEDPA Section 440(d) – retrospectively to deny the statutory right to seek 212(c) relief even from lawful permanent residents convicted of deportable offenses occurring prior to the effective dates of these new laws.

AEDPA Section 440(d), which came first, barred 212(c) relief for individuals who are convicted of certain specified criminal offenses, regardless of the sentence imposed or served. Pub. L. No. 104-132, 110 Stat. 1214 (1996). AEDPA contained no language of retroactive applicability relating to Section 440(d).

Subsequently, IIRIRA Section 304(b) repealed INA Section 212(c). Pub. L. No. 104-128, Division C, 110 Stat. 3009 (1996). IIRIRA provided that this repeal provision would be effective on April 1, 1997, see IIRIRA 309(a), and likewise contained no language of retroactive applicability to conduct or events prior to that effective date.

3. Decisional framework for retroactivity analysis

The Supreme Court's 1994 decision in Landgraf v. USI Film Products, 511 U.S. 244 (1994), established a two-step process for deciding whether new statutes such as AEDPA and IIRIRA may be applied retroactively to past events. "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." Landgraf, 511 U.S. at 280. In order to establish retroactive intent, the statute must include language that is so "clear and positive as to leave no room to doubt that such was the intention of the legislature.'" Id. at 271-72 (quoting Chew Heong v. United States, 112 U.S. 536 (1884), a case involving the nation's immigration laws). Such a clear statement is not required, however, to show prospective intent: "[T]he presumption against retroactivity was reaffirmed [in Landgraf] in the traditional rule requiring *retroactive* application to be supported by a clear statement. Landgraf thus referred to 'express command[s],' 'unambiguous directive[s],' and the like where it sought to reaffirm that clear-statement rule, but only there." Lindh v. Murphy, 521 U.S. 320, 325 (1997) (emphasis added).

If this Court is unable to discern Congressional intent under these case law guidelines, the Court then must resort to the judicial default rules of the second step of the process outlined in Landgraf. 511 U.S. at 280. Under these default rules, the Court must determine "whether the

application of the new statute to the conduct at issue would result in a retroactive effect." Martin v. Hadix, 119 S.Ct. 1998, 2003 (1999). If it does, the Court must apply the traditional presumption against applying statutes to conduct arising before their enactment. Id.; see also Hughes Aircraft Company v. United States ex rel. Schumer, 520 U.S. 939, 946 (1997).

The inquiry into whether a new statute would have retroactive effect if applied to past conduct requires a "common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" Martin v. Hadix, 119 S.Ct. at 2006 (quoting Landgraf, 511 U.S. at 269). The determination should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." Landgraf, 511 U.S. at 269. One, but not the only, way a new statute will be found to have retroactive effect is 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...." Id. (quoting Justice Story in Society for Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, No. 13,156 (C.C.D.N.H. 1814)).[2]

[2] The Supreme Court has clarified that falling within the Justice Story formulation cited in Landgraf is merely one way that a statute would be found to have retroactive effect; as Landgraf had already indicated, there are many

B. LAWFUL PERMANENT RESIDENTS RELIED ON THE POSSIBILITY OF 212(C) RELIEF WHEN PLEADING GUILTY TO DEPORTABLE OFFENSES IN THE PAST

Petitioners here show that Congressional intent may be discerned to apply the new laws at issue here only with respect to conduct occurring after the effective dates of these laws. However, if the Court disagrees and reaches the second step of the Landgraf analysis -- whether there is genuine retroactive effect when the government applies these new laws to lawful permanent resident immigrants in removal proceedings based on prior criminal conduct -- this Court must make its "common sense, functional judgment" about whether eliminating 212(c) relief for prior criminal conduct attaches new legal consequences to that conduct. To assist the Court, amici in this section of this brief offer information regarding the experience of defense lawyers and their lawful permanent resident clients in the criminal

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ways a new statute could be found to have a retroactive effect invoking the presumption against retroactivity. Hughes, 520 U.S. at 947. Among the wide range of statutory provisions specified by Landgraf as ones where "a new legal consequence" may be found, are those that: (1) "affect[] substantive rights," Landgraf, 511 U.S. at 278, or (2) "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," id. at 280, or (3) "sweep away settled expectations suddenly and without individualized consideration," id. at 266, or (4) "'change[] the legal consequences of acts completed before [the new law's] effective date,'" id. at 269 n.23, or (5) "give[] 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed,'" id., or (6) "impos[e] new burdens on persons after the fact," id. at 270, or (7) may be "retributive," id. at 282.

justice system. We submit that this information vividly illustrates how lawful permanent residents reasonably relied on, or had settled expectations concerning, their eligibility for relief from deportation under prior law.

Amici include the largest provider of defense services to indigent defendants in the state (Legal Aid Society of the City of New York), as well as the two largest statewide associations of criminal defense lawyers (New York State Defenders Association and New York State Association of Criminal Defense Lawyers). The staff and members of our organizations represent or counsel thousands of lawful permanent residents accused of deportable criminal offenses every year.

The experience of defense lawyers is that lawful permanent residents (green card holders) charged with criminal offenses are extremely concerned about the immigration implications of their criminal cases. As a group, they tend to be more concerned about the immigration implications than any other category of noncitizen criminal defendants. This makes sense, given the greater ties permanent resident immigrants generally have to the United States. Many lawful permanent residents immigrated to this country at a young age, now work or study here, and have all their family here. Many have not been in the country in which they were born since early childhood, and some do not even know the language of that country. As a result, lawful

permanent residents are often as, if not more, worried about whether the disposition of their criminal case will lead to deportation as they are concerned about the penal sentence they will receive if convicted. Deportation, after all, is the “equivalent of banishment or exile." Costello v. INS, 376 U.S. 120, 131 (1964). It is “a sanction which in severity surpasses all but the most Draconian criminal penalties." Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977). Indeed, deportation may deprive a noncitizen of “all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

In recognition of the severity of the penalty of deportation as a consequence of a criminal case, defense lawyers have an ethical duty to advise noncitizen defendant clients about the immigration implications of a conviction. Thus, the American Bar Association's Standards provide that, where it is apparent that a defendant faces deportation as a result of conviction, counsel "should fully advise the defendant of these consequences." ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2, commentary at p. 75 (2 ed. 1982). The National Legal Aid and Defender Association likewise recognizes that it is defense counsel's duty to "be fully aware of, and make sure that the client is fully aware of...consequences of conviction such as deportation." NLADA Performance Guidelines for Criminal Defense Representation, Guideline

6.2(a)(3) and commentary (1994). A standard treatise for criminal defense lawyers advises:

> Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence. Thus, the immigration consequences of a prosecution may totally alter the strategies chosen ... a[ny] attorney who suspects that his client is an alien has a duty to inquire and to protect his client's immigration status. Pleas and admissions must be approached with caution and with knowledge of the consequences...

3 Bender's Criminal Defense Techniques (1999) § 60A.01 and § 60A.02[2].

Consistent with the ethical duty of defense lawyers to investigate and advise noncitizen defendants regarding immigration consequences of a conviction, and in response to the concerns of lawful permanent resident immigrant and other noncitizen clients, amici organizations have provided extensive immigration instructions, resource materials, and training over the years to defense lawyers throughout New York State. For example, Legal Aid Society Criminal Defense Division (CDD) attorneys have always received training about the immigration consequences of criminal convictions, and are required not only by ethical guidelines but also by explicit CDD policy to advise all non-citizen clients of the potential immigration consequences that could result from a conviction.[3] This training has been provided both through

[3] This training also familiarizes CDD lawyers with other potential adverse consequences of arrest and conviction for various crimes, including property forfeiture, temporary suspension of drivers' licenses, restrictions on eligibility

periodic distribution of written materials to staff (see attached copies of some immigration-related materials distributed to CDD staff) and through continuing legal education programs. All newly-hired CDD attorneys receive training on the immigration consequences of convictions as part of their initial training. The primary focus of the training is to familiarize attorneys with the concept of aggravated felonies, the potential for relief from deportation, and the necessity of avoiding a criminal disposition that renders a client ineligible for relief. The training specifically covered the availability of 212(c) relief because, as one court put it, "[i]n the years immediately preceding the passage of AEDPA, . . . any competent advice an alien defendant received about the immigration consequences of a guilty pleas would have included a discussion of the possibility of § 212(c) relief and what is required to be eligible to apply." Wallace v. Reno, 24 F.Supp.2d 104, 111 (D.Mass. 1998), aff'd, 1999 WL 959538 (1st Cir.).

Since 1987, this training has been supplemented by the presence within CDD of attorneys with special expertise in immigration law as well as criminal law. These immigration resource attorneys consult with CDD staff attorneys on individual cases involving non-citizen clients. Whenever a

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for certain state employment-related licenses and weapons permits, and restrictions on eligibility for public housing

plea bargain appeared to be in the best interest of a non-citizen client, the resource attorney counseled the staff attorney regarding which crime the client should plead to in order to remain eligible to apply for a waiver of deportation. In such cases, the client was always advised that the conviction was likely to lead to deportation proceedings, but that he or she would have the opportunity to apply for a waiver. Indeed, in many cases, even the prosecutor and judge were involved in the discussion of immigration consequences, and assured CDD clients that they would be eligible to apply for a waiver of deportation. This was particularly common when the client had succeeded in a treatment program, or it was apparent that the criminal conduct was an aberration in an otherwise law-abiding life.

The New York State Defenders Association and the Association of Criminal Defense Lawyers have also offered numerous training sessions and materials to state defense lawyers on the immigration consequences of criminal convictions, including discussion of eligibility for relief from deportation such as the 212(c) waiver. Many member defense lawyers also consult with in-house or outside immigration law experts.

Defense lawyers in New York State and nationwide additionally refer to numerous immigration law practice aids designed to assist the defense lawyer in figuring out and

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and, in some states, for public assistance benefits.

communicating to noncitizen clients the immigration implications of a criminal conviction. For many years prior to 1996, these practice aids provided information regarding the availability of 212(c) relief for lawful permanent residents convicted of deportable offenses. Examples of such publications are:

- Maryellen Fullerton and Noah Kinigstein, Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys, 23 American Criminal Law Review 425 (1986)(instructing defense attorneys that the "only crime for which this [212(c)] waiver is unavailable is a conviction for possession of a shotgun or automatic weapon");

- Ira J. Kurzban, The Immigration Act of 1990, The Champion (April 1991)(instructing defense attorney members of the National Association of Criminal Defense Lawyers that "[i]n entering a plea, a criminal defense attorney should be aware of this serious consequence [ineligibility for 212(c) relief under the Immigration Act of 1990] and take steps, where possible, to avoid it");

- Tarik H. Sultan, Immigration Consequences of Criminal Convictions, 30-JUN Ariz. Att'y 15 (1994) (instructing defense attorneys that a 212(c) waiver "is probably the most common form of relief available, and also certainly the easiest to obtain . . ..");

- Katherine A. Brady, with Norton Tooby, Michael K. Mehr, Derek W. Li, and Ed Swanson, California Criminal Law and Immigration (1995), § 11.10 (instructing defense attorneys that "[a] permanent resident can apply for this [212(c)] relief even if she has been convicted of serious offenses such as narcotics violations, certain aggravated felonies or crimes involving moral turpitude"); and

- Dan Kesselbrenner and Lory D. Rosenberg, Immigration Law and Crimes (1995 ed., first published in 1984), § 11.4 (instructing defense attorneys that the 212(c) waiver "is extremely beneficial, and may be the last resort as an ameliorative mechanism in the criminal

context, particularly for drug offenses that trigger immigration consequences").

Based on the immigration law information available from the above-described immigration law training, consultations with immigration experts, and immigration law resource materials, defense lawyers advised lawful permanent resident defendant clients that, even if they pled guilty to a deportable offense, they might still be able to avoid deportation. We explained that they would have a deportation hearing where they would have an opportunity to ask for a waiver of deportation and to present evidence to persuade an immigration judge to grant the waiver. Obviously, a defense lawyer was in no position to assure a permanent resident client that a waiver would be granted. But we could -- and did -- assure them that they had a right to apply. And we could -- and did -- tell them that obtaining a waiver was a realistic possibility if they could show the existence of favorable factors such as long residence in the United States, close family ties, military or other service to the community, or a history of employment in the United States. See Matter of Marin, 16 I & N Dec. 581, 585 (BIA 1978). In fact, between 1989 and 1994, over fifty percent of all Section 212(c) applications were granted. See Mojica v. Reno, 970 F.Supp. 130, 178 (E.D.N.Y. 1997).

Relying on this real possibility of avoiding deportation under prior law, many lawful permanent resident immigrant defendants pled guilty to deportable offenses. To describe one common scenario, we often represent defendants who are facing criminal charges for the first time or who, if they have faced charges before, have never been sent to prison. Many such clients have been charged with drug offenses for which imprisonment is a possible, though not a required, sentence. Defendants in such cases -- particularly where they have families or jobs to worry about -- have particularly strong incentives to avoid prison time. Defense lawyers typically negotiate particularly strenuously to avoid incarceration in such cases, because of the devastating effects imprisonment can have on an offender's family, his dependents, his current employment, and his future job prospects. At the same time, if the defendant is a noncitizen, the individual also faces and must consider the possibility of deportation and permanent separation from their families, jobs, and communities. In the past, if we knew the noncitizen defendant to be a green card holder, we advised the defendant that they would be able to ask an immigration judge for a waiver of deportation based on the very same factors – family, job, residence, etc. – that made it likely that we could negotiate a favorable plea and sentence agreement. Reasonably relying on this possibility, many such lawful permanent resident defendants

with strong ties to this country, but also with strong reasons to want to avoid incarceration, pled guilty even though the resulting conviction subjected them to possible deportation.[4]

Before agreeing to plead guilty to deportable offenses, lawful permanent resident defendants often specifically asked us what chance they would have of receiving the 212(c) waiver and then weighed the *likelihood* of deportation just as they weighed other matters in a plea, such as the likely sentence, the availability of parole, and the overall disruption that the plea would cause to their lives, and those of their families. Frequently, Legal Aid Society CDD attorneys consulted with the CDD immigration resource attorney and the CDD assigned social worker to develop rehabilitation plans that were designed to address not only the concerns of the judge presiding over the criminal case, but the likely concerns of an immigration judge who in the future would eventually hear their applications for 212(c) relief.

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[4] Under New York's stringent "Rockefeller drug laws," conviction after trail even of minor involvement with the sale of a fairly small quantity of narcotics will result in a 15 year to life mandatory prison sentence; the incentive to enter a negotiated plea to a lesser offense rather than risk the harsh incarceration consequences of a trial conviction is especially strong, even for a defendant who may be innocent. See People v. Thompson, 83 N.Y.2d 477 (1994)(discussing statutory scheme): People v. Jones, 39 N.Y.2d 694, 698 (1976)(Breitel, J. dissenting)(comparing defendant's sentence after trial with sentences of similarly situated co-defendants who pled). The availability of a waiver under INA Section 212(c) played a critical part in these decisions for lawful permanent resident defendants.

Indeed, Society CDD and Civil Division immigration attorneys often undertook representation of former CDD clients seeking 212(c) relief in subsequent deportation proceedings. Sadly, those lawful permanent residents who tended to rely the most on the possibility of a waiver of deportation were those with the strongest equities, e.g., individuals who had lived virtually their whole lives in the United States, had all their family here, or served in the military during the Vietnam War or other armed conflict.

If deportation had been a certainty, rather than a calculable risk as it was before AEDPA and IIRIRA were enacted, our lawful permanent resident clients would have been much less likely to plead guilty as they did. Instead they might have chosen to hold out and try to negotiate a plea or sentence agreement that might avoid deportability altogether. Or, if unable to do that, and knowing that pleading guilty to what was offered would necessarily result in deportation - and with it, inevitable disruption in their employment and family lives – they might have chosen to go to trial.

Apparently without the benefit of any information regarding the experience of lawful permanent resident immigrants in the criminal justice system, some courts have suggested -- without identifying any factual basis -- that the possibility of a waiver of deportation was never relevant to actions taken by noncitizens in the criminal

process. See, e.g., LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998). We respectfully disagree. Our experience teaches us that noncitizens, particularly lawful permanent resident immigrants, who plead guilty to criminal offenses were and are deeply concerned about the possibility of deportation. But given the real possibility of avoiding deportation offered by the right to apply for 212(c) relief, a lawful permanent resident defendant could reasonably decide to plead guilty when he or she otherwise might not have if he or she knew that deportation would be a certain, as opposed to a possible, result. See Dunbar v. INS, 1999 WL 692391, *8 (D.Conn.)("potential deportees would have had settled expectations and reasonably relied on their eligibility for INA § 212(c) relief at the time of their guilty pleas or convictions"); Yesil v. Reno, 973 F. Supp. 372, 382 (S.D.N.Y. 1997)("The availability of relief from deportation -- even the possibility thereof -- is a critical factor to an alien who is considering whether to enter into a guilty plea"); Mojica, 970 F. Supp. at 175 ("For a noncitizen, the choice to forego trial and plead guilty is often critically dependent on information regarding possible immigration consequences"); United States v. Del Rosario, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring), cert. denied, 498 U.S. 942 (1990)("The possibility of being deported can be -- and frequently is -- the most important factor in a criminal defendant's decision how to plead").

In short, there is no question that lawful permanent resident immigrants agreed in the past to plead guilty to deportable offenses fully expecting or relying on knowledge that there would be some consideration of the equities in their cases before any government decision to carry out a deportation. As the next section of this brief points out, such reliance is not necessary to show the retroactive effect of the government's application to petitioners of the changes in law at issue here. Nevertheless, this reliance on prior law confirms and illustrates the retroactive effect of the government's application of these new laws. Especially given that our criminal justice system relies on the willingness of individuals to plead guilty without insisting on a trial,[5] this Court should apply the presumption against retroactivity to prevent the government from unfairly and unnecessarily shattering the expectations of lawful permanent residents who agreed to plea dispositions of their criminal cases. As the Supreme Court has stated in a relevant discussion of constitutional limits on governmental power to make changes in the law, "in both the civil and the criminal contexts, the Constitution places limits on the sovereign's ability to use its law-making power

[5] In fact, more than 90 percent of criminal charges in both New York State and the federal system are disposed of by guilty plea. See New York State Division of Criminal Justice Services, Crime and Justice Annual Report (1992); U.S. Department of Justice, Bureau of Justice Statistics, Noncitizens in the Federal Criminal Justice System, 1984-94

to modify bargains it has made with its subjects. The basic principle is one that protects not just the rich and the powerful, but also *the indigent defendant engaged in negotiations that may lead to an acknowledgement of guilt and a suitable punishment*." Lynce v. Mathis, 519 U.S. 433, 441 (1997)(emphasis added).

C. IN ANY EVENT, ACTUAL RELIANCE ON PRIOR LAW IS NOT NECESSARY TO SHOW IMPERMISSIBLE RETROACTIVE EFFECT OF A NEW LAW

The prior section of this brief describes how defense lawyers advised lawful permanent residents clients in criminal proceedings about the availability of relief from deportation and how such clients reasonably relied on this information when they pled guilty to deportable offenses. In addition, lawful permanent residents often came to the criminal proceedings knowing of permanent resident family members, friends, or neighbors who had been in deportation proceedings but were not deported. Based on the experience of these other members of their communities, they knew even before they spoke to a lawyer that permanent residents had an opportunity to be heard on factors, such as the existence of a spouse and children in the United States, that might warrant a decision not to deport. Thus, permanent residents had a general awareness that their criminal conduct would not automatically result in deportation. See Pottinger v. Reno, 51 F.Supp.2d 349, 363 (E.D.N.Y. 1998)(“A lawful

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(Aug. 1996).

permanent resident is, in any event part of a community and it is not unreasonable to attribute to him or her a basic sense of what happens to other members of the resident alien community who engage in criminal conduct").

Such "settled expectations" and "reasonable reliance" on prior law inform and guide the determination of whether a new law has retroactive effect; however, the law is clear that persons need not be able to show actual reliance for application of the new laws to have genuine retroactive effect. It would be contrary to our system of justice, not to mention largely unfeasible and tremendously burdensome, for persons to have to show actual individual reliance on prior law before they can avoid application of a new law to them. Rather, in our system of justice, it is assumed that you act in conformity with the law at the time of your act. Thus, in Landgraf and other cases where the Supreme Court has analyzed whether a new statute has retroactive effect in order to decide whether the presumption against retroactivity applied, the essential question for the Court is not whether the person expressly relied on a given understanding of the law, but rather merely whether applying the new law to past events changes the consequences of the relevant conduct. See Hughes, 520 U.S. 939 (finding retroactive effect when private party lost a defense against private suits for submitting a false claim to the government that it never had against government suits, even though

there was no showing that the party relied on the government failing to pursue a suit); Landgraf, 521 U.S. 244 (finding retroactive effect of new punitive and compensatory damages and jury trial provisions of the Civil Rights Act of 1991 in a suit for sexually harassing conduct that pre-dated the amendments even though there was no evidence of express reliance).

What the Supreme Court's decisions recognize is that people have a right to know the possible consequences of their actions at the time of their conduct whether or not they will later be able to demonstrate actual reliance on that knowledge. As the Landgraf Court explained, "even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." 511 U.S. at 283, n.35. Indeed, the Supreme Court's decisions applying the Ex Post Facto clause clearly recognize that new laws have impermissible retroactive effect when they change the legal consequences of past conduct, regardless of whether actual reliance on prior law may be demonstrated.[6] They specifically recognize the impermissible

[6] Although the Ex Post Facto clause's prohibitions are limited to punitive legislation, the Court relies on this case law in decisions relating to civil legislation to answer the preliminary question of what it means for a law to be retroactive. See, e.g., Hughes, [1997 WL at *5](citing Collins v. Youngblood, 497 U.S. 37 (1990) and Beazell v. Ohio, 269 U.S. 167 (1925); Landgraf, [114 S.Ct at 1497 at n. 23 (citing Miller v. Florida, 482 U.S. 423 (1987).

retroactive effect of a change from a discretionary penalty system to a system of mandatory penalties. See, e.g., Lindsay v. Washington, 301 U.S. 397 (1937)(Court held that a statute changing a maximum sentence to a mandatory sentence for offense committed prior to the statute's enactment is an impermissible ex post facto law); Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 663 (1974)(Court indicated that a statute taking away parole eligibility for offenses subject to parole according to the law at the time they were committed was impermissible as an ex post facto law). These decisions do not require the individual making such a challenge to show reliance on, or even knowledge of, the law at the time of the relevant criminal conduct. Certainly, the same should hold true for the immigrant to whom the government is seeking to apply a change in immigration law from a system of possible deportation to one of mandatory deportation.

In sum, under the law that existed prior to AEDPA and IIRIRA, lawful permanent residents such as the petitioners faced possible, but not certain, deportation based on their past criminal conduct and convictions because they had eligibility to seek 212(c) relief. However, if IIRIRA Section 304(b) and AEDPA Section 440(d) are applied to them, their statutory right to seek 212(c) relief is taken away and deportation becomes certain. Clearly, this alone constitutes a change in the legal consequences of their

prior conduct and thus calls for application of the presumption against retroactivity.

CONCLUSION

For the foregoing reasons, amici respectfully urge that the Court hold that the government's application of IIRIRA Section 304(b) and AEDPA Section 440(d) to petitioners has genuine retroactive effect and is therefore impermissible under the traditional presumption against retroactivity of a new statute.

Respectfully submitted,

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