99-2684/2710/ 2739/2711/2732

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JUNIOR EARL POTTINGER, HIGINIO AZCONA, JIUN YI YU,
Petitioners-Appellees,

EDDY MARIA,
Petitioner-Appellee - Cross-Appellant

v.

JANET RENO, U.S. Attorney General; DORIS MEISSNER, Commissioner, Immigration and Naturalization Service; JOHN B. Z. CAPLINGER, New Orleans District Director, Immigration and Naturalization Service, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPT. OF JUSTICE,
Respondents-Appellants,

EDWARD MCELROY, as DISTRICT DIRECTOR, New York District, IMMIGRATION AND NATURALIZATION SERVICE,
Respondents-Appellants - Cross-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

Brief Of *Amici Curiae*

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NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
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In Support Of Petitioners-Appellees And
Affirmance Of The District Court Decisions Below

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF INTEREST 2

ISSUE ADDRESSED 6

SUMMARY OF ARGUMENT 6

ARGUMENT 7

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

A. STATUTORY AND CASE LAW BACKGROUND 7

1. Right to seek 212(c) relief under old law 7

2. Government retrospective denial of right to seek 212(c) relief 8

3. Decisional framework for retroactivity analysis . . 9

B. LAWFUL PERMANENT RESIDENTS RELIED ON THE POSSIBILITY OF 212(C) RELIEF WHEN PLEADING GUILTY TO DEPORTABLE OFFENSES IN THE PAST 11

C. IN ANY EVENT, ACTUAL RELIANCE ON PRIOR LAW IS NOT NECESSARY TO SHOW IMPERMISSIBLE RETROACTIVE EFFECT OF A NEW LAW 22

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

DeOsorio v. INS, 10 F.3d 1034 (4th Cir. 1993) 26

Dunbar v. INS, 64 F.Supp.2d 47 (D.Conn. 1999) 26

Francis v. INS, 532 F.2d 268 (2d Cir. 1976) 7

Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998),
cert. denied, 119 S.Ct. 1140 (1999) 17,26

Henderson v. INS, 157 F.3d 106 (2d Cir. 1998),
cert.denied, 119 S.Ct. 1140 (1999) 26

Hughes Aircraft Company v. United States ex rel. Schumer,
520 U.S. 939 (1997) 10,11,23,24,26

LaGuerre v. Reno, 164 F.3d 1035 (7th Cir. 1998) 20

Landgraf v. USI Film Products, 511 U.S. 244 (1994) . . . . passim

Lindh v. Murphy, 521 U.S. 320 (1997) 9

Lindsay v. Washington, 301 U.S. 397 (1937) 24

Martin v. Hadix, 119 S.Ct. 1998 (1999) 10,23

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) 8

Matter of Marin, 16 I & N Dec. 581 (BIA 1978) 17

Matter of Silva, 16 I&N Dec. 26 (BIA 1976) 7

Mayers v. INS, 175 F.3d 1289 (11th Cir. 1999) 26

Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997) 17

Pena-Rosario v. Reno, 2000 WL 150710 (E.D.N.Y.) 25

Pottinger v. Reno, 51 F.Supp.2d 349 (E.D.N.Y. 1998) 18

Tasios v. Reno, 2000 WL 223333
(4th Cir. Feb. 28, 2000) 20,24,26

United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990),
cert. denied, 498 U.S. 942 (1990) 21

Wallace v. Reno, 24 F.Supp.2d 104 (D.Mass. 1998), aff'd, 194 F.3d 279 (1st Cir. 1999) 21

Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653 (1974) 24

Yesil v. Reno, 973 F. Supp. 372 (S.D.N.Y. 1997) 21

Statutes

AEDPA 440(d) . . . . . passim

INA 212(c), 8 U.S.C. 1182(c) (1994) . . . . . passim

Miscellaneous

ABA Standards for Criminal Justice, Pleas of Guilty (2d ed. 1982) 13

Bender's Criminal Defense Techniques (1999) 13

Katherine A. Brady, California Criminal Law and Immigration (Immigrant Legal Resource Center, 1995) 15

Maryellen Fullerton and Noah Kinigstein, Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys, 23 Amer. Crim. L. Rev. 425 (1986) 15

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Ira J. Kurzban, The Immigration Act of 1990, The Champion (April 1991) 15

New York State Division of Criminal Justice Services, Crime and Justice Annual Report (1992) 22

NLADA Performance Guidelines for Criminal Defense Representation (1994) 13

Tarik H. Sultan, Immigration Consequences of Criminal Convictions, 30-JUN Ariz. Att'y 15 (1994) . . . 15

U.S. Department of Justice, Bureau of Justice Statistics, Noncitizens in the Federal Criminal Justice System, 1984-94 (Aug. 1996) 22

Manuel D. Vargas, Representing Noncitizen Criminal Defendants in New York State (New York State Defenders Association, 1998) 15

PRELIMINARY STATEMENT

This *amicus curiae* brief is submitted to demonstrate to the Court -- should it reach the issue -- that there is an unfair and unlawful "retroactive effect" when the government applies a new law eliminating statutory eligibility for a waiver of deportation to lawful permanent resident immigrants convicted of committing deportable offenses before the new law came into effect.

Criminal defense lawyer members and staff of *amici* organizations have represented, or provided counsel to, lawful permanent resident immigrants in criminal proceedings. In so doing, they have experienced first-hand the extreme concern of lawful permanent resident defendants about the effect of their criminal cases on their lawful permanent resident status. In fact, they have a professional and ethical obligation to inform immigrant defendants when a conviction would make the defendant deportable. Under the law prior to 1996, however, defense lawyers, as well as immigration lawyers, community advocates, immigrant neighbors, friends, and family, could and did inform lawful permanent resident defendants that, even if the defendant pled guilty to a deportable offense, deportation would not be automatic. This was because long-time lawful permanent residents had a statutory right to apply for a waiver of deportation. Indeed, the waiver was granted over half the time. Thus, many lawful permanent resident immigrants pled guilty with the expectation that, if they were later subjected to deportation

proceedings, they would have a good chance at avoiding deportation.

This is not to say, however, that each lawful permanent resident immigrant seeking to avoid application of the new law eliminating statutory eligibility for a waiver of deportation must show individual reliance on the old law. The law is clear that, once application of a new civil statute to pre-law conduct is demonstrated to have "retroactive effect" that wasn't expressly intended by Congress, individual reliance need not be shown in order for the traditional presumption against retroactive application of a new statute to be invoked. What matters is simply whether there has been a change in the legal consequences of the prior conduct that may affect considerations such as fair notice, reasonable reliance, or settled expectations. Here, the change in legal effect of the prior conduct from *possible* to *mandatory* deportation unquestionably constitutes a change in legal consequences that raises such concerns about fundamental fairness.

This *amicus curiae* brief is filed pursuant to Rule 29 of the Federal Rules of Appellate Procedure. All parties have consented to its filing.

STATEMENT OF INTEREST

Amici organizations -- the National Association of Criminal Defense Lawyers, the National Legal Aid and Defenders Association, the New York State Association of Criminal Defense Lawyers, the New York State Defenders Association, and The Legal

Aid Society of the City of New York -- are associations or legal services providers whose members or staff include criminal defense lawyers who have represented, or provided counsel to, lawful permanent resident immigrants in criminal proceedings, and who have an interest in ensuring that their clients are not unfairly and unlawfully subjected to later adverse changes in the nation's immigration laws.

The **National Association of Criminal Defense Lawyers** (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958 with a direct membership of almost 10,000 attorneys. NACDL is affiliated with 80 state and local criminal defense organizations with which it works cooperatively on issues related to criminal defense. Thus, it speaks for more than 28,000 criminal defense lawyers nationwide. Among other things, NACDL seeks to promote the proper and fair administration of criminal justice.

The **National Legal Aid and Defender Association** (NLADA) is a private, non-profit membership organization based in Washington, D.C. Founded in 1911, the Association is the only national organization devoted solely to assuring the delivery of high quality legal services to poor people. The Association often appears as an *amicus* party on issues of broad concern that address the constitutional right to counsel and equal access to and fairness in the judicial system. Its national membership includes members of the indigent defense and civil legal service bars, and professionals who provide related services. Many of

the nation's public defender organizations, as well as assigned counsel and private criminal defense practitioners, are NLADA members.

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.

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 the state, establish standards for practice in the representation of poor people, and engage in a statewide program of community legal education. Among other initiatives, NYSDA operates the Criminal Defense Immigration Project, which provides public defender, legal aid society, and assigned counsel program lawyers with legal research and consultation, publications, and training on issues involving the interplay between criminal and immigration law.

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, the largest division of The Society, employs more than 400 attorneys. 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.

Amici organizations are concerned that the government's position in this case undermines the factual and legal basis for plea agreements that our members and staff negotiated for lawful permanent resident immigrant clients in past criminal proceedings. Based on the counsel of our lawyer members and staff, as well as others, that deportation would not be automatic, many lawful permanent residents agreed to forego trial and plead guilty to deportable offenses -- even in many cases in which they continued to profess their innocence to their lawyers. Many of these immigrants could expect a likelihood of obtaining relief from deportation based on their length of residence in the United States, other equities such as family ties, and a personal commitment to do what was necessary 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 the state of the law at the time -- 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 appellees 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.

ISSUE ADDRESSED

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

SUMMARY OF ARGUMENT

A new law has "retroactive effect" if its application to past conduct or transactions would result in the deprivation of a right possessed by a party under prior law. Unless a new law that has such an effect includes a clear and unambiguous statement of retroactive intent, it is presumed that the new law does not govern past conduct or transactions.

Under the law in effect at the time of the events that made the lawful permanent resident appellees here deportable, lawful permanent residents had a statutory right to apply for a waiver of deportation. The government's application of the new law at issue here takes away this significant right. 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 individual reliance on prior law is not necessary to show impermissible retroactive effect of a new law. What matters is simply whether there has been a change in the legal consequences of any past conduct at issue that may raise concerns relating to fair notice, reasonable reliance, or settled expectations. The government's attempt to eliminate the appellees' right to apply for a waiver of deportation so changes the legal consequences of past conduct and is, therefore, presumptively impermissible.

ARGUMENT

THE GOVERNMENT'S APPLICATION OF AEDPA TO TAKE AWAY FROM LAWFUL PERMANENT RESIDENTS 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 that subjected them to possible deportation have long had a right to seek a waiver of exclusion or deportation under Section 212(c) of the Immigration and Nationality Act (INA), provided they had been lawfully domiciled in the United States for seven years at the time of their deportation hearing. See INA 212(c), 8 U.S.C. 1182(c) (1994), as 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 April 24, 1996, the date of enactment of the Antiterrorism and

Effective Death Penalty Act of 1996 (AEDPA), 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 nevertheless seek the waiver if he or she was likely to have satisfied the seven year requirement 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 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).

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

In this and other cases, the government seeks to apply AEDPA Section 440(d) retroactively to deny the statutory right to seek 212(c) relief even for lawful permanent residents convicted of committing deportable offenses prior to the effective date of the law. AEDPA Section 440(d) barred 212(c) relief for individuals who are convicted of specified criminal offenses, regardless of the sentence imposed or served. Pub. L. No. 104-132, 110 Stat.

1214 (1996). However, the AEDPA contained no language making Section 440(d) retroactive.

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 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 Landgraf's first step, the Court then must resort to the judicial default rules outlined in Landgraf's second step. 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)).[1]

[1] 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 ways a new statute could be found to have a retroactive effect invoking the presumption

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

Prior to AEDPA, long-time lawful permanent residents had a statutory right to apply for a waiver of deportation under former INA Section 212(c). The government now seeks to apply AEDPA Section 440(d) retroactively to deprive appellees of this important right. The Court may – and we hope will – find that Congress expressly prescribed only prospective application of AEDPA Section 440(d). If the Court is unable to discern Congressional intent, however, the Court must apply Landgraf's second step, and determine whether there is "retroactive effect" when the government applies Section 440(d) to such lawful permanent residents. In other words, the Court must make a "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 on whether lawful permanent residents accused

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against retroactivity. Hughes Aircraft, 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.

of criminal conduct prior to AEDPA may have reasonably relied, or had settled expectations based on their eligibility for relief from deportation under prior immigration law. By offering this information, *amici* do not mean to suggest that each lawful permanent resident immigrant seeking to avoid application of Section 440(d) must prove such reliance or expectations (see Point C below). Rather, the reasonable reliance and settled expectations of many lawful permanent residents is offered to demonstrate the universal injustice that would result from retroactive application of Section 440(d).

As a preliminary matter, *amici* note the general experience of our members and staff that lawful permanent resident criminal defendants charged with criminal offenses are extremely concerned about the immigration implications of their criminal cases. As a group, lawful permanent residents 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 consequences of conviction.

In recognition of the severity of the penalty of deportation as a consequence of a criminal case, various ethical and professional standards require defense lawyers to advise noncitizen defendant clients about the immigration implications of a conviction, and to plan defense strategy accordingly. For example, the Standards for Criminal Justice of the American Bar Association have long provided that, where it is apparent that a defendant may face deportation as a result of a 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 (2d ed. 1982). In addition, the Performance Guidelines of *amicus* National Legal Aid and Defender Association likewise recognize 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). Consistent with these standards, a leading treatise for 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 . . .. [An] 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].

In keeping with its ethical and professional responsibilities, the criminal defense community has taken steps

over the years to ensure that defense lawyers properly advise all noncitizen defendants, including lawful permanent residents, about the immigration implications of their criminal cases, and how they might seek to avoid adverse immigration consequences. These include the following:

- ***Immigration law training*** -- Defense lawyers have attended training on the immigration consequences of criminal convictions, including training on the availability of 212(c) relief for lawful permanent residents convicted of deportable offenses. On the national level, for many years prior to AEDPA, the National Immigration Project of the National Lawyers Guild conducted or participated in numerous training presentations on this subject for criminal defense lawyers throughout the United States. Many other organizations or individual immigration law experts have provided similar training that focused on the immigration effects of a particular state's criminal laws. In California, for example, the state with the largest lawful permanent resident immigrant population, the Immigrant Legal Resource Center in San Francisco has provided training on the immigration consequences of criminal convictions to public defender offices in the state on over thirty occasions, as well as over twenty Continuing Legal Education seminars throughout the state in conjunction with the California Bar Association, Criminal Law Section. In New York, criminal defense lawyers of The Legal Aid Society of New York City have always received training about the immigration consequences of criminal convictions, and are required not only by ethical guidelines but also by explicit Criminal Defense Division policy to advise all non-citizen clients of the potential immigration consequences that could result from a conviction. All newly hired Criminal Defense Division attorneys receive training on the immigration consequences of convictions as part of their initial training. Further training is provided both through periodic distribution of written materials to staff and through continuing legal education programs. The primary focus of the training is to familiarize attorneys with the immigration law 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.

- ***Reference to immigration law practice aids*** – There are numerous immigration law practice aids designed to assist the defense lawyer in analyzing the immigration consequences of criminal convictions for noncitizen defendants, and in planning strategies to avoid negative consequences such as deportation. E.g., Dan Kesselbrenner and Lory D. Rosenberg, Immigration Law and Crimes (West Group, 1984-1999); Katherine A. Brady, California Criminal Law and Immigration (Immigrant Legal Resource Center, 1990-1999); Manuel D. Vargas, Representing Noncitizen Criminal Defendants in New York State (New York State Defenders Association, 1998-2000). Practice aids that were published prior to AEDPA included information about the availability of 212(c) relief to waive deportation for most deportable offenses, and how to preserve eligibility for 212(c) relief. Specific examples of such publications were:

  - 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.), § 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").

- ***Consultation with in-office or outside immigration experts*** -- Defense lawyers often consult with immigration law experts on the immigration consequences of criminal convictions, and strategies to avoid deportation, including preserving eligibility for relief. On a national level, the National Immigration Project of the National Lawyers Guild responds to about 800 inquiries from criminal defense lawyers every year. In addition, immigration law experts in many of the high-immigrant population states are consulted on the specific interplay between these states' criminal laws and the federal immigration laws. In California, for example, the Immigrant Legal Resource Center, a nonprofit legal backup center, has for a number of years offered a program of telephone consultations for public defenders and private attorneys to answer questions concerning the immigration consequences of particular plea bargains. Other public defense or legal aid offices have their own in-house experts available for consultation on immigration issues. In New York, since 1987, the immigration law training provided its criminal defense attorneys by the Criminal Defense Division of The Legal Aid Society of the City of New York has been supplemented by the presence on staff of attorneys with special expertise in immigration law. These immigration resource attorneys consult with Criminal Defense Division staff attorneys on the immigration impact of choices and strategies in individual criminal cases involving non-citizen clients. When consulted regarding plea bargaining options in cases where pleading guilty to a deportable offense could not be avoided, the resource attorney counseled the staff attorney regarding how to plead and remain eligible at least to apply for a waiver of deportation. In such cases, the client was advised that the conviction was likely to lead to deportation proceedings, but that he or she would have the opportunity to present evidence of equities to avoid a deportation order.

Based on the immigration law information available from the above-described immigration law training, resource materials, and consultations with immigration experts, defense lawyers advised

lawful permanent residents accused of pre-AEDPA deportable offenses that, even if they pled guilty, they might still be able to avoid deportation. Many defense lawyers specifically explained to such clients that they would have a deportation hearing where they would have an opportunity to present evidence to persuade an immigration judge to grant a waiver of deportation.[2] Obviously, a defense lawyer was in no position to assure a permanent resident client that a waiver would be granted. But a defense lawyer could -- and many did -- assure lawful permanent resident defendants that they had a right to apply. And defense lawyers could -- and many did -- tell lawful permanent resident defendants 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 Goncalves v. Reno, 144 F.3d 110, 128 (1st Cir. 1998) (citing Mojica v. Reno, 970 F.Supp. 130, 178 (E.D.N.Y. 1997)), cert. denied, 119 S.Ct. 1140 (1999).

The advice that lawful permanent residents received from criminal defense lawyers was frequently corroborated by the experience of their permanent resident family members, friends,

[2] In some cases, even the prosecutor and judge were involved in the discussion of immigration consequences and the right to apply for a waiver of deportation.

and neighbors who had been in deportation proceedings but were not deported. Thus, even before they spoke to a lawyer, many lawful permanent residents had a general awareness that their criminal conduct would not automatically result in deportation if they could present factors, such as the existence of a spouse and children in the United States, that might warrant a decision not to deport. As the district court below stated, "[a] lawful 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." Pottinger v. Reno, 51 F.Supp.2d 349, 363 (E.D.N.Y. 1998).

Thus, many lawful permanent resident immigrant defendants pled guilty to deportable offenses, relying on both general and specific knowledge that deportation could be avoided. Before agreeing to plead guilty, many specifically asked their defense lawyers what chance they would have of avoiding deportation, 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 themselves and their families. 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 had served the country in the military.

If deportation had been a certainty, rather than the calculated risk it was before enactment of AEDPA, lawful permanent residents would have been much less likely to plead guilty in many circumstances. For example, a lawful permanent resident immigrant might have pled guilty to a deportable offense -- despite the lack of a prior criminal record and weak evidence of guilt -- because he had a family and/or job to worry about and desperately wanted to avoid prison time. In such a case, a defense lawyer typically negotiated aggressively to avoid incarceration because of the devastating effects imprisonment can have on a client's family, his current employment, and his future job prospects. At the same time, as a noncitizen, the client also faced the possibility of deportation and permanent separation from family, job, and community. Nonetheless, many such lawful permanent resident clients pled guilty based on information or advice that deportation would not be automatic if they could demonstrate the very same factors – family, job, residence, etc. – that made it likely that the lawyer could negotiate a favorable plea and sentence agreement. If they had known that deportation would be unavoidable, however, they might well have chosen to hold out and try to negotiate an alternative plea or sentence agreement that might have avoided deportability altogether. Alternatively, they might have negotiated a plea or sentence agreement that still subjected them to deportability but left them eligible to apply for a waiver of deportation under the new law. Or, if unable to do that, and knowing that acceptance

of a plea bargain would necessarily result in deportation - and with it, the inevitable disruption of their employment and family lives – they might have chosen to stand trial.

Some courts have suggested -- without identifying any factual basis and apparently without the benefit of any information regarding the experience of lawful permanent resident immigrants in the criminal justice system -- 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). *Amici* respectfully disagree. The experience of our members and staff teaches us that noncitizens, particularly lawful permanent resident immigrants, are deeply concerned about the possibility of deportation when they plead guilty to criminal offenses. Many lawful permanent residents nevertheless pled guilty in reliance on the real promise of avoiding deportation offered by the statutory right to apply for 212(c) relief. As the Fourth Circuit recently stated, "an alien might waive the right to trial and plead guilty to a criminal charge, banking on a lighter sentence that would preserve the availability of a § 212(c) waiver." Tasios v. Reno, 2000 WL 223333, at *6 (4th Cir. Feb. 28, 2000). The Fourth Circuit therefore concluded: "By withdrawing the availability of [§ 212(c)] relief, AEDPA § 440(d) worked a *fundamental change* in the legal effect of such a plea . . . ," and, therefore, would be impermissibly retroactive. Id. (emphasis added). See also Dunbar v. INS, 64 F.Supp.2d 47, 55

(D.Conn. 1999)(“[P]otential 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”); Wallace v. Reno, 24 F.Supp.2d 104, 111 (D.Mass. 1998), aff’d, 194 F.3d 279 (1st Cir. 1999) (“In 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”); 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”); 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 sum, there is no question that lawful permanent resident immigrants agreed in the past to plead guilty to deportable offenses 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 discussed in the next section of this brief, such reliance is not necessary to show the retroactive effect of the government’s application of AEDPA Section 440(d) to appellees. Nevertheless, this reliance on prior law confirms and illustrates the retroactive effect of

the government's application of the new law. In light of the criminal justice system's heavy reliance on the willingness of individuals to plead guilty and forego their right to a jury trial, [3] this Court should apply the presumption against retroactivity to prevent the government from unfairly shattering the expectations of lawful permanent residents who previously agreed to a negotiated settlement of their criminal cases.

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

The prior sections of this brief describe how lawful permanent residents in criminal proceedings often reasonably relied on general and specific knowledge about the availability of relief from deportation when they pled guilty to deportable offenses. Such reasonable reliance on prior law informs and guides the determination of whether a new law has retroactive effect. See Landgraf, 511 U.S. at 270 ("familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance"). Nevertheless, Supreme Court case law is clear that persons need not show actual individual reliance before they can avoid the adverse consequences of a retroactive application of a new law where Congress did not expressly provide for such retroactive application. What matters is simply "whether the new provision attaches new legal consequences to events

[3] In fact, more than 90 percent of criminal charges are disposed of by guilty plea. See e.g., U.S. Department of Justice, Bureau of Justice Statistics, Noncitizens in the Federal Criminal Justice System, 1984-94 (Aug. 1996); New York State Division of Criminal Justice Services, Crime and Justice Annual Report (1992).

completed before its enactment." Martin v. Hadix, 119 S.Ct. at 1998 (quoting Landgraf, 511 U.S. at 269-270); see also Tasios v. INS, 2000 WL 223333, at *6 (4th Cir. Feb. 28, 2000)("When the legal effect of conduct is determined by subsequently enacted law, that law operates retroactively."). Thus, in Landgraf and other cases where the Supreme Court has analyzed whether a new civil statute has impermissible retroactive effect, the essential question is not whether the person expressly relied on a given understanding of the law, but whether applying the new law to past events changes the consequences of the relevant conduct. See Hughes Aircraft, 520 U.S. 939 (finding retroactive effect when a private party lost a defense against private suits for submitting a false claim to the government, even though the private party never had such a defense against a government suit and 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 sexual harassment where the conduct pre-dated the amendments, even though the conduct had always been wrongful and there was no evidence of reliance on prior law). The Landgraf Court noted that "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." Id. at 283, n.35.

Supreme Court decisions applying the Ex Post Facto clause also 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 can be demonstrated.[4] These decisions specifically recognize the 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); see also Tasios, 2000 WL 223333, at *7 ("As cases decided under the Ex Post Facto Clause establish, any change of outcomes from a discretionary relief to one of proscribed outcomes is retroactive."). These decisions do not require a showing of reliance on prior law from the individual seeking to demonstrate the retroactive effect of a new law.

What the Supreme Court's retroactivity decisions recognize, in both the civil and criminal contexts, is that people have a

[4] Although the Ex Post Facto clause's retroactivity prohibitions are limited to criminal legislation, the Court often relies on Ex Post Facto case law to determine whether civil laws have "retroactive effect." See, e.g., Hughes Aircraft, 520 U.S. at 948 (citing Collins v. Youngblood, 497 U.S. 37 (1990) and Beazell v. Ohio, 269 U.S. 167 (1925)); Landgraf, 511 U.S. at 269, n.23 (citing Miller v. Florida, 482 U.S. 423 (1987)).

right to know the possible legal consequences of their actions at the time of their conduct, whether or not they will later be able to demonstrate actual individual reliance on that knowledge. 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 the adverse consequences of application of a new law to pre-Act conduct. Rather, in our system of justice, it is presumed that a person acts in conformity with the law at the time of his or her actions. As U.S. District Judge John Gleeson recently stated:

> Individuals are presumed to act against a backdrop of legal obligations. If they were not, there would be little problem with the retrospective application of many laws; there are likely to be few instances of an individual poring over a statute book before acting. "Whether or not the operative conduct might have been different, the immigrant has a presumptive right to the imposition of only those consequences which could have attached at the time he committed his act."

Pena-Rosario v. Reno, 2000 WL 150710, *16 (E.D.N.Y.) (quoting Maria v. McElroy, 68 F.Supp. 2d 206, 229 (E.D.N.Y., 1999)).

Here, the government's application of AEDPA Section 440(d) to lawful permanent residents convicted of committing deportable offenses prior to the new law unquestionably eliminates a legal right -- eligibility for 212(c) relief from deportation -- based on conduct that occurred in the past. Under prior law, long-time lawful permanent residents with criminal convictions faced possible, but not certain, deportation due to eligibility to seek 212(c) relief. However, if AEDPA Section 440(d) is applied to them, their statutory right to seek 212(c) relief is taken away

and deportation becomes virtually inevitable. Thus, for such lawful permanent residents, the government's position changes a mere possibility of deportation into a certainty of deportation. Based on the Supreme Court's retroactivity jurisprudence, in the absence of a clear statement of retroactive legislative intent, such retroactive effect is presumptively impermissible.[5]

[5] Court decisions that found that previous restrictions on 212(c) relief enacted by Congress in 1990 were not impermissibly retroactive, e.g., DeOsorio v. INS, 10 F.3d 1034 (4th Cir. 1993), pre-dated the recent Supreme Court retroactivity decisions. The Fourth Circuit itself recently concluded that the Supreme Court's 1997 decision in Hughes Aircraft undermined its analysis in DeOsorio, and dictated a contrary result. Tasios, 2000 WL 223333, at *6 ("In light of [the] recent guidance from the Supreme Court, we conclude that the observations made in DeOsorio do not account for the essential retroactive consequences of removing the availability of 212(c) relief."); see also Mayers v. INS, 175 F.3d 1289, 1303 (11th Cir. 1999)("Prior to the passage of AEDPA, the appellees had a statutory right to apply for a § 212(c) waiver. To prohibit them from making such an application now arguably 'attaches a new disability' and imposes additional burdens on past conduct."); Henderson v. INS, 157 F.3d 106, 129 (2d Cir. 1998)("Application of this presumption would require us to consider whether the statute before us [AEDPA Section 440(d)] is genuinely retroactive. We are inclined to believe that it is."); Goncalves, 144 F.3d at 128 ("The Attorney General's application of the new AEDPA restrictions takes away a form of relief that, while discretionary, is plainly substantive, and so implicates Landgraf's presumption against retroactivity").

CONCLUSION

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

Respectfully submitted,

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