Supreme Court, U.S.
FILED
MAR 16 2011
OFFICE OF THE CLERK

No. 10-730

IN THE
Supreme Court of the United States

LIVINGSTON RONDELL JOHNSON,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

CHARLES ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle Street
Suite 1818
Chicago, IL 60601
(312) 660-1370

BRIAN J. MURRAY
(*Counsel of Record*)
JONES DAY
77 West Wacker Drive
Suite 3500
Chicago, IL 60601-1692
(312) 782-3939
bjmurray@jonesday.com

ERIK J. CLARK
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
(614) 469-3939

Counsel for Petitioner

MARCH 16, 2011

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U.S. Dept. of Justice, 2010 Statistical Yearbook (2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf 5

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REPLY BRIEF FOR PETITIONER

The Government does not deny that this case raises two entrenched circuit splits as to the meaning of a significant provision affecting thousands of noncitizens in removal proceedings. Indeed, most of the Government's brief in opposition reads more like a merits brief, arguing not that the two issues raised by Johnson are not cert-worthy, but that they should be resolved against Johnson. At this stage in the proceedings, the Government's certiorari silence speaks louder than its merits words.

The little the Government does have to say about certiorari fails to raise any issue that should keep this Court from taking this case. As to the retroactivity issue, the Government argues principally that the vastly differing circuit views on the nature of *Landgraf* retroactivity analysis are of "limited prospective significance" because the provision being discussed has already been repealed. That is true of all statutes implicating *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and is no reason to deny certiorari here. Moreover, the § 212(c) context is particularly appropriate for resolving the split on *Landgraf*, because the issue has been so thoroughly considered in this context.

The Government's arguments against certiorari as to the "statutory counterpart" issue are likewise flawed. Petitioner raised the issue and fully made his arguments below; the Seventh Circuit has already decided the matter by published decisions; and all eleven circuits that review immigration cases have spoken on the matter. Again, there is no reason for this Court to delay any further in resolving this

issue. Certiorari should be granted on both questions presented.

ARGUMENT

I. THE GOVERNMENT DOES NOT DENY THE RELEVANT CIRCUIT SPLITS.

The Government concedes that this case presents two well-developed circuit splits. *First*, after *INS v. St. Cyr*, 533 U.S. 289 (2001), the circuits are badly splintered on whether the repeal of § 212(c) applies retroactively to anyone other than immigrants who pled guilty before its repeal. Some circuits limit *St. Cyr* to these facts. Others read *St. Cyr* to mean that the § 212(c) repeal is generally not retroactive to any immigrant convicted before 1996. Others require some showing of reliance for immigrants to avoid retroactive application of the repeal but allow for reliance showings beyond pleading guilty. Pet. 8-15.

Second, the circuits have split on the Equal Protection implications of the "statutory counterpart" test. Section 212(c) relief has long been available to immigrants facing deportation even though on its face, the provision applies only to exclusion; the "statutory counterpart" test determines *which* immigrants facing deportation can seek § 212(c) waivers. Some circuits focus on language only and ask whether the deportability ground has a mirror image in the statutory grounds of exclusion. In contrast, the Second Circuit looks at the substance of the basis for deportability, asking whether such conduct would fit under a ground for excludability if the person had traveled abroad. Pet. 16-20.

The Government concedes the circuit splits. It argues that the first split is "quite narrow" because all courts agree that reliance on the law before it was

changed has some role in retroactivity analysis. Opp. 13-16. Agreeing that reliance has some role, however, does not make the split narrow. Some courts find that immigrants can have objectively reasonable reliance notwithstanding lack of a guilty plea. Others find reliance can be shown only after a guilty plea. Still others analyze reliance on an individualized basis using either objective or subjective standards. These distinctions are conceptually broad and make all the difference in the world to immigrants like Johnson.

The Government further argues, as to the second split, that the Second Circuit is alone in siding with Johnson on the issue—an important point, but not for the reason the Government thinks. In 2010, the Second Circuit heard nearly one-fifth of all immigration cases. *See* Duff, Judicial Business of the United States Courts: 2010 Annual Report of the Director, at Table B-3 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/Judicial-Business/2010/JudicialBusinespdfversion.pdf.[1] In fact, the Second Circuit has been the leading authority on § 212(c) matters for decades. It was *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), that first recognized an equal protection problem relating to § 212(c) relief, a holding that the Agency accepted and codified later on. Pet. 20-21. This lends particular weight to the Second Circuit's views on this split.

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[1] Nor is it accurate to assert that all other circuits are in lockstep against the Second Circuit. *See, e.g.*, *Abebe v. Mukasey*, 554 F.3d 1203, 1211 (9th Cir. 2009) (*en banc*) (Clifton, J., concurring) (noting that majority opinion "create[d] a three-way circuit split").

The Government also argues that, even in the Second Circuit, Johnson would not prevail given that Circuit's position on the *first* split. The Second Circuit *would* permit Johnson to make an individualized showing of reliance, notwithstanding that he did not plead guilty. *See Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004); *Walcott v. Chertoff*, 517 F.3d 149 (2d Cir. 2008). And even if the Government were correct, the coincidence that no circuit's holdings on both issues align for Johnson would be no reason for the Court to avoid establishing consistent law now as to both issues.

II. THIS CASE RAISES IMPORTANT ISSUES WORTHY OF THIS COURT'S CONSIDERATION, AND NO VEHICLE PROBLEM EXISTS.

1. The Government is wrong to assert that this case is not important enough for this Court's consideration, because § 212(c) applications and grants are diminishing. Opp. 28-30.

First, *Landgraf* retroactivity analysis has impact beyond immigrants seeking § 212(c) relief. These issues implicate broader questions about how the Court analyzes statutes for retroactivity, including the role of reliance and whether the question can result in different answers depending on who asks. Johnson's petition noted various ways in which these answers affect other areas of law. Pet. 24-26. The Government has no response to this point.

Second, while the Government reports that the number of § 212(c) waiver cases is falling, it concedes that hundreds of cases remain. By the Government's own numbers, last year alone, there were 857 grants of § 212(c) relief and 507 new applications. Opp. 29.

This does not include § 212(c) cases pending amongst the backlog of 262,000 cases at the Immigration Court level, nor the 30,000 case backlog at the BIA. *See* U.S. Dept. of Justice, 2010 Statistical Yearbook (2011), at Y1-Y2, *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf. And these numbers are somewhat depressed because many immigrants choose not to fight circuit law precluding relief.

Third, the argument is illogical. Of course, in any case about retroactivity, the number of people affected diminishes over time. But that truism has not prevented this Court from understanding the significance of retroactivity and accepting such cases. Pet. 26 n.9. The alternative would be to insulate from review all retroactive changes in law because, someday, the change will be old enough for retroactivity not to matter anymore. This Court historically has seen past that argument, and it should do so again here.

2. The Government also attempts to create a vehicle problem, asserting that the Seventh Circuit in this case did not analyze the second question presented. But it does not contest that the parties briefed the issue fully before the IJ, the BIA, and the Seventh Circuit. The IJ followed Seventh Circuit precedent in rejecting Johnson's arguments, as did the BIA. Pet. 7. And the Seventh Circuit rejected Johnson's retroactivity arguments, thereby disposing of his claim without the need to reach the second issue. If the Seventh Circuit and other circuits had not already fully explored the issue, then the lack of analysis on the second question could hinder this Court's ability to fully understand the lower courts' reasoning. But dozens of opinions, from the Seventh

Circuit and others, offer full treatment of the issue for this Court to analyze during its own review. Pet. 18-19. No further percolation is needed.

III. THE GOVERNMENT'S MERITS ARGUMENTS FAIL.

Rather than addressing the most crucial aspects of certiorari, the Government spends most of its brief in opposition defending the merits of the decision below. This effort only underscores the value of full merits review. In any event, as could be explained in more detail in merits briefing, the Government's arguments fail.

1. a. First, the Government argues that individual reliance *should* be the determining factor for whether a change in law is applied retroactively. Opp. 10. This confuses the difference between *some role* for reliance in retroactivity analysis and a showing of actual reliance as *sine qua non*. Johnson never asserted that reliance is not a factor to be considered in the second step of a *Landgraf* analysis. Pet. 10-11. Rather, the questions are whether reliance should be the only factor considered and weighed on a case-by-case basis, and whether in this context reliance can only be established by a guilty plea. Although the court below answered both in the affirmative, that reliance can be part of a *general* statute-wide analysis under *Landgraf* does not require that result.[2]

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[2] Here, as in *St. Cyr*, Johnson's relevant choices occurred before the § 212(c) repeal, so *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) has no application. *See* Opp. 12-13. And while the Court in *Fernandez-Vargas* repeated typical language about *Landgraf* reliance considerations, it also recognized that the central retroactivity question in *St. Cyr* was whether the repeal

b. Likewise, the Government cannot avoid *Clark v. Martinez*, 543 U.S. 371 (2005). There, the Court answered a statutory interpretation question uniformly based on a prior holding rather than letting a statute mean different things for different people. It should do the same here. Pet. 13-15.

In response, the Government argues that the second step of a *Landgraf* analysis is not really statutory analysis at all, but rather a chance for "a court to decline to apply the statute." Opp. 11-12. The Government offers no authority for this view of *Landgraf*, which treats retroactivity analysis as essentially an arrogation of legislative power based on judicial preference. The second step of *Landgraf* is still a question of statutory interpretation. It simply considers the effects of the change in law and creates a presumption about Congress' intended effect in the absence of express statutory language. *See Landgraf*, 511 U.S. at 280. The absence of express language does not convert the second step of Landgraf into a case-by-case courtroom determination. It applies to the law as a whole just like reading a statute's express language.

2. a. The Government attempts to establish that Johnson himself could not have relied on § 212(c) relief when facing his conviction. As Johnson

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of § 212(c) imposed new burdens on immigrants. As the Court explained, "[t]he answer was that converting deportation from a likely possibility to a dead certainty would add such a burden, and application of the new law was accordingly barred." *Fernandez-Vargas*, 548 U.S. at 43. The same is true for Johnson, and whether he pled guilty has no impact on that analysis.

explained, § 212(c) relief was always part of the consideration for any rational noncitizen facing criminal allegations. For example, decisions not to appeal a criminal conviction (particularly where a probationary sentence would not have barred § 212(c) relief), *see, e.g.*, *Hem v. Maurer*, 458 F.3d 1185, 1199 (10th Cir. 2006), or delay in seeking a § 212(c) waiver to establish a record of rehabilitation, *Restrepo*, 369 F.3d at 634-35, would both demonstrate reasonable reliance.[3] Pet. 27 n.11.

The Government opines that "[i]t is implausible that an alien concerned about building equities for a future application for discretionary relief under Section 212(c) would forgo the equity of accepting responsibility through a guilty plea." Opp. 18. But it is entirely plausible for an immigrant to challenge his charges while still hoping that he could seek § 212(c) relief if his challenge failed. Likewise, for all the reasons articulated here and in his petition, it was entirely reasonable for Johnson to expect that § 212(c)'s repeal would not affect his rights and that he could seek such relief after its repeal and after years of good conduct. Contrary to the Government's contention, Opp. 18, that Johnson did not jump at

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[3] The Government suggests that Johnson's showing of alternative reliance, while made before the Seventh Circuit, was not exhausted at the agency level. Opp. 18 n.9. Of course, Johnson was aware of the settled law of the Seventh Circuit at the time of his agency proceedings and tailored his arguments accordingly. When he had the opportunity to request that the Seventh Circuit itself reconsider its approach to *St. Cyr* at the *en banc* stage, Johnson did so. At all turns, Johnson asserted every reasonably sustainable argument against denying him § 212(c) relief.

§ 212(c) relief once he heard of a coming change in law does not undermine his reliance claim.

b. The Government also suggests that Johnson could not have relied on § 212(c) relief because when he was convicted, his offense was not a deportable one. It became a deportable offense years after his conviction due to an expressly retroactive change in law. Opp. 15-16. But at the time of his guilty plea, Johnson would have been inadmissible, *see* 8 U.S.C. § 1182(a)(2)(A)(i)(I), and thus eligible to seek § 212(c) relief if he ever traveled abroad (although he had no immediate need to seek relief, since he was not deportable). A rational noncitizen might well have considered possible future immigration implications and acted accordingly. Johnson's safest route to prevent deportation—especially with the benefit of hindsight—was to fight the charges at trial and do whatever possible to keep his options open for a waiver.

Indeed, there is irony in the Government's argument—in support of the retroactive application of a change in immigration law—that Johnson did not rely on § 212(c) because his offense was not deportable when committed (until, retroactively, it was). The Government suggests that Johnson had nothing to worry about in terms of deportation because of the current state of the law at the time of his conviction. But the Government's own expansive view of retroactivity in this case would make it abundantly reasonable for any immigrant to expect that the legal rights he enjoys at the moment may be taken from him at any time in the future.

3. a. On the second question presented, the majority of the Government's response simply

repeats arguments of the circuits on the wrong side of the split as to why inequitable treatment of similarly situated immigrants should be permitted. Opp. 19-27. The Second Circuit's opinion in *Blake v. Carbone* ("*Blake II*"), 489 F.3d 88 (2d Cir. 2007), adequately refutes most of these arguments, as does Johnson's petition. Pet. 16-21. The salient point here is that after the Second Circuit in *Francis* found impermissible discrimination between immigrants who had never left the country and those who had, the BIA's *Silva* decision adopted *Francis*' holding, *see Matter of Silva*, 16 I & N. Dec. 26 (BIA 1976), as did subsequent regulations. Pet. 20-21. Then, years later, while purporting fidelity to the *Silva* understanding, the Agency drew distinctions completely inconsistent with its decades-long approach. It simply ruled by fiat that certain immigrants (beginning with those convicted of sexual abuse of a minor) were categorically ineligible for that relief if they were charged under 8 U.S.C. § 1227, and if they had never traveled abroad. This simply revives the old *Francis* problem of treating similarly situated immigrants differently for no justifiable reason.

b. The Government responds that the BIA's statutory counterpart approach after 2005 was not new. Opp. 21-22. Wrong. *In re Meza*, 20 I. & N. Dec. 257, 259 (BIA 1991), held that an aggravated felony conviction does not preclude the possibility that a statutory counterpart for exclusion could exist. Likewise, *In re Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590 (BIA 1992), dealt with whether an aggravated felony conviction could be considered a ground for exclusion. And *In re Rodriguez-Symonds*, 2004 WL 880246 (BIA March 9, 2004), specifically remanded a

case to determine whether a sex crime involving a minor could be a crime involving moral turpitude. Under the BIA's post-2005 regime, none of these issues would matter.

c. The Government also asserts that the BIA's historical practice of permitting *nunc pro tunc* applications for immigrants already in the country "is wholly discretionary and is limited to extraordinary cases—not to every case where an alien would otherwise be eligible for relief." Opp. 26 n.12. But the Government's cases do not pertain to § 212(c) relief itself, and in fact, the Board's decisions permitting § 212(c) to be granted *nunc pro tunc* do not require extraordinary equities. *See Matter of G-A-*, 7 I. & N. Dec. 274 (BIA 1956); *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 698 (BIA 1971); *Matter of K-*, 9 I. & N. Dec. 585, 586 (BIA 1962); *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1954). *See also Matter of Marin*, 16 I. & N. Dec. 581, 582, 586-87 (BIA 1978) (rejecting general "extraordinary equities" requirement for § 212(c) relief for an individual treated as if he was applying *nunc pro tunc*). To be sure, relief under § 212(c) is discretionary. But historically, over half of § 212(c) applications are granted. *St. Cyr*, 533 U.S. at 296 & n.5. Petitioner seeks only the opportunity to be considered for that relief.

Besides, the Government does not dispute that nothing in *In re Blake*, 23 I. & N. Dec. 722 (BIA 2005), precludes individuals who traveled abroad from seeking § 212(c) relief *nunc pro tunc* to the date of their return. Thus, the Agency has revived the distinction found irrational 35 years ago in *Francis*, and discontinued by the Agency shortly thereafter. If

Johnson had maintained close ties with his homeland, traveling annually or monthly, he would have been eligible to seek relief; but because he truly moved his life to the United States, he is not. That remains as irrational today as in 1976 when *Francis* was decided.

CONCLUSION

The petition should be granted.

Respectfully submitted,

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 South LaSalle
Street
Suite 1818
Chicago, IL 60601
(312) 660-1370

BRIAN J. MURRAY
(*Counsel of Record*)
JONES DAY
77 West Wacker Drive
Suite 3500
Chicago, IL 60601-1692
(312) 782-3939
bjmurray@jonesday.com

ERIK J. CLARK
JONES DAY
325 John H. McConnell
Blvd.
Suite 600
Columbus, Ohio 43215
(614) 469-3939

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Counsel for Petitioner