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*Agasino v. County of Santa Clara*, No. 04-16038**FERGUSON**, Circuit Judge, dissenting:MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

I dissent because I believe that we reached the correct result in our initial disposition of this case, which the majority withdraws today. *Agasino v. County of Santa Clara*, No. 04-16038, 2008 WL \_\_\_\_\_. In our initial decision, we granted Agasino's petition for review based on the equal protection rationale that served as the foundation of our grant of relief in *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005). *Agasino v. Chertoff*, No. 04-16038, 2005 WL 2033330 (9th Cir. Aug. 24, 2005). *Cordes* was subsequently vacated on jurisdictional grounds, *see Cordes v. Mukasey*, 517 F.3d 1094, 1095 (9th Cir. 2008), and the majority here chooses to abandon its reasoning. I continue to believe that denying Agasino the opportunity to apply for relief from removal while allowing similarly situated individuals that opportunity violates her equal protection rights. Accordingly, I would grant her petition for review.

Agasino, a native of the Philippines, has been a lawful permanent resident ("LPR") of the United States since 1970. She entered a nolo contendere plea to grand theft embezzlement on March 10, 1997. At the time of her plea her crime was not considered an aggravated felony, and did not render her deportable.

Agasino entered her plea during the period between the effective dates of

AEDPA<sup>1</sup> and IIRIRA. Section 440(d) of AEDPA made LPRs who commit aggravated felonies ineligible for discretionary relief from removal under INA § 212(c). This change in itself had no effect on Agasino, as her crime was not an aggravated felony. Shortly after her plea, however, her crime was retroactively reclassified as an aggravated felony by IIRIRA, which took effect on April 1, 1997. *See* 8 U.S.C. § 1101(a)(43)(G). IIRIRA also replaced § 212(c) relief with cancellation of removal, a more restrictive form of relief unavailable to people with convictions for aggravated felonies. *See* 8 U.S.C. § 1229b(a)(3). With these changes in the law, Agasino was rendered both deportable and ineligible for relief, whereas at the time of her plea she had been neither.

In *INS v. St. Cyr*, 533 U.S. 289, 326 (2001), the Supreme Court held that AEDPA's repeal of § 212(c) could not be retroactively applied to noncitizens who pled guilty to deportable offenses before the passage of AEDPA and were eligible at the time of their pleas for § 212(c) relief. *Id.* at 293. The Court held that applying the repeal of § 212(c) retroactively in such cases would be “contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations.” *Id.* at 323-24. In *United States v. Velasco-Medina*, this Court

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<sup>1</sup> The Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104-32, 110 Stat. 1214 (April 24, 1996).

determined that *St. Cyr*'s holding was inapplicable to LPRs like Agasino, who pled guilty to nondeportable offenses after AEDPA but before IIRIRA, and whose crime IIRIRA retroactively transformed into a deportable offense. 305 F.3d 839, 850 (9th Cir. 2002).

The combined effect of *St. Cyr* and *Velasco-Medina* produces a bizarre result. Had Agasino pled guilty to a crime that rendered her deportable at the time of her plea—one that was more severe, or that followed a prior conviction—she would have been eligible for § 212(c) relief under *St. Cyr*. Instead, because her crime was considered too minor at the time of her plea to carry any immigration consequences, she is ineligible for relief from removal today. LPRs with more serious or extensive criminal records, on the other hand, are able to apply for § 212(c) relief.

It is “wholly irrational” and a violation of the guarantee of equal protection to extend § 212(c) relief to LPRs who pled to deportable offenses but to withhold it from LPRs, like Agasino, who did not. *See Mathews v. Diaz*, 426 U.S. 67, 83 (1976). These two groups of LPRs facing deportation are similarly situated. The only difference between them is that one group pled to crimes that rendered them deportable at the time of the plea, while the other group became deportable retroactively. This distinction, however, is “irrelevant and fortuitous,” as both are

now subject to removal. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) (“Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.”).

This Court’s case law requires that similarly situated LPRs receive similar treatment under § 212(c). *See Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1198 (9th Cir. 2002); *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981). There is no rational basis for denying § 212(c) relief to noncitizens who pled guilty to crimes that carried no immigration consequences, while making relief available to those noncitizens who committed more, or worse, crimes.

Finally, I note that Congress’s aim in expanding the definition of aggravated felony and making that expansion retroactive was to increase the rate of removal of noncitizens who commit crimes, and reduce the availability of relief from removal. *See* H.R. Rep. No. 104-879, at 107-09 (1997). The combined effect of *St. Cyr* and *Velasco-Medina* is to increase only the number of *less dangerous* noncitizens subject to removal, while permitting more dangerous noncitizens to apply for relief.

Rather than upholding an irrational classification, as the majority does, I would grant Agasino’s petition for review. Accordingly, I dissent.