No. 10-1211

In The Supreme Court of the United States

PANAGIS VARTELAS,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTION PRESENTED

Is 8 U.S.C. § 1101(a)(13)(C)(v), which has been interpreted as depriving certain lawful permanent residents of their right to take brief trips abroad without being denied reentry, impermissibly retroactive as applied to lawful permanent residents who pleaded guilty before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 620 F.3d 108. The decision of the Board of Immigration Appeals (BIA) (Pet. App. 29-32) is unreported but available at 2009 WL 331200 (Jan. 23, 2009).

JURISDICTION

The court of appeals entered its judgment on September 9, 2010 and denied a timely petition for rehearing and rehearing en banc on January 4, 2011 (Pet. App. 33). The petition for a writ of certiorari was filed on April 4, 2011 and granted on September 27, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this brief (App. 1-8) are the pertinent portions of:

(a) former Immigration and Nationality Act (INA) § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994), as in effect before 1997 (App. 1);

(b) current INA § 101(a)(13)(A), (C), 8 U.S.C. § 1101(a)(13)(A), (C), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C,

§ 301(a), 110 Stat. 3009-575 (enacted Sept. 30, 1996, effective Apr. 1, 1997) (App. 2-3);

(c) current INA § 212(a)(2)(A)-(D), 8 U.S.C. § 1182(a)(2)(A)-(D) (App. 3-7); and

(d) former INA § 212(c), 8 U.S.C. § 1182(c) (1994), as in effect before 1996, when it was amended and later repealed effective April 1, 1997 by IIRIRA, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597 (App. 8).

INTRODUCTION AND STATEMENT OF THE CASE

In the early 1990s, petitioner played a small role in a counterfeiting scheme, pleaded guilty, and was sentenced to four months' incarceration. Until 1997, lawful permanent residents had the right to take brief trips abroad without risk of being denied reentry upon their return. Thereafter, IIRIRA changed the law by adding INA § 101(a)(13)(C)(v). That subsection provides that a lawful permanent resident who returns from a trip abroad "shall not be regarded as seeking an admission" unless he "has committed an offense identified in [INA § 212(a)(2), 8 U.S.C.] section 1182(a)(2)." The BIA has interpreted that subsection as abridging certain lawful permanent residents' right to travel abroad and return. Specifically, lawful permanent residents who have been convicted of certain types of offenses are now inadmissible upon their return from brief trips

abroad, regardless of whether they are deportable for those same offenses if they remain in this country.

Even if this is the proper interpretation of § 101(a)(13)(C)(v), Congress did not provide for that subsection to apply retroactively to lawful permanent residents who committed offenses before IIRIRA's effective date. First, this Court requires a clear statement from Congress that a statutory provision applies retroactively, and none is present here. Second, if applied to lawful permanent residents who committed offenses before its enactment, § 101(a)(13)(C)(v) would retroactively impose a substantial new disability and penalty upon them for their pre-IIRIRA offenses. They would have to surrender their pre-IIRIRA right to travel abroad, on pain of being removed from this country upon their return. Imposing the disability of not being able to travel abroad, or the penalty of removal upon doing so, would disrupt their settled expectations.

Applying § 101(a)(13)(C)(v) retroactively would also undermine lawful permanent residents' reasonable reliance, when deciding to plead guilty, on their pre-IIRIRA right to travel. Particularly given the canon of construing lingering ambiguities in favor of the immigrant, § 101(a)(13)(C)(v) cannot apply to conduct that predated IIRIRA.

I. STATUTORY BACKGROUND

A. The Immigration and Nationality Act of 1952 (INA)

The main statute governing immigration is the Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1101 et seq.). Until it was amended by IIRIRA, the key event that determined many persons' immigration status was an "entry." *See Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (*Mezei*). The INA defined entry as "any coming of an alien into the United States, from a foreign port or place." INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994). The INA definition also considered intent: it explicitly excepted from its scope a lawful permanent resident (colloquially, a "green-card holder") who showed that "his departure to a foreign port or place . . . was not intended or reasonably to be expected by him." *Id.*

Thus, not every return from a trip abroad amounted to an entry. In *Rosenberg* v. *Fleuti*, the government sought to deport a lawful permanent resident on the ground that he was excludable upon returning from a several-hour visit to Mexico. 374 U.S. 449, 450-51 (1963) (*Fleuti*). This Court "construe[d] the intent exception to § 101(a)(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Id.* at 462. A lawful permanent resident's "innocent, casual, and brief" trip abroad,

this Court held, "may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." *Id.*

The definition of entry mattered because those who were denied entry at the border faced exclusion hearings. In contrast, those who gained entry (or, under *Fleuti*, had not made a new entry) could be removed only through deportation hearings, which afforded greater due process safeguards. *See, e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 32-34 (1982) (*Plasencia*); *Mezei*, 345 U.S. at 212; *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596-99 (1953). Furthermore, the grounds for deportation were narrower than the grounds for exclusion. *Compare* INA § 241(a), 8 U.S.C. § 1251(a) (1994), *with* INA § 212(a), 8 U.S.C. § 1182(a) (1994). For instance, an immigrant who had been convicted of or admitted to committing a "crime involving moral turpitude" was generally excludable. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i) (1994). He was not deportable, however, unless he had been convicted of at least two such crimes, or one such crime with a prison sentence of a year or more within five years of entry. INA § 241(a)(2)(A)(i), (ii), 8 U.S.C. § 1251(a)(2)(A)(i), (ii) (1994). Thus, until IIRIRA, a lawful permanent resident who had been sentenced to and served less than one year in prison for committing just one crime involving moral turpitude was not deportable. Though he might become excludable if he sought entry after a long absence, he

could return from brief trips abroad without ever making an entry. *Fleuti*, 374 U.S. at 462.

"Crime involving moral turpitude" is a term of art that the INA uses but nowhere defines. *See, e.g.*, INA §§ 101, 212(a)(2)(A)(i)(I), 240(a)(2)(A)(i)(I), 8 U.S.C. §§ 1101, 1182(a)(2)(A)(i)(I), 1251(a)(2)(A)(i)(I) (1994). That category encompasses many offenses that are not necessarily serious but require a certain level of *mens rea*. It has been interpreted to include a wide range of offenses, including misdemeanors like stealing bus transfer passes and jumping subway turnstiles to avoid paying the fare. *Michel* v. *INS*, 206 F.3d 253, 256, 262-65 (2d Cir. 2000) (Sotomayor, J.); *Santos-Gonzalez* v. *Reno*, 93 F. Supp. 2d 286, 288 n.2 (E.D.N.Y. 2000). In contrast, the category has been interpreted to exclude at least some forms of burglary, statutory rape, and domestic violence. *Wala* v. *Mukasey*, 511 F.3d 102, 109-10 (2d Cir. 2007) (Sotomayor, J.); *Quintero-Salazar* v. *Keisler*, 506 F.3d 688, 691, 694 (9th Cir. 2007); *Fernandez-Ruiz* v. *Gonzales*, 468 F.3d 1159, 1163-69 (9th Cir. 2006).

B. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)

In 1996, Congress passed sweeping amendments to the INA in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1101 et seq.). IIRIRA

substituted "admission" for "entry" as the key event determining many immigrants' status. IIRIRA § 301(a) (codified at INA § 101(a)(13), 8 U.S.C. § 1101(a)(13)). Immigrants ineligible for admission at a point of entry are now called "inadmissible" (not "excludable"). INA § 212(a), 8 U.S.C. § 1182(a). Those who had been admitted but are not allowed to stay are still called "deportable." INA § 237(a), 8 U.S.C. § 1227(a). Inadmissible and deportable immigrants are now collectively called "removable" and are subject to the same procedural mechanism: a removal proceeding. *See* INA § 240, 8 U.S.C. § 1229a.

IIRIRA defines "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A). The government "bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident" should be treated as "seeking an admission" under INA § 101(a)(13)(C). *In re Rivens*, 25 I. & N. Dec. 623, 625-26 (BIA 2011). In 1998, the Board of Immigration Appeals (BIA) reviewed IIRIRA's new definition of "admission" and determined that the *Fleuti* defense "does not survive the enactment of IIRIRA as a judicial doctrine." *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1065-66 (BIA 1998) (en banc). The BIA reasoned that because the new definition removed the word "intended," it eliminated the intent exception on which *Fleuti* had relied. *Id.* at 1065-66. *But see id.* at 1075 (Rosenberg, Bd. Mem., dissenting) ("[T]he statute is utterly silent as

to the continued vitality of the *Fleuti* doctrine."). This Court has never passed on whether the *Fleuti* doctrine survives IIRIRA, but petitioner assumes for the sake of argument that it does not.

In another significant change, IIRIRA repealed INA § 212(c), which had allowed lawful permanent residents to seek discretionary relief from exclusion or deportation. 8 U.S.C. § 1182(c). IIRIRA replaced § 212(c) with a narrower discretionary provision, called "cancellation of removal," with generally stricter eligibility criteria. *See* IIRIRA § 304 (codified as amended at INA § 240A, 8 U.S.C. § 1229b). In *INS* v. *St. Cyr*, this Court held that the repeal of § 212(c) does not operate retroactively against lawful permanent residents who were eligible for § 212(c) relief when they pleaded guilty. 533 U.S. 289, 326 (2001).

Because IIRIRA made such sweeping changes, Congress delayed its effective date, providing that most of its provisions would take effect on April 1, 1997. *See* IIRIRA § 309(a).

II. FACTS AND PROCEDURAL HISTORY

1. Petitioner Panagis Vartelas, a native and citizen of Greece, has resided in the United States for more than three decades. *See* Administrative Record (AR) 281. He received a student visa at the end of 1979 and came to the United States to study at Queens College. *See id.* at 281, 293. He married a U.S. citizen in 1985 and became a lawful permanent resident in 1989. *Id.* at 185, 254, 281, 321. In the

early 1990s, Mr. Vartelas and his wife had two children, both of whom are U.S. citizens.[1] *Id.* at 191-92, 240, 254. He remains in close contact with them and continues to support them financially, working as a sales manager for a roofing company. *Id.* at 191-92, 200-01, 241-42, 254. He also helps his elderly parents with their family-run bed and breakfast in Greece, which on occasion requires him to travel there. *See id.* at 198-99, 324.

2. In 1992, Mr. Vartelas opened an auto body shop in Queens, New York. AR 186. One of his partners in the shop leased a photocopier to make counterfeit traveler's checks. *Id.* at 186-88, 299-302. When his partner asked Mr. Vartelas for assistance, Mr. Vartelas helped him perforate the sheets into individual checks. *Id.* He neither sold the checks nor received any money from them. *Id.* at 188. In 1994, he pleaded guilty to conspiring to make or possess a counterfeit security, in violation of 18 U.S.C. § 371. *Id.* at 309. The prosecutor agreed that Mr. Vartelas's guilty plea allocution would qualify him for a two-level sentence reduction for acceptance of responsibility. *Id.* at 288-89; U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (1994). That two-level reduction subtracted four months from both the top and the bottom of the guideline range, reducing it to four to ten months' imprisonment. *See* AR 312; U.S.

[1] Mr. Vartelas and his first wife have divorced, and he has remarried another U.S. citizen, though those facts are not in the record.

SENTENCING GUIDELINES MANUAL ch. 5, pt. A (1994) (sentencing table). The sentencing judge sentenced him to four months' incarceration followed by two years' supervised release, a sentence at the bottom of the range. AR 310-12. His conviction did not make him deportable. Years later, the immigration judge found that Mr. Vartelas "was not a major actor in the crime." *Id.* at 123.

3. From January 22 to 29, 2003, Mr. Vartelas traveled to Greece to assist his parents with their family business. *See* AR 317-18. Upon his return, an immigration officer questioned him about his 1994 conviction. *Id.* at 319. Mr. Vartelas explained that he was unaware that his 1994 conviction would impede his return to the United States. *Id.* at 319.[2]

4. In March 2003, the government issued a notice to appear, placing Mr. Vartelas in removal proceedings. The government claimed that he was inadmissible under INA § 212(a)(2)(A)(i)(I) upon his return to this country because he had been convicted of a crime involving moral turpitude in 1994. AR 359-61. Mr. Vartelas appeared before an immigration judge at a series of hearings, but his initial attorney failed to appear twice and failed to submit

[2] Mr. Vartelas had previously made other trips to Greece in the years following his conviction and the enactment of IIRIRA. *See, e.g.*, AR 192-93, 222. He had never encountered any difficulties reentering this country and had never been told that he was seeking an admission or was inadmissible, though these facts are not in the record.

a requested brief. *Id.* at 132-77. At a 2005 hearing, his attorney indicated that he would challenge IIRIRA's retroactive application to Mr. Vartelas's pre-IIRIRA offense. *Id.* at 150-51. But at the next hearing, he conceded that Mr. Vartelas was removable on the ground that he was inadmissible when he returned to the United States. *Id.* at 155, 359-61; *see* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). His attorney did not question whether *Fleuti* had been superseded, whether Mr. Vartelas's brief trip qualified for the *Fleuti* doctrine, or whether IIRIRA's definition of "seeking an admission" in § 101(a)(13)(C)(v) could apply retroactively based on the pre-IIRIRA conviction. AR 155. Instead, he requested discretionary relief from removal under former § 212(c) of the INA. *Id.* at 108-09, 156.

In 2006, the immigration judge denied that request. AR 116. The judge expressed doubt, however, about whether the attorney was correct to concede removability: "The crime, while one of moral turpitude[,] may not have been an excludable offense when he committed it, but he clearly has conceded removability." *Id.* The BIA affirmed, discussing only the factors relating to discretionary relief under former § 212(c). *Id.* at 51, A22 670 589, 2008 WL 2401105 (BIA May 1, 2008) (unpublished).

5. Represented by new counsel, Mr. Vartelas filed a timely motion to reopen and remand his case on the ground that his prior counsel had been ineffective for, among other reasons, conceding his removability. AR 13-30. The motion requested permission to

withdraw that concession on the ground that INA § 101(a)(13), as amended by IIRIRA, cannot apply retroactively to his pre-IIRIRA guilty plea. *Id.* at 23-27.

The BIA denied the motion. It noted that the immigration judge had found "that [previous counsel] had been derelict in his duty." Pet. App. 31. Nevertheless, the BIA held that Mr. Vartelas had not proven prejudice because his argument against applying § 101(a)(13) retroactively "[wa]s misplaced." *Id.*

The court of appeals denied Mr. Vartelas's timely petition for review of the BIA's decision. Pet. App. 28. The court first rejected his argument that the counterfeiting conviction was a petty offense that did not make him removable. Pet. App. 13-15. It then reviewed the retroactivity holding de novo, first explaining that the BIA's statutory interpretation deserved no *Chevron* deference because retroactivity neither implicates the BIA's expertise nor involves a congressional delegation of power to the BIA to fill a statutory silence. Pet. App. 20.

To determine whether Congress intended amended INA § 101(a)(13) to apply retroactively, the court applied the two-step test set forth in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). First, the court asked whether "Congress has expressly prescribed the statute's proper reach." *Id.* at 280. The government conceded, and the court agreed, that "Congress has not expressly prescribed the temporal reach of § 101(a)(13)." Pet. App. 20-21.

Because there is no explicit command, the court went on to decide *Landgraf*'s second step, namely whether applying the statute to this case would have a retroactive effect. The court of appeals held that § 101(a)(13) should be applied to Mr. Vartelas because, in the court's view, it would not interfere with his settled expectations. Pet. App. 21-22, 28. *St. Cyr*, in holding that the repeal of § 212(c) could apply only prospectively, had noted that immigrants had often relied on the possibility of discretionary relief under former § 212(c) when deciding whether to plead guilty to charges that would preserve the possibility of such relief. *Id.* at 22-24 (citing *St. Cyr*, 533 U.S. at 315, 321-24). Here, however, § 101(a)(13)(C)(v) refers to a lawful permanent resident who "has committed an offense" involving moral turpitude, rather than to one who has been convicted of such an offense. *Id.* at 25.

The court of appeals thus treated Mr. Vartelas's decision to plead guilty as immaterial. Reasoning that lawful permanent residents do not reasonably rely on the immigration laws in deciding whether to commit their offenses, the court held that the reliance interests that had informed this Court's decision in *St. Cyr* were inapplicable. AR 25-27. In so holding, the court below rejected Fourth and Ninth Circuit precedents to the contrary. *Id.* at 27-28 (declining to follow *Camins* v. *Gonzales*, 500 F.3d 872 (9th Cir. 2007) (W. Fletcher, J.), and *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004) (Luttig, J.)).

Based on its holding that § 101(a)(13)(C)(v) applies to lawful permanent residents guilty of

pre-IIRIRA offenses, the court held that Mr. Vartelas could not prove under any standard that he was prejudiced by his attorneys' failure to dispute retroactivity. Pet. App. 13, 28. Thus, the court denied his petition for review.

The court of appeals denied a timely petition for panel rehearing or rehearing en banc. Pet. App. 33.

SUMMARY OF ARGUMENT

Congress did not provide for INA § 101(a)(13)(C)(v) to apply retroactively to lawful permanent residents who committed offenses before IIRIRA's effective date. The government cannot bear its heavy burden of overcoming the presumption against retroactivity because IIRIRA does not satisfy either step of the *Landgraf* retroactivity test.

1. First, the statute contains no clear statement mandating retroactive application, as this Court recognized in *St. Cyr.* Indeed, the government conceded below the lack of a clear directive on retroactivity.

2. Second, the statute cannot satisfy *Landgraf*'s second step, which asks whether a statute would have a retroactive effect. If applied to lawful permanent residents whose conduct predated IIRIRA, its effect would be retroactive. IIRIRA's change in law would add a new penalty to pre-IIRIRA conduct by giving the government grounds to remove lawful permanent residents. It would disrupt their settled

expectations that returning from a brief trip would not amount to an entry that would trigger inadmissibility. Applying IIRIRA retroactively would thus "attach[ ] new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270.

IIRIRA's change in the law increases the substantive consequences of pre-IIRIRA conduct; it does not merely adjust prospective relief, jurisdiction, or procedure. It is no answer to say, as the government does, that lawful permanent residents can avoid removal by not traveling abroad. The restrictions that apply to present travel are a new disability imposed because of pre-IIRIRA conduct. Lawful permanent residents cannot avoid this new disability, which all but forbids lawful foreign travel on pain of removal. That disability, as well as the threatened penalty of removal based on pre-IIRIRA conduct, abridges the right to travel abroad.

3. The presumption against retroactivity is based on the general "unfairness of imposing new burdens on persons after the fact"; it does not require proof of reliance on the prior state of the law. *Landgraf*, 511 U.S. at 270. Nevertheless, as this Court recognized in *St. Cyr*, one can presume that lawful permanent residents in general relied on pre-IIRIRA law, which militates against giving the amendment retroactive effect.

Here too, applying the amended statute to lawful permanent residents would undermine their reasonable reliance on pre-IIRIRA law in deciding to plead guilty. Before IIRIRA, the *Fleuti* doctrine protected lawful permanent residents' right to make brief trips abroad without risk of being denied reentry upon return. If they had known that their right to travel under *Fleuti* would later be annulled by Congress on account of their pre-IIRIRA convictions, many lawful permanent residents would instead have chosen to go to trial or negotiated pleas to different charges.

Though § 101(a)(13)(C)(v) speaks in terms of the commission of an offense, and not the conviction, this distinction is immaterial. The consequences that IIRIRA attaches to the commission of certain offenses come into play only when a lawful permanent resident has been convicted of or admits to such offenses. Thus, the BIA correctly reads the scope of § 101(a)(13)(C)(v) as coextensive with § 212(a)(2)(A)(i)(I)'s requirement of a conviction. *Rivens*, 25 I. & N. Dec. at 626-27. In determining whether a lawful permanent resident is "seeking an admission" under the former subsection or is "inadmissible" under the latter subsection, the issue is the same: here, whether Mr. Vartelas has been convicted of or has admitted to a crime involving moral turpitude.

4. Finally, if any ambiguities remain, this Court should construe IIRIRA in favor of preserving lawful permanent residents' defense to removal. *St. Cyr*, 533 U.S. at 320. Thus, § 101(a)(13)(C)(v) should not apply

retroactively to lawful permanent residents' pre-IIRIRA conduct.

ARGUMENT

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. The laws of Ancient Greece and Rome as well as the Napoleonic Code embraced this precept, and Bracton, Blackstone, Chancellor Kent, and Justice Story affirmed its importance in the common law. *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855-56 (1990) (Scalia, J., concurring) (collecting historical sources); 1 WILLIAM BLACKSTONE, COMMENTARIES *46. As Justice Story stated, "every statute, which 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, must be deemed retrospective" and impermissible. *Soc'y for the Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (Story, Circuit Justice, C.C.D.N.H. 1814) (No. 13,156).

This principle applies to civil as well as criminal cases as a strong rule of statutory construction. Indeed, *Society for the Propagation of the Gospel* was a civil case. As this Court recognized two centuries ago, "[w]ords in a statute ought not to have a retrospective operation, unless they are so clear, strong,

and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *United States* v. *Heth*, 7 U.S. (3 Cranch) 399, 413 (1806); *see also Chew Heong* v. *United States*, 112 U.S. 536, 559 (1884) ("[T]he courts uniformly refuse to give to statutes a retrospective operation. . . .") (immigration consequences of international treaty); James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 370, 403-09 (2010) (both "the Framers of the Constitution and the members of Congress who applied its terms in the early [Republic] were strongly committed to norms of prospectivity" that "rul[ed] out retrospective changes in [immigration] rules").

In *Landgraf*, this Court distilled the presumption against retroactivity into a two-step test of statutory construction. First, courts ask whether "Congress has expressly prescribed the statute's proper reach" by "express[ly] command[ing]" retroactive application. 511 U.S. at 280. Second, if there is no explicit command, courts must decide whether construing the law to apply to an event occurring before its enactment "would 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.* If so, courts must reject that construction as impermissibly retroactive.

Congress passed IIRIRA against the backdrop of *Landgraf*, which had been decided only two years

earlier. Here, IIRIRA fails both steps of the *Landgraf* test.

I. IIRIRA CONTAINS NO CLEAR STATEMENT MANDATING RETROACTIVE APPLICATION OF INA § 101(a)(13)(C)(v)

Subsection 101(a)(13)(C)(v) does not mandate its retroactive application to lawful permanent residents whose offenses predate IIRIRA. For a statute to apply retroactively, Congress must express its intent in an "unambiguous directive." *Landgraf*, 551 U.S. at 263. "The standard for finding such unambiguous direction is a demanding one," requiring "'statutory language that was so clear that it could sustain only one interpretation.'" *St. Cyr*, 533 U.S. at 316-17 (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 328 n.4 (1997)). Only language of "unmistakable clarity" will suffice. *Id.* at 318.

No language in § 101(a)(13) even hints at, let alone clearly mandates, retroactive application to lawful permanent residents whose offenses predate IIRIRA. In the proceedings below, the government conceded this point and the court of appeals agreed. Pet. App. 20-21.

Furthermore, in *St. Cyr* this Court rejected the government's contention that IIRIRA as a whole clearly directs that all of its provisions should apply retroactively. 533 U.S. at 316-20. At the time of his pre-IIRIRA guilty plea to a deportable offense, Mr. St. Cyr would have been eligible for discretionary relief

under INA § 212(c). IIRIRA then repealed § 212(c) and purportedly eliminated his eligibility. *Id.* at 293. Applying *Landgraf*, this Court held that the repeal could not apply retroactively because Congress had not manifested a clear intent and because the repeal attached a new disability on account of his guilty plea. *Id.* at 315, 321. As this Court noted, Congress had explicitly made more than a dozen other provisions of IIRIRA retroactive (including another subsection of INA § 101(a)), indicating that it did not intend the remaining provisions to be retroactive as well. *Id.* at 319-20 & n.43; *e.g.*, IIRIRA § 321(b) (codified as amended at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43)) (specifying that IIRIRA's new definition of "aggravated felony" "applies regardless of whether the conviction was entered before, on, or after [September 30, 1996]"). Because § 101(a)(13), like the repeal of § 212(c), contains no mention of retroactivity, *St. Cyr*'s holding forecloses any such argument here.[3]

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[3] Indeed, IIRIRA's structure reflects Congress's clear intent *not* to make the provision retroactive. That intent is apparent from the interaction of § 101(a)(13)(C)(v) and the pre- and post-IIRIRA discretionary waiver provisions, which makes no sense if the statute is construed to apply retroactively. While § 101(a)(13)(C)(v) treats lawful permanent residents who have committed crimes involving moral turpitude as seeking admission, it excepts those who have received discretionary waivers under INA § 212(h) (8 U.S.C. § 1182(h)) or under a new provision enacted by IIRIRA, INA § 240A(a) (8 U.S.C. § 1229b(a)). But there is no exception for lawful permanent residents who received discretionary waivers under former INA § 212(c), the pre-IIRIRA predecessor to § 240A(a) that was at issue in *St. Cyr*.

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II. IF APPLIED TO OFFENSES OCCURRING BEFORE ITS ENACTMENT, INA § 101(a)(13)(C)(v) WOULD HAVE A RETROACTIVE EFFECT

IIRIRA cannot satisfy *Landgraf*'s second step either, because it "attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. "Elementary considerations of fairness" counsel that new laws should not "lightly disrupt[ ]" "settled expectations." *Id.* at 265. Yet applying § 101(a)(13)(C)(v) to lawful permanent residents like Mr. Vartelas would threaten those settled expectations by imposing new legal consequences: many years after their offenses and guilty pleas, it would abrogate their *Fleuti* right to return after brief trips abroad or penalize them with removal if they did return. Those substantive changes establish that § 101(a)(13)(C)(v), if applied to Mr. Vartelas, would be retroactive.

Moreover, persons who have received former § 212(c) relief are categorically ineligible for § 240A(a) relief. INA § 240A(c)(6), 8 U.S.C. § 1229b(c)(6). Yet Congress cannot have intended to treat as immigrants seeking an admission all of the lawful permanent residents with past convictions who, before IIRIRA, had received § 212(c) relief, even though IIRIRA's definition of "seeking an admission" makes no exception for them. The only logical explanation for why Congress saw no need to include an exception for them is that IIRIRA eliminated former § 212(c) waivers for future offenses, and § 101(a)(13)(C)(v) was intended to apply only to post-IIRIRA offenses. Thus, § 101(a)(13)(C)(v) makes sense only as a prospective rule.

A. Applying IIRIRA to Lawful Permanent Residents Like Mr. Vartelas Would Have a Retroactive Effect

1. The principle of non-retroactivity "finds expression in several provisions of our Constitution," including the Contracts Clause, the Takings Clause, the Bill of Attainder Clauses, the Due Process Clauses, and the *Ex Post Facto* Clauses. *Landgraf*, 511 U.S. at 266; *see* U.S. Const. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1; *id.* amends. V, XIV § 1. All of "[t]hese [constitutional] provisions demonstrate that retroactive statutes raise particular concerns." *Landgraf*, 511 U.S. at 266.

"[T]he presumption against retroactivity applies far beyond the confines of the criminal law." *St. Cyr*, 533 U.S. at 324. Indeed, though "the constitutional prohibition on *ex post facto* laws applies only to penal statutes," the Court's test for retroactivity of civil statutes is "borrowed directly from [its] *Ex Post Facto* Clause jurisprudence." *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990) (penal limitation); *Landgraf*, 511 U.S. at 290 (Scalia, J., concurring) (citing *Miller* v. *Florida*, 482 U.S. 423, 430 (1987), an *Ex Post Facto* Clause case, as a source).[4] Thus, when adjudicating claims of civil retroactivity, this Court has repeatedly relied on *Ex Post Facto* Clause cases. *See*, *e.g.*, *St.*

[4] One member of this Court has questioned "the soundness of this limitation" of the *ex post facto* bar to criminal cases. *E. Enters.* v. *Apfel*, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring).

Cyr, 533 U.S. at 325 (applying *ex post facto* case law to the retroactivity of IIRIRA); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 948 (1997) (same, for False Claims Act); *Landgraf*, 511 U.S. at 266-67 & n.20, 269 n.23, 275 n.28, 282 n.35, 285 n.37 (same, for Civil Rights Act of 1991). Where Congress has not spoken with unmistakable clarity in enacting a civil statute, "prospectivity remains the appropriate default rule." *Landgraf*, 511 U.S. at 272.

The overarching presumption that laws, whether criminal or civil, apply only prospectively is critical to protect people's settled expectations. "[C]entral to the *ex post facto* prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" *Miller*, 482 U.S. at 430 (quoting *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981)). This same principle finds expression in civil cases, where "familiar considerations of fair notice, reasonable reliance, and settled expectations" guide retroactivity analysis. *Landgraf*, 511 U.S. at 270.

2. Here, § 101(a)(13)(C)(v) would add a new penalty to the pre-IIRIRA offenses of lawful permanent residents like Mr. Vartelas, by authorizing their removal upon their return from brief trips abroad.

If this were a criminal case, the ban on *ex post facto* laws would categorically forbid such new penalties. As this Court has long recognized, *ex post facto* laws include "[e]very law that changes the

punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.). A "central concern[ ] of the *Ex Post Facto* Clause" is to prevent "'legislature[s from] increas[ing] punishment beyond what was prescribed when the crime was consummated.'" *Lynce* v. *Mathis*, 519 U.S. 433, 441 (1997) (quoting *Weaver*, 450 U.S. at 30); *accord Miller*, 482 U.S. at 430.

Although it is not technically a criminal punishment, adding removal to the consequences of past criminal conduct likewise triggers retroactivity concerns. In deportation cases, "we do well to eschew technicalities and fictions and to deal instead with realities." *Costello* v. *INS*, 376 U.S. 120, 131 (1964). This Court "ha[s] long recognized that deportation is a particularly severe 'penalty.'" *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1481 (2010) (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting)); *accord Jordan* v. *De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) ("a savage penalty"). It may cause "loss of both property and life, or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). Because removal operates as a penalty, it cannot apply retroactively absent specific congressional authorization.

3. Whether it is labeled a penalty or not, retroactively authorizing removal "attaches new legal consequences" to a lawful permanent resident's pre-IIRIRA conduct and disrupts his settled expectations. *Landgraf*, 511 U.S. at 269-70. In *Landgraf*, this Court

considered whether the broader damages provisions enacted by the Civil Rights Act of 1991 could be applied to workplace discrimination that occurred before the Act's effective date. *Id.* at 249-50. Though the stakes were only dollars, not deportation, this Court declined to apply the change retroactively. *Id.* at 283. Courts must guard against laws that increase "[t]he *extent* of a party's liability, in the civil context as well as the criminal." *Id.* at 283-84 (emphasis in original). "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 282 n.35; *see also Hughes Aircraft*, 520 U.S. at 948.

Likewise, making lawful permanent residents inadmissible upon their return from lawful trips abroad based on pre-IIRIRA conduct "clearly '"attaches a new disability, in respect to transactions or considerations already past."'" *St. Cyr*, 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269, which in turn quoted *Society for the Propagation of the Gospel*, 22 F. Cas. at 767 (Story, J.)). Until IIRIRA, lawful permanent residents enjoyed the right to take and return from brief trips abroad. If applied retroactively, IIRIRA would abridge that right based on a long-ago, pre-IIRIRA offense. Because Mr. Vartelas took a brief trip to help his elderly parents in Greece, he now faces "the equivalent of banishment or exile" from the United States, where his wife and children live and

which he has called home for more than thirty years. *Fong Haw Tam* v. *Phelan*, 333 U.S. 6, 10 (1948).

4. The repeal of the *Fleuti* defense is especially disfavored under both this Court's retroactivity and *Ex Post Facto* Clause jurisprudence. Under *Fleuti*, the government could not exclude a lawful permanent resident or detain him as an arriving alien unless it could prove that his trips abroad were not "innocent, casual, and brief" and so were "meaningfully interruptive of [his] permanent residence." 374 U.S. at 462; *Plasencia*, 459 U.S. at 28-29; *see* INA § 235(b), 8 U.S.C. § 1225(b) (1994). Applying § 101(a)(13)(C)(v) retroactively would thus prevent lawful permanent residents like Mr. Vartelas from asserting their *Fleuti* defense in their removal proceedings.

Again, if this were a criminal case, the ban on *ex post facto* laws would flatly forbid abolishing such defenses. "A law that abolishes an affirmative defense . . . contravenes [the *Ex Post Facto* Clause], because it expands the scope of a criminal prohibition after the act is done." *Collins*, 497 U.S. at 49. The same principle applies in the civil context as a strong rule of statutory construction. In *Hughes Aircraft*, the False Claims Act had previously barred *qui tam* suits filed by private parties based on information already possessed by the government. 520 U.S. at 941. An amendment removed that bar, but this Court held that the amendment could not apply retroactively to conduct completed before it took effect. *Id.* at 941-42. The amendment, the Court stressed, "eliminates a defense to a *qui tam* suit." *Id.* at 948. Even though it

did not increase the dollar amount of liability, the amendment nonetheless "'"attach[ed] a new disability"'" based on the prior act, by exposing the company to lawsuits brought by more and different parties. *Id.* (quoting *Landgraf*, 511 U.S. at 269, which in turn quoted *Society for the Propagation of the Gospel*, 22 F. Cas. at 767 (Story, J.)).

Here, as in *Hughes Aircraft*, lawful permanent residents must remain able to raise any defense to removal that existed before IIRIRA, when they committed their offenses and pleaded guilty. Before IIRIRA, lawful permanent residents returning to the country could defend against removal by showing that their trips were not "meaningfully interruptive of [their] permanent residence." *Fleuti*, 374 U.S. at 462. Depriving them of that defense would attach a new disability to them based on their pre-IIRIRA offenses.[5]

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[5] Although Mr. Vartelas's *Fleuti* defense could in theory fail on remand, that possibility does not affect the retroactivity analysis. *See St. Cyr*, 533 U.S. at 325 ("There is a clear difference, for the purposes of retroactivity analysis, between facing *possible* deportation and facing *certain* deportation" (citing *Hughes Aircraft*, 520 U.S. at 949) (emphasis added)).

In any event, Mr. Vartelas's trip was innocent: he traveled to Greece to help his elderly parents with their family business. It was casual: no visa or similar paperwork was required for the trip. *See Fleuti*, 374 U.S. at 462. And it was brief: just one week long. Though the trip in *Fleuti* itself lasted only a few hours, courts have found trips of weeks or even months to be brief enough. *See, e.g.*, *Jubilado* v. *United States*, 819 F.2d 210, 213 (9th Cir. 1987) (three-month trip to bring family to the United

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B. Applying IIRIRA to Lawful Permanent Residents Like Mr. Vartelas Would Change Their Substantive Rights

None of the exceptions to the rule against retroactivity applies to this case. *Landgraf* identified three such exceptions: for statutes that authorize prospective relief or regulate jurisdiction or procedure. *See* 511 U.S. at 273-75.

Under *Fleuti*, Mr. Vartelas's return from his one-week trip did not amount to an entry under pre-IIRIRA law, so he was free to return. Under the court of appeals' decision, however, he would be regarded as "seeking an admission" under § 101(a)(13)(C)(v) and in fact would be inadmissible under § 212(a)(2)(A)(i)(I). That change imposes a substantive disability on Mr. Vartelas, preventing him from traveling abroad and returning, on pain of removal.

Abrogating the *Fleuti* doctrine is nothing like providing new prospective relief such as declaratory

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States); *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253, 1255, 1258 (9th Cir. 1979) (one-month trip to visit dying mother); *Itzcovitz* v. *Selective Serv. Local Bd. No. 6*, 447 F.2d 888, 889, 893-94 (2d Cir. 1971) (three-week trip for job training). A trip lasting a week, a month, or even longer may be considered brief, depending on the circumstances, as long as it is not "meaningfully interruptive of the alien's permanent residence." *Fleuti*, 374 U.S. at 462.

In short, Mr. Vartelas should be able to litigate this colorable issue on remand, as Mr. Fleuti did. *See Fleuti*, 374 U.S. at 463 (vacating and remanding for factual development).

or injunctive relief. In *St. Cyr*, this Court rejected the government's argument that deportation was "inherently prospective" because it concerned an immigrant's "right to remain in this country in the future." 533 U.S. at 324 (internal quotation marks omitted); *see id.* at 324 n.53. That holding governs here as well.

Nor is § 101(a)(13)(C)(v) a jurisdictional statute, *see Hughes Aircraft*, 520 U.S. at 950-51, or a purely procedural change. This Court has excepted purely procedural changes from the non-retroactivity presumption because they "regulate secondary rather than primary conduct." *Landgraf*, 511 U.S. at 275. Committing an offense is primary conduct.[6] The change here affects lawful permanent residents' substantive rights.

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[6] Even procedural changes can have impermissible substantive effects. "[S]imply labeling a law 'procedural' . . . does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause"; "a procedural change may constitute an *ex post facto* violation if it 'affect[s] matters of substance.'" *Collins*, 497 U.S. at 45-46 (quoting *Beazell* v. *Ohio*, 269 U.S. 167, 171 (1925)); *accord Weaver*, 450 U.S. at 29 n.12 ("Alteration of a substantial right . . . is not merely procedural, even if the statute takes a seemingly procedural form."); *see*, *e.g.*, *Lindh*, 521 U.S. at 327 (noting that, under *Landgraf*, "change[s to] standards of proof and persuasion . . . go[ ] beyond 'mere' procedure to affect substantive entitlement to relief").

C. The Disability and Penalty Imposed by IIRIRA Are Based on Pre-IIRIRA Conduct, Not Post-IIRIRA Travel

1. In opposing certiorari, the government argued that applying § 101(a)(13)(C)(v) to Mr. Vartelas would not be retroactive because his trip abroad occurred in 2003, years after IIRIRA's 1997 effective date, and constituted a "determinative event for retroactivity analysis." BIO 12. The government argued that Mr. Vartelas "could have avoided the application of the statute. . . . [by] refrain[ing] from departing from the United States (or from returning to the United States)." BIO 13. These contentions misconceive the nature of the rights abridged by the statute as a result of past conduct, namely the right to return after brief trips abroad and the corresponding right not to be penalized for that travel based on pre-IIRIRA conduct.

Retroactivity analysis "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf*, 511 U.S. at 270). Here, as a "commonsense, functional" matter, IIRIRA unquestionably attaches "new legal consequences" to lawful permanent residents' pre-IIRIRA offenses. When Mr. Vartelas committed the offense, and when he pleaded guilty, he had no notice that any travel abroad in the future, no matter how brief, would jeopardize his lawful permanent resident status. In other words, he retained the right, under

Fleuti, to continue to make and return from brief trips abroad. Years later, IIRIRA added a new, retroactive consequence to his pre-IIRIRA conviction by abridging his right to travel abroad. This new disability attached at the time of IIRIRA's enactment but is based on past, pre-IIRIRA conduct that he cannot undo.

It is thus no answer to say, as the government does, that Mr. Vartelas could have refrained from traveling abroad. BIO 13. True, a lawful permanent resident who stays in the United States can avoid making an entry that could trigger inadmissibility and removal. But the right to make such trips without risking removal was among the rights Mr. Vartelas preserved when he pleaded guilty before IIRIRA. For Mr. Vartelas, like many in his situation, not traveling would mean forever surrendering the right to see and help his elderly parents, lest he jeopardize his lawful permanent resident status. Applying IIRIRA to Mr. Vartelas both imposes a disability on him by abridging his right to travel and adds a new penalty – the risk of removal – based on his pre-IIRIRA conduct. *See Olatunji*, 387 F.3d at 392, 398.

The retroactive repeal of *Fleuti* would indisputably "attach[ ] new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. That is the correct legal test, and the inquiry should end there.

2. Not only does applying the statute to lawful permanent residents who committed pre-IIRIRA offenses have clear retroactive effect under *Landgraf*, but it also satisfies the standard advocated by Justice Scalia in his concurrence in *Martin*. Justice Scalia opined that "the decision of which reference point (which 'retroactivity event') to select should turn upon which activity the statute was intended to regulate." *Martin*, 527 U.S. at 363 (Scalia, J., concurring in part and concurring in the judgment). That inquiry should focus "not on the subjective motivation of the legislature in enacting the [provision], but rather on whether objectively the new statute. . . . had the effect of" adding a new consequence to pre-IIRIRA activity. *Lynce*, 519 U.S. at 442-43 (1997) (citing *Weaver*, 450 U.S. at 33) (*ex post facto* decision). For example, a law restricting future good-time sentence reductions is *ex post facto* if applied to sentences for offenses committed before its enactment. *Weaver*, 450 U.S. at 32-33. Though in form the good-time-credits law in *Weaver* applied only after its effective date, in substance it increased the consequences imposed on account of prior offenses. *Id.* at 31. Here too, the statute imposes a new disability and penalty on Mr. Vartelas based on his pre-IIRIRA offense, not based on his innocent post-IIRIRA travel.

Subsection 101(a)(13) enumerates six criteria that require returning lawful permanent residents to be treated as seeking an admission. Three of the six criteria involve some form of earlier misconduct, namely abandonment of one's lawful permanent

resident status, departure while in removal or extradition proceedings, or commission of a crime involving moral turpitude or the like. INA § 101(a)(13)(C)(i), (iv), (v), 8 U.S.C. § 1101(a)(13)(C)(i), (iv), (v).[7] Absent these factors, a lawful permanent resident may travel abroad without being treated as seeking an admission upon his return. The statute does not make foreign travel unlawful. Even if the travel serves as an occasion for screening, as the government suggests (BIO 11-12), the penalty of inadmissibility flows from impermissible past conduct. Historically, this Court has understood deportation triggered by a criminal conviction as a "penalty," "the forfeiture for misconduct of a [lawful permanent resident's] residence in this country." *Fong Haw Tan*, 333 U.S. at 10.[8] That is how it operates here.

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[7] Two other criteria involve present misconduct, namely illegal activity while abroad or trying to enter at an unauthorized place or time. INA § 101(a)(13)(C)(iii), (vi), 8 U.S.C. § 1101(a)(13)(C)(iii), (vi). Only one of the six criteria is apparently innocent: an absence of more than 180 days, though that absence might amount to abandonment of one's lawful permanent resident status. INA § 101(a)(13)(C)(ii), 8 U.S.C. § 1101(a)(13)(C)(ii).

[8] That understanding of § 101(a)(13)(C)(v) as a penalty for past misconduct fits IIRIRA's title, which targets "Immigrant Responsibility" for misconduct rather than travel by lawful permanent residents. It also fits other provisions of IIRIRA, such as those broadening the category of aggravated felonies and abolishing or limiting relief for many immigrants convicted of crimes. *See, e.g.*, IIRIRA § 321(a) (broadening the definition of an aggravated felony); *id.* § 304 (repealing INA § 212(c) and making aggravated felons ineligible for cancellation of removal);

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In addition, the effect of § 101(a)(13)(C)(v) is not only to penalize past misbehavior, but also to provide incentives to keep lawful permanent residents on good behavior. After IIRIRA, lawful permanent residents have notice that committing even minor offenses involving moral turpitude can result not only in imprisonment but also in a permanent bar to travel on pain of becoming removable. While minor offenses might carry only brief jail terms and thus provide limited deterrence, the prospect of removal would make many lawful permanent residents hypervigilant about obeying the law. The abrogation of *Fleuti* thus adds a weighty deterrent to committing such offenses. *Cf. Landgraf*, 511 U.S. at 282 & n.35 (noting that the availability of damages would change managers' conduct and help to prevent discrimination). But deterrence can operate only prospectively, after IIRIRA has given notice of the removal penalty. It would be nonsensical to read IIRIRA as seeking to deter past misconduct. *See id.* at 282 n.35.

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id. §§ 326-329, 332 (authorizing systems for identifying and tracking criminal aliens, appropriating funds to cover states' expenses of incarcerating criminal aliens, and requiring annual reporting on the numbers of illegal aliens convicted and incarcerated for various offenses); *id.* §§ 330-331 (addressing treaties governing transfers of immigrant prisoners to other countries). Likewise, upon signing IIRIRA into law, President Clinton stressed that it "crack[s] down on illegal immigration . . . in the criminal justice system – without punishing those living in the United States legally." Statement of the President on Signing Budget and Immigration Bill, 1996 WL 555150, at *2 (Sept. 30, 1996).

3. This is not a case in which the change in law prospectively targets a current or ongoing crime, as was the case in *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006). After his deportation and several illegal reentries, Fernandez-Vargas unlawfully remained in the United States for more than two decades, undetected by immigration authorities until 2003. *Id.* at 35. As an illegal alien, he was deportable at any time. This Court found no retroactive effect in applying IIRIRA to an illegal alien like Fernandez-Vargas who had illegally reentered before IIRIRA and illegally remained after its effective date. It noted that retroactivity analysis is "meant to avoid new burdens imposed on completed acts." *Id.* at 46. The statute in that case targeted the "indefinitely continuing violation" of "cho[osing] to continue his illegal presence, after illegal reentry and after the effective date of the new law . . . not a past act that he is helpless to undo." *Id.* at 44. "Fernandez-Vargas continued to violate the law by remaining in this country day after day, and . . . the United States was entitled to bring that continuing violation to an end." *Id.* at 46 n.13.

Here, by contrast, there is no ongoing or post-IIRIRA crime. Mr. Vartelas's only offense occurred and was resolved before IIRIRA: he pleaded guilty to it, capped his liability, and paid his debt to society. He is not an illegal alien whose very presence is an ongoing crime justifying removal. He is a lawful permanent resident and has always been in this country lawfully. Likewise, his brief trips to help his

parents in Greece are entirely lawful, and he wants to continue to make these trips. But for his 1994 conviction, those trips themselves would not subject him to the possibility of removal. The inadmissibility triggered by his lawful trips is thus a pure retroactive penalty for conduct completed before IIRIRA.

In short, by amending the INA to add § 101(a)(13)(C)(v), Congress attached a new disability and a new penalty to crimes involving moral turpitude. Congress expressed no clear intent, however, to apply that new penalty and disability retroactively to past offenses or convictions.

III. IIRIRA IS IMPERMISSIBLY RETROACTIVE REGARDLESS OF RELIANCE, BUT RELIANCE BY THOSE WHO PLEADED GUILTY UNDER PRE-IIRIRA LAW ESTABLISHES AN ESPECIALLY OBVIOUS AND SEVERE RETROACTIVE EFFECT

The presumption against retroactivity is grounded in "the unfairness of imposing new burdens on persons after the fact," rather than on any reliance by those affected by a change in the law. *Landgraf*, 511 U.S. at 270. The court of appeals therefore erred in ruling that reliance was a prerequisite for impermissible retroactivity. Even if the court were right to require reliance, however, it also erred by ignoring the substantial reliance on existing law by lawful permanent residents who pleaded guilty. That reliance makes the statute's retroactive effect all the more severe.

A. Reliance on Pre-Existing Law Is Not Necessary for a New Law to Have a Retroactive Effect

1. In *Landgraf*, this Court noted that while the Civil Rights Act of 1991 authorized previously unavailable civil damages for employment discrimination, the discrimination itself had been illegal for decades. 511 U.S. at 282 & n.35. Thus, it acknowledged, "concerns of unfair surprise and upsetting expectations" upon applying the new law would be "attenuated." *Id.* But that lack of reliance by employers was of no consequence. As the Court explained, "[e]ven 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.* (citing *Weaver*'s interpretation of the *Ex Post Facto* Clause, 450 U.S. at 28-30). *Landgraf*'s decision turned not on any showing of reliance, but on "whether the new provision attache[d] new legal consequences to events completed before its enactment." *Id.* at 269-70.

Likewise, in *Hughes Aircraft*, this Court noted that "impermissible retroactivity" takes "various formulations," and no particular kind of harm is a "necessary condition" for finding retroactivity. 520 U.S. at 947 (emphasis and comma omitted). As in *Landgraf*, the Court focused on additional burdens: whether applying the law retroactively "'"attach[ed] a new disability, in respect to transactions or considerations already past."'" *Id.* at 948 (quoting

Landgraf, 511 U.S. at 269, which in turn quoted *Society for the Propagation of the Gospel*, 22 F. Cas. at 767 (Story, J.)). And, as Judge Luttig observed in a case presenting the same issue as this one, this Court did so without "a single word of discussion as to whether Hughes Aircraft – or, for that matter, similarly situated government contractors – had relied on the eliminated defense to its detriment." *Olatunji*, 387 F.3d at 391 (emphasis omitted). *Hughes Aircraft*, like *Landgraf*, never mentioned reliance as a prerequisite for a retroactivity claim. As in *Landgraf*, Hughes Aircraft's actions in submitting false claims to the government had long been illegal, so it could not have relied on a right to violate the law. But the lack of reliance was immaterial.

In *St. Cyr*, this Court treated reliance as just one of several factors that inform the retroactivity inquiry. *See* 533 U.S. at 321 n.46. *St. Cyr* held that discretionary relief from deportation under former INA § 212(c) remained available to a lawful permanent resident who had pleaded guilty before IIRIRA to a crime that would later bar that relief under IIRIRA. *Id.* at 293, 326. The Court considered the case of another lawful permanent resident, Charles Jideonwo, who had expressly relied on the availability of § 212(c) relief. *Id.* at 323. *St. Cyr* found Mr. Jideonwo's case "instructive" as to the frequency with which "a great number of defendants in Jideonwo's and St. Cyr's position agreed to plead guilty." *Id.* at 323.

Under *St. Cyr,* reliance on the old law, while sufficient to establish an "obvious and severe retroactive effect," is not necessary to show impermissible retroactivity. 533 U.S. at 325; *see Olatunji*, 387 F.3d at 389, 393. *St. Cyr* reiterated Justice Story's enduring rule that a "statute has retroactive effect when it '"takes away or impairs vested rights acquired under existing laws . . . *or* attaches a new disability, in respect to transactions or considerations already past."'" *St. Cyr*, 533 U.S. at 321 (emphasis added) (quoting *Landgraf*, 511 U.S. at 269, which in turn quoted *Soc'y for the Propagation of the Gospel*, 22 F. Cas. at 767 (Story, J.)). As *St. Cyr* explained, Justice Story's formulation "describes several '*sufficient*,' as opposed to '*necessary*,' conditions for finding retroactivity." *Id.* at 321 n.46 (emphases in original) (quoting *Hughes Aircraft*, 520 U.S. at 947); *see also Fernandez-Vargas*, 548 U.S. at 44 n.10 (treating Justice Story's vested-rights category as distinct from his category of laws imposing "new consequences [on] past acts"). *St. Cyr* did not add a new reliance requirement to Justice Story's classic formulation or to the holdings of *Landgraf* or *Hughes Aircraft*. Whether or not one can prove reliance, a new disability based on past conduct violates the presumption against retroactivity.

2. Finally, a reliance requirement would not square with the presumption that Congress intends its laws to operate only prospectively. "It is a strange 'presumption,' in our view, that arises only on so heightened a showing as actual reliance. . . ."

Ponnapula v. *Ashcroft*, 373 F.3d 480, 491 (3d Cir. 2004) (Becker, J.). "[W]here Congress has apparently given no thought to the question of retroactivity whatever, there is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply retroactively. Anything more, in the face of complete congressional silence, is nothing but judicial legislation." *Olatunji*, 387 F.3d at 394.

Thus, no proof of reliance is necessary. It is enough that IIRIRA attaches an additional consequence to pre-IIRIRA offenses. The court of appeals erred in concluding otherwise.

B. In Any Event, Applying IIRIRA Retroactively Would Upset Lawful Permanent Residents' Reasonable Reliance on the *Fleuti* Doctrine in Pleading Guilty

1. Lawful Permanent Residents Reasonably Relied upon the *Fleuti* Doctrine in Deciding Whether to Plead Guilty

Even though reasonable reliance on the prior statutory scheme is not necessary to show impermissible retroactivity, this Court may take such reliance into account, as it did in *St. Cyr*. *See* 533 U.S. at 324; *see also Landgraf*, 511 U.S. at 270. When pleading guilty, many lawful permanent residents like Mr. Vartelas have reasonably relied on the known

immigration consequences of a plea. Until 1997, one of the most important consequences would have been their continued ability to travel abroad under *Fleuti*. Applying the new statute to those with pre-IIRIRA offenses would violate that reliance. For the reasons given above, applying the new § 101(a)(13)(C)(v) would be retroactive, and thus impermissible, regardless of reliance. In addition to those reasons, lawful permanent residents' reliance makes the retroactivity especially "obvious and severe." *St. Cyr*, 533 U.S. at 325.

A statute is retroactive if it upsets the expectations of lawful permanent residents who relied on the existing state of the law when they agreed to plead guilty. *St. Cyr*, 533 U.S. at 321. "Plea agreements involve a *quid pro quo* between a criminal defendant and the government." *Id.* In exchange for surrendering their constitutional rights and conserving prosecutorial resources, defendants expect various assurances, including assurances regarding any possible effect on their immigration status and rights. *See id.* at 322-23. "There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *Id.* at 322 (quoted in *Padilla*, 130 S. Ct. at 1481-82). Indeed, "[p]reserving [their] right to remain in the United States may be more important to [them] than any potential jail sentence."

Id. at 322 (quoted in *Padilla*, 130 S. Ct. at 1483) (internal quotation marks omitted).

Thus, in *St. Cyr*, preserving the possibility of discretionary relief "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." 533 U.S. at 323. Once prosecutors have benefitted from immigrants' guilty pleas, applying IIRIRA retroactively to those immigrants "would surely be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.* at 323-24 (quoting *Landgraf*, 511 U.S. at 270).

The same is true here. Lawful permanent residents like Mr. Vartelas reasonably relied on the state of the immigration law at the time of their pleas. *St. Cyr*, 533 U.S. at 322, 325 n.55 (citing *Chew Heong*, 112 U.S. at 559). By pleading guilty to a crime involving moral turpitude, those lawful permanent residents gave up the chance of acquittal or a lesser conviction in exchange for "some perceived benefit" – namely, a shorter prison term and known immigration consequences of their pleas. *Id.* at 322. Lawful permanent residents like Mr. Vartelas were on notice that pleading guilty to a crime involving moral turpitude would impede taking extended trips abroad. But he and similarly situated lawful permanent residents relied on their continuing right under *Fleuti* to make brief trips abroad, to help their families or for other

innocent purposes.[9] This reliance on *Fleuti* was eminently reasonable, "[f]or it would seem never to be unreasonable for one to rely upon a duly enacted or promulgated law." *Olatunji*, 387 F.3d at 396.

Even though they have made their permanent homes here, lawful permanent residents consider their right to travel abroad to be of paramount importance. Many must make brief trips abroad to visit loved ones, care for sick relatives, tend to business, and attend weddings and funerals. *See* Nancy Morawetz, *The Invisible Border: Restrictions on Short-Term Travel by Noncitizens*, 21 GEO. IMMIGR. L.J. 201, 223-26 (2007). Particularly because lawful permanent residents cannot petition to bring their parents here permanently, many have no choice but to return home to tend to those who are too old or ill to travel. *See id.* at 203 & n.4, 223. The right to travel abroad is thus precisely the kind of consideration that lawful permanent residents "are acutely aware of" in deciding whether to plead guilty. *St. Cyr*, 533 U.S. at 322.

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[9] Indeed, at oral argument before this Court in another case, the government contended that a lawful permanent resident would have relied on *Fleuti*'s continued existence for another consideration, namely whether he had made an entry within five years before his guilty plea and thus would be ineligible for discretionary relief under former INA § 212(c). Transcript of Oral Argument at 38, *Judulang* v. *Holder*, No. 10-694 (U.S. Oct. 12, 2011).

Had they known that their guilty pleas would later foreclose *all* travel outside the United States, many lawful permanent residents likely would not have agreed to plead guilty. They might have insisted on trials or negotiated pleas to offenses not involving moral turpitude or to ones that would qualify for the petty-offense exception. *See* INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (exempting offenses for which the maximum sentence is one year or less and the actual sentence imposed is six months or less).[10]

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[10] It is no answer to suggest that Mr. Vartelas should have applied for discretionary relief under former INA § 212(c) before his brief trip to Greece in 2003. BIO 13. Relief under that provision is granted only as a matter of discretion. It is not guaranteed and therefore is not the same as the right to travel that Mr. Vartelas previously enjoyed under *Fleuti*. *Cf. St. Cyr*, 533 U.S. at 325 (stressing the "clear difference . . . between facing possible deportation and facing certain deportation"). In fact, when Mr. Vartelas applied for relief under former § 212(c) during his removal proceedings, his claim was denied. AR 116.

In any event, there was no reason why Mr. Vartelas would have thought he needed to apply for such relief. This Court's precedents in *Landgraf* and *St. Cyr* indicated that § 101(a)(13)(C)(v) could not apply retroactively to his pre-IIRIRA offense to deprive him of the protection of the *Fleuti* doctrine.

Finally, Mr. Vartelas might not have known to be attentive to changes in immigration law following his plea. While ignorance of the law is generally no excuse, Mr. Vartelas did not and is not accused of violating the law after IIRIRA. Moreover, expecting ordinary people to follow changes in the law becomes unfair when dealing with "highly technical statutes that present[ ] the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan* v. *United States*, 524 U.S. 184, 194 (1998); *see also Padilla*, 130 S. Ct. at 1490 (Alito, J., concurring in the judgment) (expressing concern about requiring attorneys

(Continued on following page)

Applying the new statute to unsettle that kind of reliance interest would be a particularly onerous and unwarranted retroactive change. In the absence of a clear congressional intent to do so, it should be rejected.

2. The Court of Appeals Erred in Dismissing Lawful Permanent Residents' Reliance Interests

1. The decision below erroneously concluded that any reliance on existing law by those in Mr. Vartelas's position, at the time they pleaded guilty, is irrelevant. In distinguishing this case from *St. Cyr*, the court of appeals focused on a linguistic difference between § 101(a)(13)(C)(v), at issue here, and former § 212(c), at issue in *St. Cyr*. Subsection § 101(a)(13)(C)(v) provides that anyone who "has committed an offense identified in section 1182(a)(2)," INA § 212(a)(2), which includes a crime involving moral turpitude, is generally regarded as "seeking an admission." INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v). Under § 101(a)(13)(C)(v), the court stated, a lawful permanent resident must generally be "regarded as seeking

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to provide immigration advice because "nothing is ever simple with immigration law") (internal quotation marks omitted). Here, Mr. Vartelas's conduct was not just "apparently" innocent – it was a lawful trip abroad by a lawful permanent resident. To suggest that he should have taken remedial steps before traveling creates a novel burden to determine, *ex ante*, whether a perfectly lawful act will trigger new penalties for old, already-penalized conduct.

an admission" if he "has committed [a specified] offense," rather than if he has been convicted or pleaded guilty. *Id.*; Pet. App. 17, 24-25. By contrast, the court of appeals interpreted former § 212(c) as permitting discretionary relief for those "convicted" of offenses and not simply those who committed offenses. Pet. App. 24-25. (The operative sentence of former § 212(c), however, uses neither term.) As a result, the court held that reliance interests should be assessed as of the time the lawful permanent resident committed the offense, not when he decided to plead guilty. *Id.* On that basis, the court of appeals concluded that lawful permanent residents' reliance on pre-IIRIRA law in pleading guilty is of no consequence here. Pet. App. 27-28.

Based on that proposition, the court of appeals attempted to distinguish *St. Cyr*. The court believed that former § 212(c)'s supposed dependence on the fact of conviction underpinned this Court's consideration of Mr. St. Cyr's reliance interest in pleading guilty. *Id.* The court stated that one cannot reasonably rely on the continued availability of an immigration benefit in deciding to commit a criminal offense, *id.* at 25, even though the *ex post facto* bar forbids increasing the penalties imposed upon past offenses. *Cf. Apprendi* v. *New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (advocating the fairness of a system in which "the criminal will never get *more* punishment than he bargained for when he did the crime") (emphasis in original); *Landgraf*, 511 U.S. at 282 n.35 (noting that managers are expected to

change their behavior in response to monetary penalties, which may deter discrimination).

2. Even if the court of appeals were theoretically correct in rejecting reliance interests at the time of the commission of an offense, its decision would founder as a practical matter. In the real world, the commission of an offense by itself generally will not trigger immigration consequences unless the lawful permanent resident has been convicted of it. Unless the lawful permanent resident admits every factual element of guilt, the government will be able to prove the commission of an offense only by virtue of some formal judicial finding, usually by guilty plea or occasionally by conviction at trial. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbls. 5.24.2010, 5.46.2006, http://www.albany.edu/sourcebook/tost_5.html (last visited Nov. 11, 2011) (97% of federal convictions in 2010, as well as 94% of state felony convictions in 2006, were by guilty plea); *In re E– N–*, 7 I. & N. Dec. 153, 153 (BIA 1956) (no "valid admission" to statutory rape where an "admission as to the age of the girl involved" was lacking).

In other words, the commission of an offense usually matters in practice only because it results in a conviction. Congress is presumably aware that most criminal defendants plead guilty. When Congress enacted IIRIRA, it was thus on notice that the reliance interests at stake would generally be those of lawful permanent residents who were considering the immigration consequences of pleading guilty. These

reliance interests existed regardless of whether particular provisions of IIRIRA were tied to the commission or the conviction of an offense.

3. In order to defend the court of appeals' distinction, the government suggests that those seeking an admission under § 101(a)(13)(C)(v) constitute a broader category than those inadmissible under § 212(a)(2). BIO 11-12. The government contends that Congress meant to cast a broader net to examine a universe of potentially inadmissible lawful permanent residents, even though only a subset of them will ultimately prove inadmissible. *Id.* Thus, the government posits, seeking an admission under § 101(a)(13)(C)(v) should not be read as narrowly as inadmissibility under § 212(a)(2)(A)(i)(I), which requires a conviction and not just commission of a crime involving moral turpitude. *Id.*

The BIA, however, rejects the government's interpretation. It reads § 101(a)(13)(C)(v) as coextensive with § 212(a)(2), which the former subsection cross-references. In *Rivens*, the BIA considered who bears the burden of proving that a lawful permanent resident is seeking an admission under § 101(a)(13)(C)(v). 25 I. & N. Dec. at 625-26. It held that the government bears the burden of proof on that point by clear and convincing evidence. *Id.* The BIA concluded that it need not decide which party bears the burden of proving inadmissibility under § 212(a)(2)(A)(i)(I) for a crime involving moral turpitude, noting that the findings for the two provisions are identical. *Id.* at 626-27. In other words, if a lawful

permanent resident is seeking an admission under § 101(a)(13)(C)(v), he is also inadmissible under § 212(a)(2). *Id.*

As the three-judge panel of the BIA explained: "The exception to the general rule in section 101(a)(13)(C) . . . , namely, the commission of an offense identified in section 212(a)(2), *coincides with* the ground of inadmissibility . . . , that is, a conviction for a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the [INA]." *Rivens*, 25 I. & N. Dec. at 626-27 (emphasis added). "Thus," the BIA stated, "if the [government] establishes that the respondent is an applicant for admission under section 101(a)(13)(C)(v) of the [INA], it will have de facto established the respondent's inadmissibility." *Id.* at 627.

Because the BIA exercises discretion delegated to it by the Attorney General, the designated enforcer of the INA, the BIA's decision in *Rivens* is entitled to *Chevron* deference. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999); *see also INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987). As the BIA recognized, the two sections governing seeking an admission and inadmissibility "coincide[ ]": there is no gap between the two, as both are triggered by a conviction for a crime involving moral turpitude. In this context, seeking an admission under § 101(a)(13)(C)(v) can be triggered only when an immigrant is inadmissible under § 212(a)(2)(A)(i)(I). The latter section and thus the former section require a conviction or an admission of guilt, not just commission of an offense.

4. The government's interpretation to the contrary would lead to absurd results. It would indeed create a gap between those seeking an admission and those who are inadmissible – except that in many cases, that gap would make the group of aliens seeking admission *smaller* than the group who could be found inadmissible.

INA § 212(a)(2) renders inadmissible any immigrant who falls within enumerated categories of criminal and related grounds. Some of its subsections require convictions or admissions of certain crimes, such as § 212(a)(2)(A)(i) (convictions for crimes involving moral turpitude).[11] Other subsections require lower standards and different kinds of proof, such as "know[ledge] or . . . reason to believe [the immigrant] is or has been an illicit [drug] trafficker." INA § 212(a)(2)(C)(i), 8 U.S.C. § 1182(a)(2)(C)(i); *see also* INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D) (persons coming to engage in prostitution or commercialized vice). Still other subsections require only secondary association with a crime, such as being a known drug trafficker's spouse or child who knew or should have known that the spouse or child derived any benefit

[11] Some of its subsections require not only convictions but also certain sentences. *E.g.*, INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii) (petty-offense exception for convictions with maximum sentences of no more than one year and actual sentences imposed of no more than six months); INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B) (multiple convictions with sentences totaling five years or more).

from the trafficking. INA § 212(a)(2)(C)(ii), 8 U.S.C. § 1182(a)(2)(C)(ii).

Yet under the government's and court of appeals' interpretation, drug traffickers and their families might qualify as not seeking an admission in the first place, even though their conduct falls within § 212(a)(2)(C). Known traffickers and their families would fall into a gap between the two sections: although they are inadmissible under § 212(a)(2)(C) simply for being known traffickers or their family members, they would not be seeking an admission under § 101(a)(13)(C)(v) unless the government could prove that they had committed an offense. In the case of known traffickers, that would sometimes be difficult; in the case of their family members, it would often be impossible. These aliens would be inadmissible, but to no avail, because they would not be deemed to be seeking an admission in the first instance.

Given the specificity of the proof required by § 212(a)(2), the two provisions must be read to "coincide[ ]." *Rivens*, 25 I. & N. Dec. at 627. That is, § 101(a)(13)(C)(v) refers to commission of an offense only to cross-reference the specific proof of commission required by § 212(a)(2), such as conviction of a crime involving moral turpitude. Any of the kinds of acts and proof specified in § 212(a)(2), such as being a known drug trafficker or a family member of a known trafficker, would equally amount to commission within the meaning of § 101(a)(13)(C)(v). Here, in short, a conviction of or admission to a crime

involving moral turpitude is the operative event for § 101(a)(13)(C)(v).

IV. ANY LINGERING AMBIGUITIES SHOULD BE CONSTRUED IN FAVOR OF THE LAWFUL PERMANENT RESIDENT

For the reasons already stated, *Landgraf*'s two-step test yields a clear result: § 101(a)(13)(C)(v) does not apply to conduct occurring before its effective date. But if any doubt remains about whether it is impermissibly retroactive, this Court should construe the statute in favor of lawful permanent residents. "The presumption against retroactive application of ambiguous statutory provisions [is] buttressed by 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *St. Cyr*, 533 U.S. at 320 (quoting *Cardoza-Fonseca*, 480 U.S. at 449); *see also INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello*, 376 U.S. at 128. Thus, even where "construe[ing] this statutory provision less generously to the alien might find support in logic," this Court must "nonetheless be constrained by accepted principles of statutory construction in this area of law to resolve that doubt in favor of the petitioner." *Costello*, 376 U.S. at 128.

Because "deportation is a drastic measure and. . . . a penalty," this Court should "resolve the doubts in favor of [the more lenient] construction." *Fong Haw Tan*, 333 U.S. at 10. This rule, akin to the rule of lenity, ensures that an immigration penalty or

disability will apply retroactively only when Congress has considered these consequences and expressed its intent with unmistakable clarity. To the extent that any ambiguity remains, this Court should "not assume that Congress meant to trench on [an immigrant's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Id.* Thus, INA § 101(a)(13)(C)(v) should be read to apply prospectively only to offenses or pleas occurring after its effective date.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

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STATUTORY APPENDIX

I. Former INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994), as in effect before 1997

8 U.S.C. § 1101 (1994). Definitions

(a) As used in this chapter –

(13) The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

II. Current INA § 101(a)(13)(A), (C), 8 U.S.C. § 1101(a)(13)(A), (C) (as amended by IIRIRA § 301(a), effective Apr. 1, 1997)

8 U.S.C. § 1101. Definitions

(a) As used in this chapter –

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

* * *

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien –

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from

the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

III. Current INA § 212(a)(2)(A)-(D), 8 U.S.C. § 1182(a)(2)(A)-(D)

8 U.S.C. § 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if –

(I) the crime was committed when the alien was under 18 years of age, and the

crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political

offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe –

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the

financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who –

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

IV. Former INA § 212(c), 8 U.S.C. § 1182(c) (1994), as in effect before 1996 (repealed by IIRIRA § 304(b))

8 U.S.C. § 1182(c) (1994). Excludable aliens

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.