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

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JIM WALDEN
AKIVA SHAPIRO
CHRISTOPHER MULLER
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166

DAVID DEBOLD
Counsel of Record
MOLLY CLAFLIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

Counsel for Amici Curiae

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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INTEREST OF *AMICI CURIAE*[1]

Amici curiae National Association of Criminal Defense Lawyers, National Legal Aid & Defender Association, Immigrant Defense Project, Immigrant Legal Resource Center, and National Immigration Project of the National Lawyers Guild are leading criminal and immigration defense associations that, among other things, provide training and legal resources to attorneys practicing in the fields or criminal and immigration law. *Amici* have a fundamental interest in the fair and just administration of the immigration statutes relating to the criminal justice system, in accordance with the dictates of the Constitution, the will of Congress, and the decisions of this Court. *Amici* have a particular interest, and vast experience, in providing guidance to lawful permanent residents in criminal proceedings, including legal advice about the immigration consequences of criminal convictions, the options to pursue in plea negotiations, and the ultimate decision whether and under what conditions to plead guilty. More detailed information about individual *amici* is provided in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

The "principle that the legal effect of conduct should ordinarily be assessed under the law that ex-

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief and copies of their letters of consent have been lodged with the Clerk of the Court.

isted when the conduct took place has timeless and universal appeal." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). In *Landgraf v. USI Film Prod.*, this Court articulated a two-step process for determining the intended temporal reach of a statute. First, a court looks to whether "Congress has expressly prescribed the statute's proper reach." 511 U.S. 244, 280 (1994). If Congress has done so, the inquiry ends. If not, the second step is to apply the presumption against retroactivity. The law will not be applied to "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.*; *see also Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (C.C.N.H. 1814) (Story, J.) ("[E]very 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.").

The version of Section 101(a)(13) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 ("INA") in effect until 1997 stated 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 . . . was not intended." *See* 8 U.S.C. § 1101(a)(13) (1994). In *Rosenberg v. Fleuti*, this Court construed this statute to exempt as "not intended" any "innocent, casual, and brief trips abroad." 374 U.S. 449, 461–62 (1963). Therefore, the statute permitted those who previously earned lawful permanent resident status

to take short trips abroad, for such things as attending to family obligations, even if something new in their background would now make them ineligible under the immigration law for an initial entry to the United States.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), as interpreted by the government, altered this regime. According to the Board of Immigration Appeals' interpretation of the amendments to INA § 101(a)(13), under IIRIRA (which now defines "admission" as opposed to "entry"), the ability to return to the United States, even after "innocent, casual, and brief" trips abroad, is now limited to those lawful permanent residents who have not committed offenses identified in INA § 212(a)(2), such as a crime of moral turpitude. *See* IIRIRA § 301(a) (amending INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994)).[2]

Petitioner in this case is like many lawful permanent resident immigrants whom *amici* have represented or counseled in criminal proceedings over the past few decades, immigrants with long-lasting ties to this country that, not surprisingly, they very much wish to preserve. Petitioner entered the United States in 1981 on a student visa and became a

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[2] This Court has not decided whether the IIRIRA amendments repeal, in whole or in part, the right that *Fleuti* recognized in the Immigration and Nationality Act. This brief does not address this question, instead focusing on whether the IIRIRA amendments, as interpreted by the government, may be applied retroactively to abrogate the *Fleuti* rights of lawful permanent residents who pleaded guilty before IIRIRA.

lawful permanent resident of the United States in 1989. When he later was charged with a crime of moral turpitude (conspiracy to make or possess a counterfeit security), he agreed to plead guilty to the charge. Under the law then in effect, petitioner retained the right to make brief trips abroad and return to the United States without subjecting himself to the restrictions that apply to those seeking "entry" or "admission" to the country within the meaning of the immigration laws—restrictions that, if applied to petitioner and others like him, would bar their ability to travel and return to this country.

Like others whom *amici* have represented and counseled, petitioner later needed to travel abroad. In January 2003, he spent a week in his native Greece to assist his elderly parents with their family business. Two months after his return home, the government initiated removal proceedings. The government, invoking its interpretation of 8 U.S.C. § 1101(a)(13)(C)(v) (2000), contended that because of petitioner's pre-IIRIRA guilty plea, *any* departure from the country—however brief—triggered the rules governing admissibility when petitioner returned to his home in the United States. Moreover, under the government's view, the same guilty plea rendered petitioner inadmissible (and therefore removable).

This case illustrates three errors in the government's view of the retroactive reach of Section 1101(a)(13)(C)(v). Each justifies reversal.

1. Contrary to the reasoning by the court below, the answer to whether a statute would have a retroactive effect—that is, an effect that the courts will impute to Congress only where there is unmistakable evidence of such a purpose—does not turn on whether the individual bringing the challenge can prove his

or her own reliance on the previous law. Rather, the retroactivity analysis is an inquiry into whether Congress intended for new legal consequences to attach to a category of conduct that predated the statute. This Court has never attributed to Congress a dual-track intent in which the statute would apply prospectively only to those who can prove they personally relied on the old law, with retrospective application for everyone else. Nothing about the statute at issue here warrants inventing and applying the government's proposed rule. Because Section 1101(a)(13)(C)(v) attaches new legal consequences to the commission of certain offenses, as well as to the decision to plead guilty to those offenses, it is retroactive in its application. *See infra* 8–15.

2. This is not to say that considerations of reliance and fair notice play *no* role in the Court's retroactivity analysis. Although reliance is not a prerequisite, the fact that many of those affected by the determination are likely to have been aware of the previous law and to have ordered their conduct accordingly, serves as overwhelming confirmation that the statute has a retroactive effect under *Landgraf*.

It would be wrong to assume that lawful permanent residents who pleaded guilty pre-IIRIRA to crimes involving moral turpitude placed no significance on their continuing ability, post-conviction, to make brief, innocent, and casual trips abroad. *See* BIO 9–10. Non-citizen defendants "considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *INS v. St. Cyr*, 533 U.S. 289, 322 (2001). Bar journals, treatises, and leading criminal and immigration defense organizations—including *ami-*

ci—regularly counsel defense attorneys to consider these consequences in rendering advice to their clients, and to structure plea agreements wherever possible to avoid both deportation and denial of reentry. *See infra* 15–22.

This should come as no surprise. Lawful permanent residents travel with great frequency to their native countries to visit ailing family members, to attend major life events such as births and funerals, and to pursue their livelihoods. The ability to return to the United States following a brief trip abroad was a well-known statutory right that, prior to IIRIRA, had "become firmly embedded in the law." Thomas A. Aleinikoff & David A. Martin, *Immigration and Citizenship* 462 (2d ed. 1991). If those like petitioner had known that they would be stripped of this ability by subsequent government action, their attorneys could have negotiated for a guilty plea that avoided this consequence, and—barring an acceptable agreement—could have advised on whether to put the government to its proof at trial. *See infra* 23–25.

3. The fact that the prior conduct here involves guilty pleas heightens the need for special care before imputing to Congress the intent to strip those like petitioner of the ability to travel and then return to their home in this country. As in *St. Cyr*, petitioner agreed to plead guilty to an offense, forfeiting his Fifth and Sixth Amendment rights to a jury trial where he could confront witnesses and invoke his privilege against self-incrimination; in exchange, he accepted responsibility for the commission of an offense that would not prevent him from taking short trips out of the country.

The success of the plea bargaining system hinges on the confidence of both parties—prosecutors and

defendants—in the benefit of the bargain struck. *See generally Brady v. United States*, 397 U.S. 742, 753 (1970); *see also, e.g., Santobello v. New York*, 404 U.S. 257, 262–63 (1971) (government must honor promises made in exchange for the plea). Where the government later upsets the negotiated balance by legislating a change in the bargain's consequences—as the retroactive application of 8 U.S.C. § 1101(a)(13)(C)(v) would do—the mutual advantage from pleading guilty is seriously disrupted. That result would raise substantial constitutional questions and erode confidence in the plea system. *See infra* 26–32. This Court often has expressed concern for such destabilization when it is the defendant who seeks to revisit the terms of a completed plea bargain. The result should be no different when the government seeks to impute from Congress's silence an intent to upset the expectations of the parties to plea agreements, especially in a manner that stretches constitutional limits to the breaking point.[3]

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[3] This brief—like the decision below—focuses on the second step of the *Landgraf* analysis: whether the statute has a retroactive effect that the Court will apply only if Congress was clear that it intended as much. *Amici* agree with petitioner, however, that the Court need not reach step two. It is clear that Congress wrote the statute with the understanding that Section 1101(a)(13)(C)(v) would apply only to those who commit moral turpitude offenses after IIRIRA's effective date; otherwise, of the universe of lawful permanent residents who have ever obtained discretionary relief from removal, only those who obtained that relief *pre*-IIRIRA would be subjected to the *post*-IIRIRA removal proceedings. *See* Petr's Br. 20–21 n.3. That result—which would introduce to the law the concept of a "grandchild clause"—is exactly the opposite of what the presumption against retroactivity dictates.

ARGUMENT

I. RETROACTIVITY IS DETERMINED IN BOTH THE CRIMINAL AND CIVIL CONTEXTS BY INQUIRING WHETHER CONGRESS INTENDED FOR NEW LEGAL CONSEQUENCES TO ATTACH TO PRIMARY CONDUCT PREDATING THE RELEVANT STATUTE, AND DOES NOT DEPEND ON PROOF THAT AN INDIVIDUAL LITIGANT RELIED ON PRIOR LAW

1. Under *Landgraf* and echoing throughout this Court's retroactivity jurisprudence, the determination whether a law would have retroactive effect turns on "whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. This formulation, rooted in the Due Process and Ex Post Facto Clauses, *id.* at 266, draws on this Court's long line of retroactivity cases in both criminal and civil contexts, *e.g.*, *Miller v. Florida*, 482 U.S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'") (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)); *Sturges v. Carter*, 114 U.S. 511, 519 (1885) (statute is impermissibly retroactive when it "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability'") (quoting *Soc'y for the Propagation of the Gospel*, 22 F. Cas. at 767), and it has been reaffirmed in every retroactivity decision since *Landgraf*. *See, e.g.*, *St. Cyr*, 533 U.S. at 321 ("The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.") (citation and quotation marks omitted);

Hughes Aircraft Co. v. United States, 520 U.S. 939, 947 (1997) (same).

Under this Court's Ex Post Facto jurisprudence, reliance is manifestly *not* a prerequisite to retroactivity. *See Carmell v. Tex.*, 529 U.S. 513, 533–534 (2000) ("Fenwick could claim no credible reliance interest in the two-witness statute . . . . [Nevertheless,] there was a profound unfairness in Parliament's retrospectively altering the very rules it had established . . . . The Framers, quite clearly, viewed such maneuvers as grossly unfair, and adopted the Ex Post Facto Clause accordingly."). This Court's retroactivity analysis in the civil context, which is "borrowed directly from [the Court's] Ex Post Facto Clause jurisprudence," *Landgraf*, 511 U.S. at 290 (Scalia. J., concurring), is no different.

In *Landgraf*, for example, this Court held that Section 102(a)(1) of the Civil Rights Act of 1991, which authorized the recovery of compensatory damages for intentional discrimination violating Title VII, was impermissibly retroactive because it would "undoubtedly impose on employers found liable a 'new disability' in respect to past events." 511 U.S. at 283 (quoting *Soc'y for the Propagation of the Gospel*, 22 F. Cas. at 767). Only as additional support for this finding did the Court note that "[t]he introduction of a right to compensatory damages is also the type of legal change that would have an impact on private parties' planning," thereby invoking the concept of reliance. *Id.* at 282. The Court never placed emphasis on the parties' reliance, nor did it explicitly require reliance in order to hold that the law was impermissibly retroactive.

That explains why, when applying *Landgraf* three years later in *Hughes Aircraft Co.*, this Court

was silent on the issue of reliance. 520 U.S. 939 (1997). The Court rested its opinion on the fact that the law in question "changes the substance of the existing cause of action . . . by 'attaching a new disability, in respect to transactions or considerations already past,'" and it did so without addressing whether Hughes Aircraft could show that it relied on the old law. *Id.* at 948 (quoting *Landgraf*, 511 U.S. at 269).

This Court's ruling in *St. Cyr* followed the same approach to retroactivity in the immigration context. The Court there began its "inquiry into whether a statute operates retroactively" by invoking the *Society for Propagation of the Gospel* test, as quoted in *Landgraf*: "A statute has retroactive effect when it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'" *St. Cyr*, 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269). Only then did the Court add that it is helpful to be "*informed and guided* by familiar considerations of fair notice, reasonable reliance, and settled expectations" in making this determination. *Id.* (internal citations omitted) (emphasis added).[4]

This Court's most recent discussion of retroactivity in the immigration context likewise confirms

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[4] *See also St Cyr,* 533 U.S. at 324 ("And our mere statement that deportation is not punishment for past crimes does not mean that we cannot *consider* an alien's reasonable reliance on the continued availability of discretionary relief from deportation when deciding whether the elimination of such relief has a retroactive effect.") (emphasis added).

that, while evidence of reliance can help to show a retroactive effect, such proof is not necessary. In *Fernandez-Vargas v. Gonzales*, this Court explained that it found a retroactive effect in *St. Cyr*—the addition of a new burden to the result of pre-enactment guilty pleas—because "converting deportation from a likely possibility to a dead certainty would add such a burden, and application of the new law was accordingly barred." 548 U.S. 30, 43 (2006). It was the added burden—not proof of St. Cyr's reliance on the absence of that burden at the time of his plea—that gave the new law a retroactive effect. *See id.* at 37.

2. To place controlling weight on whether a particular litigant can prove he relied on the previous law would be a curious way to divine whether "the manifest intention of the legislature," *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913), was for the new law to apply to all those whose conduct pre-dated the new law. Such a nuanced result cannot be squared with the fact that step two of *Landgraf* is reserved for cases where Congress did not even think to legislate on the question. *See Olatunji v. Ashcroft*, 387 F.3d 383, 389–90 (4th Cir. 2004).

A reliance requirement as a prerequisite to a determination of retroactivity is also inconsistent with the burden-shifting inherent in the presumption against retroactivity. A presumption is a "legal inference or assumption that a fact exists" that "shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." Black's Law Dictionary 1304 (9th ed. 2009). In other words, the government has the burden of overcoming the initial inference in favor of prospective-only application before that law will op-

erate retroactively. Applying reliance as a prerequisite in the retroactivity analysis alters this careful allocation of burdens. It arms the government with the presumption that all laws may be applied retroactively unless litigants can prove that they actually relied on the consequences that attached to the earlier law. That misguided reading of *St. Cyr* would squarely contradict this Court's precedent on retroactivity in civil cases, as well as divorce that jurisprudence from its grounding in the Ex Post Facto Clause. *See supra* 9; *St. Cyr*, 533 U.S. at 325 (citing, *inter alia*, *Lindsey v. Washington*, 301 U.S. 397 (1937), an Ex Post Facto case); *see also Ponnapula v. Ashcroft*, 373 F.3d 480, 490 (3d Cir. 2004).

Finally, requiring each litigant to make a particularized showing of reliance would lead to onerous and, inevitably, inequitable consequences. Every litigant to whom a retroactive law may apply would need to search for case-specific proof that she relied on the old law—proof that often would be years old (as would be true in this case, where the removal notice post-dated the guilty plea by a decade). And the government would inevitably raise individualized challenges to each proffered retroactivity claim, as it does in this case, with a burdensome strain on litigants and on the dockets of federal courts. Moreover, such individual adjudications based on sparse and mostly indirect evidence are likely to lead to disparate results, thereby increasing the inequities between individuals who are similarly situated.

3. This case highlights three distinct ways in which IIRIRA's purported repeal of the right recognized in *Fleuti* attaches new legal consequences to acts completed before the new law went into effect, and is therefore retroactive in its application. *First*,

it impairs a vested right to travel abroad for brief, innocent, and causal trips. *Second*, it imposes a greater penalty upon past conduct. *Third*, it abolishes a previously available affirmative defense.

a. Applying 8 U.S.C. § 1101(a)(13)(C)(v) as interpreted by the government here would take away a statutory right to brief, innocent, and casual travel abroad—a right that immigrants who pleaded guilty prior to IIRIRA had at the time of their pleas. *See, e.g., Soc'y for Propagation of the Gospel*, 22 F. Cas. at 767 ("[E]very statute, which takes away or impairs vested rights . . . "). That effect is more certain than the one this Court declined to impute to Congress in *St. Cyr*, where the Court found that "IIRIRA's elimination of any *possibility* of § 212(c) relief for people who entered into plea agreements . . . clearly attaches a new disability in respect to [the guilty plea]." 533 U.S. at 321 (emphasis added) (internal citations omitted). Even though there was no guarantee that the Attorney General would exercise his discretion in favor of any particular lawful permanent resident, the Court held that the denial of just the chance for discretionary relief would be improperly retroactive. Here, the government would interpret Section 1101(a)(13)(C)(v) to remove a *certain* pre-existing right to make "innocent, casual, and brief" trips abroad. Because there is no question that the substantive rights of lawful permanent residents would change, the presumption against retroactive application of this law applies.

b. Application of the government's view of 8 U.S.C. § 1101(a)(13)(C)(v) to those immigrants who pleaded guilty prior to IIRIRA would also impermissibly increase liability for past conduct. *See, e.g., Fernandez-Vargas*, 548 U.S. at 37 ("Statutes are dis-

favored as retroactive when their application would . . . increase a party's liability for past conduct . . . ."). Section 1101(a)(13)(C)(v) imposes a greater penalty upon prior adjudicated conduct. In particular, the new law precludes *any* foreign travel by a lawful permanent resident who intends to retain that status and who pleaded guilty to a designated offense before the change in law. Those who have entered such pleas and leave the country for any length of time whatsoever will be subject to either denial of re-admission or removal from the country. Thus, while deportation is not considered a formal "punishment" for past crimes, *St. Cyr*, 533 U.S. at 324, its imposition here would be an increased disability for someone whose punishment already has been imposed. *Cf. Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) ("deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes") (footnote omitted). That also triggers the presumption against retroactivity.

c. Finally, application of the government's view of 8 U.S.C. § 1101(a)(13)(C)(v) to immigrants who pleaded guilty prior to IIRIRA would abolish the affirmative defense to removal, recognized in *Fleuti*, of having made only an "innocent, casual, and brief" trip abroad; as a result, these lawful permanent residents would be subject to the entry and admission provisions of the INA upon their return. *See, e.g.*, *Hughes Aircraft*, 520 U.S at 948 ("[the statute] eliminates a defense . . . and therefore . . . 'attach[es] a new disability, in respect to transactions or consideration already past'") (quoting *Landgraf*, 511 U.S. at 269). This result, like the elimination of the *qui tam* defense in *Hughes Aircraft*, "changes the substance of the existing cause of action" (*id.*) for removal: If a

lawful permanent resident is convicted of a crime listed as a ground for inadmissibility, that resident can now be removed after any departure from the country whatsoever. *Cf. Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 663 (1974) ("a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause . . . of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the . . . offense'") (quoting *Rooney v. North Dakota*, 196 U.S. 319, 325 (1905)). To strip this defense through the application of Section 1101(a)(13)(C)(v) would be impermissibly retroactive.

II. THE AVAILABILITY OF REENTRY FOLLOWING A BRIEF, CASUAL, AND INNOCENT TRIP ABROAD WAS A WELL-KNOWN AND VERY IMPORTANT RIGHT ON WHICH IT WAS REASONABLE FOR LAWFUL PERMANENT RESIDENTS TO RELY PRE-IIRIRA WHEN THEY PLEADED GUILTY AND WAIVED IMPORTANT CONSTITUTIONAL RIGHTS

Although this Court has never required that an individual litigant prove his reliance on prior law before a court will apply the presumption against retroactivity, *supra* at 8–15, this "does not mean that [the Court] cannot consider an alien's reasonable reliance" on the continued availability of relief from immigration consequences "when deciding whether the elimination of such relief has a retroactive effect." *St. Cyr*, 533 U.S. at 324. In fact, widespread reliance on a statutory right or limitation is a powerful indicator that a change in the state of the law would have a retroactive effect if applied to past conduct. *Id.* at 325; *see also Landgraf*, 511 U.S. at 270

(suggesting that "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in determining retroactivity).

Here, the experience of *amici* is that lawful permanent residents whom their members represented or counseled in pre-IIRIRA criminal proceedings reasonably relied on the opportunity to continue taking short trips abroad—particularly in weighing plea offers and entering guilty pleas. Treatises, and other guidance from leading criminal and immigration defense organizations—including *amici*—educated lawful-permanent-resident defendants, through their criminal defense lawyers and immigration law expert consultants, that brief trips abroad would not subject them to grounds for excludability (now inadmissibility) upon their return. *See infra* 18–24.

1. Freedom of movement is a fundamental right, *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230), and "an important aspect of the citizen's 'liberty.'" *Kent v. Dulles*, 357 U.S. 116, 127 (1958). "Freedom of movement *across frontiers* . . . [is] a part of our heritage" that, "like travel within the country, . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." *Id.* at 126 (emphasis added). The right to travel, "at home and abroad, is important for job and business opportunities—for cultural, political, and social activities—for all the commingling which gregarious man enjoys." *Aptheker v. Sec'y of State*, 378 U.S. 500, 519–20 (1964) (Douglas, J., concurring).

As important as the ability to travel is to citizens, it has particular significance to the lives of lawful permanent residents. Having emigrated to the United States, these individuals "often have continuing ties and interests abroad," including significant

family and personal commitments in their home countries, and in fact "tend to travel internationally more than most Americans." Robert C. Divine, *Immigration Practi*ce § 9-2(c) (1994). More than 12.5 million lawful permanent residents resided in the United States as of January 1, 2009.[5] A significant percentage were admitted before IIRIRA's enactment: Over 7.5 million lawful permanent residents were admitted to the United States between 1990 and 1996 alone.[6]

A great many still have family members and close friends in their countries of origin. One-third of all non-citizens travel to their home countries at least once a year, Manuel Orozco, *Transnationalism and Development: Trends and Opportunities in Latin America*, *in Remittances: Development Impact and Future Prospects* 307, 313 (Samuel Munzele Maimbo & Dilip Ratha eds., 2005), and sixty-five percent of Latino immigrations have made at least one trip back to their native county since moving to the United States, Roger Waldinger, Pew Hispanic Center, *Between Here and There: How Attached Are Latino Immigrants to Their Native County?* 4 (2007). Funerals, weddings, births, and the need to care for ailing family members represent just a few of the significant reasons immigrants travel to their homelands. *See* Nancy Morawetz, *The Invisible Border:*

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[5] Nancy Rytina, U.S. Dep't of Homeland Sec., Office of Immig. Statistics, *Population Estimates: Estimates of the Legal Permanent Resident Population in 2009*, at 1 (Nov. 2010).

[6] Immig. and Naturalization Servs., U.S. Dep't of Justice, *1996 Statistical Yearbook of the Immigration and Naturalization Service*, 25 tbl. 1 (Oct. 1997).

Restrictions on Short-Term Travel for Noncitizens, 21 Geo. Immigr. L.J. 201, 219-27 (2007); *see also, e.g., Kamheangpatiyooth v. INS*, 597 F.2d 1253, 1257–59 (9th Cir. 1979) (discussing lawful permanent resident's month-long visit to Thailand to care for gravely ill mother). And in many cases, "whether [a noncitizen] would be able to keep his job, much less advance himself, without going [abroad] is doubtful." *Itzcovitz v. Selective Serv. Local Bd.*, 447 F.2d 888, 894 (2d Cir. 1971).

2. "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." *St. Cyr*, 533 U.S. at 322; *see also, e.g., Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) ("That an alien . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented."). No properly advised lawful permanent resident would elect to plead guilty without carefully considering the immigration consequences.

"[P]reserving the . . . right to remain in the United States may be more important to [an immigrant] than any potential jail sentence," *St. Cyr*, 533 U.S. at 323, and, in fact, "the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty[.]" *Padilla*, 130 S. Ct. at 1486. A lawful permanent resident may also make the rational choice of going to trial—accepting the risk of a more severe criminal sentence—to keep open the possibility of remaining in the United States. *See United States v. Orocio*, 645 F.3d 630, 645 (3d Cir. 2011) (noting that the defendant rationally could have been more con-

cerned about banishment from the U.S. than the possibility of spending a decade in prison).

In *Padilla*, this Court held that counsel has a duty under the Sixth Amendment to inform a non-citizen criminal defendant of the deportation consequences of a guilty plea. 130 S. Ct. at 1486. Professional norms also impose a broader obligation on counsel to provide advice on the immigration consequences of a non-citizen's plea, as evidenced by American Bar Association standards,[7] criminal and

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[7] *See, e.g.,* ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f) (3d ed. 1999) ("defense counsel should determine and advise the defendant . . . [as to] possible collateral consequences") and cmt. at 127 ("counsel should be familiar with the basic immigration consequences . . . in investigating law and fact and advising the client"). This Court has regularly looked to ABA standards in determining prevailing professional norms of effective representation, *see, e.g., Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Florida v. Nixon*, 543 U.S. 175, 191 (2004), "especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." *Padilla*, 130 S. Ct. at 1482. The state courts also have regularly looked to the ABA Standards for Criminal Justice, and often specifically to the Pleas of Guilty standards, in evaluating attorney conduct. *See, e.g., State v. Donald*, 10 P.3d 1193, 1198–99 (Ariz. Ct. App. 2000); *People v. Barocio*, 264 Cal. Rptr. 573, 577, 579 (Cal. Ct. App. 1989); *MacDonald v. State*, 778 A.2d 1064, 1071–72, 1075 (Del. 2001); *Cottle v. State*, 733 So. 2d 963, 966 (Fla. 1999); *People v. Manning*, 883 N.E.2d 492, 502 (Ill. 2008); *Lagassee v. State*, No. CR-92-407, 1993 Me. Super. LEXIS 236, at *2–5 (Me. Sup. Ct. Sept. 23, 1993); *Commonwealth v. Stanton*, 317 N.E.2d 487, 490 n.3 (Mass. App. Ct. 1974); *State v. Loyd*, 190 N.W.2d 123, 124 (Minn. 1971); *State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004); *People v. Reyes*, No. 678195, 2006 WL 3891499, at *6 (N.Y. Sup. Ct. Dec. 14, 2006); *State v. Yanez*, 782 N.E.2d 146, 154–55 (Ohio Ct. App. 2002); *Harris v. State*, 875 S.W.2d 662, 665 (Tenn.

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immigrant defense guidelines published by *amici* submitting this brief,[8] numerous state and local bar publications and practice guides,[9] and authoritative

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1994); *State v. Bean*, 762 A.2d 1259, 1266 (Vt. 2000); *Booker v. Commonwealth*, No. 1325-07-2, 2008 WL 926246, at *3 (Va. Ct. App. Apr. 8, 2008); *In re Pers. Restraint of Stenson*, 16 P.3d 1, 15–16 (Wash. 2001). *But see Padilla*, 130 S. Ct. at 1482 (while ABA standards are "valuable," they are "'only guides'" in determining prevailing norms) (quoting *Strickland*, 466 U.S. at 688).

[8] *See, e.g.*, *Performance Guidelines for Criminal Defense Representation* §§ 2.2(b)(2)(A) & 6.2(a)(3) (Nat'l Legal Aid and Defender Ass'n 1995); Scott E. Bratton, Nat'l Ass'n of Criminal Def. Lawyers, *Representing a Noncitizen in a Criminal Case*, The Champion, Jan./Feb. 2007, at 61.

[9] *See, e.g.*, *Performance Guidelines for Criminal Defense Representation* §§ 6.2–6.4 (N.M. Pub. Defender Dep't 1998); Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 Law & Ineq. 567 (1999); *The Immigration Consequences of Deferred Adjudication Programs in New York City* (Comm. on Criminal Justice Operations, Ass'n of the Bar of the City of N.Y. 2007); David C. Koelsch, *Proceed with Caution: Immigration Consequences of Criminal Convictions*, 87 Mich. B.J. 44, 45–46 (2008); Fernando A. Nunez, *Collateral Consequences of Criminal Convictions to Noncitizens*, 41 Md. B.J. 40, 42 (Jul./Aug. 2008); *Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases* § 2.8 (Or. State Bar 2007); Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2010); *Assigned Counsel Manual: Policies and Procedures*, ch. IV, Guidelines Governing Representation of Indigents in Criminal Cases § 5.4(o) (Mass. Comm. for Public Counsel Servs. 2009); *see also* Sara Elizabeth Dill, 101 Tips for Representing Non-Citizens in Criminal Proceeding, at 3 (ABA Young Lawyers Division 2007) ("it is imperative that

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treatises.[10] And at least 28 states and the District of Columbia require courts to advise non-citizen criminal defendants of the possible immigration consequences of their pleas. *Padilla*, 130 S. Ct. at 1491. This makes sense, as "it may well be that many [defendants'] greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f) cmt. at 127 (3d ed. 1999).

In cases involving non-citizens, informed defense counsel is often able to structure the plea agreement to avoid severe immigration consequences. *See, e.g.*, Norton Tooby & Joseph Justin Rollin, *Safe Havens: How to Identify and Construct Non-Deportable Convictions* (2005); Anna Marie Gallagher, *Immigration Consequence of Criminal Convictions: A Primer on What Crimes Can Get Your Client into Trouble*, in Navigating the Fundamentals of Immigration Law 403, 415–17 (2009); Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (Nat'l Immig. Project of the Nat'l Lawyers Guild 2008) (charting varying adverse immigra-immigration consequences that flow from plethora of federal offenses).

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defense counsel speak at length with non-citizen clients about possible [immigration] consequences").

[10] *See, e.g.*, Norton Tooby, *Criminal Defense of Immigrants* § 1.3 (3d ed. 2003); Dan Kesselbrenner et al., Nat'l Immig. Project of the Nat'l Lawyers Guild, *Immigration Law and Crimes* § 4:7 (2011); Thomson Reuters/West, *2 Crim. Prac. Manual* §§ 45:3, 45:15 (2011).

If lawful permanent residents facing charges pre-IIRIRA had known that a conviction would bar readmission to the United States after any trip (however brief and however urgent) to their country of origin, they would have considered a very different set of options. These include the exploration of different offenses as part of a guilty plea—for example, assault instead of aggravated assault (Dill, *supra*, at reference chart 4); transportation of a firearm instead of transfer of a firearm for unlawful purposes (Kesselbrenner & Lin, *supra*, at 9); or possession of drug paraphernalia instead of possession with intent to distribute (Baron, *supra*, at 62). Here, for example, petitioner's counsel could have pursued a plea to possession of counterfeit securities in violation of 18 U.S.C. § 474, which in relevant part does not include an intent to defraud and therefore is not a crime involving moral turpitude (*see* Kesselbrenner & Lin, *supra*, at 6; *In re Lethbridge*, 11 I. & N. Dec. 444 (B.I.A. 1965)). And where the only option is an offense involving moral turpitude, the defendant may very well choose to put the prosecution to its proof at trial.[11]

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[11] Post-IIRIRA practitioners' guides for criminal defense lawyers do indeed stress the importance of confining the guilty plea, wherever possible, to offenses that could not be categorized as triggering inadmissibility (such as crimes involving moral turpitude) in part because such offenses would now bar readmission, under the BIA's interpretation of IIRIRA, even after only brief trips abroad. *See, e.g.*, Baldini-Potermin, *supra*, at 608; Ann Benson, Jonathan Moore & Katherine Brady, Immigration and Washington State Criminal Law 53–59 (2005); Baron, *supra*, at app. B (chart advising attorneys how to reframe crimes in plea bargaining). Competent counsel are under a duty to avail themselves of such resources.

3. Although there is no need for litigants to prove reliance before invoking the presumption against retroactivity, this Court in *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* between a criminal defendant and the government," creating a "focus of expectation and reliance," *Fernandez-Vargas*, 548 U.S. at 43–44—and, particularly, "rel[iance] upon settled practice [and] the advice of counsel" at the time of the plea. *St. Cyr*, 533 U.S. at 323.

The availability of reentry following a brief, casual, and innocent trip abroad was a well-known right under *Fleuti* that, prior to IIRIRA, had "become firmly imbedded in the law." Thomas A. Aleinikoff & David A. Martin, *Immigration: Process and Policy* 462 (2d ed. 1991); *see also, e.g.*, Ira J. Kurzban, *Immigration Law Sourcebook* 27–28 (5th ed. 1995) (opportunity for reentry under *Fleuti* is "significant in determining the rights of [lawful permanent residents]"); Nat'l Immig. Project of the Nat'l Lawyers Guild, *Immigration Law and Defense* § 6.4 (Sept. 1995) (discussing *Fleuti*). And it was likewise "critical" for counsel "to consult the standard articulated in *Fleuti* and its progeny" in representing non-citizen defendants. Dan Kesselbrenner et al., Nat'l Immig. Project of the Nat'l Lawyers Guild, *Immigration Law and Crimes* § 5.2(d) (June 1995).

As a result, a "limitation on the ability to travel outside the United States is one of the immigration consequences of which [lawful-permanent-resident] defendants considering whether to enter into a plea agreement would be acutely aware." *Camins v. Gonzales*, 500 F.3d 872, 884 (9th Cir. 2007) (internal quotation marks omitted); *see also Olatunji v. Ashcroft*, 387 F.3d 383, 397 (4th Cir. 2004) ("an alien . . .

could reasonably have considered the ramifications of his guilty plea on his immigration status, including its implications for travel abroad"). In this context, "'aliens who accepted a plea agreement prior to IIRIRA could reasonably have relied on their continuing ability to take brief trips abroad.'" *Camins*, 500 F.3d at 884 (quoting *Olatunji*, 387 F.3d at 397).

The government misses the mark when it argues that a pre-IIRIRA guilty plea does not "reflect[] . . . a *quid pro quo* agreement" and that the plea is not a "'past act that [the defendant] is helpless to undo.'" BIO 9–10, 13 (quoting *Fernandez-Vargas*, 548 U.S. at 44). To the contrary, this Court in *Fernandez-Vargas* made clear that its holding in *St. Cyr* was compelled by the fact that the defendant in *St. Cyr*—unlike the defendant in *Fernandez-Vargas*—pleaded guilty based on the state of the law at the time of his plea, prior to the intervening statute. This Court "emphasized that plea agreements 'involve a *quid pro quo* between a criminal defendant and the government,' in which a waiver of 'constitutional rights . . .' had been exchanged for a 'perceived benefit.'" *Fernandez-Vargas*, 548 U.S. at 43–44 (quoting *St. Cyr*, 533 U.S. at 321–22). And it made clear that St. Cyr's "agreement . . . and his plea were entirely past, and there was no question of undoing them." *Id.* at 44.

As the Court recognized in *St. Cyr*, lawful-permanent-resident defendants often make a *quid pro quo* agreement with the prosecutor: In exchange for a waiver of constitutional rights, including the right to trial by jury and against self-incrimination, a defendant can receive sentence credit for accepting responsibility for her offense and a further "perceived benefit" (*St. Cyr*, 533 U.S. at 322) that, after pleading guilty, she would be able to continue mak-

ing brief trips abroad. As this case illustrates, it is of no moment that IIRIRA uses language relating to "commission of" the offense. BIO 10–11. Here, the government conceded that the only evidence of petitioner's commission was "his guilty plea." BIO 11 n.2.[12] States and the federal government have made countless agreements with lawful permanent residents, with the resulting guilty pleas "completed," well before the new statute passed. *See Fernandez-Vargas*, 548 U.S. at 46 ("the branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts"). Each of those guilty pleas—which are the mode of conviction for the vast majority of state and federal defendants—is a "past act that he is helpless to undo," and on which IIRIRA placed "new burdens."

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[12] In any event, the statute likewise imposes retroactive burdens on the "commission" of a crime involving moral turpitude. The lower court's skepticism about "any claim that the [lawful permanent resident] reasonably relied on the immigration laws in deciding to break the criminal laws," *Vartelas v. Holder*, 620 F.3d 108, 121 (2d Cir. 2010), is nothing less than a flat rejection of two of our legal system's basic premises: that individuals will order their affairs mindful of the full consequences of running afoul of the law, and that it is fundamentally unfair to alter those consequences after the fact. *See, e.g.*, *Carmell*, 529 U.S. at 531 & n.21 (stating that a new law that "increases . . . punishment" for previously committed crimes is impermissibly retroactive and violates principles of "fundamental justice," even though "there are few, if any, reliance interests in planning future criminal activities based on the expectation of less severe repercussions").

III. THE RETROACTIVE APPLICATION OF SECTION 1101(a)(13)(C)(v) WOULD BE INCONSISTENT WITH CONSTITUTIONAL PLEA BARGAIN SAFEGUARDS AND WITH THE PRACTICAL FUNCTIONING OF THE PLEA PROCESS.

A guilty plea involves an exchange between a criminal defendant and the government. *See Brady*, 397 U.S. at 753. For her part, the pleading defendant waives significant constitutional rights: her right to trial by jury and to confront the witnesses against her, for example, and her privilege against self-incrimination. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). By waiving those rights, she allows the government to preserve its prosecutorial and judicial resources, and she permits the prompt commencement of her rehabilitation. *See Brady*, 397 U.S. at 752. In return, the pleading defendant obtains benefits: perhaps a promise of lesser charges or a lesser sentence, and the speedy resolution of her case. *Id.* The result is a "mutuality of advantage" that affords both the government and a defendant outcomes superior to those possible in a plea-free system. *See id.*; *see also, e.g.*, Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1975 (1992).

The Constitution establishes a framework for the protection of this system, which has practical benefits for defendants and the government alike. The retroactive application of Section 1101(a)(13)(C)(v) to those who enter into plea agreements would be inconsistent with the constitutional safeguards protecting the plea bargaining process, and would undermine participants' confidence in the finality of pre-IIRIRA guilty pleas to the detriment of defendants and society alike.

A. The Retroactive Application Of Section 1101(a)(13)(C)(v) Would Be In Tension With The Constitutional Values Animating This Court's Plea Bargain Jurisprudence.

1. The Constitution imbues a criminal defendant's decision to plead guilty with constitutional protections and imperatives. To prevent pleas obtained by duress, fraud, and other deficiencies, for example, due process requires that any court receiving a guilty plea assure itself that the plea is both "intelligent"—*i.e.*, "knowing" and "done with sufficient awareness of the relevant circumstances and likely consequences"—and "voluntary." *Brady*, 397 U.S. at 748.[13] The Sixth Amendment supports this objective by requiring that the pleading defendant's counsel adequately inform her choice of whether to plead guilty. *Padilla*, 130 S. Ct. at 1482–83; *see also id.* at 1492–94 (Alito, J., concurring in the judgment) (arguing that affirmative mis-advice by counsel violates the Sixth Amendment and that in cases of affirmative mis-advice "it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights"); *Libretti v. United States*, 516 U.S. 29, 50 (1995) (". . . it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement"). And to protect agreements and facilitate bargaining, a defendant who enters into a

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[13] For the same reason, the defendant must be found competent to enter a plea of guilty. *See, e.g.*, *Godinez v. Moran*, 509 U.S. 389, 396 (1993).

plea agreement must honor promises made to the government, *see, e.g.*, *Ricketts v. Adamson*, 483 U.S. 1, 9–12 (1987), and the government must honor promises made in exchange for the guilty plea, *e.g.*, *Santobello*, 404 U.S. at 262–63.

Santobello well illustrates the point. In that case, the defendant pleaded guilty in reliance on the prosecutor's promise that the State would make no sentencing recommendation. 404 U.S. at 258. Before sentencing, however, the defendant's case was taken over by a new prosecutor, and the new prosecutor failed to honor his predecessor's promise. *Id.* at 259, 262. This Court held that the State's actions breached the defendant's plea agreement, even if the breach was "inadvertent," and that the defendant was accordingly entitled to a remedy. *Id.* at 262–63. The case was remanded to the lower court to determine the appropriate remedy: rescission of the agreement to plead guilty, or specific performance of the State's promise. *Id.* at 263.

For the defendant, the sum of these rules rationalizes the defendant's decisionmaking and guarantees the reasonable expectations underlying the choice of a plea. Motivating each rule is a concern with protecting that choice, either *ex ante* (when the choice is made) or *ex post* (when, in the future, the bargain inducing the choice is threatened). *Ex ante*, the rules ensure that the choice to plead is rational and informed—by preventing fraud and duress, for example. *See, e.g.*, *Santobello*, 404 U.S. at 261–62; *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (holding that a plea is void "if induced by promises or threats which deprive it of the character of a voluntary act"); *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (per curiam) (plea void if coerced by the

threats of an FBI agent); *Walker v. Johnston*, 312 U.S. 275, 286 (1941) (plea void if defendant "was deceived or coerced by the prosecutor into entering a guilty plea"); *cf.* Restatement (Second) of Contracts § 164 (fraud); *id.* § 175 (duress). And *ex post*, the rules ensure that the pleading defendant receives the benefit of his bargain. *See, e.g.*, *Santobello*, 404 U.S. at 262 ("This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances.").

2. Retroactive application of 8 U.S.C. § 1101(a)(13)(C)(v) to pre-IIRIRIA guilty pleas would denigrate these constitutional values. It would deny lawful-permanent-resident defendants *ex post* protection of their reasonable expectations in agreeing to plead guilty. And it would permit the government to retain its benefit from the bargain while denying to the pleading defendants an important benefit.

Indeed, retroactively altering the core immigration consequences of pre-IIRIRA guilty pleas is little different than reneging on a charging or sentencing promise. *Cf., e.g.*, *Santobello*, 404 U.S. at 262 (holding that where a promise "can be said to be part of the inducement or consideration" for a plea, "such promise must be fulfilled"). Unlike many consequences of a conviction that may not be within the consciousness of defendants when they decide whether to plead guilty, the *Fleuti*-based right to return was an essential right that competent attorneys expressly considered and advised regarding pre-IIRIRA, and that many lawful permanent residents therefore considered when contemplating guilty pleas. *See supra* at 18–24. Had a lawful permanent

resident like petitioner known at the time of his plea that he would be forfeiting his statutory travel rights, he could have instructed his attorney to negotiate a non-moral-turpitude plea or, were that not an option, he could have chosen to contest his guilt at trial. Denying him this important benefit after the waiver of his constitutional rights vitiates the intelligence of this "choice." *See Camins*, 500 F.3d at 884; *Olatunji*, 387 F.3d at 397.

"A statute having such a [retroactive] result may incur the opposition of the Constitution." *Laramie*, 231 U.S. at 199–200; *see also Landgraf*, 511 U.S. at 281 ("Retroactive [application of the statute] would raise a serious constitutional question."). This Court need not, however, reach the difficult question whether the Due Process Clause forbids expressly altering the terms of plea bargains retroactively. Because the statute does not "explicit[ly] command" such an outcome, *Landgraf*, 511 U.S. at 281, the Court should follow a path that avoids the dual evils of presuming retroactivity and pushing the limits of due process. *See id.*; *Laramie*, 231 U.S. at 199–200 ("When such may be the result a different construction of the statute is determined.").

Denying retroactive application to 8 U.S.C. § 1101(a)(13)(C)(v), as it is interpreted by the government, ensures that lawful-permanent-resident defendants who pleaded guilty pre-IIRIRA, with the understanding that they would remain entitled to the brief foreign trips allowed under the Immigration and Nationality Act, are afforded the full benefit of their bargain. Holding otherwise would significantly weaken the long-standing constitutional structure that this Court has established for guilty pleas.

B. The Retroactive Application Of Section 1101(a)(13)(C)(v) Would Destabilize The Plea Process And Undermine The Finality Of Completed Plea Bargains.

Approximately ninety-five percent of all convictions are obtained through guilty pleas.[14] This system serves to conserve judicial, police, juror, and prosecutorial resources, hastens the resolution of pending matters, spares witnesses the trauma and inconvenience of testifying at trial, and dramatically lowers the cost to taxpayers of the criminal justice system. *See generally Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (praising the "virtues of the plea system—speed, economy, and finality"); *United States v. Timmreck*, 441 U.S. 780, 784 (1979) ("'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice.'") (quoting *United States v. Smith*, 440 F.2d 521, 528–29 (7th Cir. 1971) (Stevens, J., dissenting)); *see also United States v. Dominguez-Benitez*, 542 U.S. 74, 83 (2004) ("[guilty pleas] are indispensable in the operation of the modern criminal justice system"). The success of the system hinges on the confidence that

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[14] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Disposition of Criminal Cases Terminated, By Offense, During Oct. 1, 2007-Sept. 30, 2008* tbl. 4.2 (2010) (96% of federal convictions over the period studied—79,762 of 82,823—were by guilty plea); Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006 Statistical Tables* 25 tbl. 4.1 (Dec. 2009) (94% of felony convictions in state courts in 2006 were by guilty plea).

both prosecutors and defendants have in the bargain struck. If, however, "either party were able to secure its benefits while making its obligations contingent, the utility of plea agreements would disappear." *United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2005). In particular, if defendants lack confidence in safeguards protecting against retroactive changes to the terms of the plea, more and more will be encouraged to choose trial instead. That result would be detrimental to defendants and to the public interest alike.

This Court has often expressed concern for destabilization of the plea process when it is the defendant who seeks to revisit the terms of a completed plea bargain. *See, e.g., Dominguez-Benitez*, 542 U.S. at 82 (noting "the particular importance of the finality of guilty pleas"); *United States v. Vonn*, 535 U.S. 55, 72 (2002) (same); *Bousley v. United States*, 523 U.S. 614, 621 (1998) ("We have strictly limited the circumstances under which a guilty plea may be attacked on collateral review."). This Court should be no less vigilant in safeguarding the finality of plea bargains when it is the government that seeks, years later, to change the consequences of those bargains.

CONCLUSION

The judgment of the United State Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

JIM WALDEN
AKIVA SHAPIRO
CHRISTOPHER MULLER
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166

DAVID DEBOLD
Counsel of Record
MOLLY CLAFLIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

Counsel for Amici Curiae

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APPENDIX:

Amici Curiae

This Appendix provides more detailed descriptions of *amici* organizations.

The **National Association of Criminal Defense Lawyers** ("NACDL") is a non-profit corporation with more than 12,500 members nationwide, joined by 35,000 members of 90 affiliate organizations in all 50 states. Founded in 1958, NACDL promotes criminal law research, advances and disseminates knowledge in the area of criminal practice, and encourages integrity, independence, and expertise among criminal defense counsel. NACDL's members include criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The **National Legal Aid & Defender Association** ("NLADA"), founded in 1911, is this country's oldest and largest non-profit association of individual legal professionals and legal organizations devoted to ensuring the delivery of legal services to the poor. For one hundred years, NLADA has secured access to justice for people who cannot afford counsel through the creation and improvement of legal institutions, advocacy, training, and the development of nationally applicable standards. NLADA promotes the fair, transparent, efficient, and uniform administration of criminal justice, and serves as the collec-

tive voice for both civil legal services and public defense services throughout the nation.

The **Immigrant Defense Project** ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes, and therefore has a keen interest in ensuring that immigration laws relating to criminal case dispositions are correctly interpreted. IDP provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. This Court has accepted and relied on *amicus curiae* briefs submitted by IDP in key cases involving the proper application of federal immigration law to immigrants with past criminal adjudications, including *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (No. 09-60); *Lopez v. Gonzalez*, 549 U.S. 47 (2006) (No. 05-547); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (No. 03-583); *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) (cited at *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001)).

The **Immigrant Legal Resource Center** ("ILRC") is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal adjudications.

The **National Immigration Project** ("NIP") **of the National Lawyers Guild** is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. NIP provides legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises published by Thomson-West. NIP has participated as *amicus curiae* in several significant immigration-related cases before this Court.