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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INTRODUCTION

When Panagis Vartelas, a lawful permanent resident, pleaded guilty in 1994 to counterfeiting, he retained the ability to take brief trips abroad without being denied reentry upon his return. The government concedes that Congress did not expressly mandate retroactive application of newly enacted INA § 101(a)(13)(C)(v). Resp't Br. 11. It nevertheless claims that when that subsection took effect in 1997, it effectively eliminated Mr. Vartelas's prior ability to take brief trips abroad without risk of being denied reentry. Under IIRIRA, he faced removal proceedings and the prospect of permanent exile upon his return from foreign travel. Applying the newly enacted statute in that way would be impermissibly retroactive, for four reasons.

First, the subsection does not simply restrict post-IIRIRA entries. It virtually eliminates lawful permanent residents' ability to travel abroad without risk of being denied reentry, based solely on pre-IIRIRA conduct. That conduct now makes them removable upon their return. Thus, unless they receive favorable exercises of discretion, traveling abroad means facing permanent exile from their homes here. *Second*, § 101(a)(13)(C)(v) need only attach a new disability or impose a new penalty based on a pre-IIRIRA offense in order to be retroactive. In response, the government attacks a straw man, denying that this case involves vested rights while admitting that Mr. Vartelas never makes that argument. Resp't Br. 20-25. *Third*, Mr. Vartelas's return to his home in the

United States is in no way unlawful. Applying IIRIRA retroactively would add a new burden to penalize his pre-IIRIRA offense, not his post-IIRIRA travel. While the post-IIRIRA travel is the trigger, the pre-IIRIRA offense is the target. *Fourth*, reliance is not a prerequisite to retroactivity, as the government appears to concede. Resp't Br. 25-26. Nevertheless, lawful permanent residents like Mr. Vartelas reasonably relied on pre-IIRIRA law in pleading guilty, and applying the statute retroactively upsets that reliance. Particularly given the canon of construing ambiguities in favor of lawful permanent residents, § 101(a)(13)(C)(v) cannot apply to offenses that predated IIRIRA.

I. This Case Involves Lawful Foreign Travel by Lawful Permanent Residents, Not Merely, As the Government Argues, Regulation of Entries

The stakes here are high. They involve lawful permanent residents' pre-existing ability to take brief trips abroad, not just entries by newly arriving aliens. Lawful permanent residents like Mr. Vartelas put down roots here: they marry, buy houses, raise families, and establish careers here. They have weighty interests in not being "banish[ed] or exile[d]" from their established homes. *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1484, 1486 (2010) (internal quotation marks omitted). Thus, when lawful permanent residents return from brief trips abroad, they are entitled to greater due process safeguards than newly arriving aliens in order to protect their stronger ties to this

country. *Landon* v. *Plasencia*, 459 U.S. 21, 32-33 (1982). "[A]n alien on the threshold of initial entry stands on a different footing" from ones "who have once passed through our gates." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212-14 (1953).

Before IIRIRA, the ability to travel briefly and return was an integral part of lawful permanent residents' settled expectations. *See* Asian Am. Justice Ctr. et al. Br. 16-23; NACDL et al. Br. 16-18, 23-25. Under the pre-IIRIRA statute, they were free to come and go briefly without being treated as new applicants for admission. *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462 (1963). They could attend family weddings and funerals and visit aged or sick parents abroad without risk of having to abandon their spouses and children here. As *Fleuti* recognized, brief trips abroad should not be "regarded as meaningfully interruptive of the alien's permanent residence" in the United States. *Id.* at 462. Now, however, lawful permanent residents like Mr. Vartelas are treated as arriving aliens and may face many months of "unreviewable, no-bond detention" and removal proceedings upon return. Asian Am. Justice Ctr. et al. Br. 10-16. IIRIRA effectively eliminates their ability to travel abroad without being treated as arriving aliens upon their return.

The government frames the issue far too narrowly. It claims the statute "in no way restricts petitioner's ability to travel abroad," as anyone can leave on a one-way ticket as long as he does not care about making a round trip. Resp't Br. 20. According to the

government, the only conduct regulated is "the post-[IIRIRA] conduct of attempting to enter the United States." *Id.* at 14. But for lawful permanent residents, one cannot divorce the outbound trip from the return. IIRIRA eliminates their entitlement to return, so any travel abroad can trigger permanent exile. If applied here, § 101(a)(13)(C)(v)'s primary effect would be on a lawful permanent resident's ability to travel abroad briefly, not merely on his reentry once the trip ends. The issue is not restricting post-IIRIRA entries, but revoking the ability to travel without risk of being denied reentry, based on a pre-IIRIRA offense.

II. INA § 101(a)(13)(C)(v) Would Attach a New Disability and Impose a New Penalty Based on Pre-IIRIRA Offenses, Regardless of Whether There Is a Vested Right to Travel

Applying § 101(a)(13)(C)(v) to Mr. Vartelas runs afoul of Justice Story's classic test for retroactivity, which continues to guide this Court's analysis:

> [E]very statute, which
>
> [1] takes away or impairs vested rights acquired under existing laws,
>
> *or* [2] creates a new obligation,
>
> [3] imposes a new duty,
>
> *or* [4] attaches a new disability,
>
> in respect to transactions or considerations already past,
>
> must be deemed retrospective. . . .

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) (line breaks, indentation, emphases, and bracketed numbers added). The government spends five pages arguing that the first category – vested rights – does not apply. Resp't Br. 20-25. But that is beside the point. As the government admits, Mr. Vartelas never claims that he had a vested right. *Id.* at 21.

Likewise, Congress's plenary power over entry (Resp't Br. 21-22) does not justify retroactivity. *St. Cyr* found another provision of IIRIRA impermissibly retroactive because it abolished discretionary relief for lawful permanent residents, even though it too involved Congress's plenary power over immigration. The question is not whether Congress *can* restrict reentry retroactively, but whether it *has* done so with "unmistakable clarity." *INS* v. *St. Cyr*, 533 U.S. 289, 318, 325 n.55 (2001).[1]

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[1] The statutory text reflects Congress's intent to make INA § 101(a)(13)(C)(v) prospective only, but the government resists this conclusion. Pet'r Br. 20 n.3; Resp't Br. 11-13. Its premise is that people granted relief under former INA § 212(c) must have their waivers "examined again" when they travel. Resp't Br. 13. The statute conflicts with that premise. Lawful permanent residents who received relief under former § 212(c) are statutorily ineligible for § 240A(a) relief. INA § 240A(c)(6), 8 U.S.C. § 1229b(c)(6). That bar reflects Congress's understanding that former § 212(c) relief would remain effective and would not need to be re-litigated. The Department of Homeland Security and the Board of Immigration Appeals (BIA) likewise reject the Solicitor General's interpretation of the statute: "Once an application [for former

(Continued on following page)

As this Court has noted, "we do not restrict the presumption against statutory retroactivity to cases involving 'vested rights.'" *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 275 n.29 (1994). Justice Story's list is disjunctive, describing four alternative categories separated by "or." It enumerates "several '*sufficient*,' as opposed to '*necessary*,' conditions for finding retroactivity." *St. Cyr*, 533 U.S. at 321 n.46 (quoting *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 947 (1997) (emphases in original)); *see also Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 n.10 (2006). This Court has repeatedly found retroactivity where statutes did not affect vested rights but added penalties even for previously *unlawful* conduct. The defendant in *Landgraf* had no vested right to engage in employment discrimination, which had been illegal for decades, but increasing the penalty was nonetheless retroactive. 511 U.S. at

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§ 212(c) relief] is approved, that approval is valid indefinitely" as to "those specific grounds of excludability" waived. 8 C.F.R. § 212.3(d). Thus, "once a waiver of excludability or deportability for a certain act [is] granted, that waiver would remain effective for all subsequent entries." *In re Balderas*, 20 I. & N. Dec. 389, 392 (BIA 1991).

The government also notes that INA § 212(h) waivers predate IIRIRA. Br. 12. But they also postdate IIRIRA, so Congress needed to prescribe rules for travelers who obtained § 212(h) relief after IIRIRA. Congress's failure to mention any comparable rule in § 101(a)(13)(C)(v) for travelers granted § 212(c) relief makes sense only if Congress believed that § 101(a)(13)(C)(v) would not apply to persons granted § 212(c) relief, because they would have been convicted before IIRIRA's passage.

282 & n.35. Likewise, Hughes Aircraft had no vested right to submit false claims to the government, but broadening its liability and abolishing a defense were retroactive changes. 520 U.S. at 947-48. Here, § 101(a)(13)(C)(v) would be retroactive not because it would impair a vested right, but because it would attach a new disability and impose a new penalty based on pre-IIRIRA offenses.

1. The subsection would attach a new disability to lawful permanent residents' pre-IIRIRA ability to travel abroad. Pet'r Br. 25-26. A disability is "[t]he inability to perform some function." BLACK'S LAW DICTIONARY 528 (9th ed. 2009); *accord* OXFORD ENGLISH DICTIONARY 713 (2d ed. 1989) ("Want of ability (to discharge any office or function); inability, incapacity, impotence."). As Professor Hohfeld explained nearly a century ago, a disability is the opposite not of a right, but of an ability or power to take some action. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30, 44 (1913). Until IIRIRA, lawful permanent residents enjoyed the ability to take brief trips abroad without risk of being denied reentry. If applied here, IIRIRA would revoke that ability based on a pre-IIRIRA offense.

The crux of the government's argument is that because removal is triggered by a post-IIRIRA entry, § 101(a)(13)(C)(v) operates only prospectively. Resp't Br. 15-20. But, by definition, a disability removes someone's ability to perform some action in the

future, after the disability is imposed. The government's argument would render Justice Story's fourth category toothless, as the essence of a disability is removing the ability to do something in the future.[2]

For the disability category to remain meaningful, it must protect the ability to engage in lawful future actions against new burdens based on unlawful pre-enactment actions. Apart from invoking Congress's plenary power, the government does not even attempt to rebut Mr. Vartelas's argument based on the new disability. *Compare* Resp't Br. 20, *with* Pet'r Br. 3, 15, 25, 27, 28, 30-32, 36, 39. It cannot deny that applying the subsection to such cases attaches a new disability to lawful permanent residents' ability to travel abroad.

2. Subsection 101(a)(13)(C)(v) would also add a new penalty to Mr. Vartelas's pre-IIRIRA offense. Pet'r Br. 23-25. *Landgraf*'s retroactivity test includes civil penalties as well as criminal punishments. "As our cases make clear, the presumption against retroactivity applies far beyond the confines of the criminal law." *St. Cyr*, 533 U.S. at 324; *see also Landgraf*, 511 U.S. at 283-84. Though the government tries to

[2] Likewise, the verb tense of § 101(a)(13)(C), which defines which lawful permanent residents "shall not be regarded as seeking an admission," reveals only that judges will make these determinations after IIRIRA's enactment. It tells us nothing about whether the law's burden targets a past act. *Contra* Resp't Br. 16-17.

limit the category of impermissible retroactive penalties to criminal punishments, *Hughes Aircraft* and *Landgraf* were civil-damages cases. *Compare* Resp't Br. 17, 22, *with* 520 U.S. at 947-48 *and* 511 U.S. at 282-84. And though the government defends deportation as an inherently prospective exercise of Congress's plenary power, *St. Cyr* rejected that very argument as a justification for retroactivity. *Compare* Resp't Br. 22 (quoting *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)), *with* 533 U.S. at 324 (rejecting the "inherently prospective" argument and distinguishing *Lopez-Mendoza*, 468 U.S. at 1038).

At the time of his conviction, the penalties imposed on Mr. Vartelas were four months' incarceration plus two years' supervised release. AR 310-311. He completed serving that sentence. His guilty plea and conviction did not affect his pre-IIRIRA ability to take brief trips abroad without being treated as an arriving alien upon his return. Under the court of appeals' decision, however, IIRIRA adds a new penalty to his conviction – even brief, lawful travel abroad now makes him removable. Pet'r Br. 23-25.[3]

3. The government argues that Mr. Vartelas "might well have" been "inadmissib[le] even under *Fleuti*" because of the alleged frequency and duration of his foreign travel. Resp't Br. 25. That is irrelevant to the retroactivity question presented here. The

[3] Mr. Vartelas assumes *arguendo* that IIRIRA abrogated the *Fleuti* doctrine. *Contra* AILA Br. 2-19.

resolution of the retroactivity question does not depend on whether Mr. Vartelas or any particular lawful permanent resident could in fact satisfy the *Fleuti* criteria under pre-IIRIRA law.[4] This Court should resolve the question presented, not apply pre-existing law to the particular facts of this case.

In any event, Mr. Vartelas would likely prevail under *Fleuti* on remand. Pet'r Br. 27 n.5. The government's factual assertions are contested, the testimony was confused on the number of months spent abroad, and the immigration judge neither applied *Fleuti* nor made the factual findings necessary to do so. AR 111-12. If this Court agrees with Mr. Vartelas on the question presented, the appropriate course will be to allow the immigration judge in the first instance to apply *Fleuti*, just as this Court did in *Fleuti* itself. 374 U.S. at 463.

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[4] The government also argues that Congress's passage, six months before IIRIRA, of another statute that made deportable certain aliens who were in a position somewhat similar to Mr. Vartelas's somehow has something to do with the retroactivity of § 101(a)(13)(C)(v). Resp't Br. 23-24. (Oddly, the government also relies on a 2005 case that was overruled in 2011 for the proposition that Mr. Vartelas was deportable when he traveled in 2003. *Id.*) It is sounder, however, to conclude that Congress intended the persons deportable under the other statute to be deported, but that normal retroactivity principles would govern IIRIRA's application to those, like Mr. Vartelas, who were *not* so deported nor made deportable.

III. Subsection 101(a)(13)(C)(v) Targets the Pre-IIRIRA Offense, Not the Innocent Post-IIRIRA Travel Abroad

1. Determining whether IIRIRA attaches a new disability or adds a new penalty "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) (emphasis added) (quoting *Landgraf*, 511 U.S. at 270). The government contends that the law has no retroactive effect because the triggering event occurs only when lawful permanent residents "make a post-IIRIRA attempt to enter the United States." Resp't Br. 19. But as the government acknowledges, the actual effect of "restricting [Mr. Vartelas's] ability to reenter" the United States is to "force him to choose between maintaining his residence in the United States and visiting his family in Greece." *Id.* at 20. As a commonsense, functional matter, that change in the law saddles Mr. Vartelas with a new disability based on a past offense: it essentially disables him from traveling abroad without becoming removable, as he was able to do before IIRIRA. And it harms him regardless of which course he chooses: forgoing travel to see his parents, or traveling and facing removal upon return.

Under the court of appeals' interpretation, IIRIRA forces lawful permanent residents with pre-IIRIRA convictions to make excruciating *new* choices between visiting ailing relatives abroad and remaining with their spouses and children within the United

States. *See* Asian Am. Justice Ctr. et al. Br. 7-8, 19-20, 22-23 (collecting stories). Indeed, "loss of the ability to travel is itself a devastating retroactive effect." *Id.* at 3. If they do travel, they face a different set of rules that makes them removable and subject to prolonged, unreviewable detention. *Id.* at 10-16. The law penalizes both those who remain in the United States and those who do not.

The commonsense, functional analysis requires "a process of judgment concerning . . . the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270. Brief round-trip travel is a perfectly innocent act that does not disrupt the status quo of Mr. Vartelas's permanent residence here. *Fleuti*, 374 U.S. at 461-62. The driving force behind the new disability and penalty is conviction of a pre-IIRIRA offense, which Mr. Vartelas is now powerless to undo. While the trigger is an innocent post-IIRIRA return home, the target is a pre-IIRIRA offense.

2. Subsection 101(a)(13)(C)(v) likewise qualifies as retroactive under Justice Scalia's approach in *Landgraf*, which asks "what is the relevant activity that the rule regulates." *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgment); Pet'r Br. 32-34 & n.8. That calls for "an objective appraisal of the impact of the change" rather than an inquiry into the legislature's "subjective motivation." *Lynce* v. *Mathis*, 519 U.S. 433, 442-43 (1997); *see also St. Cyr*, 533 U.S. at 320-21, 324-25 & n.55. The government thus errs in citing committee reports, especially since those

reports concerned older bills that Congress never passed, neither of which contained this particular subsection. Resp't Br. 40.[5]

The government also notes that two other subsections in § 101(a)(13)(C) govern only post-IIRIRA conduct or misconduct. Resp't Br. 39. But at least three subsections refer to earlier misconduct, and five of the six depend upon a finding of some form of misconduct. Pet'r Br. 32-33 & n.7. Moreover, five of them look to conduct beyond the entry itself. Under most of the subsections, including the one at issue here, neither the outbound nor the return trip is the relevant event. The statute targets misconduct distinct from the foreign travel itself. At most, the return from travel abroad is a convenient occasion to screen for past wrongs for those who are deportable.

3. The government does not dispute that Mr. Vartelas's foreign travel was completely lawful. Resp't Br. 20. Yet it strains to analogize this case to cases involving *crimes*. It quotes *ex post facto* cases that focus on "a crime already consummated" or "crimes that have already been committed" or "a criminal prohibition [expanded] after the act is done." Resp't Br.

[5] *Cf.* Pet'r Br. 33 n.8 (contrary enactment history). While many of those criminal-alien provisions are in Title III-B of IIRIRA (Resp't Br. 38-39), several, including the subsection at issue here, are in Title III-A. *E.g.*, IIRIRA § 304(a)(3), (c). But it is doubtful whether such intent-based factors can ever be strong enough to overcome the canon of construing immigration statutes in favor of lawful permanent residents.

18 (quoting *Cal. Dep't of Corr.* v. *Morales*, 514 U.S. 499, 505 (1995) and *Collins* v. *Youngblood*, 497 U.S. 37, 49 (1990)) (internal quotation marks omitted). Those cases cut in favor of Mr. Vartelas, as his post-IIRIRA travel was lawful and his offense predated IIRIRA.

Similarly, the government's RICO example requires "that an *act of racketeering* occurred after the section's effective date." Resp't Br. 18 (quoting *United States* v. *Brown*, 555 F.2d 407, 417 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978)) (emphasis added and omitted and internal quotation marks omitted). "[R]acketeering" within the meaning of 18 U.S.C. § 1962(c) requires proof of a statutorily enumerated crime, whereas § 101(a)(13)(C)(v) does not depend on the commission of a crime "after the section's effective date."

Likewise, lower courts have upheld applying felon-in-possession-of-a-firearm laws to defendants with pre-enactment convictions because "possession of a firearm" is "prohibited conduct." *United States* v. *Pfeifer*, 371 F.3d 430, 436 (8th Cir. 2004); Resp't Br. 19. As this Court has emphasized, there are well-known, "longstanding prohibitions on the possession of firearms by felons." *District of Columbia* v. *Heller*, 554 U.S. 570, 626 (2008). Unlike foreign travel, gun possession by felons is inherently dangerous conduct that legislatures have long treated as a crime.

The government's examples all require proof of post-enactment *crimes* to invoke new penalties. They

are analogous to recidivism sentencing enhancements for future crimes, which are permissible. "[T]he enhanced punishment imposed for the later offense 'is not to be viewed as . . . [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one.'" *Witte* v. *United States*, 515 U.S. 389, 400 (1995) (quoting *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948)). Here, by contrast, there is no "aggravated . . . repetitive" offense or indeed any post-IIRIRA offense at all. Mr. Vartelas's travel abroad and return are innocent acts, burdened only because of his pre-IIRIRA offense.

4. Finally, the government relies on *Fernandez-Vargas* for the proposition that removal is prospective simply because it is triggered by Mr. Vartelas's return from post-IIRIRA travel. Resp't Br. 17, 36-37. The government stresses the superficial similarity that Messrs. Fernandez-Vargas and Vartelas both "le[ft] the United States and then attempt[ed] to return" post-IIRIRA. *Id.* at 36. It misreads *Fernandez-Vargas*'s holding as turning on the lack of a vested right or *quid pro quo*, as opposed to the ongoing crime. *Id.* at 37. And it selectively quotes phrases discussing the alien's "conduct of remaining in the country after entry" and "the alien's choice" "after the effective date of the new law," "not a past act that [the alien] is helpless to undo." *Id.* at 17, 36 (quoting *Fernandez-Vargas*, 548 U.S. at 44 (internal quotation marks omitted)).

The government quotes those snippets out of context. The full passage reads:

> Thus, it is the conduct of remaining in the country after entry that is the predicate action; the statute applies to stop *an indefinitely continuing violation* that the alien himself could end at any time by voluntarily leaving the country. It is therefore the alien's choice *to continue his illegal presence, after illegal reentry* and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.

548 U.S. at 44 (emphases added). Missing from the government's account is any explanation of how the italicized phrases could apply here. Mr. Fernandez-Vargas faced no "new disability" because his "illegal presence," which had been illegal all along, was a "continuing violation." *Id.* at 45. He could enjoy no "right to continue illegal conduct indefinitely" because his "lawbreaking [wa]s continuous," so "the United States was entitled to bring that continuing violation to an end." *Id.* at 46 & n.13.

Here, by contrast, Mr. Vartelas's post-enactment conduct was completely lawful. IIRIRA imposes a new disability on his lawful travel based on his *pre-IIRIRA* offense. He is a lawful permanent resident, not an illegal alien charged with illegal reentry. Neither his departure nor his return is analogous to

Mr. Fernandez-Vargas's continuing commission of an ongoing crime.

IV. Reliance Is Not Required, But Its Presence in Cases Like This One Makes the Retroactive Effect Even More Obvious and Severe

A. Reliance on Pre-Existing Law Is Not Necessary

A litigant need not prove reliance on prior law for a court to conclude that a statute is retroactive. As the government concedes, "th[is] Court has not required a party challenging the application of a statute to show that he was subjectively aware of the prior law and relied on it in structuring his conduct." Resp't Br. 25-26. Nor could the government insist on a reliance requirement, given this Court's repeated findings of retroactivity in cases involving no reliance. *Hughes Aircraft*, 520 U.S. at 947-48; *Landgraf*, 511 U.S. at 282 & n.35; Pet'r Br. 37-38. While *St. Cyr* recognized that lawful permanent residents' reliance in deciding to plead guilty sufficed to show "an obvious and severe retroactive effect," it made clear that such reliance was not necessary to establish impermissible retroactivity. *St. Cyr*, 533 U.S. at 325; Pet'r Br. 38-39.[6] Instead, the government and Mr. Vartelas

[6] The government's other citations (Resp't Br. 26) are likewise inapposite. *See Judulang* v. *Holder*, 132 S. Ct. 476, 489 n.12 (2011) (finding no retroactivity problem "[b]ecause we find the BIA's prior practice so unsettled" that it did not amount to "a legal rule" that was retroactively changed; mentioning reliance

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agree that the likelihood and reasonableness of reliance are "significant factors" but not indispensable ones. Resp't Br. 26.

This Court therefore need not consider reliance; the preceding arguments suffice to resolve this case. But strong reliance interests, as discussed below, make the retroactive effect especially "obvious and severe." *St. Cyr*, 533 U.S. at 325.

B. Many Lawful Permanent Residents Reasonably Relied on the *Fleuti* Doctrine in Deciding to Plead Guilty

The government does not dispute that here, as in *St. Cyr*, many lawful permanent residents pleaded guilty in reliance on the state of immigration law at the time. 533 U.S. at 322, 325 n.55; Pet'r Br. 40-45. "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. In exchange for surrendering their constitutional rights and prospects of acquittal, defendants agree to accept known immigration consequences as well as sentences. *Id.* at 322-23. Retaining the ability

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in dictum); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 694-96 (2004) (not resting on *Landgraf*, but resolving case "[i]n this *sui generis* context" based on Foreign Sovereign Immunities Act); *cf. Fernandez-Vargas*, 548 U.S. at 38 n.6 (distinguishing *Altmann* as "turn[ing] on the peculiarities of the Foreign Sovereign Immunities Act").

to travel and return under pre-IIRIRA law is an important immigration consequence that reasonably influences lawful permanent residents' decisions to plead guilty. NACDL et al. Br. 16-18, 23-25.

Knowledge of immigration consequences is so central to guilty pleas that providing it is part of criminal defense counsel's professional obligations. The Sixth Amendment requires defense counsel to warn non-citizen criminal defendants of the possible immigration consequences of their pleas. *Padilla*, 130 S. Ct. at 1482-83, 1486; NACDL et al. Br. 19-21. Knowledge of immigration consequences enables lawyers to craft plea agreements to limit immigration consequences. *Padilla*, 130 S. Ct. at 1486. For example, defense counsel can explore charge bargains that would avoid depriving their clients of their ability to travel. NACDL et al. Br. 21-22. Had Mr. Vartelas known that his conviction would later make him removable upon his return from foreign travel, he could have sought to plead guilty instead to possessing counterfeit securities, which is not a crime involving moral turpitude. 18 U.S.C. § 474; *In re Lethbridge*, 11 I. & N. Dec. 444, 445 (BIA 1965); NACDL Br. 22. In 1994, he had no reason to anticipate that this distinction would someday be dispositive under a future statute.

The government struggles in vain to distinguish *St. Cyr* from this case. It notes that the repeal of former INA § 212(c) eliminated the possibility of discretionary relief for immigrants who were immediately deportable. Resp't Br. 34. It claims that INA

§ 101(a)(13)(C)(v), by contrast, "has no immediate effect on [lawful permanent residents] with prior criminal convictions" until they choose to travel abroad and return. *Id.*

Actually, Mr. Vartelas's case is a clearer example of retroactivity than *St. Cyr*. Former § 212(c) authorized only a possibility of discretionary relief, whereas prior law here guaranteed that lawful permanent residents could take brief trips abroad without risking exclusion upon return. The prior law here thus provided a firmer foundation for reliance.

Since lawful permanent residents were entitled to return if they met the *Fleuti* criteria, it is immaterial that they remain eligible for discretionary relief even after *Fleuti*'s abrogation. *Contra* Resp't Br. 34-35. Just as there is a "clear difference . . . between facing possible deportation and facing certain deportation," there is a clear difference between automatic return and a discretionary, uncertain chance of overcoming inadmissibility. *St. Cyr*, 533 U.S. at 325; Pet'r Br. 44 n.10. Here, for example, since Mr. Vartelas was denied discretionary relief, he will be treated as a newly arriving alien and removed from this country if INA § 101(a)(13)(C)(v) applies to him. If it does not apply, and he satisfies *Fleuti*'s criteria, he will not have made an entry triggering inadmissibility and will remain a lawful permanent resident. The difference is stark.

C. IIRIRA Upsets Reliance Interests in the Conviction, Not Just Commission, of Crimes Involving Moral Turpitude

1. If applied retroactively, INA § 101(a)(13)(C)(v) would upset lawful permanent residents' reasonable reliance on the laws in effect when they decided to plead guilty. As the government and the court of appeals noted, that subsection does not explicitly require proof of a conviction or guilty plea. Br. 28-29, 31; Pet. App. 24-25. The government, however, must prove by clear and convincing evidence that an applicant is seeking admission, so documents based on mere probable cause (such as arrest warrants or indictments) do not suffice. *Compare* Resp't Br. 28 (citing two cases for the proposition that an arrest warrant or indictment is sufficient proof), *with In re Rivens*, 25 I. & N. Dec. 623, 625-26 & n.4 (BIA 2011) (requiring proof by clear and convincing evidence and rejecting one of the cases cited by the government). Customs and border patrol officers ordinarily question the returning lawful permanent resident, scan his passport into their computers, and discover a record of conviction. TRAC Immigration, Immigration Inspections When Arriving in the U.S., http://trac.syr.edu/immigration/reports/142 (last visited Dec. 27, 2011). Thus, the government routinely uses the conviction, usually obtained by guilty plea, to prove commission of an offense. *See* Resp't Br. 27 (not disputing this point).

The point is not that guilty pleas are indispensable to proving prior offenses, nor that lawful permanent

residents have "a legitimate reliance interest in whatever practical impediments" there are to proving offenses. Resp't Br. 27, 31. Rather, when Congress enacted IIRIRA, it was well established that lawful permanent residents routinely considered immigration consequences and relied on the pre-existing statute (and *Fleuti*) in deciding to plead, just as they did in *St. Cyr*. Pet'r Br. 47-48; Resp't Br. 33 (acknowledging this as *St. Cyr*'s premise). Before IIRIRA, pleading guilty to a crime involving moral turpitude could preserve the ability to travel abroad without risk of being denied reentry; afterwards, a guilty plea would usually eliminate that ability. These reliance interests deserve respect regardless of whether particular sections of IIRIRA were tied to proof of conviction or commission of an offense. Of course, Congress *could have* changed the law to affect those who had already pleaded guilty, but courts may not presume that Congress would have wanted to vitiate such substantial reliance interests.

2. In addition to the dispositive non-reliance considerations and the practical reliance interests discussed above, the statutory structure respects reliance interests in the conviction and not just commission of offenses. INA § 101(a)(13)(C)(v)'s test for "seeking an admission" cross-references and works in tandem with INA § 212(a)(2)'s test for inadmissibility. The Board of Immigration Appeals reads these two subsections as coextensive. Pet'r Br. 48-49. In *Rivens*, the BIA held that having placed the burden of proof on the government under § 101(a)(13)(C)(v), it did not

need to decide separately which party bears the burden under § 212(a)(2)(A)(i)(I). 25 I. & N. Dec. at 626-27. Put another way, if a lawful permanent resident is seeking an admission under the former subsection, he is also inadmissible under the latter one because the former subsection "coincides with" the latter one. *Id.* Subsection 101(a)(13)(C)(v) presupposes that the government will prove commission by adducing clear and convincing evidence of the conviction or admission required by § 212(a)(2)(A)(i)(I). Thus, those who are proven to be seeking an admission are likewise proven inadmissible.

The government does not dispute that *Rivens*, as a published three-judge ruling of the BIA, is entitled to *Chevron* deference. Pet'r Br. 49. But it claims that the BIA did not reach "a general conclusion about the meaning of the statute." Resp't Br. 31-32. That is incorrect. *Rivens* resolved the relationship between seeking an admission and inadmissibility in the context of crimes involving moral turpitude, the very category at issue here. The BIA treats seeking an admission and inadmissibility as two sides of the same coin. The government's submission here, that Congress meant § 101(a)(13)(C)(v) to cast a broader net to screen lawful permanent residents who were not in fact inadmissible, conflicts with the BIA's reading. Resp't Br. 29.

In response, the government points to a different subsection. Under INA § 101(a)(13)(C)(ii), the government notes, an absence of more than 180 days triggers seeking an admission, even though absence

is not *per se* a ground of inadmissibility. Resp't Br. 29-30. Such a long absence may be a trigger because it is often tantamount to abandonment of one's lawful permanent resident status. Pet'r Br. 33 n.7. Regardless, that subsection was not addressed in *Rivens*, and it does not cross-reference INA § 212(a)(2). Subsection 101(a)(13)(C)(v), the one at issue here, is best read as coextensive with § 212(a)(2), which it explicitly cross-references.

3. *Rivens*'s approach is especially reasonable because it would prevent the absurd results occasioned by the government's reading. As Mr. Vartelas's opening brief explained, § 101(a)(13)(C)(v) requires that certain returning lawful permanent residents be treated as seeking admission if they have *committed* an offense identified in § 212(a)(2). Pet'r Br. 50-51. Yet, under the government's approach, the inadmissibility criteria in some of § 212(a)(2)'s subsections would encompass *more* lawful permanent residents than are covered by § 101(a)(13)(C)(v). The result would be a group of inadmissible aliens who would nonetheless be entitled to return to the United States because they would not be seeking an admission. Pet'r Br. 50-51.

Under the BIA's approach, the two subsections are coextensive; no aliens fall through the cracks. Thus, individuals who are inadmissible under § 212(a)(2) are seeking an admission under § 101(a)(13)(C)(v) and vice versa. The government concedes that, under its approach, some aliens who are inadmissible under § 212(a)(2) would not be seeking an admission and so

could not be excluded from this country. Resp't Br. 30. It tries to defend that conclusion by noting that the several other grounds for inadmissibility likewise do not trigger seeking an admission. *Id.* (citing the health-related grounds in § 212(a)(1) and the security-related grounds in § 212(a)(3)).

That response falls short. In drafting § 101(a)(13)(C)(v), Congress did not cross-reference § 212(a)(1) or (a)(3), instead enforcing those subsections by other means. But it did explicitly cross-reference § 212(a)(2), in order to treat everyone who would be inadmissible under that subsection as seeking an admission. The government's reading would undermine that explicit statutory cross-reference. It is more sensible, and certainly permissible under *Chevron*'s second step, to follow *Rivens*'s reading of § 101(a)(13)(C)(v) as cross-referencing the specific proof of commission required by § 212(a)(2), such as conviction of a crime involving moral turpitude. Pet'r Br. 51.

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If any doubt remains, a longstanding canon requires construing the statute in favor of the lawful permanent resident. Pet'r Br. 52-53. There is no reason to limit that canon arbitrarily to *Landgraf*'s first step, as the government suggests. Resp't Br. 40-41 (citing no case imposing such a limitation). Rather, it applies to the entire process of construction "because deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan* v.

Phelan, 333 U.S. 6, 10 (1948). The canon is not a technical tool limited to divining congressional "logic," but a humane safeguard against "trench[ing] on [the lawful permanent resident's] freedom." *Id.*

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Mr. Vartelas's opening brief, this Court should reverse the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

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