No. 10-1211

In The

Supreme Court of the United States

PANAGIS VARTELAS,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PANAGIS VARTELAS (Pro Se)
73 Courtland Avenue
Stamford, CT 06902
(516) 244-3997
achow@nawlaw.com

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PRELIMINARY STATEMENT

Petitioner, Panagis Vartelas, herewith submits his Reply to the Brief for the Respondent in Opposition.

ISSUES BEFORE THE COURT

The questions presented for review involve a direct conflict in the Circuits relating to the retroactivity of 8 U.S.C. § 1101(a)(13)(C)(v).

1. Whether the Second Circuit erred in misconstruing the significance of the term "committed" as used in 8 U.S.C. § 1101(a)(13)(C)(v) when the court below focused its analysis of the retroactivity of 8 U.S.C. § 1101(a)(13)(C)(v) merely on the commission of an offense without reading the provision in conjunction with 8 U.S.C. § 1182(a)(2)(A)(i)(I) which requires a conviction or admission to a crime involving turpitude to trigger inadmissibility to the United States.

2. Whether the Second Circuit misapplied the second step test articulated in *Landgraf v. USI Film Prods,* 511 U.S. 244 (1994), in analyzing whether 8 U.S.C. § 1101(a)(13)(C)(v), which effectively repealed the "innocent, casual, and brief" doctrine espoused in *Rosenberg v. Fleuti,* 374 U.S. 449 (1963), can be retroactively applied to the petitioner's guilty plea taken prior to the enactment and the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 301(a), 110 Stat. 3009-575 (1996).

3. Whether the Second Circuit erred in refusing to recognize that the amendment denies the petitioner's vested right of returning to his lawful permanent residence and attaches a new legal consequence to the petitioner's guilty plea which renders him inadmissible upon return from a brief travel outside the United States subsequent to the effective date of IIRIRA.

ARGUMENT IN REPLY

I. There Was a *Quid Pro Quo* Agreement as in *St. Cyr*

Upon returning from Greece to JFK airport in New York on January 29, 2003 after an absence of one week, the petitioner was found inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude in 1994. The Solicitor General contends that the petitioner's reliance on the *Fleuti* doctrine is distinguishable from *INS v. St. Cyr*, 533 U.S. 289 (2001) in that there was no *quid pro quo* agreement as in *St. Cyr*. (Opp. 9-10). On the contrary, as in *St. Cyr*, the petitioner pled guilty to a crime involving moral turpitude and waived his constitutional right to a trial (a *quid pro quo* agreement) in reasonable reliance on the pre-IIRIRA immigration laws, inclusive of the *Fleuti* doctrine that would have allowed him to continue to take brief trips abroad without facing adverse immigration consequences upon his return, notwithstanding his guilty plea.

II. The Term "Committed" As Used in § 1101(a)(13)(C)(v) Must Be Construed in the Context of § 1182(a)(2)

The Solicitor General and the Second Circuit's statutory interpretation of 8 U.S.C. § 1101(a)(13)(C)(v) is incorrect in the context of proper retroactivity analysis. The very language relied on by the Second Circuit would render the statute superfluous if "committed an offense identified in section 1182(a)(2)" is interpreted independently from the inquiry of whether a returning lawful permanent resident (LPR) is actually admissible.

In reviewing statutes the legislature is presumed not to use any superfluous language, *Baily v. U.S.*, 516 U.S. 137, 145 (1995). *See* also *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990), where this Court held that "[o]ur cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."

There is no question that under 8 U.S.C. § 1101(a)(13)(C)(v) a returning LPR is deemed to be seeking admission if he or she has committed an offense identified in 8 U.S.C. § 1182(a)(2). However, contrary to the Solicitor General's assertion, the issue of whether an LPR is inadmissible under § 1182(a)(2) is relevant to a determination as to whether an alien will be deemed under 8 U.S.C. § 1101(a)(13)(C)(v) to be seeking admission since 8 U.S.C. § 1182(a)(2) requires

an actual conviction or formal admission of acts constituting a crime involving moral turpitude.

The explicit terms of 8 U.S.C. § 1182(a)(2) state in relevant part that an "alien is inadmissible if he or she has been *convicted* of, or *admits having committed*, or *admits committing* acts which constitute the essential elements of – a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime. . . ."

As such an LPR is not inadmissible merely upon commission of a crime of moral turpitude – an LPR is only inadmissible if he has admitted or been convicted of a crime of moral turpitude. The admission to a crime involving moral turpitude must comply with stringent administrative safeguards set forth by agency case law. (Pet. 12). This is precisely the statutory and administrative reason why the petitioner was charged with having been convicted of and not for having committed a crime of moral turpitude under § 1182(a)(2)(A)(i)(I).

Therefore, the Second Circuit erred when it held that "section [i.e. § 1101(a)(13)(C)(v)] does not hinge on either a returning LPR's conviction or his decision to plead guilty." 620 F.3d at 119. In fact, in the absence of a conviction or admission of a crime involving moral turpitude, 8 U.S.C. § 1101(a)(13)(C)(v) simply does not apply.

III. The Determinative Event That Triggers Retroactivity Analysis Is the Petitioner's Guilty Plea And Not the Commission of an Offense

The Solicitor General contends that the determinative event for retroactivity analysis is not the petitioner's pre-IIRIRA guilty plea but the petitioner's "commission" of an offense and also includes conduct that occurred well after the enactment of the revised definition. The Solicitor General also maintains that the petitioner should have refrained from ever traveling, regardless of the duration or purpose, outside the United States (Opp. 12). The Solicitor General's contention is without statutory basis.

This Court has ruled that whether "a particular application is retroactive will depen[d] upon what one considers to be the event by which retroactivity or prospectivity is to be calculated." *Republic National Bank of Miami v. United States*, 506 U.S. 80, 100 (1992).

In the present case, as in *St. Cyr*, the determinative event is the guilty plea (an event subsequent to the criminal act) and not the commission of the crime insofar as the petitioner was not deportable at the time and would not have been inadmissible under former pre-IIRIRA law as a result of pleading guilty to a crime of moral turpitude. When petitioner pled guilty to a crime of moral turpitude in 1994, he retained the right under the pre-IIRIRA law existing at such time to make "innocent, casual, and brief"

overseas trips without being subjected to a charge or finding of inadmissibility upon his return to the United States.

Therefore, because the determinative event of the guilty plea occurred before the effective date of IIRIRA in reliance on the *Fleuti* doctrine, the subsequent event of departure after the effective date is irrelevant.

IV. The Circuit Split Has To Be Resolved by this Court and the Solicitor General's Reliance on *Fernandez-Vargas* Is Misplaced

The Solicitor General contends that the Second Circuit was correct in refusing to follow the retroactivity analysis utilized in both *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007) and *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). The Second Circuit chose to focus its statutory analysis on the "commission of an offense" rather than the proper retroactivity analysis based on a pre-IIRIRA guilty plea. Therefore, the conflicts between the Circuits must be reviewed by this Court. The Solicitor General incorrectly suggests that the issue should be revisited by the Fourth and Ninth Circuits based on the Second Circuit's reasoning. (Opp. 13).

More importantly, the Solicitor General's reliance on *Fernandez-Vargas v. Gonzales,* 548 U.S. 30 (2006), (Opp. 13-14), in his retroactivity analysis is misplaced. The Solicitor General asserts that *Fernandez-Vargas* was decided before *Olatunji* and went unnoticed by

the *Camins* court. The Solicitor General failed to mention that *Fernandez-Vargas* went unnoticed by the Second Circuit as well. Also, the petitioner's brief trip abroad occurred before *Fernandez-Vargas* was decided in 2006.

In *Fernandez-Vargas* this Court ruled that the reinstatement statute in that case applied to illegal aliens who re-entered the United States before the effective date of the statute, and that the application to such aliens was not impermissibly retroactive. The Court held that the purpose of the statute was most consistent with a broad application, and "common principles of statutory interpretation fail to unsettle the apparent application § 241(a)(5) to any re-entrant present in the country, whatever the date of return." *Id.* at 41, 42. Fernandez-Vargas's offense was not a "past act that he is helpless to undo," *id.* at 44, but rather the "continuing violation," *id.* at 46, of remaining in the country illegally. This is not the case of the petitioner herein.

The majority opinion in *Fernandez-Vargas* affirmed the presumption against retroactive statutes, but found the reinstatement statute permissible under a test set out in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

This Court in *Landgraf* articulated a two-step test for determining whether a federal statute applies retroactively. First, "absent clear congressional intent favoring" retroactive application, the court must move to the second step of the *Landgraf* test. The first step

is not an issue in this case as conceded by the government (Opp. 6).

Under the second step, this Court determined that statutes are disfavored as retroactive when their application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280.

The Court in *Fernandez-Vargas* affirmed that "[t]he modern law thus follows Justice Story's definition of a retroactive statute as 'tak[ing] away or impair[ing] vested rights acquired under existing laws, or creat[ing] a new obligation impos[ing] a new duty, or attach[ing] a new disability, in respect to transaction or considerations already past.'" *Fernandez-Vargas, supra,* at 37. (internal citation omitted).

Since the petitioner herein pled guilty to a crime of moral turpitude in 1994, he retained the vested and substantive rights under the pre-IIRIRA law existing at such time for an LPR to make "innocent, casual, and brief" overseas trips without being exposed to a charge or finding of inadmissibility upon return to the United States.[1]

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[1] The Solicitor General contends that the petitioner does not claim that he has a "vested right" to the matter at issue. (Opp. 13, n.13). The vested right is self-evident as the retroactive statute in question does impair and take away the petitioner's right to travel briefly under the existing law. In addition, the statute is retroactive as the new law attaches a new disability to

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Unlike the petitioner who was returning to his lawful permanent residence in the United States, Fernandez-Vargas chose to continue his illegal presence, after illegal re-entry and after the effective date of the new law, and later sought to adjust his illegal status. *Id.* at 42, 43.

In addition, adjustment of status, among other reliefs, as a putative claim to relief is not a vested right, a term that describes something more substantial than inchoate expectations and unrealized opportunities. *Id.* at 44, n.10.

Fernandez-Vargas could have sought "[s]ome varieties of discretionary relief," *id.* at 33, before the new law came into effect. Instead he chose to continue his illegal status and challenged the application of the new law as impermissibly retroactive to him.

The Solicitor General reasons that the petitioner has not attempted to avoid the consequences of the "admission" by refraining from departing from the United States and by filing in advance an application for relief under former Section 212(c). (Opp. 13). However, the petitioner herein was not required to take affirmative steps before his brief trip abroad simply because under the *Fleuti* doctrine the petitioner

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petitioner's decision to plead guilty by now rendering him inadmissible based on his decision to plead guilty to a crime of moral turpitude. Thus, in reliance on the *Fleuti* doctrine, the petitioner should not be deemed to be seeking admission even if the brief trip occurred after the effective date of the new law.

would not have been deemed to be seeking "entry" or "admission."

Therefore, "commonsense, functional judgment," *Martin v. Hadix*, 527 U.S. 343, 357 (1999), dictates that 8 U.S.C. § 1101(a)(13) has a detrimental retroactive effect when applied to the petitioner who was denied his vested rights upon returning to his lawful and permanent place of abode in the United States after a brief trip abroad.

CONCLUSION

For the foregoing reasons, the Court should grant the instant petition for a writ of certiorari to resolve the split between the Fourth and Ninth Circuits, and the Second Circuit involving a legal issue of significant importance requiring national uniformity.

Respectfully submitted,

PANAGIS VARTELAS (Pro Se)
73 Courtland Avenue
Stamford, CT 06902
(516) 244-3997

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