No. 10-1211

In the Supreme Court of the United States

PANAGIS VARTELAS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

In 1996, Congress amended 8 U.S.C. 1101(a)(13) to specify that those aliens seeking "admission" to the United States include lawful permanent resident aliens who are returning to the United States from travel abroad and who have committed an offense identified in 8 U.S.C. 1182(a)(2) (2006 & Supp. IV 2010). 8 U.S.C. 1101(a)(13)(C)(v).

The question presented is as follows:

Whether the amended definition of "admission" in 8 U.S.C. 1101(a)(13) is applicable to a lawful permanent resident alien who committed an offense identified in 8 U.S.C. 1182(a)(2) (2006 & Supp. IV 2010) (and was convicted of that offense upon a guilty plea) before 1996 and then departed from and returned to the United States in 2003.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 620 F.3d 108. The decision of the Board of Immigration Appeals (Pet. App. 29-32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2010. A petition for rehearing was denied on January 4, 2011 (Pet. App. 33). The petition for a writ of certiorari was filed on April 4, 2011, and granted on September 27, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

1. a. In the immigration laws, Congress has "long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry." *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958). Before 1996, the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provided for two basic types of proceedings to determine whether an alien was removable from the United States: An alien seeking admission was placed in an "exclusion" proceeding, while an alien who had already entered the United States was placed in a "deportation" proceeding. *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982). In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress abolished the distinction between "exclusion" and "deportation" proceedings and instituted a new, uniform proceeding known as "removal." See 8 U.S.C. 1229, 1229a; *Judulang* v. *Holder*, No. 10-694 (Dec. 12, 2011), slip op. 1-2.

While unifying removal procedures, Congress maintained two separate lists of the substantive grounds for removal, with one still defining those that render an alien excludable (or, in the term the Act now uses, "inadmissible"), see 8 U.S.C. 1182(a) (2006 & Supp. IV 2010), and the other defining those that render an alien deportable, see 8 U.S.C. 1227(a) (2006 & Supp. IV 2010). See 8 U.S.C. 1229a(e)(2) (specifying that an alien is "removable" if "inadmissible" or "deportable"); *Judulang*,

slip op. 2. Because the lists differ, an alien may be inadmissible without being deportable, and vice versa.

Both before and after the enactment of IIRIRA, the class of inadmissible aliens has included "any alien convicted of, or who admits having committed, or who 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." 8 U.S.C. 1182(a)(2)(A)(i)(I). As relevant here, counterfeiting offenses are crimes involving moral turpitude. See *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 423 (1933).

b. Until 1996, the INA defined an "entry" into the United States as "any coming of an alien into the United States, from a foreign port or place." 8 U.S.C. 1101(a)(13) (1994). But the definition specified that a lawful permanent resident alien (LPR) returning from abroad would "not be regarded as making an entry into the United States * * * if the alien prove[d] * * * that his departure to a foreign port or place * * * was not intended or reasonably to be expected by him or * * * was not voluntary." *Ibid.*

Construing that definition in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), this Court observed that it did "not think Congress intended to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned in 'about a couple of hours.'" *Id.* at 461. The Court therefore held "that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." *Id.* at 462.

c. In Section 301(a) of IIRIRA, Congress replaced the earlier definition of "entry" with a new definition of "admission," and it specified the circumstances under which an LPR returning to the United States from abroad would be treated as seeking "admission" and therefore subject to the limitations on admissibility contained in 8 U.S.C. 1182 (2006 & Supp. IV 2010). IIRIRA § 301(a), 110 Stat. 3009-575. The new definition states that the terms "admission" and "admitted" refer to "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). The Act further provides that an LPR "shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless" he or she is covered by one of six enumerated exceptions, one of which applies to any alien who "has committed an offense identified in section 1182(a)(2) of this title"—that is, an offense identified in the provision setting out the grounds of inadmissibility. 8 U.S.C. 1101(a)(13)(C)(v).

In 1998, the Board of Immigration Appeals (Board) held that a returning LPR described in Section 1101(a)(13)(C) "shall be regarded as 'seeking an admission' into the United States, without regard to whether the alien's departure from the United States might previously have been regarded as 'brief, casual, and innocent' under the *Fleuti* doctrine." *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1065-1066 (1998) (en banc).

2. Petitioner, a native and citizen of Greece, has been an LPR since 1989. Pet. App. 2. In 1992, he participated in a scheme to manufacture and sell $50,000 in counterfeit traveler's checks. Administrative Record (A.R.) 299-300. In 1994, he pleaded guilty to conspiracy to make or possess counterfeit securities, in violation of

18 U.S.C. 371, and was sentenced to four months of imprisonment. Pet. App. 2-3.

In January 2003, petitioner left the United States to visit Greece. Pet. App. 4; A.R. 318. Upon his return in late January, he sought entry into the United States as a returning LPR. Pet. App. 4; A.R. 360. In March 2003, he was placed in removal proceedings as an arriving alien who was inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) on account of his 1994 conviction for a crime involving moral turpitude. Pet. App. 4.

Before an immigration judge, petitioner conceded that he was removable but sought discretionary relief from removal under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994) (repealed 1996). Pet. App. 4. Following a hearing, the immigration judge denied his application, finding that the equities did not warrant relief because, among other things, petitioner's testimony was "close to incredible"; he "appear[ed] to be not merely remiss in his tax obligations, but a serious tax evader"; and he had "demonstrated no hardship to himself should he return to Greece," where "he [had] an extensive family business and property." A.R. 111, 116; see Pet. App. 5. The immigration judge ordered petitioner removed to Greece. *Ibid.*

3. a. On appeal, the Board adopted and affirmed the immigration judge's decision. A.R. 51; see Pet. App. 5-6.

b. Petitioner subsequently moved to reopen the proceedings, alleging that he had received ineffective assistance of counsel. Pet. App. 29. He argued that he had been prejudiced by his previous attorney's failure to challenge his removability on the ground that the statutory definition of "admission," as amended by IIRIRA, should not apply to him because "[h]e pled guilty to a crime of moral turpitude at a time when he would not be

considered an alien seeking 'entry' upon returning to the United States." A.R. 26; Pet. App. 6-7. In support of that argument, he cited *Camins* v. *Gonzales*, 500 F.3d 872 (9th Cir. 2007), which held that IIRIRA's amendment to Section 1101(a)(13) was not applicable to LPRs who pleaded guilty to crimes before IIRIRA's effective date. A.R. 26; Pet. App. 31-32.

The Board denied petitioner's motion to reopen. Pet. App. 29-32. It concluded that petitioner had failed to show that his prior counsel's performance had prejudiced his case, and that petitioner's reliance on the Ninth Circuit's decision in *Camins* was misplaced because it did not govern his proceeding (which was within the Second Circuit) and had been decided two years after he had conceded his inadmissibility. *Id.* at 31-32.

4. The court of appeals denied a petition for review. Pet. App. 1-28. The court held that, for purposes of his claim of ineffective assistance of counsel, petitioner had "failed to show prejudice under any standard." *Id.* at 13.

In reaching that conclusion, the court of appeals determined that the Board had "reasonably interpreted IIRIRA as superseding the *Fleuti* doctrine." Pet. App. 20. In considering whether IIRIRA "was impermissibly retroactive as applied to [petitioner]," the court applied the two-step inquiry described in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). Pet. App. 20. For purposes of the first step, the court noted that the government conceded that "Congress has not expressly prescribed the temporal reach of" the amended version of Section 1101(a)(13). *Id.* at 20-21. With respect to the second step of the *Landgraf* analysis, however, the court held that the amended definition did not have a genuinely retroactive effect on petitioner because he could not claim that he had reasonably relied on the former

version of the law in deciding to participate in a counterfeiting scheme. *Id.* at 21-27. The court explained that Section 1101(a)(13)(C)(v)—unlike former Section 212(c) of the INA, which had been at issue in *INS* v. *St. Cyr*, 533 U.S. 289 (2001)—"does not hinge on either an LPR's conviction or his decision to plead guilty; rather, it turns on whether the LPR 'has *committed* an offense identified in [S]ection 1182(a)(2).'" Pet. App. 24 (quoting 8 U.S.C. 1101(a)(13)(C)(v)).

Observing that some definitions in the INA refer to an alien's conviction and some refer to an alien's commission of an offense, the court of appeals concluded that "Congress intended the focus [in Section 1101(a)(13)(C)(v)] to be on the alien's commission of the crime." Pet. App. 25. The court noted that it had "consistently rejected the notion that an alien can reasonably have relied on provisions of the immigration laws in 'committ[ing]' his crimes." *Ibid.* (brackets in original). Accordingly, it held that applying Section 1101(a)(13)(C)(v) to petitioner's "January 2003 foreign trip—an event begun and completed long after the effective date of IIRIRA—is not impermissibly retroactive, for * * * it would border on the absurd to suggest that [petitioner] committed his counterfeiting crime in reliance on the immigration laws." *Id.* at 27.

The court of appeals acknowledged that two other circuits had reached a contrary conclusion. Pet. App. 27. But the court found those decisions "unpersuasive," in part because they both "analyzed retroactivity in relation to the alien's plea of guilty" and therefore failed to "address[]" the Act's "focus on the LPR's 'commi[ssion]' of the crime, or on the lack of rationality in any claim that the LPR reasonably relied on the immigration laws in deciding to break the criminal laws." *Id.* at 27-28 (dis-

cussing *Camins*, *supra*, and *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004)) (second brackets in original).

SUMMARY OF ARGUMENT

Under 8 U.S.C. 1101(a)(13)(C)(v), as amended by IIRIRA in 1996, a lawful permanent resident alien who has left the United States and wishes to return will be regarded an applicant for "admission" if he has "committed an offense identified in" 8 U.S.C. 1182(a)(2) (2006 & Supp. IV 2010)—that is, an offense that would constitute a ground of inadmissibility. The court of appeals correctly held that the amendment to Section 1101(a)(13) applies to all returning aliens, including those who committed criminal offenses before IIRIRA was enacted.

In determining the temporal scope of a statute, this Court applies the two-part test described in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). The first step entails determining whether Congress has specified the statute's reach. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that Congress did not do so in IIRIRA. It is therefore appropriate to proceed to the second step of the *Landgraf* inquiry, which calls for a "commonsense, functional judgment" of whether the application of the statute would have a retroactive effect. *Martin* v. *Hadix*, 527 U.S. 343, 357 (1999). The Court has identified several factors that inform that judgment, and in this case, all of them indicate that applying Section 1101(a)(13)(C) to aliens whose convictions predate IIRIRA would not have a retroactive effect.

First, the statute applies only to aliens who engage in the post-enactment conduct of attempting to enter the United States. This Court made clear in *Landgraf* that

a regulation of post-enactment conduct is not retroactive, even if it takes into account pre-enactment conduct.

Second, Section 1101(a)(13)(C) does not "impair rights a party possessed when he acted," *Landgraf*, 511 U.S. at 280, because aliens have no vested right to enter (or reenter) the United States. Congress possesses plenary power to regulate immigration by preventing aliens from entering the United States. And even under pre-IIRIRA law, petitioner's travels may have subjected him to exclusion from the United States. He therefore cannot plausibly claim to have had a right to leave the United States and return without seeking readmission.

Third, the statute does not undermine "reasonable reliance" by aliens, *Landgraf*, 511 U.S. at 270, because aliens could not reasonably have relied on pre-IIRIRA law in deciding to commit crimes identified in the grounds of inadmissibility. Unlike the provision at issue in *St. Cyr*, which for certain LPRs altered the consequences of a conviction obtained following a guilty plea, Section 1101(a)(13)(C) applies to any alien who has committed an offense, whether or not he has been convicted of it. The "reliance" at issue here is therefore more akin to that involved in *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), in which this Court rejected a retroactivity claim similar to the one petitioner asserts.

Several Justices in *Landgraf* suggested that the temporal scope of a statute should be determined based on an analysis of "what is the relevant activity that the rule regulates." *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgment). That analysis points to the same conclusion as the factors identified by the *Landgraf* majority. Because Section 1101(a)(13) is intended to regulate the admission of aliens to the United

States, not to deter or punish past criminal conduct by aliens, it is not retroactive.

Finally, petitioner errs in suggesting that ambiguities in immigration statutes should be construed in favor of aliens. Whatever the force of that principle in other contexts, it has no relevance to the analysis of a statute's retroactive effect under *Landgraf*.

ARGUMENT

8 U.S.C. 1101(a)(13) GOVERNS THE ADMISSION TO THE UNITED STATES OF ALIENS WHO COMMITTED CRIMES BEFORE AS WELL AS AFTER ITS ENACTMENT

IIRIRA amended 8 U.S.C. 1101(a)(13) to provide that LPRs who are returning to the United States will be deemed to be seeking admission if, among other things, they have committed an offense identified in the provision that sets out the grounds of inadmissibility. That amendment abrogates the holding in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), that LPRs were deemed not to be seeking to reenter the United States if they had taken an "innocent, casual, and brief" foreign trip, *id.* at 462. See Pet. Br. 8. By its terms, the amended version of Section 1101(a)(13) applies to all aliens. This case presents the question whether the amendment applies to aliens, such as petitioner, who before the enactment of IIRIRA committed crimes identified in the statutory grounds of inadmissibility.

Under *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), this Court applies a two-part test in determining the temporal scope of a statute. First, the Court asks "whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. Second, it asks "whether the new statute would have retroactive effect," in which case a presumption against retroactivity applies.

Ibid. Under *Landgraf*, the amended version of Section 1101(a)(13) is not retroactive as it applies to the circumstances of this case, and it therefore governs petitioner's situation.

A. This Court Has Held That Congress Did Not Expressly Prescribe The Temporal Reach Of IIRIRA's Amendment To Section 1101(a)(13)

1. The amendment to Section 1101(a)(13) that is at issue here was contained in Section 301(a) of IIRIRA, which was part of Title III-A of that statute. 110 Stat. 3009-575. Section 309(a) of IIRIRA states that "the amendments made by [Title III-A] shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment" of IIRIRA. 110 Stat. 3009-625. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that that effective-date provision was insufficient to resolve the ambiguity in the temporal scope of another provision of Title III-A of IIRIRA, Section 304(b). *Id.* at 317-320. That holding is equally applicable here, and it compels the conclusion that Congress has not "expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. The Court should therefore proceed to the second step of the *Landgraf* analysis.

2. Petitioner suggests (Br. 20 n.3) that Congress expressed a "clear intent *not* to make" the amendment to Section 1101(a)(13) applicable to LPRs with pre-IIRIRA criminal convictions. He notes that, while Section 1101(a)(13)(C)(v) provides that LPRs returning to the United States will be deemed to be seeking admission if they have committed a crime involving moral turpitude, it exempts those aliens who "have been granted relief under [8 U.S.C.] 1182(h) or 1229b(a)." It does not,

however, exempt aliens who have received discretionary relief under former Section 212(c) of the INA, which IIRIRA repealed. See 8 U.S.C. 1182(c) (1994); IIRIRA § 304(b), 110 Stat. 3009-597. According to petitioner (Br. 21 n.3), "[t]he only logical explanation" for that omission "is that IIRIRA eliminated former § 212(c) waivers for future offenses, and [Section 1101(a)(13)(C)(v)] was intended to apply only to post-IIRIRA offenses."

Petitioner's reasoning is flawed. Waivers under Section 1182(h) predate IIRIRA, and nothing in the text of the statute distinguishes among Section 1182(h) waivers on the basis of the date on which they were granted. Moreover, Section 1101(a)(13)(C)(v) exclusively addresses inadmissibility under Section 1182(a)(2), and Section 1182(h), likewise, applies exclusively to certain subparagraphs of Section 1182(a)(2). By contrast, a waiver under former Section 212(c) may be granted with regard to *any* ground of inadmissibility, except Section 1182(a)(3) and (9)(C). 8 U.S.C. 1182(c) (1994). It is hardly surprising that a waiver that may be granted for diverse grounds of inadmissibility that typically involve lesser harms than the criminal activity described under Section 1182(a)(2)—such as visa fraud or being a public charge, see 8 U.S.C. 1182(a)(4) and (6)(C)—would be insufficient to insulate a returning LPR from the effect of Section 1101(a)(13)(C)(v).

In addition, petitioner overlooks that relief under former Section 212(c) was more easily obtained than is discretionary relief under the provisions that replaced it. For example, many criminal aliens who were eligible for Section 212(c) relief are statutorily ineligible for cancellation of removal under 8 U.S.C. 1229b (2006 & Supp. IV 2010). Compare 8 U.S.C. 1182(c) (1994) (making re-

lief unavailable to "an alien who has been convicted of one or more aggravated felonies and has served * * * a term of imprisonment of at least 5 years"), with 8 U.S.C. 1229b(a)(3) (making relief unavailable to any alien who has "been convicted of any aggravated felony"), and 8 U.S.C. 1229b(c) (making relief unavailable to various other classes of aliens); see IIRIRA § 321, 110 Stat. 3009-627 (expanding the category of crimes designated "aggravated felon[ies]"). Likewise, an applicant for a waiver under 8 U.S.C. 1182(h)(1)(B) bears a much greater burden than an applicant for former Section 212(c) relief, see 8 U.S.C. 1182(h)(1)(B) (requiring that the applicant establish that "the alien's denial of admission would result in extreme hardship" to a qualifying family member), and many aliens who were eligible for Section 212(c) relief are ineligible for a waiver under 8 U.S.C. 1182(h), see *ibid.* (rendering an LPR convicted of an aggravated felony ineligible). The decision not to exempt aliens who had obtained Section 212(c) relief therefore reflects a view that those aliens should be examined again, to make sure that it is appropriate to readmit them in light of the new provisions governing admission of aliens outside the United States, under which discretionary relief is available but under heightened standards. It does not indicate an intent to apply the amendments to Section 1101(a)(13) only to LPRs with post-IIRIRA convictions.

B. Application Of Section 1101(a)(13)(C) In The Circumstances Presented Here Would Not Have A Retroactive Effect

The second step in the *Landgraf* inquiry is to "determine whether the new statute would have a retroactive effect, *i.e.*, whether it would impair rights a party pos-

sessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 511 U.S. at 280. Determining whether the effect of a statute would be retroactive requires a "commonsense, functional judgment" that is "informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf*, 511 U.S. at 270). In making that functional judgment, this Court has looked to Justice Story's definition of a retroactive statute as one that "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." *Society for the Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156); see *Landgraf*, 511 U.S. at 269.

In this case, all of those considerations point to the conclusion that the application of Section 1101(a)(13)'s definition of admission to aliens who committed crimes before IIRIRA would not have a retroactive effect. First, the statute applies only to aliens who engage in the post-enactment conduct of attempting to enter the United States. Second, it does not "impair rights a party possessed when he acted," *Landgraf*, 511 U.S. at 280, because aliens have no vested right to enter the United States. Third, it does not undermine "reasonable reliance" by aliens, *id.* at 270, because aliens could not reasonably have relied on pre-IIRIRA law in deciding to commit crimes that would render them inadmissible. And although petitioner invokes this Court's decision in *St. Cyr*, that case was altogether different from this one with respect to the prospect of reasonable reliance.

1. Section 1101(a)(13)(C) applies only to aliens who engage in the post-IIRIRA conduct of attempting to enter the United States

As this Court observed in *Landgraf*, "a statute is not made retroactive merely because it draws upon antecedent facts for its operation," since "[e]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct." 511 U.S. at 269-270 n.24 (internal quotation marks omitted). Instead, "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 273. One such "unquestionably proper" application is when the statute regulates conduct in the future, even when that regulation is based in part on prior events. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 (2006); see also *Landgraf*, 511 U.S. at 293 n.3 (Scalia, J., concurring in the judgment) (noting that "the presumption against retroactivity is not violated by interpreting a statute to alter the future legal effect of past transactions"). Because 8 U.S.C. 1101(a)(13)(C) defines the circumstances in which an alien's future conduct will constitute a request for "admission" to the United States, it does not "attach[] new legal consequences to events *completed* before its enactment," and it therefore does not have a retroactive effect when applied to aliens who committed crimes before its enactment. *Landgraf*, 511 U.S. at 270 (emphasis added).

a. Section 1101(a)(13) is part of the INA's comprehensive regulation of the entry of aliens into the United States. Under IIRIRA's effective-date provision, IIRIRA's amendments to Section 1101(a)(13) apply only to entries that take place after the enactment of the statute. See IIRIRA § 309(a), 110 Stat. 3009-625.

Section 1101(a)(13)(A) provides a general definition of "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Section 1101(a)(13)(C) sets out an exception to that general rule, specifying that "[a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws"—unless one of six conditions is present. In some respects, Section 1101(a)(13)(C) provides a more generous rule than *Fleuti* did. For example, a returning LPR will not be deemed to be seeking admission if he has not been "absent from the United States for a continuous period in excess of 180 days," 8 U.S.C. 1101(a)(13)(C)(ii), even though a 180-day absence might well have been too long to qualify as "brief" or "casual" under *Fleuti*. See 374 U.S. at 462. In other respects, Section 1101(a)(13)(C) incorporates a strand of *Fleuti*'s analysis, by, for example, deeming the alien to be applying for admission if he engaged in illegal activity after having departed the United States. See 8 U.S.C. 1101(a)(13)(C)(iii); *Fleuti*, 374 U.S. at 462. And in still other respects, Section 1101(a)(13)(C) is narrower than *Fleuti*, as in its exception for aliens who have committed offenses covered by Section 1182(a)(2). 8 U.S.C. 1101(a)(13)(C)(v). These features strongly suggest that Congress meant for that entire set of new provisions to apply to attempted entries after IIRIRA's effective date.

Significantly, in identifying the cases in which a returning LPR will be deemed to be seeking admission, Section 1101(a)(13)(C) employs the future-looking phrase "shall not be regarded," further demonstrating that the provision governs only conduct occurring after

its enactment. See *United States* v. *Wilson,* 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). Indeed, petitioner does not appear to dispute that Section 1101(a)(13)(C) is applicable only to aliens who engage in conduct—seeking to enter the United States—after the enactment of IIRIRA. To paraphrase this Court's most recent decision addressing retroactivity at length in the immigration context, it is "the alien's choice" to depart and then seek to re-enter the country "after the effective date of the new law, that subjects him to the new and less generous legal regime," not merely the commission of a prior offense. *Fernandez-Vargas*, 548 U.S. at 44. Because Section 1101(a)(13)(C) regulates post-enactment conduct, its effect is not retroactive.

b. Petitioner invokes (Br. 26) the prohibition on the retroactive application of criminal statutes embodied in the Ex Post Facto Clause, U.S. Const. Art. I, § 9, but his reliance on that principle is misplaced because removal from the United States is not a criminal punishment and therefore is not subject to the Ex Post Facto Clause. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952). In any event, cases involving the Ex Post Facto Clause reinforce the conclusion that the application of Section 1101(a)(13)(C) to petitioner's post-IIRIRA entry to the United States is not retroactive.

To prevail in a challenge to a statute under the Ex Post Facto Clause, it is not sufficient for a defendant to show that some portion of his conduct occurred before the enactment of a new criminal punishment. Rather, when characterizing the retroactivity inquiry under the Ex Post Facto Clause, this Court has repeatedly spoken of the imposition of new punishments on "crimes that have already been committed," or acts that were "com-

pleted," or "consummated," or "done" before the statute became effective. See, *e.g.*, *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 505 (1995) ("[A] legislature may not stiffen the 'standard of punishment' applicable to crimes that have already been committed.") (quoting *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937)); *ibid.* ("[T]he Constitution 'forbids the application of any new punitive measure to a crime already consummated.'") (quoting *Lindsey*, 301 U.S. at 401); *Collins* v. *Youngblood*, 497 U.S. 37, 49 (1990) ("A law that abolishes an affirmative defense of justification or excuse" violates the Ex Post Facto Clause "because it expands the scope of a criminal prohibition after the act is done."); *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)).

Thus, a prosecution for a course of conduct that straddles the effective date of a statute does not violate the Ex Post Facto Clause as long as at least one of the acts constituting the offense took place after the statute was enacted. For example, courts of appeals have upheld convictions of those who "conducted an enterprise through a pattern of racketeering activity having its inception" before 18 U.S.C. 1962(c) took effect, as long as the government "established that an act of racketeering occurred *after* the section's effective date." *United States* v. *Brown*, 555 F.2d 407, 416-417 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); accord *United States* v. *Campanale*, 518 F.2d 352, 364-365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

Courts have reached similar conclusions in cases involving 18 U.S.C. 922(g), which prohibits the possession of firearms by convicted felons. In particular, courts

have uniformly approved the application of Section 922(g) to individuals who were convicted of a felony before the statute was enacted. See, *e.g.*, *United States* v. *Pfeifer*, 371 F.3d 430, 436 (8th Cir. 2004) (citing cases). As long as one element of the offense—the possession of a firearm—is committed after the statute's enactment, the application of the statute is not impermissibly retroactive. See *United States* v. *Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001) ("A law is not retroactive simply because it 'draws upon antecedent facts for its operation.'") (quoting *Cox* v. *Hart*, 260 U.S. 427, 435 (1922)).

To the extent ex post facto principles shed light on the question in this case, they confirm that Section 1101(a)(13)(C) is not retroactive because it applies only to aliens who attempt to enter the United States after IIRIRA's effective date.

c. Nonetheless, throughout his brief, petitioner fails to take account of the fact that the amended version of Section 1101(a)(13)(C) applies only to aliens who have engaged in post-IIRIRA conduct. For example, petitioner asserts (Br. 23-24) that "removal operates as a penalty" and that IIRIRA therefore "add[s] a new penalty to the pre-IIRIRA offenses" committed by LPRs. But Section 1101(a)(13)(C) does not provide for the removal of any aliens. Rather, it makes certain LPRs subject to the INA's admissibility requirements, but only if they make a post-IIRIRA attempt to enter the United States.

Similarly, petitioner argues that because the statute prevents LPRs from asserting what he labels as their "*Fleuti* defense" in removal proceedings, it is akin to a "'law that abolishes an affirmative defense,'" which has been held to be impermissibly retroactive. Br. 26 (quoting *Collins*, 497 U.S. at 49). But even assuming that the

Fleuti doctrine's analysis of what is an entry could properly be characterized as an affirmative "defense" comparable to one under a criminal statute, that analogy does not help petitioner. A law that abolishes a defense raises retroactivity concerns only when it is applied "after the act is done." *Collins*, 497 U.S. at 49; see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 952 (1997) (applying the presumption against retroactivity to conclude that an amendment eliminating a defense to liability under the False Claims Act did not apply "to conduct completed before its enactment"). And Section 1101(a)(13)(C) abrogates the *Fleuti* doctrine only for LPRs whose reentry to the United States occurs after its enactment.

2. Section 1101(a)(13)(C) does not impair vested rights

Petitioner asserts (Br. 25) that, "[u]ntil IIRIRA, lawful permanent residents enjoyed the right to take and return from brief trips abroad." In his view (Br. 28, 31), IIRIRA "imposes a substantive disability" on aliens in his position by "abridging [their] right to travel" abroad. As the court of appeals observed, however, Section 1101(a)(13)(C) in no way restricts petitioner's ability to travel abroad; it affects only his ability "to enter the United States again—a matter that is squarely within the province of Congress to regulate." Pet. App. 27. And while petitioner states (Br. 31) that restricting his ability to reenter will force him to choose between maintaining his residence in the United States and visiting his family in Greece, the presumption against retroactivity "is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law." *Fernandez-Vargas*, 548 U.S. at 46. The effect of IIRIRA on petitioner's ability to return to the United

States after traveling abroad does not make the statute retroactive.

a. Petitioner does not expressly argue that he had a "vested right" to travel abroad without being required to seek readmission upon his return—and with good reason. See *Landgraf*, 511 U.S. at 269 (quoting *Society for the Propagation of the Gospel*, 22 F. Cas. at 767). An alien, even one lawfully admitted for permanent residence, has no vested right to remain in the United States—or to return to the United States after having departed—and Congress retains the authority to order the expulsion or exclusion of aliens at any time.

This Court has long held that the ability to control the borders and prohibit or permit entry is a core sovereign prerogative. *Landon* v. *Plasencia*, 459 U.S. 21, 33 (1982). It is an exercise of Congress's plenary power, rooted in the Nation's sovereignty, to determine which aliens are welcome here and which are not. See *Harisiades*, 342 U.S. at 587 ("The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose."); see also *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972) ("Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (internal quotation marks omitted); *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952) ("So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders."). As Judge Learned Hand put it, "[t]he interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall

go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate." *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F.2d 489, 490 (2d Cir. 1950).

In light of Congress's plenary power over the admission of aliens, this Court has held that removal from the United States, even if based on an alien's past criminal conduct, is not punitive and therefore is not impermissibly retroactive. For that reason, the Court has rejected Ex Post Facto Clause challenges to statutes requiring deportation of aliens on the basis of pre-enactment conduct. See, *e.g.*, *Harisiades*, 342 U.S. at 594. As the Court has explained, a removal proceeding "looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); see *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913) (Holmes, J.) ("[N]or is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want."); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924).

From those principles, it follows *a fortiori* that a statute requiring criminal LPRs to seek *admission* after departing the country does not impair any vested right, nor is its effect properly regarded as retroactive.

b. The historical context in which IIRIRA was enacted makes it particularly implausible to suppose that applying Section 1101(a)(13)(C) in the circumstances of this case would impair any settled rights of LPRs who committed pre-enactment crimes involving moral turpitude. Less than six months before it enacted IIRIRA, Congress expanded the circumstances under which aliens could be deported for crimes involving moral tur-

pitude, and it made that amendment applicable to aliens whose criminal conduct was already completed.

In Section 435(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1274, Congress amended 8 U.S.C. 1227(a)(2)(A), which provides for the deportation of aliens who have committed crimes involving moral turpitude within five years of their admission to the United States. While the predecessor to that section applied only to crimes for which the alien actually received a sentence of more than one year of imprisonment, the amended version applies to all crimes that are punishable by more than one year of imprisonment, regardless of the sentence imposed. Compare 8 U.S.C. 1251(a)(2)(A) (1994) ("sentenced to confinement or is confined * * * in a prison or correctional institution for one year or longer"), with 8 U.S.C. 1227(a)(2)(A) ("convicted of a crime for which a sentence of one year or longer may be imposed"). The new version applies to all aliens whose removal proceedings were commenced after the effective date of AEDPA. See AEDPA § 435(b), 110 Stat. 1275. And the difference in the two provisions can be significant in cases such as petitioner's: petitioner received a sentence of only four months, but the crime of which he was convicted was punishable by up to five years of imprisonment. See Pet. App. 2-3; 18 U.S.C. 371.

Under current Board precedent, petitioner himself is not deportable because his offense occurred more than five years after his admission to the United States. See *In re Alyazji*, 25 I. & N. Dec. 397, 406-407 & n.8 (B.I.A. 2011). But at the time he undertook the travel at issue in this case, petitioner would have been deportable because his 1989 adjustment to LPR status would have

been regarded as an "admission" to the United States, and his crime was committed within five years of that admission. See *In re Shanu*, 23 I. & N. Dec. 754 (B.I.A. 2005), overruled in part by *Alyazji*, *supra*; see also *In re Rosas-Ramirez*, 22 I. & N. Dec. 616 (B.I.A. 1999). More generally, the rule petitioner advocates would apply to many aliens who were unquestionably made deportable by AEDPA. It makes little sense to say that criminal conduct that could subject an alien to deportation cannot also, without offending principles of retroactivity, restrict the alien's ability to reenter the United States after leaving the country.

c. Petitioner's argument is further undermined by the fact that pre-IIRIRA law did not clearly establish which trips an LPR could take outside the United States without being regarded as seeking entry upon his return. In *Fleuti*, this Court construed the prior version of 8 U.S.C. 1101(a)(13) to deem an LPR to be making an entry only if he intended his departure to be "meaningfully interruptive" of his permanent residence status. 374 U.S. at 462. The Court did not define "meaningfully interruptive," leaving that term to "be developed by the gradual process of judicial inclusion and exclusion." *Ibid.* (internal quotation marks omitted); see *Heitland* v. *INS*, 551 F.2d 495, 504 (2d Cir.) ("[T]he significance of an absence will depend upon the relevant factors and circumstances found in each case."), cert. denied, 434 U.S. 819 (1977). And the Court suggested that an alien might "imperil[] his status by interrupting his residence too frequently or for an overly long period of time." *Fleuti*, 374 U.S. at 461.

Before IIRIRA, the application of *Fleuti* to petitioner would have been far from certain. The immigration judge noted that, aside from the trip at issue in this

case, petitioner had spent significant periods of time in Greece, ranging from two to nine months per year. A.R. 111-112. The frequency and duration of those trips might well have rendered him subject to exclusion (now inadmissibility) even under *Fleuti*. See, *e.g.*, *Dabone* v. *Karn*, 763 F.2d 593, 596 (3d Cir. 1985) (rejecting an alien's *Fleuti* argument and noting the "the numerous trips he made in and out of the United States"); *Lozano-Giron* v. *INS*, 506 F.2d 1073, 1078 (9th Cir. 1974) ("In a period of somewhat more than two years, he was absent on three occasions for a total of seven months. This may under *Fleuti* be 'too frequently or for an overly long period of time.'") (quoting *Fleuti*, 374 U.S. at 461). The uncertainty surrounding the application of *Fleuti* forecloses any suggestion that IIRIRA removed any "vested right" to reenter the United States that LPRs had previously enjoyed. See *Fernandez-Vargas*, 548 U.S. at 44 n.10 (describing a "vested right[]" as "an immediate fixed right of present or future enjoyment") (quoting *Pearsall* v. *Great Northern Ry.*, 161 U.S. 646, 673 (1896)). In fact, as noted above, Section 1101(a)(13)(C) replaced *Fleuti*'s fact-specific analysis with, *inter alia*, a bright-line, generous exception for LPRs who remain outside the United states for 180 days or less. IIRIRA thus liberalized and lent predictability to *Fleuti* in an important respect that operates to the benefit of many aliens.

3. Section 1101(a)(13)(C) does not impair any reasonable reliance interests

Petitioner argues (Br. 15) that the presumption against retroactivity "does not require proof of reliance on the prior state of the law." While it is true that the Court has not required a party challenging the applica-

tion of a statute to show that he was subjectively aware of the prior law and relied on it in structuring his conduct, the likelihood of reliance, and whether any such reliance is reasonable, are nevertheless significant factors in the retroactivity analysis. As this Court has explained, the inquiry into whether a statute has a retroactive effect "should be informed and guided by 'familiar considerations of fair notice, *reasonable reliance*, and settled expectations.'" *Martin*, 527 U.S. at 357-358 (emphasis added) (quoting *Landgraf*, 511 U.S. at 270); see *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004) ("The aim of the presumption [against retroactivity] is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct."). Indeed, just this Term, the Court held that, to succeed on a claim that certain Board decisions "were impermissibly retroactive," an alien "would have to show, at a minimum, that in entering his guilty plea, he had reasonably relied on a legal rule from which [the decisions] departed." *Judulang* v. *Holder*, No. 10-694 (Dec. 12, 2011), slip op. 20 n.12. And as discussed below, see pp. 32-35, reliance was crucial to this Court's decision in *St. Cyr*, in which the Court held that, because aliens in St. Cyr's position "almost certainly relied upon [the] likelihood [of receiving relief under former Section 212(c)] in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." 533 U.S. at 325.

According to petitioner (Br. 36), application of Section 1101(a)(13)(C) in the circumstances presented here would upset "substantial reliance on existing law by lawful permanent residents who pleaded guilty" to crimes involving moral turpitude before the enactment of IIRIRA. That is incorrect.

a. Contrary to petitioner's assumption, the prior conduct that rendered him an applicant for admission under the amended definition of "admission" in Section 1101(a)(13), once he left the country and then sought to reenter after IIRIRA, was petitioner's commission of a criminal offense, not his decision to plead guilty. The statute refers to whether an LPR "has *committed* an offense identified in section 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v) (emphasis added). Petitioner does not dispute that he committed such an offense. Nor does he dispute that, as the court of appeals put it, "it would border on the absurd to suggest" that an alien reasonably relied on current immigration law in deciding to commit a crime. Pet. App. 27. See *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2d Cir. 2000) (rejecting the proposition that "aliens might have decided not to commit * * * crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation") (quoting *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000)), aff'd, 533 U.S. 289 (2001).

Petitioner asserts (Br. 47) that "the commission of an offense usually matters in practice only because it results in a conviction." It is true that a criminal conviction makes it easier to prove that an alien has in fact committed an offense. But an alien who has committed an offense can hardly be said to have a legitimate reliance interest in whatever practical impediments might prevent the government from establishing that fact in an immigration proceeding. And in any event, nothing in Section 1101(a)(13)(C), or any other law, prevents the government from establishing independently that a re-

turning LPR has committed a crime involving moral turpitude and should therefore be regarded as seeking admission. For example, the Third Circuit has upheld a Board decision treating a returning LPR as an applicant for admission on the basis of an arrest warrant for a crime of which he had not yet been convicted. *Doe* v. *Attorney Gen.*, 659 F.3d 266, 273 (2011); accord *Odoku* v. *INS*, 276 Fed. Appx. 21 (2d Cir. 2008) (reaching a similar conclusion based on an indictment). Although the Board recently held that a determination that an LPR is an applicant for admission should be made on the basis of clear and convincing evidence, the Board has not suggested that evidence of a conviction is required. See *In re Rivens*, 25 I. & N. Dec. 623, 624-627 & n.4 (2011), Dep't of Homeland Sec. mot. for recon. pending (filed Nov. 18, 2011).

Petitioner appears to take the position (Br. 48-49) that an LPR is deemed to be seeking an "admission" under Section 1101(a)(13)(C) only when he is actually inadmissible. Under 8 U.S.C. 1182(a)(2)(A)(i), an alien who is "convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of" a crime involving moral turpitude is inadmissible. In petitioner's view, Section 1101(a)(13)(C) must require a conviction before a returning LPR may be deemed to be seeking admission in order to make it parallel to Section 1182(a)(2)(A)(i). As an initial matter, Section 1182(a)(2)(A)(i) renders an alien inadmissible not only if he has been convicted of a crime involving moral turpitude, but also if he admits committing acts that constitute such a crime. In any event, as the court of appeals noted, some provisions of the INA turn on convictions, while others turn on the commission of offenses, and Congress's distinctions be-

tween the two were presumably intentional. Pet. App. 25; see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (When Congress "uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:06, at 194 (6th rev. ed. 2000)).

Here, the reason for the distinction is evident. Section 1101(a)(13) appears in the section of the INA that defines terms, such as "admission," that are used throughout the Act. As applied in the present context, it determines at the threshold how an alien at the border will be treated—*i.e.*, whether he will be subject to the general procedural and substantive standards applicable to aliens seeking admission in the first place. By contrast, Section 1182(a)(2)(A)(i) provides one substantive ground of inadmissibility for an alien who has been determined at the threshold to be regarded as an alien seeking admission.

Thus, Section 1101(a)(13)(C) merely ensures that certain LPRs returning to the United States after traveling abroad will "be regarded as seeking an admission into the United States for purposes of the immigration laws." 8 U.S.C. 1101(a)(13)(C). There is no reason to conclude that Congress intended that the category of LPRs who would be subject to an inquiry about their admissibility would be limited to those LPRs who are in fact inadmissible. To the contrary, the definition of "admission" plainly requires some LPRs to be examined for inadmissibility (and thus *potentially* refused admission) on the basis of facts that would not in the end suffice to actually render them inadmissible. For example, 8 U.S.C. 1101(a)(13)(C)(ii) applies to an LPR who "has been absent from the United States for a continuous

period in excess of 180 days," even though that is not a ground of inadmissibility. Petitioner thus errs in collapsing the category of those LPRs who may be subjected to an inquiry into their admissibility with the category of those LPRs who will eventually be found inadmissible.

The atextual nature of petitioner's interpretation is further demonstrated by his argument (Br. 50) that treating the category of aliens covered by Section 1101(a)(13)(C)(v) as distinct from those covered by Section 1182(a)(2) "would lead to absurd results." Petitioner notes that Section 1182(a)(2) makes certain aliens inadmissible for conduct that is not necessarily a criminal offense. See, *e.g.*, 8 U.S.C. 1182(a)(2)(C)(ii) (certain relatives of controlled-substance traffickers who knowingly "obtained any financial or other benefit from the illicit activity"). According to petitioner, it would be absurd to conclude that such LPRs would be able to reenter the United States without having to seek "admission" because they would not have "committed an offense identified in section 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v). But that conclusion is not absurd at all. Section 1101(a)(13)(C) singles out certain grounds of inadmissibility that were the subject of particular concern to Congress, and even on petitioner's reading, there are many grounds of inadmissibility that are not covered. See, *e.g.*, 8 U.S.C. 1182(a)(1) (2006 & Supp. IV 2010) ("Health-related grounds"); 8 U.S.C. 1182(a)(3) (2006 & Supp. IV 2010) ("Security and related grounds"). Moreover, petitioner's resolution of the supposed absurdity—treating Section 1101(a)(13)(A)(v) as simply a "cross-reference [to] the specific proof of commission required by" Section 1182(a)(2) (Br. 51)—would entail a substantial rewriting of the Act, requiring the

replacement of both "committed" and "offense" with different language.

Petitioner emphasizes the Board's decision in *Rivens* (Br. 48-49), which he reads for the proposition that the category of aliens covered by Section 1101(a)(13)(C)(v) is the same as the category covered by Section 1182(a)(2). That is incorrect. In *Rivens*, the Board held that the government "bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking an admission." 25 I. & N. Dec. at 625. In that case, which involved a conviction, the Board remanded to an immigration judge for a determination of whether the alien's offense was a crime involving moral turpitude. *Id.* at 630. The Board observed that "[t]here remains an open question of who then bears the burden of showing admissibility, or a lack of admissibility." *Id.* at 626. The Board found it unnecessary to reach that question, however, because the conviction already presented in that case would coincidentally establish inadmissibility if it were found to be sufficient to establish that the alien was seeking admission. See *id.* at 627 ("Thus, if the [government] establishes that the respondent is an applicant for admission under [Section 1101(a)(13)(C)(v)], it will have de facto established the respondent's inadmissibility."). Nothing in the Board's decision in *Rivens* suggests that, in any other case, clear and convincing evidence other than conviction documents would be insufficient to establish that an alien was seeking admission. Such evidence might include, for example, eyewitness testimony, a confession given by the alien to police, or a jury's verdict of guilt in a case in which a final judgment of conviction had not yet been entered. In arguing to the contrary, petitioner mistakes the Board's obser-

vation about the particular facts in *Rivens* for a general conclusion about the meaning of the statute. But see *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.").

b. Petitioner rests much of his argument (Br. 40-45) on this Court's decision in *St. Cyr*, but that case does not support his position. *St. Cyr* involved IIRIRA's elimination of discretionary relief from removal under former Section 212(c) of the INA. The Court held that the elimination of eligibility for Section 212(c) relief had a retroactive effect in the case of an LPR who had pleaded guilty to the commission of an aggravated felony during the period, from 1990 to the enactment of IIRIRA, when an alien was ineligible for Section 212(c) relief if he was convicted of an aggravated felony and served a sentence of at least five years. 533 U.S. at 321-325. During that period, an alien who entered into a plea agreement under which he was convicted of an aggravated felony, but received a sentence of less than five years, would have remained eligible for Section 212(c) relief. The Court based its retroactivity ruling in *St. Cyr* in large part on the premise that, before IIRIRA, resident "aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief" as a matter of discretion once they were found statutorily eligible for such relief. *Id.* at 325. The Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*" whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." *Id.* at 321-322 (internal quotation marks and citation omitted). In light of "the frequency with which

§ 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because the Court concluded that aliens in St. Cyr's position "almost certainly relied upon [the] likelihood [of receiving relief under former Section 212(c)] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

For two reasons, this case is fundamentally different from *St. Cyr*. First, *St. Cyr* was grounded on the notion that, because a substantial number of aliens had based their decision to plead guilty on the continued availability of Section 212(c) relief, their guilty pleas gave rise to reasonable reliance interests and expectations in preserving eligibility for that relief. For that reason, a substantial majority of the courts of appeals have recognized that the holding of *St. Cyr* generally does not extend to aliens who were convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 519-520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v. *Holder*, 592 F.3d 700, 705-706 (6th Cir. 2010); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Saravia-Paguada* v. *Gonzales*, 488 F.3d 1122, 1131-1134 (9th Cir. 2007), cert. denied, 553 U.S. 1064 (2008); *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir.

2006); *Ferguson* v. *United States Att'y Gen.*, 563 F.3d 1254, 1259-1271 (11th Cir. 2009), cert. denied, 130 S. Ct. 1735 (2010); but see *Atkinson* v. *Attorney Gen.*, 479 F.3d 222, 230-231 (3d Cir. 2007); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009). Similarly, in regulations issued after notice-and-comment rulemaking, the Attorney General has determined that aliens are ineligible for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h); see 8 C.F.R. 1003.44(a)-(b).

Unlike the elimination of Section 212(c), the application of Section 1101(a)(13)(C) does not depend upon an alien's guilty plea, but only on his underlying criminal conduct. As already explained, an alien who engaged in criminal conduct cannot reasonably claim to have relied on the current state of immigration law in doing so.

Second, the consequence of the elimination of Section 212(c) was to make aliens in St. Cyr's position immediately removable from the United States, without the possibility of discretionary relief that had formerly existed and was frequently granted. See 533 U.S. at 323-324. By contrast, the amendment to Section 1101(a)(13) has no immediate effect on LPRs with prior criminal convictions. Its effect occurs only if those LPRs choose to engage in the post-enactment conduct of leaving the United States and attempting to return, at which point IIRIRA itself provides for discretionary relief for certain aliens. Moreover, an alien may be eligible to seek relief from inadmissibility under former Section 212(c) if he pleaded guilty before the enactment of AEDPA and IIRIRA in the circumstances described in *St. Cyr* and was not otherwise ineligible for a waiver. Petitioner, in fact, applied for Section 212(c) relief but was denied it as a matter of discretion. See p. 5, *supra*. The circum-

stances presented here thus bear no resemblance to the disruption of reliance interests the Court considered in *St. Cyr* in the context of the repeal of Section 212(c)'s discretionary relief from substantive grounds for deportation.

c. Contrary to the suggestion of petitioner (Br. 42) and one of his *amici* (National Immigrant Justice Ctr. Br. 13-15), this case is also unlike *Chew Heong* v. *United States*, 112 U.S. 536 (1884). In *Chew Heong*, the Court held that a statute barring Chinese nationals from reentering the United States without a certificate prepared when they left this country should not be applied to a Chinese national who had left the United States before the statute was passed. At that time, a treaty between the United States and China gave Chinese nationals "the right to go from and return to the United States at pleasure, without being subjected to regulations or conditions affecting the substance of that right." *Id.* at 539. Crucial to the Court's decision was the conclusion that application of the new statute to an alien who had previously left the country would retroactively impair the "rights previously vested" in him, upsetting an obvious reliance interest. *Id.* at 559.

Chew Heong might be relevant here if Section 1101(a)(13)(C) were applicable to LPRs who had left the United States before it was enacted and were caught unawares when, upon their return, they were deemed to be seeking admission. But Section 1101(a)(13)(C) did not take effect until more than six months after IIRIRA was enacted, thus eliminating any possibility that it created such a trap. See IIRIRA § 309(a), 110 Stat. 3009-625; see *Fernandez-Vargas*, 548 U.S. at 45. The unusual facts of *Chew Heong* therefore have no application to this case.

d. The asserted reliance interest in this case is instead similar to the interest that the Court rejected in *Fernandez-Vargas* as insufficient to establish that a statute has retroactive effect. *Fernandez-Vargas* involved Section 305(a)(3) of IIRIRA, which limited the relief available to aliens who had illegally reentered the United States after a prior removal order. 110 Stat. 3009-599. This Court held that the statute was not retroactive as applied to aliens who had reentered before IIRIRA's enactment. 548 U.S. at 33. In so holding, the Court explained that "it is the conduct of remaining in the country after entry," and "not a past act that [the alien] is helpless to undo," "that subjects him to the new and less generous legal regime." *Id.* at 44. The Court emphasized that, after the enactment of IIRIRA but before its effective date, Fernandez-Vargas "had an ample warning that the new law could be applied to him," yet he chose to remain in the country anyway. *Id.* at 45. While acknowledging that leaving the country "would have come at a high personal price," the Court explained that "the branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law." *Id.* at 46. The Court observed that "[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." *Ibid.* (quoting Lon R. Fuller, *The Morality of Law* 60 (1964)) (brackets in original).

Those considerations are equally applicable here. As in *Fernandez-Vargas*, it is post-enactment conduct—in this case, leaving the United States and then attempting to return—that subjects petitioner to the new legal rule. That rule is therefore not retroactive, even if it arguably

upset expectations developed under the old rule. Petitioner observes (Br. 35-36) that the post-enactment conduct in *Fernandez-Vargas* involved a violation of law. That is true but beside the point. What matters is that, like Fernandez-Vargas (but unlike St. Cyr), petitioner did not rely on the prior law as part of a *quid pro quo* with the government, nor were his interests in the continuation of the prior law any "more substantial than inchoate expectations and unrealized opportunities." 548 U.S. at 44 & n.10.

4. Section 1101(a)(13)(C) is intended to regulate future conduct, not past conduct

The conclusion that Section 1101(a)(13)(C) is not retroactive is confirmed by the fact that the activity it operates to regulate here is post-IIRIRA entry into the United States, not pre-IIRIRA conduct that could render an alien removable as a substantive matter. Several Justices suggested in *Landgraf* that the key question in determining the temporal scope of a statute is "what is the relevant activity that the rule regulates." 511 U.S. at 291 (Scalia, J., concurring in the judgment). That inquiry leads to the same conclusion as the analysis of the factors identified in the majority opinion in *Landgraf*: application of the amended version of Section 1101(a)(13) in the circumstances of this case would not have a retroactive effect. Although Section 1101(a)(13)(C)(v) uses pre-IIRIRA events as the basis for treating an alien's post-IIRIRA entry as a request for "admission" to the United States, the application of that provision to post-IIRIRA entries is not retroactive because the text, structure, and legislative history of IIRIRA demonstrate that the "activity the statute was intended to regulate" is post-enactment conduct, not

pre-enactment conduct. *Martin*, 527 U.S. at 363 (Scalia, J., concurring in part and concurring in the judgment).

a. As noted above, Section 1101(a)(13)(C), by its terms, applies only to aliens who have engaged in post-IIRIRA conduct: attempting to enter the United States. And the title of the provision shows that its focus is on regulating the alien's entry, not his earlier conduct. See *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."). Section 1101 is the "Definitions" section of the INA, and the provision of IIRIRA that amended Section 1101(a)(13), Section 301(a), was entitled "'ADMISSION' DEFINED." IIRIRA § 301(a), 110 Stat. 3009-575. Those section titles confirm that Section 1101(a)(13) is a definitional provision aimed at describing what post-IIRIRA conduct will constitute an admission. See *Tineo* v. *Ashcroft*, 350 F.3d 382, 395 (3d Cir. 2003); *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1064 (B.I.A. 1998) (en banc). It is not aimed at punishing or deterring the alien's earlier criminal conduct.

b. That conclusion is reinforced by the structure of IIRIRA. Section 301(a), in which 8 U.S.C. 1101(a)(13)(C) was enacted, is part of Title III-A of IIRIRA, "Revision of Procedures for Removal of Aliens." 110 Stat. 3009-575. IIRIRA also includes several provisions imposing greater restrictions on criminal aliens, for example, by expanding the definition of "aggravated felony" so as to make more criminal aliens removable," IIRIRA § 321, 110 Stat. 3009-627; by authorizing the imposition of registration requirements on aliens on probation or parole, IIRIRA § 323, 110 Stat. 3009-629; and by providing for enhanced penalties for certain immigration offenses, IIRIRA § 334, 110 Stat.

3009-635. But those provisions are set out in Title *III-B*, "Criminal Alien Provisions." 110 Stat. 3009-627. Section 301(a)'s placement in a different subtitle demonstrates that it is a regulation of the procedures governing admission and removal, not of aliens' past criminal conduct.

Significantly, several of the exceptions identified in Section 1101(a)(13)(C)—that is, the circumstances in which a returning LPR will be deemed to be seeking admission—pertain to conditions that can arise only after the enactment of IIRIRA. For example, Section 1101(a)(13)(C)(ii) provides that an LPR shall be regarded as seeking admission if he or she "has been absent from the United States for a continuous period in excess of 180 days." That provision did not take effect until more than 180 days after IIRIRA's enactment, so it can apply only to LPRs who have "been absent from the United States" after the enactment of the statute. See IIRIRA § 309(a), 110 Stat. 3009-625. Similarly, Section 1101(a)(13)(C)(vi) applies to any LPR who "is attempting to enter at a time or place other than as designated by immigration officers." Under that provision, the circumstance subjecting the LPR to the requirement of seeking admission—the attempted entry—necessarily post-dates the statute's enactment. Those provisions confirm that the overall purpose of Section 1101(a)(13) is to regulate future admissions to the United States, not past activity by aliens.

c. That understanding is further confirmed by IIRIRA's legislative history. The principal purpose of Section 301(a) of IIRIRA was "to replace certain aspects of the * * * 'entry doctrine,' under which illegal aliens who have entered the United States without inspection gain[ed] equities and privileges in immigration proceed-

ings that [were] not available to aliens who present themselves for inspection at a port of entry." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 225 (1996) (House Report). The statute accomplishes that purpose by defining "admission" as a "lawful entry" after inspection. 8 U.S.C. 1101(a)(13)(A). The House Report accompanying the initial version of the bill that became IIRIRA explained that Section 301(a) would also "preserve[] a portion of the *Fleuti* doctrine" while making some changes to it, but the changes did not include the provision that became Section 1101(a)(13)(C)(v). House Report 225. That provision was added by the Conference Committee; its report noted the change but said nothing to suggest that its aim was any different from that of the other provisions of Section 1101(a)(13)—that is, the regulation of admission, not of past criminal conduct by aliens. H.R. Rep. No. 828, 104th Cong., 2d Sess. 207 (1996). Because the conduct that Congress sought to regulate is conduct occurring after the enactment of IIRIRA, application of the statute is not retroactive.

C. There Is No Basis For Applying A Canon Of Construing Ambiguity In Immigration Statutes In Favor Of Aliens

Petitioner invokes (Br. 52-53) the "principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Petitioner correctly notes that this Court relied on that principle in *St. Cyr*, but its application there was limited to step one of the *Landgraf* retroactivity analysis. 533 U.S. at 320 (reasoning that *Cardoza-Fonseca* "forecloses the conclusion that, in enacting" IIRIRA's effective-date provision, "'Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is

an acceptable price to pay for the countervailing benefits'") (quoting *Landgraf*, 511 U.S. at 272-273); but see *Fernandez-Vargas*, 548 U.S. at 40 (rejecting a similar argument based on *Cardoza-Fonseca*). In this case, there is no need to invoke *Cardoza-Fonseca* at step one because *St. Cyr* already establishes that Congress has not expressly specified the temporal reach of provisions enacted in Section 301(a) of IIRIRA. See 533 U.S. at 320.

Cardoza-Fonseca has no relevance to step two of the *Landgraf* analysis. At that step, the Court asks "whether the new statute would have a retroactive effect." *Landgraf*, 511 U.S. at 280. Answering that question does not call for resolving ambiguity in the statutory text; rather, it requires examining the application of the statute to determine whether its effect is retroactive. There is accordingly no reason to apply *Cardoza-Fonseca* or any similar rule of construction in this case. Cf. *St. Cyr*, 533 U.S. at 320-321 n.45.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101(a)(13) provides:

Definitions

(a) As used in this chapter—

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

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

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

(i) has abandoned or relinquished that status,

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

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

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

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

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

2. 8 U.S.C. 1101(a)(13) (1994) provided:

Definitions

(a) As used in this chapter—

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

3. 8 U.S.C. 1182(a)(2) (2006 and Supp. IV 2010) provides:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

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

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

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

is inadmissible.

(ii) Exception

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

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional

institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

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

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

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

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspir-

ator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

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

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who—

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

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

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

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

4. 8 U.S.C. 1182(c) (1994) provided:

Excludable aliens

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an

alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.