No. 10-1211

In the Supreme Court of the United States

PANAGIS VARTELAS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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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 "ha[ve] committed an offense identified in [8 U.S.C.] 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v). The question presented is as follows:

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

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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. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines several classes of aliens who are inadmissible to the United States, including certain criminal aliens. See generally 8 U.S.C. 1182(a)(2) (2006

& Supp. III 2009). As relevant here, that class includes "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 also relevant here, this Court has held that counterfeiting offenses are plainly crimes involving moral turpitude. See *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 423 (1933).

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," 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." 8 U.S.C. 1101(a)(13) (1994) (repealed 1996).

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.

In Section 301(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),

Pub. L. No. 104-208, Div. C, 110 Stat. 3009-575, Congress replaced the earlier definition of "entry" and specified the circumstances under which an LPR returning to the United States from abroad could be treated as seeking "admission," and therefore subject to limitations on admissibility contained in 8 U.S.C. 1182. The new definition of "admission" provides in relevant part as follows:

> (13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.
>
> * * * * *
>
> (C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
>
> (i) has abandoned or relinquished that status,
>
> (ii) has been absent from the United States for a continuous period in excess of 180 days,
>
> (iii) has engaged in illegal activity after having departed the United States,
>
> (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
>
> (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

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

8 U.S.C. 1101(a)(13).

In 1998, the Board of Immigration Appeals (Board) determined that IIRIRA's definition of "admission" had "expressly preserve[d] some, but not all, of the *Fleuti* doctrine," and that a returning LPR described in Section 1101(a)(13)(C)(i)-(vi) "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. a. Petitioner, a native and citizen of Greece, was admitted to the United States as an LPR in 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.) 288, 303. In December 1994, he was convicted upon a guilty plea of conspiracy to make or possess counterfeit securities in violation of 18 U.S.C. 371 and was sentenced to a four-month term of imprisonment. Pet. App. 2-3.

In 2003, petitioner left the United States to visit Greece. Upon his return, 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 based on the charge that he was 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.

b. Before an immigration judge, petitioner conceded that he was removable but sought a waiver 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 petitioner's application, finding that the equities did not warrant discretionary relief from removal, because, among other things, petitioner had made long and frequent trips to Greece where he had extensive family and business ties, and he "appear[ed] to be not merely remiss in his tax obligations [to the United States], but a serious tax evader." A.R. 111; see also Pet. App. 5. The immigration judge ordered petitioner removed to Greece. Pet. App. 5.

c. On appeal, the Board, in May 2008, "adopt[ed] and affirm[ed] the decision of the Immigration Judge." A.R. 51; see Pet. App. 5-6.

3. In July 2008, petitioner filed a motion with the Board to reopen the proceeding, alleging that he had received ineffective assistance of counsel. Pet. App. 6. He argued, in part, that he had been prejudiced by his previous attorneys' failure to challenge his removability on the ground that the statutory definition of "admission," as amended by IIRIRA in 1996, should not be applicable 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, petitioner cited *Camins* v. *Gonzales*, 500 F.3d 872 (9th Cir. 2007), which held, under principles of non-retroactivity, that IIRIRA's partial repeal of the *Fleuti* doctrine was not applicable to LPRs who acted in reasonable reliance on the old law before IIRIRA's 1997 effective date. A.R. 26; Pet. App. 8.

The Board denied petitioner's motion to reopen. Pet. App. 29-32. In relevant part, the Board found 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 petitioner's proceeding (which was within the Second Circuit) and had been decided two years after petitioner had conceded his inadmissibility. *Id.* at 31-32.

4. Petitioner sought judicial review of the Board's decision, and the Second Circuit denied his petition for review. Pet. App. 1-28. The court concluded that, for purposes of his claim of ineffective assistance of counsel, petitioner had "failed to show prejudice under any standard." *Id.* at 13. The court of appeals first rejected petitioner's contention that his counterfeiting offense did not render him removable (a contention petitioner does not repeat in this Court). *Id.* at 13-15. The court of appeals then considered and rejected petitioner's argument about the applicability of the definition of "admission" in 8 U.S.C. 1101(a)(13)(C). Pet. App. 16-28.

The court of appeals concluded that the Board had "reasonably interpreted IIRIRA as superseding the *Fleuti* doctrine." Pet. App. 20. In considering whether that amendment "was impermissibly retroactive as applied to [petitioner]," the court applied the two-step inquiry prescribed by *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] § 101(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 reasonably relied on the former version of the law in deciding to plead guilty to his counterfeiting offense. *Id.* at 21-27. The court explained that Section 1101(a)(13)(C)(v)—unlike former Section 212(c), 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)) (emphasis supplied by court).

Recognizing 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 further explained 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 supplied by court). 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 noted that petitioner claimed two other circuits had reached a "contrary" conclusion. Pet. App. 27. But the court found those decisions "unpersuasive," in part because they had both "analyzed retroactivity in relation to the alien's plea of guilty" and had therefore failed to "address[]" the statute'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 (discussing *Camins*, *supra*, and *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004)).

The court of appeals thus held that Section 1101(a)(13)(C)(v) applies "to an LPR who, after the effective date of IIRIRA, makes a trip abroad and seeks to reenter the United States," and that petitioner was, accordingly, not prejudiced by his attorney's failure to contest petitioner's removability on nonretroactivity grounds. Pet. App. 28.

ARGUMENT

Petitioner renews his contention (Pet. 5-16) that the definition of "admission" in 8 U.S.C. 1101(a)(13)(C)(v) should not be applied to him. Specifically, he contends (Pet. 14) that "he detrimentally relied on the prior [version of the] law at the time of [his] guilty plea," under which he would have been allowed "to take innocent, casual, and brief trips outside the United States without subjecting himself to a charge of inadmissibility." Petitioner's argument lacks merit. Although there is some disagreement among the circuits, the Second Circuit correctly noted (Pet. App. 27-28) that the only other circuits to have addressed the question—the Fourth and the Ninth Circuits—did not consider the Second Circuit's reasoning, which is supported by the text of the statute. Because that rationale may persuade other circuits, and perhaps persuade the Fourth and Ninth Circuits to revise their views, review of the question by this Court would be premature. Moreover, the issue is of limited significance, as it involves the applicability of a statutory repeal and amendment that occurred more

than 15 years ago and has precipitated only a handful of cases.[1]

1. The court of appeals correctly held that the application of 8 U.S.C. 1101(a)(13) does not have retroactive effect when applied to an LPR who committed an offense before IIRIRA took effect in 1997, and who then departed from and returned to the United States in 2003. Petitioner contends (Pet. 13-16) that he reasonably relied on the pre-IIRIRA *Fleuti* doctrine in deciding to plead guilty to an offense of conspiring to make or possess counterfeit securities in violation of federal law. As an initial matter, petitioner's claim of reliance is distinguishable from the one that this Court found persuasive in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), in which the alien pleaded guilty to an aggravated felony under a plea agreement that provided for a sentence of five years or less, and thus preserved his eligibility at the time for discretionary relief under Section 212(c) of the INA. See *id.* at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a sentence of less than five years); see also *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 43-44 & n.10 (2006) (distinguishing alien's claim of non-retroactivity from the one in *St. Cyr* because the alien had not availed himself of pre-IIRIRA provisions or taken action "that enhanced their significance to him in particular, as

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[1] A similar, but materially distinguishable, question is presented by the pending petition for a writ of certiorari in *Myers* v. *Holder*, No. 10-1178 (filed Mar. 24, 2011). In that case, the alien did not plead guilty to the underlying offense, which caused the Ninth Circuit to distinguish its earlier decision in *Camins* v. *Gonzales*, 500 F.3d 872 (2007). See *Myers* v. *Holder*, 409 Fed. Appx. 69, 70 (2010). Because petitioner focuses on his guilty plea (see Pet. ii), a victory for him in this Court would not necessarily benefit the petitioner in *Myers*.

St. Cyr did in making his *quid pro quo* agreement"). In this case, petitioner does not suggest that his guilty plea reflected such a *quid pro quo* agreement. But petitioner's focus on his guilty plea is also misdirected for two additional reasons.

a. First, as the court of appeals explained (Pet. App. 22-25), the prior conduct that triggers the amended definition of "admission" is not petitioner's decision to plead guilty. Instead, the statutory text expressly 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 indeed "committed" such an offense. Nor does he dispute the court of appeals' observation that "it would border on the absurd to suggest" that an alien reasonably relied on the present status of the immigration laws in committing a crime. Pet. App. 27. See also, *e.g.*, *Saravia-Paguada* v. *Gonzales*, 488 F.3d 1122, 1133-1135 (9th Cir. 2007), cert. denied, 553 U.S. 1064 (2008); *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2d Cir. 2000), aff'd, 533 U.S. 289 (2001); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000).

Petitioner instead argues (Pet. 8-12) that the court of appeals erred in focusing on the word "committed" in Section 1101(a)(13)(C)(v) "without discerning its meaning in conjunction with" the provision it cross-references, Section 1182(a)(2). Pet. 9. The latter provision—at least with respect to crimes involving moral turpitude— makes an alien inadmissible only when the alien has been "convicted of, or admits having committed," such an offense. 8 U.S.C. 1182(a)(2)(A)(i)(I). Petitioner thus asserts (Pet. 8) that the Second Circuit erred

in holding that an LPR is "inadmissible to the United States without being convicted or admitting to a crime involving moral turpitude."[2] But the Second Circuit spoke only to whether an LPR would be deemed to be seeking admission, not whether he would be found inadmissible.

Petitioner's argument depends entirely on his assumption that the definition of "admission" "only comes into play if the LPR is *actually inadmissible*." Pet. 10 (emphasis added). But he provides no basis for that assumption, which is refuted by the text of the statute. As the court of appeals noted, some definitions in the INA turn on convictions, while others turn on the commission of offenses, and Congress's distinctions between the two were presumably intentional. Pet. App. 25 (citing *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)).

Moreover, Section 1101(a)(13)(C) merely ensures that certain LPRs returning to the United States after traveling abroad will "be regarded as seeking 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

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[2] Petitioner asserts (Pet. 12) that the record "is devoid of any reference to [his] admission of a crime involving moral turpitude." But he was, of course, *convicted* of such an offense, which suffices to make him inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I), and his guilty plea in federal court satisfied the requirements that he identifies (Pet. 12) for an admission that he committed such an offense.

actually render them inadmissible. For instance, 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 demonstrably 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 actually be found inadmissible.

Furthermore, in the specific context of criminal aliens (*i.e.*, the category specifically addressed by Section 1101(a)(13)(C)(v)), it is entirely reasonable for Congress to require an LPR who has "committed" an offense to undergo examination even if more might be required to make that alien inadmissible under Section 1182(a)(2). Thus, in *Odoku* v. *INS*, 276 Fed. Appx. 21 (2008), the Second Circuit held that the Board had reasonably read Section 1101(a)(13)(C)(v) to require an LPR to be "treated as an arriving alien" when he had already been *indicted* for a crime involving moral turpitude but was not actually *convicted* of that offense until several months after he returned to the United States. *Id.* at 24.

b. The second reason petitioner errs in focusing on his guilty plea is that the determinative event for retroactivity analysis is not just petitioner's pre-1996 criminal conduct, but also conduct that occurred well *after* the enactment of the revised definition. In order for an LPR to be "regarded as seeking an admission into the United States" under 8 U.S.C. 1101(a)(13)(C), it is necessary not only that he have committed a certain kind of offense; he must also depart from and return to the United States.

Here, petitioner's 2003 departure from and return to the United States both occurred many years after the 1997 effective date of the new definition of "admission." Thus, petitioner could have avoided the application of the statute. After IIRIRA became effective in 1997, petitioner could have refrained from departing from the United States (or from returning to the United States). He could also have attempted to avoid the consequences of the "admission" definition by, in advance of his departure and return, filing and obtaining approval of his application for relief under former Section 212(c). To paraphrase this Court's most recent decision addressing retroactivity in the immigration context: "It is therefore the alien's choice" to depart and 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 a past act that he is helpless to undo up to the moment the Government finds him out." *Fernandez-Vargas*, 548 U.S. at 44. Cf. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 275 (1994) ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.").[3]

Accordingly, the court of appeals did not err in concluding that an LPR who departed from and returned to the United States in 2003 can be deemed to have been seeking admission if he committed a crime involving moral turpitude before IIRIRA became effective.

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[3] Like the alien in *Fernandez-Vargas*, see 548 U.S. at 44 n.10, petitioner does not claim that he has a "vested right[]" to the matter at issue (the ability to depart from and return to the United States on a brief, casual, and innocent basis, without regard to his admissibility).

2. Petitioner contends (Pet. 6-7) that the decision below conflicts with the decisions of the Fourth and Ninth Circuits in *Olatunji* v. *Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004), and *Camins* v. *Gonzales*, 500 F.3d 872 (9th Cir. 2007). But *Olatunji* was decided before this Court's decision in *Fernandez-Vargas* (which also went unacknowledged by the Ninth Circuit in *Camins*.) Moreover, as the Second Circuit explained (Pet. App. 27-28), the other two courts simply assumed that the determinative event for retroactivity analysis was an LPR's guilty plea. See *Olatunji*, 387 F.3d at 396 (explaining that the court's retroactivity analysis turned on "new legal consequences" associated with the defendant's "decision to plead guilty" and the resulting "*conviction*"); *Camins*, 500 F.3d at 882-883 (same). The government in those cases did not—as it and the Second Circuit did in this case—press the statutory language focusing on whether the LPR "committed" an offense. Thus, although the Second Circuit has rejected the analysis of the other two courts, neither of them has rejected the Second Circuit's rationale.

Because the Second Circuit's reasoning is, as discussed above, strongly supported by the statutory text, it could well persuade other circuits. In turn, the Fourth and Ninth Circuits might also be persuaded to revisit the issue and adopt that rationale. Accordingly, review by this Court now would be premature.

3. Even if the question were otherwise worthy of this Court's review at this time, this case would be a poor vehicle because it is by no means clear that petitioner would qualify for relief under the pre-IIRIRA *Fleuti* doctrine, under which "the significance of an absence will depend upon the relevant factors and circumstances found in each case." *Heitland* v. *INS*, 551 F.2d

495, 504 (2d Cir.), cert. denied, 434 U.S. 819 (1977). Here—presumably in part because petitioner raised this issue for the first time in his motion to reopen proceedings before the Board—there is little evidence in the record about the circumstances of petitioner's travels to Greece. The trip from which he returned on January 29, 2003, was one-week long, but the only evidence in the record about its purpose is petitioner's vague assertion to an INS officer that it was for "[f]amily business." A.R. 318. In addition, as the immigration judge noted in determining that the equities did not support petitioner's request for relief under former Section 212(c), aside from that particular trip, petitioner spent significant periods of time in Greece, ranging from two to nine months per year. A.R. 111-112. In *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), this Court noted that "an alien wishing to retain his classification as a permanent resident of this country imperils his status by interrupting his residence *too frequently* or for an overly long period of time." *Id.* at 461 (emphasis added). There is thus reason to believe petitioner could be treated as seeking "entry" into the United States even under pre-IIRIRA law.[4]

4. Finally, petitioner asserts in passing (Pet. 6) that the decision below will "adversely affect thousands of LPRs who are deemed to have *committed* but were *not convicted* nor *admitted to* [having committed] an offense * * * prior to April 1, 1997, upon return from innocent, casual and brief trips abroad." But he provides no support for that assertion, and there appears to be none.

[4] Petitioner makes no attempt in this Court to explain why he would qualify for relief under the *Fleuti* doctrine. In the court of appeals, he simply asserted, without further explanation, that it is "patently clear" that his "departure from the United States for merely *one week* was brief, casual, and innocent." Pet. C.A. Br. 14.

Indeed, although Section 1101(a)(13)(C)(v) was added in 1996, there appear to be only three reported court of appeals decisions (*Olatunji*, *Camins*, and the decision below) addressing its applicability under principles of non-retroactivity.[5] Accordingly, the issue does not warrant this Court's further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] The First Circuit's decision in *Nadal-Ginard* v. *Holder*, 558 F.3d 61 (2009), involved the admissibility of an LPR with pre-IIRIRA convictions for crimes involving moral turpitude, but that court did not consider any retroactivity-based challenge to the applicability of Section 1101(a)(13)(C)(v). In most other reported cases discussing that provision, the alien's offense was committed after IIRIRA. As a result, those cases did not implicate the question presented by the petition here.