IN THE SUPREME COURT OF THE UNITED STATES

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PANAGIS VARTELAS, :

Petitioner : No. 10-1211

v. :

ERIC H. HOLDER, JR., :

ATTORNEY GENERAL. :

- x

Washington, D.C.

Wednesday, January 18, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:22 a.m.

APPEARANCES:

STEPHANOS BIBAS, ESQ., Philadelphia, Pennsylvania; for Petitioner.

ERIC D. MILLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:22 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 10-1211, Vartelas v. Holder.

Mr. Bibas.

ORAL ARGUMENT OF STEPHANOS BIBAS

ON BEHALF OF THE PETITIONER

MR. BIBAS: Mr. Chief Justice, and may it please the Court:

As the Government concedes, INA subsection 101(a)(13)(C)(v), added by IIRIRA, does not expressly mandate retroactivity. Under Landgraf, applying that new provision would attach new legal consequences to pre-IIRIRA offenses, penalizing both those who travel and those who don't.

Covered lawful permanent residents could not visit their parents abroad without being forced to abandon their children here. They would be removed from the country or else confined here. Either way, they would lose an ability they had under pre-IIRIRA law based on pre-IIRIRA offenses. Thus, applying the subsection to them would be impermissibly retroactive.

The settled expectations at issue here are those of round trips by lawful permanent residents, not, as the Government would put it, one-way tickets or

first-time entrants.

These are people who have structured their lives here. They have homes, spouses, children, and careers here and, yet, have a settled expectation that they will be able to maintain ties to visit aged and ailing parents abroad, to go to funerals and wakes and visit them in the hospital and surgeries. Our amici, the NACDL brief and the Asian American --

JUSTICE GINSBURG: As far as going forward is concerned, that's -- that's just the way it is, right?

MR. BIBAS: Yes, because Congress has expressly changed the law post-IIRIRA. The question is, for those before IIRIRA, whether those settled expectations are being disrupted.

JUSTICE GINSBURG: Could they -- could they -- the person who -- who is here and then the new law is passed -- could that person have petitioned for discretionary relief before traveling?

MR. BIBAS: Yes, Your Honor, that is a possibility. That is not the same as the automatic ability to travel, and, in fact, in this case the discretionary relief was denied. It depends on a different set of factors from the automatic pre-IIRIRA ability to travel. But it is a theoretical possibility

in some cases.

CHIEF JUSTICE ROBERTS: So, your expectations argument is that somebody trying to figure out whether to go ahead and rob the bank is going to say, well, if I do and I'm caught and I'm found guilty, I won't be able to take temporary trips abroad; so, I'm not going to rob the bank.

MR. BIBAS: No, Your Honor. First of all, you phrased it specifically as a reliance argument, which is an alternative. Even the Government concedes it's not a prerequisite.

Second, the right time to look at expectations is the moment before the law is enacted: Does one have an expectation at that point that one will be able to continue --

CHIEF JUSTICE ROBERTS: Well, you're concerned under Landgraf, I think, with whether or not it disrupts settled expectations. And it just doesn't seem to me that this issue enters into the expectations at all when the pertinent act, which is the commission of the crime, not the pleading guilty, takes place.

MR. BIBAS: No, Your Honor, I believe the practical impact is a new travel disability or penalty, just as in Landgraf. The discrimination there had been illegal for decades; yet, adding a new form of damages

to it was impermissibly retroactive. In Hughes Aircraft, filing false claims with the government had been illegal for years; yet, broadening the class of people who could file suit and removing a defense -- no reliance possible at all, but there was a settled expectation that there would be no additional consequences attached to that.

JUSTICE ALITO: What's the difference between someone who commits the crime just before the Act is passed and someone who commits the crime just after the Act is passed? The person who commits the crime just after the Act is passed had the expectation prior to the passage of the Act that if he did certain things, he wouldn't -- he wouldn't have this consequence from his conduct.

MR. BIBAS: Congress, of course, has the power to change things, but the expectation until an Act is passed is that the consequences are fixed in time. And if Congress decides that the potential unfairness is outweighed by the benefits of making the Act retroactive --

JUSTICE ALITO: But the person who -- who commits the crime just after the Act is passed had the expectation prior to that time, that had -- if he did certain things in the future, he wouldn't suffer certain

consequences.

MR. BIBAS: And yet, Congress has -- has affirmatively warned and put everybody on notice that now there is this new consequence. You may be deterred by this new consequence. We may be punishing you by this new consequence. But the consequence has been announced.

JUSTICE SCALIA: Mr. Bibas, I have -- this is almost a question of personal privilege. You -- you make your whole argument on the basis of Landgraf. So does the Government. You do not cite -- the Government cites but does not discuss the relevant portion of a -- of a later case which involved the same question, Republic of Austria v. Altmann.

I concurred separately in Landgraf because I thought that the test that the Court was using, upsetting settled expectations, was indeed the proper test for constitutional provisions forbidding ex post facto laws, which is where the Court derived it from, Justice Story's opinion in a New Hampshire constitutional case.

But I said in my concurrence that the proper test for -- for the other issue of retroactivity, namely, constitutionality aside, does this statute mean to be applied only in the future or in the past? And

for that, I propose -- well, I'll read you what we said in Altmann:

"Our approach" -- which postdates Landgraf. "Our approach to retroactivity in this case thus parallels that advanced by Justice Scalia in the concurrence in Landgraf." Quote, and it's quoting the concurrence: "'The critical issue ... is not whether the rule affects 'vested rights,' or governs substance or procedure, but rather what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relative retroactivity event'" -- "'relevant retroactivity event.'"

And that is what we have here. The -- the event that is sought to be regulated is entry into the United States, and it is clear that this statute applies only to prospective entry into the United States. It doesn't apply to past entry so that those people who came in, in violation of this statute, can be deported. Now, why shouldn't we apply that rule in this case, as

we did in the Republic of Austria case?

MR. BIBAS: No, Your Honor. As a -- first of all, our reply brief discussed Altmann, and the majority of the Court has viewed that as limited to the foreign sovereign immunities context. But taking your test on its own terms --

JUSTICE SCALIA: Why would it be limited just to the foreign sovereign immunities context?

MR. BIBAS: That's the majority's approach. But taking your test on its own terms, what you're pointing out is there is a future --

JUSTICE SCALIA: Why do you say that's the majority's approach?

MR. BIBAS: I'm sorry. The majority in Fernandez-Vargas expressly said that Republic of Austria was in a sui generis context and that its holding shouldn't be extended to -- to Fernandez-Vargas.

JUSTICE SCALIA: Its -- its holding.

MR. BIBAS: Yes.

But to take -- to look at your test, you were pointing out that there is a future event which the Government -- practically its entire theory turns on that. But even if there is a future event, there is a past event being regulated here, and the activity at issue under your test would be the pre-IIRIRA offense,

not just the innocent post-IIRIRA travel. What we have is future lawful travel, concededly lawful, nothing nefarious needs to be shown of it.

JUSTICE KAGAN: Well, Mr. Bibas, how is it different then from a felon in possession statute, where you look at the past offense --

MR. BIBAS: Right.

JUSTICE KAGAN: -- and then you say, well, this man, because of that past offense, can't buy a gun in the future? How is it different at all?

MR. BIBAS: Your Honor, there are five pertinent distinctions. Permit me to unpack.

The first and most important is that the Landgraf test should have a broader scope than the ex post facto context in these criminal cases because Congress can override it expressly.

Since the ex post facto clauses disable both State and Federal legislatures from acting at all, the deprivation of power must be narrow and careful so State and Federal legislatures can continue to regulate felon in possession or racketeering or the other crimes the Government advances.

But Landgraf just tells Congress how to legislate. It's a background rule. So, it's legitimate to have a presumption against retroactivity sweep more

broadly, as Congress is free to override it and, as I will explain, does override it regularly.

Secondly, felon in possession is inherently dangerous conduct. This is a protective law. It's not just a punitive or deterrent law.

The third and related point is that felon in possession laws are tailored. There's a nexus to a danger, a threat to people suffering firearm -- it's narrowly tailored. Fourth --

JUSTICE KAGAN: Well, why isn't the -- the government, Congress, making the exact same judgment here? If the activity to be regulated is entry, and Congress is making a judgment that we do not want dangerous people to enter, and we're using the conviction, the prior conviction, as a marker for who is dangerous, and that's exactly what Congress has done in the felon in possession statute.

MR. BIBAS: Your Honor, I believe the two are quite different. Felon in possession is limited to firearms in the hands of proven dangerous people. Here we have a law that says you can stay in the country indefinitely; we're going to discourage you from going abroad and leaving the country because we'll make it harder for you to come back. That's not tailored at all to protecting the people inside the United States.

I'd also point out that the felon in possession statute, as this Court noted in Heller, is part of a long tradition of forbidding such activity as a crime. So, it's hard to say there are settled expectations being upset by felon in possession laws.

And the final one is Congress can do that simply by being explicit, and it has done so repeatedly in laws such as IIRIRA. Elsewhere in IIRIRA, section 321(b) says the aggravated felony definition applies to convictions entered before, on, or after the statute's effective date. It knew how to do it; it did it more than a dozen other times in IIRIRA, as this Court noted in St. Cyr. It didn't spell it out here. The point of this --

JUSTICE SOTOMAYOR: How about the career criminal enhancements, instead of the felon in possession? And assuming your arguments, what limits can Congress put on anyone with respect to future conduct if it's going to be a burden? Under your view, it stops people from traveling. Career criminal statutes put on the distinct disadvantage of a longer sentence.

MR. BIBAS: Yes, Your Honor, and as we noted, in the criminal context, this Court in Witte and Gryger notes it's a heavier punishment on the new crime

because it's aggravated, because it's repeated. And because Congress has more leeway in the ex post facto context and because recidivism enhancements have a long tradition, it's entirely legitimate. There's no need to say that that's punishing the past offense because the future offense -- it --- it's permissible to increase it under the Ex Post Facto Clause.

And that's an inquiry that's different from the Landgraf test here because all Congress has to do is spell out expressly we want to apply this to convictions entered before, on, or after the statute's effective date, which it did in 321(b), which it didn't do here. So, if we were looking at the function of --

JUSTICE SOTOMAYOR: Does that argument that you've just made go more to whether or not the BIA's conclusion that Congress intended to rescind the Fleuti decision -- but you assume that's what its intent was?

MR. BIBAS: We've assumed arguendo because that's the premise of the question presented. Yes.

JUSTICE SOTOMAYOR: So, if we assume that, if we assume that was Congress's intent, doesn't that start -- give you the conclusion? If Congress intended to undo it, doesn't that prove that they intended to effect it retroactively?

MR. BIBAS: No, Your Honor, it doesn't. All

the case law, the legislative history, the other discussion was about certain other aspects of entry doctrine that needed to be changed. The discussion was express about saying we're changing the definition from entry to admission because we don't want people who have snuck into the country outside of --

JUSTICE SOTOMAYOR: No, no. I -- those go to the basic premise.

MR. BIBAS: Right.

JUSTICE SOTOMAYOR: If you assume Congress intended to rescind the prior doctrine, isn't that proof itself that it intended to apply the statute retroactively?

MR. BIBAS: No, Your Honor --

JUSTICE SOTOMAYOR: To this conduct?

MR. BIBAS: No, Your Honor. Congress can intend to rescind -- to -- to abrogate a statute such that it will have no effect going forward, but as this Court noted in Landgraf, the -- the background default rule that the public and Congress expect is that new laws will apply prospectively. That has the virtue not only of giving a clear background rule which -- against which Congress legislates, against which it did legislate in IIRIRA; but it also forces Congress to advert to the potential unfairness of retroactivity and

decide that the benefits outweigh it.

That's what this Court said in Landgraf. It makes perfect sense, and that clear statement rule serves the function of having them smoke out into the open. If you think it's beneficial to make this affect convictions in the past, just say so. But it didn't.

So, to go back to our primary point, with the practical impact or effect being a new travel disability, the Government's argument seems to boil down to that, because there is one event that must happen after the statute's effective date, therefore there can be no retroactive effect.

JUSTICE KAGAN: Well, that event is the event that the government cares about, which is the entry into the country. It's not as though the -- you know, the government says -- just picks an event at random and -- and makes it the trigger mechanism. The government has picked the event that it wants to regulate, which is entry.

MR. BIBAS: Yes, Your Honor, but this is an effect test, and under Martin v. Hadix and Landgraf, we have to take a commonsense functional view of what the effects are, the new legal consequences. As --

CHIEF JUSTICE ROBERTS: I would have thought

your answer to my colleague would be: No, what they want to regulate is the staying in the country, and they're trying to make that as uncomfortable as possible in order to encourage the individual to leave. If he can't go to the, you know, parent's party, the cousin's wedding or whatever, he's just going to leave, and then once he does, he can't come back.

Why would -- why would the Government care -- it's a question for them, I'm sure. Why would they care whether somebody that they don't want to be here stays here? It seems to me the exact opposite. So, I would have thought your argument -- your answer would be, no, what they're trying to regulate is not the coming and going, but simply the staying.

MR. BIBAS: Yes, Your Honor, you're right that, particularly given the strange way in which it's written, it's hard to understand it as something other than a penalty and possibly a deterrent, but certainly a penalty based on past crimes, to make life uncomfortable. And that does not speak of a protective, forward-looking exclusive function, if that's the test.

But to go back to the earlier point, if that were -- if we were to follow the approach Justice Scalia outlined, that would be the right response. But we don't even need to get there because the primary test

under Landgraf is not the point or function or purpose, but an effects test. The effect, as the Government concedes, is to force him to choose between his parents in Greece and his wife, children, career, and home here.

JUSTICE SCALIA: But there are a lot of -- but there are a lot of statutes which we interpret to be valid, and not retroactive, which have a substantial effect. You can pass a statute altering the rules of evidence which have the effect of making someone who committed a prior murder convictable; whereas, before, he was not convictable.

And we don't just look to the effect and say, well, it has that substantial effect; so, it's operating retroactively. We say, no, it's a rule of evidence. It applies in the future, and that evidence can come in.

And that's my problem with this other approach. There are often adverse effects upon activities that occurred before the statute was enacted, but we still regard the statute as prospective only and, therefore, not subject to special rules for people who are affected.

MR. BIBAS: Well, setting aside the difference between the ex post facto context and the civil context, and I -- there is the procedural

distinction which I know Your Honor didn't sign on to. It's also relevant that here it is directly expressly tied to a past conduct. It's a precondition. It's not even a piece of evidence or something one can draw an inference from. It is a precondition for ineligibility under 101(a)(13)(C)(v). And, therefore, it looks like the disability that Justice Story said; a disability has to involve future conduct. But if it's expressly disabling future conduct, that's a penalty on past conduct.

The disability in St. Cyr of not being able to apply for future discretionary relief. The disability in some other cases of this Court that we found after briefing and alerted opposing counsel to, Cummings v. Missouri and Ex parte Garland in volume 71 of the U.S. Reports. Even though the law there forbade teaching in the future or holding office or preaching or being a member of the bar, the Government's theory would say those are post-enactment things; just refrain from teaching; you don't have a vested right to teach.

This Court said, no, we recognize those are expressly targeted to punish the past membership in the Confederacy that triggers that disability. And so, the Government's approach would render the Justice Story's disability category a nullity.

CHIEF JUSTICE ROBERTS: Does it matter in the examples that you just gave that admission to the United States is purely a matter of legislative grace, while we might conclude that teaching, being a member of the bar, whatever, is not?

MR. BIBAS: I don't believe that that is important. That only matters for the vested rights argument, and this Court in Cummings said expressly it was dealing with a privilege. So -- moreover --

CHIEF JUSTICE ROBERTS: I'm sorry. What -- an which privilege was that?

MR. BIBAS: The privilege of teaching or the privilege of holding office. So, you can't rest on a right/privilege disposition.

CHIEF JUSTICE ROBERTS: Suppose that might have been regarded as such then but not under current law.

MR. BIBAS: Okay. Well, another answer -- in St. Cyr, the government made the same argument, and this Court said: Well, sure, Congress has the plenary power to change the rules any time it wants; just do it expressly.

The question is not whether Congress can, but whether it has, in fact, changed the rules expressly, to make that express tradeoff that the

potential unfairness of retroactivity is worth it.

Now, the final point here, I believe there was some reference earlier to reliance in the offense. And as the Government concedes, reliance is not a prerequisite. This Court can rule for Petitioner and not even bother with reliance. But the presence of reliance here is an extra factor that -- that shows the retroactivity to be obvious and severe. So, the court of appeals' whole premise that reliance is necessary goes away. The Government concedes the court of appeals implicitly was wrong on that.

As a practical matter, our point is that defendants rely on the known consequences of offenses when they decide to plead guilty. As this Court recognized in --

CHIEF JUSTICE ROBERTS: When they decide to plead guilty?

MR. BIBAS: Yes.

CHIEF JUSTICE ROBERTS: The operative issue here is when they commit the crime.

MR. BIBAS: We don't claim that there's a reliance interest in committing the crime, but in the decision to plead guilty, as a practical matter, the defendants weigh a number of consequences. And one of those is whether they might have a 4-month discount off

their sentencing guidelines, which was the inducement here, and another one is, will they ever be able to see their parents again?

CHIEF JUSTICE ROBERTS: So, this -- so, this --

JUSTICE KENNEDY: So, you draw the line -- your position is that only those who have entered a guilty plea are entitled to the presumption against non-retroactivity, but not those who've been found guilty?

MR. BIBAS: Your Honor, our primary position is that because reliance isn't necessary, all of them benefit from it because they all have settled expectations.

JUSTICE KAGAN: How do you explain St. Cyr if reliance isn't necessary? St. Cyr is all about reliance.

MR. BIBAS: Yes. And at the end of this Court's opinion, the Court said that the presence of this reliance made the retroactive effect especially obvious and sincere -- especially obvious and severe in St. Cyr. That did not purport to overrule holdings in Landgraf and Hughes Aircraft, where there had been no legally cognizable reliance.

So, St. Cyr is an easy case because of the

guilty plea because of the reliance. But Landgraf and Hughes Aircraft didn't involve any reliance, and there was still retroactivity because the settled expectations were disrupted because there were new consequences attached to pre-enactment conduct.

So, regardless of whether there is reliance, there are settled expectations that are upset by a law whose function or point is to punish and deter misconduct based on past wrongs. My client --

JUSTICE SCALIA: We're trying to figure out what Congress intended, right? We're not talking about constitutionality. We're talking about a rule that it's presumed that statutes are only prospective. All right? And your argument is the reasonable expectation of Congress when they passed this was that it would only apply to -- to people who, what, committed the crime or were convicted after the statute passed --

MR. BIBAS: Yes.

JUSTICE SCALIA: -- just as a matter of statutory interpretation?

MR. BIBAS: Yes, Your Honor.

JUSTICE SCALIA: Okay.

MR. BIBAS: This -- that is the background default rule against which Congress legislates. And in laws such as IIRIRA and SORNA and elsewhere, Congress

spells out when it wants to apply to pre-enactment offenses, to pre-enactment conduct. That's a defeasible civil retroactivity rule that can reach more broadly than the ex post facto jurisprudence.

JUSTICE KAGAN: Well, do you have any case in which a court has deemed a statute retroactive even though it wasn't triggered until the party took some further action? Is there any case out there either from this Court or from another court where we've said, you know, it's retroactive even though it depends upon a future event?

MR. BIBAS: Yes, Your Honor. St. Cyr depended on applying for discretionary relief in the future. He didn't have to. Cummings depended on trying to teach or preach or hold office. Ex parte Garland depended on trying to practice law in the future.

Those are all disabilities taking away a future ability based on a past wrong. That's what the disability category has to mean if it's to remain meaningful. And the Government's approach would gut Justice Story's fourth category. If there are no further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Miller.

ORAL ARGUMENT OF ERIC D. MILLER
ON BEHALF OF THE RESPONDENT

MR. MILLER: Mr. Chief Justice, and may it please the Court:

As the discussion so far this morning reveals, the Court's retroactivity analysis takes account of a number of different factors, but the one that is most significant and, indeed in this case, virtually dispositive is that the application of section 1101(a)(13) to Petitioner was triggered only because he engaged in voluntary conduct that postdated the enactment of the statute.

JUSTICE KAGAN: What do you take the trigger to be? Because in your brief you kept on talking about the trigger being the trip. And I would have thought that you would have talked more about the activity being the attempt to enter the country.

MR. MILLER: That's -- I mean they're closely connected together in time, and they both -- but they both postdate the enactment of the statute. But what -- the thing that is being regulated by section 1101(a)(13) is the entry of aliens into the United States. The statute sets out a comprehensive scheme for determining when an alien arriving at the border seeking to come into the United States should be regarded as

seeking an admission. So, that's conduct that takes place in the future.

Part (A) of 1101(a)(13) sets out the general definition of admission, and then (C) sets out a number of exceptions. And so, taken together, they are part of a comprehensive effort to codify Fleuti in some respects. And, in particular, Romanette (ii), the 180-day provision, is actually a fairly generous codification of Fleuti, probably extending beyond what would have been regarded as a brief trip under Fleuti.

CHIEF JUSTICE ROBERTS: Counsel, I have to -- I just don't understand this statute. This is somebody we would not allow into the country. And yet, the only thing we say is you can't leave. I just don't understand how that -- how that works.

MR. MILLER: I think there are -- there are two points to be made about that. And the first is that that is a feature of the statute writ large. I mean, that exists even with respect to post-enactment criminal convictions. So, it's --

CHIEF JUSTICE ROBERTS: No. Right.

MR. MILLER: And the second, I think to understand it, it's helpful to look at the history. The distinction between grounds of inadmissibility and grounds of deportability goes back all the way to the

1917 Act. In that statute, a single crime of moral turpitude was a basis for inadmissibility but was generally not a basis for deportability unless it had a 1-year sentence and was committed within 5 years --

CHIEF JUSTICE ROBERTS: Well, I know, and I understand that there is a limitation on actually deporting the person. But here I would think the one thing you want the person to do is leave. Maybe for a particular event, but maybe he'll decide to stay in Greece if once he's there for the -- but it seems very odd to say we're going to show you how much we don't want you here; we're not going to let you leave.

MR. MILLER: I think what the -- what the history shows that it's the crossing the border that has always been regarded as a legally significant event. This Court's cases recognizing --

JUSTICE GINSBURG: But it wasn't before. We -- I think we have held that an immigration lawyer is obliged to tell a defendant faced with a criminal charge what the legal -- what the immigration consequences will be. And here, suppose before the -- at the time of the plea in this case, the attorney had said, once you've served your time, you will be able to take brief casual trips. That would have been accurate advice, right? Before IIRIRA.

MR. MILLER: Well, I think -- I think the most important point about the consequence of the plea is that, as an immediate result of the plea under pre-IIRIRA law, so at the time he pleaded guilty in 1994, he made himself inadmissible. So, that's not anything that has changed. So, he knew that he was --

JUSTICE GINSBURG: But I'm asking you, the lawyer talking to the client -- and the client wants to know before I enter this plea, what will be the consequence for me? And the question that's asked is, will I still be able to visit my mother in Greece? What should the lawyer -- what should the lawyer at that time have answered?

MR. MILLER: I think the lawyer should have said, by pleading guilty, you are making yourself inadmissible to the United States. Under --

JUSTICE BREYER: When Rosenberg would have been the law -- Fleuti -- and the answer to the question would have been, yes, you can make trips abroad, wouldn't it?

MR. MILLER: That's -- that's right. And I think you might also have said that under a current law, you will not be regarded as seeking an admission if you take a brief, casual, and innocent trip. But the change in the law --

JUSTICE KAGAN: All right. Well, that's what's going to be important to the person, right? It's not inadmissible and all the legal terms. Am I going to be able to make short trips to visit my mother? Yes, you are going to be able to make short trips to visit your mother.

And then you wake up the next morning, and Congress has passed a statute, and now you're not able to take short trips to visit your mother. So, something very real has happened to the life of this person.

MR. MILLER: That's -- that's right, I mean, and there is no question but that there is a serious consequence as a result of the change in the law. But the Court has made clear in Landgraf and in a number of other cases that even uncontroversially prospective statutes can impose burdens.

JUSTICE BREYER: That's true, but in -- in St. Cyr, as I read it, on pages 322 and 23, the Court focused directly, not on the crime point of time, but the time of the guilty plea. And what the Court says there is that a person who is thinking of pleading guilty might well have taken into account the fact that he could ask the Attorney General later when he's about to be deported to exercise discretion in his favor.

So, that's as I read those pages. You can

say why I'm not reading them correctly, but that's how I read them. And then, having read it that way, I thought the question in this case is whether the person who's sitting at the table and deciding whether to plead guilty or not is likely to think, well, if I plead guilty, I can always ask for discretion. That's St. Cyr.

Well, if I plead guilty, I can still visit my aging parents and grandparents, a matter that could be of importance to some people, as opposed to whether I will never see them again. Now, that seems to be the question.

Is the second as likely to be in the person's mind as the first? And to tell you the truth, I don't know the answer. I mean, maybe it would be. There isn't that much chance of getting discretion. It might be important to some people to visit their aging parents and grandparents. So, go ahead. Answer the question. Is the one more important than the other? And if not, why not?

MR. MILLER: I think you've correctly described the reasoning of the Court in St. Cyr, and I think that that reasoning highlights two ways in which this case is significantly different. And the first is that, in St. Cyr, it was the guilty plea, the

conviction, that was legally significant under the provision of IIRIRA at issue there. And the Court emphasized that a guilty plea is a quid pro quo. It has to be knowing and voluntary. The Court cited Santobello v. New York, a due process case about guilty pleas. And then -- so, one difference in this case is that the legally significant event here --

JUSTICE BREYER: No, but I'm really asking you --

MR. MILLER: -- is not the guilty plea.

JUSTICE BREYER: -- isn't my question the key question? Now, you can answer that "no." But -- I mean, I suppose you could prove that the only thing that mattered to -- to LPRs who plead guilty, the only thing that mattered, was visiting their parents and grandparents, a matter I doubt; but, you can say, even on that situation, it would make no difference, or you could say I think the one is as important as the other, or you could say they're not. I just want to get your full answer, all -- your whole answer to my question.

MR. MILLER: The conclusion to the first part of the answer is that it wouldn't make a difference because what matters here is not the guilty plea; what triggers the application of 1101(a)(13)(C) is the underlying criminal conduct and is --

JUSTICE KAGAN: You're quite right, Mr. Miller, as a formal matter that that's true, that that's the words of the statute. But how many times has the Department of Homeland Security tried to declare a person inadmissible on the basis of the commission of a crime without putting into evidence either a conviction or a guilty plea?

MR. MILLER: I don't have any --

JUSTICE KAGAN: I can't imagine that it's like more than on one -- you know, five fingers of your hand. I mean, that's the way people prove crimes in this area, isn't it, by convictions or guilty pleas?

MR. MILLER: Well, I would say that -- this is a statue --

JUSTICE KAGAN: Or convictions after trial or convictions by guilty pleas.

MR. MILLER: The statute is being applied by -- in the first instance, by customs officers at the airport or at the land border crossing. They have access to a number of databases which include not only records of convictions but also things like arrest warrants. And an arrest warrant by itself would not be enough to show that a person had, in fact, committed an offense, but it might well trigger some further inquiry from the customs officer that would lead to them finding

out more information or perhaps getting an admission from the person.

JUSTICE KAGAN: If, as a fact of the matter, the way the commission of crime is proved in this area is through showing a conviction, does your distinction stand up at all?

MR. MILLER: I mean, there is still, I think, a significant formal distinction, and then there's also another important distinction from St. Cyr, which is that that was a case where, as a result of the guilty plea plus the change in law, the person there faced immediate deportability with no prospect of discretionary relief. And the Court said that there is a clear difference, for purposes of the retroactivity analysis, between a possibility of deportability and a certainty of deportation.

Here, not only is he not deportable, but there's no immediate consequence for him at all. The statute only has any effect on him when he engages in the post-enactment travel. And I think --

JUSTICE GINSBURG: What about the characterization? Which seemed to me to make common sense. Yes, the trigger is that he has gone abroad and is returning. But the target, they say, was the crime. That's why the law -- the law really doesn't care about

the travel back and forth; what it cares about is that this person was convicted of a crime.

MR. MILLER: I -- I don't think that's correct, Your Honor, and I think that highlights one of the distinctions between this case and Cummings v. Missouri and Ex parte Garland.

In those cases, you had statutes that were nominally prospective in application, but the Court actually said that we think that what's really happening here is that the statutes are imposing punishment for the completed acts. To the extent there was any doubt in those cases themselves, this Court discussed them both in Harisiades v. Shaughnessy and said that it viewed them as cases about punishment. This is not a statute --

JUSTICE SOTOMAYOR: But isn't that the case here, meaning -- it goes back to the Chief Justice's question, which is what they're trying to do is punish those individuals, those LPRs, who have committed this kind of crime, by not letting them travel or come back in. That's really what their argument is, is -- you know, you are imposing a punishment, a disability, for having committed the crime. You're not imposing a disability merely for the act of traveling.

MR. MILLER: I mean, I think when you look

at the statute as a whole, you see that it's a -- it's a comprehensive regulation of crossing the border, which has always been regarded as a legally significant event. There are six subparts to 1101(a)(13)(C). Five of them have nothing to do with past conduct. They're about the nature of the trip and what the alien is doing as he's coming in.

And then you have -- have this one, which is of a piece with the long history of drawing a distinction between inadmissibility and deportability. And I think it recognizes --

CHIEF JUSTICE ROBERTS: What is the -- what is the policy underlying the rule that doesn't allow somebody who has a lawful status here to go to his grandmother's funeral --

MR. MILLER: I -- I --

CHIEF JUSTICE ROBERTS: -- and come back? It's going to take 4 days. He goes; he comes back. What policy supports prohibiting that travel?

MR. MILLER: I mean, I -- I think it reflects a -- a judgment over -- on the part of Congress over many, many years that it is one thing to say to an alien, all right, we're not going to go and try and find you and take you and kick you out of the country. It is quite another to say you may freely cross our borders;

even after having left, you may come back, and we're -- without any inquiry into your --

CHIEF JUSTICE ROBERTS: Okay. They're two different things, but I don't know that you've articulated what the policy is to prevent -- prohibit somebody from doing that.

MR. MILLER: I mean, other than referring you to -- to the history and to the idea that's been reflected -- you know, this Court has recognized that control over the border is a core sovereign prerogative that lies at the heart of Congress's immigration power. And I think that --

JUSTICE SCALIA: Well, I suppose you could say that there's a likelihood of quite inequitable enforcement if indeed you adopt a position we're going to pick up all of these people and send them away. That's not going to happen. It'll -- it'll be hit and miss.

And, on the other hand, you can enforce it rigorously and equitably upon everyone if you only forbid reentry to those people who want to come back in and who have to, you know, give their names to Immigration, and you can check on -- on this status.

That seems to me a sensible reason.

MR. MILLER: That's right. And --

JUSTICE BREYER: All right. But why do you -- look, as I read the statute, it isn't even clear whether it overrules Rosenberg v. Fleuti. I mean, they talk about admission, but admission, after all, could have an exception for the 4-day trip. That's what the Court said effectively in Rosenberg v. Fleuti.

So, Congress certainly wasn't clear on what policy they're following. I would have thought that. You can disagree with that. But I -- because -- but the part that's still gnawing at me 95 percent of the people plead guilty. All right. You know. Everybody pleads guilty. All -- about. About. And now, the consequence that this ex post enacts is he can't take the 4-day trip.

And you keep saying, well, a 4-day trip requires action on a person's part. Right. Of course, it does. So, why does that matter? I mean, the fact is he can't take the 4-day trip. A 4-day trip requires action. You have to buy a trip -- ticket. You have to get on a plane. So --

MR. MILLER: Well, i think -- if I could just first address the -- the question of whether the statute, in fact, abrogates Fleuti, and just to be clear on that -- the question presented assumes that it does. Petitioner isn't challenging that. And the Board, in

the Collado-Munoz decision, has explained why the -- the statute, in fact, does have that effect.

And I think that the significance of this post-enactment conduct, the significance of the trip, is illustrated by this Court's decision in Fernandez-Vargas, which made clear that when you have -- when the application of the statute is within the control of the person to whom it's being applied, because he has to do something after it comes into effect -- there, it was choosing to remain in the United States and becoming subject to the reinstatement of a prior order of removal -- here, it's taking the travel. But that goes a long way towards establishing that it doesn't have a retroactive effect, that it's regulating future conduct.

Another --

JUSTICE SOTOMAYOR: Prior to the Fernandez case, the illegal act was remaining. And so, that was within your control. But the -- you can't undo an illegal act that you've done to be able to travel. The act is now part of your background. And so, there's nothing in your control to change that act once the statute has passed.

MR. MILLER: Well --

JUSTICE SOTOMAYOR: And so, you're -- you're

carrying that around as a disability.

MR. MILLER: In Fernandez-Vargas, the conduct that subjected the alien to the application of this -- this procedural -- this disadvantageous removal procedure was remaining in the United States.

And it's true that that conduct was unlawful, but for purposes of the retroactivity analysis, the Court didn't focus on whether it was lawful or unlawful. What matters is that it was conduct that was in the future, that was after the statute was enacted.

And so, here, although the -- the trip is not unlawful in that sense, it is future conduct. And here, as in Fernandez-Vargas, there is ample warning -- which was another point that the Court emphasized in that case -- ample warning that the statute would be applied to people who engaged in that conduct.

I do want to address your --

JUSTICE KAGAN: It -- it can't be right that it's any future conduct. If -- if there's a trigger mechanism that is entirely random, you know, it's -- you can be deported if you've committed a crime of moral turpitude in the past, but not until you go to the movies on a Saturday.

Surely, that would not change the analysis.

MR. MILLER: I think that's right, Your Honor, and I think the reason it wouldn't is reflected in some of this Court's -- in the ex post facto analysis.

If you have a statute that, for example, makes it a crime to have engaged in certain conduct in the past and then, you know, something -- some commonplace, utterly trivial activity in the future, I think a court looking at that would say this is not -- although it is nominally prospective, this is really a statute aimed at punishing the prior conduct.

JUSTICE SCALIA: Well, I -- I don't know. I think it would be prospective and unconstitutional because it's irrational. I mean, not everything that's unconstitutional is unconstitutional -- not everything that is unconstitutional is not prospective, it seems to -- or do you think that's so?

If it's -- if it is unconstitutional in violation of the ex post facto law, the statute has to be -- has to be prospective. I'm sorry. Has to be assumed not to cover that prior conduct. Is that right?

MR. MILLER: I mean, I think -- the hypothetical statute I was describing I think would violate the Ex Post Facto Clause under the sort of analysis that this Court used in Smith v. Doe, in a

holding that --

JUSTICE SCALIA: Okay. And if it does, it automatically has to be interpreted not to cover that?

MR. MILLER: I mean --

JUSTICE SCALIA: By reason of the presumption of expectation --

MR. MILLER: Oh, you mean -- if you mean a parallel statute in the civil context.

JUSTICE SCALIA: Yes, yes.

MR. MILLER: I -- I think that's the best reading of Landgraf, and I think under -- under the analysis suggested in your concurring opinion in Landgraf --

JUSTICE SCALIA: Yes. Yes.

MR. MILLER: -- I think one would look at that statute and say this is really a statute that's aimed at regulating the past conduct, and that -- that has a retroactive effect.

So, I mean, to finish that thought, I think I would just say that there is a narrow category of cases where you have what is in form a prospective regulation that's really aimed at -- aimed at burdening or punishing a past act. But this is not that.

JUSTICE KAGAN: And how do we separate those two? How do we decide that this is not that, and that

it's instead something else, that it's a regulation of future conduct?

MR. MILLER: I -- in the criminal context, the Court has used the analysis of Kennedy v. Mendoza-Martinez to figure out whether a statute is -- is imposing additional punishment for past conduct. And that looks at a number of factors, and the most important factor under that test, the Court has said, is whether the statute appears to be related to a legitimate prospective regulatory purpose.

And so, that's why, for example, statutes like 922(g), the felon in possession statute, which was, I would point out, amended just back in 1996 to add misdemeanor crimes of domestic violence, which had not previously been something that would subject one to a firearms disability -- that was added.

Every court of appeals that has considered the question has held that it doesn't violate the Ex Post Facto Clause and, I think, implicitly has held that it does in fact reach that conduct.

JUSTICE SCALIA: Even -- even if you had pleaded guilty to spousal abuse?

MR. MILLER: I'm not aware of any cases --

JUSTICE SCALIA: Yes.

MR. MILLER: -- specifically addressing that

question, but -- but, yes, because there you have a statute that is regulating future conduct. It only applies to somebody who engages in the future conduct. The sex offender registration laws are another example that this Court has upheld. That kind of law obviously imposes a very significant burden on people on the basis of prior conduct, but the fact that there is some burden by itself does not mean that the statute is retroactive.

Nor does it mean that it's appropriately viewed as imposing a disability. I mean, I think that the Court in Landgraf quoted Justice Story's formulation of a disability as referring to statutes that impose a disability in respect to transactions that are already passed. So, it is not enough that there used to be something that you could do, and now, in the future, you're not going to be able to do that. That's not a disability in the relevant sense, and if it were, I think the Court would have a very difficult line-drawing problem to figure out why it is that statutes like 922(g) are okay, or sex offender registration laws, or any number of --

JUSTICE BREYER: That's -- that's why I think the Chief Justice's question and the ambiguity of the statute are relevant. Like with SORNA you would apply it backwards, because that's a pretty clear

intent.

I don't know about, you know, like, "three times and you're out" statutes, et cetera. But -- but here you have the disability on the one -- the disadvantage to the person pleading guilty, that problem, on the one hand; and, on the other hand, you have the policy that with a -- fill in the blank -- with a statute that doesn't talk about it but simply uses a new definition of admission or admissibility. That's -- do you want to say something about that?

MR. MILLER: I think, if you're -- if you're asking whether Congress has specifically addressed the temporal scope of the statute, we -- we acknowledge under St. Cyr that it hasn't. And so, that's why we're at step two of the --

JUSTICE BREYER: More than that, what is -- I'm ignoring -- more than that, I'm saying what's the policy on the other side? The policy that favors the retroactivity despite the fact that the person might not have pleaded guilty? And that's why I was interested in the Chief Justice's question and also the ambiguity of the language in the statute that they used.

MR. MILLER: I think that the -- the policy is Congress was trying to redefine -- I mean, they were replacing the old term of "entry" and -- with a new

concept of admission. They're trying to redefine a comprehensive scheme for regulating the treatment of aliens arriving at the border. And I think that you have to look at all the parts of it together as a scheme that was to be applied going forward, when people arrived at the border in the future, after the enactment of the statute.

If there are no further questions --

CHIEF JUSTICE ROBERTS: Could you go over again for me your distinction of St. Cyr?

MR. MILLER: I think it's twofold, Your Honor. The first is that, in St. Cyr, the legally significant event was the conviction. It was the guilty plea. Here, the guilty plea is significant because it makes Petitioner inadmissible, but that was true under current law.

CHIEF JUSTICE ROBERTS: You don't argue that -- that the significance of what the individual is giving up makes a difference?

MR. MILLER: That's our second point, is that St. Cyr said there is a big difference between immediate deportability and the potential --

CHIEF JUSTICE ROBERTS: Is there -- is there a difference in terms of what they face if they don't plead guilty? I've always had difficulty with St. Cyr

and the notion that, say, someone pleads -- is facing, you know, 10 years, and they plead -- plead guilty to 2 years, that the -- the reason they did that is to, you know, avoid one of these immigration provisions. It seems to me it is to avoid 8 years.

MR. MILLER: I --

CHIEF JUSTICE ROBERTS: And I just wonder if the relative significance of what is at issue under the immigration law is something that we can take into account, or if St. Cyr prohibits that?

MR. MILLER: No, I think it is certainly appropriate to take into account, that however -- however significant the application of Fleuti might be to aliens, it's on a different order of significance from --

JUSTICE KAGAN: Well, Mr. Miller, the Solicitor General actually represented to us -- in the Judulang argument, used that as an example, the Fleuti case, as something that people doing pleas did think about and did rely upon.

MR. MILLER: Well, I think -- I mean, we don't question that that's something that people might have -- have been aware of and have been thinking about, but it's not something that was bargained for in the plea agreement because it's not something that's

affected by the plea agreement.

The statute here is triggered by the post-enactment conduct of entering the country but also by the -- the pre-enactment conduct of committing the crime. And, as Petitioner has acknowledged, there isn't any reliance in the state of immigration law when you choose to commit the crime. And so, I think that's -- that's a difference from the scenario that was addressed in Judulang.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Miller.

MR. MILLER: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Bibas, you have 6 minutes remaining.

REBUTTAL ARGUMENT OF STEPHANOS BIBAS
ON BEHALF OF THE PETITIONER

MR. BIBAS: Thank you, Your Honor. I'd like to make five points.

The first one is the statute is poorly tailored to any protective or forward-looking effect. As the Court has noted, its perverse effect is to discourage people from leaving the country, to keep them in. So, any idea that the purpose is to get them out just doesn't square with the way the statute is written.

As Justice Ginsburg noted, while the

post-IIRIRA innocent travel may be the trigger here, the obvious target is the pre-IIRIRA offense. The statute is tied to misconduct. The natural inference of making misconduct not just a piece of evidence but a prerequisite is that it is the misconduct that is being penalized.

Second, the impact, we suggest, is the relevant test. The impact is a penalty. It is a disability based on a past act that Mr. Vartelas is now helpless to undo. That is all that is required under Landgraf. If Congress thinks it important, it can expressly require retroactivity, but it hasn't done so.

Third, let me make clear that we have alternative theories here. Reliance is something that makes the case worse. It is something that exacerbates the problem, makes it obvious and severe. And our amici, the NACDL brief, points out very movingly how important these kinds of considerations are in immigrants' decisions to plead guilty. Here, for example, my client received a 4-month discount off his sentencing range. It's entirely plausible to believe that immigrants in his situation might value the ability to stay in the same country with their 4-year-old and 2-year-old child as much as 4 months in jail.

But our broader theory is that the violation

of settled expectations is sufficient, whether or not there's reliance. The settled expectation that one has of planning one's life in this country and yet having relatives abroad one will tend to or care for their business, et cetera -- that is sufficient. Just as in Landgraf and Hughes Aircraft, there were no legally cognizable reliance interests in discriminating or in submitting false claims, but changing the penalties is enough.

Fourth, this Court's decision in St. Cyr, I believe, strongly helps our case. The first reason is that it imposed a disability, a disability on filing in the future for discretionary relief, but as a practical matter, it's burdening past conduct.

Secondly, St. Cyr didn't purport to change the holdings in Landgraf and Hughes Aircraft that those are other ways of showing impermissible retroactivity. The logic in St. Cyr is ineluctable that because you are burdening a decision, a decision that, as the -- the Court and the amici in St. Cyr noted, matters greatly and factors into things like the plea bargaining calculus, that the retroactivity is especially obvious and -- and severe.

And let me note that St. Cyr was decided under this same statute, a privilege, not a right, a privilege

that Congress can abrogate at any time. That did not influence this Court's holding at all. The right/privilege distinction is dead in this area of law. If there is a privilege under IIRIRA to apply for discretionary relief, there is a privilege to not be subject to the disability on one's traveling and returning.

Finally, let me talk about the criminal/civil line. I believe my brother here introduced Smith v. Doe and mentioned some of the sex offender cases. I've explained why the criminal cases in ex post facto are different, but let me go into some more detail as the Court is well familiar with Smith v. Doe. That was a civil case that Doe attempted to turn into a criminal case under the very demanding standard in Kennedy v. Mendoza-Martinez. But that's a very uphill fight. As the Court's opinion recognized, the court must be very deferential before turning something facially civil into criminal because then it's categorically forbidden and it comes with the criminal procedure protections in the Bill of Rights.

That's not what we're doing now. We're not trying to say this law is forbidden. Smith v. Doe involved a law where the Court's opinion said on its face the legislature made it retroactive; it says it's

retroactive. The Federal law SORNA is expressly retroactive in section 113(d). IIRIRA is expressly retroactive. That's a different inquiry, where you're asking, does the Ex Post Facto Clause forbid something that's expressly retroactive? Does Mendoza-Martinez turn it into a criminal case?

Versus here, where it's not retroactive. All Congress has to do is spell it out. If this Court adheres to its previous jurisprudence, the guidance to the drafters across the street is clear: Just draft the statutes the way you've always been doing it; say before, on, or after effective date.

JUSTICE ALITO: Do you think we have the authority to tell Congress how to draft its laws? I thought what we were doing was trying to infer what they intended.

MR. BIBAS: Yes, Your Honor.

JUSTICE ALITO: Do we send them a drafting manual? Now, you can do this, but you can only do it if you do it -- if you follow the steps that we've prescribed. And you've said this over and over. It seems to be completely unfounded.

MR. BIBAS: Your Honor, this Court has said that it's important to adhere to its traditional tools of statutory construction because it's a settled

background rule against which Congress legislates, which it is aware of.

JUSTICE SCALIA: And you think Landgraf is clear and settled, and you're -- you're over there in Congress, and you say, boy, I know how this statute is going to come out under Landgraf --

MR. BIBAS: Yes, Your Honor.

JUSTICE SCALIA: -- better than I am.

MR. BIBAS: Let me explain. This Court decided Landgraf two decades ago. A few years after Landgraf, Congress passed IIRIRA in 1996. IIRIRA contains express retroactivity provisions that go hand-in-glove with the Landgraf presumption.

And then Congress passed SORNA, to which my brother alludes. SORNA in 2005 likewise in section 113(d) says, yes, this sex offender registration shall apply; the Attorney General can apply it to people with pre-SORNA convictions. Congress understands the Landgraf presumption. In those statutes and others, it has legislated against it. It can continue to do it because this Court should continue to use its traditional tools of statutory construction.

JUSTICE SCALIA: Well, that can be explained because Congress understands that who knows whether it's going to be held to be retroactive or not. If you -- if

you surely want it to apply, you'd better say so. If that's the rule you want us to adopt, that's okay.

MR. BIBAS: Yes, Your Honor, and a clear statement rule has that virtue, as I believe Your Honor is well aware.

For all of these reasons, we ask this Court to reverse the judgment below and remand.

CHIEF JUSTICE ROBERTS: Thank you, counsel, counsel.

The case is submitted.

(Whereupon, at 12:19 p.m., the case in the above-entitled matter was submitted.)

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