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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. :

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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.

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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

1 first-time entrants.

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

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

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

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

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

1 in some cases.

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

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

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

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

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

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

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

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

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

1 consequences.

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

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

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

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

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

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

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

1 we did in the Republic of Austria case?

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

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

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

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

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

18 JUSTICE SCALIA: Its -- its holding.

19 MR. BIBAS: Yes.

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

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

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

7 MR. BIBAS: Right.

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

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

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

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

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

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

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

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

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

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

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

6 And the final one is Congress can do that
7 simply by being explicit, and it has done so repeatedly
8 in laws such as IIRIRA. Elsewhere in IIRIRA, section
9 321(b) says the aggravated felony definition applies to
10 convictions entered before, on, or after the statute's
11 effective date. It knew how to do it; it did it more
12 than a dozen other times in IIRIRA, as this Court noted
13 in St. Cyr. It didn't spell it out here. The point of
14 this --

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

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

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

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

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

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

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

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

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

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

9 MR. BIBAS: Right.

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

14 MR. BIBAS: No, Your Honor --

15 JUSTICE SOTOMAYOR: To this conduct?

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

1 decide that the benefits outweigh it.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: I would have thought

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 potential unfairness of retroactivity is worth it.

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

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

16 CHIEF JUSTICE ROBERTS: When they decide to
17 plead guilty?

18 MR. BIBAS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

18 MR. BIBAS: Yes.

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

21 MR. BIBAS: Yes, Your Honor.

22 JUSTICE SCALIA: Okay.

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Miller.

1 ORAL ARGUMENT OF ERIC D. MILLER

2 ON BEHALF OF THE RESPONDENT

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

5 As the discussion so far this morning
6 reveals, the Court's retroactivity analysis takes
7 account of a number of different factors, but the one
8 that is most significant and, indeed in this case,
9 virtually dispositive is that the application of section
10 1101(a)(13) to Petitioner was triggered only because he
11 engaged in voluntary conduct that postdated the
12 enactment of the statute.

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

18 MR. MILLER: That's -- I mean they're
19 closely connected together in time, and they both -- but
20 they both postdate the enactment of the statute. But
21 what -- the thing that is being regulated by section
22 1101(a)(13) is the entry of aliens into the United
23 States. The statute sets out a comprehensive scheme for
24 determining when an alien arriving at the border seeking
25 to come into the United States should be regarded as

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

3 Part (A) of 1101(a)(13) sets out the general
4 definition of admission, and then (C) sets out a number
5 of exceptions. And so, taken together, they are part of
6 a comprehensive effort to codify Fleuti in some
7 respects. And, in particular, Romanette (ii), the
8 180-day provision, is actually a fairly generous
9 codification of Fleuti, probably extending beyond what
10 would have been regarded as a brief trip under Fleuti.

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

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

21 CHIEF JUSTICE ROBERTS: No. Right.

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

1 1917 Act. In that statute, a single crime of moral
2 turpitude was a basis for inadmissibility but was
3 generally not a basis for deportability unless it had a
4 1-year sentence and was committed within 5 years --

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

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

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

1 MR. MILLER: Well, I think -- I think the
2 most important point about the consequence of the plea
3 is that, as an immediate result of the plea under
4 pre-IIRIRA law, so at the time he pleaded guilty in
5 1994, he made himself inadmissible. So, that's not
6 anything that has changed. So, he knew that he was --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. MILLER: I -- I --

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

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

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

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

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

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

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

24 That seems to me a sensible reason.

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

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

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

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

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

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

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

16 Another --

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

24 MR. MILLER: Well --

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

1 carrying that around as a disability.

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

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

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

18 I do want to address your --

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

25 Surely, that would not change the analysis.

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

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

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

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

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

1 holding that --

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

4 MR. MILLER: I mean --

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

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

9 JUSTICE SCALIA: Yes, yes.

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

14 JUSTICE SCALIA: Yes. Yes.

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

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

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

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

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

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

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

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

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

24 JUSTICE SCALIA: Yes.

25 MR. MILLER: -- specifically addressing that

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

9 Nor does it mean that it's appropriately
10 viewed as imposing a disability. I mean, I think that
11 the Court in Landgraf quoted Justice Story's formulation
12 of a disability as referring to statutes that impose a
13 disability in respect to transactions that are already
14 passed. So, it is not enough that there used to be
15 something that you could do, and now, in the future,
16 you're not going to be able to do that. That's not a
17 disability in the relevant sense, and if it were, I
18 think the Court would have a very difficult line-drawing
19 problem to figure out why it is that statutes like
20 922(g) are okay, or sex offender registration laws, or
21 any number of --

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

1 intent.

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

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

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

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

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

8 If there are no further questions --

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

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

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

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

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

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

6 MR. MILLER: I --

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

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

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

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

1 affected by the plea agreement.

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

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Miller.

12 MR. MILLER: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Bibas, you have
14 6 minutes remaining.

15 REBUTTAL ARGUMENT OF STEPHANOS BIBAS

16 ON BEHALF OF THE PETITIONER

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

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

25 As Justice Ginsburg noted, while the

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

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

13 Third, let me make clear that we have
14 alternative theories here. Reliance is something that
15 makes the case worse. It is something that exacerbates
16 the problem, makes it obvious and severe. And our
17 amici, the NACDL brief, points out very movingly how
18 important these kinds of considerations are in
19 immigrants' decisions to plead guilty. Here, for
20 example, my client received a 4-month discount off his
21 sentencing range. It's entirely plausible to believe
22 that immigrants in his situation might value the ability
23 to stay in the same country with their 4-year-old and
24 2-year-old child as much as 4 months in jail.

25 But our broader theory is that the violation

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

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

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

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

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

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

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

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

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

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

17 MR. BIBAS: Yes, Your Honor.

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

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

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

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

7 MR. BIBAS: Yes, Your Honor.

8 JUSTICE SCALIA: -- better than I am.

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

14 And then Congress passed SORNA, to which my
15 brother alludes. SORNA in 2005 likewise in section
16 113(d) says, yes, this sex offender registration shall
17 apply; the Attorney General can apply it to people with
18 pre-SORNA convictions. Congress understands the
19 Landgraf presumption. In those statutes and others, it
20 has legislated against it. It can continue to do it
21 because this Court should continue to use its
22 traditional tools of statutory construction.

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

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

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

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

8 CHIEF JUSTICE ROBERTS: Thank you, counsel,
9 counsel.

10 The case is submitted.

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

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