No. 10-1211

IN THE

Supreme Court of the United States

PANAGIS VARTELAS,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

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

BRIEF OF THE NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 South LaSalle Street
Chicago, IL 60604

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker Dr.
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com

WARREN D. POSTMAN
JONES DAY
51 Louisiana Avenue N.W.
Washington, D.C. 20001

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Counsel for Amicus Curiae

QUESTION PRESENTED

Is 8 U.S.C. § 1101(a)(13)(C)(v), which has been interpreted as depriving certain lawful permanent residents of their right to take brief trips abroad without being denied reentry, impermissibly retroactive as applied to lawful permanent residents who pleaded guilty before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)?

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Immigrant Justice Center (NIJC) is a non-profit organization accredited by the Board of Immigration Appeals since 1980 to provide immigration assistance. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In 2009, NIJC provided such legal services to more than 10,000 non-citizens.

NIJC also promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through policy advocacy, impact litigation, and public education. In light of the foregoing mission, NIJC has a deep interest in ensuring that the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") is not applied retroactively in a manner that is inconsistent with Congressional intent and fundamental principles of fairness.

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this briefs preparation or submission. Counsel of record for both petitioner and respondents received timely notice of amicus's intent to file the brief, and consented to it.

INTRODUCTION AND SUMMARY OF ARGUMENT

Prior to 1997, the Immigration and Nationality Act ("INA") set out different standards governing "exclusion" and "deportation." An alien seeking "entry" into the United States could be "excluded" based on a broad set of grounds and with relatively minimal procedures. But an alien who had already "entered" the country could be "deported" only on narrower grounds and with greater procedural protections. *See, e.g.*, 8 U.S.C. §§ 1182(a), 1251(a) (1994); *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212-15 (1953).

In *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963), this Court held that a lawful permanent resident's "innocent, casual, and brief" trip outside the country was not sufficiently "disruptive of his resident alien status" that a return from such a trip could be considered an "entry" under the INA. *Id.* As a result, a lawful permanent resident ("LPR") who was not deportable while in the United States, but would have been excludable if seeking "entry" into the country, had the right to take "innocent, casual, and brief" trips abroad without triggering exclusion proceedings upon return.

Petitioner was such an alien. That is, he was an LPR with a minor conviction for conspiracy to make or possess a counterfeit security. Pet. App. 2-3. This single conviction did not render Petitioner deportable, 8 U.S.C. § 1251(a) (1994), but this conviction was for an excludable offense; *i.e.*, it would have made Petitioner excludable if he were seeking entry, as it was for a "crime involving moral

turpitude," 8 U.S.C. § 1182(a) (1994). Thus, prior to 1997, Petitioner's conviction did not prevent him from taking brief trips outside the United States.

With the passage of IIRIRA in 1997, Congress replaced the term "entry" with the term "admission" as the key to determining many aliens' legal status. Interpreting this new term, defined in INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v), the BIA concluded that "admission" was required for *any* physical entry into the country by an alien convicted of an excludable offense triggering inadmissibility under 8 U.S.C. § 1182(a)(2), even if the alien's trip abroad had been "innocent, casual, and brief." *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1065-66 (BIA 1998) (en banc). Under the BIA's interpretation, IIRIRA thus abrogated the *Fleuti* doctrine for all aliens convicted of an excludable offense.[2]

As a result, now if such aliens take an "innocent, casual, and brief" trip overseas, they must seek admission upon return. That not only places their legal resident status at risk, but also could result in their detention for a period of months, or even years. *See* 8 C.F.R. § 1003.19(h)(2)(i). And this is so for all aliens, regardless of whether they were convicted of excludable offenses before or after IIRIRA's effective date.

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[2] *Amicus curiae* believes there are strong arguments that *Collado-Munoz* was wrongly decided. *See, e.g.*, *Collado-Munoz*, 21 I. & N. Dec. at 1075 (Rosenberg, Bd. Mem., dissenting) ("[T]he statute is utterly silent as to the continued vitality of the *Fleuti* doctrine."). Given the formulation of the Question Presented, however, *amicus curiae* will assume *arguendo* that IIRIRA abrogated the *Fleuti* doctrine.

This Court has long recognized that federal statutes will not be read to apply retroactively absent a clear expression of congressional intent to the contrary. This presumption is grounded in "[e]lementary considerations of fairness," which dictate that "'the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). In assessing whether a statute operates retroactively, the Court has generally asked "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 270. Several members of the Court have suggested that an alternative formulation better explains the Court's precedents. Under that approach, a court should determine "the relevant activity that the [new] rule regulates"; "only such relevant activity which occurs *after* the effective date of the statute is covered." *Id.* at 291 (Scalia J., concurring).

IIRIRA's abrogation of the *Fleuti* doctrine would be impermissibly retroactive under either of the foregoing standards if applied to LPRs who, like petitioner, were convicted of an excludable offense before the enactment of IIRIRA. Limiting the ability of such LPRs to travel overseas would attach major "new legal consequences to events completed before [IIRIRA's] enactment." *Id.* at 270 (majority opinion). Moreover, because subsection 101(a)(13)(C)(v) constitutes an added penalty for certain crimes, "the relevant activity that the [new] rule regulates" is petitioner's conviction for an excludable offense, an "activity which occurs [before] the effective date of

the statute." *Id.* at 291 (Scalia J., concurring). Because it is undisputed that subsection 101(a)(13)(C)(v) does not expressly define its own temporal reach, the presumption against retroactivity dictates that subsection 101(a)(13)(C)(v) not be applied in this retroactive manner.

The Second Circuit reached a contrary conclusion by erroneously requiring a showing of specific, individualized reliance before finding a statute to have retroactive effect. This approach cannot be reconciled with the decisions of this Court, fundamentally misunderstands the role of reliance interests in applying the presumption against retroactivity, and would produce the untenable result of a single statute meaning as many things as there are people to whom it applies.

This Court should accordingly reject the Second Circuit's approach and instead hold that subsection 101(a)(13)(C)(v) does not apply to LPRs who, like Petitioner, were convicted of an excludable offense prior to the Act.

ARGUMENT

As this Court explained in *Landgraf*, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 511 U.S. at 265. The presumption stems from a principle with "timeless and universal appeal": "'the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.'" *Id.* (quoting *Kaiser*, 494 U.S. at 855 (Scalia, J., concurring)). Indeed, this "antiretroactivity principle" is reflected in several provisions of the

Constitution, including the Ex Post Facto Clause, the Contracts Clause, and the Fifth Amendment's Due Process Clause. *Id.* at 266.

It is undisputed that IIRIRA's abrogation of the *Fleuti* doctrine is not explicitly retroactive. *See* Pet. App. 20-21 ("[H]ere, we note—and the government concedes—that Congress has not expressly prescribed the temporal reach of § 101(a)(13)."). Accordingly, the question in this case is simply whether abrogating the *Fleuti* doctrine for LPRs already convicted of an excludable offense before IIRIRA's effective date would constitute a retroactive change to their legal rights. *See Landgraf*, 511 U.S. at 280. Such a change would be impermissibly retroactive. The Second Circuit's contrary holding cannot be reconciled with either of the approaches suggested by this Court's case law or basic principles of statutory interpretation.

I. ABROGATION OF THE *FLEUTI* DOCTRINE WOULD BE IMPERMISSIBLY RETROACTIVE IF APPLIED TO LPRS CONVICTED OF AN EXCLUDABLE OFFENSE BEFORE IIRIRA'S EFFECTIVE DATE.

A. A Statute Applies Retroactively if it Attaches New Legal Consequences to Past Conduct or Regulates Past Activity.

Despite the well-established pedigree of the presumption against retroactivity, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. But the majority opinion in *Landgraf*, as well as a concurring opinion by Justice Scalia, offered several guideposts that

courts should consider in assessing the retroactive nature of a legal change.

1. The *Landgraf* majority.

When applying the presumption against retroactivity, the overarching inquiry is "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. The *Landgraf* majority drew this principle from Justice Story's classic formulation:

> "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . ."

Id. at 269 (quoting *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (No. 13,156) (CC NH 1814)).

Moreover, the Court added, "[t]he presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Id.* at 270. In applying the presumption, "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.*

Finally, the Court explained, new rules "conferring or ousting jurisdiction" over suits arising from prior conduct are often not considered retroactive because "[a]pplication of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Id.* at 274 (internal quotation marks

omitted). By the same token, "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Id.* at 275. Although such rules may sometimes be considered retroactive, they generally do not pose the same retroactivity concerns because they "regulate secondary rather than primary conduct." *Id.*

Turning to the statute before it, the *Landgraf* majority easily concluded that the punitive damages remedy added to Title VII by the 1991 Civil Rights Act could not apply to pre-enactment conduct absent a clear statement of congressional intent. *Id.* at 281. That result was clear, the Court reasoned, because punitive damages "share key characteristics of criminal sanctions." *Id.*

The Court reached the same conclusion regarding the retroactivity of the new *compensatory* damages provision added to Title VII. *Id.* at 282. Because this new compensatory damages remedy "only reache[d] discriminatory conduct already prohibited by Title VII," the Court acknowledged, it "d[id] not make unlawful conduct that was lawful when it occurred." *Id.* at 281-82. "Nor could anyone seriously contend that the compensatory damages provisions smack of a 'retributive'" purpose. *Id.* at 282. Nonetheless, the Court concluded that the new compensatory remedy could not be applied to pre-enactment conduct absent a clear statement, for several reasons.

First, compensatory damages are "quintessentially backward looking."

Second, "[t]he introduction of a right to compensatory damages is also the type of legal

change that would have an impact on private parties' planning." *Id.* To be sure, the Court conceded, "concerns of unfair surprise and upsetting expectations [would be] attenuated in [many] case[s] of intentional employment discrimination, which has been unlawful for more than a generation." *Id.* at 282 n.35. But, the Court reasoned, "a degree of unfairness is inherent *whenever* the law imposes additional burdens based on conduct that occurred in the past." *Id.* (emphasis added).

Finally, even though the compensatory damages remedy could be seen as simply "increasing the amount of damages available under a preestablished cause of action," such a change would still raise retroactivity concerns because "[t]he *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Id.* at 283-84.

2. The *Landgraf* concurrence.

Justice Scalia agreed with the majority's conclusion regarding the retroactivity of the 1991 Civil Rights Act, but took a different path to rationalize that result and the Court's retroactivity precedents. He opined that, whether a statute "upset[] vested substantive rights" did not "ha[ve] anything to do with . . . the presumed temporal application of a statute." *Id.* at 291 (Scalia J., concurring) (internal quotation marks omitted). "The critical issue," Justice Scalia explained:

> 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 a clear statement otherwise,

> only such relevant activity which occurs *after* the effective date of the statute is covered.

Id. On this analysis, both the punitive and compensatory damages provisions were easily classified as retroactive because they were "directed at the regulation of primary conduct, and the occurrence of the primary conduct is the relevant event." *Id.* at 294.

As explained below, in this case, these guideposts all point to the same conclusion: IIRIRA's abrogation of the *Fleuti* doctrine for LPRs convicted of an excludable crime prior to IIRIRA is impermissibly retroactive.

B. If Applied to LPRs Already Convicted of an Excludable Offense, Abrogation of the *Fleuti* Doctrine Would Attach New Legal Consequences to Past Conduct.

Under the *Landgraf* majority's approach, the new burden imposed by subsection 101(a)(13)(C)(v) would plainly be retroactive if applied to LPRs such as Petitioner.

Prior to 1997, LPRs who had convictions making them excludable but not deportable had a legal right to take "innocent, casual, and brief" trips abroad without facing exclusion proceedings on their return. *Fleuti*, 374 U.S. at 462. If applied to such LPRs, IIRIRA's abrogation of the *Fleuti* doctrine would eliminate that right. Put another way, subsection 101(a)(13)(C)(v) would impose an additional restriction—the inability to travel abroad without risking one's lawful status—on such LPRs as a result of their criminal convictions. This clearly "would impair rights a party possessed when he acted" and

"attach[] new legal consequences" to past acts. *Id.* at 270, 280 (majority opinion). And, far from merely ousting jurisdiction or altering procedural rules, such a change destroys a deeply significant *substantive* right. *See id.* at 274-75.

Moreover, like the Title VII remedies analyzed in *Landgraf*, the denial of the right to travel overseas is certainly "the type of legal change that would have an impact on private parties' planning." *Id.* at 282. And while, "concerns of unfair surprise and upsetting expectations are attenuated" by the fact that the conduct triggering the new burden (commission of an excludable offense) was already unlawful, as the Court explained in *Landgraf*, new burdens attached to already-unlawful conduct still implicate retroactivity concerns since "a degree of unfairness is inherent *whenever* the law imposes additional burdens based on conduct that occurred in the past." *Id.* at 282 n.35 (emphasis added).

Indeed, concerns of fair notice and reliance are far stronger in this case than in *Landgraf.* Here, in practice, the burden at issue applies *only* to those LPRs who have already been convicted of an excludable offense. As Petitioner has explained, although subsection 101(a)(13)(C)(v) by its terms punishes the *commission* of an excludable offense, it applies in practice only to LPRs with *convictions* for such offenses. Pet. Br. 47. If "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is" at the time of potentially illegal conduct, *Landgraf*, 511 U.S. at 265, such principles are even more strongly implicated during a criminal prosecution, when alien defendants "are acutely aware of the

immigration consequences of their convictions." *INS v. St. Cyr*, 533 U.S. 289, 322 (2001). Indeed, the argument for applying subsection 101(a)(13)(C)(v) in this case is akin to arguing in *Landgraf* that companies who had *already paid* judgments or settlements for Title VII violations before the 1991 amendments could be subjected to *additional* compensatory damages after them. Such an imposition is plainly retroactive.

Finally, although deportation or exclusion "is not, in a strict sense, a criminal sanction," the Court has "long recognized that deportation is a particularly severe 'penalty,'" and is "intimately related to the criminal process." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)). Thus, like the punitive damages remedy in *Landgraf*—which this Court considered to be *clearly* retroactive—the new burden imposed on Petitioner by IIRIRA "share[s] key characteristics of criminal sanctions." *Landgraf*, 511 U.S. at 281.

Because IIRIRA's abrogation of the *Fleuti* doctrine would impose a major new burden on Petitioner based on his prior conviction, would do so in a manner that generally causes unfair surprise, and would "share[e] key characteristics of criminal sanctions," such a change must be considered retroactive.

C. The Relevant Activity Regulated by IIRIRA's Abrogation of the *Fleuti* Doctrine is an LPR's Conviction for an Excludable Offense.

Application of the standard set forth in Justice Scalia's concurrence only drives home the foregoing

conclusion. Subsection 101(a)(13)(C)(v) is triggered by an alien's conviction for an excludable offense. Accordingly, such an offense is the most obvious conduct regulated by the statute. That is, by revoking the right to travel abroad without risking lawful status, IIRIRA imposes an additional penalty for the commission of excludable offenses by LPRs.

No alternative activity or event is plausibly targeted by subsection 101(a)(13)(C)(v). An LPR's brief travel abroad could hardly be the target of the provision; it is simply implausible to suggest that Congress abrogated *Fleuti* to keep LPRs with excludable offenses *in* the United States. To whatever degree the law may regard LPRs with excludable offenses as undesirable, that undesirability stems from their underlying criminal convictions, *not* from the fact that they have taken an "innocent, casual, and brief" trip outside the country. *Fleuti*, 374 U.S. at 462.

Nor can it reasonably be thought that subsection 101(a)(13)(C)(v) regulates solely the *return* of an LPR after a brief trip abroad. If an LPR's return were the only relevant event, subsection 101(a)(13)(C)(v) would apply even to LPRs who left for a brief trip *before* IIRIRA and attempted to return *after*. But that would be impossible to reconcile with *Chew Heong v. United States*, 112 U.S. 536 (1884). There, the Court refused to apply the "Chinese Restriction Act," which barred Chinese laborers from reentering the United States without a certificate issued on their departure, to aliens who had left the country before the Act's passage and tried to return without a certificate after. *Id.* at 538-39. The Court reasoned that, at the time such aliens left the country, they

had a legal right to return without such a certificate. *Id.* at 559. To apply the new requirement to them would cause "rights previously vested [to be] injuriously affected," a result the Court would not reach "unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Id.*

Read through the lens of Justice Scalia's *Landgraf* concurrence, *Chew Heong* reflects a recognition that Congress was, in fact, regulating more than Chinese laborers' initial entry. It was in fact placing a new restriction on aliens already in the country: a requirement that they obtain a certificate in order to leave and return. Here too, 101(a)(13)(C)(v) plainly does not restrict LPRs entry *qua* entry. Rather, on its face, the provision regulates only those LPRs who have committed an excludable offense. Indeed, even the Second Circuit conceded that "in framing § 101(a)(13)(C)(v) . . . Congress intended the focus to be on the alien's commission of the crime." Pet. App. 25.

Other portions of IIRIRA provide telling contrast: Under 8 U.S.C. § 1101(a)(13)(C)(iii) and (vi), for example, LPRs returning from brief trips abroad are treated as applicants for admission if they engaged in illegal activity during their trip or attempt to reenter illegally. Such provisions plainly target conduct related to the LPR's travel. Here, on the other hand, there is no plausible reason why Congress would have been concerned with brief trips overseas by LPRs such as Petitioner.

Chew Heong likewise exposes the flaw in the Government's argument that Petitioner's post-IIRIRA travel is the "determinative event for retroactivity analysis" and that Petitioner "could

have avoided the application of the statute. . . . [by] refrain[ing] from departing from the United States (or from returning to the United States)." BIO 12-13. The statute at issue in *Chew Heong* regulated a transaction that included some pre-enactment conduct (obtaining a certificate upon departure) and some post-enactment conduct (return to the United States). 112 U.S. at 538-39. Accordingly, the Chinese laborers in that case could have avoided application of the statute by "refrain[ing] from . . . returning to the United States." BIO 13. But this post-enactment Hobson's choice did not stop the Court from concluding that application of the Chinese Restriction Act would have been retroactive. *Id.* at 559. As the result in *Chew Heong* thus illustrates, the critical question in assessing the retroactivity of a statute must be whether the *primary* activity being regulated occurs prior to the statute's enactment.

Take, for example, a statute banning individuals convicted of sex offenses involving minors from residing within 2,000 feet of a school or child care facility. *See, e.g.*, *Doe v. Miller*, 405 F.3d 700, 704 (8th Cir. 2005). Such a statute would not be impermissibly retroactive as applied to a sex offender convicted prior to the law's passage, because "[t]he primary purpose of the law is not to alter the offender's incentive structure by demonstrating the negative consequences that will flow from committing a sex offense." *Id.* at 720. Rather, such a statute operates mainly prospectively "to reduce the likelihood of reoffense by limiting the offender's temptation and reducing the opportunity to commit a new crime." *Id.* In contrast, the post-enactment conduct at issue in this case (travel) is *not* the

primary target of subsection 101(a)(13)(C)(v). The pre-enactment criminal offense is.

Because "the relevant activity that [subsection 101(a)(13)(C)(v)] regulates" is the commission of an excludable offense "only such relevant activity which occurs *after* the effective date of the statute is covered." *Landgraf*, 511 U.S. at 291 (Scalia J., concurring).

II. THE SECOND CIRCUIT'S REQUIREMENT OF INDIVIDUAL RELIANCE CANNOT BE RECONCILED WITH *LANDGRAF* AND ITS PROGENY.

The Second Circuit followed none of these guideposts, but instead blazed its own trail. In so doing, the court did not quarrel with the notion that subsection 101(a)(13)(C)(v) imposed a new burden on Petitioner based on his pre-IIRIRA offense. Nor did the court dispute that Petitioner's offense was the relevant conduct regulated by subsection 101(a)(13)(C)(v). Rather, the Second Circuit grounded its decision on the assertion that Petitioner could not have *relied* on pre-IIRIRA law at the time he committed his offense.

Specifically, the Second Circuit reasoned that, because subsection 101(a)(13)(C)(v) is worded to refer to "the alien's *commission* of the crime," it would not consider the particularly weighty reliance interests at stake when an alien enters a plea bargain resulting in conviction. Pet. App. 25 (emphasis added). Instead, the court focused solely on the reliance interests implicated when Petitioner decided to *commit* his excludable offense: "it would border on the absurd to suggest that Vartelas committed his counterfeiting crime in reliance on the immigration

laws." Pet. App. 27. Because Petitioner had not actually and specifically relied on the availability of the *Fleuti* doctrine in committing his offense, the court concluded, applying subsection 101(a)(13)(C)(v), while perhaps retroactive, would not be "impermissibly" retroactive, regardless of whether he in fact was convicted through a plea bargain. Pet. App. 28.

That decision is consistent with a line of Second Circuit cases holding that the presumption against retroactivity will apply only where an alien demonstrates actual, subjective, and individual reliance on the prior state of the law. For example, in *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003), the court considered the retroactivity of IIRIRA's repeal of INA § 212(c), which had allowed certain aliens to receive of waiver of deportation. In *St. Cyr.*, this Court held that applying the repeal of § 212(c) to aliens who had previously pleaded guilty to a deportable offense would be retroactive because it "clearly 'attaches a new disability, in respect to transactions or considerations already past.'" 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269). The Second Circuit distinguished this holding, however, because the aliens in *Rankine* had been convicted *at trial* and had not demonstrated individual reliance on the availability of § 212(c) relief:

> First, none of these petitioners detrimentally changed his position in reliance on continued eligibility for § 212(c) relief. Unlike aliens who entered pleas, the petitioners made no decision to abandon any rights and admit guilt . . . .

> Second, the petitioners have pointed to no conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial. . . . . Under these circumstances, it is difficult to conclude, *as we must to find impermissible retroactivity*, that the petitioners chose to go to trial in reliance on the availability of § 212(c) relief.

Rankine, 319 F.3d at 99-100 (emphasis added). In sum, the Court reasoned, "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." *Id.* at 99; *see also Restrepo v. McElroy*, 369 F. 3d 627 (2d Cir. 2004) (suggesting that individual reliance could be shown where petitioner alleged that he had foregone an opportunity to file for relief under § 212(c) in subjective reliance on the ability to file later); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200, 205 (5th Cir. 2007) (following *Rankine* and holding that "an applicant who alleges continued eligibility for § 212(c) relief [must] demonstrate *actual, subjective* reliance on the pre-IIRIRA state of the law to be eligible for relief from its retroactive application.") (emphasis added).

But this approach is irreconcilable with this Court's precedents, which do not require any showing of actual reliance by affected parties, let alone the sort of individualized reliance demanded by the Second Circuit. This approach, moreover, ignores that the presumption against retroactivity is a tool of statutory interpretation, which must produce a statute with a single meaning. The Court should expressly reject the Second Circuit's approach and clarify that "reliance" is simply a background

principle animating the presumption against retroactivity and is not a specific and individualized requirement of the doctrine.

A. A Statute's Retroactivity Does Not Require a Showing of Individualized Reliance.

This Court has repeatedly applied the presumption against retroactivity to bar the application of a statute without discussing individual reliance, and where the burdened party could not plausibly have relied on the prior state of the law. In *Landgraf* itself, for example, the Court conducted no individualized analysis of whether the employer, USI Film Products, actually relied on the absence of the punitive and compensatory damages added to Title VII by the newly-enacted law. *See Landgraf*, 511 U.S. at 280-93. Indeed, the Court effectively conceded that it was unlikely *any* employer could have relied on the absence of such damages, given that employment discrimination was already unlawful. *Id.* at 282 n.35 ("[C]oncerns of unfair surprise and upsetting expectations [would be] attenuated in [many] case[s] of intentional employment discrimination, which has been unlawful for more than a generation."). Nonetheless, the Court held that the principles animating the presumption against retroactivity were implicated because "a degree of unfairness is inherent *whenever* the law imposes additional burdens based on conduct that occurred in the past." *Id.* (emphasis added).

Likewise, in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Court considered the temporal scope of a 1986 amendment to the False Claims Act ("FCA"), which eliminated a defense to *qui tam* actions based on information

already in the Government's possession. The Court held that the elimination of this defense did not apply to pre-1986 conduct in light of the presumption against retroactivity. *Id.* at 941-42. As in *Landgraf*, however, the relevant conduct (submitting a false claim) had been unlawful for decades. *Id.* at 947. In fact, the elimination of the defense did not really change a party's potential liability *at all*, because the Government could bring the action with that information, and "the monetary liability faced by an FCA defendant is the same whether the action is brought by the Government or by a *qui tam* relator." *Id.* at 948. In such circumstances, it is difficult to see how any business could have detrimentally relied on the fact that inculpatory information was already in the Government's possession. Yet, again, the Court barred application of the new law on retroactivity grounds and did not even discuss reliance.

As the Third Circuit has summarized matters:, "it is unlikely that in *Landgraf* any employer demonstrably relied on the absence of a punitive damages remedy for Title VII violations, or that in *Hughes Aircraft* any government contractor purposely arranged its billing practices ex ante to take advantage of a specific defense under the False Claims Act." *Ponnapula v. Ashcroft*, 373 F.3d 480, 493 (3d Cir. 2004); *see also Olatunji v. Ashcroft*, 387 F.3d 383, 392 (4th Cir. 2004) (Luttig, J.) (noting that *Hughes Aircraft* applied the presumption against retroactivity "without even a single word of discussion as to whether *Hughes Aircraft*—or, for that matter, similarly situated government contractors—had relied on the eliminated defense to its detriment") (emphasis omitted). Indeed, "the Supreme Court has never required actual reliance in

any case in the *Landgraf* line." *Ponnapula*, 373 F.3d at 489.

These cases make clear that *Landgraf's* reference to "fair notice, reasonable reliance, and settled expectations," 511 U.S. at 270, can only be understood as describing the animating principles behind the presumption against retroactivity. This reference in no way defined the doctrine's outer limits. And it certainly did not require an *individualized* showing of reliance. As the Court made perfectly clear in *Hughes Aircraft*, "[t]o the extent respondent contends that *only* statutes with one of these effects are subject to our presumption against retroactivity, he simply misreads our opinion in *Landgraf*. . . . . [O]ur opinion in *Landgraf*, like that of Justice Story, merely described that any such effect constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." 520 U.S. at 947; *see also Olatunji*, 387 F.3d at 394 ("[T]he Supreme Court has *variously articulated* the requirements to show retroactivity, has never insisted upon a reliance requirement, and has consistently concluded that Justice Story's formulation is sufficient for invoking the presumption against retroactivity.") (emphasis in original).

The Second Circuit's requirement that reliance on prior law "must [be proved] to find impermissible retroactivity," *Rankine*, 319 F.3d at 100, is thus flatly inconsistent with the foregoing decisions.

B. The Second Circuit's Approach Would Impermissibly Tie the Meaning of a Statute to Individual Intent and Produce a Statute with No Unitary Meaning.

The Second Circuit's approach to retroactivity is also inconsistent with the basic premise that the presumption against retroactivity is a tool of statutory interpretation. Simply put, the temporal relationship between a statute and regulated conduct does not change based on the state of mind of a particular regulated party. *See Olatunji*, 387 F.3d at 394 ("Whether the particular petitioner did or did not subjectively rely upon the prior statute or scheme has nothing whatever to do with Congress' intent—the very basis for the presumption against statutory retroactivity."). Thus, there is no basis to presume, as the Second Circuit has, that Congress intended a single statute to apply retroactively to some aliens, who have relied on prior law, but not to other aliens, who also engaged in relevant conduct *at the same time*, but without reliance.

To the contrary, there is every reason to believe otherwise. For such a result would violate the well-established rule that a single statute cannot mean different things to different people. "To give the[] same words [in a statute] a different meaning for each category [or individual] would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005); *see also id.* (a statute may be interpreted in one of two ways "[i]t cannot, however, be interpreted to do both at the same time"); *id.* at 386 (applying a different statutory interpretation to different classes of people "would render every statute a chameleon" by "establish[ing] . . . the dangerous principle that judges can give the same statutory text different meanings in different cases").

But this is precisely the approach taken by the Second Circuit. Under *Rankine*, two aliens convicted on the same day for the same crime would be subject to different statutory rules. For the alien convicted at trial, IIRIRA would not operate retroactively and would have eliminated § 212(c) relief. But for the alien convicted by guilty plea, IIRIRA would operate retroactively and would not have eliminated § 212(c) relief. On the Second Circuit's view, "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." *Rankine*, 319 F.3d at 99.

Likewise, in *Restrepo,* the Second Circuit suggested that although an alien convicted at trial had not relied on the availability of § 212(c) when deciding to go to trial, he might have relied on the later availability of such relief by choosing not to file an earlier preemptive petition for § 212(c) relief. 369 F.3d at 632. The Court therefore held that, "on remand, the district court [would] have to make further inquiries in order to determine whether Petitioner may himself claim the benefit of his argument." *Id.* at 633. Thus, in *Restrepo*, the retroactive reach of IIRIRA turned on the subjective intent of an individual alien.

Such results are not consistent with an attempt to determine the temporal scope of a single statute. Instead, they appear to assume that the new statute applies, but then invent an atextual "reliance defense" to that application. As the Fifth Circuit has stated in applying the Second Circuit's test, "an applicant who alleges continued eligibility for § 212(c) relief [must] demonstrate actual, subjective reliance on the pre-IIRIRA state of the law *to be eligible for*

relief from its retroactive application." *Carranza-De Salinas*, 477 F.3d at 205 (emphasis added). But as Judge Luttig explained, the Court's case law:

> asks only whether a statute *in fact* has retroactive effect. . . . Whether the particular petitioner did or did not subjectively rely upon the prior statute or scheme has nothing whatever to do with Congress' intent—the very basis for the presumption against statutory retroactivity . . . . [W]here Congress has apparently given no thought to the question of retroactivity whatever, there is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply retroactively.

Olatunji, 387 F.3d at 394. "Anything more, in the face of complete congressional silence, is nothing but judicial legislation." *Id.*

* * *

Under the multi-factor approach set out in *Landgraf*, actual reliance by some or all of the affected individuals or businesses would support a non-retroactive interpretation, but is by no means necessary. Moreover, even if some form of reliance were required to find a statute non-retroactive, it could not be a showing of individualized reliance. Rather, the most that could be reconciled with *Landgraf* and *Hughes Aircraft* is a requirement that the legal rule in question be the sort of rule on which an informed observer would rely; that is, the sort of rule that is objectively material. The *Fleuti* doctrine is precisely such a rule, as the ability to travel abroad without risking one's legal status is a deeply significant right for most aliens.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 South LaSalle Street
Chicago, IL 60604

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker Dr.
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com

WARREN D. POSTMAN
JONES DAY
51 Louisiana Avenue N.W.
Washington, D.C. 20001

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Counsel for Amicus Curiae