No. 04-1376

In the Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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Although the government strives to defend the Tenth Circuit's decision, it is clear that INA § 241(a)(5) was not intended to apply, and may not be applied, to deprive petitioner of the right to seek discretionary relief from removal.

I. The Government's Arguments Are Based On A Fundamental Misconception About INA § 241(a)(5).

The government repeatedly relies on a foundational assumption that cannot withstand scrutiny—that INA § 241(a)(5) does not regulate the act of illegal reentry but instead regulates only the process of removal. See, *e.g.*, Resp. Br. 6, 11, 13, 14–15, 29, 31. But the salient aspect of INA § 241(a)(5) for purposes of this litigation is the provision specifying that an alien who has illegally reentered the United States after a prior deportation "is not eligible and may not apply for any relief under [the INA]." See Resp. Br. 4 & n.2. That provision, by penalizing those who reenter after removal, regulates reentry.

a. Hoping to avoid the presumption against retroactivity, the government characterizes INA § 241(a)(5) as purely procedural. See, *e.g.*, Resp. Br. 6–7; cf. *Landgraf*, 511 U.S. at 275 ("[c]hanges in procedural rules may often be applied * * * without raising concerns about retroactivity"). But although certain aspects of INA § 241(a)(5) govern reinstatement procedures, the salient provision effected a *substantive* change in law that clearly *penalizes* those who illegally reenter the United States after having been previously removed.[1] See Part III, *infra*. Indeed, in an interim rule implementing IIRIRA, the INS itself explained that "review of the relevant statutory provisions reveals that a *substantive change* was in fact effected in the transition from section 242(f) of the Act to section 241(a)(5) of the Act."[2] 62 Fed. Reg. 10,312,

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[1] Each of the statute's distinct provisions must be separately scrutinized for purposes of retroactivity analysis. See *Landgraf*, 511 U.S. at 280; *Alvarez-Portillo*, 280 F.3d at 865.

[2] The government has taken the same position in other litigation. See, *e.g.*, Gov't Br. in *Velasquez-Gabriel*, 2000 WL 33988616, at *32 ("To

10,326 (Mar. 6, 1997) (emphasis added).[3]

b. The government also argues that INA § 241(a)(5) regulates merely *reinstatement*, not *reentry*. See Resp. Br. 6, 11, 13, 29. But as the government has repeatedly acknowledged, in enacting INA § 241(a)(5) "Congress clearly attempted to address the problem of illegal entry, and particularly to deter repeated illegal reentry by aliens who have already been removed." Gov't Br. in *Sarmiento Cisneros*, 2004 WL 3557971, at *46 n.12.[4] Inasmuch as INA § 241(a)(5) was concededly intended to "address" and "deter" illegal reentry—by setting higher penalties for such conduct—it plainly regulates that primary conduct.

c. Relatedly, the government's assertion that INA § 241(a)(5) is, for purposes of retroactivity analysis, triggered not by the reentry itself but instead by the Attorney General's "finding" of reentry, see Resp. Br. 13, does not withstand scrutiny. As an initial matter, the regulation implementing INA § 241(a)(5) leaves no doubt that the provision is triggered by reentry.[5] The regulation does not mention the Attor-

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address the serious problem of illegal reentries, Congress sought to make a substantive change when it enacted Section 241(a)(5) by precluding an illegally reentering alien's eligibility for relief from deportation.").

[3] The government suggests that its characterization of INA § 241(a)(5) as purely procedural is bolstered by the subsection's placement within the INA. See Resp. Br. 31. But while much of INA § 241 addresses procedural matters, the bar on deportation relief in INA § 241(a)(5) is by no means the only substantive provision in INA § 241. See, *e.g.*, INA § 241(a)(4)(D) ("No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien."); § 241(a)(6) (allowing government to detain certain aliens "beyond the removal period"); § 241(b)(3)(A) (prohibiting Attorney General from removing alien to country where alien's life or freedom would be threatened).

[4] See also, *e.g.*, Gov't Br. in *Ojeda-Terrazas*, 2001 WL 34090034, at *5; Gov't Br. in *Alvarez-Portillo*, 2001 WL 34095765, at *7.

[5] Indeed, the government previously told both the Fifth and Eighth Circuits that INA § 241(a)(5) "is directed at two events," namely "the prior

ney General at all, instead specifying that the provision applies to any "alien who illegally reenters the United States after having been removed," and requiring that an immigration officer determine "[w]hether the alien unlawfully reentered the United States." 8 C.F.R. § 241.8(a)(1).

Furthermore, the government's position is inconsistent with this Court's decision in *St. Cyr*. The petitioner in *St. Cyr* had been eligible for relief from deportation under INA § 212(c) before IIRIRA, but the decision to grant such relief lay entirely within "'the discretion of the Attorney General,'" *St. Cyr*, 533 U.S. at 295 (quoting INA § 212(c) (1996)), who had not exercised that discretion as of the day that IIRIRA took effect. Nonetheless, this Court held that application of IIRIRA, which would have made the petitioner ineligible for such discretionary relief, would be impermissibly retroactive. That result forecloses the government's argument here: If the government were correct that the triggering event for retroactivity purposes is action by the Attorney General, then *St. Cyr* would necessarily have come out the other way because the Attorney General had not acted before IIRIRA took effect.

Indeed, the government's position as to the relevant triggering event is at odds with basic principles of retroactivity analysis. On the government's theory, a statute is, for retroactivity purposes, triggered not by the actor's primary conduct, but rather by the fact-finder's subsequent determination of culpability. This, however, is true neither in the criminal context, see, *e.g.*, *Miller* v. *Florida*, 482 U.S. 423 (1987) (prohibiting application of statute enacted after crime but in effect at time of sentencing), nor in the civil context, see, *e.g.*, *Hughes Aircraft*, 520 U.S. 939 (prohibiting application of statute in effect at time of trial to conduct predating statutory enactment). Thus, there is no support for the government's argument that INA § 241(a)(5) is a procedural provision that

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order of removal and the subsequent illegal reentry." Gov't Br. in *Ojeda-Terrazas*, at *18; Gov't Br. in *Alvarez-Portillo*, at *25.

does not regulate and is not triggered by reentry.

II. Congress Intended INA § 241(a)(5) To Apply Only To Post-IIRIRA Reentrants.

As demonstrated in our opening brief, Congress intended INA § 241(a)(5) to apply only to persons who reentered the United States after IIRIRA took effect. The government disputes this proposition—and goes so far as to argue that Congress specifically intended for the statute to apply retroactively. Its arguments are baseless.

A. Congress intended INA § 241(a)(5) to apply only prospectively.

1. The foremost proof that Congress intended INA § 241(a)(5) to apply only prospectively is the comparison between that provision and its 1952 predecessor. See Pet. Br. 16-20. The government challenges the import of this comparison, arguing that "[b]ecause the 'before or after' clause [in the 1952 Act] pertained to the date of the alien's previous deportation or departure—rather than to the date of the alien's illegal reentry—the absence of such language in [INA § 241(a)(5)] in no way suggests that Congress sought to draw a distinction based on the timing of illegal reentry." Resp. Br. 20. But the government's quibble over the precise meaning of the "before or after" clause misses the point.

Although the government may be correct that the "before or after" clause in the 1952 provision related to deportations rather than reentries, the elimination of that clause nonetheless demonstrates that INA § 241(a)(5) must be interpreted not to apply to aliens who reentered before April 1, 1997. By eliminating the "before or after" clause, Congress deliberately removed the express retroactivity language that it had previously understood was necessary for a reinstatement provision to apply to pre-enactment conduct. Consistent with the default rule against retroactivity, the INS interpreted the 1950 statute—which contained no specific temporal restriction—to apply strictly prospectively, *i.e.* only to aliens who were deported, and thus also reentered, after its enactment. In the

1952 statute, Congress, evidently dissatisfied with that result, expressly commanded—through adoption of the "before or after" clause—that the new reinstatement provision be retroactively applied to pre-enactment deportations. But in enacting INA § 241(a)(5) in 1996, Congress *eliminated* the very language that made the 1952 Act retroactive. The clear implication is that Congress, in eliminating the language it had introduced in 1952, intended that INA § 241(a)(5), like the 1950 provision, not be applied to pre-enactment conduct.[6]

Moreover, far from advancing the government's position, the implication of its argument is that INA § 241(a)(5), like its 1950 precursor, may not be applied to an alien who was *deported* before its enactment, let alone to one who reentered before that date. Reentry necessarily follows deportation. Thus, if the deportation must have occurred after enactment of the reinstatement provision, *a fortiori* the reentry must also have occurred thereafter. The government's effort to avoid this logical corollary, see Resp. Br. 21 n.6, mistakenly assumes that petitioner can prevail only if the negative inference derived from Congress's elimination of the "before or after" clause relates directly to an immigrant's illegal reentry. Thus, even if the government's interpretation of the "before or after" clause were accepted, petitioner would still prevail, as he was deported 15 years before IIRIRA's enactment.

2. As explained in our opening brief, see Pet. Br. 21–22,

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[6] The government argues that Congress removed the retroactivity language from the prior reinstatement provision because, by 1996, "there was no enduring need to maintain the specification that the reinstatement authority encompasses aliens whose previous deportation or departure was 'before * * * June 27, 1952.'" Resp. Br. 21. This argument is a red herring. The government mistakenly quotes the *codified* version of the prior reinstatement provision, which references "June 27, 1952." The version enacted by Congress specified, however, that it applied to reentries whether "before or after *the date of enactment of this Act*." Pub. L. No. 82-414 § 242(f); 66 Stat. 163, 212 (1952) (emphasis added). Thus, had Congress intended the expanded reinstatement provision to apply retroactively, it would have retained this clause from the prior provision.

the legislative history, too, reveals that Congress intended INA § 241(a)(5) to apply only prospectively. Although the government contends that "[p]etitioner's argument rests on a clear misunderstanding of the legislative history," Resp. Br. 22, the history that it recounts is identical to what we outlined: Before adopting what became INA § 241(a)(5), Congress considered a Senate bill that would have left the text of the former reinstatement provision unchanged.[7] Yet rather than accept the Senate proposal, Congress instead adopted a House bill that expanded the scope of reinstatement but—critically for current purposes—also eliminated the express retroactivity language that had been contained in the 1952 provision. That elimination must be given effect. See Pet. Br. 21–22; *Cardoza-Fonseca*, 480 U.S. at 442–443.[8]

3. The government's efforts to distinguish *Lindh* are similarly unpersuasive. In *Lindh*, this Court compared two parallel provisions enacted as part of AEDPA and inferred that Congress intended one of them to apply prospectively. See Pet. Br. 19–20. The government contends that *Lindh* is distinguishable because "the 'before or after' clause [in INA § 242(f) (1952)] pertained to a subject that was entirely distinct from the date of an alien's illegal reentry." Resp. Br. 24.

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[7] The Senate bill would have renumbered INA § 242(f) to § 242(f)(1) and added a new § 242(f)(2) to impose a new 15-year criminal sentence for illegal reentry. See S. REP. NO. 104-249, at 118 (1996).

[8] The government's reliance on *Martin* to counter our legislative-history argument, see Resp. Br. 23, is misguided. In *Martin*, the petitioner argued that by moving a particular statutory provision from one section of a statute to another, when the first section had language making it applicable to pending cases and the latter did not, Congress intended not to apply the moved provision to pending cases. This Court rejected that argument, concluding that the provision "may have been moved for a variety of other reasons." 527 U.S. at 357. In enacting IIRIRA, by contrast, Congress did not simply move the reinstatement provision from one section in the statute that had retroactivity language to another section that did not: It intentionally discarded language *from within the prior provision itself* that would have made reinstatement expressly retroactive. There are simply not "a variety of other reasons" for that change.

But there can be no serious dispute that, regardless of the precise referent of the before-or-after clause, INA § 241(a)(5) and its 1952 predecessor address precisely the same subject—reinstatement of a prior deportation order after a subsequent illegal reentry—and that Congress expressly directed that the reinstatement provision in the earlier statute but not the latter one be applied retroactively. The point in *Lindh* was that, if "Congress was reasonably concerned to ensure that [the first statutory provision] be applied to pending cases, it should have been just as concerned about [the second statutory provision], unless it had the different intent." 521 U.S. at 329. Here, Congress "had the different intent."

4. Finally, if there were any doubt as to Congress's intent that INA § 241(a)(5) be applied only prospectively, it would be resolved in petitioner's favor by the presumption against retroactivity, Pet. Br. 24–26, and the canon that any ambiguity be resolved in favor of the alien, *id.* at 27–28.

The government argues that the default rule against retroactivity cannot be invoked in the first step of the *Landgraf* analysis because the presumption is not triggered unless a statute has a "retroactive effect." Resp. Br. 25. But *both* steps of the *Landgraf* retroactivity analysis are based on the presumption against retroactivity. Thus, the test under step one is asymmetric: To demonstrate that Congress intended strictly *prospective* application of INA § 241(a)(5), and therefore to prevail under the first prong of the *Landgraf* analysis, petitioner need not identify an express command requiring that result. Rather, because retroactive application is "disfavored," *Lindh*, 521 U.S. at 328, prospective intent can be demonstrated through the "normal rules of [statutory] construction," *id.* at 326. In fact, "a statute that is ambiguous with respect to retroactive application is construed * * * to be unambiguously prospective." *St. Cyr*, 533 U.S. at 321 n.45. By contrast, a statute will be applied retroactively under *Landgraf* step one only when "Congress has *expressly* prescribed" such application. *Landgraf*, 511 U.S. at 280 (em-

phasis added). Thus, the *only* way that the government can prevail under the first prong of *Landgraf* is to point to express retroactivity language "so clear that it could sustain only one interpretation," *Lindh*, 521 U.S. at 328 n.4—language that is absent from INA § 241(a)(5).

B. Congress did not intend INA § 241(a)(5) to apply retroactively.

Despite the ample evidence that Congress specifically intended INA § 241(a)(5) to apply only prospectively, and despite always before arguing that congressional intent as to the application of this provision is ambiguous,[9] the government now contends that Congress specifically intended the provision to apply *retroactively*. This argument is without merit.

1. The government suggests that because INA § 241(a)(5) governs reinstatement against any alien who "has reentered" the country illegally, "there is no basis for exempting from the statute's reach an alien who 'had reentered' before IIRIRA's effective date." Resp. Br. 13. But as the government itself has repeatedly emphasized, INA § 241(a)(5) begins with the phrase "[i]f the Attorney General finds that an alien has reentered." Thus, use of the present perfect—"has reentered"—is a natural consequence of the fact that the reentry will *necessarily* have occurred before the Attorney General's finding, regardless of whether the reentry occurred before or after the enactment of IIRIRA.

The government also argues that a retroactive reading of INA § 241(a)(5) "is reinforced by" the provision's prescription that an alien whose prior order of removal has been reinstated may be removed "at any time after the reentry." Resp. Br. 13. The "at any time after the reentry" language does not, however, define the temporal scope of INA § 241(a)(5); it

[9] See, *e.g.*, Gov't 10th Cir. Br. in *Fernandez-Vargas*, at 8 ("there is simply no clear evidence of whether Congress intended to apply or not to apply [INA § 241(a)(5)] to aliens who reentered the country prior to April 1, 1997"); Gov't Br. in *Faiz-Mohammad*, 2003 WL 23339842, at *11–*12 (same).

simply affirms that, when reinstatement applies, removal may be executed forthwith.

2. The government also contrasts INA § 241(a)(5) with two other IIRIRA provisions—8 U.S.C. § 1326(a) (criminalizing illegal reentry) and 8 U.S.C. § 1325(b) (imposing civil fines for illegal entry)—and argues that because they, unlike INA § 241(a)(5), are expressly prospective, a negative inference can be drawn that Congress intended INA § 241(a)(5) to be retroactive. Resp. Br. 14–16. But any such inference is foreclosed by Congress having specifically *eliminated* retroactivity language from INA § 241(a)(5)—and having done so while on notice of the "wisdom of being explicit" if it intended the statute to apply retroactively. *Lindh*, 521 U.S. at 328.[10] Further, the government's argument is based on the mistaken premise that, unlike these other provisions, INA § 241(a)(5) does not regulate primary conduct. But it *does* regulate the primary conduct of reentry, see Part I, *supra*, and as the government acknowledges, "when Congress addresses primary conduct as such, it generally does not impose new consequences on past acts." Resp. Br. 16 n.5.

3. Nor is there merit to the government's argument that "Congress's express treatment of Section 1231(a)(5) in statutes enacted since IIRIRA confirms that the provision encompasses illegal reentrants who made their unlawful reentry before IIRIRA." Resp. Br. 16. None of the statutes the government cites—NACARA, HRIFA, or the LIFE Act—supports its position.

Each of these statutes extends relief from deportation to a defined class of aliens. To be eligible for relief under any of them, an alien must have been present in the United States on a date before the enactment of IIRIRA, and must have maintained a statutorily defined continuous presence in the United

[10] Given that other provisions of IIRIRA are expressly retroactive, see Pet. Br. 25, Congress clearly knew how to overcome the presumption against retroactivity when it wanted to do so.

States thereafter.[11] As the government notes, Congress has expressly exempted aliens otherwise eligible for relief under those acts from the operation of INA § 241(a)(5). Resp. Br. 17–18. According to the government, because each act requires that an alien have maintained a continuous presence in the United States beginning at some time before IIRIRA's enactment, the exemptions "can be explained only if Section 1231(a)(5) applies to aliens who had illegally reentered the country before the enactment of IIRIRA." Resp. Br. 18.

The government is wrong: Under each statute, although aliens must have been present in the United States before IIRIRA's enactment to qualify for relief, those eligible for relief who had previously been deported but were in the United States as of the relevant cutoff date could thereafter leave and reenter the country illegally—even after IIRIRA—without losing that eligibility.[12] But INA § 241(a)(5) would, by its plain terms, preclude a person who reentered after IIRIRA from receiving such relief. Accordingly, contrary to the government's suggestion, an exemption from INA § 241(a)(5) *was* necessary if immigrants otherwise eligible for relief under those statutes were to be assured continued eligibility for relief, *even though* INA § 241(a)(5) does not apply to persons who illegally reentered the country before IIRIRA's enactment. Consequently, the statutes provide no evidence that

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[11] See LIFE Act, Pub. L. No. 106-553, § 1104(c)(2)(B)(i), 114 Stat. 2762A-142, 2762A-146 (2000); HRIFA, Pub. L. No. 105-277, Tit. IX, § 902(b)(2), 112 Stat. 2681-538, 2681-539 (1998); NACARA, Pub. L. No. 105-100, Tit. II, § 202(b)(1), 111 Stat. 2193, 2194 (1998).

[12] HRIFA and NACARA each provide, in substance, that an immigrant "shall not be considered to have failed to maintain continuous physical presence by reason of an absence, or absences, from the United States for any period or periods amounting in the aggregate to not more than 180 days." HRIFA § 902(d)(2); see also NACARA § 202(b)(2). Under the LIFE Act, although an immigrant had to be continuously present in the United States between January 1, 1982, and May 4, 1988, in order to qualify for relief, the immigrant need not have been continuously present *after* 1988. LIFE Act § 1104(c)(2)(B)(i).

Congress intended INA § 241(a)(5) to apply retroactively.

4. Finally, the government does not claim that "Congress has expressly prescribed" the retroactive application of INA § 241(a)(5), *Landgraf*, 511 U.S. at 280, but, relying on *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), it nonetheless argues that "the text and structure of Section 1231(a)(5) and related statutory provisions are sufficiently clear to establish that Sections 1231(a)(5) applies to immigrants whose illegal reentry occurred before as well as after IIRIRA's effective date." Resp. Br. 28. The government's reliance on *Altmann* is misplaced. As it concedes, Resp. Br. 33 n.12, *Altmann* involved no "private rights"; rather, it addressed the Foreign Sovereign Immunities Act (FSIA), a "*sui generis* context" "not control[led]" by this Court's decision in *Landgraf*. *Altmann*, 541 U.S. at 692, 696.[13] As explained in Part I, *supra*, INA § 241(a)(5) regulates the primary conduct of reentry, not the Attorney General's subsequent finding relating thereto. By contrast, the FSIA is a jurisdictional statute and as such presumptively applies to all pending cases regardless of when the underlying primary conduct occurred. See *Landgraf*, 511 U.S. at 274. Moreover, Congress "unambiguously" provided that the FSIA would apply "henceforth" to all "[c]laims of * * * immunity," 28 U.S.C. § 1602, without regard to when the conduct giving rise to such a claim occurred. Here, there is no language in INA § 241(a)(5) that approaches even that degree of clarity with respect to retroactivity, let alone language "so clear that it could sustain only one interpretation." *Lindh*, 521 U.S. at 328 n.4.

[13] The presumption against retroactivity is inapplicable in the FSIA context because unlike statutes "on which parties relied in shaping their primary conduct"—such as former INA § 242(f)—"the principal purpose of foreign sovereign immunity has never been to permit foreign states * * * to shape their conduct in reliance on the promise of future immunity." *Altmann*, 541 U.S. at 696. "Rather, such immunity reflects current political realities and relationships, and aims to give foreign states some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Ibid*. (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)).

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Thus, this Court should hold that Congress intended INA § 241(a)(5) not to apply to pre-1997 reentries.

III. Application Of INA § 241(a)(5) To Pre-IIRIRA Reentrants Is Impermissibly Retroactive.

It is beyond serious dispute that INA § 241(a)(5) "attaches new legal consequences to events completed before its enactment," *Landgraf*, 511 U.S. at 269-270. Before INA § 241(a)(5) took effect, petitioner was entitled to apply for discretionary relief from deportation; now, if INA § 241(a)(5) is applied to him, he is not.

We have already rebutted the government's overarching counterargument that INA § 241(a)(5) regulates the process of removal, not reentry. See Part I. Its other arguments are equally flawed. In essence, the government asserts that INA § 241(a)(5) imposes no new consequences on people who reentered before 1997. But application of the bar on discretionary relief undermines their legitimate expectation that the mere fact of reentry would not categorically preclude them from seeking discretionary relief. Indeed, even if the Court declines to approach the issue categorically, applying INA § 241(a)(5) to petitioner would impermissibly deny *him* the right to seek specific forms of discretionary relief to which he would otherwise be eligible, and would expose him to sanctions to which he would not otherwise be subject. Finally, the government's argument that illegal reentrants lack a reasonable expectation interest in any form of discretionary relief—because such relief could not have motivated their reentry and because their expectations were based on unlawful conduct—has neither factual nor legal support.[14]

[14] The government's administrative-burden argument, Resp. Br. 49, also has no merit. If the statute is viewed categorically, the only inquiry that immigration officials must make is whether an alien reentered before April 1997. Even if the Court rejects the categorical approach and concludes that the retroactivity determination depends on whether a particular individual was eligible for some form of relief before that date, the

A. The bar on discretionary relief is categorically inapplicable to aliens who reentered before IIRIRA.

INA § 241(a)(5) addresses the availability of relief from deportation in absolute terms, barring all previously removed illegal reentrants from receiving "any relief under this Act" without distinguishing among the various forms of relief that would otherwise be available. Accordingly, as we have explained, see Pet. Br. 36–38, its retroactive effect should be evaluated on a similarly categorical basis. Aliens who reentered the country before IIRIRA took effect had a legitimate expectation that *the mere fact of illegal reentry* would not itself operate as an absolute bar to relief from deportation. Although Congress could have upset that expectation, it would have needed to do so *explicitly*. Because it elected not to, INA § 241(a)(5) may not be applied to deprive someone who reentered the country before its enactment of the opportunity to seek relief merely on the basis of that reentry.[15]

B. Application of INA § 241(a)(5) to petitioner would attach new legal consequences to events completed before the statute's enactment.

In any event, application of INA § 241(a)(5) to *petitioner* would impermissibly "impair rights [he] possessed when he acted" and "increase [his] liability for past conduct." *Landgraf*, 511 U.S. at 280.

1. As we explained, see Pet. Br. 38–39, upon reentering the country in 1982, petitioner was immediately eligible for voluntary departure—a form of discretionary relief granted "in lieu of deportation," 8 U.S.C. § 1254(e)(1) (1982), that confers significant benefits on its recipient.[16] The most im-

administrative inquiry is still a ministerial one—*i.e.*, whether the individual was eligible for the relief on April 1, 1997.

[15] Contrary to the government's argument, Resp. Br. 42 n.17, petitioner does not seek a "windfall." An alien requesting discretionary relief would, of course, have to satisfy the eligibility requirements for the specific form of relief sought. The point is merely that, under *Landgraf*, reentry before April 1997 cannot *categorically* preclude all such relief.

[16] Indeed, the benefits of voluntary departure are so substantial that, as

portant benefit conferred is that a person granted voluntary departure is immediately eligible to apply for admission to the United States, whereas someone who is deported (or "removed" in post-IIRIRA terminology) is inadmissible for up to twenty years. See 8 U.S.C. § 1182(a)(6)(B) (1996); 8 U.S.C. § 1182(a)(9)(A)(ii).[17]

The government does not dispute that petitioner was, upon reentry, immediately eligible for voluntary departure, or that voluntary departure confers substantial benefits to one who would otherwise be deported. See Resp. Br. 41–42. Rather, the government argues principally that petitioner could not have reasonably relied on the availability of voluntary departure when he chose to reenter this country. *Ibid*. As we discuss below, see Part III.C, that argument is misplaced.

The government also argues that denying petitioner the opportunity to seek voluntary departure is not impermissibly retroactive because "petitioner's act of illegal reentry was not itself a 'completed' act within the meaning of *Landgraf*." Resp. Br. 36. But reentry *is* a completed act.[18] And it is the *act* of illegal reentry, rather than the *state* of being unlawfully present in the United States, that renders one ineligible for relief under INA § 241(a)(5).[19]

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part of IIRIRA, Congress specified that certain individuals may receive such relief only once. See 8 U.S.C. § 1229c(c).

[17] Further, despite the government's erroneous suggestion otherwise, see Resp. Br. 3, 14, even after IIRIRA an alien granted voluntary departure who subsequently reentered illegally would not be subject to INA § 241(a)(5) or the criminal prohibition against reentry.

[18] The government has previously acknowledged this, arguing that an alien unlawfully present by virtue of having overstayed his visa would be eligible for adjustment of status but that "[i]f, however, the alien entered the United States illegally after deportation, he would"—as a result of INA § 241(a)(5)—"be ineligible for any relief, including adjustment of status." Gov't Br. in *Castro-Cortez*, 2000 WL 34430709, at *33.

[19] Even apart from INA § 241(a)(5), other statutory provisions make clear that illegal reentry is a "completed" act. First, reentry without authorization after having previously been deported is, without more, a crime. See 8 U.S.C. § 1326(a). Second, illegal reentry itself, independent

2. Interpreting INA § 241(a)(5) to deny petitioner the right to seek cancellation of removal would also be impermissibly retroactive. See Pet. Br. 39–41. The government argues that because petitioner was ineligible for suspension of deportation for some time after his reentry, denying him the opportunity to seek such relief does not give INA § 241(a)(5) retroactive effect. Resp. Br. 40–41. This argument is based on the unstated—and incorrect—assumption that even if petitioner's reentry is a completed act to which INA § 241(a)(5) attaches new legal consequences, it is the *only* such act. As of 1989—well before IIRIRA—petitioner had, through affirmative conduct, established seven years continuous presence in the United States. Pet. App. 3a. By virtue of *that* completed act, he became entitled to seek suspension of deportation. See Pet. Br. 39–41. Applying INA § 241(a)(5) to deprive him of the opportunity to seek its successor, cancellation of removal, would therefore be impermissible.[20]

3. Denying petitioner the right to seek adjustment of status is also impermissibly retroactive. Pet. Br. 41. Although such relief was not available in 1982, Resp. Br. 38, it *was* available years before the enactment of IIRIRA, and the government ignores the fact that, but for INA § 241(a)(5), petitioner, upon marriage to a U.S. citizen, could have sought ad-

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of any ensuing unlawful presence in the United States, renders a removed person inadmissible. See 8 U.S.C. § 1182(a)(9)(A)(ii); see also Gov't Br. in *Sarmiento Cisneros*, at *46–*47 (acknowledging that "inadmissibility" is "one consequence of * * * illegal reentry").

[20] The government's argument that petitioner could have no "settled expectation" that he would ever become eligible for suspension or cancellation, Resp. Br. 41, inappropriately conflates his expectation at the time of reentry with his expectation after 1989, when he satisfied the criteria for suspension of deportation. It is also inconsistent with *St. Cyr*'s recognition that "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." 533 U.S. at 325. At the time of his reentry, petitioner knew that he faced "possible" deportation, but he also knew that one reason such deportation was not "certain" was that he might eventually satisfy the criteria for suspension of deportation.

justment of status as a *defense* to deportation. Indeed, before IIRIRA, petitioner could have married his long-time partner even after initiation of deportation proceedings and then invoked this defense. See Pet. Br. 41 n.19, 43.[21]

4. The government claims that removal under INA § 241(a)(5) merely "has the effect of *undoing* the act of illegal reentry, not penalizing it." Resp. Br. 35. But as the government elsewhere concedes, petitioner's removal under INA § 241(a)(5) in fact "trigger[s] two separate constraints on admission that were enacted by IIRIRA," Resp. Br. 40 n.16, and to which petitioner was not previously subject.[22]

First, removal renders petitioner inadmissible under 8 U.S.C. § 1182(a)(9)(A)(ii).[23] Because this bar is triggered by a removal order, see *ibid.*, petitioner would not now be subject to it if he had been granted voluntary departure (which is "in lieu" of removal, 8 U.S.C. § 1229c(a)(1)), cancellation of removal, or adjustment of status.[24]

Second, removal under INA § 241(a)(5) also renders peti-

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[21] The government also argues that adjustment of status is "merely a *procedural mechanism*" governing "the location from which * * * an alien may seek discretionary admission into the country—and not his substantive entitlement to admission." Resp. Br. 39. But as the government itself acknowledges, the very act of removal alters petitioner's "substantive entitlement to admission" by rendering him statutorily inadmissible from *any* location. See Resp. Br. 40 n.16; see also pages 16-17, *infra*.

[22] Even if INA § 241(a)(5) did simply "undo" the act of illegal reentry, that would not mean that it may be applied retroactively. Restitution is, by definition, designed to "undo" the consequences of past conduct. Yet restitution orders can constitute a criminal penalty, and thus be subject to the *Ex Post Facto* Clause's ban on retroactive application. See *Pasquantino* v. *United States*, 544 U.S. 349 (2005); *United States* v. *Leahy*, __F.3d __, 2006 WL 335806, at *3–*5 (3d Cir. 2006).

[23] The government mistakenly cites to § 1182(a)(9)(A)(i), see Resp. Br. 40 n.16, which applies only to arriving aliens.

[24] This bar would render petitioner inadmissible for either 10 or 20 years. By contrast, under pre-IIRIRA law, petitioner would have been subject to at most a 5-year ban on admissibility if he had been deported. See 8 U.S.C. § 1182(a)(6)(B) (1996).

tioner inadmissible under 8 U.S.C. § 1182(a)(9)(B). The government concedes that this provision—which had no parallel under prior law—imposes an "added burden" on petitioner, but asserts that "its application raises no issue of retroactive unfairness" because "[t]hat added burden arises only by virtue of petitioner's continued unlawful presence in the United States *after* IIRIRA's effective date." Resp. Br. 40 n.16. This 10-year admissibility bar is not triggered, however, unless an alien "depart[s] or [is] remov[ed] from the United States." 8 U.S.C. § 1182(a)(9)(B)(i)(II). Thus, petitioner would not be subject to it had he been granted cancellation of removal or adjustment of status.

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In sum, applying INA § 241(a)(5) to petitioner "impair[s] rights [he] possessed when he acted" and "increase[s] [his] liability for past conduct." *Landgraf*, 511 U.S. at 280. Thus, its application to petitioner is impermissibly retroactive.[25]

C. Petitioner had a cognizable expectation that he would be eligible for relief from deportation.

The government seeks to excuse INA § 241(a)(5)'s retroactive effect on petitioner by advancing two arguments to discredit his claim of reasonable reliance on, and settled expectation in, the availability of discretionary relief from deportation. But as we explained, see Pet. Br. 46–48, petitioner

[25] Contrary to the government's suggestion, Resp. Br. 32–33, *Altmann*, which is in any event inapplicable, see page 11 & n.13, *supra*, does not in any way undermine this conclusion. Unlike the situation here, in which petitioner had a pre-existing right to seek relief from deportation and now faces increased liability for past acts, the petitioner in *Altmann*, the Republic of Austria, neither had a pre-existing right to immunity nor faced increased liability as a consequence of the FSIA. See *Altmann*, 541 U.S. at 694–695. To the extent that the government, through its reliance on *Altmann*, is implicitly suggesting that *Landgraf* is inapplicable to immigration cases, that suggestion is erroneous: This Court has consistently applied the presumption against retroactivity in the immigration context. See, *e.g.*, *St. Cyr*, 533 U.S. at 315–316; *Kessler* v. *Strecker*, 307 U.S. 22, 30 (1939); *Chew Heong* v. *United States*, 112 U.S. 536, 559 (1884).

need not prove actual reliance. The government's arguments fail, moreover, because it is entirely reasonable to assume that petitioner and others who reentered before IIRIRA and remained in the country thereafter acted, at least in part, with the legitimate expectation that they would be eligible for such relief.[26] See Pet. Br. 45–46.

1. The government first asserts that eligibility for discretionary relief from deportation could not possibly have motivated petitioner and others to act given the danger of criminal prosecution. Resp. Br. 37. But the actual threat of criminal sanction for reentry before IIRIRA was *extremely* remote. In 1982—the year petitioner reentered the United States—the INS located 970,246 deportable aliens, but only 10,058, or 1.04%, were convicted of immigration violations. In 1996—the last full year before IIRIRA took effect—the INS located 1,649,986 deportable aliens, but only 12,086, or 0.73%, were convicted of immigration violations.[27]

These low conviction rates reflect the fact that, before IIRIRA, discretionary relief was the rule rather than the exception: In 1982, the year of petitioner's reentry, the INS granted voluntary departure to 812,572 deportable aliens, or

[26] Migration is "an investment decision." Gordon H. Hanson & Antonio Spilimbergo, *Illegal Immigration, Border Enforcement, and Relative Wages: Evidence from Apprehensions at the U.S.-Mexico Border*, 89 AM. ECON. REV. 1337, 1338 n.5 (Dec. 1999). As such, "[p]otential migrants estimate the costs and benefits" of migration, and in so doing consider "the likelihood of being able to avoid deportation." Douglas S. Massey, *Theories of International Migration: A Review and Appraisal*, 19 POPULATION & DEV. REV. 431, 434 (Sept. 1993).

[27] Even these numbers exaggerate the risk of prosecution for illegal reentry. In 1982, only 341 people, or 0.035% of the deportable aliens located in the US that year, were convicted of illegal reentry after deportation. In 1996, only 2,331 people, or 0.14%, were similarly convicted. Moreover, those who were convicted of an immigration violation faced comparatively light sentences of, on average, approximately 6 months in both 1982 and 1996. See 1985 STATISTICAL YEARBOOK OF THE INS 176, 213 (1986); 1996 STATISTICAL YEARBOOK OF THE INS 173 (1997); 1998 STATISTICAL YEARBOOK OF THE INS 207, 235 (2000).

83.7% of those it located; it deported only 14,518, or 1.5%. In 1996, the year before IIRIRA took effect, the INS granted voluntary departure to 1,572,798 people, or 95.3% of those it located, and granted suspension of deportation to an additional 5,812 people; it deported only 50,064.[28] Weighing the minimal risk of criminal sanctions that deportable aliens faced against the high likelihood of relief from deportation, it would have been entirely reasonable for petitioner to act in the expectation of receiving such relief.

2. The government also argues that, regardless of actual motivation, petitioner, by virtue of his unlawful conduct, had no legitimate expectation in relief from deportation. Resp. Br. 11, 35. But the fact that petitioner reentered the country illegally and remained here unlawfully does not undermine the legitimacy of the settled expectation of eligibility to seek such relief. This Court has consistently recognized that, "[e]ven when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf*, 511 U.S. at 283 n.35. See also *St. Cyr*, 533 U.S. at 325;[29] *Hughes Aircraft*, 520 U.S. at 952. Indeed, the *Ex Post Facto* Clause and the antecedent principle of *nulla poena sine lege*, from which the presumption against retroactivity is derived, see *Landgraf*, 511 U.S. at

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[28] 1996 YEARBOOK 173; 1998 YEARBOOK 28.

[29] Trying to distinguish *St. Cyr*, the government argues that "[i]n this case, by contrast, no transaction or event akin to a guilty plea * * * that occurred after petitioner reentered the United States could even arguably be said to have independently given rise to reasonable reliance interests and settled expectations." Resp. Br. 44. That is incorrect. As the government notes, "[p]etitioner * * * could have left the country * * * at any time and avoided the operation of Section 1231(a)(5)." Resp. Br. 36. But rather than leave, petitioner chose to stay and build a life here. By 1989 he had established a continuous presence of seven years in the United States. That affirmative conduct made him eligible for suspension of deportation and thus "independently [gave] rise to reasonable reliance interests and settled expectations."

265–266, are paradigmatically applicable in criminal cases.

Focusing on petitioner's conduct after reentry, the government also asserts that "there is no basis for recognizing claims of reasonable reliance that accrued only by virtue of petitioner's continued ability to avoid detection." Resp. Br. 47. Yet there is a *statutory* basis for recognizing petitioner's expectation that he would be eligible to seek suspension of deportation by virtue of having established a continuous presence of seven years in the United States: Suspension of deportation and its successor, cancellation of removal, are defenses to removal, and thus are available *only* to persons unlawfully present in the United States.[30] Moreover, to be eligible, a person *must* have been continuously present in the United States for a specified period of time. See 8 U.S.C. § 1254(a)(1) (1996); 8 U.S.C. § 1229b(b). Thus, far from defeating his settled expectation, it is precisely petitioner's continued unlawful presence that gives rise to his legitimate expectation that he would be eligible for suspension of deportation.[31]

Thus, petitioner had a legitimate expectation that he would be entitled to seek discretionary relief, and an interpretation of INA § 241(a)(5) that would defeat that expectation would be impermissibly retroactive.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[30] The government asserts that petitioner "cannot now make a claim of reasonable reliance premised on the previous availability of suspension of deportation" because "he elected not to seek" such relief. Resp. Br. 49 n.20. But suspension of deportation is a *defense* to deportation, and thus could not be sought by petitioner unless and until he was placed in deportation proceedings. Denial of a previously available defense is impermissibly retroactive. See Pet. Br. 43 (citing cases).

[31] Statutes of limitations, the doctrine of laches, and the principle of adverse possession demonstrate that the law routinely recognizes that even wrongdoers can acquire legitimate expectations over time.

Respectfully submitted.

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