No. 04-1376

In The Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

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

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAW FOUNDATION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, IMMIGRANTS' RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION, MIDWEST IMMIGRANT AND HUMAN RIGHTS CENTER, NATIONAL IMMIGRATION LAW CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NORTHWEST IMMIGRANT RIGHTS PROJECT, AND THE TEXAS LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PETITIONER

TRINA A. REALMUTO
Counsel of Record
AMERICAN IMMIGRATION LAW FOUNDATION
918 F Street, N.W.
Washington, D.C. 20004
(202) 742-5611

MATT ADAMS
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
(206) 957-8611

MARC VAN DER HOUT
STACY TOLCHIN
VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE, LLP
180 Sutter St., Fifth Floor
San Francisco, CA 94104
(415) 981-3000

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae proffer this brief to assist the Court in its consideration of the retroactive application of §241(a)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. §1231(a)(5), as enacted by §305(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), against noncitizens who were previously deported and who entered the country illegally before the provision took effect. *Amici* are associations of immigration lawyers and immigrants' rights advocates whose membership regularly advise, represent, and/or support noncitizens appearing before immigration agencies within the Department of Homeland Security, the Executive Office for Immigration Review, and the federal courts. Through their experience, *amici* have distinct insight into how the government's retroactive application of §1231(a)(5) is causing long-term United States residents sudden and permanent separation from family members by eliminating their pre-existing right to apply for immigration relief to legalize their immigration status and to defend against deportation.[2]

Amici appear in this proceeding because resolution of the question presented will impact the uniform application of immigration law and the rights of immigrants within this country.

---

[1] This *amici curiae* brief is filed with the written consent of both parties. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission.

[2] The separate statements of interest of each of the *amici* immigration organizations are included in the Appendix.

BACKGROUND

Statutory Background

Unlike people who are subject to reinstatement under §1231(a)(5), persons subject to the predecessor reinstatement provision, 8 U.S.C. §1252(f) (repealed 1996), were not barred from applying for relief from deportation. The statute provided:

> Unlawful Entry. Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after the date of enactment of this Act, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

Former §1252(f) was more limited than the current provision in that it permitted reinstatement of a prior, executed deportation order only if the individual reentered illegally after having been previously ordered deported based on specified, limited deportability grounds. These grounds were restricted to deportation based on alien smuggling, certain criminal grounds, failing to register and falsification of documents, and national security grounds. *See* former 8 U.S.C. §1152(e) (repealed 1996) referencing grounds of deportability in former 8 U.S.C. §1251(a)(1)(E), (a)(2), (a)(3), and (a)(4) (repealed 1996). Former §1252(f) was expansive, however, in that it explicitly applied to illegal reentries

"whether before or after the date of enactment of this Act."[3] Most importantly, even if §1252(f) applied, individuals were eligible to apply for relief from deportation.

On September 30, 1996, Congress enacted IIRIRA. Section 305(a)(3) of IIRIRA redesignated former 8 U.S.C. §1252(f) as §1231(a)(5) and amended it to read as follows:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Section 1231(a)(5) took effect on April 1, 1997. IIRIRA §309(a). The current provision substantively differs from former §1252(f) in three significant ways. First, it does not restrict reinstatement to prior orders that were based on a criminal or national security-related ground of deportability. Thus, under §1231(a)(5), prior orders based on relatively minor immigration violations (*e.g.,* remaining beyond an authorized period of stay, violating the terms of a nonimmigrant visa) may be reinstated. Second, unlike former §1252(f), current §1231(a)(5) does not contain language retroactively applying it to reentries before enactment. Indeed, Congress considered – and rejected – an earlier draft containing such language, which would have applied the provision to reentries before or after §1231(a)(5)'s enactment. *See* H.R. Rep. No. 104-469(I) at 416-17 (Mar. 4, 1996) (containing no retroactive language);

[3] Former §1252(f) was enacted as part of the McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 208 on June 27, 1952.

S. Rep. No. 104-249 at 118 (Apr. 10, 1996) ("whether before or after the date of enactment of this Act"); H.R. Rep. No. 104-828 at 54 (Sept. 24, 1996) (agreeing to recommend the House version of the provision without expressly retroactive language).[4]

Third, §1231(a)(5) triggers two distinct bars that were not present in the prior statute. The provision purports to bar reopening or review of the prior order. Additionally, an individual subject to §1231(a)(5) "is not eligible and may not apply for any relief" under the INA. This latter bar is most relevant to the instant case. Prior to the effective date of IIRIRA, persons subject to reinstatement under former §1252(f) were still eligible to apply for relief from deportation. Under new §1231(a)(5), relief is explicitly precluded.[5]

---

[4] The version the Senate considered, and Congress ultimately rejected, provided:

> Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, *whether before or after the date of enactment of this Act*, on any ground described in any of the paragraphs enumerated in subsection (e), the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

S. Rep. No. 104-249 at 118 (Apr. 10, 1996) (emphasis added).

[5] The current regulations implementing §1231(a)(5) state that a person has "no right to a hearing before an immigration judge." 8 C.F.R. §241.8(a). This change is regulatory in nature, not statutory. Thus, it is not relevant to the retroactivity analysis and is not at issue here.

Relief from Removal

Congress created several types of immigration benefits for which persons who unlawfully reentered the country after deportation may qualify. But for the government's retroactive application of §1231(a)(5)'s bar to relief, this class of people would be eligible to apply for one or more of the following:

Asylum: Persons who fled their countries to escape death, torture, and/or other forms of persecution may be granted asylee status by either the Asylum Office, if the application is filed affirmatively, or an immigration judge, if the application is filed as a defense in removal proceedings. 8 U.S.C. §1158. Unlawful entry, after removal or otherwise, does not preclude asylum eligibility. 8 U.S.C. §1158(b)(2). Asylees may apply to adjust their status to lawful permanent residence one year after their asylum application is approved. 8 U.S.C. §1159(a). An asylee who is inadmissible due to an unlawful entry or reentry after deportation may request a waiver of these grounds of inadmissibility. 8 U.S.C. §1159(c) (waiving 8 U.S.C. §§1182(a)(6)(A)&(a)(9)).

Adjustment of Status: Certain family members and employers may sponsor noncitizens for lawful permanent residence based upon qualifying family and employment relationships, respectively. 8 U.S.C. §§1151, 1153. Congress created a specific provision that affords people who unlawfully entered the country the ability to adjust status if a visa petition was filed on their behalf by April 30, 2001, a visa number is available, and they pay a $1,000 penalty fee. 8 U.S.C. §1255(i). *See also* 8 C.F.R. §1245.2(a)(1) & (a)(5)(ii) (permitting affirmative and defensive adjustment applications, including renewal before an immigration judge of a denied affirmative application). Through §1255(i), Congress recognized that people who entered without inspection had

been living in and would continue to live in the country while they waited for a visa number to become available.[6] Rather than forcing these individuals to leave the country, Congress created a process through which they could become lawful permanent residents from within the United States notwithstanding their unlawful entry.

VAWA Adjustment: Under the Violence Against Women Act of 2000 (VAWA), Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000), victims of domestic violence perpetrated by an abusive U.S. citizen or permanent resident spouse or parent may petition the immigration service for an immigrant visa. Based on an approved petition, they may also apply for adjustment of status, notwithstanding an unlawful entry. 8 U.S.C. §1255(a) (referencing self-petitions filed by victims of domestic violence under 8 U.S.C. §1154(a)(1)).

Nonimmigrant Visa Status for Delayed Adjustment Applicants: Congress created a special nonimmigrant visa status for spouses and minor children of lawful permanent residents who are beneficiaries of a visa petition filed by December 21, 2000 and who will be eligible to file their adjustment applications when a visa number becomes available. 8 U.S.C. §1101(a)(15)(V). Congress specifically provided for the eligibility of persons who unlawfully entered the country. 8 U.S.C. §1184(q).

Suspension of Deportation/Cancellation of Removal: Prior to IIRIRA, persons who unlawfully entered the country could qualify for suspension of deportation and

[6] When a visa number will be available depends on nationality and family or employment category. At present, the waiting time ranges from five to twenty-two years. http://travel.state.gov/visa/frvi/bulletin/bulletin_2757.html (monthly listing of priority dates for family-based immigration).

adjustment of status to lawful permanent residence if they: demonstrated the requisite continuous physical presence, possessed good moral character, were not subject to certain criminal and national security-related deportation grounds, and demonstrated that deportation would cause certain hardship to themselves or a qualifying citizen and/or permanent resident relative. 8 U.S.C. §1254(a) (repealed 1996). IIRIRA eliminated suspension of deportation for most persons and replaced it with cancellation of removal. IIRIRA §§304(a), 308(b)(7). Presently, people in removal proceedings may apply for cancellation of removal and adjustment of status to lawful permanent residence if they: demonstrate the requisite continuous physical presence, possess good moral character, have not been convicted of certain crimes, and demonstrate removal would cause certain hardship to a qualifying citizen and/or permanent resident relative. 8 U.S.C. §1229b(b)(1).

VAWA Cancellation: Under VAWA, *supra*, victims of domestic violence perpetrated by an abusive U.S. citizen or lawful permanent resident spouse or parent may apply for cancellation of removal based on less stringent continuous physical presence and hardship standards. 8 U.S.C. §1229b(b)(2).

Family Unity Benefits: Pursuant to the family unity programs of the Immigration Act of 1990, Pub. L. No. 01-649, §301, 104 Stat. 4978 (Nov. 29, 1990), with few exceptions, people who entered illegally before May 5, 1988 and who are beneficiaries of certain family-based visa petitions may apply for renewable two-year periods of voluntary departure (allowing them to remain in the country), while they wait for a visa number to become available. Periods of voluntary departure may be renewed until a visa number is immediately available, at which time the person may

apply for adjustment of status under 8 U.S.C. §1255(i). 8 C.F.R. §236.15(e).

Voluntary Departure: Prior to IIRIRA, with limited exceptions, people who entered without inspection could avoid a final immigration order by applying for voluntary departure, even when they were "under deportation proceedings." 8 U.S.C. §1254(e) (eliminated by IIRIRA §304(b)(7) and redesignated by §304(b) (deportation proceedings)). Individuals ordered deported before IIRIRA were subject to a five-year bar from returning to the United States. 8 U.S.C. §1182(a)(6)(B) (repealed 1996). However, individuals granted voluntary departure were not subject to this bar and, therefore, could return to the United States at any time if otherwise eligible to enter as an immigrant or nonimmigrant. Such relief remains available "in lieu of removal" in the post-IIRIRA era, also with limited exceptions. 8 U.S.C. §1229c.

Other Relief: People subject to §1231(a)(5) may also be eligible to apply for: (1) a nonimmigrant visa under 8 U.S.C. §1101(a)(15)(U) (available to victims of certain crimes, including rape, trafficking and torture, who cooperate with law enforcement officials); (2) temporary protected status under 8 U.S.C. §1254a(c)(2)(A) (temporary, humanitarian-based status available to nationals of designated countries); and (3) registry benefits under 8 U.S.C. §1259 (legalization for persons who have lived in the country continuously since January 1, 1972).

Significantly, many of the above-mentioned forms of relief lead to lawful permanent resident status.

SUMMARY OF ARGUMENT

Amici submit that §1231(a)(5), as enacted by IIRIRA §305(a)(3), cannot be applied retroactively to individuals

who were deported and reentered the country before April 1, 1997, the date the provision took effect. Accordingly, the lower court's decision should be reversed.

Congress' intent to apply §1231(a)(5) prospectively is ascertainable through application of standard statutory construction principles, even without explicit statutory language regarding the temporal scope of the provision. The court below considered the relevant statutory construction principles but erred by demanding proof that Congress *unambiguously* intended the statute to apply prospectively, an equally exacting showing as is required for retroactive application. Contrary to the lower court's conclusion, proof of intended prospective application does not require the "high level of clarity" that is required to prove intended retroactive application, *i.e.*, clarity that can sustain "only one interpretation." *INS v. St. Cyr*, 533 U.S. 289, 317 (2001) (citation omitted). Accordingly, this Court should find that the court below applied the wrong standard and instead should employ statutory construction principles to see whether Congressional intent can reasonably – but not unambiguously – be discerned. (*See* Point IA).

Congress intended to apply §1231(a)(5) prospectively. In enacting the provision, Congress modified the predecessor reinstatement statute by deleting expressly retroactive language. Moreover, Congress specifically considered and rejected retroactivity language which would have expressly applied the statute to illegal reentries before the date of enactment. Congress knew it had to be explicit if it wanted §1231(a)(5) to apply to pre-enactment reentries and it also knew that the law favors prospective application of new statutes. Thus, Congress' considered omission of expressly retroactive language, along with its knowledge of how such omission would be construed, demonstrates that it clearly

intended §1231(a)(5) to apply prospectively only.[7] (*See* Point IB).

If the Court disagrees and finds that Congressional intent was unclear, it must then consider whether applying §1231(a)(5) to persons who illegally reentered the country prior to April 1, 1997 would have an impermissible retroactive effect. As in *Landgraf v. USI Film Products*, 511 U.S. 244, 286 (1994) (where the defendant sexually harassed an employee) and *Hughes Aircraft Co. v. U.S. ex rel. Schumer,* 520 U.S. 939, 951 (1997) (where Hughes Aircraft lied to the government), the central concern in this case is the attachment of new legal consequences to past conduct notwithstanding the fact that the conduct was unlawful at the time it occurred. (*See* Point IIA). Reliance on pre-IIRIRA law is but one way to demonstrate retroactive effect. In addition, the imposition of new and increased penalties on a pre-IIRIRA reentry demonstrates retroactive effect because it triggers fairness concerns and upsets reasonable expectations. (*See* Point IIB).

Applying §1231(a)(5)'s bar to relief to persons who already had reentered the country before the change in law has impermissible retroactive effect because it would convert a possibility of deportation into a certainty. As the Second, Third, and Eighth Circuits correctly have held, this loss of the opportunity to apply for relief attaches a

[7] The Courts of Appeals for the Sixth and Ninth Circuits have so held. *Bejjani v. INS*, 271 F.3d 670, 687 (6th Cir. 2001); *Castro-Cortez et al. v. INS*, 239 F.3d 1037, 1053 (9th Cir. 2001*). But see Arevalo v. Ashcroft*, 344 F.3d 1, 13 (1st Cir. 2003); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Faiz-Mohammad v. Ashcroft,* 395 F.3d 799, 804 (7th Cir. 2005); *Alvarez-Portillo v. Ashcroft,* 280 F.3d 858, 865 (8th Cir. 2002); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277, 1283 (11th Cir. 2004).

new legal consequence and creates a new disability both when the individual loses the ability to have his or her relief application adjudicated affirmatively, before the immigration service, or defensively, before an immigration judge. (*See* Point IIC).

Retroactive application of §1231(a)(5) would upset reasonable pre-IIRIRA expectations of being able to apply for relief affirmatively, including, for example, asylum and adjustment of status based on a qualifying family or employment relationship. It also would deprive long-time U.S. residents of their pre-existing right to defend against deportation by asking an immigration judge to forgive their illegal reentry if they qualified for relief based on their ties to this country (*e.g.*, suspension of deportation, adjustment of status). Moreover, applying §1231(a)(5)'s bar to relief retroactively would take away a person's pre-existing right to request voluntary departure (in lieu of a deportation order) and thereby possibly avoid the five-year bar to returning to the United States based on subsequent eligibility for an immigrant or nonimmigrant visa. Thus, contrary to the lower court's conclusion, the government's application of §1231(a)(5) to pre-IIRIRA reentrants is impermissibly retroactive. (*See* Point IIC).

ARGUMENT

I. APPLICATION OF TRADITIONAL STATUTORY CONSTRUCTION RULES EVIDENCES CONGRESS' INTENT TO APPLY §1231(a)(5) PROSPECTIVELY.

A strong presumption against retroactivity "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). Determining whether a

statute may be applied retroactively requires a two-step inquiry. First, courts, employing traditional tools of statutory construction, look to whether Congress provided for the statute's temporal reach, either explicitly or implicitly. *Id.* at 266; *Lindh v. Murphy*, 521 U.S. 320, 324 (1997). If Congress' intent can be ascertained, the inquiry ends. *Lindh*, 521 U.S. at 336. If, and only if, a court determines Congress' intent cannot be ascertained should it proceed to the second step of the inquiry, which asks whether application of the new law to past events would have retroactive effect. *Martin v. Hadix,* 527 U.S. 343, 357 (1999); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997). If the court finds retroactive effect, in keeping with the "traditional presumption" against retroactivity, it must conclude the statute applies prospectively only. *St. Cyr*, 533 U.S. at 325.

A. Congress' Intent to Apply §1231(a)(5) Prospectively Need Not Be Expressed Unambiguously.

A court construing the temporal reach of a statute may reach one of the following three possible conclusions: (1) Congress intended the statute to apply prospectively; (2) Congress unambiguously intended the statute to apply retroactively; or (3) Congress' intent cannot be ascertained. *Lindh* is illustrative of the first category. At issue in *Lindh* was whether the amendments made to Chapter 153 of the federal habeas statute, 28 U.S.C. §2241 *et seq.*, governing standards affecting entitlement to habeas relief, applied to cases pending on the date of enactment. The statute did not include an express statement of prospectivity. Nonetheless, two statutory construction rules were paramount to the Court's conclusion that Congress intended the new rules to apply prospectively only to cases filed after enactment: the

negative implication rule and the rule that Congress is deemed to write legislation knowing how courts have interpreted prior statutes. *Lindh,* 521 U.S. at 327-31.[8]

In the second category of cases, Congress' intention to apply the statute retroactively must be clear and unambiguous. "The standard for finding such unambiguous direction is a demanding one." *St. Cyr*, 533 U.S. at 316. A party must prove that "the statutory language was so clear that it could sustain only one interpretation." *Id.* at 317, *citing Lindh,* 521 U.S. at 328 n.4. This demanding standard is designed to "ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268. This contrasts with the first category, where such a high standard is not required to demonstrate Congress' intent that the statute be applied prospectively only. *Lindh*, 521 U.S. 326 ("*Landgraf* thus referred to 'express commands,' 'unambiguous directives,' and the like where it sought to reaffirm that clear-statement rule [requiring retroactive application], *but only there*.") (emphasis added, citations omitted).[9]

---

[8] As to the latter, the Court stated:

> Since *Landgraf* was the Court's latest word on the subject when the Act was passed, Congress could have taken the opinion's cautious statement about procedural statutes [as generally applying to pending cases] and its silence about the kind of provision exemplified by the new §2254(d) *as counseling the wisdom of being explicit if it wanted such a provision to be applied to cases already pending*.

Lindh, 521 U.S. at 328 (emphasis added).

[9] Only if the case falls in the final category, where Congress' intent cannot be discerned, should a court proceed to the second step of the analysis. *See*, *e.g.*, *Martin*, 527 U.S. at 353-54; *St. Cyr,* 533 U.S. at 320; *Hughes*, 520 U.S. at 946.

Thus, proof of intended prospective application does not require the "high level of clarity" that is required to prove intended retroactive application, *i.e.*, clarity that can sustain "only one interpretation." *St. Cyr*, 533 U.S. at 317 (citation omitted). Because the government asserted that §1231(a)(5) applies retroactively, only it was required to prove that Congress expressly and unambiguously intended this result. Nevertheless, the lower court erroneously required Petitioner Fernandez-Vargas to prove a "high level of clarity" for *prospective* application, *i.e.*, that Congress "unambiguously intended" that §1231(a)(5) apply prospectively. *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 890 (10th Cir. 2005) ("Congress's failure to expressly state that the reinstatement statute *applied* to aliens who re-entered the country prior to its effective date, does not mean Congress therefore unambiguously intended for the statute *not* to apply to these aliens.") (emphasis in the original).[10]

In invoking this incorrect standard, the court below improperly relied on *St. Cyr.* In *St. Cyr*, the government asserted §304(b) of IIRIRA[11] – the same statute at issue here – applied retroactively to pre-enactment events. The Court in *St. Cyr* found that the government did not come close to meeting the "demanding" "one interpretation" standard of showing that retroactive application was Congress' only possible intention. *St. Cyr*, 533 U.S. 317-20. In addition to rejecting the government's "unambiguously

[10] Other courts have made this same mistake. *See*, *e.g.*, *Arevalo*, 344 F.3d at 11; *Velasquez-Gabriel*, 263 F.3d at 108; *Alvarez-Portillo*, 280 F.3d at 865; *Ojeda-Terrazas*, 290 F.3d at 300; *Faiz-Mohammad*, 395 F.3d at 804; *Sarmiento-Cisneros*, 381 F.3d at 1283; *Avila-Macias v. Ashcroft*, 328 F.3d 108, 113 (3d Cir. 2003).

[11] IIRIRA §304(b) repealed relief under former INA §212(c), 8 U.S.C. §1182(c) (repealed 1996).

retroactive" arguments,[12] the Court's conclusion was supported by "the presumption against retroactive application of ambiguous statutory provisions" and the rule of lenity. *Id*. at 320.

The *only* argument before the *St. Cyr* Court regarding Congressional intent, and the only argument the Court addressed, was the government's assertion that Congress unambiguously intended the statute to apply retroactively. *St. Cyr*, 533 U.S. at 318-20. Conversely, here, Petitioner and *amici* contend that Congress intended the statute to apply prospectively only. Thus, contrary to the lower court's conclusion, the unambiguous intent standard discussed and applied in *St. Cyr* is not applicable here. Rather, Petitioner Fernandez-Vargas only needs to show that §1231(a)(5) is susceptible to prospective application. *United States Fidelity & Guaranty Co. v. United States*, 209 U.S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible *of any other*.") (emphasis added).

---

[12] The government argued that Congress' intent to apply the statute retroactively was supported by: (1) the "comprehensive nature" of IIRIRA's immigration reform; (2) IIRIRA §304(b)'s effective date; and (3) IIRIRA's "savings" provision. *St. Cyr*, 533 U.S. at 317-20. The Court rejected the significance of these three factors, finding IIRIRA's comprehensiveness said "nothing about Congress' intentions," a provision's effective date is distinct from its applicability date, and the negative implication rule undermined any indication of Congressional intent that could be gleaned from IIRIRA's saving provision. *St. Cyr*, 533 U.S. at 317-18. In proving prospective intent, Petitioner Fernandez-Vargas does not rely on any of the statutory construction rules relied on by the government in *St. Cyr*. The only applicable rule employed by the Court in *St. Cyr* is the rule of lenity, which would apply in his favor. *See*, *e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 384 n.8 (2004).

B. Correct Application of Statutory Construction Analysis Reveals Congress' Intention to Apply §1231(a)(5) Prospectively Only to Reentries After April 1, 1997.

Amici acknowledge the absence of express statutory language specifying the temporal reach of §1231(a)(5). Absent such express language, *Lindh* directs courts to employ customary rules of statutory construction and examine the text, structure and history of the legislation to determine whether Congress expressed its opinion as to the temporal reach of the statute. *Lindh,* 521 U.S. at 336. Application of several statutory construction rules show that Congress intended §1231(a)(5) to have a purely prospective application.

First, in enacting §1231(a)(5), Congress eliminated the language of former §1252(f), which had expressly applied the reinstatement provision to pre-enactment reentries. *Compare* former §1252(f) (applying to reentries "whether before or after the date of enactment of this Act") *with* §1231(a)(5) (eliminating retroactive language and not containing any replacement language). *See, e.g., Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 838-39 (1990) (concluding that a comparison of the original and amended version of statute governing awards of post-judgment interest "evidences clear congressional intent that [the statute] is not applicable to judgments entered before its effective date").

If Congress desired the new and more stringent version of the reinstatement provision found at §1231(a)(5) to be applied retroactively to individuals who reentered prior to the effective date, it would have included the express retroactivity language of former §1252(f). Instead,

Congress completely eliminated this language from the new provision. As the Sixth Circuit aptly stated:

> . . . [T]he complete elimination of retroactive language from the reinstatement provision is persuasive evidence that Congress did not intend for the new reinstatement provision to apply to reentries which occurred prior to the statute's effective date. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that is has earlier discarded in favor of other language."

Bejjani, 271 F.3d at 684-85 *citing Cardoza-Fonseca,* 480 U.S. at 442-43 (internal quotation omitted); *Castro-Cortez*, 239 F.3d at 1051 ("Congress's decision to remove the retroactivity language from this part of the statute provides strong support for the conclusion that it did not intend that the revised provision be applied to reentries occurring before the date of the statute's enactment").[13]

Second, Congressional intent also may be determined by the legislative history of §1231(a)(5). *Cf. Landgraf*, 511 U.S. at 257-58 (reviewing legislative history to determine if Congress intended a specific temporal reach for new statute); *Pritchett v. Office Depot, Inc.,* 420 F.3d 1090, 1095

[13] In *Avila-Macias*, the court found the omission of retroactivity language provided evidence of Congress' intent to apply §1231(a)(5) prospectively but erroneously required an "express mandate" reflecting such intent. 328 F.3d at 114. The petitioner in that case, however, reentered *after* §1231(a)(5)'s effective date. On this basis, the court limited its conclusion as to Congressional intent, stating "[i]t is not necessarily the case that Congress would intend that aliens who illegally reentered the country prior to the effective date of the statute be treated the same as those who reentered afterwards." *Id.* at 113 n.5. Despite this statement, the court later concluded that it had "already decided" the issue. *See Dinnall v. Gonzales*, 421 F.3d 247, 255 (3d Cir. 2005).

(10th Cir. 2005) (same); *Pak v. Reno*, 196 F.3d 666, 676 (6th Cir. 1999) (same). Not only did Congress eliminate the retroactive language in former §1252(f), but it also considered and rejected new retroactivity language which would have expressly applied §1231(a)(5) to illegal reentries that occurred before the date of enactment. *Compare* H.R. Rep. No. 104-469(I) at 416-17 (Mar. 4, 1996) (containing no retroactivity language) and S. Rep. No. 104-249 at 118 (Apr. 10, 1996) (containing retroactive language) *with* H.R. Rep. No. 104-828 at 54 (Sept. 24, 1996) (resolving dispute in favor of omitting express retroactivity language) and §1231(a)(5) (no express retroactivity language). *Bejjani*, 271 F.3d at 686 ("the simple comparison between the prior version, (as well as the rejected version), and the current version is striking, and clearly conveys the intent of Congress").[14]

Post-*Landgraf*, Congress knew that it had to be "explicit if it wanted [a new] provision to be applied to cases already pending." *Lindh*, 521 U.S. at 328. In numerous provisions in IIRIRA, Congress demonstrated that it knew how to make provisions apply retroactively.[15] In addition, as Congress is presumed to be aware of the presumption against retroactive legislation, it must explicitly provide for such when it wants a statute applied to past conduct. *Lindh*, 521 U.S. at 328. *See also Castro-Cortez*, 239 F.2d at 1052 ("[C]ongressional silence is instructive"). *Accord Olatunji v. Ashcroft*, 387 F.3d 383, 394 (4th Cir. 2004) ("[W]here Congress has apparently given no thought to the question of retroactivity whatsoever, there is no basis for

[14] Although the Fourth Circuit held that Congress' intent as to §1231(a)(5)'s temporal reach was unclear, it did so *without* comparing the text of §1231(a)(5) with former §1252(f). *Velasquez-Gabriel,* 263 F.3d at 106-07.

[15] *See*, *e.g.*, IIRIRA §§212(e); 322(c); 342(b); 347(c); 351(c).

inferring that Congress' intent was any more nuanced than that statutes should not be held to apply retroactively. Anything more, in the face of complete congressional silence, is nothing but judicial legislation").

In sum, Congress' conscious decision to omit the expressly retroactive language in former §1252(f) combined with both its knowledge of how to enact retroactive language and its knowledge of how silent legislation must be construed, evidences its clear intent to apply §1231(a)(5) to post-IIRIRA reentries only.

II. APPLICATION OF §1231(a)(5) TO PRE-IIRIRA REENTRIES HAS IMPERMISSIBLE RETROACTIVE EFFECT.

Assuming the Court concludes that the temporal reach of the statute cannot be discerned using the ordinary rules of statutory construction, it must then proceed to the second step of the *Landgraf* analysis to determine whether applying §1231(a)(5) to conduct that took place prior to its effective date would have an impermissible retroactive effect. The "traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment" is well established. *Landgraf,* 511 U.S. at 273, 278. Accordingly, courts must evaluate the impact of applying a new law retroactively in light of that presumption. A new statute that "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," is impermissibly retroactive. *Landgraf*, 511 U.S. at 269. The determination of whether a new law has an impermissible retroactive effect is a "common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed

before its enactment.'" *Martin*, 527 U.S. at 327 *citing Landgraf,* 511 U.S. at 270. "[T]he judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *St. Cyr*, 533 U.S. at 321 (internal quotations and citations omitted).

A. The Triggering Conduct for Retroactivity Analysis Is Petitioner's Pre-IIRIRA Reentry.

Illegal reentry following departure under a prior order is the primary conduct at issue here because this act ultimately subjects individuals to §1231(a)(5) and its associated bar to relief. Analyzing the primary conduct of unlawfully reentering (rather than the secondary conduct of affirmatively filing an application for relief) is consistent with the Court's analysis of the petitioner's primary conduct in *Landgraf,* not the secondary proceedings that resulted from that behavior. In *Landgraf*, the Court found that a statute that created a right to recover monetary damages could not be applied retroactively to pre-enactment conduct, stating:

> In this case, the event to which the new damages provision relates is the discriminatory conduct of respondents' agent John Williams; if applied here, that provision would attach an important new legal burden to that conduct.

511 U.S. at 282. *Id.* at 294 (Scalia, J., concurring) (" . . . the occurrence of the primary conduct is the relevant event").

The fact that the reentry is unlawful has no bearing on the analysis. Courts routinely analyze whether a statute has retroactive effect when applied to an already illegal act. *See*, *e.g.*, *Landgraf*, 511 U.S. at 264 n.35 ("Even 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."); *Hughes*, 520 U.S. at 951-52 (addressing whether the elimination of a defense to fraud on the government attaches new disability); *Rivers v. Roadway Express*, 511 U.S. 298, 301 (1994) (addressing whether the perpetrator of racial harassment would face new damage remedies); *Mathews v. Kidder, Peabody, & Co.*, 161 F.3d 156, 164 (3d Cir. 1998) ("In this case, the events in question are the alleged fraudulent acts by the defendants"). *See also* Nancy Morawetz, *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 Fordham Urb.L.J. 1743, 1752 (2003) (discussing Supreme Court retroactivity cases where "the issue presented to the Court was whether Congress could be allowed to impose new consequences on past wrongful conduct").

B. Reliance on the Availability of Relief from Removal Is Not Required for the Court to Find That §1231(a)(5) Has Impermissible Retroactive Effect.

No single formula dictates how to evaluate retroactive effect. *St. Cyr*, 533 U.S. at 321 n.46. The consideration mandated by *Landgraf* and its progeny is not limited to an analysis of any actual or theoretical *quid pro quo* arrangement. This Court has implicitly held, and lower federal courts have expressly held, that reliance, or any evidence thereof, is not required to find that a statute has an impermissible retroactive effect. *Landgraf*, 511 U.S. at 280 (*no* requirement that the defendant had to show that Williams' "conduct would have been different" had he known that his employer might incur monetary damages as a result of his actions); *Hughes*, 520 U.S. at

948 (*no* requirement that Hughes Aircraft relied on existing law when making false representations to the U.S. government); *Ponnapula v. Ashcroft*, 373 F.3d 480, 491 (3d Cir. 2004) ("The Supreme Court has never required actual reliance or evidence thereof in the *Landgraf* line of cases, and has in fact assiduously eschewed an actual reliance requirement"); *Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004) ("[W]e believe that reliance, in any form, is irrelevant to the retroactivity inquiry").

In *St. Cyr*, the Court ultimately determined that the retroactive application of IIRIRA's repeal of §212(c) relief[16] had an "obvious and severe" (and hence impermissible) effect because noncitizens who pleaded guilty to criminal offenses prior to the change in law may have given up their right to a jury trial under the assumption that they were eligible for relief from deportation. *St. Cyr*, 533 U.S. at 321-22, 324. In reaching this conclusion, the Court did not require proof of actual reliance on the availability of §212(c) relief. In fact, the Court affirmed the Second Circuit's decision in *St. Cyr v. INS*, 229 F.3d 406, 418 (2d Cir. 2000), which itself did not require proof of reliance. Thus, while a possibility of reliance may sometimes inform the analysis, actual reliance is not required to create retroactive effect.

Rather, as courts have found, reliance should be regarded as but one way of demonstrating the existence of an impermissible retroactive effect – it is a "sufficient" rather than a "necessary" component of the retroactivity analysis. *Ponnapula*, 373 F.3d at 490 *citing Hughes,* 520 U.S. at 947. *See also Leitao v. Reno*, 311 F.3d 453, 455 (1st Cir. 2002) (finding reliance on availability of §212(c) relief not required under *St. Cyr*); Morawetz, *supra*, at 1747-48

[16] 8 U.S.C. §1182(c) (repealed 1996).

and 1758 ("[t]he Supreme Court [in *St. Cyr*] did not explicitly address the issue whether [individuals with pre-IIRIRA guilty pleas were] the only set of persons who would suffer an improper retroactive effect as a result of application of the new mandatory deportation rules").

The *Landgraf* analysis does not merely protect past transactions (like the plea bargain in *St. Cyr*), but also limits the imposition of new or increased penalties on past conduct because these penalties similarly trigger fairness concerns and upset reasonable expectations. Here, such fairness concerns include "the unfairness of lawmaking that changes the consequences of past acts by persons or corporations that are unpopular or are seen as having acted wrongfully." Morawetz, *supra*, at 1751. In addition, the retroactive application of §1231(a)(5) would upset reasonable expectations of being able to apply for immigration relief.

C. Retroactive Application of §1231(a)(5) Attaches New, and Impermissible, Consequences to Pre-IIRIRA Reentrants Who Were Eligible for Relief.

A successful showing that retroactive application impacts substantive rights is sufficient to apply the presumption against retroactivity. *Hughes*, 520 U.S. at 951.[17] Importantly, the "elimination of any possibility of [immigration] relief" has already been held to attach "a new disability, in respect to transactions or considerations

[17] *See also Republic of Austria v. Altman,* 541 U.S. 677, 694 (2004) ("Under *Landgraf*, . . . , it is appropriate to ask whether the Act affects substantive rights (and thus would be impermissibly retroactive if applied to preenactment conduct) or addresses only matters of procedure (and thus may be applied to all pending cases regardless of when the underlying conduct occurred)").

already past." *St. Cyr*, 533 U.S. at 321 (citations and internal quotation marks omitted) (repeal of relief under former INA §212(c) has retroactive effect). *St. Cyr* leaves no room to dispute that "availability of relief (or, at least, the opportunity to seek it) is properly classified as a substantive right," and that the opportunity to apply for such relief need not be "vested" for its elimination to have impermissible retroactive effect. *Arevalo*, 344 F.3d at 33, 34-35 (citations omitted). Furthermore, the discretionary nature of any such relief does not affect the analysis. *St. Cyr*, 533 U.S. at 325 (explaining "there is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation").

Section 1231(a)(5) has retroactive effect because it "attaches a new disability" and "new legal consequences" to illegal reentries by eliminating the opportunity to apply for relief. This is true for both affirmative relief applications (filed with the immigration service) and defensive relief applications (filed with an immigration judge). Individuals who reentered the country before §1231(a)(5)'s bar to relief took effect could reasonably expect to file affirmative relief applications if or when eligible to do so. They also could choose to wait and if placed in deportation (now removal) proceedings, they could apply for defensive relief from removal, *e.g.*, family or employment-based adjustment of status, suspension of deportation (now cancellation of removal), and voluntary departure. *See Dinnall*, 421 F.3d at 262 ("It is not unreasonable to assume that many of these aliens may well have reentered the country with the understanding that they might be eligible for some form of discretionary relief").

In *Alvarez-Portillo v. Ashcroft,* the Eighth Circuit acknowledged the settled expectations of a person subject

to §1231(a)(5) who, prior to the change in law, was eligible for adjustment of status and thus had the choice of either filing for adjustment affirmatively or waiting and pursuing adjustment as a defense to a later deportation proceeding. *Alvarez-Portillo*, 280 F.3d at 867. Because Alvarez-Portillo chose to wait, and consequently application of §1231(a)(5) "deprived him of [the] defense [of adjustment of status]," the court found that the statute would have an impermissible retroactive effect. *Id. See also Lopez-Flores v. DHS,* 376 F.3d 793, 796 (8th Cir. 2004) (finding that the lack of immediate eligibility for relief from removal before April 1, 1997, "has no bearing on the reasonableness of Lopez-Flores's expectation" that such relief would be available to defend against deportation if deportation proceedings were instituted). *Accord Restrepo v. McElroy*, 369 F.3d 627, 634 (2d Cir. 2004) (holding that the elimination of §212(c) relief to individuals who could have affirmatively applied for it before April 1, 1997, but instead chose to wait until they had a stronger application, was a violation of fundamental fairness).

Similarly, people who unlawfully reentered could reasonably expect, at a minimum, to be eligible to apply for voluntary departure. The only court to consider this issue reasoned:

> Although [Petitioner] has no guarantee of a favorable decision on his voluntary departure application, because §241(a)(5) [§1231(a)(5)] constitutes a "new disability" that did not exist prior to IIRIRA's passage, he nevertheless had a reasonable expectation of an avenue of relief before IIRIRA was enacted that he no longer has.

Dinnall, 421 F.3d at 37-38 *citing St. Cyr*, 533 U.S. at 321.

Here, the lower court acknowledged "that a number of cases have held that barring an application for adjustment

under INA §241(a)(5) [8 U.S.C. §1231(a)(5)] is an impermissible retroactive effect where the adjustment application was filed before the effective date of IIRIRA." *Fernandez-Vargas*, 394 F.3d at 890.[18] Relying on these cases, and without analyzing Petitioner Fernandez-Vargas's eligibility for defensive relief, the lower court concluded that Petitioner's failure to marry and actually file a relief application before the effective date of §1231(a)(5) was fatal to his retroactivity claim.

In so holding, the court cited with approval to *Lattab v. Ashcroft*, in which the First Circuit similarly held that §1231(a)(5) does not have impermissible effect when applied to a petitioner who did not marry and apply for adjustment of status until after April 1, 1997. 384 F.3d 8, 16 (1st Cir. 2004). Unlike here, however, the petitioner in *Lattab* was not immediately eligible to adjust status or defend against deportation before the change in law.[19] Thus, the court reasoned he had no "settled expectation that retroactivity analysis seeks to protect." *Lattab*, 384 F.3d at 16.

---

[18] These cases include: *Arevalo*, 344 F.3d at 6 (pre-IIRIRA adjustment application based on visa petition filed by petitioner's lawful permanent resident father); *Faiz-Mohammad*, 395 F.3d at 800 (pre-IIRIRA adjustment application based on visa petition filed by petitioner's U.S. citizen spouse); *Sarmiento-Cisneros*, 381 F.3d at 1279 (same).

[19] As Petitioner Lattab did not marry a U.S. citizen until 1999, he was not *prima facie* eligible for adjustment of status before April 1, 1997. In addition, although not addressed by the court, Lattab was one of a relatively small number of people who were not eligible for voluntary departure prior to April 1, 1997. Because he was previously granted voluntary departure in March 1996 and failed to timely depart the United States prior to the expiration of the voluntary departure period (June 27, 1996), 384 F.3d at 13, Lattab was statutorily ineligible for five years from receiving a second grant of voluntary departure. *See* 8 U.S.C. §1252b(e)(2)(A) referencing 8 U.S.C. §1252b(5) (repealed 1996).

Here, the court below considered only whether, before the change in law, Petitioner Fernandez-Vargas was immediately eligible for adjustment of status. *Fernandez-Vargas,* 394 F.3d at 890-91. Because his marriage to a U.S. citizen took place after the change in law, the court concluded that he had no "protectable expectation" of affirmative or defensive relief. *Id.*

Section 1231(a)(5)'s bar to relief has impermissible retroactive effect as applied to pre-April 1, 1997 reentrants as they could reasonably expect to be eligible for future relief: at a minimum, voluntary departure. Thus, there is no need for courts to consider whether a person has demonstrated actual pre-IIRIRA eligibility for affirmative or defensive relief. Because Petitioner Fernandez-Vargas was *prima facie* eligible for relief, §1231(a)(5) has impermissible retroactive effect as applied to him.[20]

Had the court below analyzed whether §1231(a)(5) has retroactive effect when applied to an individual who was eligible to apply for either affirmative or defensive relief before April 1, 1997, it may have reached the same result reached by the First Circuit in *Arevalo*, the Third Circuit in *Dinnall*, the Seventh Circuit in *Faiz-Mohammad*, the Eighth Circuit in *Alvarez-Portillo* and *Lopez-Flores*, and the Eleventh Circuit in *Sarmiento-Cisneros*, *i.e.*, that §1231(a)(5) has impermissible retroactive effect. *See Fernandez-Vargas,* 394

[20] Petitioner Fernandez-Vargas was *prima facie* eligible for voluntary departure, 8 U.S.C. §1254(e) (repealed 1996), and suspension of deportation, 8 U.S.C. §1254(a) (repealed 1996), prior to the change in law. However, the Court could decline to resolve whether §1231(a)(5) has impermissible retroactive effect when applied to someone who asserts pre-IIRIRA eligibility for relief because the lower court did not make findings on this issue. *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 436 n.8 (2004) (declining to resolve identity of custodian to an immigration habeas because the issue was not squarely before the Court).

F.3d at 891 n.11 (declining to express an opinion on the Eighth Circuit's rationale in *Alvarez-Portillo* and reiterating its understanding that petitioner was not eligible for relief until after April 1, 1997). *See also Lattab*, 384 F.3d at 17 (stating it was not deciding whether §1231(a)(5) has impermissible retroactive effect when applied to a person "who had a potential defense to deportation before IIRIRA took effect but had not yet applied for relief when IIRIRA eliminated that defense").[21]

For example, voluntary departure is a form of relief that is available to many individuals facing potential removal. Even prior to IIRIRA, individuals who were separated from their U.S. citizen or lawful permanent resident parents, spouses, siblings and/or children often had to wait ten years or more for an immigrant visa number to become available and/or for approval of a waiver of a prior deportation. Upon unlawful reentry, persons could seek voluntary departure if faced with potential deportation. Voluntary departure, if granted, would allow them to return to their country and continue waiting for an immigrant visa number to become available. Importantly, the voluntary departure would not trigger the five year bar to returning to the United States once a visa number became available (the bar only applied to deportation orders). 8 U.S.C. §1182(a)(6)(B) (repealed 1996).

[21] *But see Velasquez-Gabriel*, 263 F.3d at 109-10 (§1231(a)(5) does not have impermissible retroactive effect when applied to a petitioner who married a U.S. citizen before, but did not apply for adjustment of status until after, April 1, 1997). Petitioner Velasquez-Gabriel did not argue that he may have defended against deportation by applying for adjustment of status or voluntary departure before an immigration judge. In addition, *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292 (5th Cir. 2002), is inapposite because the petitioner did not assert any pre-IIRIRA eligibility for relief.

As the Second, Third and Eighth Circuits have recognized, whether the individual applied for affirmative relief from removal before the effective date of *IIRIRA* is not determinative of whether §1231(a)(5)'s bar to relief has retroactive effect. *Restrepo*, *Dinnall, Alvarez-Portillo,* and *Lopez-Flores, supra*. Moreover, in *St. Cyr*, the Court held that IIRIRA §304(b) would have harsh, unwarranted consequences if applied retroactively to individuals who would have been eligible for such relief at the time they pleaded guilty under the law then in effect. 533 U.S. at 326. The Court's holding was not limited to individuals who had already attempted to apply for §212(c) relief in pending deportation proceedings. Rather, *St. Cyr*'s holding extends to individuals placed in removal proceedings after IIRIRA's effective date. 533 U.S. at 326. *St. Cyr* specifically rejected the Attorney General's interpretation of the statute, which conditioned eligibility on whether the §212(c) application was adjudicated before or after the change in the law.[22]

The happenstance that individuals, like Petitioner, were not afforded the opportunity to apply for such relief in deportation proceedings before the law changed to their detriment does not alter the fact that they had a pre-existing right to apply – affirmatively or defensively – for

[22] In *Matter of Soriano*, the Board of Immigration Appeals (BIA) held that people who had filed their §212(c) applications before the effective date of the changes made by §440(d) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-207, 110 Stat. 3009 (Apr. 24, 1996) were still statutorily eligible for that relief. The Attorney General reversed, holding that AEDPA applied retroactively to bar any §212(c) applications that were pending on April 24, 1996. *Matter of Soriano*, Int. Dec. 3289 (BIA 1996) reversed by 21 I&N Dec. 516 (A.G. 1997). The *St. Cyr* Court declined to adopt either the BIA or the Attorney General's line-drawing. *St. Cyr,* 533 U.S. at 292.

such relief before April 1, 1997 and that amended §1231(a)(5) takes away this right. The relief at issue in *St. Cyr* (§212(c) relief) is predominantly a defensive relief application, yet the procedural posture in which it is sought did not influence the Court's conclusion that losing the ability to seek it has impermissible retroactive effect. This increased penalty demonstrates impermissible retroactive effect to pre-April 1, 1997 reentrants by attaching a new disability to past conduct in a way that offends fair notice and reasonable expectation. *Landgraf*, 511 U.S. at 269-70.

Lastly, IIRIRA's changes to the reinstatement statute may have been intended to deter illegal reentries, but that deterrent effect is not achieved by applying §1231(a)(5)'s bar to relief to pre-IIRIRA reentries. *Landgraf*, 511 U.S. at 264 n.35 ("The new damages provisions of §102 can be expected to give managers an added incentive to take preventive measures to ward off discriminatory conduct by subordinates *before* it occurs, but that purpose is not served by applying the regime to pre-enactment conduct.") (emphasis in the original).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court below.

Respectfully submitted,

TRINA A. REALMUTO,* AMERICAN IMMIGRATION LAW FOUNDATION

MATT ADAMS, NORTHWEST IMMIGRANTS' RIGHTS PROJECT

MARC VAN DER HOUT and STACY TOLCHIN, VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE, LLP

**Counsel of Record*

December 2005

APPENDIX 1: ORGANIZATIONAL STATEMENTS OF INTEREST

The **American Immigration Law Foundation** (AILF) is a non-profit organization established in 1987 to increase public understanding of immigration law and policy, to promote public service and professional excellence in the practice of immigration law, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and its administration. AILF's Legal Action Center has worked extensively in federal courts on behalf of noncitizens on the issues of reinstatement of removal and retroactivity of immigration laws.

The **American Immigration Lawyers Association** (AILA) is a national non-profit association of practicing immigration and nationality lawyers, law professors, and law students. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than 9,500 members organized in 35 chapters across the United States and in Canada. Many of AILA's members' clients will be directly affected by the decision in this case.

The **Capital Area Immigrants' Rights Coalition** (CAIR Coalition) is a membership organization of legal and social service providers serving the immigrant community in the Washington D.C. metropolitan area. CAIR Coalition strengthens and supports the work of its member organizations and serves as the primary source of representation for detained immigrants in the region. CAIR Coalition is committed to a country where immigration laws and policy are fair, humane, just and accord due

process. Many of its members represent people who will be directly affected by the decision in this case.

The **Immigrants' Rights Project of the American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. The Immigrants' Rights Project of the ACLU, which litigated *INS v. St. Cyr*, 533 U.S. 289 (2001), engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants.

The **Midwest Immigrant & Human Rights Center** (MIHRC), a program of Heartland Alliance for Human Needs and Human Rights, provides direct legal services to and advocates for impoverished immigrants, refugees, and asylum seekers. MIHRC, formerly known as Travelers & Immigrants Aid, has provided assistance to low-income immigrants since 1881. MIHRC has provided legal consultations to immigrants, including asylum seekers, who have had prior orders reinstated against them when seeking legal status, even when their reentry pre-dated April 1, 1997. MIHRC conducts legal rights presentations and individual legal consultations in various county jails throughout Illinois, Indiana, and Wisconsin, and litigates on behalf of immigrants in the immigration and federal courts, often in conjunction with local lawyers working pro bono publico. Through direct legal services and advocacy, MIHRC strives to advance local and international human rights and protections for immigrants, refugees and asylum seekers, including the right to be free from arbitrary or unreasonable detention.

The **National Immigration Law Center** (NILC) is a nonprofit national legal advocacy center dedicated to protecting and promoting the rights of low-income immigrants and their family members. NILC conducts trainings, produces legal publications, and provides technical assistance to nonprofit legal assistance organizations across the country concerning issues of immigration law, as well as issues of employment and public benefits law that affect low-income immigrants. NILC also conducts litigation and policy analysis concerning these issues. A major concern of the organization is to ensure the fairness and constitutionality of immigration law enforcement. NILC has a direct interest in the issues in this case.

The **National Immigration Project of the National Lawyers Guild** is a non-profit organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights. The National Immigration Project provides legal training to the bar and the bench on eligibility for relief from removal in immigration proceedings and is the author of four treatises on immigration law published by Thomson-West. The National Immigration Project also has participated as *amicus curiae* in significant immigration-related cases before the Supreme Court, including: *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *Jean v. Nelson*, 472 U.S. 846 (1985); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *INS v. Stevic*, 467 U.S. 407 (1984).

The **Northwest Immigrant Rights Project** (NWIRP) is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants who are applying for immigration and naturalization benefits and to persons

who are placed in removal proceedings. NWIRP has provided direct representation on behalf of several individuals before the federal courts challenging the application of the reinstatement of removal provision. NWIRP has a direct interest in the issues in this case.

The **Texas Lawyers' Committee for Civil Rights Under Law** is part of a national network of nonpartisan, non-profit offices founded in 1963 to provide legal services to victims of discrimination. The Texas Lawyers' Committee, founded in 1991, is committed to attaining and preserving civil rights for immigrants and refugees throughout Texas.