No. 04-1376

In the Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

SRI SRINIVASAN
Assistant to the Solicitor General

DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether 8 U.S.C. 1231(a)(5), which provides for the reinstatement of a previous order of removal against an alien who has illegally reentered the United States, applies to an alien whose illegal reentry predated the effective date of the provision.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 394 F.3d 881.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2005. The petition for a writ of certiorari was filed on April 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

1. This case involves the reinstatement of a previous order of deportation pursuant to 8 U.S.C. 1231(a)(5). The immigration laws have long provided for reinstatement of a previous order of deportation against an alien who illegally reenters the country after having been deported. As originally enacted in 1950, the reinstatement provision stated as follows:

> Should any alien subject to the provisions of subsection (c) unlawfully return to the United States after having been released for departure or deported pursuant to this section, the previous warrant of deportation against him shall be considered as reinstated from its original date of issuance.

Internal Security Act of 1950, § 23, 64 Stat. 1012 (8 U.S.C. 156(d) (1946 & Supp. V 1952)). Section 23 of the Internal Security Act, which enacted that provision, also made other revisions to the rules governing deportation of aliens. Congress's intent in those amendments, including the reinstatement provision, was "to provide more effective control over, and to facilitate the deportation of, deportable aliens." H.R. Conf. Rep. No. 3112, 81st Cong., 2d Sess. 59 (1950).

The reinstatement authority was limited to particular categories of aliens who had illegally reentered the country, including aliens whose deportation was based on their involvement in narcotics trafficking, crimes of moral turpitude, or subversive activity. See 64 Stat. 1012 (adding 8 U.S.C. 156(c)). Deportation of other illegal reentrants was conducted pursuant to the provisions governing deportation of aliens generally. See 8 U.S.C. 155 (1946 & Supp. V 1952).

When Congress comprehensively revised the immigration laws in the Immigration and Nationality Act of 1952 (INA), it reenacted the reinstatement provision in revised form. § 242(f), 66 Stat. 212 (8 U.S.C. 1252(f) (1994)). The reinstatement provision enacted by the INA, as codified, stated:

> 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 June 27, 1952 [the enactment date of the INA], 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.

8 U.S.C. 1252(f) (1994). The reinstatement authority under that provision remained confined to certain categories of illegal reentrants, including aliens who had committed specified crimes, had falsified documents, or had endangered national security. See *ibid.*; 8 U.S.C. 1252(e) (1994).

The reinstatement provision remained unchanged until 1996, when Congress again enacted comprehensive revisions to the immigration laws in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. IIRIRA repealed the former reinstatement provision and replaced it with a new Section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5). IIRIRA § 305(a)(3), 110 Stat. 3009-599. That provision, which remains unchanged, states:

> 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 chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. 1231(a)(5).

That provision differs from the previous reinstatement statute in three principal respects. First, the reinstatement authority now extends to all illegal reentrants. Second, the

reinstatement provision now makes explicit that an illegal reentrant's previous order of removal is not subject to reopening or review. Finally, and of principal relevance here, an illegal reentrant whose previous order of removal is reinstated now is "not eligible and may not apply for any relief." 8 U.S.C. 1231(a)(5).[1] Under the predecessor reinstatement provision, by contrast, an illegal reentrant retained eligibility to seek discretionary relief from deportation to the same extent as other deportable aliens. See Pet. App. 10a-11a.[2]

2. Petitioner, a citizen of Mexico, was deported from the United States in October 1981. Although petitioner had been deported on a number of previous occasions, he had illegally returned to the United States each time. In January 1982, petitioner again illegally reentered the United States without inspection. On April 1, 1997, the new reinstatement provision enacted by IIRIRA, 8 U.S.C. 1231(a)(5), became effective. Pet. App. 3a, 19a; see IIRIRA § 309(a), 110 Stat. 3009-625.

On March 30, 2001, nearly four years after IIRIRA's effective date, petitioner married a United States citizen. On May 30, 2001, petitioner filed an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212). Petitioner also filed an application to adjust his status to that of lawful permanent resi-

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[1] Section 1231(a)(5) bars only various forms of discretionary relief. The alien remains eligible for withholding of removal under 8 U.S.C. 1231(b)(3), and for withholding or deferral of removal under the Convention Against Torture. See 8 C.F.R. 208.31, 241.9(e).

[2] The administration of the current reinstatement provision also differs from that of the former provision in that, under the regulations implementing the current provision, an alien no longer has a right to a hearing before an immigration judge. See 8 C.F.R. 241.8(a). Petitioner's argument that Section 1231(a)(5) has a retroactive effect is limited to the provision's elimination of eligibility for discretionary relief from removal. Petitioner does not contend that the other changes brought about by Section 1231(a)(5) raise retroactivity concerns. See Pet. 19 n.15.

dent based on a relative visa petition filed on his behalf by his wife. See 8 U.S.C. 1255(i). On November 7, 2003, the Department of Homeland Security (DHS) issued a notice of its intent to reinstate petitioner's prior deportation order pursuant to 8 U.S.C. 1231(a)(5) on the basis that petitioner had illegally reentered the United States after having been removed. On November 17, 2003, DHS entered an order reinstating petitioner's prior deportation order pursuant to Section 1231(a)(5), and also issued a warrant for petitioner's arrest and removal. Pet. App. 3a-4a, 19a-28a.

3. Petitioner sought review in the court of appeals of the reinstatement of his prior deportation order. Petitioner argued that, because he had illegally reentered the country before IIRIRA's effective date, the application against him of the current reinstatement provision, 8 U.S.C. 1231(a)(5), was impermissibly retroactive. Petitioner contended that he instead was subject to the previous reinstatement provision, 8 U.S.C. 1252(f) (1994), under which he would have retained eligibility to apply for adjustment of status. The government argued that application of Section 1231(a)(5) to petitioner has no retroactive effect, and that the provision renders petitioner ineligible to apply for discretionary relief from removal, including adjustment of status. Pet. App. 4a-5a.

The court of appeals denied the petition for review, holding that Section 1231(a)(5)—including its bar against discretionary relief from removal—applies to aliens whose illegal reentry predated IIRIRA's effective date. Pet. App. 1a-18a. The court explained that, under the retroactivity framework established by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the threshold question is whether Congress prescribed the temporal reach of Section 1231(a)(5). See Pet. App. 11a-12a. The court held that Congress had not prescribed with requisite specificity whether Section

1231(a)(5) applies to aliens who had illegally reentered the country before the provision's effective date. *Id.* at 14a-16a.

The court of appeals therefore turned to the second step of the *Landgraf* inquiry, and addressed whether application of Section 1231(a)(5) to petitioner would have a "retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280; see Pet. App. 16a. The court emphasized that, while petitioner's illegal reentry predated IIRIRA's effective date, petitioner had neither married nor applied for adjustment of status by that date. *Id.* at 17a. In those circumstances, the court reasoned, petitioner "had no protectable expectation of being able to adjust his status." *Ibid.* The court explained that it "would be a step too far to hold that simply by re-entering the country, [petitioner] created a settled expectation that *if* he did marry a U.S. citizen, he *might then* be able to adjust his status and defend against removal." *Ibid.* Accordingly, the court held that application of Section 1231(a)(5) to petitioner had no retroactive effect, and that petitioner thus was ineligible to seek discretionary relief from removal.[3]

SUMMARY OF ARGUMENT

The central object of Section 1231(a)(5) is not to regulate the act of illegally reentering the country, but instead is to facilitate the *removal* of an alien who is unlawfully present as the result of an illegal reentry. Because the provision is addressed to the Attorney General (now the Secretary of Home-

[3] Although petitioner was removed to Mexico while the case was pending in the court of appeals (Pet. 7), his removal does not moot the proceedings. If petitioner were to prevail in this Court, he would be permitted to seek adjustment of status, and any grant of adjustment would give him lawful status in the United States.

land Security, see 6 U.S.C. 251(2) (Supp. II 2002)) and the process for removing the alien—as opposed to penalizing the alien's act of illegal reentry—its application in post-IIRIRA reinstatement proceedings is prospective in nature. *Landgraf*'s two-step inquiry confirms that Section 1231(a)(5) governs the removal of an illegal reentrant regardless of whether his unlawful reentry occurred before IIRIRA.

A. The threshold question under *Landgraf* is whether Congress has prescribed Section 1231(a)(5)'s temporal reach. Section 1231(a)(5) provides that, "[i]f the Attorney General finds that an alien has reentered the United States illegally after having been removed," the "prior order of removal is reinstated" and the alien "shall be removed under the prior order." 8 U.S.C. 1231(a)(5). The statute therefore is triggered by the Secretary's "finding" that an alien is an illegal reentrant, not by the aliens's act of illegal reentry. That finding is the relevant event for judging the statute's retroactivity. And because the provision applies upon a finding that an alien "*has reentered* the United States illegally," with no qualification based on when that past reentry occurred, there is no basis for concluding that the provision's applicability turns on whether the reentry was before or after IIRIRA.

Section 1231(a)(5) contrasts with other IIRIRA provisions addressing illegal entry itself, as to which Congress made express specification that IIRIRA's amendments apply solely to post-IIRIRA entries. Congress made such a specification both with respect to IIRIRA's expansion of the criminal prohibition on illegal reentry and with respect to IIRIRA's enactment of civil monetary penalties for illegal entry. 8 U.S.C. 1325(b), 1326(a). The disparate treatment reflects that, while those provisions turn on the conduct of illegal entry, Section 1231(a)(5) governs the process of removal. Section 1231(a)(5) imposes no new consequences on the conduct of illegal reentry, but simply enforces the alien's prior order of removal.

Section 1231(a)(5) therefore applies to all aliens found after IIRIRA's effective date to be an illegal reentrant, regardless of when the illegal reentry occurred.

Congress reinforced that intention in certain post-IIRIRA enactments affording specific categories of aliens an opportunity to seek adjustment of status. The only aliens eligible to seek adjustment under those statutes were required to be present in the United States well before IIRIRA's effective date. Congress nonetheless specifically exempted those aliens from the operation of Section 1231(a)(5). That step would have had no effect if, as petitioner claims, Section 1231(a)(5) applied only to aliens who entered illegally after IIRIRA's effective date.

There is no merit to petitioner's reliance on a negative inference based on a clause in the predecessor reinstatement provision stating that it applied regardless of whether an illegal reentrant's previous *removal* had been "before or after" the INA's enactment date of June 27, 1952. 8 U.S.C. 1252(f) (1994). That "before and after" clause addressed the date of an illegal reentrant's previous removal from the country, not the date of his illegal reentry. Moreover, the "before and after" clause by its express terms related to the date of the *INA*'s enactment in 1952. Congress's failure to reenact that language in Section 1231(a)(5) thus in no way suggests that the applicability of that provision might depend on the date of an alien's illegal *reentry*, let alone the date of reentry in relation to *IIRIRA*'s effective date. Rather, Congress presumably declined to carry forward the language simply because it was no longer necessary in 1996 to address the reinstatement provision's applicability in relation to the date of the INA's original enactment in 1952.

Every indication therefore is that Congress intended Section 1231(a)(5) to govern removal of an illegal reentrant regardless of when the illegal reentry occurred. Even if Section

1231(a)(5) does not explicitly address the temporal issue with sufficient specificity to satisfy *Landgraf*'s requirement of an express command, under the approach applied in *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696-697 (2004), the terms and structure of Section 1231(a)(5) and of the related, post-IIRIRA statutes are sufficiently clear to establish that Section 1231(a)(5) applies to aliens whose illegal reentry predated IIRIRA's effective date.

B. Application of Section 1231(a)(5) to aliens who illegally reentered the country before IIRIRA is not retroactive. Petitioner's argument for a retroactive effect begins with the erroneous premise that Section 1231(a)(5) regulates the conduct of illegal reentry. Section 1231(a)(5) regulates the *removal* of an alien through reinstatement of his prior removal order, not the alien's act of illegal reentry. That understanding follows from the terms of Section 1231(a)(5), and also from the statutory context. IIRIRA enacted Section 1231(a)(5) as part of a new section of the INA that addresses the execution of orders of removal, including, for instance, the countries to which an alien may be removed, the detention of the alien pending removal, and the transportation of the alien to the removal destination. Because Section 1231(a)(5) likewise regulates the process of removal, its application in post-IIRIRA reinstatement proceedings is inherently prospective. See *Altmann*, 541 U.S. at 696-697.

In addition, application of Section 1231(a)(5) to aliens who illegally reentered the country before IIRIRA involves no interference with "settled expectations" or "reasonable reliance" interests. *Landgraf*, 511 U.S. at 270. An alien who illegally reentered the country could have no legitimate expectation of being permitted to remain. Section 1231(a)(5), by prescribing that an illegal reentrant once again be removed pursuant to his prior order of removal, merely undoes the intervening act of illegal reentry and restores the state of

affairs that prevailed beforehand, in which the alien had been removed from the country under the prior order and had no lawful basis for reentering.

There is no merit to petitioner's contention that applying Section 1231(a)(5) to an alien whose reentry predated IIRIRA would attach new legal consequences to the completed act of illegal reentry itself. An alien who committed the crime of illegal reentry could make no persuasive claim that he might have declined to do so had he been ineligible to seek discretionary relief from removal. Moreover, aliens who illegally reentered before IIRIRA could not assert that the reentry was made in reasonable reliance on the specific forms of relief invoked by petitioner. Adjustment of status, for instance, was categorically unavailable to illegal entrants at the time of petitioner's illegal reentry (and until shortly before IIRIRA's enactment). And cancellation of removal requires accruing ten years of continuous presence in the country, and therefore was unavailable at the time of an illegal reentry.

INS v. *St. Cyr*, 533 U.S. 289 (2001), does not support petitioner's retroactivity claim. *St. Cyr* held that IIRIRA's elimination of discretionary relief from removal under Section 212(c) of the INA for permanent resident aliens convicted of an aggravated felony produced a retroactive effect in the case of aliens who had pleaded guilty to an aggravated felony before IIRIRA's enactment. In this case, there is no plea of guilty or comparable transaction that independently gives rise to legitimate reliance interests in the availability of discretionary relief. Moreover, St. Cyr, unlike petitioner, was a lawful permanent resident with correspondingly enhanced expectations of remaining in the country.

Finally, there is no merit to petitioner's claim of a retroactive effect based, not on his "completed" act of illegal reentry, but instead on events that transpired *after* his illegal reentry—including, for instance, his accumulating sufficient years

of physical presence to gain eligibility for cancellation of removal, his fathering of a citizen-son, and his (post-IIRIRA) marriage to a citizen-spouse. There is no basis in this Court's decisions or in the principles of fairness underlying retroactivity law for recognizing reasonable reliance interests based on events that transpired only by virtue of petitioner's ability to avoid detection and prolong his illegal presence in the country.

ARGUMENT

SECTION 1231(a)(5) GOVERNS THE REMOVAL OF AN ILLEGAL REENTRANT UNDER HIS PRIOR ORDER OF REMOVAL REGARDLESS OF WHEN THE ILLEGAL REENTRY OCCURRED

Section 1231(a)(5) provides for removal of an illegal reentrant through reinstatement of his prior order of removal. The statute does not regulate the primary conduct of illegal reentry, but rather governs the alien's removal. Because Section 1231(a)(5) turns on an alien's having the status of an illegal reentrant, its application to aliens who had that status when IIRIRA took effect is prospective in nature.

That is particularly the case because an alien who entered the country illegally and maintained an unlawful presence could have no legitimate expectation that he could remain. Indeed, because Section 1231(a)(5) deals with illegal *re*-entrants, it only assumes significance in the case of an alien who has already been ordered removed but nonetheless has unlawfully returned. By providing for reinstatement of the prior order and removal of the alien under that order, Section 1231(a)(5) works no interference with legitimate expectations or reasonable reliance interests. Rather, it simply undoes the intervening act of illegal reentry and restores the status quo ante. Accordingly, as is confirmed by the two-step inquiry set forth in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994),

Section 1231(a)(5) governs the removal of an illegal reentrant under his prior order of removal without regard to when his illegal reentry may have occurred.

A. The Terms Of Section 1231(a)(5) And Related Statutory Provisions Establish That Section 1231(a)(5) Applies To Aliens Whose Illegal Reentry Predated IIRIRA's Effective Date

The threshold question under *Landgraf* is whether Congress prescribed Section 1231(a)(5)'s temporal reach. See *Martin* v. *Hadix*, 527 U.S. 343, 352 (1999); *Landgraf*, 511 U.S. at 280. If Congress has done so, there is no need to reach step two of the *Landgraf* framework concerning whether application of Section 1231(a)(5) would be retroactive. *Ibid.*

Petitioner points to nothing that exempts aliens who unlawfully reentered the United States prior to IIRIRA from the categorical terms of Section 1231(a)(5). Petitioner nonetheless argues that Section 1231(a)(5) reveals a congressional intent that the provision have no application to an alien whose illegal reentry predated IIRIRA's effective date. Pet. Br. 16-28. That argument lacks merit, and it has correctly been rejected by the majority of courts of appeals to have considered it. See Pet. App. 12a-13a. Indeed, the clear import of the terms of Section 1231(a)(5) and related statutory provisions is that Section 1231(a)(5) governs the process of removing illegal reentrants regardless of when the reentry occurred.

1. Section 1231(a)(5) and related statutes reflect a congressional intent that the provision applies to aliens whose illegal reentry predated IIRIRA

a. Section 1231(a)(5) provides for reinstatement of a prior removal order 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" 8 U.S.C. 1231(a)(5). Nothing in those terms suggests

an intent to preclude the provision's application in the case of an alien whose illegal reentry predated the statute's effective date. The triggering event under the statute is not an illegal reentry, but a "finding" by the Attorney General (now, the Secretary of Homeland Security, see 6 U.S.C. 251(2) (Supp. II 2002), that an alien "has reentered the United States illegally" after previously having been removed. *Ibid.* In the event of such a finding, "the prior order of removal is reinstated" and the alien "shall be removed under the prior order." *Ibid.* The finding is the relevant event for judging the statute's retroactivity, and the statute has no impermissible retroactive effect. Cf. *Landgraf*, 511 U.S. at 290-294 (Scalia, J., concurring in the judgment).

To the contrary, the language Congress used demonstrates its intention that Section 1231(a)(5) governs the procedure for the *present*, post-IIRIRA removal, through reinstatement, of an alien who reentered illegally at some point in the past and remains in the United States in unlawful status at the time of the Secretary's finding. And because the provision governs reinstatement of a removal order against an alien who "has reentered" the country illegally, without any qualification based on when the past reentry occurred, there is no basis for exempting from the statute's reach an alien who "had reentered" before IIRIRA's effective date.

That reading is reinforced by Section 1231(a)(5)'s prescription that, upon reinstatement of the prior order of removal, the "alien shall be removed under the prior order *at any time* after the reentry." 8 U.S.C. 1231(a)(5) (emphasis added). If Congress had intended to condition the removal authority on when the illegal reentry occurred, Congress would not have afforded unqualified authority to effect removal "at any time after the reentry," without specifying the timing of the reentry itself.

b. A comparison of Section 1231(a)(5)'s terms with other IIRIRA provisions addressed to the subject of illegal entry—*i.e.*, to the illegal reentry itself—reinforces the conclusion that Section 1231(a)(5) encompasses unlawful reentrants regardless of whether their illegal reentry occurred before IIRIRA. IIRIRA amended the longstanding criminal bar against illegal reentry following removal, codified at 8 U.S.C. 1326. See IIRIRA § 324, 110 Stat. 3009-629. That provision, as amended by IIRIRA, makes it a crime for any alien who "has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding," to "enter[], attempt[] to enter, or [be] found in, the United States" without authorization or proof that no authorization is required. 8 U.S.C. 1326(a). IIRIRA expanded the scope of the offense to encompass illegal reentry following voluntary departure, whereas it previously had been limited to illegal reentry following deportation or exclusion. See IIRIRA § 324(a), 110 Stat. 3009-629. Significantly, Congress prescribed that IIRIRA's amendments to the criminal prohibition "shall apply * * * only with respect to entries (and attempted entries) occurring on or after" IIRIRA's enactment date. IIRIRA § 324(c), 110 Stat. 3009-629. The absence of any comparable restriction on the temporal scope of Section 1231(a)(5) indicates that no such restriction was intended.[4]

This difference in temporal scope reflects the difference in what Congress has chosen to regulate in the two provisions. Section 1326 regulates the *conduct* of illegal reentry, and is triggered when the alien "enters" or "attempts to enter" the

[4] As petitioner observes (Pet. Br. 35), the Ex Post Facto Clause would independently dictate that IIRIRA's expansion of the criminal prohibition against illegal reentry could apply only to post-enactment reentries. That Congress nonetheless specified that limitation in IIRIRA only underscores the significance of the lack of a parallel specification for Section 1231(a)(5).

country illegally. Section 1231(a)(5), by contrast, governs the Secretary's process of removing aliens who have the *status* of illegal reentrants, and is triggered when the Secretary "finds" that an alien present in the United States is one who "has reentered" illegally after having been removed. Cf. *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). Furthermore, Section 1326 imposes punishment on the alien for engaging in the conduct of unlawful entry, while Section 1231(a)(5) terminates the alien's unlawful status by removing him immediately from the United States.

Because Section 1326, unlike Section 1231(a)(5), punishes the primary conduct of illegal reentry, Congress prescribed that IIRIRA's changes to Section 1326 would apply only to acts of illegal reentry that occur after IIRIRA's enactment. But because Section 1231(a)(5) governs the Secretary's process of removing aliens he finds to have reentered illegally and simply provides for the Secretary to undo the illegal reentry and restore the status quo ante by sending the alien outside the United States, Congress had no occasion to limit its application to aliens whose illegal reentry occurred after IIRIRA was enacted. While an alien whose prior order of removal is reinstated under Section 1231(a)(5) is not eligible for any discretionary relief, that simply reflects the fact that Section 1231(a)(5) operates to enforce the prior order of removal, that the prior order is already final and thus precludes such relief, and that if the alien had remained outside the United States, where he previously had been sent, there would be no basis for him to request immigration benefits (*e.g.*, adjustment of status, cancellation of removal, or voluntary departure) that are available to certain aliens in the United States.

IIRIRA's new provisions imposing civil monetary penalties on the act of illegal entry, which parallel the amendments

to the criminal prohibition against illegal reentry, also stand in marked contrast to Section 1231(a)(5). IIRIRA amended the INA by providing for the imposition of a civil monetary penalty on "[a]ny alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers." IIRIRA § 105(a)(2), 110 Stat. 3009-556 (codified at 8 U.S.C. 1325(b)). That provision, like the criminal prohibition on illegal reentry—but unlike Section 1231(a)(5)—imposes sanctions for engaging in the conduct of illegal entry. Accordingly, as with IIRIRA's amendments to the criminal prohibition, but in significant contrast to Section 1231(a)(5), Congress specified that the imposition of civil penalties on illegal entry "shall apply only to illegal entries or attempts to enter occurring on or after" IIRIRA's effective date. IIRIRA § 105(b), 110 Stat. 3009-556. The civil penalty provision thus reinforces the conclusion that Section 1231(a)(5), which has the distinct purpose of terminating the alien's continuing unlawful presence, does not have the temporal restriction that petitioner urges.[5]

c. 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. In 1997, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Tit. II, § 202, 111 Stat. 2193 (8 U.S.C. 1255 note), and in 1998, Congress enacted the Hai-

[5] Because it imposes sanctions for past conduct, that provision, like the criminal prohibition in Section 1326, presumably would apply only to future entries even in the absence of an express specification to that effect. Congress's express specification reinforces the general notion that, when Congress addresses primary conduct as such, it generally does not impose new consequences on past acts, but when it addresses procedures for removing aliens, it intends to alter those proceedings prospectively in the sense of modifying all future proceedings without regard to when the underlying primary conduct occurred.

tian Refugee Immigration Fairness Act (HRIFA), Pub. L. No. 105-277, Div. A, § 101(h) [Tit. IX, § 902], 112 Stat. 2681-538 (8 U.S.C. 1255 note). Those enactments afforded certain aliens from Nicaragua, Cuba, and Haiti a limited window of opportunity to seek adjustment of status. Critically for present purposes, to be eligible to seek adjustment under those statutes, the aliens must have maintained continuous presence in the United States beginning not later than December 1, 1995, in the case of NACARA, and December 31, 1995, in the case of HRIFA. See NACARA § 202(b)(1), 111 Stat. 2194; HRIFA § 902(b)(1), 112 Stat. 2681-538.

NACARA and HRIFA alleviated various restrictions on seeking relief that otherwise would have applied. Of particular relevance to this case, Congress specifically provided that aliens covered by NACARA and HRIFA who had illegally reentered the United States following deportation would be exempt from the operation of Section 1231(a)(5). Pub. L. No. 106-554, § 1(a)(4) [Div. B, Tit. XV, § 1505(a)(1) and (b)(1)], 114 Stat. 2763A-326 (amending NACARA and HRIFA); see 8 C.F.R. 241.8(d); H.R. Rep. No. 1048, 106th Cong., 2d Sess. 231 (2001) ("Nicaraguan[s], Cubans, and Haitians eligible for adjustment of status * * * under NACARA and HRIFA may receive this relief despite having been previously removed under an order of removal"). Because relief under NACARA and HRIFA is restricted to aliens who were present in the country as of December 1, 1995, and December 31, 1995, respectively—well before IIRIRA's effective date of April 1, 1997—there would have been no need for Congress to exempt aliens covered by those statutes from Section 1231(a)(5) under petitioner's reading of the provision as applying solely to illegal reentries after April 1, 1997.

The same conclusion follows from Congress's treatment of Section 1231(a)(5) in connection with the Legal Immigration Family Equity Act, Pub. L. No. 106-553, § 1(a)(2) [Tit. XI],

114 Stat. 2762A-142. That Act permits certain aliens covered by the litigation addressed in *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993), to seek adjustment of status. To be eligible for adjustment, an alien must have entered the United States before January 1, 1982. § 1104(c)(2)(B)(i), 114 Stat. 2762A-146. Although all eligible aliens therefore had entered the United States more than 14 years before IIRIRA's effective date, Congress specifically provided that any covered alien whose presence was the result of an illegal reentry was exempt from the operation of Section 1231(a)(5). See LIFE Act Amendments of 2000, Pub. L. No. 106-554, § 1(a)(4) [Div. B, Tit. XV, § 1503(c)], 114 Stat. 2763A-325. That action again can be explained only if Section 1231(a)(5) applies to aliens who had illegally reentered the country before the enactment of IIRIRA.

2. Petitioner errs in relying on an asserted negative inference gleaned from the absence in Section 1231(a)(5) of "before or after" language contained in the predecessor reinstatement provision

In the face of the many affirmative indications of Congress's intent that Section 1231(a)(5) apply to aliens whose illegal reentry predated IIRIRA, petitioner chiefly relies (Pet. Br. 16-24) on a negative inference he draws from a comparison of Section 1231(a)(5) with the predecessor provision, 8 U.S.C. 1252(f) (1994). Petitioner emphasizes that the former provision allowed for reinstatement of a previous deportation order upon a finding that an alien "has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, *whether before or after June 27, 1952* [the date of the INA's enactment], on any ground described in any of the paragraphs enumerated in subsection (e)." 8 U.S.C. 1252(f) (1994) (emphasis added). According to petitioner, Congress, by failing to reen-

act the "before or after" clause in Section 1231(a)(5), signaled by negative implication that the provision does not reach aliens who had illegally reentered "before" IIRIRA's effective date. That argument is fundamentally flawed.

a. Petitioner's argument for a negative inference rests on the premise that the phrase, "before or after June 27, 1952," in the former reinstatement provision concerned the date of an alien's illegal *reentry*. See Pet. Br. 17. That premise is incorrect. The "before or after" clause pertained to the date of the alien's previous *deportation* or *departure* from the country, not the date of the alien's illegal reentry.

That understanding is compelled by the surrounding statutory text. The "before or after" clause immediately followed a reference to the alien's "having previously departed or been deported pursuant to an order of deportation," and the clause immediately preceded a description of the ground for the alien's previous deportation or departure, *i.e.*, "on any ground described in any of the paragraphs enumerated in subsection (e) of this section." 8 U.S.C. 1252(f) (1994). Because the "before or after" clause was adjoined on both sides by language addressing the alien's previous deportation or departure, the clause plainly was addressed to the date of that deportation or departure. If Congress instead had intended for the clause to address the date of the alien's illegal reentry, it would have inserted the clause after the phrase, "has unlawfully reentered the United States," 8 U.S.C. 1252(f) (1994), rather than in the midst of language discussing the previous deportation or departure.

The origins of the "before or after" clause erase any doubt concerning its proper interpretation. The original reinstatement provision enacted in 1950 contained no "before or after" language. See Internal Security Act of 1950, § 23, 64 Stat. 1012 (8 U.S.C. 156(d) (1946 & Supp. V 1952) (quoted at p. 2, *supra*). In regulations implementing that provision, the Im-

migration and Naturalization Service (INS) confined the reinstatement authority to illegal reentrants whose previous deportation or departure postdated the statute's effective date. The regulations thus provided for reinstatement when an alien "unlawfully returns to the United States after having been released for departure under an order of deportation *on or after September 23, 1950*, or after having been deported * * * *on or after that date*." 8 C.F.R. 152.5 (1949 & Supp. I 1951) (emphasis added). When Congress enacted the INA soon thereafter in 1952, the addition of the "before or after" clause directly responded to the INS's interpretation, and clarified that the reinstatement authority did not vary based on whether the alien's previous deportation or departure came before or after the INA's enactment.

Because the "before or after" clause 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 Section 1231(a)(5) in no way suggests that Congress sought to draw a distinction based on the timing of illegal reentry. Indeed, that language suggests that neither the 1996 Congress nor the 1952 Congress viewed the date of illegal reentry as critical to the provision's operation. Rather, the provision directly regulates the Secretary's determination of the prospective consequences of the prior order of removal.

Petitioner's negative-inference argument also rests on an additional misconception: that the "before or after" clause, had it been carried forward in Section 1231(a)(5), would have been tied to *IIRIRA*'s effective date. Instead, the "before or after" clause by its terms was pinned to the date of the *INA*'s enactment. See INA § 242(f), 66 Stat. 212 (1952) ("whether before or after the date of enactment *of this Act*," *i.e.*, the INA) (emphasis added); 8 U.S.C. 1252(f) (1994) (substituting actual date of INA's enactment—"whether before or after June 27, 1952"—in codified version); Pet. Br. 17-18 n.9.

As a result, if Congress had carried forward the "before or after" clause as it read in the INA, that would have said nothing about the applicability of Section 1231(a)(5) vis-a-vis the enactment of *IIRIRA*. Instead, the clause would have continued to specify that the reinstatement provision applies regardless of whether the date of the alien's previous deportation or departure was before or after the *INA*'s enactment. Congress thus may have elected not to reenact the "before or after" clause for the simple reason that, by 1996, when IIRIRA was enacted, 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." 8 U.S.C. 1252(f) (1994). Settled practice by then had long made the date of the prior deportation irrelevant, and aliens who had been deported at least 44 years earlier would not in any event have been a central concern of Congress.[6]

b. Petitioner also raises essentially the same negative-inference argument in connection with the legislative history of IIRIRA. Pet. Br. 21-24. The House bill that led to IIRIRA called for repeal of the former reinstatement provision and enactment of a new one. The proposed new provision, which

[6] Petitioner does not suggest that his negative-inference argument could have merit even if, as we demonstrate in the text, the "before or after" clause referred to the date of the previous deportation or departure rather than the date of illegal reentry. Any such contention would require accepting three layers of negative inference, each of which is dubious in its own right: (i) by failing to reenact a "before or after" clause, Congress manifested an intent concerning the temporal reach of Section 1231(a)(5); (ii) by failing to reenact language that concerned the date of an alien's previous deportation or departure, Congress manifested an intent about the distinct question of the date of an alien's illegal reentry; and (iii) by failing to reenact a clause that referred in terms to the date of the INA's enactment, Congress manifested an intent tied to the effective date of IIRIRA. There is no basis for accepting any of those contentions, let alone all three.

became Section 1231(a)(5), *inter alia*, expanded the reinstatement authority to encompass all illegal reentrants and also shed the "before or after" clause. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I, at 26 (1996). The Senate bill, while generally proposing wholesale changes to the immigration laws, would have made no change in the reinstatement provision in former Section 242(f) of the INA (8 U.S.C. 242(f) (1994)), including its "before or after" reference to the date of the *INA*'s enactment. See S. Rep. No. 249, 104th Cong., 2d Sess. 118 (1996). Petitioner infers from Congress's enactment of the House version that Congress reached a compromise under which it accepted the House's expansion of the reinstatement provision to encompass all illegal reentrants, but rejected the proposition that the provision should apply to aliens who illegally reentered prior to IIRIRA.

Petitioner's argument rests on a clear misunderstanding of the legislative history. Contrary to petitioner's suggestion, the Senate bill did not contain a new reinstatement provision at all, much less one that would have expressly applied to aliens whose prior deportation (or subsequent reentry) occurred "before or after" the new bill's effective date. As explained above, the Senate bill would have left former Section 242(f) unamended. See S. Rep. No. 249, *supra*, at 118.[7] Congress's enactment of the reinstatement provision in the House bill therefore does not reflect either a compromise with some different Senate version of a new reinstatement provision, or a rejection of a Senate proposal to enact a new reinstatement

[7] Page 118 of the Senate Report, which petitioner cites (Pet. Br. 21), is in a portion of the Report that shows how the INA would have been affected by the Senate bill. Section 242(f) of the INA appears in Roman type, indicating it was to be unaffected (see S. Rep. No. 249, *supra*, at 70), except for the insertion (in italics) of a subsection "(1)" preceding it. The Sixth Circuit, in *Bejjani* v. *INS*, 271 F.3d 670, 685 (2001), misread the Senate Report in a manner similar to petitioner.

provision that would have expressly applied to aliens whose prior deportations (or subsequent reentries) occurred "before" as well as "after" the effective date of IIRIRA. The legislative history reveals nothing except what is evident from the enactment of IIRIRA itself: Congress chose to enact the new Section 241(a)(5) of the INA—codified at 8 U.S.C. 1231(a)(5)—rather than to leave former Section 242(f) of the INA unamended. For the reasons explained, Congress's failure to reenact the "before or after" clause says nothing about whether Section 1231(a)(5)'s applicability turns on the timing of an illegal reentry, especially the timing of reentry in relation to IIRIRA's effective date.

This Court, moreover, rejected a similar argument in *Martin* v. *Hadix*, 527 U.S. 343 (1999), that had far more force than petitioner's in this case. *Martin* concerned Congress's enactment of limitations on the hourly rate for attorney's fee awards in the Prison Litigation Reform Act of 1996 (PLRA), 42 U.S.C. 1997e(d)(3). The Court rejected an argument that, as long as a particular suit had been filed before the PLRA, the fee limitation would have no effect on fee recoveries in the case even for post-PLRA work. That argument was based on the fact that, during consideration of the bill in Congress, the provisions imposing the fee limitation were moved from one section of the PLRA to another, where the former section contained language applying its provisions to pending cases but the latter section did not. See 527 U.S. at 355-356. The Court considered that argument to "overstate[] the inferences that can be drawn from an ambiguous act of legislative drafting," explaining that the fee provisions may have been moved "for a variety of other reasons." *Id.* at 357. That conclusion is even more warranted in this case, because, whatever may have been Congress's reasons for failing to reenact the "before or after" clause in former Section 242(f) of the INA, a correct understanding of the clause makes clear that Con-

gress's failure to reenact it bears no relation to concerns about the timing of an alien's illegal reentry—and especially no such relation vis-a-vis the effective date of *IIRIRA*.

c. In light of the fatal shortcomings of petitioner's negative-inference argument, his heavy reliance (Br. 19-20, 32-33) on *Lindh* v. *Murphy*, 521 U.S. 320 (1997), is misplaced. *Lindh* addressed whether certain amendments governing habeas corpus review enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, were applicable to cases pending when the amendments were enacted. The Court drew a negative inference from an AEDPA provision that addressed precisely that subject and that specified that a separate group of AEDPA amendments would apply to pending cases. *Lindh*, 521 U.S. at 326-328; *Martin*, 527 U.S. at 356. The Court concluded that "[n]othing * * * but a different intent" could "explain[] the different treatment." *Lindh*, 521 U.S. at 329.

Here, unlike in *Lindh*, the "before or after" clause on which petitioner rests his negative-inference argument pertained to a subject that was entirely distinct from the date of an alien's illegal reentry, and also referred to a specific date (the date of the INA's enactment) that was entirely distinct from the date that IIRIRA became effective. See *Martin*, 527 U.S. at 356 ("Because [the provisions] address wholly distinct subject matters, the same negative inference" as in *Lindh* "does not arise."). The reasoning in *Lindh*, in fact, weighs *against* petitioner here in light of IIRIRA's specification that its amendments to the criminal prohibition against illegal reentry and its new civil penalties for illegal entry apply only to post-IIRIRA entries, and the absence of any comparable specification with respect to Section 1231(a)(5). See pp. 14-16, *supra*.

3. Petitioner's remaining arguments under step one of the Landgraf *inquiry are without merit*

a. Petitioner contends (Br. 24-26) that any doubt about Congress's intent concerning Section 1231(a)(5)'s temporal reach should be resolved in his favor in light of the presumption against retroactivity. That reasoning fundamentally misconceives the nature of the presumption.

It is axiomatic that *Landgraf*'s presumption against retroactivity could be triggered only if the statute's application would be retroactive within the meaning of *Landgraf*, *i.e.*, would produce a retroactive effect. See, *e.g.*, *Martin*, 527 U.S. at 352.[8] A determination as to retroactive effect is the office of step two of the *Landgraf* test, and "comes *at the end* of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270 (emphasis added). Petitioner, however, would invoke the presumption against retroactivity at step one of the *Landgraf* analysis as a reason to conclude that Congress meant for Section 1231(a)(5) to be inapplicable to pre-IIRIRA reentrants, without any assessment of whether the provision's application actually would be retroactive.

Petitioner effectively seeks to transform the presumption against retroactivity into a presumption against *alleged* retroactivity. That approach is incompatible with this Court's decisions. As the Court has explained, "*if* the [statute] has a ret-

[8] Alternatively, as we explain in Part B.1, *infra*, the inquiry into retroactivity can be limited solely to temporal considerations, such that, absent a contrary intent, the statute has only prospective application based on the relevant event for retroactivity purposes—here, the Secretary's finding that the alien satisfies the statutory prerequisites for reinstatement of his prior removal order. See generally *Landgraf*, 511 U.S. at 290-294 (Scalia, J., concurring in the judgment).

roactive effect, *then* we presume it will not apply to the conduct * * * which occurred prior to its effective date." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 946 (1997) (emphasis added); accord *Martin*, 527 U.S. at 352; *Landgraf*, 511 U.S. at 280. Consequently, there is no basis for petitioner to benefit from the presumption without a predicate finding of retroactive effect.

b. Petitioner contends (Br. 27-28) that ambiguity concerning Section 1231(a)(5)'s temporal reach should be construed in favor of the alien, and (Br. 28-33) that the Court should adopt his interpretation of Section 1231(a)(5) even absent any unambiguous indication that Congress desired that result. Those arguments are unavailing. Petitioner's arguments do not approach demonstrating that Congress intended to exempt aliens whose illegal reentry predated IIRIRA from the application of Section 1231(a)(5). All relevant statutory provisions, in fact, point to the contrary conclusion.

Moreover, the practical implications of petitioner's interpretation of Section 1231(a)(5) weigh strongly against its adoption. Section 1231(a)(5) not only prescribes that an illegal reentrant is ineligible for discretionary relief, but it also expands the reinstatement authority to encompass all illegal reentrants regardless of the basis of their prior removal orders, and specifies that an illegal reentrant's prior removal order is not subject to challenge. See pp. 3-4, *supra*. According to petitioner's argument (see Pet. 19 n.15), *none* of those features could be applied to an illegal reentrant who was in the United States as of IIRIRA's effective date.

Petitioner's position thus would attribute to Congress the intention to insulate from those provisions any illegal reentrant who happened to have reentered the United States illegally before IIRIRA's effective date and managed to evade detection until after that date. The result under petitioner's view is that, when Section 1231(a)(5) took effect, the bar to

challenging the prior removal order, the expanded coverage to encompass all illegal reentrants, and the ineligibility for relief from removal, had *no* application to *any* existing illegal reentrant. Indeed, as long as an illegal reentrant had managed to reenter illegally and evade detection until IIRIRA took effect, petitioner's reading would grant the alien a permanent immunity from the operation of Section 1231(a)(5) and a permanent entitlement to treatment under the displaced predecessor provision, even if the alien's unlawful presence were first discovered years or even decades after IIRIRA's effective date. There is no basis for supposing that the Congress that enacted IIRIRA—which was intent on expediting the removal of aliens who were illegally present in the United States, see H.R. Rep. No. 469, *supra*, at 107-108—could have intended that anomalous result.

4. The Court can decide that Section 1231(a)(5) applies to petitioner based on the terms of that section and related statutory provisions

As explained above, the terms of Section 1231(a)(5), the contrasting language of other IIRIRA provisions addressing illegal entry, and Congress's express treatment of Section 1231(a)(5) in post-IIRIRA statutes, all demonstrate Congress's intent that Section 1231(a)(5) governs reinstatement of an illegal reentrant's prior removal order regardless of when the unlawful reentry occurred. As this Court recently concluded, even if Congress does not expressly address the temporal question with "sufficient [specificity] to satisfy *Landgraf*'s 'express command' requirement," the statute's import and context nonetheless might be sufficiently clear in certain circumstances to resolve the temporal issue. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 697 (2004) (quoting *Landgraf*, 511 U.S. at 280). That is the case here.

As explained in Point B.1, *infra*, this Court held in *Altmann* that the *Landgraf* framework, including its requirement of an express statement of a statute's applicability to pre-enactment conduct, was not fully applicable to the Foreign Sovereign Immunities Act of 1976 (FSIA) because the FSIA was intended to regulate, not past primary conduct, but rather the present immunity of a foreign sovereign in United States courts. Here, too, Section 1231(a)(5) does not regulate past primary conduct such as illegal reentry, but rather regulates the Secretary's *present* removal process and denies the alien a *present* immunity for his illegal reentry in disregard of the prior removal order by specifying that removal will occur through reinstatement of that order. That statutory focus on prospectively regulating the removal of aliens who have violated a prior order of removal, regardless of the date of illegal reentry, is reinforced by subsequent enactments premised on Section 1231(a)(5)'s applicability regardless of the date of illegal reentry. Under *Altmann*, the text and structure of Section 1231(a)(5) and related statutory provisions are sufficiently clear to establish that Section 1231(a)(5) applies to aliens whose illegal reentry occurred before as well as after IIRIRA's effective date.[9]

[9] The government has not previously argued in this case that the text and context of Section 1231(a)(5), coupled with the text of other statutes, settles the temporal application of that section under the analysis applied in *Altmann*. That conclusion, however, logically follows from the government's arguments in rebuttal to petitioner's contention that he should prevail under *Landgraf*'s first step, and the issue is anterior to the second step of the *Landgraf* analysis. In addition, petitioner himself argues that the "critical issue" in resolving the retroactivity question is "identifying 'the relevant activity that the statute in question regulates,'" Pet. Br. 34 (quoting *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgment)) (brackets omitted), which is precisely the approach adopted by this Court in *Altmann*, 541 U.S. at 696-697 & n.17.

B. Application Of Section 1231(a)(5) To Aliens Whose Illegal Reentry Predated IIRIRA Is Not Retroactive

Every indication is that Congress intended Section 1231(a)(5) to govern post-IIRIRA reinstatement proceedings regardless of the date of the alien's illegal reentry. But even if the Court concludes that the government cannot prevail on the basis of statutory text and structure alone, it is clear that *petitioner* cannot prevail at step one of the *Landgraf* inquiry. In that event, petitioner must show that application of Section 1231(a)(5) in the circumstances of this case would be retroactive. Petitioner cannot make that showing.

1. Because Section 1231(a)(5) regulates the manner of removal rather than the act of illegal reentry, the provision's application in post-IIRIRA proceedings is inherently prospective

a. In arguing that Section 1231(a)(5)'s application to pre-IIRIRA illegal reentrants is retroactive, petitioner begins with the premise that Section 1231(a)(5) regulates the act of illegal reentry. Pet. Br. 12-13, 34-36. That is incorrect. The terms of Section 1231(a)(5) and the statutory context make clear that the provision regulates the Secretary's removal of an illegal reentrant through reinstatement and enforcement of the prior removal order, not the alien's primary conduct of illegal reentry. Because the prior removal order is already final and "not subject to being reopened or reviewed," 8 U.S.C. 1231(a)(5), Congress provided as a logical corollary that the alien is ineligible for discretionary immigration benefits such as adjustment of status. Congress reasonably determined that, not only would the availability of such benefits allowing the alien to remain in the United States be inconsistent with the alien's status of having already been ordered removed—and indeed, having actually been removed or departed under that prior order at least once—but also that

creating a process for the alien to apply for such relief would delay the removal of such aliens and thereby frustrate the purpose of Section 1231(a)(5) of providing for the immediate execution of the prior order of removal.

Enforcement of prior removal orders in that manner presents no substantial retroactivity concerns for aliens who were removed but then illegally reentered the United States before IIRIRA and remained here unlawfully after IIRIRA's enactment. Indeed, the prior order of removal includes, at least implicitly, an ongoing obligation to stay out of the country unless the subsequent entry is lawful. Accordingly, Section 1231(a)(5)'s modification of the process of removal pursuant to a prior order of removal can be analogized to a statute modifying the process for enforcing an ongoing injunction, which would not be retroactive in any relevant sense as applied to events occurring after the statute was enacted. See *Landgraf*, 511 U.S. at 273-274; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-436 (1856).

To be sure, the fact that an alien "has reentered the United States illegally" gives rise to the authority to reinstate his prior removal order and to remove him again under that order. 8 U.S.C. 1231(a)(5). But that precondition simply reflects the obvious fact that the need to remove the alien would never arise if the alien had remained outside of the United States after his prior removal instead of reentering illegally and remaining in the United States unlawfully. Likewise, there would be no prior order to reinstate if the alien had not previously been removed (or departed voluntarily) under such an order. But although both a prior order of removal and a subsequent illegal reentry are necessary preconditions for the removal authority addressed in Section 1231(a)(5), those preconditions are not the relevant conduct that the statute seeks to regulate. Rather, the central aim of the reinstatement pro-

vision is to govern the process for removing the alien, not to punish or otherwise regulate the illegal reentry itself.

That focus is made apparent by comparing the terms of Section 1231(a)(5) with the language of other provisions that directly address illegal reentry. As explained above, when Congress has sought to regulate the act of illegal reentry itself, the triggering event under the statute is the act of illegal reentry. See 8 U.S.C. 1326(a) (making it a crime when an alien "enters, attempts to enter, or is at any time found in, the United States" after having been removed); see also 8 U.S.C. 1325(a) (making it a crime when an alien "enters or attempts to enter the United States" except as authorized by immigration officers).

The focus on the removal process is further reinforced by Section 1231(a)(5)'s companion provisions. IIRIRA enacted the reinstatement provision as part of a new section of the INA entitled "Detention and Removal of Aliens Ordered Removed." IIRIRA § 305(a)(3), 110 Stat. 3009-598 (enacting INA § 241, codified at 8 U.S.C. 1231). In addition to the reinstatement provision, Section 1231 contains provisions that concern: the period of time after entry of the removal order within which an alien is to be removed, 8 U.S.C. 1231(a)(1); the detention and supervision of the alien pending his removal, 8 U.S.C. 1231(a)(2) and (3); the countries to which the alien may be removed, 8 U.S.C. 1231(b); the transportation of the alien to the removal destination, 8 U.S.C. 1231(d); and the payment of expenses of removal, 8 U.S.C. 1231(e). The association of the reinstatement provision with those provisions demonstrates that Section 1231(a)(5) is focused, not on regulating the act of illegal reentry, but on regulating the process of removal. That has been the object of the reinstatement provision since its original enactment in 1950. See H.R. Conf. Rep. No. 3112, *supra*, at 59 (explaining the purpose of the reinstatement authority as to "to provide more effective con-

trol over, and to facilitate the deportation of, deportable aliens").[10]

b. Under the approach recently applied by the Court in *Republic of Austria* v. *Altmann*, *supra*, and advocated by concurring Justices in previous cases, see *Landgraf*, 511 U.S. at 290-294 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment); *Martin*, 527 U.S. at 362-364 (Scalia, J., concurring in part and concurring in the judgment), applying Section 1231(a)(5) in post-IIRIRA reinstatement proceedings is inherently prospective. Under that approach, because "the relevant conduct regulated by" Section 1231(a)(5) is removal of an alien found to be an illegal reentrant through reinstatement of his previous removal order, *Altmann*, 541 U.S. at 697, any reinstatement and removal that "occurs *after* the effective date of the statute is covered" by the provision and is prospective, *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgment).

In *Altmann*, the Court considered whether a provision of the Foreign Sovereign Immunities Act of 1976 (FSIA) that exempts cases involving an expropriation of private property from the general grant of immunity accorded to foreign sovereigns in United States courts, 28 U.S.C. 1605(a)(3), is applicable in a case in which the alleged expropriation occurred be-

[10] Petitioner relies (Br. 34) on a statement in a House committee report that IIRIRA was intended to prevent aliens from repeatedly entering the country unlawfully without consequence. See H.R. Rep. No. 469, *supra*, at 155. Certain of IIRIRA's provisions undoubtedly were intended to address that concern, and the particular statement cited by petitioner pertained to Title I of IIRIRA, which contained measures aimed to improve border control. See *id.* at 153-157. But while Congress desired to enhance border control in an effort to deter illegal entry, Congress also, in Title III of IIRIRA, separately enacted provisions intended to "streamline[] rules and procedures for removing illegal aliens," and in particular, "illegal aliens already present in the U.S." *Id.* at 107-108; see *id.* at 157-161. The reinstatement provision directly serves *those* objectives and thus was enacted as part of Title III.

fore the FSIA's enactment. The Court held that the FSIA—including the expropriation exemption—governs suits filed after the FSIA's enactment, regardless of whether the conduct at issue in the case occurred before the FSIA's enactment. The central basis for that holding was that the "relevant conduct" regulated by the FSIA is the assertion of immunity by a foreign sovereign rather than the underlying conduct giving rise to the suit. 541 U.S. at 697.[11]

The Court indicated in *Altmann* that it applied the approach of focusing on the "relevant conduct" regulated by the statute, because, in the context of foreign sovereign immunity, the aim is to determine a foreign sovereign's "*present*" immunity from suit rather than to enable a foreign sovereign to shape its primary conduct in reliance on the promise of "future" immunity from suit in the United States. 541 U.S. at 696-697.[12] While the Court thus suggested that its approach would not necessarily apply in other contexts, the basic rationale for the approach in *Altmann* has salience here inasmuch as Section 1231(a)(5) is focused on the *present* process for removing an illegal reentrant and the question of his *present* immunity for illegal reentry. Applying the provision to aliens who had illegally reentered the United States by the time of IIRIRA's effective date therefore is "most consistent with the * * * [statute's] principal purposes." *Altmann*, 541 U.S. at 699; see H.R. Rep. No. 469, *supra*, at 107-108 (explaining that IIRIRA's new provisions concerning removal aim to "streamline[] rules and procedures for removing illegal aliens," including those "already present in the U.S.").

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[11] The Court explained that its focus on the "relevant conduct" for retroactivity purposes adhered to the approach advocated in concurring opinions in previous cases, including, in particular, Justice Scalia's concurring opinion in *Landgraf*. See *Altmann*, 541 U.S. at 697 n.17.

[12] The Court also noted that the case did not involve "private rights." 541 U.S. at 696.

2. Applying Section 1231(a)(5) to pre-IIRIRA illegal reentrants does not impair reasonable reliance interests or interfere with legitimate expectations

Even putting to one side the focus of Section 1231(a)(5) on the present process for removing an illegal reentrant, petitioner cannot prevail at step two of the *Landgraf* analysis. Under *Landgraf*, the "inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin*, 527 U.S. at 357-358 (quoting *Landgraf*, 511 U.S. at 270). The analysis "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.* at 358 (quoting *Landgraf*, 511 U.S. at 270).

Petitioner's arguments that Section 1231(a)(5) produces a retroactive effect fall into two distinct categories. First, petitioner contends that Section 1231(a)(5) attaches new legal consequences to his "completed," pre-IIRIRA act of illegal reentry. See *Landgraf*, 511 U.S. at 269-270. Second, petitioner argues that Section 1231(a)(5) produces a retroactive effect based on events that transpired *after* his illegal reentry but before IIRIRA's enactment. Neither claim has merit.

a. Section 1231(a)(5)'s denial of discretionary relief does not impose new legal consequences on the completed act of illegal reentry

Petitioner's principal argument is that application of Section 1231(a)(5) to an alien whose illegal reentry predated IIRIRA attaches new legal consequences to the alien's "completed" act of unlawful reentry. See Pet. Br. 33, 37-38, 42. For purposes of that claim, any events that transpired after the "completed" act of reentry are irrelevant, and petitioner thus should be situated no differently than an alien whose unlawful reentry was one day before IIRIRA's enactment.

Petitioner does not suggest otherwise, as he seeks a categorical ruling that Section 1231(a)(5) is retroactive with respect to all aliens whose illegal reentry predated IIRIRA, regardless of the circumstances. See Pet. Br. 36-38.

Contrary to petitioner's argument, Section 1231(a)(5) does not attach new legal consequences to the allegedly "completed" act of illegal reentry. As the Court explained in *Landgraf*, "a statute is not made retroactive merely because it draws upon antecedent facts for its operation," and "[e]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct." 511 U.S. at 269-270 n.24 (internal quotation marks omitted). Although Section 1231(a)(5) "draws upon [the] antecedent fact[]" of an alien's illegal reentry, the provision's application to aliens who made their illegal reentry and thus resumed their unlawful presence pre-IIRIRA is prospective. *Ibid.* Section 1231(a)(5) operates prospectively by terminating that unlawful status and providing for immediate removal from the United States.

i. The Court has explained that the "aim of the [*Landgraf*] presumption is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct." *Altmann*, 541 U.S. at 696. There is no basis for concluding that an alien who surreptitiously enters the country with no lawful status could have any legitimate, reliance-based or settled expectation that he would be permitted to remain. Section 1231(a)(5), by denying eligibility for discretionary relief and mandating removal of an illegal reentrant, does not undermine legitimate expectations or otherwise "penalize" the act of illegal reentry. Pet. Br. 11. Section 1231(a)(5) instead has the effect of *undoing* the act of illegal reentry, not penalizing it: petitioner illegally reentered the country, and Section 1231(a)(5) requires that he leave the country forthwith. Indeed, because Section 1231(a)(5) operates by reinstating a prior removal order, the ultimate effect

is to enforce that preexisting order once again rather than to impose any added consequence for the alien's act of illegal reentry after the order was enforced the first time. There is no attachment of "new" legal consequences, *Landgraf*, 511 U.S. at 270, and no retroactive unfairness, when the effect of a statute is to restore the status quo ante in that manner.

That conclusion is reinforced by the fact that petitioner's act of illegal reentry was not itself a "completed" act within the meaning of *Landgraf*, 511 U.S. at 270. That is so both because petitioner's continued presence in the United States following his illegal entry (and following the enactment of IIRIRA) was unlawful, and because petitioner could have terminated that unlawful status at any time. Petitioner and other pre-IIRIRA illegal reentrants thus could have left the country on their own at any time and avoided the operation of Section 1231(a)(5). Indeed, because IIRIRA's relevant provisions, including Section 1231(a)(5), did not go into effect until six months after the statute's enactment, see IIRIRA § 309(a), 110 Stat. 3009-625, an alien who had illegally reentered the country before IIRIRA's enactment had a six-month window within which to depart and thereby avoid the relevant provisions of IIRIRA altogether. By leaving the country, petitioner, no less than an alien who illegally reentered one day before IIRIRA became effective, would have put himself in the same position—at least from the perspective of Section 1231(a)(5)—as if he had never reentered unlawfully in the first place.[13] Because petitioner's act of illegal reentry was not irrevocable with respect to the operation of Section 1231(a)(5), that provision cannot be seen to attach new legal

[13] Petitioner also argues that Section 1231(a)(5) operates retroactively based on events that transpired *after* his illegal reentry. That claim lacks merit, see Point B.2.c, *infra*, but in any event is distinct from his contention that Section 1231(a)(5) altered the consequences of his assertedly "completed" act of reentry.

consequences to his allegedly "completed" act of illegal reentry. Cf. *Martin*, 527 U.S. at 361 (because attorney could withdraw from case and avoid PLRA's limitation on attorney's fee recovery for post-PLRA work on the case, it cannot "be said that the PLRA change[d] the legal consequences of the attorneys' pre-PLRA decision to file the case").

ii. Petitioner's claim of reasonable reliance and settled expectations also fails as a practical matter because he cannot show that Section 1231(a)(5), by eliminating eligibility for discretionary relief from removal, changed "legal rules on which parties relied in shaping their primary conduct" of illegal reentry. *Altmann*, 541 U.S. at 696. Indeed, illegal reentry has long been considered a felony offense. 8 U.S.C. 1326; see also 8 U.S.C. 1325(a) (rendering first-time illegal entry a crime). An alien who illegally reenters the country notwithstanding the prospect of criminal prosecution and punishment could make no persuasive claim that he nonetheless might have elected to forgo an illegal reentry had he known that he would be ineligible to seek discretionary relief from removal.[14]

The absence of any cognizable claim of reasonable reliance or settled expectations becomes especially apparent upon consideration of the particular forms of discretionary relief emphasized by petitioner. Petitioner argues that, if not for Section 1231(a)(5)'s elimination of his eligibility for discretionary relief, he would have been entitled under the previous reinstatement provision to seek adjustment of status, cancellation of removal, or voluntary departure in lieu of removal. See Pet. Br. 38-41. But for purposes of petitioner's claim that

[14] Aside from considerations of legitimate reliance and settled expectations, concerns about fair notice are substantially diminished when, as here, the conduct at issue was unlawful when committed. See *Landgraf*, 511 U.S. at 282 n.35 ("[C]oncerns of unfair surprise and upsetting expectations are attenuated in the case of intentional employment discrimination, which has been unlawful for more than a generation."). See also *id.* at 281-282.

Section 1231(a)(5) retroactively alters the legal consequences of his completed act of illegal reentry, the relevant question is what forms of discretionary relief were available to him *at the time of that reentry*, not at the time of his eventual removal. Petitioner, at the time of his illegal reentry, could have had no reasonable reliance on any of the forms of relief he now seeks to invoke.

(1) *Adjustment of Status.* Illegal entrants (and reentrants) were categorically ineligible for adjustment of status when petitioner unlawfully reentered the country in 1982. It was not until 1994 that Congress first made adjustment of status available to illegal entrants. See 8 U.S.C. 1255(i) (1994) (enacted by Act of Aug. 26, 1994, Pub. L. No. 103-317, § 506(b), 108 Stat. 1765). Even then, the provision took effect on October 1, 1994, but was to sunset on October 1, 1997. See § 506(c), 108 Stat. 1766.[15]

The result is that the only class of pre-IIRIRA illegal reentrants who could even conceivably assert reliance on the potential availability of adjustment of status under petitioner's theory would be those—unlike petitioner—whose illegal reentry occurred during the period after October 1, 1994, and before IIRIRA's enactment on September 30, 1996. Even aliens in that limited category were not automatically eligible for adjustment at the time of illegal reentry. Rather, adjustment was conditioned on the alien's establishing admissibility to the United States and becoming eligible to receive an immigrant visa—for instance, by becoming married to a United States citizen—and doing so before the sunset date of

[15] Congress later twice extended the sunset date to encompass aliens as to whom a family-based visa petition or application for labor certification was filed by April 30, 2001. See 8 U.S.C. 1255(i)(1)(B). Both of those extensions, however, were enacted after IIRIRA's effective date of April 1, 1997. See Act of Nov. 26, 1997, Pub. L. No. 105-119, § 111(a)-(b), 111 Stat. 2458; Pub. L. No. 106-554, § 1(a)(4) [Div. B, Tit. XV, § 1502(a)(1)], 114 Stat. 2763A-324 (2000).

the provision. See 8 U.S.C. 1255(i)(2)(A) (1994). For those reasons, there is no basis for concluding that pre-IIRIRA illegal reentrants like petitioner could have reasonably relied on the prospect of obtaining adjustment of status.

Moreover, "adjustment of status is merely a *procedural mechanism* by which an alien [already in the United States] is assimilated to the position of one seeking to enter the United States." *In re Rainford*, 20 I. & N. Dec. 598, 601 (BIA 1992) (emphasis added). Before Congress created the mechanism of adjustment of status, "aliens in the United States who were not immigrants had to leave the country and apply for an immigrant visa at a consulate abroad." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). Under the adjustment-of-status procedure, an alien already in the United States is treated as if he were seeking admission from abroad but is permitted to remain here while the application is pending. See *ibid.*; *Tibke* v. *INS*, 335 F.2d 42, 44-45 (2d Cir. 1964); *In re S—*, 9 I. & N. Dec. 548, 553-554 (Att'y Gen. 1962).

Adjustment of status thus is a "wholly procedural" mechanism, under which "the alien must still satisfy applicable substantive standards and persuade the Attorney General to exercise his discretion favorably." *Tibke*, 335 F.2d at 45. Because the adjustment-of-status procedure ultimately affects the procedures by which, and the location from which, an alien may seek discretionary admission into the country— and not his substantive entitlement to admission—Section 1231(a)(5)'s denial of eligibility for adjustment is not retroactive. See *Landgraf*, 511 U.S. at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.")[16]

[16] In this case, for instance, if the government prevails and petitioner's removal is thus upheld, petitioner could seek admission from Mexico in lieu of seeking adjustment of status from within the United States. If petitioner's wife obtains approval of a family-based visa petition filed on his behalf, see 8 U.S.C.

(2) *Cancellation of Removal.* Eligibility for cancellation in the case of a non-permanent resident alien is conditioned, *inter alia*, on maintaining continuous physical presence in the United States for at least ten years. 8 U.S.C. 1229b(b)(1)(A). Before IIRIRA, the continuous-presence requirement for suspension of deportation—the precursor to cancellation of removal for non-permanent resident aliens—was seven years. See 8 U.S.C. 1254(a)(1) (1994). Consequently, at the time that petitioner and other pre-IIRIRA illegal reentrants decided to

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1154(a)(1)(A)(i); 8 C.F.R. 204.2(a), petitioner could then apply for an immigrant visa in Mexico, the grant of which would permit him to return to the United States as a lawful permanent resident. See 8 U.S.C. 1201, 1202. Although the grant of a visa application is discretionary, the grant of adjustment of status also is discretionary, see 8 U.S.C. 1255(a), and the likelihood of obtaining discretionary admission through a visa application generally does not differ from the likelihood of obtaining discretionary adjustment of status.

Petitioner's removal also would trigger two separate constraints on admission that were enacted by IIRIRA. First, petitioner would face a default 20-year inadmissibility period because he would have been removed a second or successive time. See 8 U.S.C. 1182(a)(9)(A)(i). That default bar, however, is subject to waiver if the Secretary of Homeland Security consents to the alien's reapplying for admission. 8 U.S.C. 1182(a)(9)(A)(iii). And because the standard for that discretionary waiver does not differ from the discretionary decision whether to grant adjustment of status, the application of Section 1182(a)(9)(A) ultimately would not affect petitioner adversely as compared with applying for adjustment of status from within the United States.

Petitioner also would face a default 10-year admission bar under 8 U.S.C. 1182(a)(9)(B)(i)(II), based on his accumulation of more than one year of unlawful presence following IIRIRA's effective date. That provision is also subject to waiver by the Secretary of Homeland Security, but waiver would require demonstrating that refusal of admission to petitioner "would result in extreme hardship" to his wife. 8 U.S.C. 1182(a)(9)(B)(v). Although that waiver standard would impose a heightened standard that petitioner would not confront if he were permitted to seek adjustment of status, its application raises no issue of retroactive unfairness. That added burden arises only by virtue of petitioner's continued unlawful presence in the United States *after* IIRIRA's effective date, see IIRIRA § 301(b)(3), 110 Stat. 3009-578, and petitioner was on notice of that consequence from the time of IIRIRA's enactment.

reenter the country unlawfully, they were ineligible for suspension of deportation and would remain ineligible for at least seven years. Because illegal reentrants were categorically ineligible for suspension at the time of their reentry, Section 1231(a)(5) did not change the legal consequences of their act of illegal reentry vis-a-vis their ability to seek suspension of deportation (or, now, cancellation of removal).

In addition, cancellation of removal requires an alien without lawful status to establish "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1)(D). Suspension of deportation correspondingly required an alien without lawful status to establish that removal would "result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1254(a)(1) (1994). There would have been no basis for an illegal reentrant to form any settled expectation, at the time of his illegal reentry, that he would be in a position to make those sorts of showings if he later satisfied the applicable continuous-presence requirement.

(3) *Voluntary Departure*. Petitioner also argues that, at the time of his illegal reentry, he was eligible to seek voluntary departure in lieu of removal if his unlawful presence were to be discovered. The notion that an alien's decision to commit a criminal reentry could have been made in reliance on the potential availability of voluntary *departure* if he was detected and ordered removed is farfetched to say the least.

Voluntary departure would not have permitted the alien to remain in the United States. In light of the substantial risks assumed by aliens in committing the crime of illegal reentry precisely to enable a return to the United States, there is little basis for supposing that their decision to reenter

could be grounded in expectations about the means by which they might later be required to leave. Moreover, an illegal reentrant's demonstrated unwillingness to abide by his prior removal order would have made him an unlikely candidate to receive discretionary permission to depart the country voluntarily. See, *e.g.*, *In re Flores*, 17 I. & N. Dec. 225, 229 (BIA 1980) (holding that alien "has not shown himself to be deserving of" voluntary departure because of, *inter alia*, "[h]is history of entering the United States without inspection"); *In re Gamboa*, 14 I. & N. Dec. 244, 248 (BIA 1972) (considerations that determine whether voluntary departure is warranted include "the alien's prior immigration history, the nature of his entry or entries," and "his violations of the immigration and other laws, and the like").[17]

***b. Petitioner's retroactivity claim materially differs from the one addressed in* INS *v.* St. Cyr**

Petitioner errs in his reliance (Pet. Br. 44, 47-48, 49-50) on *INS* v. *St. Cyr*, 533 U.S. 289 (2001). *St. Cyr* involved IIRIRA's elimination of discretionary relief from removal under former Section 212(c) of the INA for aliens who had been affirmatively granted the status of aliens lawfully admit-

[17] Even assuming, *arguendo*, that aliens who illegally reentered the country before IIRIRA could be said to have done so in reasonable reliance on the possibility of obtaining voluntary departure—and also assuming that the elimination of eligibility for voluntary departure would constitute a retroactive effect—the remedy would be to permit aliens who unlawfully reentered before IIRIRA to seek voluntary departure under their reinstated order of removal in lieu of removal under that order. Petitioner appears to assume that, if the elimination of eligibility for voluntary departure were retroactive in effect, aliens who had illegally reentered before IIRIRA would then be free to seek *any* sort of discretionary relief, not just voluntary departure. See Pet. Br. 38-39, 42-44. There could be no basis for granting that windfall. A conclusion that Section 1231(a)(5) is retroactive as to one form of relief would not open a gateway to permit aliens to seek any and all other forms of relief, even relief as to which aliens were categorically ineligible when they illegally reentered.

ted for permanent residence, see 8 U.S.C. 1101(a)(20) (definition of "lawfully admitted for permanent residence"), but who were thereafter convicted of an aggravated felony. The Court held that the elimination of eligibility for Section 212(c) relief had a retroactive effect in the case of a lawful permanent resident who had pleaded guilty to the commission of an aggravated felony before IIRIRA. 533 U.S. at 321-325.

The Court based that conclusion in part on the premise that, before IIRIRA, permanent resident "aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief." 533 U.S. at 325. The Court explained that the decision to plead guilty entails the waiver of several constitutional rights, *id.* at 321-322, and that "preserving the possibility of [Section 212(c)] relief would have been one of the principal benefits sought by defendants in deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. The Court reasoned that lawful permanent residents who pleaded guilty and received a sentence that preserved their eligibility for Section 212(c) relief "almost certainly relied upon [the] likelihood" of obtaining such relief "in deciding whether to forgo their right to a trial." *Id.* at 325; see *id.* at 323. The Court thus held that "the elimination of any possibility of § 212(c) relief by IIRIRA" contravened principles of reasonable reliance and settled expectations. *Id.* at 325; see *id.* at 323-324.

There is no similarity between *St. Cyr* and this case. *St. Cyr* was grounded in the notion that, because aliens had based their decision to plead guilty on the continued availability of Section 212(c) relief, the plea of guilty gave rise to reasonable reliance interests and expectations in preserving eligibility for that relief. Cf. *McMann* v. *Richardson*, 397 U.S. 759, 766 (1970) (plea of guilty "must be an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences") (internal quotation marks omitted). The Court therefore held that IIRIRA attached new legal conse-

quences to the completed transaction of entering a plea of guilty, see *St. Cyr*, 533 U.S. at 321—a transaction that occurred after the alien was lawfully admitted for permanent residence and thus was formally accorded the expectation that he would be permitted to remain in the country.

In this case, by contrast, no transaction or event akin to a guilty plea (and the concomitant waiver of rights) 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. Petitioner's claim instead is that his criminal act of reentering the country itself engendered cognizable expectations and reliance interests. *St. Cyr* affords no support for that claim.[18]

Indeed, petitioner's claim is far less persuasive even than the contention that IIRIRA's elimination of Section 212(c) relief would produce a retroactive effect if applied to a permanent resident alien who had committed an aggravated felony—as opposed to entered a plea of guilty to commission of such a felony—before IIRIRA. In that situation, the alien would have committed a criminal offense that presented grounds for removing him from the country, but would have retained eligibility before IIRIRA to seek discretionary relief from removal. Lower courts have uniformly rejected the suggestion that IIRIRA's repeal of Section 212(c) relief could

[18] The circumstances in *Chew Heong* v. *United States*, 112 U.S. 536 (1884), are like those in *St. Cyr* in that there was an independent source for the alien's legitimate expectation that he would be admitted to the United States. The Court held in *Chew Heong* that a statute barring Chinese nationals from reentering the United States without a certificate prepared for them on their departure was not applicable to a Chinese laborer who had left the United States before the statute was enacted. There was no reason at that time to suppose that a certificate would be required for reentry. In fact, the Court explained, the laborer had a "vested" right to reenter the country under a treaty that gave Chinese nationals the right to leave and return to the United States at their pleasure. *Id.* at 559.

raise retroactivity concerns simply because it is applied to a permanent resident alien who had committed an aggravated felony before IIRIRA was enacted.[19] In fact, the Second Circuit's decision in *St. Cyr*, which this Court affirmed, explained that it "would border on the absurd to argue that * * * aliens might have decided not to commit drug crimes * * * had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418-419 (2d Cir. 2000) (internal quotation marks omitted), aff'd, 533 U.S. 289 (2001). That rationale applies *a fortiori* to petitioner's claim that Section 1231(a)(5) retroactively alters the legal consequences of his act of illegal reentry.

Finally, as noted above, *St. Cyr* involved discretionary relief available to lawful permanent residents. The result of obtaining Section 212(c) relief was that the "deportation proceeding is terminated and the alien *remains a permanent resident*." 533 U.S. at 295 (emphasis added). Cf. *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."). Any cognizable expectation in remaining in the country that accompanies achieving status as a lawful permanent resident has no force with respect to an alien who enters (or reenters) the country illegally and maintains an unlawful presence. Such an alien has never been accorded the lawful status under the immigration laws that is an essential

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[19] See *Evangelista* v. *Ashcroft*, 359 F.3d 145, 154-156 (2d Cir. 2004), cert. denied, 125 S. Ct. 1293 (2005); *Montenegro* v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002). See also *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam) (rejecting analogous argument under AEDPA), cert. denied, 539 U.S. 926 (2003); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (same), cert. denied, 539 U.S. 902 (2003).

prerequisite for claiming the protection afforded by principles of non-retroactivity against changes in those laws.

c. Petitioner's actions after his illegal reentry cannot give rise to reasonable reliance interests

Although petitioner's principal claim is that Section 1231(a)(5) attached new legal consequences to his completed act of illegal reentry, petitioner also argues that events after his reentry gave rise to expectations that he could obtain discretionary relief. Petitioner, for instance, observes that, because he maintained unlawful presence for a continuous period of seven years after his illegal reentry in 1982, he became eligible to seek suspension of deportation in 1989 under the then-existing suspension statute. Pet. Br. 38. Petitioner further notes that he fathered a citizen-son in 1989, and that hardship to his son could have been a favorable consideration in any application for suspension of deportation. *Id.* at 40-41. Petitioner also observes that, upon his marriage to a United States citizen in 2001—after IIRIRA's effective date—he gained eligibility to seek adjustment of status. *Id.* at 38.

i. There could be no claim that petitioner married in reliance on the availability of discretionary relief, given that the marriage occurred nearly four years after IIRIRA's effective date. Petitioner does not indicate which, if any, of the other post-reentry events he cites—*e.g.*, his remaining in the country unlawfully for the seven-year period required to qualify for suspension of deportation, or his fathering a citizen-son—could have been undertaken in reliance on his eligibility for discretionary relief. Petitioner, for instance, makes no suggestion that any post-reentry action or event would have been different had he known that he would be ineligible for discretionary relief from removal. Compare, *e.g.*, *St. Cyr*, 533 U.S. at 323-325 (aliens detrimentally relied on eligibility for Section 212(c) relief in electing to plead guilty and forgo right

to trial). Accordingly, the post-reentry events identified by petitioner—like the act of illegal reentry itself—do not implicate the "aim of the [*Landgraf*] presumption" of avoiding "changes to legal rules on which parties relied in shaping their primary conduct." *Altmann*, 541 U.S. at 696.

Petitioner, at any rate, cannot assert *reasonable* reliance based on those sorts of events that transpired after his illegal reentry. Principles of non-retroactivity and the analytical framework of the Court's cases such as *Landgraf* were not intended to legitimize any claimed expectations of aliens who resort to self-help by bringing themselves unlawfully within the territorial application of United States law to begin with. To conclude otherwise would convert the presumption against retroactivity from a shield that protects persons from new and unfair consequences for past acts or transactions that occurred in the United States into a sword that an illegal entrant or reentrant can wield in an effort to defeat reasonable measures enacted by Congress, in the exercise of its plenary control over the Nation's borders, to remove aliens who have not affirmatively been granted any right to return.

Reasonable reliance is "a legal construct designed to protect against unfairness." *Altmann*, 541 U.S. at 711 (Breyer, J., concurring). There is no unfairness in declining to take into consideration events whose occurrence was predicated on continuation of the unlawfulness of petitioner's reentry and continued presence. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) ("[I]n all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law."). Petitioner had no protected interest in continuing to violate the law unabated, and there is no basis for recognizing claims of reasonable reliance that accrued only by virtue of petitioner's continued ability to avoid detection. Cf. *United States* v. *Boyd*, 149 F.3d 1062, 1068 (10th Cir. 1998) (noting settled rule that "when a crime

involves a continuing violation, application of a law enacted after the crime begins does not implicate the ex post facto clause"), cert. denied, 526 U.S. 1147 (1999).

Petitioner's position, in this respect, is no different than that of any alien who unlawfully entered the country at a time when the rules governing discretionary relief were more generous, and who claims that those rules became ossified at that time such that he retains presumptive immunity from any subsequent restrictions on relief. IIRIRA, for instance, increased the continuous-presence requirement to obtain suspension of deportation (renamed cancellation of removal in IIRIRA) from seven to ten years. An alien who had illegally reentered the country before IIRIRA could make no persuasive claim that he possessed an ongoing entitlement to seek discretionary relief after seven years instead of being subject to the ten-year period imposed by IIRIRA. See *Jimenez-Angeles* v. *Ashcroft*, 291 F.3d 594, 601-602 (9th Cir. 2002) (rejecting claim that it would be retroactive to impose the ten-year physical-presence requirement against an alien who had accumulated seven years of unlawful presence by the time of IIRIRA's enactment); see also *Karageorgious* v. *Ashcroft*, 374 F.3d 152, 155-156 (2d Cir. 2004) (rejecting claim that IIRIRA's standards for cancellation of removal are retroactive when applied to aliens who would have qualified for suspension of deportation under less restrictive pre-IIRIRA standards). Although IIRIRA's increase in the continuous-presence requirement rendered ineligible for relief certain aliens who would have been eligible under pre-IIRIRA rules, the increase uncontroversially applies to such aliens. Section 1231(a)(5) has the same effect on petitioner, and its application to him is equally uncontroversial.[20]

[20] Petitioner, for instance, observes that, in 1989, he had satisfied the then-applicable requirement that he maintain seven years of continuous presence to qualify for suspension of deportation, and he could have sought suspension at

ii. Petitioner's claims of reasonable reliance on events that transpired after his illegal reentry is also misconceived because that approach would call for a highly individualized retroactivity inquiry turning on the particular factual circumstances faced by specific aliens. The inquiry could depend, for instance, on whether a particular illegal reentrant had surpassed the continuous-presence requirement for cancellation of removal before IIRIRA's effective date; had developed family ties within the United States of a character that would implicate the hardship showing required to obtain cancellation; or had become married to a United States citizen before IIRIRA's effective date so as to become eligible to seek adjustment of status. See Pet. Br. 38-41.

That manner of individualized inquiry not only would raise problems of administration, but it also would contradict the approach applied by this Court. The Court has not applied retroactivity analysis at a level of specificity turning on each person's individual circumstances. Rather, the Court has considered whether a statute is applicable to a *general class* of claims or individuals. See, *e.g.*, *St. Cyr*, 533 U.S. at 321-325 (applicability of IIRIRA's repeal of relief to aliens who had pleaded guilty before IIRIRA); *Martin*, 527 U.S. at 343 (ap-

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that time (presumably by presenting himself to INS authorities to be placed in deportation proceedings, in which he could have then sought suspension of deportation). Pet. Br. 41. Petitioner, however, elected not to seek suspension but instead to continue his unlawful presence. He cannot now make a claim of reasonable reliance premised on the previous availability of suspension of deportation, relief he elected not to seek. Petitioner's circumstances are indistinguishable from those of an illegal entrant who had satisfied the seven-year requirement for suspension at the time of IIRIRA's effective date but elected not to seek suspension. Such an alien, after IIRIRA, could not claim immunity from the ten-year period required to qualify for cancellation of removal, even if application of the ten-year period would render him ineligible for relief. See *Jimenez-Angeles*, 291 F.3d at 601-602. Petitioner can no more claim immunity from Section 1231(a)(5)'s denial of discretionary relief.

plicability of PLRA to pre-PLRA and post-PLRA attorney work); *Lindh*, 521 U.S. at 320 (applicability of AEDPA to cases pending on effective date); *Landgraf*, 511 U.S. at 244 (applicability of amendments to Title VII to cases pending on effective date). That approach reflects the ultimate object of the retroactivity inquiry, *viz.*, to determine Congress's intent concerning the temporal reach of the statute. There is no reason to suppose that Congress intended for Section 1231(a)(5)'s applicability to turn on the particular post-reentry events that may have affected a specific alien.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SRI SRINIVASAN
Assistant to the Solicitor General
DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

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STATUTORY APPENDIX

1. 8 U.S.C. 1182 provides, in pertinent part:

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(9) Aliens previously removed

(A) Certain aliens previously removed

* * * * *

(ii) Other aliens

Any alien not described in clause (i) who—

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) Aliens unlawfully present

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who—

* * * * *

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible

* * * * *

(v) Waiver

The Attorney General has sole discretion to waive clause (I) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would

result in extreme hardship to the citizen or lawfully resident spouse or parents of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

* * * * *

2. 8 U.S.C. 1229b provides, in pertinent part:

§ 1229b. Cancellation of removal; adjustment of status

* * * * *

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney

General exercises discretion to grant a waiver); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * * * *

3. 8 U.S.C. 1229c provides, in pertinent part:

§ 1229c. Voluntary departure

* * * * *

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntary to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under Section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

* * * * *

4. 8 U.S.C. 1231 provides, in pertinent part:

§ 1231. Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

* * * * *

(5) Reinstatement of removal orders against aliens illegally reentering

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 chapter, and the alien shall be removed under the prior order at any time after the reentry.

* * * * *

5. 8 U.S.C. 1255 provides, in pertinent part:

§ 1255. Adjustment of status of nonimmigrant to that of person admitted for permanent residence

* * * * *

(i) Adjustment in status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—

(A) who—

(i) entered the United States without inspection; or

* * * * *

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of—

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or status to that of an alien lawfully admitted for permanent residence. * * *

* * * * *

6. 8 U.S.C. 1325 provides, in pertinent part:

§ 1325. Improper entry by alien

(a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Improper time or place; civil penalties

Any alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration offices shall be subject to a civil penalty of —

(1) at least $50 and not more than $250 for each such entry (or attempted entry); or

(2) twice the amount specified in paragraph (1) in the case of an alien who has been previously subject to a civil penalty under this subsection.

Civil penalties under this subsection are in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed

* * * * *

7. 8 U.S.C. 1326 provides, in pertinent part:

§ 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United State or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

* * * * *

8. Section 105 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-556, provides, in pertinent part:

SEC. 105. CIVIL PENALTIES FOR ILLEGAL ENTRY

(a) IN GENERAL.—Section 275 [of the Immigration and Nationality Act (INA)] (8 U.S.C. 1325) is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) Any alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers shall be subject to a civil penalty of—

"(1) at least $50 and not more than $250 for each such entry (or attempted entry); or

"(2) twice the amount specified in paragraph (1) in the case of an alien who has been previously subject to a civil penalty under this subsection.

Civil penalties under this subsection are in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed."

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply to illegal entries or attempts to enter occurring on or after the first day of the sixth month beginning after the date of the enactment of this Act.

9. Section 324 of IIRIRA (110 Stat. 3009-629) provides, in pertinent part:

SEC. 324. PENALTY FOR REENTRY OF DEPORTED ALIENS

(a) IN GENERAL.—Section 276(a)(1) [of the INA] (8 U.S.C. 1326(a)(1)) is amended to read as follows:

"(1) has been arrested or deported, has been excluded and deported, or has departed the United States while an order of exclusion or deportation is outstanding, and thereafter".

* * * * *

(c) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to departures that occurred before, on, or after the date of the enactment of this Act, but only with respect to entries (and attempted entries) occurring on or after such date.

10. The Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, § 202, 111 Stat. 2193 (1997) (8 U.S.C. 1255 note), as amended, provides, in pertinent part:

"(a) ADJUSTMENT OF STATUS.—

"(1) IN GENERAL.—The status of any alien described in subsection (b) shall be adjusted by the Attorney General to that of an alien lawfully admitted for permanent residence, if the alien—

"(A) applies for such adjustment before April 1, 2000; and

"(B) is otherwise admissible to the United States for permanent residence * * * .

"(2) RULES IN APPLYING CERTAIN PROVISIONS.—In the case of an alien described in subsection (b) or (d) who is applying for adjustment of status under this section—

"(A) the provisions of section 241(a)(5) of the Immigration and Nationality Act [8 U.S.C. 1231(a)(5)] shall not apply; and

* * * * *

"(b) ALIENS ELIGIBLE FOR ADJUSTMENT OF STATUS.—

"(1) IN GENERAL.—The benefits provided by subsection (a) shall apply to any alien who is a national of Nicaragua or Cuba, and who has been physically present in the United States for a continuous period, beginning not later than December 1, 1995, and ending not earlier than the date the application for adjustment under such subsection is filed, * * * .

* * * * *

11. The Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, Div. A, § 101(h) (Tit. IX, § 902), 112 Stat. 2681-538 (1988) (8 U.S.C. 2255 note), as amended, provides, in pertinent part:

"(a) ADJUSTMENT OF STATUS.—

"(1) IN GENERAL.—The status of any alien described in subsection (b) shall be adjusted by the Attorney General to that of an alien lawfully admitted for permanent residence, if the alien—

"(A) applies for such adjustment before April 1, 2000; and

"(B) is otherwise admissible to the United States for permanent residence * * * .

"(2) INAPPLICABILITY OF CERTAIN PROVISIONS.—In the case of an alien described in subsection (b) or (d) who is applying for adjustment of status under this section—

"(A) the provisions of section 241(a)(5) of the Immigration and Nationality Act [8 U.S.C. 1231(a)(5)] shall not apply; and

* * * * *

"(b) ALIENS ELIGIBLE FOR ADJUSTMENT OF STATUS.—The benefits provided by subsection (a) shall apply to any alien who is a national of Haiti who—

* * * * *

"(2) has been physically present in the United States for a continuous period beginning not later than December 31, 1995, and ending not earlier than the date the application for such adjustment is filed, * * * .

* * * * *