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IN THE SUPREME COURT OF THE UNITED STATES

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HUMBERTO FERNANDEZ-VARGAS, :

Petitioner, :

v. : No. 04-1376

ALBERTO R. GONZALES, :

ATTORNEY GENERAL. :

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Washington, D.C.

Wednesday, March 22, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

DAVID M. GOSSETT, ESQ., Washington, D.C.; on behalf of the Petitioner.

SRI SRINIVASAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

[10:06 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Fernandez-Vargas versus Gonzales.

Mr. Gossett.

ORAL ARGUMENT OF DAVID M. GOSSETT

ON BEHALF OF PETITIONER

MR. GOSSETT: Mr. Chief Justice, and may it please the Court:

Using the ordinary tools of statutory construction, it is clear that Congress intended the 1996 reinstatement provision to apply only prospectively. But even if Congress had no specific intent as to the retroactive applicability of that provision, under Landgraf it would, nonetheless, not apply in this case.

Applying it to aliens who reentered before IIRIRA's effective date would give the statute an impermissibly retroactive effect. Before IIRIRA, such aliens were entitled to seek, and eligible to receive, discretionary relief from deportation. Now if the provision is applied to them, they are not.

CHIEF JUSTICE ROBERTS: Wouldn't it be the same result if Congress decided, for example, to take away one of the available methods of seeking

1 discretionary review, just saying, "We're not going to  
2 have that available anymore"?

3 MR. GOSSETT: Congress might change the  
4 specific types of review that are available, and then  
5 this Court would have to -- but would either have to --  
6 would have to engage in a Landgraf analysis of whether  
7 --

8 CHIEF JUSTICE ROBERTS: But that would be --

9 MR. GOSSETT: -- that would be --

10 CHIEF JUSTICE ROBERTS: -- a pretty easy  
11 case, wouldn't it? I mean, if you have a mechanism  
12 saying some -- an alien in this position can apply for,  
13 you know, this type of relief, this type of relief, or  
14 another, and they say, "Well, we're not going to allow  
15 this type of relief anymore. We're going to change  
16 those" -- was -- that's a pretty easy case, under  
17 Landgraf, isn't it?

18 MR. GOSSETT: The -- yes, Mr. Chief Justice.

19 And the transition from suspension of deportation to  
20 cancellation of removal would fall into that category.

21 However, the reinstatement provision talks in terms --  
22 in categorical terms of any forms of relief from  
23 deportation. It doesn't specify the particular types  
24 of relief that would be available --

25 JUSTICE SCALIA: But why should that --

1 MR. GOSSETT: -- and, therefore --

2 JUSTICE SCALIA: -- why should that make a  
3 difference as to whether it's retroactive or not? I  
4 mean, if it -- it seems to me you look to the activity  
5 that it governs. And the activity that it governs is  
6 the deportation or removal from now on.

7 Now, you could argue that -- if you want,  
8 that there are some due process violations in making  
9 that prospective law affect past activities as they do.

10 I mean, let's -- one of the examples given in  
11 Landgraf, or at least in my concurrence in Landgraf,  
12 was a change of the law procedure so that expert  
13 testimony, which previously was not admissible, is now  
14 admissible. Now, the person who committed the crime  
15 that's involved in the next case that comes up when  
16 that new procedural rule is applied, he can say, "Well,  
17 you know, you've changed -- you've changed the rules on  
18 me. When I committed the crime, the expert testimony  
19 wasn't admissible. Now it is admissible. That's not  
20 fair." Well, whether it's fair or not is something we  
21 can inquire into under the due process clause, but  
22 nobody would say that that procedural change is  
23 retroactive. And it --

24 MR. GOSSETT: Two --

25 JUSTICE SCALIA: -- seems to me that's what's

1 going on here.

2 MR. GOSSETT: Two responses, Justice Scalia.

3 The first is, I think it's unfair to say that this  
4 provision merely regulates the procedure of removal.

5 JUSTICE SCALIA: That wasn't my point. My  
6 point --

7 MR. GOSSETT: The --

8 JUSTICE SCALIA: -- was, you look to the --  
9 to the activity which is governed by the new law. In  
10 the case of the -- of the expert testimony, the  
11 activity governed is the trial, so that law applies  
12 prospectively to all future trials. So, also, in this  
13 case, this law applies prospectively to all future  
14 removals, QED. It is not retroactive. Now, you may  
15 have an argument, although I don't think it's a very  
16 good one, that there are due process problems involved  
17 in this prospective law. But I don't see how you can  
18 call the law retroactive.

19 MR. GOSSETT: Justice Scalia, the portions of  
20 the reinstatement provision, besides for the provision  
21 barring other forms of relief, I would agree, are  
22 simply procedural provisions. And, again, there might  
23 be due process challenges to those, but I -- we're not  
24 raising those here. It's the provision that says that  
25 merely because you illegally reentered the country at

1 some prior date, you will -- because you illegally  
2 reenter the country, you will be ineligible, that I  
3 think can only fairly be categorized as regulating the  
4 process of reentry, not the process of removal. It's -  
5 -

6 JUSTICE SCALIA: That doesn't affect --

7 MR. GOSSETT: -- the fact that you --

8 JUSTICE SCALIA: -- doesn't affect his  
9 reentry at all. His reentry occurred. It -- how could  
10 it possibly have anything to do with his reentry?

11 MR. GOSSETT: Under Your Honor's analysis, a  
12 statute that said that if the Attorney General finds  
13 that an alien has reentered in the past, the alien may  
14 be sentenced to 15 years in prison, would also merely  
15 be procedural and governing the sentencing rather than  
16 the underlying act of reentry. I think that parallel  
17 hypothetical, which obviously would -- would violate  
18 the ex post facto clause --

19 JUSTICE SCALIA: That would apply new  
20 penalties to the reentry. This law does not apply any  
21 new penalties to the reentry, it just -- it just  
22 establishes a new regime for removing the person who  
23 has reentered.

24 MR. GOSSETT: But the act of removing the  
25 right to seek adjustment of status, suspension of

1 deportation, voluntary departure, that is a new  
2 penalty. In the Landon v. Placencia case, in fact,  
3 this Court called those "substantive rights." It  
4 called, specifically, voluntary departure and  
5 suspension of deportation "substantive rights." That's  
6 at 459 U.S. 26 to 27. Therefore, I think it's unfair  
7 to say that the removal of those substantive rights is  
8 merely a procedural change. Of course, we don't even  
9 get into the question of whether there's a procedural  
10 change here, or a substantive change, unless we get to  
11 stage two of the Landgraf analysis under the -- under,  
12 I would say, either the majority's approach in Landgraf  
13 or your approach, Justice Scalia, because the first  
14 stage of Landgraf is about this Court's deferring to  
15 Congress's specific intent as to the applicability of a  
16 statute, because if Congress has decided whether a  
17 statute should apply prospectively or retroactively,  
18 this Court defers to that, outside of the ex post facto  
19 context. And I think here it's clear that, in fact,  
20 Congress intended the 1996 reinstatement provision to  
21 apply only prospectively.

22 JUSTICE GINSBURG: Has any -- a number of  
23 courts have considered this question -- have any of  
24 them accepted your first -- your argument that the  
25 statute is clear that it is nonretroactive?

1           MR. GOSSETT: Yes, Justice Ginsburg, both the  
2 Sixth and the Ninth Circuits have accepted that  
3 argument. They've accepted it in a slightly different  
4 form than we are currently raising, because before the  
5 Government's brief in this case, no one has laid out  
6 the history of the 1950 and 1952 statutes as carefully  
7 as the Solicitor General's Office now has. But both  
8 the Sixth and Ninth Circuit have held that this statute  
9 is exclusively prospective by a comparison between the  
10 1952 Act and the 1996 Act.

11           JUSTICE GINSBURG: I'd -- I'll have to look  
12 at those decisions. It was my impression that they  
13 did, indeed, hold that it was retroactive, but not on  
14 the ground that Congress had clearly spoken to the  
15 point, so that you didn't need any further inquiry.

16           MR. GOSSETT: Both -- they didn't use the  
17 term "clearly," because, of course, as we explained in  
18 our brief, there's an asymmetry in retroactivity  
19 analysis, and using the ordinary tools of statutory  
20 construction, one can demonstrate a prospective intent  
21 on the part of Congress. But both the Sixth and the  
22 Ninth Circuit, in the Bejjani case and the Castro-  
23 Cortez case, did stop their retroactivity analysis at  
24 stage one of the Landgraf inquiry --

25           JUSTICE SCALIA: Yes, but --

1 MR. GOSSETT: -- decided that.

2 JUSTICE SCALIA: -- I think that's because  
3 they were using the version of stage one that you are  
4 using, which includes, in the consideration of whether  
5 Congress has been clear, an inquiry into whether the --  
6 whether the law is retroactive or not, which, as I  
7 understand it, should be left to stage two,  
8 exclusively.

9 MR. GOSSETT: I --

10 JUSTICE SCALIA: Your analysis in your brief  
11 mingles the two. It says one of the factors that you  
12 can take into account in stage one is whether it's  
13 retroactive. And as I -- I don't understand Landgraf  
14 to speak that way. I thought you were supposed to use  
15 all other indicia of legislative intent, other than the  
16 normal rule against retroactivity, in deciding  
17 congressional intent, and then you go to stage two,  
18 which is where retroactivity comes in.

19 MR. GOSSETT: In both the St. Cyr's case and  
20 the Lindh case, this Court did invoke the presumption  
21 against retroactivity in its stage one analysis. But,  
22 more generally, I don't think we need a presumption to  
23 win this case. I think that -- under stage one, under  
24 an inquiry into congressional intent -- what we have in  
25 this case is a history of Congress providing for the

1 reinstatement of deportation that goes back to 1950.  
2 In 1950, Congress passed a reinstatement provision that  
3 said that for the specified aliens -- and it was only a  
4 subgroup -- if they were deported and reentered, they  
5 would be -- that their previous deportation order would  
6 be reinstated. The INS -- and that statute's quoted  
7 at page 2 of the Government's brief -- the INS  
8 interpreted that statute as applying only  
9 prospectively, and only applying to an alien who was  
10 deported, and, therefore, obviously reinstated --  
11 reentering after the effective date of that statute.

12           Now, in 1952, Congress, evidently  
13 dissatisfied with an interpretation -- with a  
14 reinstatement provision that was only prospective,  
15 added the "before or after" language to the  
16 reinstatement provision. They said, under this 1952  
17 Act, "If you were deported, either before or after the  
18 effective date of the INA, your deportation order can  
19 be reinstated." But in 1996, Congress removed that  
20 "before or after" clause. Congress expanded the scope  
21 of reinstatement and provided that a much broader  
22 category of reentrants could be subject to  
23 reinstatement.

24           JUSTICE SCALIA: Yes, but as the Government  
25 points out, that "either before or after" applied to

1 when you had been deported --

2 MR. GOSSETT: Yes, Justice Scalia.

3 JUSTICE SCALIA: -- not to when you  
4 reentered. And what we're -- what you're arguing for  
5 here is a rule that goes from the time of reentry, not  
6 from the time of deportation. So, it's not really a  
7 parallel.

8 MR. GOSSETT: Actually, Justice Scalia, under  
9 our stage one argument, we are now arguing that, in  
10 fact, the Government is right, that the 1952 Act was  
11 tied to the date of deportation. What we don't  
12 understand is how the Government thinks that helps its  
13 case, because the obvious and necessary consequence of  
14 that is that the removal of the "before or after"  
15 clause in 1996 must imply that the 1996 provision only  
16 is triggered by post-enactment deportations.

17 CHIEF JUSTICE ROBERTS: Well, that's an --

18 MR. GOSSETT: And --

19 CHIEF JUSTICE ROBERTS: -- that may be a  
20 reasonable inference, but I think it's a real stretch  
21 to say that it "clearly establishes." When you're  
22 talking about a statute, and you say something's  
23 "clear," you want to be able to point to actual words.  
24 And, on the other side, the Government points out  
25 that, elsewhere in IIRIRA, Congress specifically

1 delineates when it wants the statute to apply  
2 prospectively only. And they did not do that in this  
3 case.

4 MR. GOSSETT: They also specifically  
5 delineated, in some context, Mr. Chief Justice, that it  
6 would be retroactive. The Government's primary  
7 comparison -- and I think it's an important one for  
8 this Court to focus on -- is to the criminal  
9 reinstatement provision, which is section 1326 -- 8  
10 U.S.C. at 1326.

11 Now, the Government asserts that that  
12 provision is exclusively prospective, and, therefore,  
13 that the comparison should be that, in this context,  
14 the reinstatement provision must be retroactive. But,  
15 in so arguing, the Government hides, in ellipses in its  
16 brief, on page 14, the actual text of the provision of  
17 the criminal -- the temporal applicability of the  
18 criminal reentry provision. What Congress actually  
19 said was that deportations that predate IIRIRA could  
20 trigger reinstatement, but reentries post- -- only  
21 reentries post-dating IIRIRA could trigger it. So, in  
22 fact, what Congress was doing in the criminal context  
23 was reaching back and saying, "We're changing the  
24 consequences of pre-enactment deportations, but not  
25 pre-enactment reentry." So, the comparison, if

1 anything, I think, strengthens our case. I'd say --

2 CHIEF JUSTICE ROBERTS: I'm sorry, I -- you

3 lost --

4 MR. GOSSETT: The --

5 CHIEF JUSTICE ROBERTS: -- me there.

6 MR. GOSSETT: I'm sorry.

7 CHIEF JUSTICE ROBERTS: Can you --

8 MR. GOSSETT: That's on --

9 CHIEF JUSTICE ROBERTS: I'm looking at page -  
10 -

11 MR. GOSSETT: -- page --

12 CHIEF JUSTICE ROBERTS: I'm --

13 MR. GOSSETT: It's quoted on page 27, note  
14 15, of our opening brief. It's section 324(c) of  
15 IIRIRA. I can read it, exactly, "The amendment made by  
16 subsection (a) expanding the criminal reentrant  
17 provision shall apply to departures that occurred  
18 before, on, or after the date of enactment of this Act,  
19 but only with respect to entries and attempted entries  
20 occurring on or after such date." The Government omits  
21 the fact that it applies to deportations pre-IIRIRA.

22 So, I think that there are two cases that  
23 this Court has --

24 CHIEF JUSTICE ROBERTS: I don't how --

25 MR. GOSSETT: -- decided --

1 CHIEF JUSTICE ROBERTS: I don't see how that  
2 undermines their point that when Congress wants to  
3 specify that something "shall apply prospectively  
4 only," as they quote, "only with respect to entries  
5 occurring on or after a date," they spell it out. And  
6 they did not similarly spell it out in the provision on  
7 -- that you suggest is prospective only.

8 MR. GOSSETT: No, Justice -- Mr. Chief  
9 Justice. I agree that this doesn't explicitly spell it  
10 out in the criminal provision, but I don't think we  
11 need to explicitly spell it out -- or we -- that this  
12 Court needs to find that Congress explicitly spelled  
13 out the prospective applicability. I think that the  
14 Lindh case and the American National Red Cross case  
15 both demonstrate that when Congress changes text over  
16 time, it matters. In the Lindh case, of course, there  
17 were two provisions, one of which had retroactivity  
18 language, the other which had none, and -- and this  
19 Court intuited that, "Therefore, Congress must have  
20 meant that the -- the section without retroactivity  
21 language would be exclusively" --

22 JUSTICE SCALIA: I wish we could get some new  
23 vocabulary. Terminology is destiny, and I really don't  
24 follow the discussion of speaking about whether it was  
25 prospective or retroactive. I don't think, whichever

1 way it applied, it is retroactive. But the issue still  
2 remains, Did Congress intend pre-IIRIRA reentries to be  
3 covered or not? I --

4 MR. GOSSETT: Was it triggered?

5 JUSTICE SCALIA: -- I would consider that  
6 still prospective, but just note my --

7 MR. GOSSETT: I --

8 JUSTICE SCALIA: -- that I don't --

9 MR. GOSSETT: -- I think, actually --

10 JUSTICE SCALIA: -- go along with you when  
11 you force this terminology on me, whether Congress  
12 intended it to be retroactive. As I see it, the issue  
13 is whether Congress intended it to apply to reentries  
14 that occurred before IIRIRA was enacted. I would not  
15 consider that retroactive, but it's still an open  
16 question what Congress intended.

17 MR. GOSSETT: Justice Scalia, I agree -- I  
18 agree that that's for purposes -- that terminology is  
19 better for stage one. It's -- whether it was triggered  
20 by a pre-enactment deportation or reentry.

21 JUSTICE ALITO: Aren't there several possible  
22 explanations for why Congress would leave the "before  
23 or after" language out of the -- out of the new  
24 provision? They might have wanted it just to be  
25 decided under the Landgraf framework. Isn't that one

1 possibility? Or they might have thought that "before  
2 or after" referred to the enactment of the INA, which  
3 would be 1952, and, therefore, irrelevant by the time  
4 this was passed.

5 MR. GOSSETT: I don't think either of those  
6 possibilities is plausible, Justice Alito. The first  
7 is implausible because we know that the INS had already  
8 interpreted the 1950 Act, which was silent as to  
9 applicability, to be exclusively prospective. And the  
10 second is implausible because the -- the "before or  
11 after" provision in the 1952 Act, which would  
12 presumably have been brought forward, the 1996 Act, had  
13 they wanted to, specified the date of enactment of this  
14 Act. It would have been about this Act. And, in fact,  
15 the Senate proposal to modify the first -- the  
16 provision also would have left it in terms of this Act,  
17 not of a specific date of 1952, which would have been  
18 the INA date.

19 More generally, I think that with this  
20 history of the 1950 Act, the 1952 Act, and the 1996  
21 Act, any interpretation of the 1996 Act as being  
22 retroactive, or as being ambiguously retroactive,  
23 doesn't pay adequate deference to Congress's choice  
24 over time that this Act should apply prospectively in  
25 1996.

1                   JUSTICE SCALIA:  Why would -- I find it  
2   difficult to understand why Congress wouldn't have  
3   wanted this to apply to illegal entrants who had come  
4   in before IIRIRA.  Bear in mind, these are people who  
5   have been deported once, already deported once, and  
6   then, in violation of the law, come back in again.  And  
7   there was a regime for deporting them, which allowed  
8   certain variations, which are eliminated by IIRIRA,  
9   permission for them to stay.  You really think Congress  
10  wanted to keep faith with the people who had, already  
11  have -- having been deported once for illegal reentry -  
12  - illegal entry -- come in again -- and you think  
13  Congress says, "Oh, well, you know, we have to keep  
14  faith with these people who are violating our law, and  
15  not -- and not deport them except under the conditions  
16  that existed when they broke the law to reenter"?  I  
17  find that a very -- what should I say? -- touching --

18                   [Laughter.]

19                   JUSTICE SCALIA:  -- attitude for Congress to  
20  have.

21                   MR. GOSSETT:  Justice Scalia, clearly  
22  Congress was attempting to change -- or to increase the  
23  disincentives to reentry.  At the same time that they  
24  modified the reinstatement provision, they extended the  
25  criminal reentry provisions.

1 JUSTICE SCALIA: Not only the --

2 MR. GOSSETT: So, the question isn't --

3 JUSTICE SCALIA: -- disincentives.

4 MR. GOSSETT: -- whether --

5 JUSTICE SCALIA: They were trying to get out  
6 of the country people who were here illegally, two-time  
7 losers who were here illegally for the second time.

8 MR. GOSSETT: The question, however, though,  
9 is not whether they were trying to change that  
10 consequence. The question is whether they did so  
11 retroactively, because this Court presumes that if  
12 Congress is trying to change the consequences of an  
13 action that has occurred in the past in substantive  
14 ways, Congress should say so explicitly, because, as  
15 your -- you have said in previous decisions, it is a  
16 foundational principle of Western law that primary --  
17 the consequences of primary conduct are judged as --

18 JUSTICE BREYER: But is that --

19 MR. GOSSETT: -- of the time of that conduct.

20 JUSTICE BREYER: -- so here? I want to know,  
21 if your client had known about this law or gone to a  
22 lawyer and said, "What do I do now?" wouldn't the  
23 lawyer have said, or would he have said, "Just leave.  
24 Leave the country, quick, before you're caught. Now,  
25 when you get back to Mexico, you can apply and point

1 out you've married an American citizen, and then you'll  
2 be able to come in, in all likelihood." And if I'm  
3 right about that, the Act does not attach new  
4 consequences to old behavior, it attaches new  
5 consequences to new behavior; namely, the act of  
6 staying within the United States, when you could leave.

7 MR. GOSSETT: I presume, Justice Breyer, you  
8 mean at the time that Congress enacted IIRIRA?

9 JUSTICE BREYER: I mean when this particular  
10 --

11 MR. GOSSETT: Was --

12 JUSTICE BREYER: -- provision was passed --

13 MR. GOSSETT: That --

14 JUSTICE BREYER: -- a week later, he goes to  
15 a lawyer, and the lawyer says, "You'd better get out of  
16 here fast, because if you're caught while you're here,  
17 you're married now, and you won't be able to take  
18 advantage of that. It would be terrible. So, go to  
19 Mexico. Then there is no problem." And if, in fact,  
20 I'm right, you see what I'm -- I find your argument  
21 excellent on the first part, but so is the  
22 Government's. So, I think there's a kind of wash  
23 there, so I'm looking to the second part. And there,  
24 you're just said, it attaches new consequences to old  
25 behavior. So, I'm asking you, if it doesn't attach the

1 new consequences to old, but, necessarily, plus new  
2 behavior -- namely, remaining.

3 MR. GOSSETT: No, Justice Breyer, it does  
4 not, because had he left in 1996, upon enactment of  
5 IIRIRA, he would have been inadmissible for 5 years --

6 JUSTICE BREYER: Well --

7 MR. GOSSETT: -- as a result of having left.  
8 Whereas, otherwise, otherwise, if he had stayed in the  
9 country, he would be eligible to apply for suspension  
10 of deportation --

11 JUSTICE BREYER: Being -- if you get married  
12 -- if you're outside the country and you marry an  
13 American, you're married to an American and you can't  
14 come in for 5 years?

15 MR. GOSSETT: As a result of his initial --  
16 having reentered --

17 JUSTICE BREYER: As a result of --

18 MR. GOSSETT: -- within 5 years --

19 JUSTICE BREYER: -- the initial deporting  
20 order.

21 MR. GOSSETT: As a result of his reentry five  
22 -- within 5 years of the date of his 1981 deportation,  
23 he would be ineligible for readmission for 5 years, had  
24 he left the country.

25 JUSTICE BREYER: So, his choice is this Act

1 or -- in which case, you never can get back, if you're  
2 caught -- or go to Mexico, wait 5 years.

3 MR. GOSSETT: Or 10 to 20 years, if --

4 JUSTICE BREYER: Ten to 20 years?

5 MR. GOSSETT: Ten to 20 years if you're  
6 caught, under this Act, is my understanding. It  
7 depends on -- the Government --

8 JUSTICE BREYER: No, no. I mean, he either  
9 stays in the United States --

10 MR. GOSSETT: Yes.

11 JUSTICE BREYER: -- in 10 to 20 years --

12 MR. GOSSETT: No, we -- if he stays in the  
13 United States, he's -- and is --

14 JUSTICE BREYER: Is caught.

15 MR. GOSSETT: -- entitled to apply for these  
16 forms of relief from deportation, then he will -- then  
17 he can become an American citizen, or become a lawful  
18 permanent resident, as a result of the forms --

19 JUSTICE BREYER: If you lose this --

20 MR. GOSSETT: -- of relief that existed --

21 JUSTICE BREYER: -- case -- if you lose this  
22 case, then his choice would be: stay here, get caught,  
23 and you never can come back, or 10 to 20 years?

24 MR. GOSSETT: Ten to 20 years.

25 JUSTICE BREYER: I see.

1 MR. GOSSETT: Ten to 20.

2 JUSTICE BREYER: Or go to Mexico, and you can  
3 come back in 5 years.

4 MR. GOSSETT: Yes.

5 JUSTICE BREYER: Okay.

6 MR. GOSSETT: But, of course, at the time --  
7 pre-IIRIRA, the choice was: stay in the country and  
8 seek -- and seek American citizenship through these  
9 other routes. And so, the forcing of him to leave is  
10 itself a retroactive effect of the enactment of this  
11 Act --

12 JUSTICE KENNEDY: Well, in this --

13 MR. GOSSETT: -- because --

14 JUSTICE KENNEDY: -- in this case, he was  
15 married after the effective date of the new statute.

16 MR. GOSSETT: Yes, Justice Kennedy.

17 JUSTICE KENNEDY: Did Judge McConnell, in the  
18 Tenth Circuit, suggest -- because he discussed this --  
19 suggest that the result might have been different if  
20 the marriage had been before?

21 MR. GOSSETT: Yes, he did suggest that. And  
22 several courts have --

23 JUSTICE KENNEDY: Why would that be  
24 consistent with his -- with his analysis?

25 MR. GOSSETT: Justice -- Judge McConnell and

1 several other courts have focused on the types of  
2 relief that an alien was eligible for as of the  
3 effective date of IIRIRA. We think that's the wrong  
4 first inquiry. We think that the way to approach the  
5 stage two analysis is on a categorical basis, because  
6 Congress, in the statute, said that, at the time of  
7 reentry, the mere act of reentry wouldn't categorically  
8 preclude you from seeking any forms of relief from  
9 deportation. And so, had Congress wanted to change  
10 that, it would have -- it would have had to do so  
11 retroactively on a categorical basis. But even if one  
12 accepts Judge McConnell's analysis of the forms of  
13 relief you're entitled to as of that date, at the very  
14 least, at that point, my client would be eligible to  
15 seek both voluntary departure and cancellation of  
16 removal. We think he'd -- also should be eligible to  
17 seek adjustment of status, because, although it's true  
18 that he is not -- he was not, at that point, married to  
19 his now-wife, adjustment of status was a -- is a  
20 defense from deportation, and he would have been able  
21 to get married even if put into deportation  
22 proceedings. And given that, at that point, he and his  
23 now-wife had -- already had a 8-year-old son --

24 JUSTICE KENNEDY: Well, but --

25 MR. GOSSETT: -- there would be no question

1 that it was a real marriage.

2 JUSTICE KENNEDY: -- it does point out that  
3 your argument is a difficult one, because this  
4 expectation that you argue for is that, number one, he  
5 has an expectation that he'd be able to adjust his  
6 status even after Congress has changed the law  
7 respecting reinstatement.

8 MR. GOSSETT: I don't think that's --

9 JUSTICE KENNEDY: This is --

10 MR. GOSSETT: -- a difficult analysis.

11 JUSTICE KENNEDY: -- this is a far-reaching  
12 expectation on his part.

13 MR. GOSSETT: The only expectation, Justice  
14 Kennedy, that we are proposing is that my client -- and  
15 aliens, generally, because this is an analysis that  
16 must be done on a categorical basis -- reasonably  
17 expected that Congress wouldn't change the consequences  
18 of their reentries far in the past without doing so  
19 explicitly.

20 JUSTICE GINSBURG: Am I wrong in thinking  
21 that readjustment based on his marriage was not one of  
22 the modes of relief that he could have had in '82 or --  
23 that that didn't come in until much later, is that so?

24 MR. GOSSETT: That is true, Justice Ginsburg.

25 JUSTICE GINSBURG: So, any -- so, that was a

1 consequence that certainly wasn't taken away from him,  
2 because it wasn't there in '82.

3 MR. GOSSETT: In 1982, Justice Ginsburg, my  
4 client reasonably presumed that the act of reentry,  
5 while itself a crime and while itself rendering him  
6 deportable, wouldn't categorically preclude him from  
7 seeking relief from deportation if, at a future date,  
8 he might become eligible to adjust in some way, either  
9 through suspension of deportation by having been here  
10 for 7 years, or by marrying an American citizen, or by  
11 having a reasonable claim for asylum. All of these  
12 were routes to stay, despite illegal entry or reentry.

13 JUSTICE GINSBURG: Even though what --

14 JUSTICE SCALIA: Why would he think that?  
15 Why wouldn't he just think, being here illegally, he is  
16 subject to being deported under such rules as the  
17 country has for deporting people who are here  
18 illegally, whatever they may be, from time to time?  
19 That would be my expectation if I came in illegally, in  
20 violation of the law. I'm saying, "I'm here at the  
21 sufferance of the country. I shouldn't be here. And  
22 whatever rules they have for kicking me out are the  
23 rules that I'll have to abide by."

24 MR. GOSSETT: The implications of your --

25 JUSTICE SCALIA: "I'm lucky not to be in

1 jail."

2 MR. GOSSETT: Justice Scalia, the implication  
3 of your argument is that a wrongdoer has no reasonable  
4 expectation in the law staying constant. But, of  
5 course, both the Hughes Aircraft and the Landgraf  
6 decisions are cases in which a conduct was clearly  
7 illegal or unlawful at the time it was done, but,  
8 nonetheless, a change in the law would retroactively  
9 change the implications of that unlawful conduct. And  
10 this Court, in both those cases, held that it was --  
11 that such change cannot be effected retroactively.

12 JUSTICE GINSBURG: Well, in St. Cyr --

13 JUSTICE SOUTER: Under the --

14 JUSTICE GINSBURG: -- was -- in St. Cyr, I  
15 think it was he pled guilty under one set of  
16 expectations, and that's what the Court fastened on.  
17 Isn't that so?

18 MR. GOSSETT: That's true, Justice Ginsburg.

19 However, the parallel in St. Cyr is that at the time  
20 the immigrant in St. Cyr pled guilty, he was  
21 presumptively deportable as a result of having pled  
22 guilty to a crime. He was eligible to seek  
23 discretionary relief from deportation, which this Court  
24 called "a matter of grace" in the St. Cyr decision.

25 JUSTICE GINSBURG: Well, he --

1 MR. GOSSETT: Similarly, here --

2 JUSTICE GINSBURG: -- might not have pled  
3 guilty if there was a different set of rules. I  
4 thought that was what drove the Court's opinion.

5 MR. GOSSETT: It's unclear to me whether or  
6 not the St. Cyr case would also generalize to someone  
7 who simply was convicted of a crime at that date. And  
8 there's a debate in the lower courts about that. But,  
9 more generally, in my client's context, at the very  
10 least his decision to stay in the United States for 7  
11 years, and thus become eligible for suspension of  
12 deportation, and then not to leave thereafter, was,  
13 itself, a very similar choice to that of the alien in  
14 St. Cyr. It's a conscious decision to remain here,  
15 rather than to leave.

16 JUSTICE SOUTER: If he had left voluntarily  
17 under the pre-'96 law, would he still have been subject  
18 to criminal prosecution for his prior illegal entry if  
19 he had later come back into the United States?

20 MR. GOSSETT: I'm not sure, Your Honor. I  
21 don't know.

22 JUSTICE SOUTER: Okay.

23 MR. GOSSETT: If there are no further  
24 questions, I'd like to reserve the remainder of my time  
25 for rebuttal.

1 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
2 Gossett.

3 Mr. Srinivasan.

4 ORAL ARGUMENT OF SRI SRINIVASAN

5 ON BEHALF OF RESPONDENT

6 MR. SRINIVASAN: Thank you, Mr. Chief  
7 Justice, and may it please the Court:

8 Section 1231(a)(5) aims to streamline the  
9 removal of aliens who were already removed but have  
10 since illegally reentered. The Congress that enacted  
11 IIRIRA did not intend to grandfather the provision and  
12 exempt those aliens who are already in the country  
13 illegally. Rather, the focus on streamlining the rules  
14 for getting illegal reentrants out of the country is  
15 fully applicable, and, indeed, is especially applicable  
16 to illegal reentrants who were already in the country  
17 at the time of IIRIRA's enactment.

18 Three considerations, I think, point to the  
19 conclusion that section 1231(a)(5) is addressed to  
20 removing illegal reentrants from the country, including  
21 aliens who are already in the country, and that the  
22 provision is not so much addressed to the antecedent  
23 act of illegal reentry, as such.

24 The first consideration I would point to is  
25 the operation of the provision. And it's useful to

1 bear in mind the following possible scenario in which a  
2 person, who's been removed, illegally reenters the  
3 country, but then returns to his home country. Now, in  
4 that situation the individual would have engaged in the  
5 act of illegal reentry, but section 1231(a)(5) simply  
6 would have no relevance to him whatsoever, because what  
7 section 1231(a)(5) seeks to do is to remove someone  
8 who's found in the country on the basis of their  
9 previous removal order. Now, if they have engaged in  
10 the act of illegal reentry, but then have gone back,  
11 section 1231(a)(5) simply is not relevant. And I think  
12 that goes to show that what the statute is focused on  
13 is not the act of illegal reentry, as such, but,  
14 rather, removing someone who's found in the country and  
15 who's determined to be an illegal reentrant.

16 Now, that operation stands in significant  
17 contrast to the criminal prohibition against illegal  
18 reentry, which is at 8 U.S.C. 1326, and the prohibition  
19 against illegal entry, which is 8 U.S.C. 1325. With  
20 respect to both of those provisions, the act of illegal  
21 reentry, or the act of illegal entry, necessarily  
22 triggers the operation of the criminal prohibition, and  
23 there's nothing that the alien can do after the fact to  
24 take himself outside of the -- of the purview of that  
25 criminal --

1 JUSTICE SCALIA: And those --

2 JUSTICE SOUTER: Should --

3 MR. SRINIVASAN: I'm sorry?

4 JUSTICE SCALIA: And those provisions are  
5 specifically recited to apply only to reentrants after  
6 the effective date.

7 MR. SRINIVASAN: That's right. Congress  
8 specifically indicated, in the text of IIRIRA, that  
9 it's -- it understood the distinction between the way  
10 in which those provisions operate and the way that  
11 1231(a)(5) operates. The IIRIRA expanded the scope of  
12 the criminal prohibition on an illegal reentry, and it  
13 also, for the first time, imposed civil monetary  
14 penalties on the act of illegal entry. There were  
15 civil fines, and then -- I think, \$50 to \$250 per  
16 episode. But what's critical is that with respect to  
17 both of those changes, Congress specified, in the terms  
18 of IIRIRA, that they would only apply, on a prospective  
19 basis, to acts of illegal entry or reentry that post-  
20 dated IIRIRA. Now, Congress made no such specification  
21 with respect to 1231(a)(5), and I think that's  
22 significant, because what that indicates is that  
23 Congress understood that that provision, unlike the two  
24 criminal -- unlike the two criminal provisions, focuses  
25 not on the act of illegal reentry, as such, but rather

1 --

2 JUSTICE SOUTER: Well, let me go back to the  
3 criminal provision for a second. I take it your answer  
4 to the question I asked your brother a moment ago is  
5 that if the individual reenters, and, hence, has  
6 committed a criminal offense, and later voluntarily  
7 returns to -- in this case, to Mexico, that the  
8 criminal violation, in effect, would not, in any sense,  
9 be canceled out.

10 MR. SRINIVASAN: That's right.

11 JUSTICE SOUTER: And that if he returned, he  
12 could be prosecuted for the prior reentry. And I  
13 suppose, in theory -- I don't know what the extradition  
14 treaty is -- in theory, he might be subject to  
15 extradition for it.

16 MR. SRINIVASAN: That's right.

17 JUSTICE SOUTER: The odd way to --

18 MR. SRINIVASAN: That's right, Justice --

19 JUSTICE SOUTER: Yes.

20 MR. SRINIVASAN: -- Souter.

21 JUSTICE SOUTER: Okay.

22 MR. SRINIVASAN: The criminal act is  
23 completed at the moment that the criminal reentry is  
24 completed, and nothing that he does afterwards can take  
25 --

1 JUSTICE SOUTER: There's no forgiveness --

2 MR. SRINIVASAN: That's right.

3 JUSTICE SOUTER: -- provision.

4 MR. SRINIVASAN: That's right. Which is  
5 different, obviously, from the operation of section  
6 1231(a)(5).

7 Now, another consideration that I think  
8 indicates that section 1231(a)(5) is focused on the  
9 timing of the removal, as opposed to the timing of  
10 reentry, is to take into account section 1231(a)(5) in  
11 the context of Section 1231 as a whole. Section 1231  
12 was a new provision that was enacted by IIRIRA, and  
13 Congress entitled it, quote, "Detention and Removal of  
14 Aliens Ordered Removed," close quote. And, as its  
15 title indicates, the provisions in section 1231, like  
16 1231(a)(5), all pertain to executing an order of  
17 removal against an alien who's been ordered removed.  
18 For example, those provisions concern the time period  
19 within which somebody is to be removed. They address  
20 the travel of somebody to the removal destination, the  
21 identification of the countries to which they may be  
22 removed, the payment of expenses. But all of them  
23 address the execution of an order of removal in the  
24 same way that section 1231(a)(5) does. Section  
25 1231(a)(5) speaks to the execution of the pre-existing

1 order of removal, the one that the alien had in place  
2 when he illegally reentered the country, but it's of a  
3 piece with those other provisions, in the sense that  
4 it, like them, addresses the timing of removal rather  
5 than speaking to the act of illegal reentry, as such.

6           The third consideration, I think, that points  
7 to the same conclusion, which is that Congress was  
8 focused prospectively on removals that postdated  
9 IIRIRA, rather than retrospectively, in some sense, on  
10 acts of illegal reentry that predated IIRIRA, is that  
11 at the time of illegal reentry, as we explain in -- at  
12 length in our brief, an alien would have had no  
13 eligibility, as a categorical matter, and at least as a  
14 practical matter, for the three types of relief that  
15 Petitioner invokes. And those three types of relief  
16 are adjustment of status, suspension of deportation,  
17 and voluntary departure.

18           Now, with respect to adjustment of status, as  
19 the colloquy earlier indicated, at the time that  
20 Petitioner illegally reentered the country in 1981, up  
21 until 1994, which was just 2 years before IIRIRA,  
22 adjustment of status was categorically unavailable to  
23 illegal entrants and illegal reentrants. In that  
24 light, it's -- one would be hard-pressed to assert that  
25 an illegal reentrant would have performed that act in

1 reasonable reliance on the availability of adjustment  
2 of status. It was simply --

3 JUSTICE SCALIA: You don't want to --

4 MR. SRINIVASAN: -- unavailable.

5 JUSTICE SCALIA: You don't want us to decide  
6 it on that ground, do you, so that all future cases  
7 you'll have to decide whether he came in before '94 or  
8 after '94, right?

9 MR. SRINIVASAN: That's right, Justice  
10 Scalia. I think a virtue of focusing on the fact that  
11 this statute is addressed to the removal, rather than  
12 the act of illegal reentry, is that it decides, once  
13 and for all, what the temporal reach of the statute is.

14 And --

15 CHIEF JUSTICE ROBERTS: Well, but your point,  
16 though -- I mean, someone illegally reentering at that  
17 time might not have had a reasonable expectation of the  
18 availability of discretionary relief. On the other  
19 hand, someone in the -- a petitioner's position, after  
20 all that had happened, did have a fairly good case  
21 under those provisions that were no longer available.

22 MR. SRINIVASAN: Well, that might be, Mr.  
23 Chief Justice, but his claim is that section 1231(a)(5)  
24 should be construed not to apply to anyone who  
25 illegally reentered before IIRIRA. And so, I think the

1 proper frame of reference is to look, ex ante, at what  
2 someone would be thinking, had they illegally reentered  
3 before IIRIRA, because he seeks to treat everyone who  
4 illegally reentered before IIRIRA as a uniform  
5 category.

6 CHIEF JUSTICE ROBERTS: Well, and someone  
7 entering says, "Well, obviously, if I'm detained the  
8 day after I enter, I'm not going to have a very good  
9 case. On the other hand, if I'm not, and I happen to  
10 make a life here, and I'm here for 20 years, and I get  
11 married and I have a child, I'm going to have a strong  
12 case," and he's going to -- he's willing to take his  
13 chances.

14 MR. SRINIVASAN: Well, two responses. First  
15 of all, that's not true with respect to adjustment of  
16 status, because someone who reentered before IIRIRA, at  
17 least if they reentered before 1984, couldn't have  
18 imagined that their marriage to a United States citizen  
19 would have given them a basis for adjustment, because  
20 adjustment simply was categorically unavailable to  
21 illegal entrants.

22 JUSTICE SCALIA: Did you say '84 or '94? I  
23 couldn't --

24 MR. SRINIVASAN: 1994, I'm sorry --

25 JUSTICE SCALIA: All right.

1 MR. SRINIVASAN: -- I didn't -- I -- in '81,  
2 when he illegally reentered, through 1994, adjustment  
3 of status was categorically unavailable to people who  
4 illegally reentered, so he couldn't --

5 JUSTICE KENNEDY: And --

6 MR. SRINIVASAN: -- have relied on the  
7 availability of that form of relief.

8 JUSTICE KENNEDY: And the executive couldn't  
9 weigh that. You say, categorically, it -- there's no -  
10 -

11 MR. SRINIVASAN: It simply wasn't provided --

12 JUSTICE KENNEDY: -- no possibility for  
13 discretion.

14 MR. SRINIVASAN: It simply wasn't provided  
15 for by statute. A precondition of eligibility for  
16 adjustment, until 1994, was that the person was not an  
17 illegal entrant. So --

18 JUSTICE KENNEDY: Well, could the -- could  
19 the INS have just stayed its hand for -- in --

20 MR. SRINIVASAN: I mean, I suppose they could  
21 have stayed their hand, in the sense that they wouldn't  
22 have applied the immigration laws to begin with, but I  
23 don't think there --

24 JUSTICE KENNEDY: No.

25 MR. SRINIVASAN: -- would have been any basis

1 to stay their hand, in the sense of granting --

2 JUSTICE SCALIA: Can't imagine that.

3 MR. SRINIVASAN: -- adjustment of status.

4 I'm sorry?

5 JUSTICE SCALIA: I say, I cannot imagine

6 that. No.

7 JUSTICE BREYER: I -- but I -- I didn't

8 understand this now. I guess I don't. Forget the

9 '94/'96 periods.

10 MR. SRINIVASAN: Sure.

11 JUSTICE BREYER: Suppose it stayed the

12 same throughout. Would you say, then, that someone who

13 came illegally into the country, and he's caught, and

14 he's married to an American, there's no possibility he

15 can stay, no matter what, no matter how appealing? Is

16 that the answer?

17 MR. SRINIVASAN: Not with respect to

18 adjustment of status.

19 JUSTICE BREYER: I'm -- yes, but you're

20 talking technically.

21 MR. SRINIVASAN: Yes, I'm speaking --

22 JUSTICE BREYER: Maybe there's --

23 MR. SRINIVASAN: -- technically, but --

24 JUSTICE BREYER: -- some other way you could

25 stay. What's the other way?

1 MR. SRINIVASAN: There is -- there's another  
2 form of relief that --

3 JUSTICE BREYER: Yes.

4 MR. SRINIVASAN: -- conceivably could give  
5 them a claim --

6 JUSTICE BREYER: Which was what?

7 MR. SRINIVASAN: -- and that's suspension of  
8 deportation --

9 JUSTICE BREYER: All right. Well --

10 MR. SRINIVASAN: -- which is the same --

11 JUSTICE BREYER: -- then it comes to the --

12 MR. SRINIVASAN: But --

13 JUSTICE BREYER: -- same thing. So, that --  
14 what I'm thinking is that a person who is here, and  
15 they marry an American -- all right? -- they marry a  
16 citizen. Now, before this Act was passed, there was a  
17 way that if they're really good -- let's assume they're  
18 the best human beings around, and the Attorney General  
19 finds all that out, and everybody knows this is like a  
20 saint, and they say, "Okay, you behave well enough.  
21 You can stay." Now, after the Act is passed, all those  
22 relevant actions have taken place in '86, long before.  
23 Now, there's absolutely nothing they can do. All they  
24 can do is go home. And now I've learned that when they  
25 go home, they will be told, "You cannot come back, no

1 matter what, for 5 years." Now, that's a pretty harsh  
2 consequence, to separate yourself from your family or  
3 have your family come to a foreign country. So, if I  
4 think the first part of this is a wash, you have a  
5 great argument, they have a great argument, and I look  
6 to the second part, does it attach new consequences to  
7 old and unchangeable behavior? I say, yes, it sure  
8 does. Now, why doesn't it?

9 MR. SRINIVASAN: Well, there's a lot in that  
10 question. Let me just try to address it one step at a  
11 time.

12 With respect to whether it attaches new legal  
13 consequences, I think you were right, Justice Breyer,  
14 earlier, in asking about what would happen if he had  
15 gone back voluntarily. Now, it's true that if he had  
16 been removed, then there would have been the  
17 consequence, in the sense that there would be a period  
18 of inadmissibility, at least presumptive  
19 inadmissibility, a period, which, by the way, is  
20 subject to waiver, which he could apply for. But if he  
21 had just gone back voluntarily after IIRIRA's  
22 enactment, or, indeed, in the 6-month window between  
23 IIRIRA's enactment and IIRIRA's effective date, my  
24 understanding is that there would have been no  
25 presumptive period of inadmissibility.

1 JUSTICE BREYER: Ah. So, then, you're saying  
2 the answer I got before was wrong --

3 MR. SRINIVASAN: I think --

4 JUSTICE BREYER: -- that, in fact --

5 MR. SRINIVASAN: I think that's correct.

6 JUSTICE BREYER: -- I now have my client in,  
7 he's come after IIRIRA has been enacted, and he says,  
8 "I've heard about this in IIRIRA, and what in heaven's  
9 name am I supposed to do?" And the lawyer says, "Get  
10 out fast, next train. Go back. And if you get across  
11 that border, you're safe. Because at that point, you  
12 can apply; and you're a saint, and you've been married,  
13 they'll let you right in, because they'll find out."  
14 That's what your view of the law is.

15 MR. SRINIVASAN: That's my understanding of  
16 the law.

17 JUSTICE BREYER: It must be the one way or  
18 the other.

19 MR. SRINIVASAN: Well, the five -- the 5-year  
20 period that Petitioners -- Mr. Gossett was referring  
21 to, I think, relates to the period after the point in  
22 time at which somebody's deported or removed. And so,  
23 his initial deportation --

24 JUSTICE BREYER: No, in -- and this is not --  
25 I was saying the question --

1 MR. SRINIVASAN: He would --

2 JUSTICE BREYER: -- would be, is this Act  
3 attaching consequences to old things that you couldn't  
4 do anything about? And you're saying, "Not entirely.  
5 You can. You can leave. In which case, you'll be no  
6 worse off, except for the train fare."

7 MR. SRINIVASAN: That's right.

8 JUSTICE BREYER: Okay.

9 MR. SRINIVASAN: That's my --

10 CHIEF JUSTICE ROBERTS: That --

11 MR. SRINIVASAN: -- understanding.

12 CHIEF JUSTICE ROBERTS: That person has not  
13 illegally reentered the United States? He's gone back,  
14 but he did illegally reenter the United States. He  
15 wouldn't be covered by the same provision that we're  
16 talking about?

17 MR. SRINIVASAN: No, he -- you're right, Mr.  
18 Chief Justice, that it's -- that he's illegally  
19 reentered. But he wouldn't be covered by this  
20 provision, because all this provision seeks to do is to  
21 remove him. And then, once he's gone back, this  
22 provision simply ceases to have any relevance to him at  
23 all, because he's, in some sense, self-removed. And  
24 so, he -- any ineligibility wouldn't stem from this  
25 provision, it would come from somewhere else. And, as

1 far as I'm aware, he wouldn't -- he wouldn't be subject  
2 to the 5-year period of inadmissibility that's imposed  
3 by a separate provision and that would attach if he  
4 were removed, because, by hypothesis, he wouldn't have  
5 removed, he would have gone back on his own accord.

6 JUSTICE SCALIA: And even if he was, that was  
7 waivable.

8 MR. SRINIVASAN: That's right. That's  
9 subject to waiver, which is another --

10 JUSTICE SCALIA: Just as he doesn't  
11 automatically get admitted because he's married, does  
12 he?

13 MR. SRINIVASAN: Right. That's --

14 JUSTICE SCALIA: That's discretionary, as  
15 well.

16 MR. SRINIVASAN: That's discretionary --

17 JUSTICE SCALIA: So, it's --

18 MR. SRINIVASAN: -- at the end of the day --

19 JUSTICE SCALIA: -- one discretion --

20 MR. SRINIVASAN: -- as well.

21 JUSTICE SCALIA: -- and another discretion.

22 MR. SRINIVASAN: Right. And we lay this out  
23 in some detail in a -- in a footnote in our brief. And  
24 that's at -- that's at pages 39 to 40. But that  
25 footnote, I should point out, doesn't deal with your

1 hypothetical, Justice Breyer, which is that he goes  
2 back of -- on his own accord. And, I think, in that  
3 situation what he would do is what people ordinarily do  
4 when they're seeking to gain lawful admission to the  
5 country, which is to apply for admission on the basis  
6 of what would have been whatever relationships he could  
7 have asserted at that point. Now, he wasn't married at  
8 the time that IIRIRA was enacted, so he wouldn't have  
9 used his marriage as a basis for coming in, because he  
10 wasn't married as of yet. But I think that cuts more  
11 against him, rather than in his favor, because --

12 JUSTICE GINSBURG: In the instance --

13 MR. SRINIVASAN: -- of course --

14 JUSTICE GINSBURG: -- of a child --

15 JUSTICE STEVENS: May I ask this --

16 JUSTICE GINSBURG: -- who had -- he had a  
17 relationship to a child in the United States. And  
18 couldn't that have counted for suspension of  
19 deportation or removal, whatever terms I use now? Did  
20 --

21 MR. SRINIVASAN: It --

22 JUSTICE GINSBURG: -- for a hardship claim, a  
23 parent-child relationship?

24 MR. SRINIVASAN: That's right, Justice  
25 Ginsburg, it would count for purposes of suspension of

1 deportation, which was renamed cancellation of removal.  
2 But that form of relief is available to somebody who's  
3 inside the United States, and I was meaning to address  
4 the situation where he has voluntarily removed himself  
5 from the United States and is seeking admission from,  
6 presumably, Mexico, in which case, suspension of  
7 deportation wouldn't really come into play, because  
8 deportation wouldn't be on the table.

9 But, you're right that if he had stayed in  
10 the country, suspension of deportation is a form of  
11 relief that he would have been eligible for -- eligible  
12 for, pre-IIRIRA. But, with respect to suspension of  
13 deportation, I think it's important to understand that  
14 that form of relief required an -- a period of presence  
15 in the United States of 7 years before one could gain  
16 eligibility to seek that relief. And so --

17 JUSTICE GINSBURG: He was here -- he was here  
18 for 20 --

19 MR. SRINIVASAN: He --

20 JUSTICE GINSBURG: -- 20 years, though.

21 MR. SRINIVASAN: He was. So, he would have  
22 clearly met that eligibility criteria -- there is no  
23 question about that -- under the pre-existing law. But  
24 if you put yourself in the position of somebody who is  
25 entering, pre-IIRIRA, and is trying to determine

1 whether suspension of deportation is relief that would  
2 be realistically available to them, you'd have to think  
3 that they would act on -- in reliance on their ability  
4 to stay in the country for 7 years, and to remain  
5 undetected, only at which point they would qualify for  
6 suspension of deportation. And that not only seems to  
7 me, as a factual matter, somewhat farfetched, but it's  
8 not clear that the law should attach significance to  
9 that sort of reliance --

10 JUSTICE GINSBURG: Is it --

11 MR. SRINIVASAN: -- interest.

12 JUSTICE GINSBURG: Is it farfetched, in view  
13 of the history of now I- -- before INS, weren't there a  
14 great many people who got here and -- just as this  
15 Petitioner -- who just lived here for years and years,  
16 and were never disturbed?

17 MR. SRINIVASAN: As an -- as an empirical  
18 matter, I think that's right, Justice Ginsburg, but I'm  
19 not sure that that necessarily means that that's a  
20 legitimate expectation or a reasonable reliance  
21 interest of the type that the Court would typically  
22 take into account in its retroactivity inquiry, because  
23 at the end of the day what it is, is a reliance  
24 interest that's predicated on essentially lack of  
25 prosecutorial resources, or a favorable exercise of

1 prosecutorial discretion in some sense. And the Court  
2 hasn't attached significance to that sort of reliance  
3 interest before. It's --

4 JUSTICE SCALIA: Or, put more starkly, if I  
5 continue to violate the law for 7 years, I can count on  
6 this kind of treatment. That's an odd reliance  
7 interest.

8 MR. SRINIVASAN: That's right, and --  
9 particularly taking into account the reasonable reliance  
10 -- the category "reasonable reliance" is designed to take  
11 -- is designed to --

12 JUSTICE STEVENS: May I ask --

13 MR. SRINIVASAN: -- account for its fairness  
14 --

15 JUSTICE STEVENS: -- this elementary --

16 MR. SRINIVASAN: -- interests.

17 JUSTICE STEVENS: -- an elementary question,  
18 just to be sure we all agree on this? You do agree, do  
19 you not, that if, in 1997, Congress passed a statute  
20 that said you should get an extra \$50 penalty for  
21 having come in, back in 1981, that would not be  
22 permissible?

23 MR. SRINIVASAN: Right. I think the  
24 presumption --

25 JUSTICE STEVENS: And --

1 MR. SRINIVASAN: -- against retroactive --

2 JUSTICE STEVENS: And there's sort of an  
3 irony in the fact that the actual consequence here is a  
4 great deal more serious.

5 MR. SRINIVASAN: Well, the consequence of  
6 removal is more serious --

7 JUSTICE STEVENS: Yes.

8 MR. SRINIVASAN: -- than -- in some sense,  
9 than a \$50 penalty. That's right. But this is a  
10 person --

11 JUSTICE STEVENS: Which is constitutionally  
12 prohibited. But the consequences here are permitted.  
13 I understand the analysis. It's like just saying we  
14 take away one ground for staying that we didn't have  
15 before. But looking at it in kind of a basic sense,  
16 that seems -- it's a fairly serious thing --

17 MR. SRINIVASAN: That's right, but --

18 JUSTICE STEVENS: -- that happens, and it  
19 effects an awful lot of people, doesn't it?

20 MR. SRINIVASAN: Sure. I think it affects  
21 anyone who had illegally reentered, at least. But it's  
22 important to bear in mind that this is somebody who was  
23 already subject to a removal order. So, in some sense,  
24 sending them back out of the country puts them in the  
25 same position that they would have been in under the

1 old removal order. And so, insofar as it has that  
2 effect on them, I think it's different than a \$50  
3 penalty that attaches to the primary conduct of illegal  
4 reentry, as such.

5 JUSTICE KENNEDY: Do you read the Tenth  
6 Circuit opinion as indicated it might have had a  
7 different result if he had been married before the  
8 enactment of the statute?

9 MR. SRINIVASAN: There is that suggestion, I  
10 think, in Judge McConnell's opinion, and that's --

11 JUSTICE KENNEDY: How does that fit with the  
12 court's theory?

13 MR. SRINIVASAN: With the -- with the Tenth  
14 Circuit's theory or --

15 JUSTICE KENNEDY: Yes.

16 MR. SRINIVASAN: I think --

17 JUSTICE KENNEDY: How does it --

18 MR. SRINIVASAN: -- the idea was -- I think  
19 what the Tenth Circuit failed to recognize was that  
20 adjustment of status was categorically unavailable to  
21 somebody who illegally reentered before IIRIRA, at  
22 least before 1994. And what Judge McConnell presumed  
23 was that it would have been available. And his point  
24 was that even if it would have been available, it's  
25 farfetched to think that somebody would have thought

1 not only about coming into the country, but coming into  
2 the country and then meeting a United States citizen,  
3 and become married to the United States citizen, and  
4 using that as sort of a reliance basis for not applying  
5 the law retroactively to somebody who had come in  
6 beforehand. But I think that was based on a  
7 misimpression about the availability of adjustment of  
8 status.

9 Now, I'd like to address, briefly, if I  
10 could, the argument at step one of the Landgraf inquiry  
11 concerning the negative inference the Petitioner seeks  
12 to draw from the "before or after" clause -- so-called  
13 "before or after" clause. And the two provisions can  
14 be compared side by side at pages 2 and 3 of the  
15 Government's brief, and that's in the body of the  
16 Government's brief.

17 The fundamental flaw with the argument at  
18 step one is that the "before or after" clause in the  
19 old provision, which is at the bottom of page 2,  
20 referred, by terms, to the date of the INA's enactment.

21 Now, what we've reflected is the codified version,  
22 which refers specifically to the date of June 27 of  
23 1952. But even the INA itself referred to the date of  
24 the enactment of this Act, which can only be seen to  
25 refer to the INA itself. So, if this language had been

1 carried forward in section 1231(a)(5), it still would  
2 have been a reference to the date of the enactment of  
3 the INA. So, it would refer to somebody who was  
4 deported before or after 1952.

5 Now, I think, as Justice Alito suggested, the  
6 probable reason that Congress decided not to carry  
7 forward this language is because the question of  
8 whether someone was deported before or after 1952  
9 doesn't have a great deal of practical significance at  
10 this point in time. But whatever one might think was  
11 the actual reason for Congress's failing to carry  
12 forward the language, I don't think that you can draw  
13 any negative inference from Congress's failure to carry  
14 forward that language, at least certainly not the  
15 negative inference that Petitioner wants to draw. In  
16 fact, the negative inference that one would draw, if  
17 one were going to do so, is that the section 1231(a)(5)  
18 applies only to people who were deported initially  
19 after 1952. But that sort of negative inference  
20 wouldn't be of much assistance to Petitioner, or any  
21 other person, for that matter, that illegally reentered  
22 before IIRIRA, at least as a practical matter, because  
23 everybody, I think, in that category, would have  
24 illegally reentered -- or would have been deported  
25 after 1952, rather.

1 JUSTICE SCALIA: I'm not sure that gives the  
2 other side the -- you know, the benefit of their  
3 argument. I think what they're arguing is not just  
4 that it was deleted, but that it was not replaced by --  
5 whether "before or after," and then filling in the date  
6 of IIRIRA, rather than the date of the INA. I have --  
7 nobody thinks that they would leave in June 27, 1952,  
8 but why wouldn't they have substituted, for that, the  
9 date of this new legislation, the date of IIRIRA? I  
10 think that's the point he's making.

11 MR. SRINIVASAN: Well --

12 JUSTICE SCALIA: And isn't there something to  
13 that?

14 MR. SRINIVASAN: I -- it's -- there's  
15 certainly not enough there to make the argument that  
16 he's making, I don't think, because what was -- what  
17 Congress did was to replace that provision with utter  
18 silence. And from that utter silence, I don't think  
19 there's any way to read into it that Congress meant for  
20 the applicability of section 1231(a)(5) --

21 JUSTICE SCALIA: Just getting rid of old  
22 language that was no longer --

23 MR. SRINIVASAN: That's right.

24 JUSTICE SCALIA: -- or intentionally not  
25 adding new language.

1           MR. SRINIVASAN: That's right. I don't think  
2 there's any way to read into it the inference that  
3 Congress meant to hinge the applicability of section  
4 1231(a)(5) on IIRIRA's enactment date. There never was  
5 a proposal on the table to hinge section 1231(a)(5)'s  
6 applicability on IIRIRA's enactment date. The only  
7 possibility was to keep the old provision in the  
8 statute books unaffected, and the decision not do that  
9 doesn't have the negative inference that Petitioner  
10 suggests.

11           If the Court has no more questions --

12           CHIEF JUSTICE ROBERTS: Thank you, Counsel.

13           Mr. Gossett, you have 2 minutes remaining.

14           REBUTTAL ARGUMENT OF DAVID M. GOSSETT

15                           ON BEHALF OF PETITIONER

16           MR. GOSSETT: Thank you, Mr. Chief Justice.

17           Only a few points I want to make.

18           The first is that illegal reentrants'  
19 reasonable expectation that they might grow into  
20 relief, as Mr. -- the Chief Justice said, not only is  
21 reasonable, but has a statutory basis. Suspension of  
22 deportation and cancellation of removal, by their very  
23 terms, are only available to aliens who were illegally  
24 present in the United States for the relevant time  
25 period, and, therefore, these forms of relief

1 specifically exist to -- for such aliens. That people  
2 have a reasonable reliance interest in unlawful acts  
3 over time is also demonstrated by such doctrines as the  
4 doctrine of adverse possession, statutes of  
5 limitations/laches, et cetera.

6 Second, Justice Breyer, your -- it is the  
7 case that were he to have been -- have left after the  
8 enactment of this Act, he would be kept out for --  
9 inadmissible for 5 years. That's 8 U.S.C.  
10 1182(a)(6)(B). Because he had reentered the country  
11 within 5 years of his 1981 deportation, he -- under the  
12 Government's interpretation of that statute, he would  
13 be inadmissible for 5 years from -- even if he were to  
14 re-leave in 1996, he would have been ineligible to  
15 reenter for 5 years.

16 JUSTICE BREYER: So, a person who just leaves  
17 voluntarily, having reentered illegally, cannot come  
18 back for 5 years, no matter what, under 1156(a)(6)(B).

19 MR. GOSSETT: The former -- that was repealed  
20 --

21 JUSTICE BREYER: That was repealed.

22 MR. GOSSETT: -- in 1996. But, yes --

23 JUSTICE BREYER: Yes.

24 MR. GOSSETT: -- that would have -- as part  
25 of IIRIRA -- but if he had waited til IIRIRA took

1 effect, then it would have been -- he would have been  
2 subject to this --

3 JUSTICE BREYER: All right.

4 MR. GOSSETT: -- provision. The --

5 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
6 Gossett. Thank you.

7 MR. GOSSETT: Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: The case is  
9 submitted.

10 [Whereupon, at 10:59 a.m., the case in the  
11 above-entitled matter was submitted.]

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