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Limiting Application of INA § 241(a)(5) after *Fernandez-Vargas v Gonzales*

Claire Hausman†

On April 1, 1997 the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") became effective and established sweeping changes to U.S. immigration law. Part of the legislation involved streamlining and expediting the existing removal procedures of illegal aliens that had become "cumbersome and duplicative." Among the provisions affected by IIRIRA was one governing the reinstatement of removal orders of aliens who reenter the United States illegally. By replacing Immigration and Nationality Act ("INA") § 242(f), 8 USC 1252(f) (repealed 1996) with § 241(a)(5), 8 USC § 1231(a)(5), the IIRIRA expanded the category of illegal reentrants subject to reinstatement of a prior removal order, eliminated the possibility of avoiding removal order reinstatement by obtaining discretionary relief, and allowed immigration officials, instead of judges, to make all necessary determinations concerning the decision to recommence removal.

After April 1, 1997 the Immigration and Naturalization Service ("INS") began applying the new reinstatement provision,

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3 IIRIRA refers to "removal" which was formerly known as "deportation." See Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum L Rev 961, 966 (1998). ("IIRIRA realigned the vocabulary of immigration law, creating a new category of "removal" proceedings that largely replaces what were formerly exclusion proceedings and deportation proceedings."). The use of each will depend on whether the old or new scheme is referenced.

4 Courts usually observe a standard of referring to immigration statutes by their INA and IIRIRA section numbers. This Comment will follow that standard, but include an initial cross-reference to section numbers in the United States Code.

5 *Arevalo v Ashcroft*, 344 F3d 1, 4–5 (1st Cir 2003).

6 Congress abolished the INS as an independent agency within the Department of Justice and transferred its functions to the Department of Homeland Security ("DHS").
§ 241(a)(5), to aliens who had been ordered deported, and then reentered the United States illegally, before the effective date of IIRIRA. These aliens challenged the reinstatement of their deportation orders in the Courts of Appeals, arguing that it was impermissibly retroactive to apply § 241(a)(5) to aliens who reentered the United States illegally before the provision's effective date. The circuits split on the issue. On June 22, 2006, in *Fernandez-Vargas v Gonzales*, the Supreme Court resolved the disagreement in favor of the Attorney General, holding that § 241(a)(5) has no retroactive effect when applied to aliens who illegally reentered the United States before IIRIRA's effective date. However, the Court expressly declined to resolve a split among the Courts of Appeals on whether an alien's marriage or application for adjustment of status before the statute's effective date renders the statute impermissibly retroactive when applied to that alien.

This Comment will address the limits of the application of § 241(a)(5) to illegal reentrants by examining the question the Supreme Court left open in *Fernandez-Vargas*. It will use the two-step test set out by the Supreme Court in *Landgraf v USI Film Products*, to analyze whether reinstating the deportation order of an alien who made efforts to legalize his status before the statute's effective date is impermissibly retroactive. Since the Supreme Court ruled in *Fernandez-Vargas* that Congress did not clearly indicate in § 241(a)(5) an intention for the law to have a

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See Homeland Security Act, Pub L 107-296, § 471, 116 Stat 2135, 2205, codified at 6 USC § 291(a) (2004). The Bureau of Immigration and Customs Enforcement ("ICE") was created as a branch of DHS in March 2003 and is composed of the former INS and U.S. Customs Service. The detention, removal, enforcement, and investigative function, as well as the power to adjudicate asylum claims, of the former INS now resides in ICE. See 6 USC § 252 (2004). For further details on ICE, see The U.S. Immigration and Customs Enforcement website, available at <http://www.ice.gov/> (last visited April 4, 2007).


8 126 S Ct 2422 (2006).

9 See id at 2425.

10 Id at 2427 n 5.

11 See *Landgraf v USI Film Products*, 511 US 244, 280 (1994). The first step is to determine "whether Congress has expressly prescribed the statute's proper reach." If the statute contains no express prescription, the court's second step is to determine "whether the new statute would have a retroactive effect" in the disfavored sense of "impair[ing] rights a party possessed when he acted, increase[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed." Id.
retroactive effect,\textsuperscript{12} this Comment will focus on the second step of the \emph{Landgraf} test, determining if the law has a disfavored retroactive effect when applied to aliens who attempted to adjust their status before IIRIRA went into effect. Part I will describe retroactivity analysis as defined by the Supreme Court. It will also address the effect of \textit{Fernandez-Vargas} on the interpretation of § 241(a)(5), and the current split in the Courts of Appeals. Part II will evaluate the arguments of the Courts of Appeals by comparing the situation of illegal reentrants to other parties who have challenged retroactive application of laws. The Comment concludes that although applying § 241(a)(5) to aliens who filed for adjustment of status before the effective date may not create new consequences for past acts, it is still impermissibly retroactive under the second step of the \emph{Landgraf} test because it cancels vested rights.

\section{I. RETROACTIVE APPLICATION OF § 241 (A)(5): NOT EVERY ILLEGAL REENTRANT IS THE SAME}

\subsection{A. Retroactive Application of Statutes}

It is generally understood that "retroactive statutes raise particular concerns."\textsuperscript{13} "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions."\textsuperscript{14} Furthermore, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."\textsuperscript{15} For these reasons, "the presumption against retroactive legislation is deeply rooted in [American] jurisprudence."\textsuperscript{16} This antiretroativity principle is expressed in several provisions of the Constitution, including the Ex Post Facto Clause,\textsuperscript{17} the Takings Clause,\textsuperscript{18} and the prohibition on Bills of Attainder.\textsuperscript{19} How-

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\item[\textsuperscript{12}] \textit{Fernandez-Vargas}, 126 S Ct at 2430 ("[I]t is just too hard to infer any clear intention... from what is now § 241(a)(5). ").
\item[\textsuperscript{13}] \textit{Landgraf} v \textit{USI Film Products}, 511 US 244, 266 (1994).
\item[\textsuperscript{14}] Id at 265–66.
\item[\textsuperscript{15}] Id at 265.
\item[\textsuperscript{16}] Id.
\item[\textsuperscript{17}] US Const Art I, § 9, cl 3 and Art I, § 10, cl 1 ("No... ex post facto Law shall be passed.").
\item[\textsuperscript{18}] US Const Amend V ("[N]or shall private property be taken for public use, without just compensation.").
\item[\textsuperscript{19}] US Const Art I, §§ 9–10 ("No Bill of Attainder... shall be passed."). See also \textit{Landgraf}, 511 US at 266.
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ever, courts will not prohibit civil legislation such as § 241(a)(5), which does not violate any of these provisions of the Constitution, from applying retroactively simply because of potential unfairness. As the Supreme Court has explained, "retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope."21 "[B]enign and legitimate purposes" of retroactive provisions include "respond[ing] to emergencies, . . . correct[ing] mistakes, . . . prevent[ing] circumvention of a new statute in the interval immediately preceding its passage, or simply . . . giv[ing] comprehensive effect to a new law Congress considers salutary."22

Therefore, the courts' focus in considering the temporal scope of civil legislation is rarely whether retroactive application is constitutionally prohibited,23 but rather whether Congress intended the legislation to be retroactive. Because "[r]etroactivity is not favored in the law . . . congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."24 The requirement that Congress make a statement of clear intent helps guarantee that Congress balanced the benefits of retroactivity against its potential for disruption or unfairness, and affirmatively determined retroactivity was warranted.25 The "fundamental policy judgments concerning the proper temporal reach of statutes" are therefore assigned to Congress, not the courts.26 For example, a court cannot designate a retroactive effect to a statute simply because it believes doing so would more fully carry out the purpose of the law.27 Since Congress rarely writes statutes addressing a single goal, and compromises made to get a bill passed of-

20 See Landgraf, 511 US at 267.
21 Id. Further, the Court has held that deportation (now called removal) is not punishment. See Fong Yue Ting v United States, 149 US 698, 730 (1893) (holding that deportation is not punishment); Wong Wing v United States, 163 US 228, 236–37 (1896) (reaffirming that deportation is not punishment and holding that criminal procedural protections do not apply in deportation proceedings unless the government seeks another remedy in addition to deportation). It is only in the criminal context that ex post facto laws are strictly prohibited, so courts have discretion in determining the scope of retroactive application of removal statutes because removal is classified as a civil remedy.
22 Landgraf, 511 US at 268.
23 However, civil penalties may raise constitutional questions. See id at 281 (teaching that retroactive imposition of punitive damages raises a serious constitutional question because of its similarity to criminal sanctions).
24 Bowen v Georgetown University Hospital, 488 US 204, 208 (1988).
25 See Landgraf, 511 US at 268.
26 Id at 273.
27 See id at 285–86.
ten necessitate resorting to means other than those that might most directly pursue the particular goals, a retroactive intent cannot be inferred by the courts.\(^{28}\) Congress legislates against the “predictable background rule” of a presumption against retroactivity, so a court’s loosening of this presumption would risk improperly countering congressional intent.\(^{29}\)

The landmark case \textit{Landgraf v USI Film Products}\(^{30}\) sets out a two step test for determining whether civil legislation may operate retroactively. A statute may be applied retroactively if Congress clearly indicates in the language of the legislation that it intends the law to have such a result.\(^{31}\) Therefore, the first step of the Landgraf test asks whether “Congress has expressly prescribed the statute’s proper reach.”\(^{32}\) To determine a statute’s temporal reach, courts use normal rules of statutory construction.\(^{33}\) The standard is a demanding one as Congress’s intent must be clear for a statute to apply in a disfavored, retroactive way.\(^{34}\)

If nothing in a statute evidences the unambiguous intent for a specific provision to apply retroactively, then in the second step, the court must consider whether its application in the case at hand would have retroactive effects.\(^{35}\) If the provision of the statute has a retroactive effect, then the court presumes it will not apply to the conduct in question in the case, which occurred prior to its effective date.\(^{36}\) If the court determines there is no retroactive effect, then the statute’s application is not barred. This outcome results from the presumption against retroactivity. If Congress has not overcome that presumption by expressing intent for a retroactive effect, then neither an agency nor a court

\(^{28}\) Id at 286.
\(^{29}\) See \textit{Landgraf}, 511 US at 273.
\(^{30}\) 511 US 244 (1994).
\(^{32}\) \textit{Landgraf}, 511 US at 280.
\(^{34}\) See id at 328 (noting that “Congress could have taken [the \textit{Landgraf} opinion] as counseling the wisdom of being explicit if it wanted such a provision to be applied to cases already pending”).
\(^{35}\) See \textit{Martin v Hadix}, 527 US 343, 357 (1999) (“Because we conclude Congress has not ‘expressly prescribed’ the proper reach of [the statute], we must determine whether application of this section in this case would have retroactive effects inconsistent with the usual rule that legislation is deemed to be prospective.” (citation omitted)).
\(^{36}\) See, for example, \textit{Hughes Aircraft Company v United States}, 520 US 939, 946 (1997) (“The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.” (quotation and citation omitted)).
can stretch the scope of the statute by applying it to past actions. Such an application is unlawful because it is inconsistent with presumed congressional intent.

Unfortunately, the boundaries defining retroactive application are not exact. Retroactive effects may include “impair[ing] rights a party possessed when he acted, increas[ing] a party’s liability for past conduct, or impos[ing] new duties with respect to transactions already completed.”\(^\text{37}\) However, a statute does not operate retroactively “merely because it is applied in a case arising from conduct antedating the statute’s enactment . . . or upsets expectations based in prior law.”\(^\text{38}\) The Supreme Court has not concretely defined the outer limit of impermissible retroactivity.\(^\text{39}\) It has stated that deciding when a statute operates retroactively is “not always a simple or mechanical task.”\(^\text{40}\)

In a line of cases, the Court has described effects that constitute sufficient, if not necessary, conditions for invoking the presumption against retroactivity.\(^\text{41}\) *Landgraf* relied on a traditional standard put forth by Justice Story that asks whether a statute “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.”\(^\text{42}\) Though the Court’s standards for evaluating retroactive effects have varied slightly,\(^\text{43}\) generally, 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.”\(^\text{44}\) The Court has repeatedly explained that the judgment “should be informed and guided by ‘familiar considerations of fair notice, reasonable reliance, and settled expectations.’”\(^\text{45}\)

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\(^\text{37}\) *Landgraf*, 511 US at 280.

\(^\text{38}\) Id at 269 (citation omitted).

\(^\text{39}\) See *Hughes Aircraft Co*, 520 US at 947 (clarifying that *Landgraf* did not “define the outer limit of impermissible retroactivity”).

\(^\text{40}\) *Landgraf*, 511 US at 268.

\(^\text{41}\) *Hughes Aircraft Co*, 520 US at 947.

\(^\text{42}\) *Landgraf*, 511 US at 269, quoting *Society for Propagation of the Gospel v Wheeler*, 22 F Cas 756, 767, 2 Gall 105 (1814). The Court later rephrased this standard as whether the statute 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 US at 280.

\(^\text{43}\) *Hughes Aircraft Co*, 520 US at 947.

\(^\text{44}\) *Martin*, 527 US at 357–58 (quotation and citation omitted).

\(^\text{45}\) *St Cyr*, 533 US at 321, quoting *Martin*, 527 US at 358. See also *Landgraf*, 511 US at 270.
B. The Landgraf Test Applied to IIRIRA

The Supreme Court applied the Landgraf test to determine whether provisions in IIRIRA applied retroactively, first in INS v St Cyr,46 and recently in Fernandez-Vargas v Gonzales.47 During March 1996, St. Cyr, a lawful permanent resident entered a guilty plea of selling a controlled substance.48 Under the pre-IIRIRA law, he became subject to deportation but was also eligible for a discretionary waiver of that deportation because his sentence did not exceed five years.49 However, removal proceedings against him were not commenced until after IIRIRA had become effective, leading the Attorney General to argue that under the new statute he no longer had discretion to grant such a waiver.50 The Court held that the elimination of any possibility of relief by IIRIRA would have an “obvious and severe retroactive effect” on St. Cyr and other aliens like him.51 The statute’s application failed the second step of the Landgraf test because St. Cyr almost certainly relied upon the likelihood of a waiver of deportation in deciding whether to forgo his right to a trial. Eliminating the possibility of that waiver would have had an impermissible retroactive effect because it attached a new disability (removing any chance for discretionary relief from deportation) resulting from his plea, which was a past transaction.52 In so holding, the Court stressed the unimportance that the relief available to St. Cyr pre-IIRIRA was discretionary. The Court explained that because “[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation” the elimination of any possibility of relief by IIRIRA was impermissible in the case because of its retroactive effect.53

48 See St Cyr, 533 US at 314.
49 See id at 295–96 n 4, 314–15. See also INA § 212(c), 8 USC 1182(c) (1994).
50 See St Cyr, 533 US at 293.
51 Id at 325.
52 Id.
53 St Cyr, 533 US at 325.
The Court in Fernandez-Vargas also addressed the temporal scope of an IIRIRA provision, but found no retroactive effect. Since 1950, Congress has allowed for the reinstatement of orders removing some aliens who either voluntarily left in the face of a deportation order or were deported, and then unlawfully reentered the country, to facilitate their expedited removal. Prior to IIRIRA, the class of illegal reentrants susceptible to reinstatement was limited to aliens who were deported for enumerated reasons. Moreover, statutes such as 8 USC § 1254(a)(1) allowed for discretionary relief from reinstated orders of deportation. In 1996 these laws were replaced as part of IIRIRA. The new section governing reinstatement provides:

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.

After § 241(a)(5) took effect on April 1, 1997, Courts of Appeals were confronted with the issue of whether the provision applied to illegal aliens who reentered before that date. Two circuits held that § 241(a)(5) did not apply to aliens who reentered before the provision's effective date but a majority held that it did, at least in some circumstances.

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54 See Fernandez-Vargas, 126 S Ct at 2425–26.
57 INA § 241(a)(5), 8 USC § 1231(a)(5).
58 See Castro-Cortez v INS, 239 F3d 1037, 1050 (9th Cir 2001), overruled by Fernandez-Vargas, 126 S Ct at 2427 & n 5 (“[W]e agree . . . that . . . INA §241(a)(5) . . . does not apply retroactively to aliens who reentered the United States before IIRIRA's effective date.”); Bejjani v INS, 271 F3d 670, 684 (6th Cir 2001) overruled by Fernandez-Vargas, 126 S Ct at 2427 & n 5 (“We agree with the Ninth Circuit that the complete elimination of the retroactive language from the reinstatement provision is persuasive evidence that Congress did not intend for the new reinstatement provision to apply to reentries which occurred prior to the statute's effective date.”).
59 See Fernandez-Vargas v Ashcroft, 394 F3d 881, 890 (10th Cir 2005):

In light of the Supreme Court's holding in St. Cyr, we agree with the reasoning of the majority of circuits and join them in holding that Congress's failure to expressly state that the reinstatement statute applied to aliens who reentered the country prior to its effective date, does not mean that Congress therefore unambiguously intended for the statute not to apply to these aliens.
The Court resolved the split in *Fernandez-Vargas* in favor of the majority of Courts of Appeals. The Court held that the new version of the reinstatement provision could apply to individuals who illegally reentered the United States before IIRIRA’s effective date and failed to make any effort to adjust their status. Fernandez-Vargas was a Mexican citizen who was deported and reentered the U.S. illegally before IIRIRA became effective. In 1989, an American citizen with whom he was romantically involved gave birth to their son, also an American citizen. In 2001 the couple married, and Fernandez-Vargas later filed an application to adjust his status to lawful permanent resident. This application brought his illegal presence to the attention of the authorities, and in 2003 the Government began proceedings under § 241(a)(5) that led to “reinstating Fernandez-Vargas’s 1981 deportation order, but without the possibility of adjusting his status to lawful residence.”

Fernandez-Vargas’s petition for review of the reinstatement order eventually landed before the Supreme Court. The Court first concluded that Congress failed to expressly state the temporal reach of the INA’s reinstatement provision. Further, its attempts to parse the language and structure did not clarify Congress’s intention. Therefore, the Court found that step one of the *Landgraf* test supported the presumption against retroactivity. Considering step two of the *Landgraf* test, the Court noted two reasons for its finding that applying § 241(a)(5), and denying Fernandez-Vargas the opportunity for adjustment of status as the spouse of a citizen of the United States, created no retroac-

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60 See *Fernandez-Vargas*, 126 S Ct at 2427.
61 Id.
62 See id at 2429–30.
tive effects, and therefore was lawful.\textsuperscript{63} First, the Court found that the text of the provision "applies to Fernandez-Vargas today not because he reentered in 1982 or at any other particular time, but because he chose to remain after the new statute became effective."\textsuperscript{64} Because it was his choice to continue his illegal presence after the effective date of the new law, and not a past act that he was helpless to undo, which subjected him to the new and less generous legal regime, application of the new provision was not retroactive.\textsuperscript{65} Second, IIRIRA became law on September 30, 1996 but had a provision setting its effective date as April 1, 1997.\textsuperscript{66} Despite ample warning of the coming change of the law, Fernandez-Vargas chose to remain until the old law was repealed and replaced by § 241(a)(5) when he could have avoided the new law by returning to Mexico. The Court therefore found that the Attorney General was free to apply § 241(a)(5).

C. Circuit Split Over Application of § 241(a)(5)

The Supreme Court's ruling only resolved the application of § 241(a)(5) in one circumstance. Fernandez-Vargas had long maintained a relationship with a United States citizen, but did not apply for adjustment of status to a legal permanent resident until after they had married in 2001.\textsuperscript{67} Therefore, the Court did not answer, and the Courts of Appeals remain split on, the question "whether an alien's marriage or application for adjustment of status before the statute's effective date . . . renders the statute impermissibly retroactive when it is applied to the alien."\textsuperscript{68}

While in Fernandez-Vargas the Supreme Court did not distinguish the unaddressed issues of aliens who were eligible to apply for adjustment because of their marital status, and those

\textsuperscript{63} See id at 2431.
\textsuperscript{64} Fernandez-Vargas, 126 S Ct at 2431.
\textsuperscript{65} Id at 2432.
\textsuperscript{66} Id at 2432, citing § 309(a), Pub L 104-208, 110 Stat 3009-625, codified at 8 USC § 1101 note (1996).
\textsuperscript{67} See Fernandez-Vargas, 126 S Ct at 2427 (Fernandez-Vargas filed an application to adjust his status to that of lawful permanent resident under 8 USC § 1255(i). This provision allows certain aliens who entered without inspection to apply to the Attorney General for adjustment of status to that of an alien lawfully admitted for permanent residence. As Fernandez-Vargas discovered, illegal reentrants are treated differently than aliens who entered illegally, but have not previously been deported. Even if deportation proceedings had been brought against Fernandez-Vargas before the establishment of the expedited removal proceedings under IIRIRA, he could have pursued adjustment of status based on his marriage to, or parenthood of, a United States citizen as a defense to deportation via a waiver of inadmissibility under INA § 212(g), 8 USC § 1182(h) (1995).
\textsuperscript{68} Fernandez-Vargas, 126 S Ct at 2427 n 5.
who actually did apply before IIRIRA’s effective date, the Courts of Appeals have treated the two situations differently. Both the Fourth and Eighth Circuits have held that applying expedited removal procedures to aliens who married United States citizens before IIRIRA’s effective date, but did not file for adjustment of status until after, was not retroactive. In Velasquez-Gabriel v Crocetti, the Fourth Circuit reasoned similarly to the Court in Fernandez-Vargas, though it heard the case before the ruling. The petitioner married a U.S. citizen more than a year before § 241(a)(5) took effect, but failed to apply to adjust his status during that time, even though he was represented by counsel and informed of his rights under pre-IIRIRA law. The court found that he clearly had the opportunity to know the law, and conform his conduct accordingly. Like Fernandez-Vargas, his failure to apply to adjust his resident status before the new law took effect “fatally undermine[d] his contention that § 241(a)(5)’s application to him ‘attaches new legal consequences to events completed before its enactment.’”

In Gonzalez v Chertoff, a case following Fernandez-Vargas, the Eighth Circuit applied the Supreme Court’s reasoning to a petitioner who had married before IIRIRA, but applied for adjustment of status after its effective date. The court emphasized that “it was [the petitioner’s] ‘choice to continue his illegal presence . . . that subjected him to the new and less generous legal regime’” and that he was not helpless to undo an act that had new legal consequences. Furthermore, between the passage of IIRIRA and its effective date, Gonzalez could have applied for adjustment of status based on his marriage, but failed to do so. Both reasons supported the court’s holding that “the elimination of the opportunity to apply for adjustment of status under the new law imposed no new burden on a completed act” and thus was not retroactive. The Eighth Circuit therefore widened the application of the Supreme Court’s holding to illegal reentrants

69 Gonzalez v Chertoff, 454 F3d 813, 818 (8th Cir 2006) (applying § 1228(b) but holding that Fernandez-Vargas was determinative of the issue and overruling Alvarez-Portillo which considered § 241(a)(5)); Velasquez-Gabriel, 263 F3d at 109–10 (applying § 241(a)(5)).
70 263 F3d 102 (4th Cir 2001).
71 Id at 109–10.
72 Id, quoting St Cyr, 533 US at 321.
73 454 F3d 813 (8th Cir 2006).
74 Id at 818, quoting Fernandez-Vargas, 126 S Ct at 2432.
75 Gonzalez, 454 F3d at 818.
76 Id.
who could have applied for adjustment of status before the effective date, but did not.

The First, Seventh, and Eleventh Circuits, in decisions predating *Fernandez-Vargas*, distinguished cases of aliens who applied for adjustment of status before IIRIRA's effective date from the "mine run" of people who appealed from the reinstatement of previous removal orders. The Seventh and Eleventh Circuits, in *Faiz-Mohammad v Ashcroft* and *Sarmiento Cisneros v United States Attorney General*, relied on the "new disability" that retroactive application of § 241(a)(5) created. Finding that § 241(a)(5) impaired rights the aliens had when they applied for adjustment of status, namely their ability to apply for discretionary relief, the courts held the application was retroactive. In addition, the First Circuit relied on the "salient distinction" created by application for discretionary relief before the effective date of IIRIRA. The court stated that once made, these applications "become a source of expectation and even reliance."

II. WHEN APPLYING § 241(A)(5) IS RETROACTIVE

The Supreme Court has already established that § 241(a)(5) gives no indication of Congress's intent regarding retroactive effect. A difference in facts of an individual case does not change that conclusion, because the Court read the statute generally, not as applied. Therefore, the second step of the *Landgraf* test constitutes the only analysis necessary to determine whether § 241(a)(5) applies retroactively to illegal reentrants that applied for adjustment of status before IIRIRA's effective date. Since the Court has determined Congress did not intend § 241(a)(5) to be retroactive, any retroactive application by an immigration agency would be unlawful. The second step of the *Landgraf* test involves considering two categories of possible retroactive effects resulting from the application of § 241(a)(5): new consequences of

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77 See *Arevalo*, 344 F3d at 14. Accord *Sarmiento Cisneros*, 381 F3d at 1284–85. See also *Faiz-Mohammad*, 395 F3d at 809.
78 395 F3d 799 (7th Cir 2005).
79 381 F3d 1277 (11th Cir 2004).
80 See id at 1284. See also *Faiz-Mohammad*, 395 F3d at 810.
81 *Arevalo v Ashcroft*, 344 F3d 1, 14 (1st Cir 2003).
82 Id.
83 See, for example, *Martin v Hadix*, 527 US 343, 352 (1999) ("If [there is retroactive effect], then in keeping with our traditional presumption against retroactivity, we presume that the statute does not apply to that conduct." (citation and quotation omitted)).
a past act and the impairment of vested rights acquired under existing laws.

A. Application of § 241(a)(5) Does Not Create New Consequences of a Past Act

The Court’s analysis in Fernandez-Vargas of why § 241(a)(5) does not create new consequences of past acts for aliens who applied for adjustment of status after IIRIRA’s effective date applies equally to aliens who applied for adjustment of status before the effective date. In considering whether a statute has retroactive effects because it creates new consequences of past acts, a court must identify the “past act.” Relying on the text of the statute, the Court pointed out that § 241(a)(5) does not penalize an alien for reentry, but instead establishes a process to remove him “under the prior order at any time after the reentry.” The Court found, therefore, that it is the “alien’s choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.” Because a court does not apply § 241(a)(5) to an act occurring before the effective date of IIRIRA, the law creates no retroactive effects.

There is no reason why the Court would change its analysis for an alien who had applied for adjustment of status before IIRIRA. The Government is likewise only ending this alien’s continued illegal presence in the United States by applying § 241(a)(5), not creating new consequences to the past act of illegal reentry. An illegal reentrant retains his illegal status even after applying for adjustment of status. Like Fernandez-Vargas, it is “the alien’s choice to continue his illegal presence, after illegal reentry and after the effective date of the new law” that exposes him to the consequences of the new law.

Also like Fernandez-Vargas, an illegal reentrant who applied for adjustment had the same grace period between the enactment of § 241(a)(5) and its effective date when he could have left the country and avoided the application of the new law. Though the costs may have been harsh, this alien could have returned to his country of citizenship, waited until his applications

84 Fernandez-Vargas, 126 S Ct at 2432, quoting § 241(a)(5).
85 Fernandez-Vargas, 126 S Ct at 2432.
86 Id.
for adjustment of status was processed, and then legally returned to the U.S. The Court recognizes that a choice to avoid the new law before its effective date or to end the continuing violation would come at a high personal price for an alien who has to leave a business or a family established during illegal residence, but the Court also stresses that retroactivity is meant to “avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law.”

Applying § 241(a)(5) to an alien who chose to apply for adjustment of status before IIRIRA’s effective date does not impose new burdens because it neither weakens his immigration status under the new law, nor hurts his chances of ultimately remaining in the country with a regularized status. However, the Court in St. Cyr found that “converting deportation from a likely possibility to a dead certainty” would add a new disability to transactions already past, and therefore application of the new law was barred under Landgraf’s retroactivity test. The Seventh and Eleventh Circuits considered this reasoning in holding that application of § 241(a)(5) should be barred in cases where it converted deportation from a possibility to a certainty.

However, a distinction exists between St. Cyr’s circumstances and those of the alien who applied for adjustment of status before IIRIRA’s effective date. St. Cyr decided to plead guilty after weighing the opportunity for discretionary relief from deportation under circumstances of the plea bargain against his chances for avoiding deportation by going to trial and being found not guilty on the drug charge. After deciding that the plea bargain was his best course of action, he pleaded guilty. IIRIRA changed the balance of consequences by eliminating his chance for discretionary relief after the guilty plea. But at that point, St. Cyr could not rescind his guilty plea.

In contrast, an illegal reentrant decreases his chance for discretionary relief by applying for adjustment of status under the new law only if he chooses to remain in the United States while his application was pending. A court faced with a petitioner who chose to remain in the United States could make two arguments. One, such an alien likely would not have acted differently know-

87 Id at 2433.
88 Id at 2431.
ing that the new law would soon take effect. If an alien in this position did not take steps to adjust his illegal status, then the chances of reinstatement of his deportation order would have been certain, should the INS have discovered his illegal presence after IIRIRA's effective date. Therefore, application of §241(a)(5) cannot increase the burden of applying for adjustment of status, since inaction would have meant a certain chance of deportation. Further, relying on Fernandez-Vargas, a court could argue it was the alien's decision to stay in the United States illegally after applying for adjustment of status, made after the effective date of §241(a)(5), that prevented the possibility of discretionary relief, not his application for adjustment of status. Unlike St. Cyr, such an alien still had an option that allowed him to retain the same chance for discretionary relief after the new law took effect.

However, there are weaknesses to both of these arguments. First, in practice, any filing with the government would seem to increase the chance of removal, as it has the effect of alerting immigration enforcement agencies to an alien's illegal presence. Arguing otherwise ignores the reality that not every alien's illegal presence comes to the attention of immigration authorities. In fact, Fernandez-Vargas's application to adjust his status to that of lawful permanent resident is apparently what "tipped off" the government to his illegal presence, causing it to begin proceedings under §241(a)(5) to reinstate his deportation order. Fernandez-Vargas had remained undetected in the United States for twenty years after illegally reentering in 1982. Absent purposeful government contact or criminal activity, the government is unlikely to become aware of an alien's illegal presence. It seems improbable that Congress intended, under §241(a)(5), to punish, with an increased chance of removal, aliens who try to regularize their status through statutorily accepted channels, while favoring those who instead choose to illegally rely on the ease of avoiding detection. Even ignoring intent, application of §241(a)(5) does seem to increase the burden of applying for adjustment of status, since an alien may fail to file, retain his illegal status, and fairly realistically assume his undetected illegal presence will allow him to avoid removal.

Second, it seems counterintuitive to argue that an alien can only retain the hope of discretionary relief that allows him to remain in the country by leaving the country. The Court has de-

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91 Fernandez-Vargas, 126 S Ct at 2427.
92 Id.
terminated that the alien's decision to stay in the United States illegally, after the effective date of § 241(a)(5), is the "past act" relevant for the retroactivity consideration of whether the application of the statute creates "new consequences of past acts." However, it is the application for adjustment of status filed before the amendment of the law that increases the chance of removal (by raising awareness of his illegal presence). Therefore, arguably it is the application that should be relevant in a court's consideration of retroactivity in the automatic reinstatement of a deportation order. This act, like St. Cyr's guilty plea, could not be rescinded after the enactment of § 241(a)(5) removed the possibility of obtaining discretionary relief. Since the filing for adjustment of status occurred before the effective date of § 241(a)(5), application of the statute to this act would be retroactive, and therefore barred.

The Eleventh Circuit in *Sarmiento Cisneros* made the same argument by defining the "past act" as the application for adjustment of status made before § 241(a)(5)'s effective date. The court contended that the retroactive application of § 241(a)(5) would attach a new disability to a completed transaction, because the alien had already applied for discretionary relief in the form of an adjustment of status before the effective date of IIRIRA. IIRIRA eliminates the availability of this relief, and therefore applying § 241(a)(5) would take away an opportunity for discretionary relief that was previously available to the alien. The Eleventh Circuit supported this assertion by stressing that an application for discretionary relief "becomes a source of expectation and even reliance." However, this argument disregards the Supreme Court's assertion that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment ... or upsets expectations based in prior law."

Any detriment due to reliance on a law is not sufficient to create a retroactive effect. The Fourth Circuit, in dicta, explained the distinction between general detrimental reliance which "proves nothing," and detrimental reliance for purposes of assess-

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93 See id at 2432.
94 *Sarmiento Cisneros*, 381 F3d at 1284.
95 See id at 1285.
96 Id at 1284, quoting *Arevalo*, 344 F3d at 14.
97 *Landgraf*, 511 US at 269.
ing the retroactive effect of § 241(a)(5). In Velasquez-Gabriel, an alien who married a United States citizen before IIRIRA’s effective date argued that he relied to his detriment on his ability, under the old law, to adjust his status after they married, and may not have married at all otherwise. The Fourth Circuit explained that the petitioner’s argument was ineffective because he “posit[ed] no way in which his marriage in ‘reliance’ on preexisting law weakened his immigration status under the new law or hurt his chances of remaining in this country.” In other words, reliance on an old law is relevant to the inquiry of the retroactive effect of § 241(a)(5) only if that reliance irrevocably worsened the alien’s chances for discretionary relief under the new law. Marriage does not decrease an alien’s chances of discretionary relief under § 241(a)(5), and therefore is extraneous evidence in the retroactive effects inquiry. That an alien married under the old law expecting to increase his chances for regularization of status does not create a retroactive effect; a statute does not operate retroactively merely because it “upsets expectations based in prior law.”

However, this distinction between different types of reliance does not explain why application of § 241(a)(5) to an illegal reentrant who applied for adjustment of status under the old law would not create a retroactive effect. Unlike Velasquez-Gabriel, an alien could posit a way in which his application for adjustment in reliance on preexisting law hurt his chances of remaining in this country. His application under the old law brought his illegal presence to the attention of the government, and under § 241(a)(5), his only opportunity to avoid automatic reinstatement of his former deportation order is to leave the country. On the other hand, under pre-IIRIRA law, if his adjustment of status had tipped off immigration authorities, discretionary relief from reinstatement was still available.

In general, the confusing process of characterizing a specific application of a statute as retroactive may point to a general weakness of the Landgraf test’s second step. The Court admits that “[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of

99 Id.
100 Id.
101 Landgraf, 511 US at 269.
legal changes with perfect philosophical clarity. The Court tries to allay fears about the vague boundaries of what qualifies as retroactive by stating "retroactivity is a matter on which judges tend to have sound instincts, and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." But a judge's weighing of these factors sounds awfully similar to a balancing inquiry between a law's purpose and private hardship that occurs in administrative law cases after agency lawmaking has been found retroactive. This balancing function is problematic in several ways. First, a main goal of the Landgraf test is to avoid judicial determination of the temporal scope of a statute. Instead, the test is meant to ensure the courts give effect to congressional intent because Congress is the branch best suited to make policy determinations about whether the benefits of retroactive effect outweigh the negatives of unfairness and reliance. Hence, in step one, if the court finds Congress intended a retroactive effect, the inquiry is at an end, and the court will not prohibit the retroactive application. Similarly, if in step one the court finds no indication Congress intended a retroactive effect, the presumption against retroactivity stands, and the court will prohibit any retroactive application. But the vague lines defining retroactivity cause the courts to push the balancing of interests into step two, and make it part of the inquiry of whether a statutory application is retroactive at all. Instead of finding an application retroactive, and then determining whether it is a permissible retroactivity under consideration of fairness and reliance, the Landgraf test encourages courts to perform a balancing test in order to determine whether a statutory application will be labeled as retroactive. The courts still end up weighing whether retroactivity is desirable, but under the guise of determining whether an application is retroactive at all.

Second, the courts may in fact be trying to give effect to Congress's intent in the second step of the Landgraf test, but its description of abstract ideas such as "new consequences for past acts" and "vested rights," which are malleable depending on context, obscure the courts' actual considerations. Though the Court says it cannot rebut the presumption against retroactivity by

102 Id at 270.
103 Id (quotation and citation omitted).
104 See id at 273.
105 Landgraf, 511 US at 272–73.
considering the purpose of a statute,\textsuperscript{106} after searching the statute and every surrounding document for intent of retroactive effect in step one, it may be difficult to counteract a purpose the Court has come to believe Congress intended. Because step two requires a court to strike down any retroactive application, the Court will find the application of the statute creates no new consequences or fails to impinge on vested rights in order to avoid contravening what it perceives as congressional intent. After all, step one makes Congressional intent determinative of whether a retroactive application of a statute is permissible. Completely ignoring intent in step two entails a dissonant shift that may be hard for courts to fully achieve.

B. Application of § 241(a)(5) Impairs a Vested Right

Aliens who applied for adjustment of status before IIRIRA's effective date established a vested right in discretionary relief. A vested right is an "immediate fixed right of present or future enjoyment."\textsuperscript{107} The Supreme Court noted that Fernandez-Vargas's claim to relief in the form of adjustment of status was not a vested right because it was contingent on "some action that would elevate it above the level of hope."\textsuperscript{108} Fernandez-Vargas never "availed himself" of forms of discretionary relief or "took an action that enhanced their significance to him in particular."\textsuperscript{109} This reasoning suggests that aliens who applied for adjustment of status have taken key action. By applying for adjustment of status before the effective date they transformed "inchoate expectations" into a fixed right. Unlike Fernandez-Vargas, aliens who applied to adjust their status before IIRIRA's effective date had completed all of the actions necessary for an adjustment of status; the relief was no longer contingent on any action by them, but awaited only a discretionary decision by the Attorney General. The Court explained that the discretionary nature of this form of relief does not affect its categorization as a vested right.\textsuperscript{110}

The vested nature of the relief sought explains the different treatment of illegal reentrants who had only married U.S. citizens, and those who took the further step of also applying for

\textsuperscript{106} See id at 285–86.
\textsuperscript{107} Fernandez-Vargas, 126 S Ct at 2432 n 10 (quotation and citation omitted).
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
adjustment of status. Application for adjustment of status did not distinguish the two groups by creating a different level of detrimental reliance, or new consequences for past action. After all, both groups knew they were remaining in the United States with an illegal status after the effective date of IIRIRA, and both could argue that they structured their lives based on their belief that discretionary relief would be available to them. Therefore, if new consequences were creating impermissible retroactive effects, then circuit courts would have held § 241(a)(5) could not apply to aliens who had married before IIRIRA's effective date, but not applied for adjustment of status.

However, the Fourth and Eighth Circuits held that it was not impermissibly retroactive to apply § 241(a)(5) to aliens who had only married. Aliens who had only married left their opportunity for relief contingent on their further action. They still needed to apply for adjustment of status in order to have any chance above "the level of hope" that they would receive relief.

In Landgraf, the Court stated that a statute which takes away or impairs a vested right acquired under existing law describes a sufficient condition for invoking the presumption against retroactivity. Therefore, § 241(a)(5)'s elimination of the vested right to discretionary relief through adjustment of status is a sufficient basis for a court to rule that applying it to aliens who applied for the relief before IIRIRA's effective date has an unlawful retroactive effect. However, considering the Court's enunciation that judgment about impermissible retroactivity "should be informed and guided by familiar considerations of fair notice" leads to that conclusion as well. The Court's reasoning relies on the "grace period" between the enactment of IIRIRA and its effective date that allowed aliens to act accordingly, for example to leave the country to avoid application of the new law. If an alien prepared for the new law by applying for adjustment of status, but then still has § 241(a)(5) applied to him, fair notice was not actually given. Fair notice implies the time to do something.

Furthermore, one purpose of the vested right paradigm is that it is undesirable for the judicial system to give different legal treatment to similar cases based on chance, or the efficiency of executive departments. Instead, the vested right distinguishes

112 St Cyr, 533 US at 321, quoting Martin, 527 US at 358; Landgraf, 511 US at 270.
people based on their affirmative past actions to secure rights. Additionally, though the Court concluded that Congress did not make clear its intended temporal scope for § 241(a)(5), the retroactivity of a statute is still fundamentally an issue of Congressional intent. Unlike the criminal context, in most instances of civil legislation there is no explicit constitutional prohibition on its retroactive application. It seems unlikely that Congress intended one alien be able to legally stay in the United States because his application for adjustment of status happened to be processed before IIRIRA’s effective date, while another alien who similarly applied for adjustment of status before IIRIRA’s effective date is deported under § 241(a)(5) because the Bureau of Immigration and Customs Enforcement (“ICE”) had not processed his application yet. Congress would have no reason to give ICE an incentive to fail to process these applications, and to just wait out the clock until the effective date of IIRIRA, in essence moving up the effective date. It would be counterintuitive for Congress to intend to provide a way for an administrative agency to undermine a provision in its statute.

**CONCLUSION**

This comment addresses the question left unanswered by Fernandez-Vargas: whether applying § 241(a)(5) to illegal reentrants who applied for adjustment of status before IIRIRA’s effective date would lead to retroactive effects. Conducting the Landgraf two-step retroactivity test while considering the reasoning of Fernandez-Vargas, as well as Courts of Appeals’ decisions on the issue, leads to the conclusion that, though it would not create new consequences for completed acts, it would impair vested rights. Since impairing a vested right is sufficient to support the presumption against retroactive application, § 241(a)(5) may not take away the vested opportunity for discretionary relief available to this group of aliens.

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113 See Fernandez-Vargas, 126 S Ct at 2432 n 10.