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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

# FERNANDEZ-VARGAS v. GONZALES, ATTORNEY GENERAL

# CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04–1376. Argued March 22, 2006—Decided June 22, 2006

Immigration law has for some time provided that an order for removing an alien present unlawfully may be reinstated if he leaves and unlawfully reenters. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the Immigration and Nationality Act (INA) to enlarge the class of illegal reentrants whose orders may be reinstated and limit the possible relief from a removal order available to them. See §241(a)(5), 8 U. S. C. §1235(a)(5). Petitioner Fernandez-Vargas, a Mexican citizen, illegally reentered the United States in 1982, after having been deported. He remained undetected for over 20 years, fathering a son in 1989 and marrying the boy's mother, a United States citizen, in 2001. After he filed an application to adjust his status to that of a lawful permanent resident, the Government began proceedings to reinstate his 1981 deportation order under §241(a)(5), and deported him. He petitioned the Tenth Circuit to review the reinstatement order, claiming that, because he illegally reentered the county before IIRIRA's effective date, §241(a)(5) did not bar his application for adjustment of status, and that §241(a)(5) would be impermissibly retroactive if it did bar his adjustment application. The court held that §241(a)(5) barred his application and followed Landgraf v. USI Film Products, 511 U.S. 244, in determining that the new law had no impermissibly retroactive effect in his case.

Held: Section 241(a)(5) applies to those who reentered the United States before IIRIRA's effective date and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA now before this Court. Pp. 5–16.

(a) Statutes are disfavored as retroactive when their application

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"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, supra, at 280. A statute is not given retroactive effect "unless such construction is required by explicit language or by necessary implication." United States v. St. Louis, S. F. & T. R. Co., 270 U.S. 1, 3. In determining whether a statute has an impermissibly retroactive effect, the Court first looks to "whether Congress has expressly prescribed the statute's proper reach," Landgraf, supra, at 280, and in the absence of express language tries to draw a comparably firm conclusion about the temporal reach specifically intended by applying its "normal rules of construction," Lindh v. Murphy, 521 U.S. 320, 326. If that effort fails, the Court asks whether applying the statute to the person objecting would have a retroactive effect in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment," Landgraf, supra, at 278. If the answer is yes, the Court then applies the presumption against retroactivity by construing the statute as inapplicable to the event or act in question. INS v. St. Cyr, 533 U. S. 289, 316. Pp. 5-7.

(b) Common principles of statutory interpretation fail to unsettle §241(a)(5)'s apparent application to any reentrant present in the country, whatever the date of return. The statute does not expressly include in or exclude from §241(a)(5)'s ambit individuals who illegally entered the country before IIRIRA's effective date. Fernandez-Vargas argues that the fact that the old reinstatement provision applied to aliens who had "unlawfully reentered . . . after having previously departed or been deported . . . , whether before or after June 27, 1952 [the INA's effective date], on any ground described in ... subsection (e)," §242(f), while §241(a)(5) lacks language of temporal reach, shows that Congress no longer meant to cover preenactment reentrants. But the old before-or-after clause, which was sandwiched between references to departure or deportation and grounds for deportation, most naturally referred not to an alien's illegal reentry but to the previous deportation or departure. The better inference is that the clause was removed because, in 1996, application keyed to departures in 1952 or earlier was academic. Applying §241(a)(5) only to deportations or departures after IIRIRA's effective date would exempt anyone who departed before that date but reentered after it. That would be a strange result, since the statute was revised to expand the scope of the reinstatement authority and invest it with something closer to finality. Fernandez-Vargas errs in suggesting that the new law is bereft of clarity and the Court should apply the presumption against retroactivity as a tool for interpreting the statute at the first Landgraf step. It is not until a statute is shown to

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have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption has its work to do. And IIRIRA has other provisions on temporal reach, which blunt Fernandez-Vargas's argument that a negative inference in his favor may be drawn from removal of the before-or-after clause. Pp. 7–10.

(c) This facial reading is confirmed by two features of IIRIRA. First, the provision's text shows that it applies here not because Fernandez-Vargas reentered at any particular time, but because he chose to remain after the new statute became effective. While the law looks back to "an alien [who] has reentered ... illegally," 8 U. S. C. §1231(a)(5), the provision does not penalize an alien for the reentry; it establishes a process to remove him under a "prior order any time after the reentry," ibid. Thus, it is the conduct of remaining in the country after entry that is the predicate action; the law applies to stop an indefinitely continuing violation that the alien could end at any time by voluntarily leaving. It is therefore the alien's choice to continue his illegal presence, after illegal reentry and after the new law's effective date, that subjects him to the new and less generous regime, not a past act that is he helpless to undo. INS v. St. Cyr, supra, distinguished. Second, IIRIRA's effective date provision shows that Fernandez-Vargas had ample warning of the coming change in the law, but chose to remain until the old regime expired and §241(a)(5) took its place. He had an opportunity to avoid the new law's application by leaving the country and ending his violation during the 6 months between IIRIRA's enactment and effective date. For that matter, he could have married his son's mother and applied for adjustment of status during the period, in which case he would at least have had a claim that proven reliance on the law should be honored by applying the presumption against retroactivity. Instead, he augmented his 15 years of unlawful presence by remaining in the country into the future subject to the new law. And the presumption against retroactivity does not amount to a presumption of legal stasis for the benefit of continuous lawbreakers. Pp. 11–15.

394 F. 3d 881, affirmed.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion.