No. 99-418

In the Supreme Court of the United States

GARY LAGUERRE AND JOSE MARTIN AVELAR-CRUZ,
PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district courts' authority to entertain challenges to the merits of final orders of deportation on petitions for a writ of habeas corpus was divested by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, including Sections 401(e) and 440(a) of AEDPA (110 Stat. 1268, 1277), which repealed the Immigration and Nationality Act's former provision for habeas corpus in 8 U.S.C. 1105a(a)(10) (1994), and replaced it with a provision precluding judicial review of deportation orders entered against aliens convicted of certain criminal offenses.

2. Whether the Attorney General permissibly concluded that Section 440(d) of AEDPA (110 Stat. 1277), which made aliens convicted of certain criminal offenses ineligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), should apply in the cases of aliens who had already filed applications for relief under Section 1182(c) as of the date of AEDPA's enactment.

3. Whether 8 U.S.C. 1182(c) (1994), as amended by Section 440(d) of AEDPA, violates constitutional principles of equal protection because it precludes discretionary relief only for aliens convicted of certain offenses who are placed in deportation proceedings in the United States, and not also aliens convicted of similar crimes who are placed in exclusion proceedings when returning from a trip abroad.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 164 F.3d 1035. The memorandum opinion and order of the district court denying habeas corpus to petitioner LaGuerre (Pet. App. 71a-103a) is unreported. The memorandum opinion and order of the district court granting habeas corpus to petitioner Avelar-Cruz (Pet. App. 14a-47a) is reported at 6 F. Supp. 2d 744. The decisions and orders of the Board of Immigration Appeals (Pet. App. 48a-49a, 104a-105a) and the immigration judge (Pet. App. 50a-59a, 106a-112a) with respect to both petitioners are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1998. Pet. App. 115a-116a. A petition for rehearing was denied on April 9, 1999. Pet. App. 113a-114a. On June 28, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 6, 1999, and the petition was filed on September 7, 1999 (the day after Labor Day). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress enacted several major changes to the Nation's immigration laws. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments are pertinent to this case: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation. To be eligible for such relief, the alien had to show that he had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the Immigration and Nationality Act (INA), he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c)

(1994) (repealed 1996).[1] If the Attorney General, in the exercise of her discretion under Section 1182(c), denied relief from deportation, then the alien could challenge that denial by filing a petition for review of his final deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (repealed 1996) (incorporating 28 U.S.C. 2341-2351). Under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996).

In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. As to substantive eligibility for relief, Section 440(d) of AEDPA, 110 Stat. 1277, amended 8 U.S.C. 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under Section 1182(c)—including aliens who were deportable because they had been convicted of aggravated felonies or of controlled substance offenses. See 8 U.S.C. 1251(a)(2)(A)(iii) and (B)(i) (1994). As to judicial review, Section 401(e) of AEDPA—in a provision entitled "Elimination of Custody Review by Habeas Corpus"—repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which had

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[1] Although Section 1182(c) by its terms applied only to aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, it had been interpreted, in response to the Second Circuit's decision in *Francis* v. *INS*, 532 F.2d 268 (1976), also to permit the Attorney General to waive the grounds of deportation of lawfully admitted permanent resident aliens who were present in the United States and in deportation proceedings. See *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976); *Gonzalez* v. *INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Ashby* v. *INS*, 961 F.2d 555, 557 & n.2 (5th Cir. 1992); *Tapia-Acuna* v. *INS*, 640 F.2d 223 (9th Cir. 1981).

specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. 110 Stat. 1268. Section 440(a) of AEDPA, 110 Stat. 1276-1277, replaced that habeas corpus provision with a new 8 U.S.C. 1105a(a)(10), which provided that any final order of deportation against an alien who was deportable for having committed certain criminal offenses "shall not be subject to review by any court." 110 Stat. 1277.

On September 30, 1996, Congress enacted IIRIRA, which comprehensively amended the INA. IIRIRA repealed 8 U.S.C. 1182(c) on a prospective basis, see IIRIRA § 304(b), 110 Stat. 3009-597, and replaced it with a new form of discretionary relief known as "cancellation of removal," see 8 U.S.C. 1229b (Supp. IV 1998). The cancellation of removal provisions, however, were made applicable only to aliens who are placed in removal proceedings on or after April 1, 1997, and therefore do not govern petitioners' cases. See IIRIRA § 309(a) and (c)(1), 110 Stat. 3009-625. For cases commenced prior to April 1, 1997, including petitioners' cases, IIRIRA retained the prior 8 U.S.C. 1182(c)—including the amendment made by Section 440(d) of AEDPA that made certain classes of criminal aliens ineligible for relief under Section 1182(c).

IIRIRA also replaced the INA's judicial review provisions in 8 U.S.C. 1105a (1994) with a new 8 U.S.C. 1252 (Supp. IV 1998), again for cases in which the administrative proceedings were commenced on or after April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625.[2] Cases in which the admin-

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[2] The new Section 1252 provides for judicial review of all final removal orders in the courts of appeals, see 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating 28 U.S.C. 2341-2351), with a limited exception for aliens subject to removal without a hearing under 8 U.S.C. 1225(b)(1) (Supp. IV 1998), for whom limited review by means of habeas corpus is available, see 8 U.S.C. 1252(a)(1) and (e)(2) (Supp. IV 1998). Section 1252 also carries forward the preclusion of review in former Section 1105a(a)(10) (as

istrative proceedings were commenced prior to April 1, 1997, however, continue to be governed by 8 U.S.C. 1105a, as amended by AEDPA. See IIRIRA § 309(c)(2), 110 Stat. 3009-625. Congress enacted special rules for any such cases in which the final deportation order was entered on or after October 31, 1996. One of those special rules, in Section 309(c)(4)(G) of IIRIRA, reinforces the preclusion of judicial review in amended 8 U.S.C. 1105a(a)(10) by providing that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed [specified criminal offenses]." 110 Stat. 3009-626.

b. After the enactment of these changes to the immigration laws, two questions arose in immigration proceedings about the scope of Section 440(d) of AEDPA, barring certain criminal aliens from relief under 8 U.S.C. 1182(c).

First, the question arose as to whether Section 440(d) applies to aliens who were placed in deportation proceedings before the enactment of AEDPA. On June 27, 1996, the Board of Immigration Appeals (BIA) initially decided that AEDPA § 440(d) does apply to deportation proceedings that had already been initiated, but that it should not be applied to aliens who had already filed applications for Section

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amended by AEDPA § 440(a)) by providing that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a crime within several classes of criminal offenses. 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). The new Section 1252(b)(9) further provides sweepingly that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section"—*i.e.*, only in the court of appeals, as provided in Section 1252(a)(1).

1182(c) relief before AEDPA's enactment. *In re Soriano*, Int. Dec. No. 3289.[3]

The Attorney General, exercising her authority under 8 C.F.R. 3.1(h), vacated the BIA's opinion in *Soriano* and certified for her decision the question whether AEDPA § 440(d) applies to applications filed as of the date of its enactment. On February 21, 1997, the Attorney General concluded in *Soriano* that Section 440(d) applies to all deportation proceedings pending on (or commenced after) the date of AEDPA's enactment, including those proceedings in which aliens had already submitted applications for Section 1182(c) relief on the date of enactment. Pet. App. 125a-138a. Following the analytical framework set forth by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the Attorney General concluded that application of Section 440(d) to pending deportation cases is not retroactive because it does not "impair a right, increase a liability, or impose new duties on criminal aliens. The consequences of [the alien's] conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation." Pet. App. 132a. The Attorney General also concluded that AEDPA § 440(d) may be understood as "Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief." *Ibid.*

Second, the question arose whether AEDPA § 440(d) bars the Attorney General from granting Section 1182(c) relief to criminal aliens who temporarily proceeded abroad, seek

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[3] Eleven of the 12 members of the BIA concluded that AEDPA § 440(d) applies to pending deportation proceedings commenced before AEDPA was enacted. Those 11 divided only on whether Section 440(d) applies to aliens who had already applied for relief under 8 U.S.C. 1182(c) before AEDPA was enacted; six of the 11 concluded that it does not.

admission to the United States, and are placed in exclusion proceedings, as well as to criminal aliens in the United States who are placed in deportation proceedings. The BIA concluded in *In re Fuentes-Campos*, Int. Dec. 3318 (May 14, 1997), and *In re Gonzalez-Camarillo*, Int. Dec. 3320 (June 19, 1997), that AEDPA § 440(d) bars relief only for criminal aliens placed in deportation proceedings in the United States.

2. a. Petitioner LaGuerre is a native and citizen of Haiti who was lawfully admitted to the United States as a permanent resident alien on August 13, 1985. On February 23, 1995, LaGuerre was convicted of delivery of a controlled substance containing cocaine, and of delivery of a controlled substance containing cocaine within 1000 feet of a school. Pet. App. 72a. On December 19, 1995, the Immigration and Naturalization Service (INS) commenced deportation proceedings against LaGuerre, charging him with deportability based on his convictions for an aggravated felony (see 8 U.S.C. 1251(a)(2)(iii)(1994))[4] and a controlled substance offense (see 8 U.S.C. 1251(a)(2)(B)(i) (1994)). Pet. App. 73a.

On April 24, 1996, before LaGuerre had his deportation hearing, the President signed AEDPA into law. On October 3, 1996, at his deportation hearing, LaGuerre conceded that he was deportable on the basis of his drug-related convictions, but he applied for relief from deportation under Section 1182(c). An immigration judge (IJ) found LaGuerre statutorily ineligible for such relief based on AEDPA § 440(d). Pet. App. 109a-112a. LaGuerre appealed to the BIA, which affirmed on August 1, 1997, based on the Attorney General's decision in *Soriano*, *supra*. See *id.* at 104a-105a.

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[4] The INA defines "aggravated felony" to include illicit trafficking in a controlled substance. 8 U.S.C. 1101(a)(43)(B) (1994 & Supp. IV 1998).

b. On November 24, 1997, LaGuerre filed a petition for a writ of habeas corpus in district court. He alleged that the district court had jurisdiction under 28 U.S.C. 2241, the general federal habeas corpus statute, as well as the Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2. He contended that the Board's denial of his application for relief under Section 1182(c) based on AEDPA § 440(d) was an improper retroactive application of the amendment made by AEDPA. Pet. App. 71a.

The district court denied the habeas corpus petition. Pet. App. 71a-102a. The court ruled (id. at 77a-87a) that it had jurisdiction under 28 U.S.C. 2241. On the merits, however, the court upheld the Attorney General's application of AEDPA § 440(d) to cases pending at its enactment, concluding that such application was not impermissibly retroactive because Section 440(d) withdrew the Attorney General's authority to grant discretionary relief after its enactment date. *Id.* at 88a-102a. LaGuerre appealed to the Seventh Circuit.

3. a. Petitioner Avelar-Cruz is a native and citizen of Mexico who entered the United States unlawfully in 1975. On September 25, 1987, Avelar-Cruz became a lawful temporary resident of the United States pursuant to the legalization provisions of 8 U.S.C. 1255a (1994 & Supp. IV 1998). On May 10, 1989, he became a lawful permanent resident alien. Pet. App. 15a.

On September 7, 1993, Avelar-Cruz was convicted of possession of a controlled substance with intent to deliver and delivery of a controlled substance. As a result of those convictions, the INS charged Avelar-Cruz with deportability as an alien convicted of an aggravated felony and a controlled substance violation. At a hearing on June 20, 1994, an IJ found Avelar-Cruz deportable based on his convictions, and further found him statutorily ineligible for relief under Section 1182(c) because he had not satisfied one of the statutory

prerequisites for such relief, *viz.*, seven years' lawful domicile in the United States. The BIA affirmed the IJ's decision. Pet. App. 15a-16a.

On June 27, 1995, the Seventh Circuit reversed the BIA's determination that Avelar-Cruz had not accumulated seven years' lawful domicile in the United States, and remanded the case to the BIA. Pet. App. 62a-70a. On February 7, 1996, the BIA remanded the case to an IJ to adjudicate Avelar-Cruz's application for relief under Section 1182(c). *Id.* at 60a-61a. While the case was pending on remand before the IJ, the President signed AEDPA into law.

On November 18, 1996, the IJ denied Avelar-Cruz's request for Section 1182(c) relief on the ground that AEDPA § 440(d) had made him statutorily ineligible for such relief. Pet. App. 50a-57a. On January 8, 1998, the BIA affirmed the IJ's decision, based on *Soriano*. *Id.* at 48a-49a.

b. On February 25, 1998, Avelar-Cruz filed a petition for a writ of habeas corpus in district court. Like LaGuerre, he invoked the district court's jurisdiction under 28 U.S.C. 2241 and the Suspension of Habeas Corpus Clause, and argued that the Attorney General's decision in *Soriano* was contrary to the presumption against retroactive application of federal statutes. He also argued that, if AEDPA § 440(d) were applied to pending cases such as his, then it would contravene equal-protection principles, because it bars relief only to aliens who are in the United States and placed in deportation proceedings and not to aliens returning to the United States from a temporary trip abroad and facing potential exclusion from the United States.

On April 27, 1998, the district court granted the habeas corpus petition. The district court concluded, as it had in *LaGuerre*, that it had jurisdiction under 28 U.S.C. 2241 to review the BIA's final deportation order (Pet. App. 20a-28a), and that Section 440(d) of AEDPA is applicable to deportation cases pending at its enactment (*id.* at 28a-38a). The

court also concluded (*id.* at 39a-46a), however, that the application of AEDPA § 440(d) to Avelar-Cruz's case violates equal protection because in its view the distinction between deportable and excludable criminal aliens, with respect to the availability of Section 1182(c) relief, lacks a rational basis. The government appealed to the Seventh Circuit.

4. The court of appeals consolidated the appeals in *LaGuerre* and *Avelar-Cruz* and on December 22, 1998, issued a decision directing the district court to dismiss the habeas corpus petitions in both cases. Pet. App. 1a-13a. The court concluded that Sections 401(e) and 440(a) of AEDPA divested the district courts of authority to review the merits of final deportation orders by habeas corpus, and that the bar to judicial review enacted by Congress does not create any constitutional difficulty under the Suspension of Habeas Corpus Clause. See *id.* at 4a-10a.

In reviewing the statutory history of judicial review of deportation orders, the court observed that, although before 1961 such orders were reviewable by habeas corpus in the district courts, in 1961 "Congress made review of such orders by the courts of appeals, without preliminary recourse to the district courts, the exclusive method of judicial review." Pet. App. 3a. Although Congress in 1961 expressly preserved "[t]he right of habeas corpus" in a provision of the INA itself, see *ibid.* (discussing 8 U.S.C. 1105a(a)(10) (1994)), that provision "was intended to be limited to situations in which the alien was unable to obtain judicial review under the new statutory procedure" enacted in 1961, *id.* at 4a. Further, that provision in the INA "preserving a limited right to apply for habeas corpus" was repealed by Section 401(e) of AEDPA. *Ibid.*

The court acknowledged that dicta in its previous decisions construing AEDPA § 440(a)--which amended 8 U.S.C. 1105a(a)(10) to preclude review by any court of deportation orders entered against aliens convicted of drug offenses and

aggravated felonies--had suggested that some review by habeas corpus might remain available in the district courts, had noted that Congress had not expressly amended 28 U.S.C. 2241, and had raised potential constitutional concerns about a suspension of habeas corpus. Pet. App. 4a. The court concluded in this case, however, that no constitutional concerns would be raised by precluding district court review by habeas corpus of petitioners' claims. The court observed that there was no question in this case of "the jurisdiction of the immigration authorities over [petitioners]," for "[t]here can be no doubt that [petitioners] are detained pursuant to valid orders issued by the responsible authorities." *Id.* at 5a. Further, "[t]he issue they wish to press—the issue of whether they are entitled to ask for discretionary relief from these orders—does not raise doubts about the jurisdiction of the [INA] over them." *Id.* at 5a-6a. And, the court stressed (*id.* at 6a), "we cannot think of any theory under which Congress would have wanted [AEDPA §] 440(a) to limit only review in the courts of appeals and leave intact whatever powers the old [8 U.S.C. 1105a(a)(10) (1994)]—which, remember, [AEDPA §] 440(a) repealed—had conferred on district courts." If petitioners were correct that the district courts retained authority to review deportation orders by habeas corpus even after enactment of AEDPA, then "Congress accomplished nothing toward its aim of curtailing judicial review" in cases involving aliens convicted of drug offenses and aggravated felonies. *Id.* at 8a. Therefore, the court held (*ibid.*), "for the class of aliens encompassed by [AEDPA] [S]ection 440(a), judicial review by means of habeas corpus did not survive enactment of that [S]ection."

The court also noted, however, that "[i]t does not follow that judicial review of the class of deportation orders illustrated by the orders in these two cases has been totally extinguished," for the government acknowledged that, even after enactment of AEDPA § 440(a), the courts of appeals

retained authority to review substantial constitutional challenges to the INA presented by aliens convicted of the specified criminal offenses. Pet. App. 8a-9a. The court also suggested (*id.* at 10a) that, "if for reasons beyond the alien's control he could not have raised his substantial constitutional issue in [the court of appeals] by seeking review here directly under [AEDPA §] 440(a), he may be able to proceed in the district court directly under 28 U.S.C. § 2241," but "[t]his we need not decide; such cases will be very rare, and these two cases are not among them."

Although the court of appeals thus concluded that it had no jurisdiction in this case, it also examined the merits of petitioners' challenges to their deportation orders, "lest they feel we've tripped them up on a technicality," Pet. App. 10a, and found them without substance, *id.* at 10a-13a. As for petitioners' contention that AEDPA § 440(d) should not be applied to their cases, the court found nothing in the text of the statute to indicate definitively whether Congress intended Section 440(d) to apply to cases pending at its enactment, noting that some provisions of AEDPA curtailing the rights of aliens were expressly prospective whereas others were expressly retroactive. *Id.* at 10a-11a. The court then considered issues of retroactivity more generally, and observed that changes in substantive law are usually not applied retroactively, whereas statutes "that change merely procedures" may be applied to pending cases, because "people are much more likely to rely on substantive than procedural law." *Id.* at 11a. But, the court noted, "[i]t would border on the absurd to argue that [petitioners] might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *Id.* at 11a-12a.

The court also found no merit to Avelar-Cruz's claim that Section 1182(c), as amended by AEDPA § 440(d), violates equal protection because it applies only to aliens placed in deportation proceedings in the United States and not to aliens returning from abroad. That distinction is rational, the court noted, because "it creates an incentive for deportable aliens to leave the country—which is after all the goal of deportation—without their having to be ordered to leave at the government's expense. To induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to the country." Pet. App. 12a.

ARGUMENT

Petitioners renew their contentions that (1) the district courts have authority under the general federal habeas corpus statute, 28 U.S.C. 2241, to review their challenges to the merits of final orders of deportation entered against them, notwithstanding Sections 401(e) and 440(d) of AEDPA, which repealed the INA's provision of habeas corpus authority to the district courts and expressly precluded judicial review of challenges to deportation orders raised by aliens convicted of certain criminal offenses; (2) Section 440(d) of AEDPA, enacted by Congress to preclude discretionary relief from deportation under 8 U.S.C. 1182(c) (1994) for such aliens, does not apply in the cases of aliens against whom deportation proceedings had been commenced before AEDPA was enacted; and (3) if Section 440(d) does apply in such cases, then it violates equal protection because it applies only to aliens placed in deportation proceedings in the U.S. and does not apply to aliens returning to the United States from a trip abroad.

As petitioners concede (Pet. 17 n.13), the court of appeals' comments on the merits are dicta, because the court concluded that it did not have jurisdiction in the case. For that

reason alone, the merits issues do not warrant review. Moreover, petitioners' challenges are closely related to the issues that were presented in the government's certiorari petitions denied by this Court in *Reno* v. *Goncalves*, 119 S. Ct. 1140 (1999), and *Reno* v. *Navas*, 119 S. Ct. 1141 (1999). The Court's denial of certiorari in those cases may have reflected a perception that, in light of the Court's decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*), those petitions presented only issues that were relevant to "transitional cases," *i.e.*, to deportation proceedings commenced before April 1, 1997, the general effective date of IIRIRA, which comprehensively revised the INA and established an entirely new statutory framework for removal of aliens from the United States and judicial review of removal orders.[5] Now, almost a year later,

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[5] In *AADC*, the Court construed 8 U.S.C. 1252(g) (Supp. IV 1998), added to the INA by IIRIRA, which precludes the district courts from entertaining "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." Although the Court held in *AADC* that Section 1252(g) did prevent the district court from taking jurisdiction in that case, it rejected the construction of Section 1252(g) principally put forth by the government, which would have eliminated the district court's authority to entertain challenges to the merits of final deportation orders. See 525 U.S. at 482-484. Before *AADC*, the government had relied on Section 1252(g) in cases like the present one to argue that the district courts had no habeas corpus authority to review the challenges presented by the aliens, and the government raised Section 1252(g) in its certiorari petitions in *Goncalves* and *Navas*. The proper construction of Section 1252(g) presented an issue of ongoing significance, because Section 1252(g) is part of the INA as comprehensively revised by IIRIRA. In light of *AADC*, the government no longer relies on Section 1252(g) in this case, but rather relies on Sections 401(e) and 440(a) of AEDPA, as well as the general structure of the INA before enactment of AEDPA and IIRIRA, to contend that the district courts lack such authority. Furthermore, in the decision below, the court of appeals relied on AEDPA §§ 401(e) and 440(a), and did not rely on

the same issues again do not warrant review, because they do not apply to removal proceedings commenced after April 1, 1997, and therefore are not of continuing importance, and because most of the courts of appeals have now resolved the issues presented and the volume of litigation on those issues has therefore subsided.

Petitioners also argue that, even if this Court does not grant plenary review, it should vacate the judgment of the court of appeals and remand the case for further consideration (on jurisdiction) in light of asserted conflicts in the Seventh Circuit's own cases and (on the merits) in light of this Court's intervening decision in *Martin* v. *Hadix*, 119 S. Ct. 1998 (1999), concerning retroactivity in another context. Such a remand would serve no purpose, however, for nothing in either the court of appeals' or this Court's intervening case law suggests that petitioners would be granted relief on remand. The petition therefore should be denied.

1. a. Petitioners first argue (Pet. 18-22) that the Court should vacate the judgment of the court of appeals and remand this case because the court of appeals' jurisdictional ruling in this case supposedly conflicts with subsequent circuit case law. Petitioners point out (Pet. 19-20) that, before the court of appeals' decision in this case, the Seventh Circuit had held that Section 440(a) of AEDPA absolutely precluded the court of appeals from entertaining any challenge to a deportation order brought by a criminal alien covered by Section 440(a), but had suggested that the district courts might have authority to exercise habeas corpus jurisdiction over constitutional challenges to deportation orders, notwithstanding Sections 401(e) and 440(a) of

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Section 1252(g), to reach its jurisdictional ruling. Sections 401(e) and 440(a) of AEDPA, however, did not survive the amendments to the INA made by IIRIRA, and therefore have no ongoing significance beyond the transitional cases commenced before IIRIRA's effective date.

AEDPA. See *Chow* v. *INS*, 113 F.3d 659, 668-670 (7th Cir. 1997) (*Chow I*); *Turkhan* v. *INS*, 123 F.3d 487, 490 (7th Cir. 1997) (*Turkhan I*). Petitioners also observe (Pet. 20-21) that, after the court of appeals' decision in this case, that court allowed the district courts to exercise habeas corpus jurisdiction over challenges to deportation orders in *Chow* and *Turkhan*, where the aliens, following dismissal of their petitions for review, sought habeas relief in reliance on the Seventh Circuit's earlier statements that any relief available on constitutional claims must be by some route other than a petition for review, such as habeas corpus. See *Chow* v. *Reno*, 193 F.3d 892, 893-894 (7th Cir. 1999) (*Chow II*); *Turkhan* v. *Perryman*, 188 F.3d 814, 823-824 (7th Cir. 1999) (*Turkhan II*). Petitioners argue that the Seventh Circuit should have followed the same course in this case, to avoid unfairness to them for having relied on that court's earlier jurisdictional decisions.

Petitioners' assertion of an intracircuit conflict between the decision in this case and subsequent decisions of the Seventh Circuit ignores distinctions among the cases[6] and in any

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[6] In both *Turkhan II* and *Chow II*, the alien previously *had* filed a petition for review, which the Seventh Circuit then dismissed for lack of jurisdiction. See *Turkhan I*, 123 F.3d at 490; *Chow I*, 113 F.3d at 668-670. The Seventh Circuit therefore concluded in *Turkhan II* and *Chow II* that those cases fell within the exception to the jurisdictional bar to habeas review recognized by the panel in this case (see Pet. App. 10a) for cases in which, "for reasons beyond the alien's control," he was unable to raise a substantial constitutional issue directly in the court of appeals. See *Turkhan II*, 188 F.3d at 824; *Chow II*, 193 F.3d at 893-894. Here, by contrast, petitioners did not previously file a petition for review in that court (albeit apparently due to the decisions in *Chow I* and *Turkhan I*), and the court of appeals therefore did not dismiss any such petition and thus itself prevent review "for reasons beyond the alien's control." Compare *Musto* v. *Perryman*, 193 F.3d 888, 891 (7th Cir. 1999) (ordering dismissal of habeas petition filed by similarly situated alien). Moreover, although the Seventh Circuit in *Chow I* and *Turkhan I* had left open the

event does not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Moreover, petitioners overlook that the court of appeals did examine the merits of their claims precisely to avoid any seeming unfairness that might have arisen from the fact that the court had previously stated that no claims of any kind could be raised in the court of appeals by a criminal alien covered by Section 440(a) of AEDPA. See Pet. App. 10a ("But we shall add, lest they feel that we've tripped them up on a technicality, that they would not have prevailed even if they hadn't dropped the jurisdictional ball.").

As petitioners concede (Pet. 17 n.13), the court's comments on their claims were dicta, given the court's jurisdictional holding. But after the court of appeals issued its decision in this case, it examined the very same claims again and squarely rejected them on the merits. In *Turkhan II*, which like this case involved a criminal alien who applied for Section 1182(c) relief before AEDPA was enacted, the court reaffirmed that "AEDPA § 440(d) applies retroactively to bar covered criminal aliens from seeking a discretionary waiver of deportation under" Section 1182(c) (except in one respect not relevant here), see 188 F.3d at 827, and concluded that the statute's application to pending cases does

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prospect of habeas relief on substantial *constitutional* claims, see *Chow I*, 113 F.3d at 668-670; *Turkhan I*, 123 F.3d at 490, petitioners seek to raise a non-constitutional claim concerning the temporal reach of Section 440(d) of AEDPA as well as a constitutional equal protection claim.

In *Singh* v. *Reno*, 182 F.3d 504 (7th Cir. 1999), on which petitioners also rely (Pet. 20-22), the court of appeals in fact ordered dismissal of the habeas corpus petition, while directly ordering that prior administrative proceedings be vacated in the "unusual circumstances" of the particular procedural due process claim in that case. See 182 F.3d at 511. Petitioners raise no such claim here.

not violate due process, *id.* at 827-828.[7] The court also rejected the same equal-protection challenge as that raised in this case, relying on its decision in this case. See *id.* at 828-829. The court again rejected the same equal-protection challenge in *Chow II*, 193 F.3d at 894. Accordingly, a remand would serve no purpose in this case, because the court of appeals has definitively rejected the substance of petitioners' contentions. See, *e.g.*, *Musto* v. *Perryman*, 193 F.3d 888, 891 (7th Cir. 1999) (denying relief to similarly situated alien).

b. Petitioners argue in the alternative (Pet. 22-25) that the Court should grant plenary review on the question whether the district courts retain authority under 28 U.S.C. 2241 to review the merits of final deportation orders. We acknowledge (as we pointed out in our filings in this Court in *Goncalves* and *Navas*) that the Seventh Circuit's jurisdictional ruling conflicts with decisions of other circuits, which have held that AEDPA did not divest the district courts of that authority under Section 2241, at least where the habeas corpus petition is filed by an alien who is precluded by AEDPA § 440(a) from raising any challenge to his deportation order by petition for review in the court of appeals.[8]

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[7] Although the court in *Turkhan II* stated that Section 440(d) applies "retroactively" to pending deportation proceedings, the better analysis is that the application of Section 440(d) to such proceedings does not constitute retroaction at all, since it controls the Attorney General's authority to grant relief from deportation in the future, *i.e.*, after AEDPA's enactment. See p. 26, n.13, *infra*. In any event, the court in *Turkhan II* arrived at the same conclusion as that arrived at by the court below in this case, namely, that Section 440(d) may be applied to deportation proceedings pending at its enactment without running afoul of either the presumption against retroactive application of federal civil statutes or constitutional concerns, and there is no reason to believe the court of appeals would arrive at a different conclusion should this case be remanded.

[8] See Gov't Reply Br., *Navas*, at 2-3; Gov't Reply Br., *Goncalves*, at 1-3; see also *Goncalves* v. *Reno*, 144 F.3d 110, 116-126 (1st Cir. 1998), cert.

The jurisdictional issue presented in this case has only limited future significance, however, because the INA was comprehensively revised by IIRIRA, which prospectively eliminated Section 440(a) of AEDPA (on which the court of appeals in this case relied) and replaced the INA's judicial review provisions with an entirely new framework in 8 U.S.C. 1252 (Supp. IV 1998). Moreover, among the provisions added by IIRIRA is a new 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which this Court described in *AADC* as an "unmistakable 'zipper' clause" (525 U.S. at 483) channeling all judicial review of removal orders into the courts of appeals.

Aliens may argue, in cases arising under the new removal provisions of IIRIRA, that the district courts have authority under Section 2241 to review challenges to removal orders filed by criminal aliens precluded from seeking review in the courts of appeals by IIRIRA, see 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). See, *e.g.*, *Richardson* v. *Reno*, 180 F.3d 1311 (11th Cir. 1999), petition for cert. pending, No. 99-887. If that argument is made, then the courts should consider, not just the express repeal in AEDPA § 401(e) of the district court's former habeas corpus authority under 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996), but also the structure of Section 1252 as a whole, the proper reach of Section

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denied, 119 S. Ct. 1140 (1999); *Henderson* v. *INS*, 157 F.3d 106, 118-122 (2d Cir. 1998), cert. denied sub nom. *Reno* v. *Navas*, 119 S. Ct. 1141 (1999); *Sandoval* v. *Reno*, 166 F.3d 225, 229-238 (3d Cir. 1999); *Bowrin* v. *INS*, 194 F.3d 483, 486-490 (4th Cir. 1999); *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 304-306 (5th Cir. 1999); *Pak* v. *Reno*, 196 F.3d 666, 671- 674 (6th Cir. 1999); *Shah* v. *Reno*, 184 F.3d 719, 722-724 (8th Cir. 1999); *Magana-Pizano* v. *INS*, Nos. 97-15678 and 97-70384, 1999 WL 1249703, at *3-*5 (9th Cir. Dec. 27, 1999); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1142-1147 (10th Cir. 1999); *Mayers* v. *INS*, 175 F.3d 1289, 1296-1301 (11th Cir. 1999) (all holding that Congress did not, in AEDPA, divest district courts of authority under 28 U.S.C. 2241 to address question on retroactive application of AEDPA § 440(d)).

1252(a)(2)(C), and the relevance of Section 1252(b)(9), all of which were added by IIRIRA, and are applicable only to removal proceedings commenced after April 1, 1997, but not to this case. Should the courts of appeals reach conflicting decisions on the continued availability of habeas corpus review of removal orders after IIRIRA, this Court will have the opportunity to consider issues about the continuing availability of habeas corpus under Section 2241 in the context of a proceeding under IIRIRA, which governs all removal proceedings commenced after April 1, 1997.

c. The jurisdictional ruling of the court of appeals is correct. The court of appeals properly held that Congress precluded the district courts from reviewing the merits of deportation orders by habeas corpus. The court correctly pointed out that, although before 1961 Congress authorized the district courts to entertain challenges to deportation orders by habeas corpus, "[i]n 1961 Congress made review of such orders by the courts of appeals, without preliminary recourse to the district courts, the exclusive method of judicial review." Pet. App. 3a. The Seventh Circuit reasoned that, although Congress in 1961 preserved a limited authority for the district courts to grant habeas corpus, see 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996), that provision "was intended to be limited to situations in which the alien was unable to obtain judicial review under the new statutory procedure." Pet. App. 4a.

In AEDPA § 401(e)—entitled "Elimination of Custody Review By Habeas Corpus"—Congress repealed 8 U.S.C. 1105a(a)(10) (1994), which had previously preserved some of the district court's habeas corpus authority. Section 440(a) of AEDPA also provided that final deportation orders entered against certain criminal aliens "shall not be subject to review by any court." Section 401(e) thus eliminated whatever authority to issue habeas corpus the district courts had previously retained after 1961 and therefore shifted all

review of deportation orders to the courts of appeals; Section 440(a) withdrew the availability of review in the courts of appeals at the behest of criminal aliens, except insofar as the withdrawal of such review would create serious constitutional questions.[9]

As the court of appeals observed, petitioners' jurisdictional theory—which would open the district courts to review under habeas corpus only for criminal aliens, and not for all other aliens, who must proceed through the INA's ordinary exclusive review procedure in the courts of appeals –-would make judicial review for criminal aliens *more* protracted than for noncriminal aliens, a result demonstrably at odds with Congress's intent to streamline the process of removing criminal aliens from the country. See Pet. App. 8a

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[9] For that reason, we have argued that AEDPA § 440(a) should not be read to preclude the courts of appeals from entertaining constitutional challenges to the INA itself made by criminal aliens. Although Section 440(a) states broadly that "[a]ny" final order of deportation entered against certain criminal aliens "shall not be subject to review by any court," the statute does not express clearly and convincingly an intent by Congress to preclude judicial review of constitutional claims. This Court has stated on several occasions that such preclusion of review of constitutional issues would raise serious constitutional questions. See *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). We therefore read AEDPA § 440(a) to permit the courts of appeals to entertain petitioners' equal-protection challenge to AEDPA § 440(d). As we explain below (pp. 28-29, *infra*), however, that challenge fails on the merits in any event.

We have also argued that the courts of appeals retain jurisdiction to review threshold issues of alienage and deportability to determine whether the preclusion of review in AEDPA § 440(a) in fact applies to a petition for review at hand. The courts of appeals have for the most part agreed. See *Xiong* v. *INS*, 173 F.3d 601 (7th Cir. 1999) (reversing BIA deportability finding for criminal alien); *Hall* v. *INS*, 167 F.3d 852 (4th Cir. 1999) (reviewing deportability issue to determine court's jurisdiction in case of criminal alien); *Okoro* v. *INS*, 125 F.3d 920, 925 (5th Cir. 1997); *Coronado-Durazo* v. *INS*, 123 F.3d 1322 (9th Cir. 1997); but see *Berehe* v. *INS*, 114 F.3d 159, 161 (10th Cir. 1997). That issue is not presented here.

(noting that, if petitioners' submission were accepted, then "Congress accomplished nothing toward its aim of curtailing judicial review [for criminal aliens], * * * and [m]aybe less than nothing"); *Henderson* v. *INS*, 157 F.3d 106, 119 n.9 (2d Cir. 1998) (acknowledging that it would be more consistent with congressional intent to streamline review for criminal aliens' claims to proceed in the court of appeals than district court), cert. denied *sub nom. Reno* v. *Navas*, 119 S. Ct. 1141 (1999).

Congress's action in AEDPA to curtail judicial review of deportation orders for criminal aliens raises no substantial constitutional questions. First, whatever review of deportation orders is required by the Suspension of Habeas Corpus Clause is satisfied by the opportunity for direct review in the courts of appeals as prescribed in the INA. There can be "no question of Congress' power to prescribe a habeas corpus substitute," Pet. App. 10a; see *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977), and Congress has provided such a substitute by placing review directly in the courts of appeals. As explained above (p. 21, n.9, *supra*), Section 440(a) of AEDPA does not preclude the courts of appeals from reviewing constitutional challenges to the INA itself by criminal aliens. Second, Congress is not required by the Suspension of Habeas Corpus Clause to provide for judicial review of purely statutory questions arising out of the application of the immigration laws, at least when such statutory questions concern solely the alien's eligibility for discretionary relief from deportation, and the alien's deportability is without dispute. This Court has described the grant of discretionary immigration relief as an "act of grace" akin to "a judge's power to suspend the execution of a sentence or the President's [power] to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 29 (1996). As the court of appeals observed, it is doubtful the Suspension of Habeas Corpus Clause "requires preserving habeas corpus as a vehicle for

challenging final orders of deportation in cases in which the jurisdiction of the immigration authorities over the alien is not in question." Pet. App. 5a.[10] Third, Congress's preclusion of review of petitioners' nonconstitutional claims raises no serious questions under Article III, for the federal courts have jurisdiction to review statutory questions only to the extent that Congress assigns it to them, see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984), and "[t]he power to expel aliens, being essentially a power of the political branches of the government, * * * may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit," *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) (internal quotation marks omitted); see *ibid.* ("No judicial review [of deportation orders] is guaranteed by the Constitution.").[11]

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[10] The court of appeals also suggested that petitioners' challenges to the Attorney General's construction of AEDPA § 440(d) in *Soriano* might be reviewable in the courts of appeals by review petition, notwithstanding AEDPA § 440(a). Pet. App. 12a. We submit that Section 440(a) bars review of that claim in any court, and that such preclusion does not present constitutional concerns. If that claim is reviewable by the courts, however, it would be far more consistent with Congress's overall intent to streamline judicial review of criminal aliens' deportation orders to construe AEDPA § 440(a) to permit review of that claim in the courts of appeals, rather than to find that review remains available in the district courts under 28 U.S.C. 2241. Cf. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose.") (internal quotation marks omitted).

[11] Petitioners observe (Pet. 25) that this Court has considered, in habeas corpus proceedings, aliens' claims that they were eligible to be considered for discretionary relief from deportation. In neither *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), nor *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957), however, did the Court's opinion address the question of habeas jurisdiction over

2. With regard to the temporal scope of Section 440(d) of AEDPA, petitioners urge the Court to remand the case to the court of appeals in light of *Martin* v. *Hadix*, 119 S. Ct. 1998 (1999), or to grant plenary review. Neither course of action is warranted.

a. First, a remand to the court of appeals (or plenary review in this Court) would not be appropriate because, as we have explained, the court of appeals correctly ruled that it lacked jurisdiction over petitioners' claims. The court of appeals therefore has no power to entertain petitioners' challenges to their deportation orders and could not reexamine the merits of those claims based on *Hadix*. Because of that jurisdictional barrier (and because the court of appeals' comments on the merits of petitioners' claims are therefore dicta), this case also is not an appropriate vehicle for this Court to give plenary consideration to the merits of petitioners' claims.

Second, petitioners' challenge to the Attorney General's construction in *Soriano* of the amendment to Section 1182(c) made by AEDPA § 440(d) is of limited prospective significance. Congress has repealed Section 1182(c) for removal proceedings commenced after April 1, 1997, and replaced it with a new form of discretionary relief, known as cancellation of removal. See pp. 4-5, *supra*. Thus, while there is a conflict in the circuits on the temporal scope of AEDPA § 440(d),[12] the question presented here has now been settled

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deportation orders, and it did not suggest that such jurisdiction was required by the Constitution itself. This Court has never considered itself bound by *sub silentio* assumptions of jurisdiction in the manner that petitioners suggest. See *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994).

[12] Compare the decision below with *Goncalves*, 144 F.3d at 126-133, *Wallace* v. *Reno*, 194 F.3d 279, 285-288 (1st Cir. 1999), *Henderson*, 157 F.3d at 129-130, *Sandoval*, 166 F.3d at 241, *Pak*, 196 F.3d at 675-676, *Shah*, 184 F.3d at 724, *Magana-Pizano*, 1999 WL 1249703, at *6-*8, and *Mayers*,

in most circuits and the issue is inherently restricted to "transitional cases." The Court denied review of the same issue last Term in *Goncalves* and *Navas*, and there is no basis in this case for a different result. The Attorney General also presently has under consideration a number of proposals for an administrative response to the court of appeals decisions that have rejected her construction of AEDPA § 440(d) in *Soriano*.

Third, the court of appeals' decision raises no broad issues of retroactivity warranting this Court's review. The court of appeals applied the two-part test articulated by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), for determining whether a new statute applies to pre-enactment conduct. The court first considered whether Congress had specifically addressed the question of the temporal application of AEDPA § 440(d) and determined that there is no clear indication of congressional intent as to its temporal scope. See Pet. App. 10a-11a (noting that several provisions of Title IV of AEDPA were expressly made prospective, and two were expressly made applicable to pending cases, but Congress expressly indicated neither as to Section 440(d)). The court next examined whether application of Section 440(d) to petitioners' cases would contravene the traditional presumption against retroactivity, and concluded that it would not, because, the court observed, while statutes that impose new primary duties are generally not applied to pending cases, new laws that change procedures usually are so applied. See *id.* at 12a. The court further noted that such procedural changes are usually applied "retroactively" be-

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175 F.3d at 1301-1304. Compare also *DeSousa* v. *Reno*, 190 F.3d 175, 185-187 (3d Cir. 1999) (holding that AEDPA § 440(d) does apply to aliens convicted before AEDPA but placed in deportation proceedings after enactment), *Requena- Rodriguez*, 190 F.3d at 307-308 (same), and *Jurado-Gutierrez*, 190 F.3d at 1152-1155 (same), with *Magana-Pizano*, 1999 WL 1249703, at *8-*9 (discussed at p. 27, n.14, *infra*).

cause they do not disturb "reasonable expectations," which underlie the presumption against retroactivity. *Ibid.* In this case, the court stated, it would "border on the absurd" to suggest that AEDPA § 440(d) disturbed any reasonable expectation in the availability of relief from deportation that petitioners might have had when they decided to commit their crimes or resist conviction at their criminal trials. *Id.* at 11a-12a; accord *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 308 (5th Cir. 1999); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999).[13]

b. This Court's decision in *Hadix* provides no basis for a remand. *Hadix* involved the temporal reach of a new provision limiting attorney's fees for prisoner lawsuits, Section 803 of the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321-66, 42 U.S.C. 1997e. Stressing that retroactivity implicates issues of "fair notice, reasonable reliance, and settled expectations," 119 S. Ct. at 2006, the Court concluded

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[13] The court of appeals did not elaborate on its point that the application of AEDPA § 440(d) to pending cases may be understood as a "procedural" change. As the Attorney General observed in her decision in *Soriano*, however, the application of AEDPA § 440(d) to pending deportation proceedings is not retroactive at all because Section 440(d) governs the availability of *prospective* relief from deportation, which itself is intended to remedy a continuing violation of federal immigration law (the alien's unlawful presence in the United States). See p. 6, *supra*; see also *Landgraf*, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."). This Court confirmed that point in *AADC*, where it emphasized that "in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law." 525 U.S. at 491. Deportation and the Attorney General's authority to grant relief from deportation are therefore matters inherently prospective in nature. See *DeSousa*, 190 F.3d at 187 (recognizing that legislative changes affecting the Attorney General's discretionary authority to grant relief from deportation in the future have only prospective impact); *Samaniego-Meraz* v. *INS*, 53 F.3d 254, 256 (9th Cir. 1995); *De Osorio* v. *INS*, 10 F.3d 1034, 1042 (4th Cir. 1993).

that application of Section 803 to govern work performed in pending cases after the passage of the new law creates "no retroactivity problem" because that application controlled only post-enactment conduct by attorneys, *id.* at 2007. Similarly, as the court of appeals noted in this case (p. 12, *supra*), application of Section 440(d) to pending proceedings does not create any problem involving fair notice, reasonable reliance, or settled expectations on the part of aliens like petitioners who committed their crimes before AEDPA was enacted. The court of appeals' decision is therefore consistent with the principles governing retroactivity articulated by this Court in *Hadix*.[14]

3. Petitioners' equal-protection claim also does not warrant further review. As is true of the issues of habeas corpus jurisdiction and the temporal scope of AEDPA § 440(d) discussed above, the equal-protection issue is of diminishing importance because Congress has repealed Section 1182(c), and so the claim by its nature applies only to transitional cases. Second, there is no conflict among the circuits on the

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[14] In its recent decision in *Magana-Pizano*, the Ninth Circuit agreed with the government that AEDPA § 440(d) does apply generally to aliens placed in deportation proceedings after AEDPA was enacted, if the alien was convicted before its enactment date. See 1999 WL 1249703, at *9. The court also expressed concern, however, about aliens who might have pled guilty or nolo contendere prior to the enactment of AEDPA, based on representations about the availability of Section 1182(c) relief. The court therefore left open the possibility of habeas relief upon a specific factual showing by an alien that he had entered a plea of guilty or nolo contendere in reliance on the availability of relief under Section 1182(c). The Ninth Circuit's belief that aliens (and only those aliens) who make such a factual showing could be exempt from the reach of AEDPA § 440(d) is incorrect. Retroactivity analysis examines the applicability of a law to the entire class of persons situated at particular point in time, not on the potentially varying specific reliance interests of different individuals within such a class. The Solicitor General has not yet decided whether to seek rehearing en banc in *Magana-Pizano*.

issue. Every other circuit that has addressed the equal-protection challenge to Section 440(d) has also rejected it. See *Almon* v. *Reno*, 192 F.3d 28, 29-32 (1st Cir. 1999); *DeSousa* v. *Reno*, 190 F.3d 175, 184-185 (3d Cir. 1999); *Requena-Rodriguez*, 190 F.3d at 308-310; *Jurado-Gutierrez*, 190 F.3d at 1152-1153. Further, even if the equal-protection claim had merit, the appropriate remedy, given Congress's overall intent in AEDPA to restrict relief from deportation for criminal aliens, would be to extend Congress's bar against discretionary relief to aliens in exclusion proceedings, rather than to strike it for aliens in deportation proceedings. See *DeSousa*, 190 F.3d at 185 n.8 (noting that "the history of Congress' amendments to [Section 1182(c)] shows that, throughout the 1990s, it had been tightening the controls over granting such waivers"); cf. *United States* v. *Estrada-Torres*, 179 F.3d 776, 779 (9th Cir. 1999) (reading language of AEDPA § 440(d) to eliminate discretionary relief for both excludable and deportable aliens).

Third, the court of appeals' rejection of petitioners' equal-protection claim is correct. Congress had a rational basis for precluding certain criminal aliens placed in deportation proceedings in the United States from obtaining Section 1182(c) relief, even while allowing criminal aliens seeking to return to the United States from a trip abroad to remain eligible for such relief. See *Fiallo* v. *Bell*, 430 U.S. 787, 794 (1977) (in light of Congress's plenary power over immigration, statutory classification must be upheld if it is based upon any "facially legitimate and bona fide reason"). The court of appeals observed that Congress's distinction encourages deportable aliens to leave the country—"which is after all the goal of deportation"—by providing them with an opportu-

nity to apply for Section 1182(c) relief in exclusion proceedings if they attempt to return. Pet. App. 12a.[15]

Petitioners' reliance on *Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976), is misplaced. *Francis* addressed a distinction that the BIA had drawn (for purposes of eligibility for Section 1182(c) relief) between two classes of aliens placed in deportation proceedings in the United States, based solely on whether the alien had previously taken a temporary trip abroad. See *Requena-Rodriguez*, 190 F.3d at 308-309 (explaining *Francis*); p.3, n.1, *supra*. Petitioners' claim challenges an entirely different distinction, between aliens placed in deportation proceedings in the United States and aliens placed in exclusion proceedings at the border or a port of entry. That traditional distinction has been fundamental to the INA. See *Landon* v. *Plasencia*, 459 U.S. 21, 25-28 (1983). Given the quite different purposes of the two kinds of proceedings and the different ways in which they operate, Congress is entitled to make different judgments about the kinds of claims for discretionary relief that may be considered in the proceedings.

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[15] Furthermore, Congress's decision to address criminal aliens in deportation proceedings and not exclusion proceedings is rational for another reason—aliens in deportation proceedings pose a much more serious problem simply because they are much more numerous. See H.R. Rep. No. 469(I), 104th Cong., 2d Sess. 384-385 (1996) (reporting that INS in 1995 removed a total of approximately 32,000 criminal aliens—29,255 arising from deportation cases and only 2,738 from exclusion cases); *Almon*, 192 F.3d at 31 (noting same). While excludable criminal aliens may also constitute an immigration problem, "a legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McDonald* v. *Board of Election Comm'rs*, 394 U.S. 802, 809 (1969) (internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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