No. 99-2082

In the Supreme Court of the United States

SAMUEL LECHUGA, PETITIONER

v.

BRIAN PERRYMAN

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

DONALD E. KEENER
LINDA S. WENDTLAND
SUSAN HOUSER
Attorneys

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

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 L. No. 104-132, 110 Stat. 1214, including Sections 401(e) and 440(a) of AEDPA (110 Stat. 1268, 1276-1277), which repealed the Immigration and Nationality Act's former provision for habeas corpus in 8 U.S.C. 1105a(a)(10) (1994) and replaced it with a provision precluding judicial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 whose deportation proceedings were commenced before 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulation and rule:

In the Supreme Court of the United States

No. 99-2082

SAMUEL LECHUGA, PETITIONER

v.

BRIAN PERRYMAN

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-2) is unreported, as are the order of the district court (Pet. App. 3-8), the order of the Board of Immigration Appeals (Pet. App. 9-11), and the order of the immigration judge (Pet. App. 12-14).

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2000. On May 24, 2000, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 3, 2000. The petition for a writ of certiorari was filed on June 27, 2000. 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 by Congress 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 under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had 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), see 8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998), he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c) (1994).[1] If the Attorney General, in

---

[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

the exercise of her discretion, denied relief from deportation, then the alien could challenge that denial of relief by filing a petition for review of his 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 Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section—including aliens who were deportable because they had been convicted of aggravated felonies or certain 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"—eliminated the previous version of 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court.

---

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).

AEPDA § 401(e), 110 Stat. 1268. Section 440(a) of AEDPA, 110 Stat. 1276-1277, also enacted an exception to the general availability of judicial review of deportation orders in the courts of appeals for the classes of aliens who were disqualified by Section 440(a) from receiving relief from deportation. Specifically, Section 440(a) of AEDPA replaced the former 8 U.S.C. 1105a(a)(10) with a new Section 1105a(a)(10), which provided that any final order of deportation against an alien who was deportable for having committed one of the specified 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 Section 1182(c) on a prospective basis, and replaced it with a new form of discretionary relief known as "cancellation of removal." See IIRIRA § 304(b), 110 Stat. 3009-597; 8 U.S.C. 1229b (Supp. IV 1998). The cancellation of removal provisions, however, were made applicable only to aliens placed in removal proceedings on or after April 1, 1997, and therefore do not govern this case. See IIRIRA § 309(a) and (c)(1), 110 Stat. 3009-625. For cases commenced prior to April 1, 1997, including this case, IIRIRA retained Section 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 administrative 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. 3009-626. Congress also 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 Section 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 Section 1182(c) relief. First, the question arose as to whether AEDPA Section 440(d) applies to aliens who were

---

[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). Section 1252 also carries forward the preclusion of review in former Section 1105a(a)(10) (as amended by AEDPA Section 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). See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999).

convicted or placed in deportation proceedings before the enactment of AEDPA. On June 27, 1996, the Board of Immigration Appeals (BIA) initially decided that AEDPA Section 440(d) applies to aliens whose deportation proceedings were initiated before AEDPA was enacted, but that it should not be applied to any such aliens who had already filed applications for Section 1182(c) relief before AEDPA's enactment. *In re Soriano*, Int. Dec. No. 3289 (B.I.A. June 27, 1996). 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 Section 440(d) applies to aliens who filed applications for relief before the date of its enactment. On February 21, 1997, the Attorney General concluded in *Soriano* that AEDPA Section 440(d) does apply to all deportation proceedings pending on or commenced after the date of enactment, including those in which aliens had already submitted applications for Section 1182(c) relief. *In re Soriano*, Int. Dec. No. 3289 (A.G. Feb. 21, 1997).

Second, the question arose whether AEDPA Section 440(d) bars the Attorney General from granting Section 1182(c) relief to criminal aliens who temporarily proceeded abroad, sought admission to the United States, and were placed in exclusion proceedings, as well as to criminal aliens in the United States who were placed in deportation proceedings. The BIA concluded in *In re Fuentes-Campos*, Int. Dec. No. 3318 (May 14, 1997), and *In re Gonzalez-Camarillo*, Int. Dec. No. 3320 (June 19, 1997), that AEDPA Section 440(d) bars relief only for criminal aliens placed in deportation proceedings in the United States.

2. Petitioner is a native and citizen of Mexico who was lawfully admitted to the United States as a

returning permanent resident alien on October 15, 1989. Pet. App. 12. In 1990, he was convicted in federal district court of possession of cocaine with intent to distribute it and conspiracy to possess cocaine with intent to distribute it. See *United States* v. *Lechuga*, 925 F.2d 1035 (7th Cir. 1991). Those offenses were aggravated felonies under the INA. See 8 U.S.C. 1101(a)(43)(B) (1994 & Supp. IV 1998).

In 1995, the Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner, charging him with deportability based on his cocaine offenses under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (conviction of an aggravated felony) and 8 U.S.C. 1251(a)(2)(B)(i) (1994) (conviction of a controlled substance offense). See Pet. 11; Pet. App. 12-13. On May 8, 1997, after both AEDPA and IIRIRA had been enacted into law, an immigration judge (IJ) determined that petitioner was deportable as charged. *Id.* at 13. The IJ also determined that AEDPA Section 440(d) rendered petitioner statutorily ineligible for relief from deportation under Section 1182(c). *Ibid.* On November 30, 1998, the BIA dismissed petitioner's appeal based on the Attorney General's decision in *Soriano*, agreeing with the IJ that AEDPA Section 440(d) rendered petitioner statutorily ineligible for relief from deportation under Section 1182(c). *Id.* at 10-11.

3. Petitioner did not file a petition for review of his deportation order in the court of appeals. Rather, on January 8, 1999, petitioner filed a petition for a writ of habeas corpus in the district court, seeking to invoke that court's purported jurisdiction under the general federal habeas corpus statute, 28 U.S.C. 2241. Petitioner contended that the Attorney General had erred in *Soriano* in concluding that AEDPA Section 440(d) was applicable to an alien placed in deportation

proceedings before AEDPA was enacted, that such application was impermissibly retroactive in violation of the Due Process Clause, and that as so applied, AEDPA Section 440(d) violated equal protection because it barred relief only for deportable aliens, and not also excludable aliens. Pet. App. 4-5.

On July 2, 1999, the district court dismissed the habeas corpus petition for lack of jurisdiction. In so ruling, it followed the Seventh Circuit's decision in *LaGuerre* v. *Reno*, 164 F.3d 1035 (1998), cert. denied, 120 S. Ct. 1157 (2000), which held that, except in certain rare cases where the alien could not file a petition for review in the court of appeals, the district courts no longer possess jurisdiction to review by writ of habeas corpus the merits of final orders of deportation.[3] Pet. App. 5-6.

4. The court of appeals summarily affirmed, relying on its decision in *LaGuerre*. Pet. App. 1-2. The court of appeals also noted that this case did not present an exceptional circumstance permitting the district court to exercise habeas corpus jurisdiction, because petitioner filed his habeas corpus petition in district court after the court of appeals had decided in *LaGuerre* that the district courts did not possess such jurisdiction. *Id.* at 2.

---

[3] *LaGuerre* found a narrow exception permitting habeas corpus jurisdiction in the district court in cases where aliens, through no fault of their own, could not seek review in the court of appeals. *LaGuerre*, 164 F.3d at 1040; see *Turkhan* v. *Perryman*, 188 F.3d 814 (7th Cir. 1999) (habeas corpus jurisdiction existed where alien, relying on circuit's case law before *LaGuerre*, had not filed petition for review in court of appeals but had filed habeas corpus petition in district court).

ARGUMENT

Petitioner seeks to renew his contentions that (1) the district courts have authority under the general federal habeas corpus statute, 28 U.S.C. 2241, to review challenges to the merits of final orders of deportation entered against 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 who were placed in deportation proceedings 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 United States and does not apply to aliens returning to the United States from a trip abroad.[4]

Petitioner's challenges are closely related to the issues that were presented in the government's certiorari petitions denied by this Court over a year ago in *Reno* v. *Goncalves*, 526 U.S. 1004 (1999), and *Reno* v. *Navas*, 526 U.S. 1004 (1999), as well as the certiorari petitions filed by aliens and denied by this Court more recently in *Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000), and *LaGuerre* v. *Reno*, 120 S. Ct. 1157 (2000).[5]

---

[4] It is not clear that petitioner has adequately presented for review his contentions on the merits. The "Question Presented" in the certiorari petition appears to raise only issues relating to the jurisdiction of the district courts. See Pet. i. Under this Court's Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." The body of the petition does raise contentions, albeit in abbreviated fashion, relating to the merits of petitioner's challenge to his deportation order. See Pet. 14-16.

[5] Related contentions about jurisdiction and about the temporal scope and constitutionality of AEDPA Section 440(d) are also

There is no basis in this case for a different result. Like those cases, this case concerns only issues of jurisdiction relating to deportation proceedings commenced before April 1, 1997, the date on which IIRIRA's permanent judicial review provisions took effect. This case also involves only substantive issues of eligibility for relief from deportation that arise under 8 U.S.C. 1182(c) (1994), as amended by AEDPA Section 440(d), which was prospectively repealed by Congress in IIRIRA. Thus, the issues presented in this case have limited and diminishing ongoing significance. In addition, petitioner may be eligible to reapply for administrative relief from deportation under a proposed rule that has been published for notice and comment by the Attorney General. Further review is therefore not warranted.

1. Petitioner argues (Pet. 16-19) that this Court should resolve a disagreement among the courts of appeals as to whether the district courts retain authority under 28 U.S.C. 2241 to review the merits of final deportation orders. As petitioner observes, the court of appeals' jurisdictional ruling in this case (as well as its earlier decision in *LaGuerre*, on which the decision below relied) conflicts with decisions of other circuits, which have held that AEDPA and IIRIRA did not divest the district courts of that authority under Section 2241.[6] The precise jurisdictional issue pre-

---

raised in pending certiorari petitions in *Alfarache* v. *Cravener*, No. 99-1789 (filed May 10, 2000); *Smith* v. *Reno*, No. 99-9096 (filed Apr. 12, 2000); *De Horta-Garcia* v. *United States*, No. 99-9140 (filed Apr. 11, 2000); and *Almon* v. *Reno*, No. 99-9214 (filed Apr. 20, 2000).

[6] Compare *LaGuerre*, 164 F.3d at 1040-1041, with *Goncalves* v. *Reno*, 144 F.3d 110, 116-126 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999); *Henderson* v. *INS*, 157 F.3d 106, 118-122 (2d Cir. 1998), cert. denied *sub nom. Reno* v. *Navas*, 526 U.S. 1004 (1999); *Sandoval* v. *Reno*, 166 F.3d 225, 229-238 (3d Cir. 1999); *Bowrin* v.

sented in this case has only limited future significance, however, because the INA was comprehensively revised by IIRIRA, which replaced the INA's judicial review provisions with an entirely new framework in 8 U.S.C. 1252 (Supp. IV 1998). Among the provisions added by IIRIRA is a new 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which this Court has described as an "unmistakable 'zipper' clause" channeling all judicial review of removal orders into the courts of appeals. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999).

Aliens have argued, 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). The courts of appeals that have considered that contention have thus far reached divergent views on the issue.[7] This Court may, therefore, be presented with

---

INS, 194 F.3d 483, 486-491 (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*, 200 F.3d 603, 607 (9th Cir. 1999); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1142-1147 (10th Cir. 1999), cert. denied *sub nom. Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000); and *Mayers* v. *INS*, 175 F.3d 1289, 1295-1301 (11th Cir. 1999).

[7] The Fifth Circuit has recently concluded that the courts of appeals retain the authority to entertain both threshold questions going to the scope of the jurisdictional bar and at least some constitutional challenges to the alien's removal proceeding, including challenges to the constitutionality of the INA itself, but that the district courts' authority to entertain such challenges by habeas corpus has been repealed by the permanent provisions of IIRIRA. See *Lopez-Elias* v. *Reno*, 209 F.3d 788, 791 (2000); *Max-*

the opportunity to address the continued availability of habeas corpus review of removal orders after IIRIRA. This Court's review of that issue, however, should await a case that arises under the permanent removal provisions of IIRIRA.[8]

2. Petitioner also notes (Pet. 15-16) that the courts of appeals have reached divergent views about the temporal scope of AEDPA Section 440(d). The Seventh Circuit, in which this case arose, has held that AEDPA Section 440(d) applies to aliens whose deportation proceedings were commenced before, on, or after the date of AEDPA's enactment, even if they applied for relief under Section 1182(c) before that date.[9] Most circuits, however, have concluded that AEDPA Section 440(d)

George v. *Reno*, 205 F.3d 194, 196-202 (2000); *Camacho-Marroquin* v. *INS*, 188 F.3d 649, 651-652 (1999). The Third Circuit has held that an alien whose offense falls within a category covered by the jurisdictional bar of Section 1252(a)(2)(C) may not raise a constitutional or statutory (retroactivity) challenge to his order of removal by petition for review in the court of appeals, but may and must proceed by habeas corpus in the district court. *Liang* v. *INS*, 206 F.3d 308, 316-323 (2000). The Ninth Circuit has held that an alien may raise in a petition for review an argument that he does not fall within a category covered by the preclusion of review in Section 1252(a)(2)(C), see *Aragon-Ayon* v. *INS*, 206 F.3d 847, 849 (2000), but that an alien who does fall within such a category may not raise a constitutional challenge to his removal order by petition for review in the court of appeals, but may and must proceed by habeas corpus in the district court, see *Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135-1141 (2000).

[8] We also submit that the court of appeals' jurisdictional ruling was correct, for the reasons set forth at length in our brief in opposition to the certiorari petition (at 20-23) in *LaGuerre* v. *Reno*, *supra* (No. 99-418). We are providing petitioner's counsel with a copy of that brief.

[9] *Turkhan*, 188 F.3d at 827; see also *LaGuerre*, 164 F.3d at 1040-1041.

does not bar relief for an alien against whom deportation proceedings were commenced before the date on which AEDPA was enacted.[10] The First and Ninth Circuits have also held that AEDPA Section 440(d) would not apply to an alien who was convicted before AEDPA was enacted, but only if the alien could show that he pleaded guilty in specific reliance on the fact that, under the state of the law before AEDPA was enacted, he might have been eligible for relief under Section 1182(c).[11] The Fourth Circuit has gone still further and held that AEDPA Section 440(d) does not apply in the case of any alien who pleaded guilty to one of the offenses covered in that Section and was convicted before AEDPA was enacted.[12] The Third, Fifth, and Tenth Circuits, by contrast, have held that AEDPA Section 440(d) does apply to aliens who were convicted before AEDPA was enacted but placed in deportation proceedings after its enactment.[13]

Despite that disagreement among the courts of appeals, petitioner's challenge to the application of AEDPA Section 440(d) in his case does not warrant this Court's review. That contention relates only to the availability of relief under a provision that Congress

---

[10] See *Goncalves*, 144 F.3d at 126-133; *Henderson*, 157 F.3d at 128-130; *Sandoval*, 166 F.3d at 241; *Pak*, 196 F.3d at 675; *Shah*, 184 F.3d at 724; *Magana-Pizano*, 200 F.3d at 611; *Mayers*, 175 F.3d at 1301.

[11] See *Mattis* v. *Reno*, 212 F.3d 31, 36-41 (1st Cir. 2000); *Magana-Pizano*, 200 F.3d at 612-613. Petitioner did not plead guilty, but was convicted after a bench trial. See *Lechuga*, 925 F.2d at 1037.

[12] *Tasios* v. *Reno*, 204 F.3d 544, 550-552 (4th Cir. 2000).

[13] See *DeSousa* v. *Reno*, 190 F.3d 175, 185-187 (3d Cir. 1999); *Requena-Rodriguez*, 190 F.3d at 306-308; *Jurado-Gutierrez*, 190 F.3d at 1148-1152.

has prospectively repealed. Further, the issue has now been settled in most circuits and the issue is inherently restricted to transitional cases. This Court has denied review of four other petitions raising issues concerning the temporal scope of AEDPA Section 440(d). See pp. 9-10, *supra*.

In addition, the Department of Justice has recently published for notice and comment a proposed rule responding to the decisions that have rejected the Attorney General's construction of the temporal scope of AEDPA Section 440(d). See 65 Fed. Reg. 44,476 (2000). That proposed rule would essentially acquiesce in the determination, by the majority of the circuits, that Congress intended AEDPA Section 440(d) not to apply in the cases of aliens who were placed in deportation proceedings before AEDPA was enacted. *Id.* at 44,478. The rule would therefore allow an alien who was placed in deportation proceedings before AEDPA was enacted and was denied Section 1182(c) relief based on *Soriano* in a final order of deportation to move to reopen his proceedings in order to reapply for relief under Section 1182(c). *Ibid.* The proposed rule provides a further reason for denial of this petition, because petitioner may well be eligible to reapply for administrative relief under the rule, if it is finally issued in substantially the same form; petitioner's deportation proceedings were commenced before AEDPA was enacted. Meanwhile, we have been informed by the INS that it has placed an administrative "hold" on the deportation of aliens who were placed in deportation proceedings before AEDPA was enacted and have received a final order of deportation, but who would appear *prima facie* to be eligible to reapply for relief under the proposed rule.

3. Petitioner also asserts (Pet. 14) that AEDPA Section 440(d) violates constitutional equal-protection principles because it applies only to aliens placed in deportation proceedings in the United States and not also to aliens placed in exclusion proceedings when they seek to return from abroad. That contention also does not warrant further review. First, as is true of the issue of the temporal scope of AEDPA Section 440(d) discussed above, the equal-protection issue is of minimal prospective importance because Congress has repealed Section 1182(c), and the claim by its nature concerns only transitional cases. Second, there is no conflict among the circuits on the issue; every circuit that has addressed the equal-protection challenge to Section 440(d) has rejected it.[14] Third, petitioner's equal-protection claim is without merit, for 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. Congress's distinction encourages deportable aliens to leave the country by providing them with an

---

[14] See *Almon* v. *Reno*, 192 F.3d 28, 31 (1st Cir. 1999), petition for cert. pending, No. 99-9214; *DeSousa*, 190 F.3d at 184-185; *Jurado-Gutierrez*, 190 F.3d at 1152-1153; *Turkhan*, 188 F.3d at 828-829; see also *LaGuerre*, 164 F.3d at 1041. The Ninth Circuit has concluded that AEDPA Section 440(d) is not limited to deportable aliens and does in fact bar relief under Section 1182(c) for excludable aliens as well. See *United States* v. *Estrada-Torres*, 179 F.3d 776, 779 (1999), petition for cert. pending, No. 99-10166. That decision, however, would afford petitioner no benefit, because in the Ninth Circuit as well as in the other circuits that have addressed the distinction, a deportable alien covered by AEDPA Section 440(d) could obtain no relief under Section 1182(c).

opportunity to apply for Section 1182(c) relief in exclusion proceedings if they attempt to return.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Assistant Attorney General

DONALD E. KEENER
LINDA S. WENDTLAND
SUSAN HOUSER
Attorneys

AUGUST 2000

---

[15] We addressed the merits of this equal-protection argument in detail in our brief in opposition (at 28-29) in *LaGuerre*, *supra* (No. 99-418).