No. 00-362

In the Supreme Court of the United States

FERNANDO GALINDO DEL VALLE, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioner lacked standing to challenge the Board of Immigration Appeals' supposed application of 8 U.S.C. 1182(c) (1994), as amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1277, to his case, because Congress repealed Section 1182(c) entirely before petitioner was placed in removal proceedings.

2. Whether the court of appeals lacked jurisdiction over petitioner's petition for review of his removal order under 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 213 F.3d 594. The decisions of the Board of Immigration Appeals (Pet. Supp. App. 1-2) and the immigration judge (Pet. Supp. App. 3) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2000. The petition for a writ of certiorari was filed on August 23, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, enacted by Congress in 1996. Those amendments 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 particularly pertinent: 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. An alien may be denied admission to the United States if he has been convicted of, or admits having committed, any violation of law relating to controlled substances, 8 U.S.C. 1182(a)(2)(A)(i)(II) (1994 & Supp. IV 1998), or if an immigration officer has reason to believe that the alien has been an illicit trafficker in any controlled substance, 8 U.S.C. 1182(a)(2)(C) (Supp. IV 1998). Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation or exclusion 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 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 denied relief from

[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, the Second Circuit held in

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) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). 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).

b. 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. Section 440(d) of AEDPA amended Section 1182(c) to make certain additional 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. See AEDPA § 440(d), 110 Stat. 1277 (referring to 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998)).

Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deportation orders in the courts of appeals for the same classes of aliens. Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses,

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Francis v. *INS*, 532 F.2d 268 (1976), that deportable aliens who had not departed from the United States and who had seven years' unrelinquished domicile in this country must also be given the opportunity to apply for relief from deportation under Section 1182(c). The Attorney General acquiesced in that decision.

including aggravated felonies, "shall not be subject to review by any court." 110 Stat. 1277. At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed 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. See 110 Stat. 1268.

On February 21, 1997, the Attorney General concluded in *In re Soriano*, Interim Dec. No. 3289, 1996 WL 426888, that the bar to granting discretionary relief under 8 U.S.C. 1182(c) (1994) that was enacted in AEDPA Section 440(d) applied to all deportation proceedings pending on the date of AEDPA's enactment, including those in which aliens had already submitted applications for relief. Numerous aliens challenged that conclusion in the federal courts, usually seeking to invoke the district courts' general habeas corpus jurisdiction under 28 U.S.C. 2241 to review their deportation orders. The courts of appeals divided as to whether the district courts retained habeas corpus jurisdiction to entertain such challenges to final orders of deportation, or whether (as the government contended) AEDPA had deprived the district courts of such jurisdiction and provided that, to the extent that judicial review of deportation orders might remain available for aliens convicted of aggravated felonies, the courts of appeals had exclusive authority to entertain such challenges.[2]

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[2] The majority of the circuits concluded that, after AEDPA, the district courts retained habeas corpus jurisdiction to entertain statutory and constitutional challenges to deportation orders against criminal aliens. See *Goncalves* v. *Reno*, 144 F.3d 110, 118-126 (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

The courts of appeals also reached varying conclusions about the temporal scope of AEDPA Section 440(d).[3]

225, 229-238 (3d Cir. 1999); *Bowrin* v. *INS*, 194 F.3d 483, 486-489 (4th Cir. 1999); *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 305 (5th Cir. 1999); *Pak* v. *Reno*, 196 F.3d 666, 670-673 (6th Cir. 1999); *Shah* v. *Reno*, 184 F.3d 719, 722-724 (8th Cir. 1999); *Magana-Pizano* v. *INS*, 200 F.3d 603, 607-609 (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); *Mayers* v. *INS*, 175 F.3d 1289, 1295-1300 (11th Cir. 1999). The Seventh Circuit, by contrast, concluded that AEDPA divested the district courts of that jurisdiction. See *LaGuerre* v. *Reno*, 164 F.3d 1035, 1040-1041 (1998), cert. denied, 120 S. Ct. 1157 (2000).

[3] The First, Second, Third, Sixth, Eighth, Ninth, and Eleventh Circuits concluded that AEDPA Section 440(d) did not bar relief under 8 U.S.C. 1182(c) (1994) for aliens whose deportation proceedings were commenced before AEDPA was enacted. See *Goncalves*, 144 F.3d at 126-133; *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*, 200 F.3d at 611; *Mayers*, 175 F.3d at 1301-1304. The Second and Fourth Circuits also held that AEDPA Section 440(d) did not bar relief for an alien who pleaded guilty to one of the offenses covered in that Section and was convicted before AEDPA was enacted, even if that alien was placed in deportation proceedings after AEDPA's enactment. See *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2d Cir. 2000), petition for cert. pending, No. 00-787; *Tasios* v. *Reno*, 204 F.3d 544, 550-552 (4th Cir. 2000). The First and Ninth Circuits held that, although AEDPA Section 440(d) generally barred relief for aliens convicted before AEDPA was enacted but placed in proceedings after its enactment, it would not bar relief if an 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). See *Mattis* v. *Reno*, 212 F.3d 31, 37 (1st Cir. 2000); *Magana-Pizano*, 200 F.3d at 612-613. The Third, Fifth, and Tenth Circuits, by contrast, held that AEDPA Section 440(d) did bar relief for aliens who were convicted before AEDPA was enacted but were placed in deportation proceedings after its enactment. *DeSousa* v. *Reno*, 190 F.3d 175, 185-187 (3d Cir. 1999); *Requena-*

The question also arose in immigration proceedings whether AEDPA Section 440(d) barred relief under Section 1182(c) for aliens placed in exclusion proceedings as well as those placed in deportation proceedings. In *In re Fuentes-Campos*, Interim Dec. No. 3318 (May 14, 1997), the BIA held that AEDPA Section 440(d) deprived the Attorney General of authority to grant Section 1182(c) relief only to aliens who are in deportation proceedings, but left unaffected her ability to grant relief to aliens in exclusion proceedings. Several deportable aliens challenged that construction of AEDPA Section 440(d) as violative of equal protection, but five courts of appeals rejected that challenge.[4]

Rodriguez, 190 F.3d at 307-308; *Jurado-Gutierrez*, 190 F.3d at 1149-1152. And the Seventh Circuit held that AEDPA Section 440(d) barred relief even for aliens who were already in deportation proceedings when AEDPA was enacted. *Turkhan* v. *Perryman*, 188 F.3d 814, 827 (1999); *LaGuerre*, 164 F.3d at 1040-1041.

In light of that conflict in the circuits, as well as this Court's denial of certiorari in several cases presenting the temporal scope of AEDPA Section 440(d), the Attorney General recently published for notice and comment a proposed rule that would acquiesce in the decisions of those circuits that have concluded that AEDPA Section 440(d) does not bar relief for an alien who was placed in deportation proceedings before AEDPA was enacted. See 65 Fed. Reg. 44,476, 44,478 (2000). The Attorney General would still apply AEDPA Section 440(d), however, to aliens who were placed in deportation proceedings after AEDPA was enacted, even if they were convicted before its enactment, absent adverse circuit precedent. *Ibid.*

[4] See *Almon* v. *Reno*, 192 F.3d 28 (1st Cir. 1999), cert. denied, 121 S. Ct. 83 (2000); *DeSousa*, 190 F.3d at 185-187; *Requena-Rodriguez*, 190 F.3d at 308-309; *LaGuerre*, 164 F.3d at 1041; *Jurado-Gutierrez*, 191 F.3d at 1152-1153. The Ninth Circuit, in a criminal case, held that excludable criminal aliens are also barred by AEDPA Section 440(d) from eligibility for Section 1182(c) relief, and thereby avoided the constitutional equal protection question.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. IV 1998); 110 Stat. 3009-587 to 3009-593.

Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. IV 1998); 110 Stat. 3009-594. As under AEDPA, Congress provided that aliens convicted of aggravated felonies are ineligible for discretionary relief. 8 U.S.C. 1229b(a)(3), 1229b(b)(1)(C) (Supp. IV 1998).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures, the new provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA—would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead

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See *United States* v. *Estrada-Torres*, 179 F.3d 776 (9th Cir. 1999), cert. denied, 121 S. Ct. 156 (2000).

would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625, as amended by Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical correction).

Congress also recast and streamlined the INA's provisions for judicial review of removal orders, in Section 306 of IIRIRA. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. In its stead, Congress enacted the new 8 U.S.C. 1252 (Supp. IV 1998), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses, including any criminal offense covered in Section 1182(a)(2). See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which provides:

> Judicial 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.*, Section 1252].

2. Petitioner is a native and citizen of Colombia who became a legal permanent resident on November 29, 1969. Pet. Supp. App. 1. On December 18, 1981, after a guilty plea, petitioner was convicted in federal district court of importation of methaqualone, in violation of 21 U.S.C. 952(a), and was sentenced to five years' imprisonment. See Certified Administrative Record (C.A.R.) 56.[5] That offense is an "aggravated felony" under the INA. See 8 U.S.C. 1101(a)(43)(B) (drug trafficking crimes).[6]

On August 30, 1998, petitioner sought to return to the United States from a trip abroad. See C.A.R. 78. An immigration officer denied him admission, however, based on his drug-trafficking conviction, and on September 17, 1998, the INS initiated removal proceedings against petitioner based on that conviction. *Ibid.*[7]

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[5] Petitioner was released on parole on August 8, 1984, and was discharged from federal custody on April 19, 1986. C.A.R. 57-58.

[6] Section 1101(a)(43)(B) defines the term "aggravated felony" to include "a drug trafficking crime (as defined in section 924(c) of title 18)." Section 924(c) of Title 18, in turn, defines "drug trafficking crime" to include "any felony punishable under * * * the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.)." That definition includes petitioner's offense for importation of methaqualone.

[7] Because petitioner was denied admission when seeking to return to the United States from a trip abroad, the INS charged him with inadmissibility under 8 U.S.C. 1182(a) (Supp. IV 1998) rather than deportability under 8 U.S.C. 1227(a) (Supp. IV 1998). Petitioner does not challenge that decision. The distinction is pertinent in some cases because a conviction for an "aggravated

Petitioner conceded his inadmissibility based on that conviction. *Id.* at 44. The immigration judge concluded that petitioner was ineligible for any form of relief from removal because of his drug-trafficking conviction, *id.* at 51, and ordered him removed from the United States, *id.* at 30.

The BIA dismissed petitioner's appeal. Pet. Supp. App. 1-2. In particular, the BIA noted that petitioner had been convicted of an aggravated felony, and that he was therefore ineligible for withholding of removal under 8 U.S.C. 1231(b)(3) (Supp. IV 1998).[8] The BIA did not specifically address petitioner's eligibility for either discretionary cancellation of removal under 8 U.S.C. 1229b(a) (Supp. IV 1998) or discretionary relief from deportation under old 8 U.S.C. 1182(c) (1994), which, as discussed above p. 7, *supra*), had been repealed by Section 304 of IIRIRA.

3. Petitioner filed a petition for review of his removal order in the court of appeals. Petitioner argued that he was eligible for discretionary relief from depor-

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felony" as such is not made a specific basis for denying an alien admission under the INA. The same conviction may, however, be a ground for denying an alien admission, as in this case, where the conviction is for a drug-trafficking offense.

[8] Petitioner had sought to argue that his life or freedom would be threatened if he were returned to Colombia, and therefore his removal should be withheld under 8 U.S.C. 1231(b)(3)(A) (Supp. IV 1998). Under Section 1231(b)(3)(B)(ii), however, an alien may not be granted withholding of removal if he was been convicted of a "particularly serious crime," and Section 1231(b)(3)(B) further provides that an alien who has been convicted of an aggravated felony who has been sentenced to a term of imprisonment of at least five years shall be considered to have committed a "particularly serious crime." As noted above (p. 9, *supra*), petitioner was convicted of an aggravated felony and received a sentence of five years' imprisonment.

tation under old Section 1182(c). He contended further that Congress's amendment to Section 1182(c) in AEDPA Section 440(d) to make that form of relief unavailable to any alien convicted of an aggravated felony should not be applied to his case because his conviction for importation of methaqualone predated Congress's enactment of AEDPA. See Pet. C.A. Br. 5-8.

The court of appeals dismissed the petition for review for lack of jurisdiction. Pet. App. 7. The court noted that petitioner had not challenged the constitutionality of IIRIRA's complete repeal of Section 1182(c), but had challenged only the purported application to his case of AEDPA Section 440(d), which made Section 1182(c) relief unavailable to aliens convicted of aggravated felonies who were placed in deportation proceedings. *Ibid.* The court concluded, however, that petitioner had no basis to challenge AEDPA Section 440(d)'s restriction of Section 1182(c) relief because Section 1182(c) was completely inapplicable to his removal proceeding; that proceeding had been commenced after the effective date of IIRIRA, which repealed Section 1182(c) entirely. As the court of appeals explained, "AEDPA § 440(d) was not applied to [petitioner] to bar [Section 1182(c)] relief because [Section 1182(c)] has been repealed. Thus [petitioner] cannot show an injury from the application of AEDPA § 440(d)." *Ibid.*

DISCUSSION

1. Petitioner seeks to renew his contention (Pet. 4) that AEDPA Section 440(d) should not be applied to his case to bar him from receiving relief from deportation under 8 U.S.C. 1182(c) (1994). Petitioner acknowledges that "[t]he permanent rules of IIRIRA repealed [Section 1182(c)] in its entirety," Pet. 4, but he contends

that "IIRIRA merely continued the elimination of [Section 1182(c)] relief already in effect for aliens convicted of drug offenses," *ibid.*

The court of appeals correctly concluded, however, that AEDPA Section 440(d) is irrelevant to petitioner's case. Petitioner was ineligible for relief under Section 1182(c), not because relief under that provision had been restricted under AEDPA, but because relief under that provision no longer existed for any alien in removal proceedings (such as petitioner's) that were commenced after the effective date of IIRIRA, April 1, 1997. Thus, petitioner was not injured by AEDPA Section 440(d)'s restriction of Section 1182(c) relief for aliens deportable because of aggravated felony convictions.[9] Moreover, petitioner is ineligible for discretionary cancellation of removal under 8 U.S.C. 1229b(a)(3) (Supp. IV 1998), which provides that such relief shall not be afforded to an alien convicted of an aggravated felony.

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[9] Indeed, it is quite possible that had Section 1182(c) been relevant to petitioner's case—in particular, if he had been placed in proceedings before the effective date of IIRIRA—then AEDPA Section 440(d) would not have barred him from eligibility for such relief. As we have noted, petitioner was placed in removal proceedings when he returned to the United States from a trip abroad. Had petitioner taken that trip abroad and returned to the United States before the effective date of IIRIRA, and had he been denied permission to enter at a port of entry because of his narcotics offense, he might well have been placed in exclusion rather than deportation proceedings. In that circumstance, petitioner would have remained eligible for a waiver of inadmissibility under Section 1182(c), because the BIA determined in *Fuentes-Campos*, *supra*, that AEDPA Section 440(d) did not apply to aliens placed in exclusion proceedings when they sought to return to the United States from a trip abroad. See p. 6, *supra*.

The Eleventh Circuit's conclusion that petitioner lacked standing to challenge AEDPA Section 440(d) in his case is premised on its conclusion that Section 1182(c) was entirely repealed by IIRIRA and has no application in removal proceedings commenced after the effective date. That conclusion, however, conflicts with decisions of the Second and Ninth Circuits. In *St. Cyr* v. *INS*, 229 F.3d 406 (2000), petition for cert. pending, No. 00-767, the Second Circuit concluded that IIRIRA's repeal of Section 1182(c) does not apply to any alien who was convicted based on a guilty plea entered before the effective dates of AEDPA and IIRIRA and who would have previously been eligible for relief under Section 1182(c), and that to apply the repeal to such cases would contravene the presumption against retroactive application of federal statutes. *Id.* at 417-421. In *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956 (Nov. 17, 2000), the Ninth Circuit concluded that, although IIRIRA's repeal of Section 1182(c) generally applies in all removal proceedings commenced after the effective date of IIRIRA, even for aliens whose convictions were entered before that date, a "limited exception" exists for an alien who can show that he entered a guilty plea before the effective date of IIRIRA in specific reliance on the fact that, under the state of the law at the time he pleaded guilty, he was eligible for consideration for discretionary relief from deportation. See *id.* at *4.

Because of that conflict in the circuits, and because of the importance of the issue to the administration of the INA, we have filed a petition for a writ of certiorari in *St. Cyr*, seeking review of the Second Circuit's decision on the merits, as well as the Second Circuit's ruling that district courts may exercise habeas corpus jurisdiction under 28 U.S.C. 2241 to review a final order of removal

(see pp. 14-16, *infra*).[10] If the Court reaches the merits issue in *St. Cyr* and concludes that relief under Section 1182(c) does remain available for at least some aliens who were placed in removal proceedings after IIRIRA became effective but who were convicted before that date, then the underlying premise of the court of appeals' decision in this case will no longer be valid. Accordingly, we suggest that the Court hold the petition in this case pending its disposition of *St. Cyr*.

2. In *St. Cyr*, we have also sought review of the Second Circuit's holding that an alien removable because of an aggravated felony conviction and therefore barred from obtaining judicial review of his final removal order directly in the court of appeals under 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) may present statutory and constitutional challenges to his removal order in the district court, invoking the district court's habeas corpus jurisdiction under 28 U.S.C. 2241. See 00-767 Pet. 17-26. In its decision in *St. Cyr*, the Second Circuit relied (229 F.3d at 409-410) on its decision in *Calcano-Martinez* v. *INS*, No. 98-4033, 2000 WL 1336611 (Sept. 1, 2000), in which it concluded (at *8-*16) that an alien who is removable because of a criminal conviction referred to in Section 1252(a)(2)(C) may not present, on petition for review in the court of appeals, a challenge to his final removal order based on the contention that a statute denying him eligibility for discretionary relief should not be applied "retroactively" to his case. The Second Circuit concluded in *St. Cyr* that, under its decision in *Calcano*, the court of appeals could not entertain on petition for review St. Cyr's challenge to his final removal order on that basis, but it

[10] We are providing petitioner with a copy of our certiorari petition in *St. Cyr*.

also concluded, based on its decision in *Calcano*, that the complete denial of any judicial forum to entertain that challenge would raise serious constitutitional concerns about the suspension of habeas corpus. See 229 F.3d at 410-411. The court therefore permitted St. Cyr to proceed in district court by way of habeas corpus. *Id.* at 411.

The Second Circuit's jurisdictional ruling in *St. Cyr* conflicts with decisions of the Fifth and Eleventh Circuits, which have held that IIRIRA deprived the district courts of jurisdiction to entertain criminal aliens' challenges to their final removal orders. See *Max-George* v. *Reno*, 205 F.3d 194, 198 (5th Cir. 2000), petition for cert. pending, No. 00-6280; *Richardson* v. *Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999), cert. denied, 120 S. Ct. 1529 (2000).[11] Because of that conflict in the circuits, as well as the importance of the issue, we have also sought review of the Second Circuit's jurisdictional decision. The resolution of that jurisdictional issue in *St. Cyr* may well affect the federal courts' jurisdiction to hear petitioner's claim in this case. Petitioner is an alien whose conviction is in a category referred to in the preclusion of judicial review in Section 1252(a)(2)(C). It would appear, therefore, that, under the Second Circuit's decisions in *Calcano* and *St. Cyr*, a court of appeals should not have jurisdiction to entertain petitioner's challenge to his removal order. We agree with the Second Circuit that an alien whose conviction is covered by Section 1252(a)(2)(C) may not present on petition for review a claim that a statute barring the

[11] Related jurisdictional issues are also presented in pending certiorari petitions in *Zalawadia* v. *Reno*, No. 00-268; *Obajuluwa* v. *Reno*, No. 00-523; *Rodriguez* v. *INS*, No. 00-753; and *Russell* v. *Reno*, No. 00-5970.

Attorney General from granting him discretionary relief from removal does not apply "retroactively" to his case. We do not agree with the Second Circuit, however, that such an alien may present the same claim in district court on habeas corpus. See 00-767 Pet. at 25-26. It appears likely, however, that if the Court grants certiorari in *St. Cyr*, its resolution of the issue of habeas corpus jurisdiction in that case will require it to examine the scope of the preclusion of review of the court of appeals' jurisdiction in Section 1252(a)(2)(C). Accordingly, because the Court's resolution of the jurisdictional issue in *St. Cyr* may determine whether the court of appeals could exercise jurisdiction over the petition in this case (even setting aside the Article III standing problem), we suggest that the Court also hold the petition in this case for its disposition of the jurisdictional issue in *St. Cyr*.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *INS* v. *St. Cyr*, No. 00-767, and then disposed of as appropriate in light the Court's action in that case.

Respectfully submitted.

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