No. 02-1344

In the Supreme Court of the United States

ANTONIO VINCENTE DIAS, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under the rule of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), certain 1996 amendments to the immigration laws, which rendered aggravated felons such as petitioner statutorily ineligible for discretionary waivers of deportation under 8 U.S.C. 1182(c) (1994), are inapplicable to petitioner, who did not enter a guilty plea, but instead was convicted of an aggravated felony after a jury trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-6a) is reported at 311 F.3d 456. The administrative decision of the Board of Immigration Appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2002. The petition for a writ of certiorari was filed on February 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Portugal who was admitted to the United States in 1979 as a lawful

permanent resident. In September 1995, petitioner was convicted after a jury trial of possessing marijuana with intent to distribute it, in violation of Massachusetts law. He was sentenced to a term of imprisonment of one year. Pet. 4; Pet. App. 4a; Gov't C.A. Mot. to Dismiss 1; Pet. C.A. Stay Mem. 1-2.

In February 1999, based on the marijuana-distribution conviction, the Immigration and Naturalization Service (INS) charged petitioner with being removable from the United States as an alien convicted of an aggravated felony and a controlled substance violation. Gov't C.A. Mot. to Dismiss 1; see 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii) and (B)(i).[1] In administrative removal proceedings before an immigration judge (IJ), petitioner argued that he should not be removed from the United States because his marijuana-distribution conviction had been vacated. IJ Oral Dec. 2. In April 2001, the IJ determined that the conviction had not been vacated, and ordered petitioner removed to Portugal. *Id.* at 3-4.

2. In his administrative appeal to the Board of Immigration Appeals (BIA), petitioner argued, *inter alia*,

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[1] On March 1, 2003, functions of several border and security agencies, including certain functions of the former INS, were transferred to the Department of Homeland Security and assigned to its Bureau of Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See 8 C.F.R. Pt. 1001 *et seq.* (Justice Department implementing regulations as recodified after Homeland Security Act). Before the reorganization, the INS was named as the respondent in the court of appeals and this Court. The correct respondent was, and is, the Attorney General of the United States. See 8 U.S.C. 1252(b)(3)(A).

that he should be allowed to apply for a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994) and *INS* v. *St. Cyr*, 533 U.S. 289 (2001). See Pet. BIA Br. 1-2.

Before the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, the Attorney General was authorized under former Section 1182(c) to provide discretionary relief from deportation to aliens lawfully admitted for permanent residence.[2] To be eligible for such relief, the alien had to show that he had maintained a lawful, unrelinquished domicile in this country for seven years. The final sentence of Section 1182(c) provided, however, that the Attorney General's discretionary authority "shall not apply" to an alien who had been convicted of an aggravated felony and had served a term of imprisonment of at least five years for such an offense. 8 U.S.C. 1182(c) (1994).

On April 24, 1996, AEDPA became law. Section 440(d) of AEDPA amended the final sentence of Section 1182(c) to provide that the Attorney General's authority to grant relief under Section 1182(c) "shall not apply" to a broader class of aliens, including all aliens

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[2] Section 1182(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General" without regard to certain grounds of exclusion. 8 U.S.C. 1182(c) (1994). Although Section 1182(c) by its terms authorized only the admission of certain lawful permanent resident aliens who otherwise would have been excludable upon returning to the United States, deportable aliens (who had achieved entry into the United States) were allowed to apply for discretionary relief from deportation under that provision. See *St. Cyr*, 533 U.S. at 295.

who were deportable because they had been convicted of aggravated felonies. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (recodified as 8 U.S.C. 1227(a)(2)(A)(iii))); see also 8 U.S.C. 1101(a)(43) (defining "aggravated felony").

In September 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Section 304(a) of IIRIRA (110 Stat. 3009-594 to 3009-597) repealed 8 U.S.C. 1182(c) (1994) and replaced it with current 8 U.S.C. 1229b, which makes permanent resident aliens who have been convicted of an aggravated felony categorically ineligible for discretionary relief from removal. New Section 1229b generally does not apply to immigration proceedings commenced before April 1, 1997. See IIRIRA § 309(a) and (c) (110 Stat. 3009-625, 3009-625 to 3009-627, reproduced in 8 U.S.C. 1101 note).[3]

In June 2001, this Court issued its decision *St. Cyr*. The Court held that Congress's elimination of the possibility of a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994) does not apply retroactively to

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[3] Before IIRIRA, aliens subject to removal from the United States were divided into two statutory categories. Aliens seeking admission and entry into the United States were "excludable." See *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982); 8 U.S.C. 1182 (1994). Aliens who had gained lawful admission to the United States or entered without permission were deportable. See 8 U.S.C. 1251 (1994). IIRIRA replaced the category of "excludable" aliens with the new category of "inadmissible" aliens, consisting of aliens who are not eligible for admission into the United States. See 8 U.S.C. 1182. In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-593, Congress instituted a new form of proceeding, known as "removal," that applies to inadmissible aliens as well as deportable aliens. See 8 U.S.C. 1229, 1229a.

alien aggravated felons *who pleaded guilty* before the effective date of that repeal and who would have been eligible for a discretionary waiver of deportation, despite their convictions, at the time of their criminal pleas. 533 U.S. at 314-326.

On July 31, 2002, the BIA dismissed petitioner's appeal. The BIA determined that petitioner "is not aided by the Supreme Court's *St. Cyr* ruling" because he "did not enter into a plea agreement, but rather was tried and found guilty of the crime which provides the basis for [his removal]." Pet. App. 1a, 2a.

3. The Court of Appeals for the First Circuit upheld the BIA's decision in a per curiam opinion. Pet. App. 3a-6a. The court explained that "the decision in *St. Cyr* relied on the Court's recognition that (1) plea agreements generally involve a quid pro quo between a defendant and the government and (2) that aliens often attach much importance to the immigration consequences of the decision whether or not to enter into an agreement." *Id.* at 5a. The court of appeals distinguished between the situation of aliens who entered a guilty plea before AEDPA, who often may have relied, when pleading guilty, on their eligibility to be considered for a waiver of deportation under 8 U.S.C. 1182(c) (1994), and the situation of aliens like petitioner who instead went to trial. The panel concluded that aliens who proceeded to trial are not entitled to the benefit of *St. Cyr* because they "were not relying on immigration law as it existed at the time in making that decision." Pet. App. 5a. Thus, the court concluded that applying AEDPA Section 440(d) and IIRIRA to such aliens is not impermissibly retroactive under *St. Cyr*. *Id.* at 6a (citing *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), petition for cert. pending, No. 02-1273), and *LaGuerre* v. *Reno*, 164 F.3d 1035,

1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000)). The court therefore affirmed the BIA's rejection of petitioner's application for relief under former Section 1182(c). *Ibid.*

ARGUMENT

The question presented by the petition is whether the retroactivity rule of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), should be extended to an alien aggravated felon who was convicted after a jury trial before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, and who would have been eligible at the time of his conviction to be considered for a waiver of deportation despite the conviction. The decision below correctly resolved that issue and there is no conflict with any decision of this Court or any other court of appeals. This Court's review accordingly is not warranted.

Every court of appeals that has considered the question after *St. Cyr* has concluded that the 1996 immigration amendments do not operate in a retroactive fashion when they are applied to disqualify an alien such as petitioner from being considered for a waiver of deportation because of his conviction of an aggravated felony *after a trial*. See Pet. App. 6a; *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir. 2003); *Chambers* v. *Reno*, 307 F.3d 284, 289-293 (4th Cir. 2002); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), petition for cert. pending, No. 02-1273; see also *Lara-Ruiz* v. *INS*, 241 F.3d 934, 945 (7th Cir. 2001) (reaching same conclusion before *St. Cyr*).

Those uniform decisions of the courts of appeals are correct and consistent with *St. Cyr*. *St. Cyr* addressed only the situation of aliens whose criminal convictions "were obtained through plea agreements" before the

1996 immigration amendments. 533 U.S. at 326. The Court reasoned that the 1996 immigration amendments that have rendered waivers of deportation unavailable to aggravated felons and certain other criminal aliens, see generally 8 U.S.C. 1229b(a) and (b), should not be applied to that class of criminal aliens because that would "attach[] a new disability" in respect to pre-AEDPA guilty pleas. 533 U.S. at 321 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994)) (internal quotation marks omitted). The Court emphasized that "[p]lea agreements involve a *quid pro quo* between a criminal defendant and the government," *ibid.*, by which the defendant waives constitutionally guaranteed rights and provides a benefit to prosecutors and the criminal justice system, *id.* at 322. Furthermore, the Court concluded that "as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions," including the possibility of ineligibility for discretionary relief from deportation. *Ibid.* Indeed, the Court determined that, before 1996, "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial," *id.* at 323, which "almost certainly" influenced their decision to accept a plea, *id.* at 325.

None of those considerations applies to aliens, like petitioner, who proceeded to trial. Those aliens did not provide the government a *quid pro quo*, but rather asserted their constitutional right to a trial and required the government to expend prosecutorial and judicial resources to obtain a conviction. Moreover, there is no basis for supposing that aliens who went to trial generally were motivated by a desire to obtain

immigration benefits. Aliens who proceeded to trial before the 1996 immigration amendments commonly did so *despite* the immigration laws that were in effect at that time. Often, such aliens would have risked losing immigration benefits if they went to trial, because they could receive and serve a sentence of five years or more after the trial and thereby be rendered ineligible for relief under 8 U.S.C. 1182(c) (1994). See p. 3, *supra*; *St. Cyr*, 533 U.S. at 323 (discussing case of alien who pursued plea agreement to avoid risk of losing waiver eligibility after trial).

Petitioner does not suggest that he actually rejected a plea offer. See Pet. C.A. Stay Mem. 4 (arguing that if petitioner had known that a conviction after trial could result in removal, "this might have led him to seek a plea bargain resulting in his pleading to non-aggravated offense"). Nevertheless, petitioner asserts (Pet. 6) that his decision to go to trial was "anchored in" pre-AEDPA immigration law. Petitioner reasons that "[i]f he won, there [would have been] no conviction on which to deport him; if he lost, a [Section 1182(c)] waiver remained available" because the maximum authorized sentence for his crime was less than five years. Pet. 6; Pet. 4 & n.*.

Under the facts stated by petitioner, the potential availability of a waiver of deportation should not have had any bearing upon petitioner's decision to go to trial. If petitioner could not have been sentenced to five years' imprisonment in his state trial, then he would have been eligible to be considered for a waiver of deportation under former Section 1182(c) *regardless of the outcome of his criminal proceeding.* When an alien proceeds to trial under circumstances like those of petitioner's case, it is reasonable to assume that he did so because he believed that the government could not

prove its case or because he was unable to reach a plea agreement that was sufficiently favorable overall, not because of immigration concerns that were immaterial at the time. Nothing in *St. Cyr* suggests that the retroactivity rule of that case would apply in such circumstances.

Furthermore, and despite the argument discussed above, petitioner indicates that he was tried on three separate state charges, each of which carried a maximum sentence of either two years' or two and a half years' imprisonment. Pet. 4 & n.*. If petitioner had been convicted of all three charged offenses, and if sentencing to consecutive prison terms was possible in petitioner's case, then his total sentence could have been longer than six years. Accordingly, the facts stated by petition suggest that his decision to go to trial could have had the consequence of rendering him *ineligible* to be considered for a waiver of deportation under 8 U.S.C. 1182(c) (1994), regardless of the later immigration amendments that denied waiver-eligibility to all aggravated felons. That apparent disregard for the immigration consequences of going to trial would be an additional reason why the considerations of *St. Cyr* do not apply to petitioner's case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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