No. 00-1327

In the Supreme Court of the United States

ADELE J. FASANO, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

MARIO RICHARDS-DIAZ

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court properly exercised habeas corpus jurisdiction to review the final removal order entered against respondent.

2. Whether the Board of Immigration Appeals correctly concluded that respondent is not eligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994) because respondent's removal proceedings were commenced after the repeal of Section 1182(c) became effective on April 1, 1997.

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The Acting Solicitor General, on behalf of Adele J. Fasano, District Director of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 233 F.3d 1160. The order of the district court (App., *infra*, 19a-28a) is unreported, as are the order of the Board of Immigration Appeals (App., *infra*, 12a-13a) and the decision of the immigration judge (App., *infra*, 14a-18a).

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App., *infra*, 29a-45a) are pertinent provisions of the Suspension of Habeas Corpus Clause of the United States Constitution, Article I, Section 9, Clause 2; Sections 1105a(a) and 1182(c) of Title 8, United States Code, as in effect before April 24, 1996; Sections 1105a(a) and 1182(c) of Title 8, as amended effective April 24, 1996; Sections 1225(b), 1229b(a), and 1252 of Title 8, as in effect beginning April 1, 1997; Sections 401(e) and 440 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276 (enacted Apr. 24, 1996); Sections 304(b) and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597, 3009-625 (enacted Sept. 30, 1996); and Section 2241 of Title 28, United States Code.

STATEMENT

1. This case involves amendments to the Immigration and Nationality Act (INA) enacted by Congress in 1996. 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 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 who is convicted of an "aggravated felony," as defined in the INA, see 8 U.S.C. 1101(a)(43) (1994 & Supp. V 1999), is subject to deportation. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999). Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation 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 he had been convicted of an aggravated felony, he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c) (1994).*

If the Attorney General, in the exercise of his discretion, denied relief from deportation and ordered the alien deported, 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 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

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* 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 *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.

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).

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 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 aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999))).

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, including aggravated felonies, "shall not be subject to review by any court." 110 Stat. 1276-1277. 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 AEDPA § 401(e)(3), 110 Stat. 1268.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304(a) 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. V 1999); IIRIRA § 304(a), 110 Stat. 3009-587 to 3009-593. As before, an alien (including a legal permanent resident alien) convicted of an aggravated felony is subject to removal. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999).

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. V 1999); 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. V 1999).

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 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 Act of Oct. 11, 1996, 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. V 1999), 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. V 1999) (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 aggravated felonies. See 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. V 1999), 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. Respondent is a native and citizen of Mexico who was admitted to the United States as a lawful permanent resident in 1975. See App., *infra*, 2a. In February 1996, respondent pleaded guilty in California state court to the offense of transporting a controlled substance. See *ibid.*; Cal. Health & Safety Code § 11379(a) (West Supp. 2001). Under the INA, that offense constituted "illicit trafficking in a controlled substance," and was therefore an aggravated felony. See 8 U.S.C. 1101(a)(43)(B).

In June 1997, after IIRIRA took effect, the Immigration and Naturalization Service (INS) commenced removal proceedings against respondent, charging him with removability based upon his aggravated felony offense. See App., *infra*, 2a-3a. On October 10, 1997, an immigration judge (IJ) found respondent deportable based upon his conviction for an aggravated felony offense and ordered him removed to Mexico. *Id.* at 18a. Respondent had sought relief from removal under Section 1182(c), but the IJ rejected that request on the ground that Congress had repealed Section 1182(c) for aliens placed in removal proceedings after the effective date of IIRIRA. *Id.* at 15a-17a. The Board of Immigration Appeals (BIA) affirmed on the same basis. *Id.* at 12a-13a.

3. Respondent then filed a petition for a writ of habeas corpus in district court, seeking to invoke that court's jurisdiction under 28 U.S.C. 2241. Respondent contended (among other things) that—notwithstanding the repeal of the former Section 1182(c) and the fact that he was placed in removal proceedings under the new provisions of IIRIRA, rather than in deportation proceedings under the pre-IIRIRA provisions of the INA—he remains eligible to be considered for discretionary relief under Section 1182(c), and that the

repeal of that provision was not to be applied "retroactively" to his case, which involves a criminal conviction entered before IIRIRA took effect. See App., *infra*, 25a-27a. The government argued that the district court lacked habeas corpus jurisdiction to review the final order of removal, and in the alternative defended on the merits the BIA's decision holding respondent ineligible for relief under former Section 1182(c). See *id.* at 21a, 26a.

The district court exercised jurisdiction over the petition. App., *infra*, 23a. The court determined that, although under Section 1252(a)(2)(C), added to the INA by IIRIRA, aliens subject to removal based on an aggravated felony conviction are precluded from seeking direct review of their final orders of removal in the court of appeals, they "may raise a narrower range of issues in a habeas petition in the district court to avoid any manifest injustice that might result if there were no forum for such challenges." *Ibid.* On the merits, however, the court held that respondent was not entitled to relief. The court noted that "[c]ivil statutes are generally not construed to apply retroactively unless Congress clearly indicates an intent to that effect." *Id.* at 25a. But the court held that Congress here had clearly specified that all of IIRIRA's provisions, including the repeal of Section 1182(c), would apply in proceedings initiated after its general effective date. Because the removal proceedings against respondent were initiated after IIRIRA's effective date of April 1, 1997, the court determined that IIRIRA's repeal of Section 1182(c) applied in the proceedings against respondent and precluded any relief from deportation. The district court accordingly denied the petition for habeas corpus relief. See *id.* at 25a-26a, 28a.

4. The court of appeals reversed and remanded for further proceedings. See App., *infra*, 1a-11a. The court first concluded, based on circuit precedent, that the district court had properly exercised habeas corpus jurisdiction to review respondent's final order of removal. See *id.* at 4a.

On the merits, the court of appeals reversed the dismissal of the habeas corpus petition and remanded the case to the district court for further proceedings. See App., *infra*, 9a-10a. The court of appeals first agreed with the district court that "Congress was clear in its intent to have IIRIRA apply to all aliens against whom removal proceedings were not yet pending as of April 1, 1997." *Id.* at 9a. In so concluding, the court expressly rejected (*id.* at 7a-9a) the reasoning of the Second Circuit in *St. Cyr* v. *INS*, 229 F.3d 406, 410-421 (2000), cert. granted, No. 00-767 (Jan. 12, 2001), by which that court held that Congress had not specified the temporal scope of its repeal of Section 1182(c), and further ruled that that repeal should not be applied to aliens who had pleaded guilty to aggravated felony offenses before the enactment of AEDPA and IIRIRA.

Nonetheless, based on its prior decision in *Magana-Pizano* v. *INS*, 200 F.3d 603, 613 (9th Cir. 2000), which had involved the temporal scope of the amendments to Section 1182(c) made by AEDPA Section 440(d), the court of appeals concluded that it was required to recognize a "limited exception to this general rule" regarding the temporal scope of Congress's repeal of Section 1182(c). App., *infra*, 9a. As it had held in *Magana-Pizano*, the court held in this case that, "under a specific factual showing that a plea [in a criminal case] was entered in reliance upon the availability of discretionary waiver under [Section 1182(c)], a [habeas] petitioner may be able to establish that [IIRIRA

§ 304(b)] has an impermissible retroactive application as to him." *Ibid.* Because respondent had alleged that "he had relied on the law in effect at the time of his guilty plea," the court concluded that he might be eligible to take advantage of the *Magana-Pizano* exception, and it therefore remanded the case "so that the district court can hold an evidentiary hearing as to the basis of [respondent's] claim that he specifically relied on the availability of a discretionary waiver when he entered his guilty plea." *Id.* at 9a-10a.

ARGUMENT

The court of appeals concluded in this case that a criminal alien found removable in proceedings commenced under IIRIRA because of an aggravated felony conviction may invoke the habeas corpus jurisdiction of the district courts under 28 U.S.C. 2241 to challenge the merits of his removal order. That issue is presently before the Court in *INS* v. *St. Cyr*, No. 00-767, and in *Calcano-Martinez* v. *INS*, No. 00-1011, in which this Court has granted review to determine whether the district courts have jurisdiction to review a final order of removal by writ of habeas corpus. Accordingly, this case should be held for the Court's decisions in those cases.

Our petition in *St. Cyr* also seeks review of the Second Circuit's decision on the merits of the alien's challenge to his removal order in that case, in the event that the Court concludes in *St. Cyr* that the district court properly exercised jurisdiction under 28 U.S.C. 2241 to review that order. The Ninth Circuit's decision on the merits in this case is related to the Second Circuit's decision on the merits in *St. Cyr*. The Second Circuit held in *St. Cyr* that the repeal of Section 1182(c) by IIRIRA Section 304(b) could not be applied to any

alien who pleaded guilty or nolo contendere to a felony crime before IIRIRA's enactment. The court first held that Congress had not made clear whether the IIRIRA's repeal of Section 1182(c) was to be applied to aliens who were convicted before IIRIRA's effective date. See *St. Cyr*, 229 F.3d at 413-416. It then held that the application of the repeal of Section 1182(c) to cases in which pleas of guilty or nolo contendere had been entered before the date of the repeal would be inconsistent with the presumption against the retroactive application of civil statutes. See *id.* at 417-421.

The court in appeals in this case expressly rejected the panel majority's analysis in *St. Cyr* and adopted, instead, the dissenting judge's view in *St. Cyr* that Congress had made clear its view that the provisions of the IIRIRA, including the repeal of Section 1182(c), apply to proceedings brought after April 1, 1997. See Pet. App. 7a-8a. Nonetheless, the court of appeals determined that an individualized evidentiary hearing would be necessary in a case in which an alien alleged that he had entered a guilty plea in specific reliance upon the availability of discretionary relief, in order to determine whether the repeal of Section 1182(c) is impermissibly retroactive as to that particular individual. See *id.* at 9a-10a. It therefore remanded this case for such an evidentiary hearing.

In our view, both the Second Circuit's and the Ninth Circuit's approaches to the temporal scope of IIRIRA's repeal of Section 1182(c) are in error. After IIRIRA became fully effective on April 1, 1997, relief under Section 1182(c) ceased to be available to any alien placed in removal proceedings after that date, regardless of the date of the alien's conviction. In *St. Cyr*, this Court granted review on the question of the temporal scope of IIRIRA's repeal of Section 1182(c). If the Court

reaches that issue in *St. Cyr*, its resolution of that question may obviate the need for further proceedings in this case. Accordingly, the Court should hold this petition pending the Court's decisions in the two cases in which it has already granted certiorari.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decisions in *INS* v. *St. Cyr*, No. 00-767, and *Calcano-Martinez* v. *INS*, No. 00-1011, and then disposed of as appropriate in light of the Court's decisions in those cases.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

FEBRUARY 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-56530
D.C. No. CV-99-327 BTM

MARIO RICHARDS-DIAZ, PETITIONER-APPELLANT

v.

ADELE J. FASANO, DISTRICT DIRECTOR,
RESPONDENT-APPELLEE

Appeal from the United States District Court
for the Southern District of California
Barry Ted Moskowitz, District Judge, Presiding

Argued and Submitted
October 12, 2000—Pasadena, California
Filed November 17, 2000

OPINION

Before: ROBERT BOOCHEVER, A. WALLACE TASHIMA, and RICHARD TALLMAN, Circuit Judges.

TASHIMA, Circuit Judge:

I.

Mario Richards-Diaz ("Richards") appeals the district court's denial of his petition for a writ of habeas corpus. He argues that § 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") violates the Equal Protection component of the Fifth Amendment of the Constitution; that the application of AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") to his case constitutes an impermissible retroactive application of the laws; and that the Court should use its equitable powers to terminate his removal proceedings and compel the Attorney General to inititate deportation proceedings. The government argues that we lack jurisdiction in the matter. Alternatively, it contends that, if we do have jurisdiction, we should affirm the district court on the merits.

II.

Richards is a native and citizen of Mexico. He was lawfully admitted into the United States in 1975. On February 21, 1996, pursuant to a guilty plea, Richards was convicted of transportation of a controlled substance in violation of § 11379(a) of the California Health and Safety Code. He was sentenced to 180 days' incarceration. That conviction made him deportable under the immigration law at the time. *See* 8 U.S.C. § 1251(a)(2)(B)(i) (1994) (making deportable "[a]ny alien who at any time after entry has been convicted of a violation . . . relating to a controlled substance"). The Attorney General, however, did not initiate proceedings at that time. Rather, approximately 18 months later, on June 20, 1997, the Attorney General issued Richards a Notice to Appear, charging him with

removability under § 237 of the Immigration and Naturalization Act ("INA"), as amended by IIRIRA. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (1999) ("Any alien . . . shall . . . be removed if the alien is . . . convicted of an aggravated felony at any time after admission.").

After a hearing, the immigration judge ("IJ") found that Richards' conviction rendered him removable as charged in the Notice to Appear. Furthermore, because Richards' removal proceeding was initiated purusant to the permanent provision of IIRIRA, the IJ held that Richards was not eligible for discretionary relief under INA § 212(c) because of its repeal by § 304(b) of IIRIRA, or under § 240A (as amended by § 304(a) of IIRIRA)[1] because of his status as an aggravated felon. *See* 8 U.S.C. § 1229b(a)(3) (1999) ("The Attorney General may cancel removal . . . if the alien . . . has not been convicted of any aggravated felony."). Richards appealed the IJ's decision to the Board of Immigration Appeals ("BIA"), which agreed with the IJ, and dismissed the appeal.

Subsequently, Richards filed a petition for a writ of habeas corpus in district court, pursuant to 28 U.S.C. § 2241.[2] The district court found that it had jurisdiction to hear the petition, but denied it on the merits. It concluded that IIRIRA was not impermissibly retro-

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[1] Section 304(a) of IIRIRA, which amended INA § 240A, incorporated aspects of former § 212(c) into an entirely new form of discretionary relief. *See* IIRIRA, Pub. L. No. 104-208, § 304(a), 110 Stat. 3009, 3009-594 (1996) (codified as 8 U.S.C. § 1229b).

[2] AEDPA § 440(a) and IIRIRA § 306 withdrew direct judicial review of deportation and removal orders of aliens convicted of aggravated felonies. *See Duldulao v. INS*, 90 F.3d 396, 399 (9th Cir. 1996).

active, that Richards had no standing to challenge § 440(d), and that Richards's nunc pro tunc argument lacked any merit. Richards appeals. We review the district court's denial of a habeas petition de novo. *See Bowen v. Hood*, 202 F.3d 1211, 1218 (9th Cir. 2000).

III.

A. Jurisdiction

The existence of subject matter jurisdiction is a question of law which we review de novo. *See Burlington N. Santa Fe Ry. v. IBT Local 174*, 203 F.3d 703, 707 (9th Cir. 2000) (en banc) (citation omitted). We have recently held that "[n]either IIRIRA's permanent nor transitional rules repeal the statutory habeas corpus remedy available via 28 U.S.C. § 2241." *Barapind v. Reno*, 225 F.3d 1100, 1110 (9th Cir. 2000) (citing *Flores-Miramontes v. INS*, 212 F.3d 1133, 1136-38 (9th Cir. 2000), and *Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 2000)). Thus, the district court had jurisdiction over this habeas proceeding pursuant to § 2241. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 2253(a).

B. IIRIRA's Repeal of Section 212(c)

1. *Evolution of Discretionary Relief*

Under the statutory scheme in effect prior to the enactment of AEDPA and IIRIRA, aliens otherwise determined to be deportable were entitled to apply for a waiver of deportation under INA § 212(c). *See* 8 U.S.C. § 1182(c) (1994), *repealed by* IIRIRA § 304(b). Discretionary relief under that section, however, did "not apply to an alien who ha[d] been convicted of one

or more aggravated felonies and ha[d] served for such felony or felonies a term of imprisonment of at least five years." *Id.*

In enacting § 440(d) of AEDPA, Congress expanded the category of criminal convictions that would render an alien ineligible to apply for § 212(c) relief. *See* AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (1996). Specifically, under the amended version, a discretionary waiver could not be granted to an alien convicted of certain enumerated offenses, including a drug-related crime, a firearm-related crime, two or more offenses involving moral turpitude, and an aggravated felony, regardless of time served in prison. *See* § 440(d). Soon thereafter, however, Congress enacted IIRIRA, which, among other things, repealed § 212(c) altogether and consolidated prior "suspension of deportation" relief and aspects of former § 212(c) relief into a new form of relief: "Cancellation of removal for certain permanent residents." IIRIRA § 304(a) (codified at 8 U.S.C. § 1229b(a) (1999)).[3] That section now makes any discretionary relief unavailable to all aliens who have been "convicted of any aggravated felony." IIRIRA § 304(a).

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[3] Congress also changed the legal lexicon associated with immigration proceedings. *See generally*, IIRIRA *passim.* Under the old scheme, aliens could either be "deported" or "excluded" from the United States, depending on their status, *i.e.*, whether or not they had entered the United States. Under IIRIRA, Congress eliminated the distinction between the two forms of proceedings and replaced them with "removal" proceedings. *See* IIRIRA § 304(a).

2. *Retroactivity*

Richards argues that the repeal of § 212(c), which prevents him from applying for discretionary relief, is impermissibly retroactive. It is true that civil statutes are generally presumed to apply prospectively only. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 271-72 (1994). "However, this presumption is applied only if Congress has not clearly manifested its intent to the contrary." *Aragon-Ayon v. INS*, 206 F.3d 847, 851 (9th Cir. 2000) (internal quotation and citation omitted). Therefore, the crucial question "is whether Congress has clearly manifested an intent for [the repeal of § 212(c)] to apply retroactively." *Id.* In answering that question, we not only look to the words of the statute, but to its structure as well. *See Magana-Pizano*, 200 F.3d at 611 (finding AEDPA's structure important in "divining intent").

We have already held that the amended definition of "aggravated felony" in IIRIRA applies retroactively. *See Aragon-Ayon*, 206 F.3d at 853. In so holding, we found that the statutory language left no doubt of Congress' intent that the new definition reach convictions that pre-dated the enactment of IIRIRA. *See id.* at 852-53. Although the language at issue here is not as definitive as the provision we were faced with in *Aragon-Ayon*, § 309(a) of IIRIRA, which governs the applicability of the sections at issue, is clear nonetheless. It states that, in general, "the amendments made by [§§ 301 through 309 of the IIRIRA, which include the repeal of § 212(c) and the enactment of § 1229b,] shall take effect on [April 1, 1997]." IIRIRA, Pub. L. No. 104-208, § 309(a), 110 Stat. 3009, 3009-625 (1996). Although "[a] statement that a statute will become

effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date," *Landgraf*, 511 U.S. at 257, the dates contained in § 309 are more than just "effective dates." *Cf. Magana-Pizano*, 200 F.3d at 611 (holding that "[b]ecause AEDPA has numerous effective date provisions, even within chapters, AEDPA's structure has been important in divining intent"). In enacting § 309, Congress went to great lengths to implement a scheme of both transitional and permanent provisions, which took many factors into consideration. In so doing, Congress made certain provisions applicable to certain aliens at certain times, while simultaneously exempting other aliens from other provisions. *See* IIRIRA § 309(a) (exempting §§ 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) from the general effective dates); IIRIRA § 309(c) (creating a transition scheme exempted from the general effective dates). In analyzing this carefully-crafted scheme, we find Judge Walker's analysis compelling:

> This legislative scheme of transitional provisions followed by permanent legislation can be reduced to one essential point relevant to IIRIRA's repeal of § 212(c): Congress intended the whole of IIRIRA's permanent provisions to apply to every alien as of April 1, 1997, except where it expressly exempted those provisions that were not meant to apply as of that date. The provision repealing § 212(c) was not one of them.

St. Cyr v. INS, 2000 WL 1234850, at *16 (2d Cir. Sept. 1, 2000) (Walker, J., dissenting). We agree.[4]

Congress' intent to repeal § 212(c) retroactively is further evidenced by the fact that § 212(c)'s "waiver of deportation" can no longer be given effect because "deportation" proceedings no longer exist after the enactment of the IIRIRA. *See* footnote 3, *supra.* Thus, to apply § 212(c)'s "waiver of *deportation*" relief to an alien subject to an order of *removal* under the new provisions,[5] would create an "awkward statutory patchwork sewn together . . . from scraps of IIRIRA and the former INA." *St. Cyr*, 2000 WL 1234850, at *17

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[4] We recognize that our decision today differs from the Second Circuit's in *St. Cyr v. INS*, 2000 WL 1234850 (2d Cir. Sept. 1, 2000). Our decision, however, is mandated by our prior decisions in *Aragon-Ayon* and *Magana-Pizano*, as well as by our own close reading of the statute. Moreover, as noted in *St. Cyr*, a three-way circuit split already exists on the issue. *See id.* at *11 (collecting cases).

[5] It is beyond doubt that the Attorney General can commence proceedings against an alien at any time, and we have no power to review that decision. *See* 8 U.S.C. § 1252(g) ("no court shall have jurisdiction to hear 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"). Here, the Attorney General commenced proceedings against Richards after the enactment of the IIRIRA. Thus, the permanent provisions of the IIRIRA, embodied in 8 U.S.C. § 1227 apply (which Richards concedes). Also, after *Aragon-Ayon*, it is beyond doubt that the Attorney General properly took Richards' 1996 conviction into account in determining his eligibility for removal (which he also concedes). Accordingly, because of his conviction, the INS determined that Richards was *removable* under the IIRIRA (which he also concedes). As a *removable* alien, the only relief he may seek is that provided in 8 U.S.C. § 1229b ("Cancellation of Removal").

(Walker, J., dissenting). Such construction "faces insurmountable hurdles even on a linguistic level." *Id.* We therefore conclude that Congress was clear in its intent to have IIRIRA apply to all aliens against whom removal proceedings were not yet pending as of April 1, 1997.

We must also recognize, however, that in *Magana-Pizano* we carved out a limited exception to this general rule:

> [W]e leave open the possibility that, under a specific factual showing that a plea was entered in reliance on the availability of discretionary waiver under § 212(c), a petitioner may be able to establish that [IIRIRA § 304(b)] has an impermissible retroactive application as to him. In doing so, we employ our sound instinct in applying the familiar considerations of fair notice, reasonable reliance, and settled expectations.

200 F.3d at 613 (internal citations and quotation marks omitted).

Richards argued in the district court that he had relied on the law in effect at the time of his guilty plea. He renews this argument on appeal. The district court, whose order pre-dates our opinion in *Magana-Pizano*, did not address this argument. Although such a showing of reliance can only be made in a rare circumstance, *see id.*, without an evidentiary hearing, we are unable to determine whether the circumstances here warrant such relief. Therefore, as mandated by *Magana-Pizano*, 200 F.3d at 613-14, we remand so that the district court can hold an evidentiary hearing as to the basis of Richards' claim that he specifically relied on the

availability of a discretionary wavier when he entered his guilty plea.

C. Other Arguments

We summarily reject Richards' arguments as to the unlawfulness of § 440(d) of the AEDPA because we find that Richards lacks standing to challenge this provision. This is so because, by the time the INS started removal proceedings against Richards, § 212(c), as amended by § 440(d), had already been repealed. *See* IIRIRA §§ 304(b), 309(a). Therefore, § 440(d) had no effect on the IJ's or the BIA's decision to deny him relief. Even if Richards were to obtain the relief he seeks with this petition, and we were to hold that the IJ should have applied the law as it existed at the time of Richards' conviction, AEDPA had not yet been enacted; thus, § 212(c) would have stood in its original form, unaffected by § 440(d). *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) ("The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." (internal quotation marks omitted)).

We also summarily reject Richards' novel argument that we should use our equitable powers to enjoin the Immigration and Naturalization Service ("INS") from continuing the current removal proceedings, and instead require the INS to reopen deportation proceedings under the old law. The justification for such request is that Richards was placed in removal proceedings only by mistake and lack of diligence on the INS' part, and that we can correct history through a nunc pro tunc theory. This, however, we cannot do.

We are in no position to review the timing of the Attorney General's decision to "commence proceedings" against petitioner. *See* 8 U.S.C. § 1252(g) (1999) ("no court shall have jurisdiction to hear 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"); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482-87 (1999) (construing § 1252(g)).

IV.

In sum, we conclude that Congress intended that the repeal of § 212(c) apply to all proceedings commenced after April 1, 1997. We further conclude that, as a general rule, the repeal is not impermissibly retroactive. The district court should, however, hold an evidentiary hearing to determine whether Richards can make a specific showing, based on his alleged reliance on § 212(c), that the retroactive application of the repeal of § 212(c) is impermissible as to him and we remand for this purpose. We otherwise affirm the decision of the district court.

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

File: A35 001 128 – San Diego Date: [Jan. 28, 1999]

In re: MARIO ALBERTO RICHARD-DIAZ a.k.a. Mario Alberto Richards-Diaz

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Murray D. Hilts, Esquire
1011 Camino Del Rio South, Suite 350
San Diego, California 92108

ON BEHALF OF SERVICE:

Thomas P. Haine
Assistant District Counsel

ORDER

PER CURIAM. The respondent is statutorily ineligible for cancellation of removal pursuant to section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), because he has been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B). Since he is in removal proceedings, a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c), is not a form of relief that is available. *See* Section 304(b) of the Illegal Immigration Reform and Immigrant Respon-

sibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"). On appeal, the respondent has argued that the Immigration and Naturalization Service should have instituted proceedings against him at an earlier date. The Service's decisions regarding the commencement of proceedings are not reviewable by this Board. *See e.g., Matter of Ramirez-Somera*, 20 I&N Dec. 564 (BIA 1992), and cases cited therein.

Accordingly, the appeal is dismissed.

ILLEGIBLE
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

File No.: A 35 001 128

IN THE MATTER OF MARIO ALBERTO RICHARDS-DIAZ
A/K/A MARIO ALBERTO RICHARD-DIAZ, RESPONDENT

IN REMOVAL PROCEEDINGS

October 10, 1997

CHARGE: Removability – Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended (being convicted of an aggravated felony).

APPLICATIONS: Section 212(c) waiver.

ON BEHALF OF RESPONDENT:

Murray D. Hilts, Esquire

ON BEHALF OF SERVICE:

Thomas Haine, Esquire
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 29-year-old male, native and citizen of Mexico who was charged with removability as noted above. The respondent, through counsel, admitted to all the factual allegations in the charging document. He denied removability as a matter of law. The respondent also applied and submitted an application for a Section 212(c) waiver under the Immigration and Nationality Act, as it stood before the amendments of September 30, 1996. *See* Exhibit 5.

The respondent was convicted in the Superior Court of California on February 21, 1996, for the offense of transportation of methamphetamine in violation of Section 11379(a) of the California Health and Safety Code. This is the conviction charge in the charging document. *See* Exhibit 1. The respondent was also convicted of possession of phencyclidine (PCP) in violation of Section 11377(a) of the California Health and Safety Code on June 16, 1997. *See* Exhibit 3.

The respondent argues that he should be allowed to apply for a Section 212(c) waiver because the Immigration and Naturalization Service did not follow their guidelines and did not issue a detainer against the respondent when he was incarcerated in county jail early in February of this year. The respondent contends that the Service follows this procedure regularly and once the detainer is placed on the prisoner, they then contact the prisoner and issue a charging document. The respondent argues that had the Service used their customary procedure and followed their guidelines and placed a detainer some time in February of 1996, they would have issued an

Order to Show Cause against the respondent, presumably in either February or March of 1996. Had they done this, the respondent argues, he would be in a better position to seek relief. Respondent contends, through counsel, that even though the amendments brought about by Section 440(d) of the Anti-Terrorism and Effective Death Penalty Act of April 24, 1996, also precluded eligibility for the 212(c) waiver relief to persons convicted of aggravated felonies who were found deportable as such, nonetheless, respondent believes that there is a possibility that the 9th Circuit Court of Appeals will overturn the ruling interpreting said amendment as applicable to all pending cases. *See Matter of Soriano*, Int. Dec. 3289 (A.G., Feb. 21, 1997).

The respondent does not argue that the crime of transporting methamphetamine is a not an aggravated felony. The Court finds that the crime of transporting methamphetamine is a drug-trafficking crime, and is thus an aggravated felony as defined in the statute at Section 101(a)(43). *See United States v. Lomas*, 30 F.3d 1191 (9th Cir. 1994). Furthermore, in light of the fact that the respondent has been convicted previously of another possession of a controlled substance type of crime, and that his second conviction for the transportation of methamphetamine can also be construed as a form of possession, the respondent may also be considered to have been convicted of a drug-trafficking crime as defined in Title 21. *See Matter of Davis*, 20 I.N. Dec. 536 (BIA 1992). After examining the evidence in this case, the Court is satisfied that the evidence is clear and convincing that respondent had been convicted of an aggravated felony and that he is removable as an aggravated felon. The Court does find that respondent is removable as charged.

It should be noted that the respondent, according to the allegations which have not been disputed, was admitted to the United States on April 25, 1975, as an immigrant. According to the information in his 212(c) application, he has many family members in the United States. His parents are legal residents. His brothers are U.S. citizens. His wife and two daughters are also U.S. citizens. The wife and daughter live with him in the United States. The parents and siblings also live in the United States.

Although the respondent may meet some of the requirements of eligibility for the Section 212(c) waiver relief and the Sections 240A(a) cancellation of removal for certain permanent residents, because of his aggravated felony conviction and the finding of deportability on that basis, the Court must find that the respondent is not eligible for the relief of cancellation of removal. The Court also cannot consider the Section 212(c) relief in these proceedings because these are removal proceedings, and according to the transition rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 at Section 309, that law must apply to cases filed on or after April 1, 1997, and such is the case in the present proceedings which were filed in June of 1997.

The Court finds that it does not have jurisdiction to entertain the equal protection clause arguments raised by the respondent as far as the timing of the issuance of the charging document in his case by the Immigration and Naturalization Service. Furthermore, the determination of when and where and how to file a charging document is left to the province of the enforcement arm of the Attorney General of the Immigration and

Naturalization Service. And the Court has no jurisdiction on that matter either. In addition, it appears to the Court at this point in time, respondent has not shown how he was prejudiced by the issuance of the charging document at a later date. This is so because had they issued the charging document in February of 1996, Congress changed the law in April of 1996, the case would have been pending and this new law would have applied to the respondent, thus precluding him from applying for the 212(c) waiver because of his aggravated felony conviction.

It does not appear that the respondent is eligible for the relief of voluntary departure either under Section 240B of the Immigration and Nationality Act, as amended, in light of his aggravated felony conviction. Therefore, and for the above-mentioned reasons, the Court now rules as follows:

ORDER

Respondent is found removable as charged. Respondent's applications for relief are denied. Respondent is ordered removed from the United States to Mexico based on the charge in the charging document. So ordered,

_____

IGNACIO P. FERNANDEZ
Immigration Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 99-CV-327 BTM (RBB)

MARIO RICHARDS-DIAZ, PETITIONER

v.

ADELE FASANO, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed: September 3, 1999]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner has filed a petition for writ of habeas corpus under 28 U.S.C. § 2241. For the reasons set forth below, the petition is DENIED. A prior order of this Court enjoining respondent from moving petitioner outside the Court's jurisdiction is VACTED.

I. Background

Petitioner is a native and citizen of Mexico and legal permanent resident of the United States. On February 21, 1996, he pleaded guilty in state court to transportation of a controlled substance and was sentenced to 270 days in prison. *See* CAL. HEALTH & SAFETY CODE

§ 11379(a). Over a year later, on June 13, 1997, the Immigration and Naturalization Service ("INS") arrested petitioner and served him with a Notice to Appear seeking his removal for this conviction. The Notice had the effect of initiating proceedings against him under the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1229. Petitioner was charged with being removable for conviction of an aggravated felony—a predicate for removal not challenged in these collateral proceedings. The new regime of "removal," established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), governs INS proceedings initiated on or after April 1, 1997. *Kalaw v. Immigration & Naturalization Serv.*, 133 F.3d 1147, 1150 (9th Cir. 1997). As IIRIRA directs, the INS placed petitioner in removal proceedings, rather than deportation proceedings. This decision is the source of the petition in this case, because petitioner seeks relief available only to aliens in deportation proceedings.

On September 2, 1997, petitioner filed an application for relief from deportation under former § 212(c) of the INA.[1] On October 10, 1997, an immigration judge found that petitioner had been properly placed in removal proceedings and was thus ineligible for discretionary relief under former § 212(c). Petitioner appealed this ruling to the Board of Immigration Appeals ("BIA"). On January 28, 1999, the BIA dismissed the appeal, concluding that petitioner was ineligible for

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[1] *See* 8 U.S.C. § 1182(c) (repealed), discussed further below in the text. Because the record does not speak to the point, the Court accepts petitioner's representation that he filed his application for discretionary relief on September 2, 1997. This date is consistent with other dates in this case's procedural history.

cancellation of removal because he was removable for conviction of an aggravated felony and, since he was in removal proceedings, could not seek § 212(c) relief available to aliens in deportation proceedings.

On February 25, 1999, after the INS ordered him to appear to be removed to Mexico, petitioner filed this petition for writ of habeas corpus. The petition raises several challenges stemming from the denial of his application for § 212(c) relief. Respondent in sum argues that the Court lacks subject matter jurisdiction and that, in any event, the petition fails on the merits. As the parties are aware, on March 2, 1999, this Court issued an order restraining respondent from moving petitioner outside the Court's jurisdiction while the petition was considered.

II. Subject Matter Jurisdiction

Subject matter jurisdiction is a threshold question in any dispute in federal court. Even if it might be tempting to proceed directly to an easy resolution on the merits, a federal court must first satisfy itself that it has jurisdiction over the subject matter. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

Here, respondent asserts that jurisdiction is barred by 8 U.S.C. § 1252(b)(9), which provides as follows:

> 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.

Subsection (b)(9) is titled "'Consolidation of questions for judicial review" and is contained in the section of IIRIRA governing judicial review of final removal orders. In its recent decision in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. _____, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999) ("*American-Arab*"), a case involving different issues, the United States Supreme Court described subsection (b)(9) as the "unmistakable 'zipper' clause." 119 S. Ct. at 943. Relying on *American-Arab*, respondent here argues that the "zipper clause" requires petitioner's claims to be brought, if anywhere, in the Ninth Circuit in review of a final removal order.

The Ninth Circuit has not addressed the effect of subsection (b)(9) on the jurisdiction of a federal district court under 28 U.S.C. § 2241 to review a petition for writ of habeas corpus by an alien in removal proceedings. Lacking controlling law on the point, this Court has already noted its position on the "zipper clause" in cases involving an aggravated felon, as here, who has no right of direct review in the Ninth Circuit. In *Sena v. Fasano*, 99-CV-715 BTM (RBB) (Order filed on May 24, 1999), this Court held that subsection (b)(9) did not bar consideration of a habeas petition by an aggravated felon under 28 U.S.C. § 2241 because aggravated felons have no right of direct review in which their constitutional challenge may be funneled. *See* 8 U.S.C. § 1252(a)(2)(C). This construction, besides avoiding potentially serious constitutional problems under the Suspension Clause, is consistent with the apparent intent of Congress gleaned from the statutory scheme. The net effect of this Court's view is that all aliens that the INS seeks to remove have a right of some review in some court at some time. In particular,

it is consistent with the "zipper clause" for Congress to provide that aggravated felons facing removal, but not aliens with a right of direct review, retain a more narrow scope of review in collateral proceedings. Under this Court's reading, non-aggravated felons have the right to present a range of issues in the court of appeals on direct review, including constitutional claims typically presented in a habeas petition and other claims (such as, for example, a challenge to a finding that a particular conviction supports removal under the Immigration and Nationality Act). Aggravated felons, by contrast, because they have no right of direct review, may raise a narrower range of issues in a habeas petition in the district court to avoid any manifest injustice that might result if there were no forum for such challenges.

While the Court appreciates that some decisions on this jurisdictional question go the other way, the Court sees no basis for changing its view of the matter at this time. If Congress meant to abrogate habeas jurisdiction as to constitutional claims by aggravated felon aliens, it would have clearly and expressly stated such intention. Accordingly, the Court follows *Sena* and holds that it has subject matter jurisdiction to consider the petition.

III. Merits

To understand petitioner's claims, a brief overview of the relevant law is necessary. AEDPA and IIRIRA significantly revamped the rules governing immigration and nationality. Before AEDPA, which was enacted on April 24, 1996, legal permanent resident aliens deportable for conviction of an aggravated felony were eligible to seek discretionary relief from deportation under

former § 212(c) of the INA so long as the term of imprisonment on the offense or offenses was less than five years.[2] Had he been placed in deportation proceedings, petitioner likely would have been eligible to seek this relief.[3] However, § 440(d) of AEDPA revised former § 212(c) to exclude aggravated felons from the right to seek relief under that section—an amendment that effectively took that right away from petitioner.[4] On Sep-

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[2] Former § 212(c) of the INA provided:

> Aliens 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 the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. § 1182(c) (repealed).

[3] Respondent essentially concedes this point because petitioner was incarcerated for less than five years on the aggravated felony underlying the INS's efforts to remove him. The Court assumes, for purposes of decision, that this point is established in petitioner's favor and holds, for the reasons given in the text, that the petition fails on the merits.

[4] As relevant here, § 440(d) of AEDPA amended the last sentence of former § 212(c) of the INA to preclude § 212(c) relief from being made available "to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii)." *See* Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277. Section 241(a)(2)(A)(iii), in turn, makes an alien deportable for conviction of an aggravated felony. *See* 8 U.S.C. § 1227(a)(2)(A)(iii).

tember 30, 1996, a few months after AEDPA was enacted, IIRIRA became law. Among its many changes, IIRIRA repealed § 212(c) and replaced it with cancellation of removal. *See* 8 U.S.C. § 1229b. Petitioner does not dispute that because he is removable for conviction of an aggravated felony, he is ineligible to seek cancellation of removal. *Id.*

As noted at the outset, petitioner pleaded guilty in state court before the discretionary-relief rules were changed to his detriment in AEDPA and then IIRIRA. In sum, petitioner argues that it is contrary to congressional intent, if not also a violation of due process, for the INS to bar him from seeking discretionary relief that was available when he pleaded guilty in state court before AEDPA and IIRIRA. Petitioner's principal contention is that § 440(d) of AEDPA amending former § 212(c) does not apply to convictions that predate AEDPA's enactment. There is no need to address that issue. Former § 212(c), as revised by AEDPA, was repealed by IIRIRA on September 20, 1996. The overriding question, therefore, is whether IIRIRA's repeal of former § 212(c) applies to convictions, like petitioner's, that precede IIRIRA. If IIRIRA's repeal of former § 212(c) applies to petitioner, whether AEDPA's previous tinker of the statute also applies is irrelevant.

Civil statutes are generally not construed to apply retroactively unless Congress clearly indicates an intent to that effect. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). Here, Congress specified that IIRIRA's amendments affecting aggravated felons apply to "actions taken on or after the date of the enactment of this Act, regardless of when the conviction

occurred." Petitioner is included because the INS did not initiate proceedings against him until after IIRIRA became law. *See Oritz v. Immigration & Naturalization Serv.*, 179 F.3d 1148, 1155-56 (9th Cir. 1999); *Valderrama-Fonseca v. Immigration & Naturalization Serv.*, 116 F.3d 853 (9th Cir. 1997). Accordingly, even if AEDPA's amendment to former § 212(c) does not apply to petitioner, it makes no difference because IIRIRA's repeal of former § 212(c) as amended by AEDPA does apply to the circumstances here.[5]

Petitioner next advances the novel argument that the Court should order, through its power to record events nunc pro tunc, that petitioner be placed in deportation proceedings so that he can petition for relief under former § 212(c). The claim is that petitioner was placed in removal proceedings only by mistake and lack of diligence on the INS's part, and that the Court can correct the history through nunc pro tunc. Respondent aptly observes that this Court has no power to review the Attorney General's decision to "commence proceedings" against petitioner. 8 U.S.C. § 1252(g). Even if that were not an obstacle, petitioner cites no authority, and the Court is aware of none, that would allow the remedy he suggests.

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[5] Alternatively, petitioner maintains that § 440(d) of AEDPA violates his Fifth Amendment equal protection rights by denying certain aliens, but not others, the right to seek discretionary relief under former § 212(c) of the INA. As just discussed above, the dispositive issue is whether IIRIRA's repeal of 212(c) applies to petitioner. By repealing § 212(c), IIRIRA, in cases where it applies, took away any equal protection challenge to § 212(c) as amended by AEDPA. Accordingly, there is no need to address petitioner's equal protection claim.

Finally, other argument in petitioner's papers does not support granting the writ. Petitioner appears to suggest at one point that his guilty plea in state court may have been involuntary because, in pleading guilty, petitioner believed he would have been eligible to seek discretionary relief from deportation under former § 212(c) of the INA. However, this point is made only in passing and no separate argument is advanced that the conviction cannot support removal due to lack of voluntariness. *See* Points and Authorities in Support of a Writ of Habeas Corpus and Stay of Deportation at 12. Consequently, the Court does not construe the petition to make any such claim. At another stage, petitioner submits that as a legal permanent resident alien, he is entitled to due process and, specifically, independent judicial review "to determine whether the BIA has demonstrated an abuse of discretion or whether their legislative interpretation is based on speculation or conjecture." *Id.* at 15. Petitioner does not otherwise elaborate on the nature of this claim. The Court construes this argument to be a subset of petitioner's argument in support of subject matter jurisdiction. To the degree that petitioner intends to maintain that he has a constitutional right to judicial review of the BIA's application of AEDPA and IIRIRA—which would be consistent with his apparent reference to his retroactivity argument—the Court finds no error in the Executive's application of these statutes for the reasons given.

IV. Conclusion and Order

For the reasons set forth above, petition for writ of habeas corpus is DENIED. This Court's order restraining respondent from moving petitioner, filed on March 2, 1999, is VACATED. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: September 2, 1999

/s/ BARRY TED MOSKOWITZ
HONORABLE BARRY TED MOSKOWITZ
United States District Judge

CC: Magistrate Judge Brooks
All parties and counsel of record

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Prior to April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> **(10) Habeas corpus**
>
> any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

3. Effective April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

4. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens 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 ad-

> mitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

5. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens 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 the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall

---

[1] Section 1182(c) of Title 8 was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. The version set forth in the text reflects both sets of amendments.

limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

6. Section 235(b) of the Immigration and Nationality Act, 8 U.S.C. 1225(b) (Supp. V 1999), provides in pertinent part:

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

* * * * *

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and ques-

tioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

* * * * *

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

* * * * *

7. Section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. 1229b(a) (Supp. V 1999), provides:

> **(a) Cancellation of removal for certain permanent residents**
>
> The Attorney General may cancel the removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (a) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (b) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (c) has not been convicted of any aggravated felony.

8. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. V 1999), provides in pertinent part:

> **§ 1252. Judicial review of orders of removal**
>
> **(a) Applicable provisions**
>
> **(1) General orders of removal**
>
> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not

order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

* * * * *

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding 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 a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to

their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

* * * * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

* * * * *

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

* * * * *

(9) Consolidation of questions for judicial review

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.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such

> further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.
>
> * * * * *

9. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

10. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

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[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA.

CRIMINAL ALIEN REMOVAL.

(a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

> "(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

> (1) by striking "The first sentence of this" and inserting "This"; and
>
> (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

11. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

> REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

12. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

> **EFFECTIVE DATES; TRANSITION.**
>
> (a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").
>
> * * * * *
>
> (c) TRANSITION FOR ALIENS IN PROCEEDINGS.—
>
> (1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

13. Section 2241 of Title 28, United States Code, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]
>
> * * * * *