No. 01-403

In the Supreme Court of the United States

CHELO HENRY VILLARREAL-ALARCON, ET AL.,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that, under Section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-627, as amended by Section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Tit. II, 111 Stat. 2196, petitioners are statutorily ineligible for suspension of deportation under former 8 U.S.C. 1254(a) (1994) because they had not accrued seven years of continuous physical presence in the United States when their deportation proceedings were commenced by service of an Order to Show Cause.

2. Whether petitioners' due process and equal protection rights were violated by the application to this case of Section 309(c)(5) of IIRIRA and Section 203(a)(1) of NACARA, which were enacted after they were placed in deportation proceedings, and which effectively terminated their statutory eligibility for suspension of deportation.

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OPINIONS BELOW

The opinion of the court of appeals denying the petition for review (Pet. App. 1-2) is unreported. The decisions of the immigration judge (Pet. App. 3-5) and the Board of Immigration Appeals (Pet. App. 14-17) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2001. A petition for rehearing was denied on June 8, 2001. Pet. App. 18. The petition for a writ of certiorari was filed on September 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Before the amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 *et seq.*, an alien who was subject to deportation could apply for suspension of deportation and adjustment of status to that of a lawful permanent resident (LPR). 8 U.S.C. 1254(a) (1994).[1] Such relief was available in the discretion of the Attorney General. To qualify for consideration, the alien was required to demonstrate, *inter alia*, that he had been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application [for relief]." 8 U.S.C. 1254(a)(1) (1994).[2] The time that an alien spent in deportation proceedings before issuance of a final order of deportation was counted towards the requirement of seven years of continuous physical presence in the United States. See, *e.g.*, *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981).

On September 30, 1996, Congress enacted IIRIRA. That statute abolished the old distinction between deportation and exclusion proceedings, repealed the provision for suspension of deportation in former 8 U.S.C. 1254(a) (1994), instituted a new form of proceeding

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[1] Unless otherwise indicated, references in this brief to Title 8 of the United States Code are to the current (2000) edition. References to the 1994 edition are identified as such.

[2] The alien was also required to demonstrate that he was of good moral character, and that his deportation would result in "extreme hardship" to himself or a spouse, parent, or child who was a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1) (1994).

known as "removal," and established a new form of discretionary relief from removal, known as "cancellation of removal." See 8 U.S.C. 1229(a), 1229b. Under the latter provision, the Attorney General may in his discretion cancel the removal of an alien if the alien demonstrates, among other things, that he has resided in the United States continuously for seven years (if the alien is an LPR) or has been continuously present in the United States for ten years (if the alien is not an LPR). 8 U.S.C. 1229b(a) and (b).

For purposes of eligibility for cancellation of removal, however, the required continuous residence or physical presence is "deemed to end * * * when the alien is served a notice to appear," 8 U.S.C. 1229b(d)(1), not when the alien makes his application for relief. The Notice to Appear is the document that commences removal proceedings under IIRIRA, and replaces the old Order to Show Cause (OSC), service of which commenced deportation proceedings under the INA before IIRIRA. See 8 U.S.C. 1229(a). Thus, IIRIRA instituted a new rule (known as the "stop-time" rule), under which the commencement of removal proceedings cuts off the time that is counted towards establishing an alien's eligibility for cancellation of removal, and the time that an alien spends in removal proceedings is not counted.

The new cancellation-of-removal provisions (including the ten-year eligibility requirement for aliens who are not LPRs) were for the most part not made applicable to aliens whose immigration proceedings were commenced prior to April 1, 1997, the general effective date of IIRIRA. IIRIRA did, however, contain a special "transitional rule with regard to suspension of deportation," which provided that the new stop-time rule was to apply to "notices to appear" issued before, on, or

after the date of enactment of IIRIRA, *i.e.*, September 30, 1996. Specifically, IIRIRA Section 309(c)(5) originally provided:

> TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act [8 U.S.C. 1229b(d)] (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

110 Stat. 3009-627.

b. After enactment of IIRIRA, aliens in deportation proceedings argued that the new stop-time rule of IIRIRA did not apply to proceedings commenced before the full effective date of IIRIRA, April 1, 1997. That argument was based on the language in IIRIRA Section 309(c)(5) directing that the new stop-time rule be applied in cases in which a "notice to appear" had been issued. Under deportation proceedings initiated before IIRIRA's effective date, no document known as a "notice to appear" existed, and proceedings were commenced by service of an Order to Show Cause.

On February 20, 1997, the Board of Immigration Appeals (BIA) rejected that argument, and held that IIRIRA Section 309(c)(5) required that the new stop-time rule be applied to all pending and future deportation proceedings, including those commenced before IIRIRA was enacted. *In re N-J-B-*, Interim Dec. 3415 (B.I.A. Feb. 20, 1997). The BIA concluded (slip op. 8-12) that the term "notice to appear" in IIRIRA Section 309(c)(5) referred generically to a document initiating proceedings, and that, because Section 309(c)(5) expressly referred to such a document "issued before, on, or after" IIRIRA's enactment date, it necessarily

included an Order to Show Cause issued before that date. On July 10, 1997, the Attorney General, exercising her authority under 8 C.F.R. 3.1(h)(1)(i), vacated the BIA's decision in *N-J-B-* and certified that case to herself for her review and determination. See *In re N-J-B-*, Interim Dec. 3415, slip op. 39 (A.G. July 10, 1997).

c. On November 19, 1997, while *In re N-J-B-* was still pending before the Attorney General, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Tit. II, 111 Stat. 2193 *et seq.*. Section 203(a)(1) of NACARA amended IIRIRA Section 309(c)(5) to make clear that the stop-time rule of IIRIRA applies to deportation proceedings initiated before April 1, 1997, by service of an Order to Show Cause (rather than a Notice to Appear). NACARA Section 203(a)(1) amended IIRIRA Section 309(c)(5) to read in part as follows:

> (A) IN GENERAL.— * * * [P]aragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to *orders to show cause* (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of the enactment of this Act.

111 Stat. 2196 (emphasis added). Section 203(f) of NACARA also made that amendment effective as if included in the original enactment of IIRIRA. 111 Stat. 2200. In *In re Nolasco-Tofino*, Interim Dec. 3385 (B.I.A. Apr. 15, 1999), the BIA held that, under the NACARA amendment, the stop-time rule applies

generally to deportation proceedings initiated before IIRIRA's effective date (except in the cases of aliens who qualify for a statutory exception).[3]

2. Petitioners are natives and citizens of Peru who entered the United States on October 26, 1989, as non-immigrant visitors for business, authorized to remain until April 26, 1990. Certified Administrative Record (C.A.R.) 479. (Petitioners are a "family unit parents and two offspring[.]" C.A.R. 40.) Petitioners did not leave the country as required and were placed in deportation proceedings on September 7, 1995, when the INS filed OSCs with the Immigration Court. The OSCs charged petitioners with being subject to deportation under 8 U.S.C. 1251(a)(1)(B) (1994), as aliens who remained in the United States longer than authorized. C.A.R. 480-481. The OSCs were served on petitioners by certified mail on December 5, 1995, about six years

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[3] NACARA created an exception to the new stop-time rule for certain qualifying aliens from El Salvador, Guatemala, and Eastern Europe. That exception allowed qualified nationals of those countries to apply for suspension of deportation or cancellation of removal without having their period of continuous physical presence stopped at the time that an Order to Show Cause was served on them. See NACARA § 203(a)(1), 111 Stat. 2196-2198. NACARA also provided certain Nicaraguan nationals with another, broader form of relief. NACARA § 202(b)(1) provided qualified Nicaraguans the opportunity to apply directly for adjustment of status to LPR, without the need also to apply for suspension of deportation (including the need to show that deportation would cause hardship). See NACARA § 202(b)(1), 111 Stat. 2194. A similar privilege was extended to certain Haitian nationals in the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 104-277, Div. A, § 101(h), Tit. IX, § 902(b), 112 Stat. 2681-538. Citizens of Peru were not granted special relief from the stop-time rule.

and two months after they had entered the United States. C.A.R. 483.

At a deportation hearing on March 28, 1996, petitioners admitted the allegations in the OSCs, conceded deportability, and applied for asylum, withholding of deportation, and voluntary departure in the alternative. C.A.R. 47. The immigration judge (IJ) advised petitioners' counsel, "[n]ow you obviously know there's an apparent relief, Mr. Vasquez, for the potential suspension," and counsel responded, "Yes, Your Honor." C.A.R. 48. The IJ then calendared the case for October 28, 1996, and instructed counsel that, to avoid a further continuance, the application for suspension of deportation had to be fully "processed and ready for submission" for a hearing on that date. C.A.R. 48. The IJ further informed the parties that the application for suspension of deportation could not be filed before October 26, 1996 (seven years after petitioners had entered the United States), when she anticipated that petitioners would become eligible for that relief. *Ibid.*

Because the IJ was unavailable for a hearing on October 28, 1996, the hearing was rescheduled for November 27, 1996. C.A.R. 51, 379-385. At the hearing on November 27, 1996, petitioners' counsel reiterated his clients' request for suspension of deportation. INS counsel argued that, in light of Congress's enactment of IIRIRA's stop-time rule on September 30, 1996, petitioners were no longer eligible for suspension, as they had not accrued the requisite seven years of continuous physical presence in the United States before they were served with the OSC commencing their deportation proceedings. C.A.R. 52. The IJ rescheduled the hearing for June 19, 1997, the earliest date on which she was available, and permitted the parties to file briefs addressing the eligibility issue. C.A.R. 54, 371-377.

The hearing was eventually rescheduled again for December 1, 1997. C.A.R. 57.

On December 1, 1997, the IJ determined that the stop-time rule enacted in IIRIRA rendered petitioners ineligible for suspension of deportation because they had not accrued seven years of continuous physical presence in the United States before being served with the OSCs commencing their deportation proceedings. C.A.R. 61-62. Petitioners were granted voluntary departure. C.A.R. 62.

3. The Board of Immigration Appeals (BIA) affirmed the IJ's determination that petitioners are ineligible for suspension of deportation under the stop-time rule. Following its earlier decision in *Nolasco-Tofino*, *supra*, the BIA explained that "the period of continuous physical presence ends at the service of the Order to Show Cause and Notice of Hearing * * * on the alien." Pet. App. 16. Applying that rule, the BIA concluded that petitioners had not accrued the requisite seven years before service of their OSCs. *Ibid.*

4. Petitioners filed a petition for review of the BIA's decision in the United States Court of Appeals for the Ninth Circuit. Petitioners contended that the BIA's determination of the temporal scope of the stop-time rule in *Nolasco-Tofino* was erroneous, and that the application of that rule to their cases violated due process and equal protection. The court denied the petition in an unpublished decision, relying on its earlier decision rejecting similar contentions in *Ram* v. *INS*, 243 F.3d 510 (9th Cir. 2001).

In *Ram*, the court of appeals held that an alien who had been placed in deportation proceedings by an OSC and who applied for suspension of deportation was covered by the new stop-time rule, as implemented by the special transitional rule in IIRIRA Section

309(c)(5)(A). The court rejected the argument that the transitional rule of IIRIRA Section 309(c)(5)(A) applied only "in one very limited circumstance: namely, where a transitional rule alien served with an *OSC* under pre-IIRIRA law is ultimately placed in *removal* proceedings [under authority of IIRIRA section 309(c)(2)] (after April 1, 1997), from which he or she seeks *cancellation of removal*." *Ram*, 243 F.3d at 514.[4] Instead, the court agreed with the BIA that IIRIRA Section 309(c)(5)(A) clearly provides that the stop-time rule applies to suspension of deportation cases "heard by an IJ or on appeal after IIRIRA took effect [on April 1, 1997]." *Ibid.*

Although the stop-time rule enacted in 8 U.S.C. 1229b(d)(1) refers expressly to "notices to appear" that commence post-IIRIRA removal proceedings, and not expressly to the OSCs that initiate pre-IIRIRA deportation proceedings, the court nonetheless concluded that that reference was sensible in light of the fact that the new stop-time rule was enacted as a permanent provision of the INA and as such refers to permanent procedures, whereas IIRIRA Section 309(c)(5)(A) is a transitional provision that governs only transitional procedures eventually made obsolete by the permanent provisions. *Ram*, 243 F.3d at 514. The court also concluded that, although the original statutory language was not entirely free from ambiguity on the point, any ambiguity was resolved by the statute's subsequent amendment by NACARA Section 203(a)(2), 111 Stat. 2198, which replaced the original reference to "notices

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[4] IIRIRA Section 309(c)(2) granted the Attorney General the option to apply the new removal procedures established by IIRIRA in cases initiated before April 1, 1997. See 110 Stat. 3009-626.

to appear" with an express reference to OSCs. That change clarified that the new stop-time rule is to be applied, through application of the transitional rule, not only in removal proceedings but in all suspension cases heard on or after April 1, 1997. *Id.* at 515-516.

The court in *Ram* also rejected the argument that application of IIRIRA Section 309(c)(5) to aliens who were aliens placed in proceedings before IIRIRA's April 1, 1997, effective date was unconstitutionally retroactive. Applying the retroactivity analysis articulated by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the court first concluded that Congress had "expressly delineated" the temporal reach of IIRIRA Section 309(c)(5)(A) when it expressly made that transition rule applicable to all OSCs "issued *before, on, or after* the date of enactment of [IIRIRA]." *Ram*, 243 F.3d at 516. The court then held that "Congress was entitled to change the standards for suspension of deportation," and that, "[w]here this change shows a clear intent to apply the new stop-time rule to [aliens], its application to bar the prospective relief of suspension of deportation does not offend due process." *Id.* at 517.

ARGUMENT

The court of appeals correctly rejected petitioners' challenge to the BIA's application of the stop-time rule in 8 U.S.C. 1229b(d)(1) to their case. The court and the BIA properly determined that the transitional rule in IIRIRA Section 309(c)(5) makes that stop-time rule applicable, at a minimum, to all applications for suspension of deportation that are adjudicated by an immigration judge on or after IIRIRA's general effective date of April 1, 1997. That conclusion does not conflict with any decision of this Court or any other court of

appeals. Petitioners' constitutional objection to the application of the stop-time rule to their case is without merit. This Court denied review of a petition raising similar contentions in *Tefel* v. *Reno*, 530 U.S. 1228 (2000), and there is no reason for a different result in this case. In addition, the issues presented by this case are of little continuing importance, for petitioners' challenges pertain to eligibility for a form of discretionary relief, suspension of deportation, that has been prospectively repealed. Further review is therefore not warranted.[5]

1. The court of appeals' decision is of little continuing importance. The temporal scope of the transitional rule in IIRIRA Section 309(c)(5) affects only aliens who sought to apply for suspension of deportation, pursuant to former 8 U.S.C. 1254(a) (1994), in deportation proceedings commenced under pre-IIRIRA law. For removal proceedings commenced on or after April 1, 1997, however, suspension of deportation has been repealed and replaced by a new form of relief known as "cancellation of removal," which is subject to different substantive terms of eligibility. See 8 U.S.C. 1229b. Thus, the claims in this case concern only deportation proceedings affected by IIRIRA's transitional rules, and do not implicate any removal proceedings under the permanent provisions of IIRIRA. Petitioners are members of a finite group of aliens who are subject to IIRIRA's transitional rules; that category of aliens is steadily diminishing in number and will

[5] Similar issues are presented in the pending certiorari petition in *Rubio* v. *Ashcroft*, No. 01-547, which also seeks review of a decision of the Ninth Circuit that relied on that court's earlier decision in *Ram*.

be depleted when the aliens complete their administrative proceedings.[6]

In addition, all the courts of appeals that have addressed the temporal scope of IIRIRA Section 309(c)(5) have agreed that that provision requires that the stop-time rule in 8 U.S.C. 1229b(d)(1) be applied, at a minimum, to all suspension of deportation applications adjudicated on or after April 1, 1997.[7] See *Angel-Ramos* v. *Reno*, 227 F.3d 942, 947 (7th Cir. 2000); *Afolayan* v. *INS*, 219 F.3d 784, 788 (8th Cir. 2000); *Rivera- Jimenez* v. *INS*, 214 F.3d 1213, 1217 (10th Cir. 2000); *Gonzalez- Torres* v. *INS*, 213 F.3d 899, 903 (5th Cir. 2000); *Appiah* v. *INS*, 202 F.3d 704, 708 (4th Cir.), cert. denied, 531 U.S. 857 (2000); *Tefel* v. *Reno*, 180 F.3d 1286, 1293 (11th Cir. 1999), cert. denied, 530 U.S. 1228 (2000). There is therefore no conflict in the circuits warranting this Court's review.

2. The court of appeals properly rejected petitioners' claims. IIRIRA Section 309(c)(5) expressly directs that the new stop-time rule in 8 U.S.C. 1229b(d)(1) is to be applied to applications for suspension of deportation in deportation proceedings commenced under old, pre-IIRIRA law. As amended by NACARA,

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[6] This Court has denied several certiorari petitions raising issues that arise only under the transitional rules of IIRIRA. See *Tefel* v. *Reno*, 530 U.S. 1228 (2000); *LaGuerre* v. *Reno*, 528 U.S. 1153 (2000); *Reno* v. *Goncalves*, 526 U.S. 1004 (1999); *Reno* v. *Navas*, 526 U.S. 1004 (1999).

[7] The Ninth Circuit has held that the new stop-time rule is not to be applied in cases in which the IJ adjudicated the application for suspension of deportation before IIRIRA's general effective date of April 1, 1997. See *Otarola* v. *INS*, No. 99-71405, 2001 WL 1242254 (Oct. 18, 2001); *Guadalupe-Cruz* v. *INS*, 240 F.3d 1209 (2001). This case does not present that issue, because the IJ ruled on petitioners' application after April 1, 1997. See pp. 7-8, *supra*.

IIRIRA Section 309(c)(5) provides that the new stop-time rule "shall apply to orders to show cause * * * issued *before, on or after* the date of the enactment of [IIRIRA]." NACARA § 203(a), 111 Stat. 2196 (emphasis added). Any ambiguity that might have existed in the original language of the transitional rule was resolved by the NACARA amendment, which replaced the phrase "notices to appear" in IIRIRA Section 309(c)(5) with "orders to show cause," the documents that commenced deportation proceedings before the April 1, 1997, effective date of the pertinent provisions of IIRIRA. NACARA also expressly made that amendment effective as if it had been originally enacted in IIRIRA. See NACARA § 203(f), 111 Stat. 2200.

NACARA accordingly makes clear that, for an alien placed in pre-IIRIRA deportation proceedings who is not subject to certain express statutory exceptions not applicable here (see p. 6 note 3, *supra*), the time after which the alien is served with the OSC commencing the deportation proceedings does not count towards the accrual of the seven years of physical presence in the United States necessary for eligibility for suspension of deportation. To be statutorily eligible, the alien must have been present in the United States for at least seven years before he was served with the OSC. Because petitioners had not been in the United States for the requisite seven years when they were served with their OSCs, the BIA correctly concluded that they were ineligible for suspension of deportation.

Petitioners err in arguing (Pet. 11-12) that IIRIRA's transitional rule directs that the new stop-time rule be applied to aliens served with OSCs only in one specific situation—namely, where the Attorney General, acting under the authority of IIRIRA Section 309(c)(2), 110 Stat. 3009-626, elected to apply the new removal pro-

cedures to an alien who had already been served with an OSC, and the alien then applied for cancellation of removal under 8 U.S.C. 1229b. Nothing in IIRIRA Section 309(c)(5) suggests that Congress intended to limit the stop-time rule to such cases. To the contrary, Congress referred to IIRIRA Section 309(c)(5)(A), as amended by NACARA, in that provision's title as the "General" transitional rule regarding suspension of deportation, limited only by specific exceptions enumerated in Sections 309(c)(5)(B) and (C). See NACARA § 203(a), 111 Stat. 2196. As the BIA noted in *Nolasco-Tofino*, Interim Dec. 3385, slip op. 8, the fact that Congress "carefully articulated exceptions to the general transitional rule" reinforces the conclusion that Congress intended to apply the stop-time rule as comprehensively as possible to all past, pending, and future suspension applications not covered by those exceptions.

Petitioners argue (Pet. 13-14) that the court of appeals' reading of the effect of NACARA's amendment of IIRIRA Section 309(c)(5)(A) is faulty because Congress was "clearly aware of the dispute over the interpretation of former [IIRIRA] Section 309(c)(5)," and so, "had Congress wished to make Section 309(c)(5) applicable to suspension of deportation cases, it would have indicated so in the statute without any ambiguities." Pet. 13-14 (citation omitted). That argument is wide of the mark. To the extent that, before enactment of NACARA, IIRIRA Section 309(c)(5) was ambiguous as to whether the stop-time rule applied in pre-IIRIRA deportation proceedings—because IIRIRA Section 309(c)(5) originally referred to "notices to appear," 110 Stat. 3009-627, which did not exist before IIRIRA was enacted and which are issued only in post-IIRIRA removal proceedings—NACARA dispelled that am-

biguity by changing the reference to "order to show cause" rather than "notices to appear." See NACARA § 203(a), 111 Stat. 2196. NACARA therefore resolved the precise issue in this case, by making clear that IIRIRA Section 309(c)(5) is a transitional rule that governs applications for suspensions of deportation in pre-IIRIRA deportation proceedings. Nothing in IIRIRA or NACARA suggests that Congress intended the transitional rule to have a narrower application to only those deportation proceedings commenced before IIRIRA's enactment in which the Attorney General subsequently elected to proceed under post-IIRIRA procedures.

Petitioners also contend (Pet. 15-16) that the court of appeals erred in not addressing whether the application of the new stop-time rule to their cases would contravene the presumption against retroactivity articulated in *Landgraf*. That contention is without merit. In *Ram*, the court correctly concluded that Congress had expressly delineated the temporal scope of the stop-time rule and had directed that it be applied to pre-IIRIRA deportation proceedings. 243 F.3d at 516. The court also correctly observed that, as this Court's decision in *Landgraf* makes clear, when Congress provides that a new federal civil statute is to be applied even in cases arising out of facts predating its enactment, it is unnecessary to examine whether the application of that statute would contravene the traditional, judicially articulated presumption against retroactivity. *Id.* at 516-517 (discussing *Landgraf*, 511 U.S. at 272-273). Thus, even if the application of the stop-time rule to petitioners' cases has the effect of taking away the possibility of receiving a form of relief from deportation for which petitioners previously would have been eligible, the short answer is that Congress expressly

directed that the stop-time rule be applied to cases like this one.[8]

Nor does anything in this Court's decision in *INS* v. *St. Cyr*, 121 S. Ct. 2271 (2001), cast doubt on the correctness of the court of appeals' decision in this case. In *St. Cyr*, the Court concluded that, when Congress in IIRIRA repealed a form of discretionary relief from deportation previously available under 8 U.S.C. 1182(c) (1994), it did not provide any indication of intent to apply that repeal retroactively that was sufficient to bar Section 1182(c) relief to aliens whose removal proceedings were based on criminal convictions based on guilty pleas entered before IIRIRA's enactment. 121 S. Ct. at 2288-2290. The Court emphasized in *St. Cyr* that "[r]equiring clear intent [that Congress intends a law to be applied retroactively] assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 2288 (internal quotation marks omitted). The Court noted, moreover, that in some instances in IIRIRA, Congress expressly manifested that it had taken those considerations into account, by requiring that a particular new provision be applied in respect of events that occurred "before, on, or after" IIRIRA's enactment. See *id.* at 2289. In a footnote (*id.* at 2289 n.43), the Court identified various

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[8] In any event, the facts of this case cast doubt on petitioners' assertion (Pet. 16) that they conceded deportability in reliance on the fact that they could apply for relief from deportation. In fact, petitioners conceded deportability on March 28, 1996, and at that time applied for asylum, not for suspension of deportation, for which they were not then eligible because they were still five months short of accruing the requisite seven years of continuous physical presence. See C.A.R. 47.

provisions of IIRIRA that contain "before, on, or after" language.

The Court's conclusion in *St. Cyr* that Congress's utilization of "before, on, or after" language indicates "unambiguously its intention to apply specific provisions retroactively," 121 S. Ct. at 2289, firmly supports the decision below. IIRIRA Section 309(c)(5)(A), as amended by NACARA, expressly provides that the new stop-time rule applies to OSCs issued "before, on, or after the date of the enactment" of IIRIRA. NACARA § 203(a), 111 Stat. 2196. Congress thus unambiguously demonstrated its intent to apply the statute to matters that occurred before the enactment of IIRIRA.

3. Petitioners contend (Pet. 17-22) that, as applied by the court of appeals, IIRIRA Section 309(c)(5)(A) violates equal protection principles. The gravamen of petitioners' complaint is that the Ninth Circuit has held that the stop-time rule does not apply to aliens whose applications for suspension of deportation were adjudicated by an IJ before April 1, 1997, the general effective date of IIRIRA, see *Otarola* v. *INS*, No. 99-71405, 2001 WL 1242254 (Oct. 18, 2001); *Guadalupe-Cruz* v. *INS*, 240 F.3d 1209 (2001), but that it does apply in cases like this one, where the application was adjudicated on or after that effective date. Petitioners maintain that that distinction is irrational. That challenge is without merit.

When Congress enacted the new stop-time rule in IIRIRA, it necessarily was required to establish an effective date for that rule. Any such effective-date rule is by nature somewhat arbitrary. Had Congress made the stop-time rule effective immediately upon IIRIRA's enactment on September 30, 1996, some aliens whose suspension applications had been post-

poned for unrelated reasons until after that date would have lost the opportunity to apply for suspension.[9] Similarly, had Congress made the stop-time rule effective only in removal proceedings commenced under IIRIRA, and not under old deportation proceedings at all, some aliens would have lost the opportunity to apply for suspension because, for unrelated reasons, the INS did not initiate proceedings against them before April 1, 1997. Under any effective date, some aliens necessarily would lose the opportunity to obtain relief based on reasons external to the merits of their case. In establishing an effective date for a new statute, Congress "must necessarily engage in a process of line-drawing," and "the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980).

Petitioners do not dispute that the stop-time rule itself is rationally related to a legitimate governmental purpose. The rule represents a legitimate congressional policy determination to eliminate a significant incentive on the part of aliens to delay deportation or removal proceedings once they have begun. See *Ram*, 243 F.3d at 513. Petitioners argue that the rationale for the stop-time rule does not apply to them, in that they did not attempt to delay their proceedings. Even if that

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[9] Had Congress provided that the new rule would apply immediately as of the law's enactment on September 30, 1996, to all deportation proceedings then pending as well as any commenced after that date, the IJ would have been compelled to deny petitioners' application for suspension, which was not even filed until after that date, because petitioners would not have become eligible for relief until October 26, 1996.

point were correct, it would be of no moment.[10] The rational-basis standard does not require Congress to ensure that the basic rationale for the stop-time rule is present in every case to which it applies. See *Heller* v. *Doe*, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."). Congress thus validly provided that the stop-time rule be applied to deportation proceedings, like petitioners', that were initiated under pre-IIRIRA law.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioners argue that they would not have had an incentive to delay their proceedings because there was a "large window of time" in which they were statutorily eligible and could have been granted suspension. Pet. 20. In fact, petitioners did not accrue seven years of continuous presence until October 26, 1996, after the enactment of IIRIRA. At that time and thereafter, petitioners were on notice that legislation had been enacted that, although not yet effective, potentially changed the criteria for eligibility. Nevertheless, petitioners waited until November 27, 1996, to file their suspension applications. C.A.R. 299. Nor did petitioners object when the IJ rescheduled the hearing for June 19, 1997. C.A.R. 54.