No. 00-1011

In the Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that, under 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), it lacked jurisdiction on direct petitions for review over petitioners' nonconstitutional challenges to their final removal orders, but that the district court had habeas corpus jurisdiction to entertain those challenges under 28 U.S.C. 2241.

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BRIEF FOR THE RESPONDENT

STATEMENT

1. ***Statutory Background.*** This case concerns amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, enacted by Congress in 1996. Those changes were designed in large part to eliminate the opportunities that criminal aliens had under prior law to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining judicial review of their deportation orders. See generally H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 107-108, 120-123, 157-161 (1996). Two enactments are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

a. *Pre-1952 Law.* From 1875 to 1917, after a period of unrestricted immigration, Congress enacted a series of laws providing for the exclusion and deportation of certain classes of aliens whose presence in the United States was deemed

contrary to the national interest. See generally William C. Van Vleck, *The Administrative Control of Aliens* 3-16 (1932). At first, exclusion and deportation of aliens within one of those classes was mandatory, and Congress provided administrative officials with very little discretion over the admission of aliens.[1]

In 1917, Congress expanded the classes of excludable aliens, but also gave Executive officials the discretion to admit certain excludable aliens. Van Vleck, *supra*, at 13-14, 34-35. In particular, in the Seventh Proviso to Section 3 of the Immigration Act of 1917 (1917 Act), ch. 29, 39 Stat. 878, Congress provided that, notwithstanding otherwise mandatory grounds of exclusion, an alien returning to an unrelinquished domicile in the United States of seven years after a temporary absence might be admitted "in the discretion of" the responsible official, "under such conditions as he may prescribe." *Ibid.*; see 8 U.S.C. 136(p) (1925). The Proviso's "humane" intent was to "permit the readmission to the United States (under proper safeguards) of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in peculiar or unusual hardship." S. Rep. No. 352, 64th Cong., 1st Sess. 6 (1916).[2]

The immigration laws from 1891 to 1952 made no express provision for judicial review of exclusion and deportation orders, and indeed indicated an intent to restrict judicial re-

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[1] For example, in the Immigration Act of 1907 (1907 Act), ch. 1134, § 2, 34 Stat. 899, Congress allowed officials to exercise discretion to exclude or admit children under 16 years of age unaccompanied by a parent. See Van Vleck, *supra*, at 10-11. Congress did not provide officials with any explicit authority to suspend *deportation* of an alien until 1940. See *id.* at 134-138; Act of June 28, 1940, ch. 439, § 20, 54 Stat. 672; *INS* v. *Chadha*, 462 U.S. 919, 933 (1983).

[2] The Seventh Proviso was enacted in response to *Lapina* v. *Williams*, 232 U.S. 78 (1914), which held that a statutory ground for exclusion required denial of admission to an alien who was returning to a domicile in the United States after a brief trip abroad, even though that alien would not have been deportable had he not left the United States.

view by providing that all decisions of immigration officers regarding exclusion and deportation would be "final."[3] This Court held, however, that aliens were entitled to limited review of the validity of their deportation and exclusion orders by writ of habeas corpus. See, *e.g.*, *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892) (alien ordered excluded was "entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful"); see also *Heikkila* v. *Barber*, 345 U.S. 229, 233-234 (1953) (holding that, after enactment of Administrative Procedure Act (APA) in 1946, aliens were not entitled to APA review of deportation orders, but could obtain more limited review by habeas corpus).

b. *The 1952 and 1961 Acts.* The Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, brought significant changes pertinent here to the Nation's immigration laws. Congress concluded that the Attorney General's discretionary power to admit excludable aliens under the Seventh Proviso had been abused, and that the authority to waive grounds of inadmissibility should be further restricted to cases involving lawful permanent resident aliens. See S. Rep. No. 1515, 81st Cong., 2d Sess. 382-383 (1950); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 51 (1952). Noting that under then-current law the Attorney General was "empowered to waive the grounds of exclusion in the case of an alien returning under the specified circumstances even though the alien had never been lawfully admitted to the United States," the House Report concluded that "any discretionary authority to waive the grounds for exclusion should be carefully restricted to those cases where extenuating circumstances clearly require such action and that the discretionary authority should be surrounded with strict limitations." *Ibid.* Congress thus enacted a new provision authorizing the Attorney General to waive exclusion of such

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[3] See 1917 Act, § 17, 39 Stat. 887; 1907 Act, § 25, 34 Stat. 906-907; Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1085.

aliens, Section 1182(c) of Title 8, in substantially the form that it took for 30 years.[4]

Like previous immigration acts, the 1952 INA made no express provision for judicial review of exclusion and deportation orders. In the 1950s, however, this Court held that the enactment of the APA and the INA had significantly altered the legal landscape, and that Congress had authorized the district courts to review the merits of deportation and exclusion orders in actions for declaratory relief brought under the APA, in addition to the more limited review available in habeas corpus proceedings. See *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956).

In 1961, Congress reacted to those decisions by enacting streamlined provisions for judicial review under the INA. Congress's principal concern was that aliens had resorted "to repeated judicial reviews and appeals for the sole purpose of delaying their justified expulsion from this country." H.R.

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[4] Section 1182(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General" without regard to certain grounds of exclusion. 8 U.S.C. 1182(c) (1994). Although Section 1182(c) by its terms applied only to permit the admission of certain lawful permanent resident aliens who would otherwise be excludable upon returning to the United States, the Board of Immigration Appeals (BIA) ruled in 1956 that the Attorney General was authorized under that provision to grant relief to an alien placed in deportation (rather than exclusion) proceedings who had previously taken a temporary trip abroad and had returned and been admitted to the United States to resume an unrelinquished domicile of seven years. See *In re G.A.*, 7 I. & N. Dec. 274 (B.I.A. 1956). In *Francis* v. *INS*, 532 F.2d 268 (1976), the Second Circuit further ruled, as matter of equal protection, that in light of *In re G.A.*, deportable aliens who had not departed from the United States and who had seven years' unrelinquished domicile in this country also had to be given the opportunity to apply for relief from deportation under Section 1182(c). In the interest of national uniformity, the Attorney General acquiesced in that decision. See *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976).

Rep. No. 1086, 87th Cong., 1st Sess. 23 (1961). While Congress determined at that time that aliens should be entitled to challenge "the Government's findings of deportability through judicial process," *ibid.*, Congress's "fundamental purpose * * * was to abbreviate the process of judicial review of deportation orders" in order to prevent "forestalling departure by dilatory tactics in the courts." *Foti* v. *INS*, 375 U.S. 217, 224 (1963).

"The key feature of the congressional plan directed at this problem was the elimination of the previous initial step in obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals." *Foti*, 375 U.S. at 225. To that end, Congress established a self-contained judicial-review provision in the INA, independent and exclusive of the general provisions of the APA. That provision incorporated by reference the procedures for exclusive review of certain orders in the courts of appeals under the Hobbs Administrative Orders Review Act (Hobbs Act), see 28 U.S.C. 2341 *et seq.*, and directed that the Hobbs Act procedures "shall apply to, and shall be the *sole and exclusive procedure for*, the judicial review of all final orders of deportation" under the INA. 8 U.S.C. 1105a(a) (1994) (emphasis added).

Section 1105a(a)'s incorporation of the Hobbs Act procedures was subject to ten express "except[ions]" that adapted for immigration cases the Hobbs Act's general provisions, establishing distinct rules with respect to time limits, venue, and other procedural matters. See 8 U.S.C. 1105a(a) (1994); *Stone* v. *INS*, 514 U.S. 386, 393 (1995). One of those express exceptions addressed habeas corpus. Congress was aware of the concern that a provision for exclusive review in the courts of appeals would divest the district courts of the authority they had previously exercised to review deportation orders by writ of habeas corpus for the benefit of aliens held in custody. See Gov't Br. at 5 & n.2, *INS* v. *St. Cyr* (No. 00-767) (hereinafter *St. Cyr* Gov't Br). Congress therefore

included, among the express exceptions to Section 1105a(a)'s incorporation of the Hobbs Act exclusive court-of-appeals review procedures, a provision that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. 1105a(a)(10) (1994). That provision, the committee report explained, "clearly specifie[d] that the right to habeas corpus [was] preserved to an alien in custody under a deportation order. In that fashion, [Congress] except[ed] habeas corpus from the language which elsewhere declare[d] that the procedure prescribed for judicial review in circuit courts shall be exclusive." H.R. Rep. No. 1086, *supra*, at 29.

c. *AEDPA*. On April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to provide that the Attorney General's authority to grant discretionary relief under Section 1182(c) "shall not apply" to a broad class of criminal aliens, including all aliens who were deportable because they had been convicted of an "aggravated felony," as defined by the INA (at 8 U.S.C. 1101(a)(43) (1994 & Supp. V 1999)).[5] See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C.

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[5] In 1990, Congress barred the Attorney General from granting discretionary relief under Section 1182(c) to any alien who was convicted of an aggravated felony offense and had served a term of imprisonment of at least five years for that offense. See Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 5052. AEDPA Section 440(d) extended that bar to any alien convicted of an aggravated felony, regardless of the length of the term of imprisonment. Even before Congress enacted those statutory restrictions on the Attorney General's authority under Section 1182(c), however, the BIA had held that aliens (such as petitioners here) found removable based on a serious crime such as a "serious drug offense, particularly one relating to the trafficking or sale of drugs," would have to demonstrate "unusual or outstanding equities" as a threshold matter in order to be considered for discretionary relief under Section 1182(c). See *In re Buscemi*, 19 I. & N. Dec. 628, 633-634 (B.I.A. 1988); *In re Marin*, 16 I. & N. Dec. 581, 586 (B.I.A. 1978).

1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999))).[6]

Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268. AEDPA therefore left in place the exclusive court-of-appeals review provision that Congress had enacted in 1961, while eliminating the INA's previous express exception to that exclusive

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[6] Congress did not expressly state in AEDPA whether Section 440(d) barred the Attorney General from granting relief under Section 1182(c) to aliens who had already been convicted and whose deportation proceedings were already pending when AEDPA was enacted. On February 21, 1997, the Attorney General concluded in *In re Soriano*, Interim Dec. No. 3289, 1996 WL 426888, that AEDPA Section 440(d)'s restriction on the Attorney General's authority applied to all deportation proceedings pending on or after the date of AEDPA's enactment, including those pending proceedings in which aliens had already submitted applications for relief. Numerous aliens challenged that conclusion in the federal courts, usually seeking to invoke the district courts' general habeas corpus jurisdiction under 28 U.S.C. 2241. The courts of appeals divided as to whether (as the government contended) AEDPA had deprived the district courts of habeas corpus jurisdiction to entertain such challenges to final deportation orders. The courts of appeals also reached varying conclusions about the temporal applicability of AEDPA Section 440(d). This Court denied several certiorari petitions raising those issues. See generally Pet. at 4-6, *INS* v. *St. Cyr*, *supra* (No. 00-767).

In light of the Court's denial of certiorari in those cases and the remaining conflict in the circuits on that issue, the Attorney General recently published a final rule that, while not conceding their correctness, acquiesced on a nationwide basis in the rule adopted by those circuits that concluded that AEDPA Section 440(d) does not bar the Attorney General from granting discretionary relief under Section 1182(c) to an alien who had been placed in deportation proceedings before AEDPA was enacted. See 66 Fed. Reg. 6436, 6438 (2001) (promulgating new 8 C.F.R. 3.44). Absent adverse circuit precedent, however, the Attorney General will continue to follow AEDPA Section 440(d)'s restriction on his authority to grant relief under Section 1182(c) in the cases of aliens who were placed in deportation proceedings after AEDPA was enacted, even if they were convicted before its enactment. See *id.* at 6443-6444.

jurisdiction that "preserved" (H.R. Rep. No. 1086, *supra*, at 29) review by habeas corpus for aliens held in custody. At the same time, Section 440(a) of AEDPA enacted a new Section 1105a(a)(10) to provide, for the same classes of criminal aliens who had been rendered ineligible for relief under Section 1182(c), an exception to the general availability of judicial review of deportation orders in the courts of appeals. AEDPA 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.

d. *IIRIRA*. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. V 1999); IIRIRA § 304(a), 110 Stat. 3009-587 to 3009-593.[7] An 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 the Attorney General, in his discretion, may grant relief to an alien found to be subject to removal. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C.

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[7] Congress also enacted special forms of removal proceedings for aliens arriving in the United States without valid documentation, see 8 U.S.C. 1225(b)(1) (Supp. V 1999), and for aliens not admitted for lawful permanent residence who are convicted of aggravated felonies, see 8 U.S.C. 1228(b) (Supp. V 1999). Congress expressly provided for limited judicial review in the district courts by habeas corpus of immigration officers' expedited-removal decisions under Section 1225(b)(1). See 8 U.S.C. 1252(e)(2) (Supp. V 1999). For aliens found subject to removal in Section 1228(b) proceedings, Congress provided a modified version of the general court of appeals judicial-review procedures of 8 U.S.C. 1252 (Supp. V 1999) (discussed at pp. 10-11, *infra*), with shortened time limits. See 8 U.S.C. 1228(b) (Supp. V 1999).

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); IIRIRA § 304(a), 110 Stat. 3009-594 to 3009-596. As under Section 1182(c) as amended by AEDPA, however, Congress provided that the Attorney General may not grant discretionary relief to an alien who has been convicted of an aggravated felony. 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 and the corresponding repeal of Section 1182(c) along with its replacement by the new provisions for cancellation of removal —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 old deportation or exclusion proceedings before April 1, 1997, Congress expressly provided that the amendments made by Title III-A of IIRIRA (including IIRIRA Section 304's repeal of former Section 1182(c)) would not apply, and that such cases instead would generally be governed by the pre-IIRIRA provisions of the INA (as amended by AEDPA) as well as by transitional rules further restricting judicial review under 8 U.S.C. 1105a (1994).[8] See IIRIRA § 309(c),

[8] Congress also provided in IIRIRA that aliens subject to exclusion orders in the transition period would no longer have access to the provision of Section 1105a(b) formerly allowing judicial review of their exclusion orders by habeas corpus (see pp. 4-5, *supra*). Instead, Congress provided that "the action for judicial review" of exclusion orders would be governed by the general provisions, including the transition rules, for judicial review of deportation orders in the courts of appeals under Section 1105a(a). See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626.

110 Stat. 3009-625 (amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical correction)).

In Section 306 of IIRIRA, Congress recast and streamlined the INA's provisions for judicial review of removal orders. 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; see pp. 5-6, *supra*. In its place, Congress enacted the new 8 U.S.C. 1252 (Supp. V 1999), which provides 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 enacted no general exception to that provision for exclusive review of removal orders in the courts of appeals to allow aliens held in custody under a final order of removal to seek habeas corpus relief, as it had done in the INA before AEDPA repealed 8 U.S.C. 1105a(a)(10) (1994). Instead, Congress included, at 8 U.S.C. 1252(e)(2) (Supp. V 1999), only a much narrower exception that permits a limited form of habeas corpus review for aliens who arrive at the border without valid documentation and were placed in expedited-removal proceedings under 8 U.S.C. 1225(b)(1) (Supp. V 1999).

Congress also specifically 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. ***Proceedings Below.***

a. Each petitioner is an alien who was convicted of an aggravated felony offense (specifically, a drug-trafficking crime, see 8 U.S.C. 1101(a)(43)(B) (1994)) before IIRIRA's general effective date of April 1, 1997, and who was placed in removal proceedings and charged with removability based on that aggravated-felony conviction after April 1, 1997. Each petitioner sought in removal proceedings to apply for discretionary relief from deportation under former Section 1182(c). In each case, the Board of Immigration Appeals (BIA) concluded that petitioners were not eligible for discretionary relief from removal, because (a) IIRIRA had repealed Section 1182(c) as of April 1, 1997, and had made relief under that Section unavailable for any alien placed in removal proceedings on or after that date, and (b) aliens such as petitioners who were convicted of aggravated felonies are not eligible to be considered for discretionary relief under IIRIRA's provision for cancellation of removal. See Pet. App. 37a-39a, 48a-49a, 72a-73a.

b. Petitioners filed petitions for review of their final removal orders in the court of appeals. Petitioners contended that they remained eligible for relief from deportation under Section 1182(c) because (they argued) Congress's repeal of that provision should not be applied "retroactively" in their removal proceedings, which were based on

convictions entered before IIRIRA became effective.[9] The court of appeals held that it lacked jurisdiction over the petitions for review because of 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), which precludes judicial review of a final removal order entered against an alien who is removable because of an aggravated felony conviction. Pet. App. 28a-31a, 33a. The court also ruled (*id.* at 21a-28a, 31a-33a), however, that the district court would have authority to review the same challenges to petitioners' removal orders under the general federal habeas corpus statute, 28 U.S.C. 2241.[10]

The court of appeals read *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), to hold that "a court cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name," Pet. App. 22a, and more particularly that "Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it," *id.* at 23a. The court found "nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241." *Ibid.* And, the court stated, the contrary interpretation would "raise a serious constitutional question under the Suspension Clause" of Article I, Section 9, *id.* at 28a, for it would leave petitioners without a judicial forum for their challenge to the BIA's

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[9] Petitioners also argued that the repeal of Section 1182(c) could not be applied to any criminal *conduct* that occurred before IIRIRA was enacted. See Pet. 17.

[10] Indeed, on the same day, the same panel of the court of appeals ruled in *St. Cyr* v. *INS*, 229 F.3d 406 (2d Cir. 2000), cert. granted, 121 S. Ct. 848 (2001), that the district court had properly exercised habeas corpus jurisdiction under 28 U.S.C. 2241 over such a challenge (see 229 F.3d at 409-410), and that Congress's repeal of Section 1182(c) was not to be applied to an alien who had pleaded guilty to an aggravated felony offense before IIRIRA was enacted (see *id.* at 410-421).

determination that they are ineligible for relief under former Section 1182(c).

The court rejected the government's argument that, even if the district courts could not review the merits of final removal orders by habeas corpus, the courts of appeals would retain sufficient authority to review final removal orders, on direct petitions for review, to satisfy the Constitution. Pet. App. 28a-30a. The government had submitted that, on a petition for review filed by an alien found removable because of an aggravated felony conviction, a court of appeals retains authority to decide issues going to the application of the jurisdictional bar in Section 1252(a)(2)(C) —*i.e.*, whether the petitioner "is an alien who is removable by reason of having committed a specified criminal offense" —as well as substantial constitutional challenges to the final removal order, which Section 1252(a)(2)(C) should not be construed to preclude. Even assuming that such review remains available in the court of appeals, the court suggested that it would be insufficient to satisfy the Constitution, for, the court stated, "review of statutory questions similar to the one presented in this case has long been deemed essential to ensure that a detained alien receives full due process of law." *Id.* at 30a.

Finally, the court observed that, "if we were legislators, rather than judges, we might opt for a statutory scheme under which an alien's constitutional and statutory challenges are cognizable in the court of appeals pursuant to a petition for review," for such a scheme "would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review." Pet. App. 32a. But, the court stated (*ibid.*), "[a]lthough this interpretation may represent sound legislative policy, * * * we do not read IIRIRA or our prior cases to permit such review under" Section 1252(a)(2)(C).

SUMMARY OF ARGUMENT

I. A. Congress has precluded all judicial review of petitioners' contention that they are eligible for discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994). Petitioners were properly found removable based on their convictions for aggravated-felony offenses. Accordingly, although removal orders are generally subject to review exclusively by petition for review in the court of appeals, under 8 U.S.C. 1252(a) (Supp. V 1999), such review of petitioners' contentions is precluded by 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), which provides that no court may review a removal order entered against an alien who is removable because of an aggravated-felony conviction. The text and legislative history of Section 1252(a)(2)(C) make clear that Congress intended to preclude petitions for review by aggravated felons to the maximum extent possible. Congress did not bar the courts of appeals from ensuring that the alien subject to the removal order is in fact an alien and is removable because of an aggravated-felony conviction, but those matters are undisputed here. Congress also did not bar the courts of appeals from considering substantial constitutional challenges to aggravated felons' removal orders, but no such challenge is presented here.

B. Congress has also precluded the district courts from reviewing challenges to aggravated felons' removal orders by habeas corpus or otherwise. Congress's unmistakable intent in the judicial-review provisions of the Immigration and Nationality Act is to channel all challenges to removal orders into the courts of appeals (subject to a narrow express exception not implicated in this case). The court of appeals' ruling that petitioners' challenges could proceed in district court cannot be reconciled with the streamlined legislative scheme for judicial review of removal orders that Congress has enacted. It also ignores the history underlying congressional efforts to minimize judicial involvement in

removal proceedings, including Congress's repeal of a provision of the INA that had previously preserved district court review by habeas corpus of deportation orders for aliens actually held in custody.

II. A. Congress's preclusion of review of petitioners' claims does not violate the Suspension Clause of Article I, Section 9, the Due Process Clause, or Article III. The constitutional guarantee of habeas corpus in the Suspension Clause does not extend to judicial review of claims that an alien is eligible for discretionary relief from deportation. This Nation's immigration laws have traditionally treated such discretionary relief as a matter of grace and not of right, and have fashioned laws to grant such relief as creations of power in the Attorney General, not vesting of rights in the individual alien. And while English common law courts before 1789 did review on habeas corpus contentions that a custodian had no legal authority to detain a petitioner, that review did not extend to contentions that the custodian, although vested with legal authority over the petitioner, nonetheless should exercise his discretion to dispense with the petitioner's custody and detention.

Nor do this Court's decisions establish that such review is required by the Suspension Clause. Petitioners rely on the fact that this Court stated that, under pre-1952 immigration law, Congress had reduced judicial review to the minimum scope permissible under the Constitution, and yet during that period the Court also considered on habeas corpus proceedings claims that the Attorney General had failed properly to exercise his discretion to consider applications for discretionary relief from deportation. But the Court did not hold that the writ of habeas corpus required review of such contentions, nor did it hold that the Suspension Clause required that such review be available as a constitutional matter. Such a holding, moreover, would have been a considerable extension of the writ from its common law scope preserved by the Suspension Clause, and the Court's habeas

corpus decisions under pre-1952 law were under a habeas corpus statute that was and is much broader than the common law writ. Moreover, the kinds of challenges to exclusion and deportation orders that the Court did state were reviewable by habeas corpus—claims that the person subject to the order is not an alien or is not removable, that the removal proceedings were wanting in due process, or that the removal order was totally lacking in evidentiary foundation—may still be raised on petition for review.

B. Judicial review of petitioners' claims is not required by the Due Process Clause. Although removal proceedings themselves must be fundamentally fair to satisfy the Due Process Clause, absent a contention that a removal proceeding was not fundamentally fair, due process does not require judicial supervision of removal orders. While due process may require judicial review of the outcome of an administrative proceeding when that proceeding itself was not consistent with the fundamental requirements of due process, that is not the case here. Due process prerequisites to imprisonment are also inapposite to immigration proceedings, given the significant difference between the two sanctions.

Nor does Congress's preclusion of judicial review of petitioners' claims contravene Article III's vesting of the judicial power of the United States in the federal judiciary. Congress may assign controversies between the government and private individuals over public rights to an administrative adjudicator without review by an Article III court. The right of an alien to enter or remain in the United States is plainly such a public right.

III. If the Court concludes that judicial review of petitioners' claims is required by the Constitution, then that review should proceed in the court of appeals, not the district court. Review in the court of appeals would be much more consistent with Congress's intent in the judicial-review provisions of the INA since 1961, which is to minimize delays

in deportations and to streamline judicial review by channeling removal cases into the courts of appeals. Congress has long acted on the understanding that district court review of removal orders presents a significant danger of unwarranted delay in the execution of removal orders. That understanding was reinforced in 1996 when Congress enacted 8 U.S.C. 1252(b)(9) (Supp. V 1999), which expressly requires that all questions of law and fact arising out of removal proceedings be heard only in the courts of appeals on petition for review. Section 1252(b)(9) therefore precludes district court review, even if some judicial review is required by the Constitution.

ARGUMENT

I. CONGRESS HAS PRECLUDED JUDICIAL REVIEW OF PETITIONERS' NON-CONSTITUTIONAL CHALLENGES TO THEIR REMOVAL ORDERS

Congress's comprehensive revision of the INA's judicial-review provisions in IIRIRA resulted from its concern that pre-IIRIRA law had been ineffective in securing the prompt deportation of criminal aliens. See generally H.R. Rep. No. 469, *supra*, Pt. 1, at 118-126. Congress adopted a two-pronged approach to prevent delays in the removal of criminal aliens after completion of the administrative proceedings. First, Congress dramatically restricted the authority of the courts of appeals to review removal orders entered against aggravated felons and other criminal aliens. The courts of appeals' authority with respect to such aliens extends only to ensuring that the person seeking review indeed falls within a class of removable aliens and that the alien's removal proceeding was consistent with the Constitution. Second, Congress completely eliminated the district courts' authority to review any removal orders on habeas corpus. The result is that Congress has allowed aliens found removable because of an aggravated felony conviction to pursue one, limited opportunity for judicial review of the removal order, and

only in the court of appeals. The scope of that limited review does not extend to petitioners' non-constitutional challenge to the BIA's conclusion that the Attorney General may not grant them discretionary relief under former Section 1182(c).

That result is precisely what Congress intended. When Congress enacted IIRIRA's permanent provisions, it simultaneously restricted judicial review for the specified classes of criminal aliens *and* unambiguously barred the Attorney General from granting discretionary relief to those very same aliens by repealing the former Section 1182(c) and excluding them from eligibility for cancellation of removal under the new 8 U.S.C. 1229b (Supp. V 1999). See *St. Cyr* Gov't Br. 32-49. Those two measures were part of a single, comprehensive package of provisions in IIRIRA that were designed to speed the removal of criminal aliens. Congress would have seen no need whatsoever to preserve an avenue for those aliens to obtain judicial review under IIRIRA of a statutory question concerning their eligibility for discretionary relief because Congress itself had supplied the answer to that very question in other provisions of IIRIRA.

A. In Section 1252(a)(2)(C) Of Title 8, Congress Has Precluded Judicial Review Of Petitioners' Challenges In The Court Of Appeals

1. In Section 1252, as added to the INA by IIRIRA, Congress carried forward the pre-IIRIRA rule that final orders of removal are subject to judicial review only in the courts of appeals pursuant to the Hobbs Act's exclusive-review procedures, except as specifically provided otherwise. See p. 10, *supra*. In Section 1252(a)(2), Congress also enacted stringent limitations on the scope of review that the courts of appeals may exercise over such removal orders. Congress provided, for example, that "no court shall have jurisdiction to review" any decision of the Attorney General specified by the INA to be within his discretion (excepting decisions regarding asylum). See 8 U.S.C. 1252(a)(2)(B)

(Supp. V 1999). Similarly, and pertinent here, Congress provided:

> 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 * * * 1227(a)(2)(A)(iii), (B), (C), or (D) of this title[.]

8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). That provision directly covers petitioners' cases. They were each found removable by reason of having committed a criminal offense "covered in" Section 1227(a)(2)(A)(iii), the INA provision making removable any alien convicted of an aggravated felony.

The legislative history of Section 1252(a)(2)(C) makes abundantly clear that Congress intended to cut off, to the maximum extent possible, judicial review for aliens found removable because of an aggravated felony conviction. Section 1252(a)(2)(C) originated in an amendment to a pending immigration bill offered by Senator Abraham at a markup session on March 14, 1996. At that session, Senator Abraham first stated that, under then-current law, aliens found deportable based on a criminal conviction could delay their deportation by "go[ing] back into the court system and * * * hav[ing] those final adjudications by the Board of Immigration Appeals reviewed throughout the entire judicial process." Sen. Judiciary Comm. Tr. of Proceedings 19 (Mar. 14, 1996) (lodged with the Clerk). Senator Abraham then explained the effect of his amendment as follows:

> What we propose in this amendment is to end the process following the appeal to the Board of Immigration Appeals. The Board obviously is specialized in this area. It understands, and we believe, we have full confidence it will protect and balance properly the rights of the deportable alien. And we believe that by ending the appeal process at that point we will make it more feasible for

> the Department of Justice to deport those criminal aliens who otherwise go back into society, commit additional crimes, end up back in the prison system, and in our judgment really should instead be replaced by people who want to be in this country and play by the rules.

Id. at 19-20. In response to an objection by Senator Kennedy that, under the amendment, "the right to appeal is eliminated altogether," *id.* at 21, Senator Abraham stated:

> There has been plenty of review. There has been full review of the entire criminal proceeding and the entire criminal case afforded to the non-citizen who has violated the law. That whole process is reviewable. And once that conviction is upheld, the criminal alien becomes deportable. The only thing—there are very few issues left then to be determined. Simply a deportation hearing determines, Is this the person who committed the crimes? Is there some sort of valid basis to conclude otherwise? There is a process for that.
>
> The notion of tying up the court system and protracting the process and permitting criminal aliens to stay, in my judgment, is one of the real serious problems we have right now.

Id. at 23.[11] In response to questions from Senators Simpson and Hatch as to whether, once the final order of deportation was entered, "there would be no further review," Senator Abraham stated, "That is right." *Id.* at 24. The Committee adopted the Abraham amendment by a 12-6 vote. *Id.* at 28.

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[11] Senator Abraham's explanation that judicial review is unnecessary because there will be very little to be decided in the administrative removal proceedings concerning an alien who had been convicted of an aggravated felony confirms the understanding that such an alien would be ineligible for discretionary relief from removal and therefore would not be in a position to interject issues concerning such relief into the proceedings.

See also S. Rep. No. 249, 104th Cong., 2d Sess. 14, 27-28 (1996); *id.* at 40 (additional views of Sen. Abraham).

On the Senate floor, Senator Abraham explained the effect of his amendment in sweeping terms:

> In short, once the criminal alien had exhausted all appeals available under the criminal laws, the criminal alien would still have the full deportation administrative provisions to protect him, that is, a deportation hearing and the ability to appeal any order of deportation to the Board of Immigration Appeals, but that would end the process as opposed to triggering a return to the court system. That will be positive because it will mean the actual deportation of more criminal aliens and the freeing up of the court system from many of these frivolous lawsuits.
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> * * * * *
>
> These reforms would not affect any of the aliens' due process protections on the underlying criminal offense. Aliens would still be entitled to the lengthy appellate and habeas corpus review, just like U.S. citizens. But abuses of the appeals process would stop there and not continue on through the deportation provisions themselves.

142 Cong. Rec. 7349 (1996).[12]

2. Especially in light of Senator Abraham's explanations of the effect of his amendment, the only reasonable construction of Section 1252(a)(2)(C) is that it prohibits the courts from reviewing challenges to removal orders entered against

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[12] See also 142 Cong. Rec. at 10,052 (statement of Sen. Abraham, explaining that his amendment would "end judicial review for orders of deportation entered against these criminal aliens," but noting that he would have preferred an even more sweeping provision that would have eliminated appeals to the BIA, because "[w]hile we have eliminated judicial review for orders of deportation entered against most criminal aliens, we have not eliminated their capacity to request repetitive administrative review of the deportation order").

aliens convicted of aggravated felonies. Even so, Section 1252(a)(2)(C) does not operate to preclude *all* judicial consideration of issues raised by removal orders entered against such aliens. The preclusion of judicial review in Section 1252(a)(2)(C) operates only when the person seeking to invoke the jurisdiction of the courts is "an alien who is removable by reason of having committed a criminal offense covered in" various sections of the INA—such as Section 1227(a)(2)(A)(iii) (making deportable aliens convicted of aggravated felonies) and Section 1227(a)(2)(B) (making deportable aliens convicted of controlled-substance offenses). Thus, as a precondition to concluding that it lacks jurisdiction over a petition for review, the court of appeals must determine whether (a) the person seeking to invoke the jurisdiction of the courts actually is an alien, (b) the alien is removable, and (c) the ground of removal is one that precludes judicial review under the statute—*i.e.*, whether the basis of the alien's removal is one of the specified classes of criminal offenses, such as an aggravated felony or a controlled-substance offense, that triggers the preclusion of judicial review.

The court of appeals' determination whether it has jurisdiction over the case (*i.e.*, whether its jurisdiction has been precluded by Section 1252(a)(2)(C)) may require it to rule on issues that also go to the underlying merits of the removal order entered against the alien. Under well-settled principles governing preclusion-of-review provisions, however, when the availability of judicial review depends on a particular factual or legal conclusion, a court may determine whether that condition exists. The doctrine that a court has "jurisdiction to determine its jurisdiction," even when to do so requires it to render a decision that bears on the underlying merits, rests on that understanding. See *Land* v. *Dollar*, 330 U.S. 731, 739 (1947).

Thus, for example, if the BIA concluded that an alien is removable because he was convicted of an aggravated felony

or a controlled-substance offense, but the court of appeals then concludes that the offense of which the alien was convicted does not fall within the INA's statutory definition of an aggravated felony or a controlled-substance offense, then the court of appeals' jurisdiction over the case is not precluded by Section 1252(a)(2)(C). The court may proceed to review the removal order on the merits and may vacate the order if it determines that the alien is not actually removable or that the order is defective for some other reason. See *Ye* v. *INS*, 214 F.3d 1128 (9th Cir. 2000); *Solorzano-Patlan* v. *INS*, 207 F.3d 869 (7th Cir. 2000); see also *Richardson* v. *Reno*, 180 F.3d 1311, 1316 (11th Cir. 1999), cert. denied, 529 U.S. 1036 (2000). Similarly, if the person seeking review of his removal order argues that he is actually a citizen, the court of appeals has jurisdiction to resolve that threshold issue. See *Nguyen* v. *INS*, 208 F.3d 528, 531 (5th Cir.), cert. granted, 121 S. Ct. 29 (2000).

In addition, we do not understand Section 1252(a)(2)(C) as precluding a court of appeals from reviewing substantial constitutional challenges to an alien's removal order, even if the BIA has found the alien to be removable based on a criminal conviction referred to in that Section. Although the preclusion of review in Section 1252(a)(2)(C) has a broad reach, we believe it is appropriate to interpret it in light of this Court's jurisprudence directing that Acts of Congress should not be construed to preclude review of constitutional claims absent a clear congressional expression to that effect. See *Webster* v. *Doe*, 486 U.S. 592, 603 (1988); *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975); *Johnson* v. *Robison*, 415 U.S. 361, 366-374 (1974). Notwithstanding Section 1252(a)(2)(C)'s categorical language, neither the text nor the legislative history of that provision adverts specifically to preclusion of review of constitutional claims, and so the courts of appeals retain authority to consider such claims. Thus, a court of appeals would not be precluded from reviewing an alien's contention that a provision of the INA defining a particular offense as an

"aggravated felony," or rendering the alien removable based on a conviction for that offense, is unconstitutional. Nor, in our view, would the court of appeals be precluded from reviewing a substantial contention that the immigration judge (IJ) or the BIA had not observed fundamental guarantees of due process before concluding that the alien was removable based on a conviction for such an offense. See *Singh* v. *Reno*, 182 F.3d 504, 509-510 (7th Cir. 1999); *Richardson*, 180 F.3d at 1316 n.5.

3. Petitioners' challenges to their removal orders at issue here do not fall within the limited scope of authority to review removal orders entered against criminal aliens that the courts of appeals retain after IIRIRA. Petitioners do not contest the BIA's conclusions that they are aliens who are removable based on a conviction for a criminal offense that triggers the preclusion of review in Section 1252(a)(2)(C). They do not challenge the constitutionality of the statutory provisions, 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i) (Supp. V 1999), that render them removable for having been convicted of an aggravated felony or controlled-substance offense. They do not contend that the administrative proceedings before the IJ and the BIA that resulted in the entry of final removal orders against them were fundamentally unfair. And they have not argued in this Court that Congress was prohibited by the Constitution from rendering them ineligible for discretionary relief from removal, and any such contention would be baseless, in light of a long line of decisions of this Court holding that Congress's power to alter the basis on which an alien may be deported is not constrained by the Constitution's limitations on retroactive lawmaking.[13] *A fortiori*, no substantial constitutional claim

[13] See *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955) (upholding deportation under 1952 INA of alien convicted in 1938 of marijuana violation); *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954) (upholding application of 1950 statute requiring deportation of anyone who had ever been a member of the Communist Party after entering the United States to an alien who

could arise here, given that petitioners were clearly deportable when they committed, pleaded guilty to, and were convicted of, their offenses, and the only change in the law that they resist is IIRIRA's repeal of Section 1182(c), which withdrew from the Attorney General the authority to grant them *discretionary relief* from deportation.

In sum, petitioners are aliens; they are removable; and their removal orders are based on convictions for aggravated felonies. The court of appeals therefore properly concluded that Section 1252(a)(2)(C) divested it of jurisdiction to review petitioners' challenges to their removal orders on petition for review.

B. Congress Has Also Divested The District Courts Of Authority To Review The Merits Of Petitioners' Removal Orders

Although the court of appeals ruled that it could not entertain petitioners' non-constitutional challenges to their removal orders on direct petitions for review, it also held that Congress had not divested the district court of its authority to review such a challenge under its general habeas corpus jurisdiction. Indeed, in the companion case of *St. Cyr* v. *INS*, 229 F.3d 406, 409-410 (2d Cir. 2000), cert. granted, 121 S. Ct. 848 (2001), the court of appeals ruled that the district court had properly exercised its habeas corpus jurisdiction to review such a challenge. As we have explained in our brief (at 18-27) for the petitioner in *St. Cyr*, that ruling is in error. The court's conclusion that aliens may challenge their removal orders in district court is contrary to Congress's unmistakable design of the judicial-review provisions of the INA, which is to channel all

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had been a Communist only before the statute's enactment); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593-596 (1952) (similarly upholding application of 1940 statute requiring deportation of any person who had been a member of the Communist Party, even in the past); *Mahler* v. *Eby*, 264 U.S. 32, 34, 39 (1924) (upholding deportation under 1920 statute of alien convicted in 1918 under the Espionage Act); see also *St. Cyr* Gov't Br. 39-41.

challenges to removal orders into the courts of appeals. In Section 401(e) of AEDPA (see *id.* at 19) and in the new judicial-review provisions enacted in IIRIRA (see *id.* at 19-21), Congress eliminated the district courts' authority to review final removal orders on habeas corpus, and required that such review be had, if at all, only in the courts of appeals on petition for review—subject only to one express and very narrow exception (which is inapplicable here) for aliens without documentation who are stopped at the border and placed in expedited-removal proceedings there (see *id.* at 20). We refer the Court to the discussion of that issue in our brief in *St. Cyr*, and add the following points:

1. Petitioners argue (Br. 17) that Section 1252(a)(2)(C) by its terms restricts only "judicial review" of aggravated felons' removal orders and need not be read also to prevent the courts from reviewing those removal orders by "habeas corpus," which, petitioners maintain, is a concept entirely separate from that of "judicial review." That argument ignores the text of Section 1252(a)(2)(C) itself as well as the text and structure of both Section 1252 as a whole and its predecessor, 8 U.S.C. 1105a(a) (1994).

As an initial matter, the preclusion of review in Section 1252(a)(2)(C) does not even use the term—"judicial review"—that petitioners insist is a term of art that implicitly excludes habeas corpus. Rather it provides broadly that "no court shall have jurisdiction to review" a removal order entered against an alien who is removable by reason of having committed one of the specified criminal offenses. Section 1252(a)(2)(C) thus prohibits any court (not just the court of appeals) from reviewing in any manner (not only by "judicial review") removal orders entered against aggravated felons. See *St. Cyr* Gov't Br. 26-27.

In any event, petitioners' argument that Congress used the term "judicial review" in a manner that excludes habeas corpus is refuted by numerous features of Section 1252 and its predecessor. Section 1252(a)(2)(C) is placed within Sec-

tion 1252(a), which provides (at Section 1252(a)(1)) that "[j]udicial review of a final order of removal * * * is governed only" by the procedures of the Hobbs Act, which require such review to proceed in the courts of appeals. As we explain in our brief (at 25-27) in *St. Cyr*, that incorporation of the Hobbs Act's exclusive-review provisions for "judicial review" of administrative orders necessarily precludes district court review of removal orders, by habeas corpus or otherwise. The INA, at least since 1961, has consistently treated "habeas corpus" as one of the forms of "judicial review" of removal orders that might be available.[14] Accordingly, in light of Congress's consistent usage in the immigration laws, a categorical prohibition in the INA against "judicial review" of removal orders against aggravated felons necessarily encompasses a prohibition against review of such orders by habeas corpus.

Petitioners' reliance (Br. 20-22) on *Heikkila* v. *Barber*, 345 U.S. 229 (1953), to establish that "judicial review," as used in IIRIRA's amendments to the INA, does not include habeas corpus is wide of the mark. In *Heikkila*, the Court held that a challenge to a deportation order could not proceed under the APA, in light of Section 10 of the APA (now codified at 5 U.S.C. 701(a)(1)), which established an exception to the APA's general right of review when "statute[s] preclude[] judicial review." The statute that the Court held to preclude judicial review was Section 19(a) of the Immigration Act of 1917, which made the decision of the Attorney General

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[14] In 1961, for example, Congress provided that "any alien held in custody pursuant to an order of deportation may obtain *judicial review* thereof by habeas corpus proceedings." 8 U.S.C. 1105a(a)(10) (1994) (emphasis added); see also 8 U.S.C. 1105a(b) (1994) (alien subject to a final order of exclusion "may obtain *judicial review* of such order by habeas corpus proceedings and not otherwise") (emphasis added). In IIRIRA itself, Congress provided that one narrow class of aliens, those placed in expedited-removal proceedings at the border, could obtain "judicial review" of their removal orders in habeas corpus proceedings. 8 U.S.C. 1252(e)(2)(Supp. V 1999). See *St. Cyr* Gov't Br. 25-27.

"final" as to deportation orders and had been held to bar judicial examination of the validity of a deportation order except by habeas corpus. 345 U.S. at 231-236. The Court concluded that the 1917 Act did indeed "preclud[e] judicial review," within the meaning of Section 10 of the APA, even though some judicial testing of the validity of the deportation order remained available on habeas corpus and so "the finality of [the] administrative decision [was not] absolute." *Id.* at 235-236.

Heikkila held that a total bar to judicial scrutiny of an administrative order was not necessary to find a "preclu[sion]" of judicial review under the APA. And *Heikkila* did assume that, in determining whether a statute "preclud[es] judicial review," within the meaning of the APA, Congress meant the courts to compare the scope of review that remains available under a statute that allows only limited scrutiny to the full scope of "judicial review" that would otherwise be available under the APA.[15] But it does not follow that every time that Congress uses the term "judicial review," it necessarily excludes habeas corpus from its scope.

As we have explained (pp. 5-6, 27, *supra*), Congress in 1961 enacted a self-contained mechanism for judicial review of deportation orders that specifically included habeas corpus in some circumstances and expressly identified such access to habeas corpus in those circumstances as "judicial review." Moreover, Congress understood the 1961 amendments to the INA, including the provisions for habeas corpus review, to "implement[] and appl[y]" Section 10 of the APA, which provided that "[t]he form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by

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[15] See *Heikkila*, 345 U.S. at 236 ("To review those requirements under the Constitution, whatever the intermediate formulation of their constituents, is very different from applying a statutory standard of review, *e.g.*, deciding 'on the whole record' whether there is substantial evidence to support administrative findings of fact under § 10(e).").

statute." See H.R. Rep. No. 1086, *supra*, at 11, 27. Indeed, Section 10 of the APA, now codified at 5 U.S.C. 703, also provided that the form of proceeding for "judicial review" under the APA may be any applicable form of legal action, including "actions for * * * writs of * * * habeas corpus."[16]

Thus, when Congress provided in Section 1252(a)(1) that "[j]udicial review of a final order of removal" shall be had only in the court of appeals, see 8 U.S.C. 1252(a)(1) (Supp. V 1999), it precluded district court review of removal orders by habeas corpus. That conclusion is confirmed by 8 U.S.C. 1252(b)(9) (Supp. V 1999), which provides that "[j]udicial review of *all* questions of law and fact, including interpretation and application of * * * statutory provisions" arising out of a removal order, "shall be available *only*" in a proceeding for review brought in the court of appeals under Section 1252 itself. (Emphasis added.) Section 1252(b)(9) therefore necessarily precludes a district court on habeas corpus from reviewing the questions of law petitioners seek to raise here regarding the application of former Section 1182(c) to their cases. And when Congress further provided in Section 1252(a)(2)(C) that, "[n]otwithstanding any other provision of law," "no court" shall "review" removal orders entered against aggravated felons, it barred such review by both the courts of appeals, on petitions for review under Section 1252 itself, *and* the district courts, whether on habeas corpus under 28 U.S.C. 2241 or otherwise.

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[16] Indeed, Congress made clear that Section 1105a was intended to create "a single, separate, statutory form of judicial review of administrative orders for the deportation *and exclusion* of aliens from the United States." H.R. Rep. No. 1086, *supra*, at 22 (emphasis added). The reference to "exclusion" of aliens is significant, because, as explained above (p. 27 note 14, *supra*), the 1961 amendments to the INA provided that "judicial review" of exclusion orders should proceed *only* by habeas corpus. Congress thus plainly understood habeas corpus review of exclusion orders to be a form of "judicial review of administrative orders."

2. Relying on *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), petitioners further argue (Br. 17-18) that, to divest the district courts of their authority to review a deportation order by habeas corpus, Congress must expressly mention "habeas corpus" (or perhaps 28 U.S.C. 2241), and that Congress did not do so in IIRIRA. In fact, however, Congress *did* expressly mention habeas corpus in IIRIRA. In Section 1252, Congress authorized the district courts to review removal orders by habeas corpus, but only in the case of aliens who are stopped at the border without documentation and placed in expedited-removal proceedings under 8 U.S.C. 1225(b)(1) (Supp. V 1999). See p. 8 note 7, p. 24 note 27, *supra*. Congress thus specified exactly the kinds of removal orders that may be reviewed by habeas corpus, and necessarily precluded review of any other removal orders by the same means.

Moreover, neither *Felker* nor *Yerger* holds that Congress must use the words "habeas corpus" or "Section 2241" to preclude review by those means, when such preclusion of review is the unmistakable conclusion that must be drawn from Congress's statutory scheme. *Felker* and *Yerger* held that, when Congress specifically divested this Court of its *appellate* jurisdiction to review habeas corpus proceedings but did not expressly address (either by explicit mention of habeas corpus or in categorical terms that included habeas corpus) the Court's *original* jurisdiction to entertain habeas corpus petitions—which jurisdiction was based in a separate statutory provision—the Court would not read the restriction in the former statutory source of jurisdiction to reach over into the latter by implication. See *Felker*, 518 U.S. at 660-661 (explaining that this Court's original and appellate jurisdiction in habeas corpus matters are based in different statutes). In IIRIRA, by contrast, Congress has placed *all* of the courts' authority to review removal orders in one place, Section 1252, and has made clear as a categorical matter in that very same place that all such review must

proceed only in the courts of appeals, except as otherwise provided in Section 1252 itself. See pp. 10-11, *supra*. The necessary conclusion from that categorical preclusion is that a district court may not review the merits of a final order of removal, whether by habeas corpus or otherwise.

II. THE PRECLUSION OF REVIEW OF PETITIONERS' CHALLENGES TO THEIR REMOVAL ORDERS IS CONSTITUTIONAL

Petitioners argue (Br. 22-42) that the Constitution requires a judicial forum for their contention that the Attorney General may grant them discretionary relief from deportation under former Section 1182(c). In particular, they contend that a congressional preclusion of judicial review of that question would violate the Suspension of Habeas Corpus Clause of Article I, Section 9, the Due Process Clause of the Fifth Amendment, and Article III. Those contentions are without merit. As we now show, the Constitution does not prohibit Congress from committing to the Attorney General the authority to determine whether, as a categorical matter, certain classes of aliens should be eligible for discretionary relief from deportation.

A. Preclusion Of Judicial Review Of A Non-Constitutional Claim That The Attorney General Has And Should Exercise Discretion To Waive Deportation Is Not A Suspension Of Habeas Corpus

1. Petitioners place primary reliance (Br. 29-34) on the Suspension Clause, which, they contend, requires the availability of judicial review of any statutory as well as constitutional issue arising in connection with an alien's removal from the United States. Petitioners argue (*ibid.*) that, at English common law before 1789, the writ of habeas corpus was available to review the legality of an individual's detention. Accordingly, they contend, a provision that deprives the courts of authority to adjudicate a statutory question bearing on the deprivation of an alien's liberty would con-

stitute a "suspen[sion]" of the "Privilege of the Writ of Habeas Corpus," in violation of Article I, Section 9.

The fundamental flaw in that argument is that petitioners are unquestionably removable based on their aggravated-felony convictions and are seeking the exercise of the Attorney General's power to grant discretionary relief from deportation. Indeed, this Court has described the Attorney General's discretionary power to grant a dispensation from deportation as "an act of grace" accorded to his "unfettered discretion," similar to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996); see also *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (L. Hand, J.). Moreover, although in this case the BIA determined as a matter of statutory construction that these petitioners were ineligible for relief under Section 1182(c), the Attorney General (or the BIA) could also have exercised discretion to determine as a matter of policy that—in light of Congress's increasingly restrictive treatment of aliens convicted of aggravated felonies and its preclusion of cancellation of removal for such aliens in IIRIRA—no alien who was convicted of such an aggravated felony should receive relief under Section 1182(c), whether or not he was theoretically eligible for such relief under that statute.[17]

In addition, as we have explained in our brief (at 43-45) in *St. Cyr*, the language and history of former Section 1182(c) make clear that Congress framed that provision, not as a "right" on the part of the alien to seek or obtain relief from deportation, but rather as an authorization to the Attorney General to grant such dispensation when he believed it was

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[17] See *Yang*, 519 U.S. at 31 (statutory eligibility for discretionary relief from deportation "in no way limits the considerations that may guide the Attorney General in exercising her discretion to determine who, among those eligible, will be accorded grace").

justified by the alien's circumstances. Section 1182(c) provided that certain lawful permanent resident aliens "may be admitted in the discretion of the Attorney General" without regard to various provisions of Section 1182(a) that render an alien excludable and therefore require the Attorney General to deny admission to such an alien. The predecessor to Section 1182(c), the Seventh Proviso to Section 3 of the 1917 Act, was similarly framed in terms of the immigration authorities' discretion to waive exclusion of aliens in light of humanitarian circumstances. See p. 2, *supra*. Absent from the background and legislative history of Section 1182(c) and its predecessor is any indication that Congress intended therein to create a "right" in the alien to be considered for relief from deportation.

Thus, this is not a case in which the courts are called upon to determine whether the Attorney General has *no authority* to detain an individual—the paradigm of the cases in which English common law courts granted habeas corpus. See pp. 33-34, *infra*. The Attorney General unquestionably has legal authority to detain and remove petitioners, for they have been properly found to be removable under standards set forth in congressional enactments.

2. A review of English common law cases does not support a conclusion that a writ of habeas corpus would issue in the circumstance where, as in this case, an official had statutory authorization to detain the individual seeking relief but that individual contended that the official was not properly exercising his discretionary power to determine whether the individual should be released. Analyses of the common law origins of the writ of habeas corpus vary considerably in their treatments of that subject, but most writers agree that the writ acquired its classic form in the 17th century, during the struggle for power between Charles I and Parliament. Before that time, common law courts had used the writ principally to protect their jurisdiction against incursions from other courts, and would not issue the writ

when the return showed that the petitioner was confined by order of the monarch or the Privy Council.[18] After *Darnel's Case* (1627), 3 State Trials 1 (1816), in which the Court of King's Bench declined to issue the writ when the return showed that the prisoner was held by special command of the monarch, Parliament proposed and Charles I accepted the Petition of Right, which abolished the monarch's power to imprison by special command without showing cause.[19] And following *Chambers's Case*, 79 Eng. Rep. 746 (K.B. 1629), in which the King's Bench declined to issue the writ for the benefit of a prisoner committed by the Star Chamber on the ground that the Star Chamber was itself a high court of justice, Parliament passed the Habeas Corpus Act of 1641, which abolished the Star Chamber and set forth the basic principles for issuance of the writ. The 1641 Act provided that, when an individual detained by order of the monarch or Privy Council sought the writ of habeas corpus, the custodian was required by return to "certify the true cause of such * * * imprisonment, and thereupon the court * * * shall proceed to examine and determine whether the cause of such commitment appearing upon the return be just and legal, or not."[20]

The 1641 Act only established, however, that common law courts could require a custodian to demonstrate that he had

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[18] See William F. Duker, *A Constitutional History of Habeas Corpus* 33-43 (1980); 9 W.S. Holdsworth, *A History of English Law* 112-113 (1926); Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2521 (1998); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 460 (1966); Robert S. Walker, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* 47-76 (1960).

[19] See Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—I*, 18 Can. B. Rev. 10, 38-40 (1940); Duker, *supra*, at 45; R. J. Sharpe, *The Law of Habeas Corpus* 9-13 (1976).

[20] Duker, *supra*, at 47 (quoting 1641 Act); see also *Developments in the Law--Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1044 (1970); 9 Holdsworth, *supra*, at 115; Sharpe, *supra*, at 15.

some basis in law to hold the detained person.[21] The 1641 Act did not provide, and English decisions before 1789 did not hold, that the writ would issue on an allegation that officials were improperly exercising or declining to exercise their discretion to waive or dispense with their legal authority to detain the prisoner. Although it has been suggested that common law courts would issue the writ on a showing of abuse of official discretion, see Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2524, 2530, 2534 (1998), the evidence cited for that suggestion is quite thin.[22]

For example, in *Hetley* v. *Boyer*, 79 Eng. Rep. 287 (K.B. 1613), in which the King's Bench ordered the release of a prisoner who had been confined by the Commissioners of Sewers, apparently in retaliation for his having previously brought a successful action challenging the commissioners' assessment, the court ordered Hetley's release on the

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[21] See 1 William Blackstone, *Commentaries on the Laws of England* 132-133 (1765) (facsimile ed. 1979) ("To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*."); 9 Holdsworth, *supra*, at 120 (noting that, during House of Lords' examination of habeas corpus in 1758, the judges informed the Lords that on habeas corpus the court was "concerned, not with the truth of the return, but with its sufficiency in point of law to justify a detention"); *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 42 (1758) (Wilmot, J., advising the House of Lords that a prisoner would not be discharged "in case the facts averred in the return to a writ of habeas corpus, are sufficient in point of law to justify the restraint"); Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. Chi. L. Rev. 243, 244-245 (1965) ("At common law * * * the use of the Great Writ against official restraints was simply to ensure that a person was not held without formal charges.").

[22] Petitioners specifically do not argue that discretionary determinations must be subject to review on habeas corpus (see Br. 24-25), and 8 U.S.C. 1252(a)(2)(B) (Supp. V 1999) expressly forecloses all judicial review of most such actions.

ground that that confinement was unjustified and was "in direct opposition to the authority and judgment of this Court" in the prior action. *Id.* at 287. Although the court reiterated its finding in the prior action that the *assessment* was invalid because it was intended to punish one person in the village, it did not issue the writ because the *confinement* was an abuse of discretion, but rather because it defied the court's prior judgment.

In *Ex parte Boggin*, 104 Eng. Rep. 484 (K.B. 1811), in which the legality of a sailor's impressment was at issue, the court referred in a footnote to a prior case before the court, involving one Chalacombe, in which the petitioner had contended that he had been impressed in contravention of Admiralty policy against impressment of persons in the coal and coasting trades. *Id.* at 484 n.(a)2. The Admiralty in Chalacombe's case argued that the writ should not issue because the Admiralty's policy not to impress such persons was a matter of "grace and favour," and not of right. Although the court directed the Admiralty to state its justification for its confinement of Chalacombe in a return to the writ, Lord Chief Justice Ellenborough also observed that, "[c]onsidering it merely as a question of discretion, is it not more fit that this should stand over for the consideration of the Admiralty, to whom the matter ought to be disclosed?" *Ibid.* (Because the Admiralty later decided in its discretion to release Chalacombe, the matter was never decided by the court. *Ibid.*)[23]

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[23] *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (cited at Hafetz, *supra*, at 2525 n.117) involved a bargeman who was impressed by order of the Admiralty while he was ferrying timber to the royal timber-yard under "the faith of a protection from the Navy Board," effectively granting him immunity from impressment during that service. *Ibid.* Although Goldswain did not have a statutory immunity from impressment, the court suggested that the case involved bad faith on the part of the Admiralty (and perhaps an attempt by the Admiralty to obtain a court test of the authority of the Navy Board to grant such protection), warned the Admiralty that it would consider discharging Goldswain because of that appar-

The absence of cases testing officials' discretion to confine, or dispense with confinement of, a prisoner may reflect the fact that "[t]he concept of 'discretion' was not well developed at common law." Hafetz, *supra*, at 2534. For that very reason, however, lawyers familiar with the common law in 1789 would not have understood that the writ would issue based on an allegation that an official had improperly declined to exercise his discretion not to act on his unquestioned legal authority to take an individual into custody. Petitioners' claim to habeas corpus, therefore, has no root in the soil of English common law.

3. Petitioners also argue (Br. 22-29) that judicial review of their challenges to their removal orders is compelled by the Suspension Clause because (a) this Court stated in *Heikkila* that Congress, in pre-1952 immigration statutes, had made administrative decisions "nonreviewable to the fullest extent possible under the Constitution," 345 U.S. at 234-235, and yet (b) during the operation of those pre-1952 statutes, courts sometimes reviewed aliens' claims that administrative officials had erred in finding them ineligible for discretionary relief from deportation. Therefore, petitioners argue, because the courts considered those claims on habeas corpus, judicial review to that extent must have been constitutionally compelled, and so elimination of the opportunity for judicial review of such claims would be unconstitutional.

Petitioners' reliance on the dictum in *Heikkila* is flawed for several reasons.[24] First, *Heikkila* itself involved a consti-

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ent bad faith, and suggested that the Admiralty reconsider the propriety of its impressment of Goldswain. *Id.* at 712. The Admiralty, taking the court's hint, decided to release Goldswain. *Id.* at 713. *Goldswain's Case* did not involve a charge of abuse of an official's discretion not to take an individual into custody, but rather a violation of the principle that individuals may rely on official assurances that their conduct is legally protected —a "traditional notion[] of fairness" in our justice system. Cf. *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973).

[24] The language in *Heikkila* relied on by petitioners was unnecessary to the holding of that case, which was that aliens could not seek judicial

tutional challenge to a provision that made membership in the Communist Party *per se* a ground for deportation. 345 U.S. at 230. A three-judge court dismissed the case, and this Court affirmed on the ground that the validity of the deportation order entered against Heikkila under that provision could be tested only on habeas corpus, and not in an action under Section 10 of the APA. The Court reasoned that the finality provision of the 1917 Act precluded judicial review within the meaning of the APA. See *id.* at 232-237. The claim in *Heikkila* therefore fell squarely within the traditional scope of habeas corpus, because it challenged the constitutionality of the statute under which the alien was ordered deported and restrained of his liberty. The decision therefore lends no support to petitioners' argument that the Suspension Clause requires review on habeas corpus of their *non-constitutional* claim concerning *discretionary relief from deportation*. Indeed, in describing the scope of habeas corpus, the Court stated that, "[r]egardless of whether or not the scope of inquiry on habeas corpus has been ex-

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review of their deportation orders under the APA, but were remitted to the more restrictive remedies of habeas corpus proceedings. See 345 U.S. at 233-235. Although, as we explain in the text, the Court relied on the fact that the scope of judicial review under the APA was significantly broader than the review available in habeas corpus proceedings, see *id.* at 236, that would have been true even if the review available on habeas corpus was in turn broader than the scope of review required by the Constitution itself.

Amicus ABA observes (Br. 12-13) that, in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893), the Court stated that "[t]he power to exclude or to expel aliens" is subject to exclusive legislative and executive control, "except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene." That case, however, did not involve the scope of the writ of habeas corpus. Moreover, the question in this case is not whether (as the Court suggested in *Fong Yue Ting*) *some* judicial review of deportation orders is required by the Constitution; rather it is whether the Constitution requires judicial review specifically of determinations about an alien's eligibility for discretionary relief from deportation—a matter that was not at issue in *Fong Yue Ting.*

panded, the function of the courts has always been limited to the enforcement of due process requirements." *Id.* at 236. "To review those requirements under the Constitution," the Court continued, "whatever the intermediate formulation of their constituents, is very different from applying a statutory standard of review" under the APA. *Ibid.*

Second, even if Congress did, in the pre-1952 immigration statutes, limit judicial review to the constitutional minimum required by the Suspension Clause, it does not follow that the Court must now conclude that, in every case in which the Court considered a legal issue on habeas corpus under those statutes, review of that issue on habeas corpus was constitutionally compelled—especially if the Court did not address in such a case either the scope of its habeas corpus jurisdiction or the scope of judicial review required by the Constitution. For example, petitioners cite (Br. 25) *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), as the instance in which the Court held on habeas corpus that the BIA failed to exercise its own discretion in ruling on an application for discretionary relief and reversed the denial on that ground. But the Court reversed the lower courts' summary denial of the writ in *Accardi* only because of allegations of a deliberate circumvention of established procedures and prejudgment by the BIA in the case. See *id.* at 266-269. The Court did not undertake to delineate the scope of the writ of habeas corpus, and it certainly did not state that habeas corpus review in that case was compelled by the Constitution. This Court has never considered itself bound by such *sub silentio* assertions of jurisdiction. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984).[25]

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[25] Petitioners also cite (Br. 25) *Jay* v. *Boyd*, *supra*, as a case in which the Court ruled that the alien had a "right to a ruling on [his] eligibility" for discretionary relief from deportation. *Jay* is inapposite for several reasons. First, the Court once again did not address the scope of review by habeas corpus that may be required by the Suspension Clause. Second, no

Third, although this Court's immigration decisions under pre-1952 law do not expressly state the source of the courts' authority to grant habeas corpus, that authority was presumably the Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385-386; see Rev. Stat. §§ 751-766 (1875).[26] The scope of review authorized by the 1867 Act, however, was much broader than that authorized by Congress's original provision for habeas corpus in the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82.[27] Whereas the 1867 Act authorized the courts to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the con-

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issue was presented in that case concerning the alien's statutory eligibility for discretionary relief; the BIA found in that case that Jay was eligible for relief, and Jay did not challenge any aspect of that determination. *Id.* at 352-353. Rather, Jay challenged the BIA's exercise of its discretion to deny him relief based on confidential information, and the Court rejected that challenge. *Id.* at 353-356. Third, although the Court described the applicable statutory provisions as providing a right to a ruling on eligibility, it did not suggest that every provision of an immigration statute that confers on the Attorney General the discretionary power to grant dispensation from deportation must be held to confer a personal right of the sort that the Constitution requires the courts to review on habeas corpus—even where, as here, Congress has in the very same law foreclosed judicial review of such a claim. Indeed, the fact that Congress has precluded judicial review of petitioners' claim here is a powerful indication that it did not intend to confer such a right in the first place. Finally, although *Jay* v. *Boyd* technically arose on habeas corpus proceedings (see *id.* at 347), it was governed by the INA of 1952, which allowed much more extensive review of immigration decisions than had been the case in habeas corpus proceedings under pre-1952 law. See *Heikkila*, 345 U.S. at 236. (Similarly, *Dessalernos* v. *Savoretti*, 356 U.S. 269 (1958), cited by amicus ABA (Br. 21), is inapposite because that case also arose under the INA of 1952.)

[26] The Court has long understood its authority to grant habeas corpus to rest in statutory enactments. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807); *Lonchar* v. *Thomas*, 517 U.S. 314, 324, 326 (1996).

[27] See *Felker*, 518 U.S. at 659 (noting that "Congress greatly expanded the scope of federal habeas corpus in 1867"); *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-326 (1867) (observing of 1867 Act that "[i]t is impossible to widen this jurisdiction"); 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 47-48 (3d ed. 1998) (discussing 1867 Act's widening of scope of habeas corpus).

stitution, or any treaty or law of the United States," 14 Stat. 385, the 1789 Act provided only that federal judges had "power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment." 1 Stat. 82. The 1789 Act thus echoed the common law and the 1641 Act in requiring only an inquiry into whether the custodian had some legal basis for the detention of the petitioner.[28] The 1789 Act, nearly contemporaneous with the ratification of the Constitution, is presumably the more reliable indicator of the Framers' understanding of the minimum scope of judicial review required by the Suspension Clause. Thus, even if this Court did, under pre-1952 law, construe the Habeas Corpus Act of 1867 to reach claims like those presented by petitioners here, it would not follow that the Suspension Clause required a judicial forum for such claims.

Fourth, as we have explained in our brief in *St. Cyr* (at 28-29), in its pre-1952 decisions, this Court held that four kinds of challenges could be raised on habeas corpus: (1) claims that a person alleged to be an alien was in fact a citizen; (2) claims that the alien's case did not fall within one of the statutory categories providing for deportation or exclusion claims; (3) claims that the alien had been deprived of a fundamentally fair administrative proceeding; and (4) claims that the administrative officer's finding of deportability was completely without supporting evidence and was therefore violative of due process.[29] This case does not fall within any

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[28] See Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31, 47 (1965) (noting that, before 1867, "[t]he sole question before the court was the formal legality of the detention"); see also *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 573-574, 577-579 (1833) (granting habeas corpus because petitioner was invalidly detained for nonpayment of fine pursuant to civil process, but also holding that writ could not be granted based on petitioner's contention that fine imposed was unconstitutionally excessive).

[29] See, *e.g.*, *Tod* v. *Waldman*, 266 U.S. 113, 118 (1924), modified, 266 U.S. 547 (1925); *Ng Fung Ho* v. *White*, 259 U.S. 276, 283-284 (1922); *Kwock Jan Fat* v. *White*, 253 U.S. 454, 458 (1920); *Gegiow* v. *Uhl*, 239 U.S. 3, 9

of those categories, for petitioners concededly are removable aliens and have made no claim that their removal proceedings were fundamentally unfair. Moreover, IIRIRA permits judicial review of all four kinds of challenges. As we have explained (pp. 22-23, *supra*), even under Section 1252(a)(2)(C), the court of appeals has jurisdiction to determine whether a petitioner challenging a removal order is an alien and whether he is removable. We have also explained (pp. 23-24, *supra*) that Section 1252(a)(2)(C) should not be read to preclude review of substantial constitutional challenges to removal orders. Accordingly, IIRIRA affords the full scope of judicial review that this Court's pre-1952 decisions held were required to be heard on habeas corpus.

B. Neither The Due Process Clause Nor Article III Requires A Judicial Forum For Petitioners' Non-Constitutional Claims

1. Petitioners argue (Br. 34-38) that the Due Process Clause requires a judicial forum for consideration of their

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(1915); *Tang Tun* v. *Edsell*, 223 U.S. 673, 681 (1912); *Chin Yow* v. *United States*, 208 U.S. 8, 11-12 (1908). All of this Court's decisions cited by petitioners at Br. 22-24 fall into one of those four categories, with the possible exception of *United States ex rel. Mensevich* v. *Tod*, 264 U.S. 134 (1924). In that case, the petitioner alleged that his warrant of deportation was invalid because it provided for his deportation to "Poland, the country whence he came," pursuant to the 1917 Act's provision authorizing deportation of aliens "to the country whence they came." See *id.* at 136. The petitioner contended that, because he had resided in a province of Russia before his emigration to the United States (there having been no sovereign state of Poland at the time of his emigration), a warrant ordering his deportation to Poland as "the country whence he came" was a nullity. The claim, although rejected by the Court on the merits, was cognizable on habeas corpus because it contended that the process pursuant to which the petitioner was detained was invalid. Cf. *Watkins*, 32 U.S. (7 Pet.) at 577-579 (holding that prisoner could not be detained for collection of fine after return-day pursuant to civil process of *capias ad satisfaciendum*); *The Case of Pressing Mariners* (1743), 18 State Trials 1323-1325 (1816) (charging jury that attempted impressment of merchant seaman was invalid because warrant required that impressment be executed by captain or lieutenant, neither of whom was present during attempt).

contentions that the Attorney General erred in finding them ineligible for discretionary relief from deportation. That contention finds no basis in this Court's immigration decisions. Indeed, the Court long ago settled the matter to the contrary:

> Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the Government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.

The Japanese Immigrant Case, 189 U.S. 86, 100 (1903) (internal quotation marks and citations omitted); see also *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) ("No judicial review is guaranteed by the Constitution."). The Court has stated that the removal proceeding itself must comport with constitutional due process, and that judicial intervention may be warranted under the "paramount law of the Constitution" to correct departures from that constitutional guarantee of fundamental fairness. See *ibid.* But the Court has not held that judicial review of *non-constitutional* challenges to removal orders is required by the Due Process Clause when (as in this case) the removal proceeding itself was fundamentally fair. Much less has the Court required judicial supervision as a constitutional matter when the challenge, as here, is to the Attorney General's determination about discretionary relief from deportation, which is "manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. at 354.

Thus, the Due Process Clause does not prevent Congress from committing to the Attorney General the authority to

make the final determination whether an alien is eligible for discretionary relief from removal. The tradition of committing immigration decisions to administrative officials, the consistency of removal proceedings with due process, and the discretionary nature of relief from removal all distinguish this case from those in which, petitioners contend (Br. 36-39), this Court has stated that judicial review is required as a matter of due process. In *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), for example, the Court concluded that due process requires judicial review of the amount of punitive damages awards to ensure that such awards are not grossly excessive. That case, however, depended on two crucial factors: first, that the Constitution also prohibits grossly excessive punitive damages (*id.* at 420), and second, that punitive damages are assessed through the judicial system, by a jury award. Thus, if the judiciary did not have the power to review juries' punitive damages awards, no institution would be available to enforce the constitutional guarantee against excessive damages. See *id.* at 432-433.

In *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minnesota*, 134 U.S. 418, 458 (1890), and *Phillips* v. *Commissioner*, 283 U.S. 589, 595-598 (1931), the Court stated that due process required judicial review of administrative determinations about the reasonableness of common carriers' transportation rates and tax deficiency assessments, respectively. In those cases, however, the crucial factor was that the administrative procedures themselves were summary and did not provide an opportunity for a hearing on a disputed factual issue, a fundamental requisite of due process.[30]

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[30] See *Chicago, Milwaukee*, 134 U.S. at 457 (noting that, before the state commission, "[n]o hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law"); *Phillips*, 283 U.S. at 595 (permitting tax collection by summary administrative procedure provided that an

Accordingly, those cases simply establish variants of the core due process requirement of notice and a hearing before the final deprivation of a property interest. They do not suggest that the Due Process Clause requires judicial review of non-constitutional challenges to an administrative determination if, as here, the administrative proceeding itself is fundamentally fair.

In *ICC* v. *Brimson*, 154 U.S. 447 (1894), the Court upheld a provision of the Interstate Commerce Act that authorized the ICC to obtain judicial enforcement of its orders requiring the attendance of witnesses and the production of documents in investigations against a challenge that such enforcement devolved upon the federal courts tasks that were outside their authority under Article III, and also stated (*id.* at 485) that, under the Due Process Clause, the ICC would not have authority to enforce its orders by imprisonment on its own. Imprisonment, however, may well be a unique sanction that requires some kind of judicial hearing. But even though removal is undoubtedly a severe sanction, this Court has never likened it to imprisonment, and the full panoply of due process requirements applicable to criminal prosecutions have never been required in removal proceedings. See, *e.g.*, *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955) (upholding conduct of deportation proceedings by special inquiry officer who was subject to supervision and control of INS officials). *A fortiori*, those requirements do not apply to the manner for granting discretionary relief from removal.

2. Petitioners also contend (Br. 38-42) that Congress's preclusion of judicial review of their claims violates Article III, Section 1's commitment of the "judicial Power of the United States" to the federal judiciary. This Court has long made clear, however, that Congress may assign exclusive re-

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opportunity for judicial review follows). Cf. *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 37 (1990) (holding that, in the unusual context of tax collection, a State may collect taxes by summary procedure provided that a full due process remedy is later available).

sponsibility for resolving controversies between the federal government and individuals involving "public rights" to tribunals lacking the attributes of Article III courts and officers without the salary and tenure protections of Article III judges. See *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985); *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). In particular, when a matter is one that could be conclusively resolved by the Legislative and Executive Branches, the Constitution also permits Congress to commit the matter to an adversary determination by officers other than Article III judges. See *Union Carbide*, 473 U.S. at 589; *Bakelite*, 279 U.S. at 452-453; cf. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opnion). That is precisely the situation here. Congress could have, in the exercise of its constitutional powers over immigration, expressly provided in *haec verba* that no alien placed in removal proceedings on or after April 1, 1997 would be eligible for relief under Section 1182(c), regardless of the date of his conviction; or it could have provided that no aggravated felon whatever should receive such relief, regardless of the date of conviction; or it could have provided, as it did before 1917, that no alien should receive discretionary relief from removal at all. The fact that the BIA was required to engage in some interpretation of Congress's enactments to conclude that aliens placed in removal proceedings under IIRIRA may not receive relief under former Section 1182(c) does not mean that an Article III court must be available to review that conclusion.

Petitioners suggest (Br. 38-39) that, while this Court has allowed Congress to assign initial adjudication of a controversy to a non-Article III actor, it has done so only on the understanding that some form of Article III judicial review of those determinations would follow. That reading of this Court's cases is simply incorrect. The Court has emphasized

the availability of ultimate Article III review when the matter committed to initial administrative decision-making involved *private* rights (especially private *state-law* rights) that traditionally would have been submitted to the courts for resolution.[31] As the Court has explained, heightened Article III concerns are presented when Congress attempts to "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty" (*Murray's Lessee*, 59 U.S. (18 How.) at 284), because those are the cases that the Framers would have understood to require judicial resolution. Cf. *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment) (Article III requires judicial resolution of "the traditional actions at common law tried by the courts at Westminster in 1789"). No such contention can be made here, for there was no tradition at English common law of judicial resolution of the rights of aliens to enter or remain in the country.[32] Accordingly, Article III does not require a judicial forum for resolution of petitioners' non-constitutional claims concerning discretionary relief from removal.

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[31] See *CFTC* v. *Schor*, 478 U.S. 833, 854 (1986) ("[W]here private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching."); *Crowell* v. *Benson*, 285 U.S. 22, 51-52 (1932); cf. *Northern Pipeline*, 458 U.S. at 80-82 (plurality opinion) (noting distinction between state-law and federal-law rights).

[32] In addition, as was the case in *Union Carbide*, the statute at issue here "limits but does not preclude review of the * * * proceeding by an Article III court." 473 U.S. at 592. Judicial review remains available to ensure that the Attorney General acts within the scope of his statutory authority in determining that an alien is removable, and that the alien's removal proceedings are conducted according to constitutional requirements of due process. Cf. *ibid.*

III. IF JUDICIAL REVIEW OF PETITIONERS' CHALLENGES IS CONSTITUTIONALLY REQUIRED, THAT REVIEW SHOULD PROCEED IN THE COURT OF APPEALS, NOT IN THE DISTRICT COURT

If the Court concludes, contrary to our submission, that the Constitution requires judicial review of petitioners' non-constitutional challenges to their removal orders, then that review should proceed in the court of appeals on petition for review, and not in the district court on habeas corpus. This Court has explained that, when a statute has been held unconstitutional, a court should adopt the remedy that is most consistent with Congress's overall objectives. See *Califano* v. *Westcott*, 443 U.S. 76, 89-90 (1979); cf. *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984). Review in the court of appeals would be much more consistent with Congress's unmistakable design in IIRIRA, which is to bar district court review of removal orders completely, but to allow at least a very limited review of removal orders, even for aggravated felons, in the courts of appeals. See pp. 18-31, *supra*; *St. Cyr* Gov't Br. 31-32.

Review in the court of appeals is more consistent with Congress's objectives than district court review for at least two reasons. First, since 1961, the judicial-review provisions of the INA have been predicated on Congress's concern that the deportation of aliens was often subject to unwarranted delay because of the process of judicial review, and that review in the court of appeals would expedite and streamline that process and accordingly reduce such delays. See *Stone*, 514 U.S. at 399-400; *Foti*, 375 U.S. at 224-225; pp. 4-5, *supra*. Review in district court on habeas corpus under 28 U.S.C. 2241, however, affords aliens significant opportunities for delays in the execution of their removal orders. Section 2241 contains no express time limit on the filing of a petition for a writ of habeas corpus, in contrast with the strict time limits

governing the exclusive-review procedures of the INA, see 8 U.S.C. 1252(b)(1) (Supp. V 1999). Also, unlike the INA, Section 2241 does not require consolidation of challenges to deportation orders with challenges to motions to reopen or reconsider. Cf. 8 U.S.C. 1252(b)(6) (Supp. V 1999); *Stone*, 514 U.S. at 393-394. And, of course, an alien who is unsuccessful in district court can appeal to the court of appeals, and thereby obtain further delay.

Second, Congress reinforced its preference for judicial review in the court of appeals in IIRIRA when it enacted Section 1252(b)(9), which provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under [the INA] shall be available only in judicial review of a final order under this section [1252]." The Court has described that provision as an "unmistakable 'zipper' clause" channeling judicial review to the courts of appeals. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). Petitioners' challenges to their removal orders fall squarely within that zipper clause. Their claims that they are eligible for relief under former Section 1182(c) involve the "interpretation" of "statutory provisions," and also "aris[e] from an[] action taken or proceeding brought to remove [them] from the United States." *Id.* at 481. Indeed, petitioners' challenges to the constitutionality of Congress's preclusion of review of their non-constitutional claims are covered as well by the zipper clause, because those challenges involve the interpretation of "constitutional provisions" arising out of an action to remove them from the United States. Thus, Section 1252(b)(9) provides the rule for a remedy in this case: Any challenge to a removal order for which judicial review is required must proceed only in the court of appeals, pursuant

to the Hobbs Act's exclusive-review procedures incorporated by Section 1252(a).[33]

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it dismissed the petitions for review, but modified to provide that the dismissal is with prejudice to the filing of a petition for a writ of habeas corpus in the district court.

Respectfully submitted.

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[33] Petitioners have argued (Br. 2, 42-43) that the Constitution requires only that such review be available in some federal court, not that it be available in district court in the first instance.